EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Miss Victoria Martins	**v**	**Ocado Central Services Limited**

Heard at: Watford **On**: 21 to 28 October 2019, 12 December 2019 (in chambers)

Before: Employment Judge Bedeau

Members: Mrs S Goldthorpe
Mr P Miller

Appearances

For the Claimant: Mr O Olubokun, Counsel
For the Respondent: Mr O Tahzib, Counsel

RESERVED JUDGMENT

1. The claimant was, at all material times, a disabled person in respect of her Irritable Bowel Syndrome.

2. The claim of discrimination arising in consequence of disability is not well-founded and is dismissed.

3. The claim of failure to make reasonable adjustments is not well-founded and is dismissed.

4. The claim of unfair dismissal is not well-founded and is dismissed.

5. The provisional remedy hearing listed on Wednesday 13 May 2020, is hereby vacated.

REASONS

1. By a claim form presented to the tribunal on 16 July 2018, the claimant made claims of unfair dismissal, race discrimination, disability discrimination and unauthorised deductions from wages.

2. In the response presented to the tribunal on 29 August 2018, the respondent denies the claims in their entirety.

3. At the preliminary hearing held in private on 29 November 2018, before Employment Judge Henry, the claims and issues were set out and the case listed for a final hearing on 21 to 28 October 2019.

4. On 9 August 2018, before Employment Judge McNeill QC, the claimant withdrew her direct race discrimination and racial harassment claims which were dismissed. As she had presented amended particulars of claim that document was incorporated in the case management orders issued by the judge.

The Issues

5. On the first day of the hearing Mr Tahzib, counsel on behalf of the respondent, produced a list of the legal and factual issues which was later agreed by Mr Olubokun, counsel on behalf of the claimant. The issues are set out here below.

"Time Limitation

1. Were any of the claimant's complaints for discrimination presented outside the time limits set out by sections 123(1)(a) and (b) of the Equality Act 2010?

2. Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before 17 March 2018 is potentially out of time, so that the tribunal may not have jurisdiction to deal with it.

3. Can the claimant prove that there was conduct extending over a period? Is such conduct in time?

4. Was any complaint presented within such other period as the Employment Tribunal considers just and equitable?

Disability

5. Did/does claimant have a physical or mental impairment namely, Irritable Bowel Syndrome "IBS" and asthma?

6. If so, did/does the impairment have a substantial adverse effect on claimant's ability to carry out normal day-to-day activities?

7. If so, is that effect long-term? In particular, when did it start and:

    a. Has the impairment lasted for at least 12 months?

    b. Is or was the impairment likely to last at least 12 months or for the rest of the claimant's life, if less than 12 months?

c. Are there any measures being taken to treat or correct the impairment? But for those measures, would the impairment be likely to have a substantial adverse effect on claimant's ability to carry out normal day-to-day activities?

8. The relevant time for assessing whether claimant had/has a disability (namely when the discrimination is alleged to have occurred) is between 7 March 2016 and 27 March 2018.

Discrimination arising from disability

9. The allegation of unfavourable treatment as something arising in consequence of claimant's disability, falling within section 39 Equality Act 2010 is :

   a. Claimant's being subjected to the capability procedure;

   b. Claimant's being dismissed.

10. Does claimant prove that respondent treated her as referred to above?

11. Was the respondent's treatment of the claimant, as aforesaid, because of 'something arising' in consequence of claimant's disability? The 'something arising' relied on by claimant is her illness-related absences which are alleged to be disability-related.

12. The particular absence about which claimant complains are:

   a. 17 December 2016 – 24 December 2016 – 3 shifts due to IBS;

   b. May – July 2017 – 26 days due to IBS; and

   c. 13 December 2017 – 6 shifts due to respiratory bug linked to claimant's asthma.

13. Did respondent show that the treatment was a proportionate means of achieving a legitimate aim?

14. Alternatively, has respondent shown that it did not know, and could not reasonably have been expected to know, that the claimant had a disability?

Reasonable adjustments

15. Did respondent apply either or both of the following provisions, criteria or practices "PCPs" generally:

   a. Triggering the attendance management procedure when an employee had had three occasions of ten or more shift absences since the beginning of their employment;

   b. That all periods of absence would be investigated and may be authorised by non-medically trained staff?

16. Did either or both of those PCPs put claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, in that:

   a. She was predisposed to a greater level of absence because of one or a combination of her disabilities; and /or

b. She would have to have her absences authorised by someone who did not have medical training?

17. Did respondent take such steps as were reasonable to avoid the disadvantage by either:

    a. Disregarding all absences relating to claimant's disabilities; or

    b. Obtaining medical advice when considering which of the claimant's disability-related absences to authorise.

Unfair dismissal

18. What was the principal reason for the claimant's dismissal and was it a potentially fair reason?

19. If so, was the dismissal fair or unfair in accordance with section 98(4) of Employments Rights Act and, in particular, did the respondent in all aspects act within the so-called 'band of reasonable responses'? The allegations of unfairness relied on by claimant are as follows:

    a. Respondent did not have a genuine belief that claimant's past absence meant that claimant lacked capability in relation to her ability or even reliability to maintain an acceptable level of absence going forward;

    b. Respondent was silent as to any alleged belief as to the claimant's capability going forward and focussed solely on past performance;

    c. If respondent did have a genuine belief as to claimant's capability, it was held on unreasonable grounds;

    d. Respondent focussed entirely on the claimant's past performance, notwithstanding that the levels of stress (caused by numerous bereavements) caused to claimant (which increased her IBS) was unlikely to be repeated;

    e. Respondent did not ask for claimant's medical evidence;

    f. Respondent decided which absences to authorise and which to reject even though the rejected absences between May 2017 to July 2017 were directly related to claimant's disability;

    g. Respondent dismissed claimant in a formulaic fashion, purely because she met stage 3 of its absence management policy, and as such treated the dismissal as a procedural necessity;

    h. Respondent failed to consider clause 10 of claimant's employment contract and failed to provide reasons why the claimant should not be demoted;

    i. The allegations that the claimant took relatively few days off work, and this level of absenteeism is not serious enough for a reasonable employer to terminate the contract of employment;

j. Respondent failed to take into account the claimant's long service, or in the alternative, merely paid lip service to this without giving it due consideration;

k. Respondent failed to apply its mind to less draconian sanction other than the ultimate sanction of dismissal, or in the alternative merely paid lip service to this without giving genuine consideration; and

l. Respondent breached the Equality Act 2010 in its dismissal and process leading to it and a reasonable employer would not dismiss an employee contrary to the Equality Act 2010.

Remedy

20. If claimant succeeds either in whole or in part, the Employment Tribunal will be concerned with issues of remedy, being:

    a. Compensation on a finding of unfair dismissal, being a basic award and a compensatory award.

21. In respect of any proven unlawful discrimination, the Tribunal will be concerned to issue a declaration thereof, and compensation to include an award for injury to feelings and make such appropriate recommendations for the purpose of obviating or reducing the adverse effects relating to the claim."

The evidence

6. The claimant gave evidence and called Ms Ruth Boughton, former Contact Centre Adviser.

7. On behalf of the respondent, evidence was given by Ms Wilma Emery, People Partner, and former Human Resources Adviser; and by Ms Anna Parker, Service Delivery Analyst, former Contact Centre Team Manager.

8. In addition to the oral evidence, the parties adduced a joint bundle of documents, comprising in excess of 380 pages. References will be made to the documents as numbered in the bundle.

Findings of Fact

9. The respondent is an on-line grocery retailer with its head office in Hatfield. It delivers groceries to customers throughout the United Kingdom. Its customers are customers of Ocado and WM Morrisons Supermarkets. WM Morrisons online grocery business is carried out by the respondent on its behalf.

10. The claimant commenced employment with the respondent on 7 March 2016, as a Contact Centre Adviser, based at the respondent's contact centre in Hatfield. Her role involved responding immediately and accurately to telephone and e-mail customer enquiries. She worked in that part of the respondent's business which services Ocado's customers. She initially worked 16 hours a week, but this was reduced to 15½ hours from 1

June 2017 after a change in the respondent's employees' terms and conditions across its business.

11. She completed a medical questionnaire form on 3 March 2016 entitled 'A bit more about you…'. She was required to tick 'yes' or 'no' in the boxes on whether she had certain medical conditions. She replied 'yes' to suffering from 'a mental illness, including: stress, depression or anxiety?' She also ticked 'yes' to suffering from migraines and visual impairment not corrected by spectacles or contact lenses and that she had been prescribed medication within the previous six months. It is noteworthy that she did not state she suffered from asthma. (96 to 100 of the bundle)

12. Evidence was given by Ms Wilma Emery, People Partner, and former Human Resources Adviser, that in relation to the claimant's stress, depression or anxiety, the respondent's Human Resources Shared Services should have written to the claimant's line manager to arrange a welfare meeting within two to three weeks from the commencement of her employment. Ms Emery could not see any records of a welfare meeting having been requested or having taken place.

13. Ms Anna Parker, Service Delivery Analyst, and former Contact Centre Team Manager, said in evidence that at the time the claimant commenced employment, she was the claimant's line manager and could not recall whether she had a welfare meeting with her. She stated that she might have had an informal meeting with her and recorded it on the Human Resources' system.

14. We find that if there was an informal meeting with the claimant, arising out of the content of the medical questionnaire, it would have been recorded on the HR system. If there was a formal welfare meeting, there would have been an e-mail chain and a record of it having been arranged together with details of the outcome. No records were produced by the respondent during the hearing. We find that a welfare meeting, whether informal or formal, did not take place with the claimant to discuss the content of the medical questionnaire she completed.

15. We refer to Ms Emery's witness statement, paragraphs 4 to 7 inclusive, in which she summarised the respondent's attendance management and long-term sickness absence policies. She stated the following:

> "4. – Ocado manages its employees' absence through its Attendance Management Procedure (the Procedure)…. The procedure has three stages with each stage aimed at reminding the employee of the attendance standards expected of them, as well as providing the employee with an opportunity to provide further information about their absence so that decisions can be made about any steps or support required to help the employee improve their attendance levels.
>
> 5. - The Procedure is triggered when an employee has been absent for a specified number of days or has had a specified number of absences in a given period. The following triggers apply:

a. Stage 1 is triggered if the employee is absent on three occasions, or ten consecutive rostered shifts in a 12 month rolling period;

b. Stage 2 is triggered if the employee is absent on a further two occasions, or for ten consecutive shifts in the next 12 months; and

c. Stage 3 is triggered if the employee is absent on a further two occasions, or for ten consecutive shifts in the next 12 months.

6. – At each stage, the employee is invited to a meeting to discuss all occasions of absence, up to and including the date of the meeting. During the meeting, the employee's absence may be authorised and not taken into account when considering an employee's ongoing employment. Authorisation may be for a variety of reasons, including where the absence relates to a family emergency, domestic incident or where it is considered to be a reasonable adjustment to discount such absence in a case of disability. The employee may progress through the Procedure if their level of absence remains unacceptable.

Long Term Sickness

7. – Where an employee is absent continuously for over four weeks, the employee triggers Ocado's Long-Term Sickness Absence Management Procedure (The LTS Procedure). The LTS Procedure has three phases, which require the employee to meet with a manager to discuss ways in which the business can help the employee return to work, including any reasonable adjustments required by employees who are considered disabled. Under the LTS Procedure, managers will also consider whether any additional medical advice is required, such as a referral to occupational health. Outside of the LTS Procedure, employees may be referred to occupational health for advice about reasonable adjustments."

16. The claimant was absent on 3 July 2016 for one shift; 13 August 2016 for one shift; and 3 September 2016 for two shifts. She was invited to a stage 1 Attendance Management meeting on 1 October 2016. Attached to the invitation was an explanatory document on preparing for Stage 1, amongst other things, it stated:

> "Throughout the meeting, your manager will take some summary notes as a record of your discussion and you can request a copy of these notes." (113)

Attendance Management Meeting on 1 October 2016

17. Mr Caleb Lloyd, Contact Centre Team Manager, conducted the meeting. The claimant said in respect of her absence on 31 July and from 3 to 10 September 2016, that she was suffering from Irritable Bowel Syndrome 'IBS', triggered by stress, due to concerns about her uncle's stomach cancer. In response to the question:

> "Are there any other circumstances that might mean that you cannot bring your attendance to a satisfactory level? In particular, I am interested in any underlying health or disability reasons".

18. She replied "Yes", saying that she had regular flare ups of her IBS, caused by stress and gave an account of that condition stating that it was

recurrent. She said it "inflames and grips you every five seconds, I lay on the floor.." and took Colofac to relieve the pain. She was asked what medical attention she sought. She replied that she saw her doctor who prescribed Colofac. She was asked what was the likelihood of further absences due to IBS. She relied "not often" and "unlikely". (114 – 118)

19. We find that the respondent was in possession of this knowledge about her IBS from 1 October 2016.

20. It is possible for a manager during any of the three stages, to authorise an employee's absence/s. If they do so, that absence would be disregarded. Mr Lloyd, after a three minutes adjournment, did not authorise any of the claimant's absences. He wrote to her on 8 October 2016, to confirm that she was at Stage 1 of the Attendance Management procedure and was warned that two occasions or ten or more absences during shifts, would result in her being invited to a Stage 2 meeting. (119)

21. An "occasion" in the Attendance Management procedure is an absence for a given reason which may cover one or more shifts.

22. On 26 November 2016, the claimant was absent for one day and had informed the respondent that she was trying to get her gas meter card issue resolved and needed to be at home. (301)

Stage 2 Attendance Management Meeting 1 and 15 February 2017

23. She was again absent from 17 to 24 December 2016, for three shifts due to sickness and diarrhoea. In her return to work form completed on 28 December 2016, it stated that the reason for her absence was sickness due to IBS. This triggered a Stage 2 meeting with Mr Andy Bailes, Contact Centre Team Manager, with Mr Darren James, also Contact Centre Team Manager, who was the claimant's line manager. It was held on 1 February 2017 and reconvened on 15 February 2017 because the Stage 1 notice start date was incorrect.

24. During the meeting, Mr James took notes. The claimant confirmed that on 26 November 2016, her gas card was not working and she had to stay at home. In relation to her absence on 17 December 2016, she said that her uncle had passed away the previous year and that Stage 1 should not have taken place; she did not like people knowing her business; and that Mr Lloyd knew that her uncle was suffering from stomach cancer. At the time it was stressing her out and she suffered from IBS and was taking Colofac medication for that condition. When asked "How is your IBS now?", she replied "It's ok. I am not stressed".

25. Mr Bailes did not interfere with her Stage 1 absences. He, however, authorised the gas and IBS absences. Accordingly, the claimant reverted back to Stage 1 until 1 October 2017. (126 – 130)

26. She was absent from 18 to 20 March 2017, and reported her circumstances to the respondent, stating that her sister was pregnant and

was unwell. She had taken sister to her doctor where she collapsed and was taken to hospital but suffered a miscarriage. Her sister was dehydrated, her potassium levels were low and she had to stay with her.

27. The claimant was absent from 6 May to 13 July 2017, 26 shifts. She submitted a fit note dated 22 May 2017, stating that she was unfit for work for one month due to stress and IBS. A further fit note was sent dated 22 June 2017, in which it stated that she was unfit for work due to stress and a recent bereavement. As the period of absence was over three weeks, this triggered the respondent's Long-Term Sickness Absence procedure.

28. On 1 June 2017, her hours were reduced to 15½ per week.

Long-Term Sickness Absence meeting on 26 June 2017

29. On 26 June 2017, Mr James conducted a Long-Term Sickness Absence Phase 1 meeting with the claimant and confirmed that she had been off work with stress which affected her IBS and asked how she was doing. She replied she was getting there but had a bad spell, a breakdown, but was getting past it. She said she had recently lost an aunt to breast cancer the previous week with the funeral was due to take place on 4 July. She stated that she had also been signed off work from her other full-time job not with the respondent. She then said:

> "It was the anniversary of my dad's death on bank holiday in May, it is just hard and year before that I lost a partner and then my dad and then his brother in December, I then found out my uncle had stomach cancer and then my aunt was battling it and what triggered it was when my partner lost his cousin and it triggered a breakdown as I had never really dealt with it, so dealing with it now".

30. She said she was taking natural remedies to help her sleep and pills to for her IBS. She said that she last saw her GP on 22 June, and had sent a fit note by recorded delivery. Ms Sarah Douglas, Human Resources Adviser, said that the fit note had not yet reached the respondent and informed the claimant that she was entitled to help with counselling from AXA but would need to get an open referral from her doctor to enable AXA to arrange counselling sessions. They may also be able to help her with her IBS. She was informed that she had an annual allocation of £1,500 for out-patient care. Ms Douglas offered to give her AXA's details together with the forms to complete, one being an AXA consent form to refer her to occupational health, the other for her GP to sign stating when she would be able to return to work. She was told that occupational health would assess her and make any recommendations with regard to reasonable adjustments, as well as time scales for her return to work. Mr James acknowledged that she was going through a tough time. (142 – 145)

31. We find that during the meeting, the respondent understood the claimant's personal circumstances, medical conditions and was prepared to help her by discussing the role of AXA and counselling sessions, as well as a referral to occupational health, and was told that it could spend £1,500 on her on outpatient care.

32. In the invitation letter inviting her to the Phase 1 meeting, she was informed that even if she was able to return to work, the respondent may seek further medical evidence from her GP or from occupational health. Ms Emery told the tribunal that as the claimant returned to work, the respondent did not think it was necessary to have an occupational health report. (paragraph 13 of Ms Emery's witness statement)

33. The claimant lost the forms which were given to her and on 15 July 2017, when she returned to work, she requested what she referred to as "the OT form" as well as the consent form for the disclosure of medical records. She stated that she had accidentally misplaced them and would like them forwarded to her to be completed and returned to Human Resources. (151)

34. On 18 July 2017, Mr Darren James, asked Ms Sarah Douglas about the forms the claimant had requested. She replied on 25 July attaching an occupational health request form which was then sent to the claimant on the same day.

35. On 29 July 2017, the claimant completed the occupational health consent form, but did not complete any of the tick boxes authorising her consent to an independent medical assessment; collection of her personal data; accessing her medical report; and management advice before being sent to the respondent. She said that the respondent did not come back to her to highlight the fact that she had not completed those parts of the form. We find that the respondent took the view that as she returned to work, there was no need to proceed with an occupational health referral. (160 to 161)

Stage 2 Attendance Management Meeting on 29 July 2017

36. The absences which triggered the Long-Term Sickness Absence procedure, also triggered Stage 2 of the Attendance Management procedure which led to the claimant being invited by letter dated 18 July 2017, to attend a Stage 2 Attendance Management meeting on 29 July. (155 to 156)

37. The meeting was chaired by Mr Bailes. The claimant gave an account of her absence on 18 to 20 March 2017, which was due to her sister's miscarriage. Mr Bailes acknowledged that her long period of absence from 6 May to 13 July 2017, was due to her IBS.

38. In evidence before us the claimant denied that she said what is recorded in the notes, namely that during the meeting she said that she would make it quick by accepting that Mr Bailes could put her on Stage 2. She said that there was an unrecorded conversation with the managers, Mr Bailes and Mr James, during the meeting about the benefits of her going on to Stage 2 but this is not recorded in the notes. She said Mr James was typing and if the conversation was proceeding at a fast pace, he may not have captured all of what was said. She said that the anniversary of her father's

death was on 26 May, therefore, she would not have said, as recorded, "that it was soon".

39. We noted that at the bottom of each page of the notes, it states that the record is not a verbatim account but covers key points.

40. In evidence she said that Mr Bailes informed her of the benefits of Stage 2 and encouraged her to go on to Stage 2. However, in her witness statement she did not refer to any missing parts in the notes. We find that Mr Bailes did not encourage her to go onto stage 2 and it was not up to her to decide on how the respondent applied its policy. In the notes she said that she was utilising AXA counselling.

41. The outcome was that Mr Bailes authorised her absence for the period 18 to 20 March 2017, due to her sister's miscarriage, but not the period 6 May to 13 July 2017, due to IBS and stress. He decided to place her on Stage 2 and warned her that there should be no absences, however, should there be a further two occasions of absence, ten shifts of absence during the following 12 months, it would trigger Stage 3 of the Attendance Management procedure. He further stated that if she had fewer than two occasions or ten shifts of absence within the following 12 months, she would be removed from the Attendance Management procedure when Stage 2 expired. (62 – 63)

Flexible working request

42. On 4 September 2017, the claimant submitted a flexible working request to change her work days. Meetings were held on 27 September and 9 December, when it was refused for a business reason. She left work after being told of the outcome citing work-related stress. We note that in her witness statement, paragraph 11, she stated that she believed that her flexible working request, would assist her in managing her disability better. However, in the request, she wrote that her reason for the request was to spend time with family on Sundays. She did not respond to the question on the form whether the request related to reasonable adjustments for reasons of disability. (110a-b, 174)

43. At her appeal on 27 December 2017, her flexible working request was allowed and some of her days were changed.

44. On 9 October 2017, she was absent due to migraine/headache. (166)

45. Around 21 October 2017, she was informed that Ms Anna Parker, Contact Centre Team Manager, who was returning from maternity leave, was going to resume her role as her line manager. As the claimant did not have a good working relationship with Ms Parker, she wrote to Mr Thomas Bilton, Contact Centre Manager, on 21 October 2017, requesting that Mr James should continue to be her line manager in relation to her medical issues, as she had concerns about working with Ms Parker. On 30 October 2017, Mr Bilton replied to her stating:

> "I am happy for Darren to carry on with your meetings etc., until they are finished though". (170)

46. Although Mr Bilton did not give evidence before us, we find that the meetings he was referring to, were those between the claimant and Mr James to discuss her "medical circumstances", that being the phrase she used in her e-mail to him. Her contact with him would be limited to that issue.

47. On 13 December 2017, the claimant attended work in the evening and left shortly thereafter because she had a headache, as she described it. She was advised by Ms Parker that Stage 3 of the Attendance Management procedure had already been triggered because she was absent on 9 October and 10 December 2017.

48. On 16 December 2017, she rang the respondent to say that she was unable to work due to flu and on 18 December, she was again unable to work and would be seeing her GP. She saw her GP on 19 December who provided her with a fit note until 26 December 2017. The diagnosis was upper respiratory tract infection, but no prescription was given. (299 – 319)

Stage 3 Attendance Management meeting 10 January 2018

49. On 28 December 2017, she was invited to a Stage 3 meeting, scheduled to take place on 10 January 2018, to be chaired by Mr Richard Blackman, Contact Centre Team Manager/Service Delivery Team Manager. It is the respondent's practice that someone from human resources should be present to take notes and to advise the manager at a Stage 3 meeting. The employee's entire absence history is reviewed. Ms Thelma Emery was present to take notes and to advise Mr Blackman. The claimant attended in the company of Ms Jenny Haines, a work colleague. The claimant had 11 instances of absence in less than two years of her employment with the respondent. She confirmed that she had received the invitation letter on the day of the hearing by recorded delivery but was content to proceed and did not request an adjournment.

50. In relation to her absence on 13 December 2017, for headache and migraine, she said that she did not feel well and admitted that it lasted six shifts. She saw her doctor, was on Amoxicillin medication and was advised to drink fluids. She said that there was a nasty bug going around. She also stated that she suffered from asthma and debated taking the flu jab but did not take it that year. She was asked whether she was on medication for her asthma to which she replied yes, and that she used an inhaler when she needed to.

51. When we looked at her medical records, there was no record in her doctors' notes of her being prescribed Amoxicillin in December 2017. (319)

52. In evidence she disputed the accuracy of that part of the notes in which it states that she said she only used an inhaler when she needed it.

53. As regards her absence on 9 December 2017 when she left work at 10:15am, she put it down to stress and depression. It was put to her that at

her return to work meeting, her absence was recorded as work-related stress. She explained that in the previous months there were five bereavements and they all affected her. She loved her job but thought she could not sit on the phone feeling sorry for herself, so she decided to go home. She said that she utilised AXA for counselling, but they changed to Aviva. She had to wait for further counselling sessions to be arranged and had to chase up Aviva. She confirmed that she now worked 16 hours a week, two evenings and a Saturday. Since 2013, she said she lost her partner who was suffering from sickle cell anaemia. He died on a bank holiday and that was the reason why she changed her hours as it was also on a bank holiday when her father passed away.

54. Mr Blackman put to her that her absence on 9 October triggered Stage 3 and asked whether she remembered her absence for one shift. She said she could remember but did not normally take days off for migraine, but "It was banging". She did not suffer a lot from migraines and confirmed that she saw her doctor.

55. In evidence before us she said that she used a brown inhaler weekly and blue inhaler every day. We noted that in February 2015, she suffered from a chest infection which, at the time, her doctor stated that her asthma was well controlled. In her doctor's notes it states she did not have an inhaler at home but gave her a prescription for her asthma.

56. The claimant also said that some time in February 2017, she was prescribed Amoxicillin but only used it for a limited period and was using it in December 2017. It was the same prescription. This was at odds with what she told Mr Blackman that she saw her GP who prescribed Amoxicillin in December 2017 and she only used her inhaler when she needed it. (326)

57. There was an adjournment for 18 minutes. Upon reconvening Mr Blackman discussed her period of absence from May to July 2017, which gave rise to the Long-Term Sickness Absence procedure being invoked. She gave an account of the bereavements in her family and said that she loved her job as well as her other job; her partner passed away on 25 May 2013; and her father on 26 May 2014. Since her father died, she experienced palpitations and IBS. Her earlier absences in 2016 were discussed. She was asked if she remained with the respondent, would her attendance improve to which she replied that she could not be sure. She said when Ms Parker returned from maternity, she asked whether she could be line managed by Mr James as he was aware of her personal issues and did not want to go over them again with Ms Parker. She described Ms Parker as a very difficult manager who would act as a catalyst to make things worse. When asked whether she could think of a time when she may be able to bring her absences back to a satisfactory level, she said that she could not until her counselling sessions were resolved and hoped this would be in February 2018.

58. There was a further adjournment for one hour forty-four minutes. Upon reconvening, Mr Blackman gave his decision:

"We have also discussed options and support with you in today's meeting about counselling, private medical care and occupational health. You have advised that you have sought for sessions but due to a delay in the system this has been longer than planned where you have had to reapply. You also recently had a flexible working agreement approved to swap your Monday evening to a Tuesday evening and working Saturdays 7-4pm to help you avoid working bank holidays, as you stated that bank holidays are difficult for you due to the passing of your partner and dad on a bank holiday. As you can see we have tried to assist and give you the tools to support you in all these absences.

Looking at the absences there were a few questions with the absence type, so therefore I have amended these today to read correct. So the absence on 31 July 2016 was for sickness and diarrhoea has now been amended to depression/stress/anxiety as this was around your uncle's diagnosis of cancer. The other absence that has been amended is the recent one on 13 December 2017 was headache/migraine and have now amended it to respiratory problems as this was chest infection.

We have discussed that you have been with the business for 1 year and 10 months having 11 absences totalling 44 shifts and I deem this to be unacceptable amount of absences in this time. Of course I understand you have had a lot of bereavements going on over this time, but these absences are not down to bereavement directly but due to the stress following on from the bereavements. From what I have heard in today's meeting I would recommend for you to push for these sessions and look to get the support you need.

I have made a decision though today and I have decided not to dismiss you and will give you an opportunity to hopefully benefit from the support that has been offered and to improve your attendance going forward. What I have done, I will authorise the 9 December 2017 absence (depression/stress/anxiety) and also the period of absence 6 May to 13 July 2017 (digestive/stomach disorder) where there was a flare up of your IBS due to the stress of family bereavements. As the system will not allow me to authorise this absence as it's from your Stage 2, I will be authorising the absence on 9 October 2017 (headache/migraine) retrospect, meaning this will leave you on a Stage 2 with 1 live absence towards a stage 3. I would remind you that should you have another absence between now and 29 July 2018 then you may see yourself invited back for another stage 3 meeting like today. I would like you to take on board my advice about the support, and also look to be more open with your direct line manager, this will hopefully improve your working relationship with them, as advised we have a duty of care to our employees and want to see you all in a fit state for work. Ok.

Is there anything that you would like to say?

VM – It looks like you guys have put this down to me but its due to Ocado, I asked for support back in July. Take up support bit distressed, to be put on a Stage 3 with one other absence to trigger another one. I've pushed for occupational therapy since my long period of sickness, it was promised to me". (180 -191)

59. It follows from Mr Blackman's decision that the claimant was not dismissed and encouraged to consider counselling. Her absences due to IBS during May to July 2017 and 10 October 2017, were authorised. She had six days' absence on her file from 13 December and was warned that another

absence between December 2017 and 29 July 2018, would trigger a further Stage 3.

60. We find that she raised for the first time, her asthma at the Stage 3 meeting on 10 January 2018 and clarified that she used her inhalers when she needed it and would become asthmatic only when she was sick. (181)

The claimant's grievance

61. In February 2018, she submitted a grievance and on 27 February 2018 at a grievance meeting with Ms Kristeen Shaw, Human Resources Manager, she withdrew it. (206 – 218)

62. On 7 March 2018, she was absent citing 'no car insurance'. (299)

The second Stage 3 meeting held on 27 March 2018

63. She attended a Stage 3 meeting on 27 March 2018 with Ms Anna Parker who reviewed her levels of absence as she had fallen foul of what Mr Blackman required of her. She was questioned about her most recent absence on 7 March 2018, that being her car breakdown and said that it was because her car insurance policy had been cancelled by her insurers as they had not received her direct debit payment. It was, however, reinstated on 16 March due to their error. She said that when leaving work at 11pm, she would either take a taxi or her partner would pick her up. She acknowledged that she would, occasionally, take the train from work to home. On the 7 March, however, she did not make any alternative travel arrangements.

64. She was questioned about the 13 December 2017 absence for six shifts and said that although the respondent recorded headache/migraine, it was not a headache but flu symptoms which was later changed to a chest infection. She was on Amoxicillin antibiotic prescribed by her doctor but was not 100% better by 27 December.

65. She was asked whether she would get chest infections and flu, to which she replied that she would get asthma. She was asked whether she had a prescription for inhalers. She replied that when she had a chest infection, she would feel wheezy and would have to use an inhaler. She then said, "I don't rely on it as it's got steroids in."

66. In evidence she denied making the comment about steroids but there was no evidence presented to show that this part of the notes was either incorrect or fabricated. Most of what is recorded in the notes she did not challenge. We find that she did say to Ms Parker that she did not use her inhaler as it had steroids in.

67. In cross-examination she was not consistent in her account of her use of medication. She told us that she had been prescribed Amoxicillin anti-biotics in December 2017 by her doctor but as we have already found, when we were taken to her medical records it did not show a prescription

for anti-biotics at that time. She sought to clarify her earlier evidence by saying that she was taking Amoxicillin in December 2017 and that it had been prescribed in February 2017. It was not taken by her at that time in February 2017 but had taken the medication for four days in December 2017.

68. She further told us in evidence that she had two different types of inhaler, Salbutamol, a blue inhaler, and Clenil Modulite, a brown inhaler. This was confirmed in her doctor's notes. In cross-examination she gave different accounts of how she used her inhalers, such as, variously as needed, or daily, or once a week. This led us to take the view that at this time in December 2017, she took her inhaler as and when she needed it which is consistent with the record of the Stage 3 meeting.

69. Ms Parker was required under the procedure to have regard to the claimant's full absence history and questioned her on it. The claimant said that she did not want to talk about any underlying health issues giving rise to her chest infection. She was asked about her previous absences which had not been authorised. She asked Ms Parker whether she, Ms Parker, could review only the two recent absences or alternatively, that a different manager take over the interview. Ms Parker suggested that she would take into account the previous absences as set out in the meeting notes. After some discussion, this was agreed.

70. There was an adjournment for one hour and forty-nine minutes, following which Ms Parker gave her decision. She concluded that the claimant's absences had reached unacceptable levels and decided to dismiss her with immediate effect. The following is what was said, AP is Ms Parker, VM is the claimant, and WE, is Ms Emery:

> "AP – ….Apologies for the length of the adjournment but it's not an easy decision to come to. I'm going to be reading from a pre typed summation so WE will not be typing.
>
> Thank you for discussing the most recent absences with me. I have reviewed the notes from the previous stage meetings to find out more about the absences before that.
>
> In total since your start here just over 2 years ago you have been absent on 11 separate occasions for a total of 45 shifts. This is an unacceptably high level of absence. I appreciate the difficult circumstances that surround some of them however this was all covered in your previous Stage 3 meeting.
>
> As you do not wish the details of the previous absences to be discussed I will summarise by saying I have reviewed them and will not be authorising any of the live absences from your Stage 1 and 2 meetings. I appreciate there are some underlying health issues that have been discussed and understand that you are still going through them, Richard Blackman (RB) mentions that he took the action he did from the previous Stage 3 meeting to give you an opportunity to benefit from the support offered to improve your absence levels. However the most recent absences that have triggered this meeting are not regarding this.

> In regards to the absence on 13 December 2017 for chest infection I will not be authorising this absence as this is a commonplace illness and is not something as a company we would authorise.
>
> In regards to the absence from 7 March 2018 for car insurance I will not be authorising this absence. I appreciate you were not expecting this to happen and did try to take steps to get your insurance reinstated, however there was several days warning to try and put something in place should you not be able to reinstate your insurance in time for your shift on Wednesday. If you had notified us sooner of the issues we may have been able to help, however you did not make us aware in advance so we were unable to help look at alternatives for you. Also when going through the paperwork you provided us we noticed your insurance does not cover commuting and you confirmed you knew about this so were aware that the journey would be uninsured either way, however took the decision to not drive and go absent.
>
> As this leaves 2 live absences on your record since you were placed on Stage 2 on 29th July 2017 this means I will be dismissing you due to unsatisfactory attendance. This will be effective immediately, you will receive 4 weeks' pay in lieu of notice. This will be confirmed in a letter to you. You do have the right to appeal which will need to be in writing to the Head of HR for Service Delivery within 7 days receipt of the outcome letter.
>
> AP – Do you understand what I've said?
>
> VM – I understand perfectly. I will just to go and collect some things from my desk.
>
> AP – I have got Holly Draper (HD) waiting outside to escort you out." (236 – 245, 245)

71. Ms Parker concluded that the claimant was in breach of the warning given to her by Mr Blackman. The claimant was paid four weeks' notice. A letter confirming her dismissal was sent dated 5 April 2018. (251)

<u>The claimant's appeal against dismissal</u>

72. On 11 April 2018, the claimant appealed against her dismissal setting out her grounds in eight A4 pages. She stated that she had not received the notes of the earlier Stage 3 meeting and that Ms Emery's and Ms Parker's involvement put her at a disadvantage; she had been escorted, unprofessionally, out of the building following the decision to dismiss her; her relationship with Ms Parker was such that she felt harassed by her; there was a breach of confidentiality in relation to a family matter; Ms Parker decided to have a Stage 3 meeting; there was no support network, in that, the respondent did not meet with her to avoid her being absent on 7 March due to her not being able to drive; flexible working; untruthful evidence had been given in relation to her absence on 13 December; authorised and unauthorised absences; no occupational health referral; the respondent's record of her past medical history was inaccurate; different treatment on racial grounds; and her request for the return of her property. (252 – 260)

73. An appeal hearing was held on 3 May 2018, chaired by Ms Kelly Badham, Contact Centre Manager. She summarised the claimant's grounds of

appeal as: a conflict of interest by Ms Parker who dismissed her; that the claimant had been trying to get an occupational health referral; the manner in which she was escorted off the premises; and racial discrimination against by her by her colleagues.

74. After meeting with the claimant, Ms Badham conducted an investigation and interviewed Ms Parker, Mr James and others. Notes were taken. (266 – 288)

75. The appeal was reconvened on 14 June 2018, during which Ms Badham told the claimant that her grounds were dismissed. She was of the view that the claimant's absence on 7 March 2018, in relation to no car insurance, was unrelated to her medical conditions and said the following:

> "KB: I have come to a decision, I have typed up my summation which I will read to you now. Therefore Nadine will no longer will [sic] be taking notes. Please do not interrupt.
>
> In respect of your appeal, your first concerns were regarding your relationship with Anna Parker, your past history and her conducting your final Stage 3 meeting. I have interviewed Anna, Darren and Nik, to address the points you made, as these were people mentioned during your appeal meeting. I do understand that it's easy for the person accused to deny all allegations. However, the statements given by Darren and Nik lead me to conclude that there is no supporting evidence that you had been treated unfairly by Anna. There also is no evidence of a breach in confidentiality or negative behaviour by Anna to yourself.
>
> Your attendance records were identified by yourself during your meeting with Richard as being incorrect and part of his summation was to get these corrected. So your record at the time of your dismissal was a true reflection of your attendance.
>
> In respect of Anna chairing your Stage 3 meeting, as your direct line manager, it was not unreasonable for Anna to conduct this as it forms part of her role. Meetings are scheduled depending on Manager and HR availability. It could be your own Team manager or another that chairs the meeting. It was due to this availability that Anna Parker chaired your meeting with Wilma.
>
> Your point in regards to the way you were escorted off the premises, I am sorry if you felt that this was done in an aggressive manner and this is certainly not the way that this is supposed to happen. However the company policy is that dismissed employees are escorted out by a member of the management team and I can only apologise for the way you felt this was handled.
>
> Your point on indifferent treatment due to racial grounds from what I have looked at and know of these cases, there is no evidence to suggest this is the case.
>
> In regards to your absences, during your Stage 3 with Richard, the outcome led to no action and one of your absences due to your underlying health issue being authorised. This, as advised by Richard at the time, meant that if you were to have 1 further absence it would trigger another Stage 3 meeting. Your absence on 7th March was due to you having no car insurance, which was an avoidable absence and therefore not authorised. This last absence ultimately resulted in your dismissal, had nothing to do with your IBS or your Depression. All of your absences for those reasons, had been authorised. I do agree with your points on Occupational Health

> not being made available to you however, even with their recommendations, it would not have prevented your car issues or your other absences not related to these reasons.
>
> And finally your flexible working request was originally declined and following your appeal was granted.
>
> For these reasons, my decision is to uphold the decision to dismiss you due to your unacceptable attendance which is part of the absence management process.
>
> The meeting is now closed. You have no further right of appeal." (295 – 296)

76. The appeal outcome letter was sent dated 20 June 2018, confirming Ms Badham's decision. (297)

77. The respondent confirmed that the claimant's date of termination was on 27 March 2018.

78. We find that it is the respondent's practice to search for an available manager and a human resources adviser to conduct a Stage 3 meeting during the employee's work time. Morrisons did not have a manager available. The only other Ocado manager available was comparatively new in post and had not received the necessary training. Ms Emery from human resources was available and Ms Parker was working on the claimant's shift at the time and was, therefore, available.

79. We find that the respondent did follow its normal practice in getting another manager to conduct the Stage 3 meeting but the only one available was Ms Parker.

80. In the claimant's Particulars of Claim sent on 6 August 2019, she gave a list of what she described as the substantial effects of her asthma and IBS on her day to day activities. In relation to her asthma, she wrote that she experienced difficulty: dressing; washing; cooking; eating; taking part in day-to-day social interaction; she avoided stressful situations; she experienced a tight, painful chest; suffered from wheezing, light headedness; restlessness; and dizziness. She stated that she was susceptible to respiratory illnesses, paragraph 29. On 16 February 2015, the medical notes recorded that she had "well-controlled asthma, currently not got any inhalers at home." (326)

81. Her doctors' surgery, Ellis Practice, issued medical records on 10 October 2018, which states that she was diagnosed with asthma on 18 October 2007. These were not available to the respondent during her employment. (328)

82. As regards her IBS, the adverse effects on her daily activities were: difficulty dressing; washing; cooking; eating; she would experience fainting spells which could cause additional injuries; she suffered from cramps and an abdominal stabbing pains and would make frequent trips to the toilet which meant that normal social interaction was nearly impossible; she was unable to drive; and experienced interrupted sleep, paragraph 33.

83. The above amounted to a list of the alleged effects of her physical conditions on normal daily activities some of which she did not elucidate by reference to the contexts in which they would occur and whether they could be corroborated by witnesses. However, her evidence in respect of her IBS was more persuasive. As we have found, the respondent knew about her IBS condition since 1 October 2016.

Submissions

84. We have taken into account the submissions by Mr Olubokun, counsel on behalf of the claimant, and by Mr Tahzib, counsel on behalf of the respondent. We do not intend to repeat their submissions herein having regard to rule 62(5) Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013. We have, in addition, considered the authorities they have referred us to.

The law

85. The section 6 and Schedule 1 of the Equality Act 2010, "EqA." defines disability and schedule 8, paragraph 20, is the provision in respect of knowledge of the disability. Section 6 provides:

> "(1) A person (P) has a disability if –
>
> (a) P has a physical or mental impairment, and
>
> (b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities."

> "Paragraph 20(1), schedule 8 states:
>
> A is not subject to a duty to make reasonable adjustments if A does not know, and could reasonably be expected to know –
>
> (a) ----------;
>
> (b) [in any case referred to in Part 2 of this Schedule], that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second, or third requirement."

85. Section 212(1) EqA defines substantial as "more than minor or trivial". The effect of any medical treatment is discounted, schedule 1(5)(1).

86. Under section 6(5) EqA, the Secretary of State has issued Guidance on matters to be taken into account in determining questions relating to the definition of disability (2011), which an Employment Tribunal must take into account as "it thinks is relevant."

87. The material time at which to assess the disability is at the time of the alleged discriminatory act, Cruickshank v VAW Motorcast Ltd [2002] IRLR 24.

88. In Appendix 1 to the Equality and Human Rights Commission, Employment: Statutory Code of Practice, paragraph 8, with reference to "substantial adverse effect" states,

> "A substantial adverse effect is something which is more than a minor or trivial effect. The requirement that an effect must be substantial reflects the general understanding of disability as a limitation going beyond the normal differences in ability which might exist among people."

89. The time taken to perform an activity must be considered when deciding whether there is a substantial effect, Banaszczyk v Booker Ltd [2016] IRLR 273.

90. Section 20, EqA on the duty to make reasonable adjustments, provides:

> "(1)Where this Act imposes a duty to make reasonable adjustments on the person, this section, sections 21 and 22 and the applicable Schedule apply; 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 of practice of A's put 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 is reasonable to have taken to avoid disadvantage."

91. An employer's failure to adhere to its own time limits during a disciplinary procedure could not amount to either a provision, criterion or practice and "taking care" cannot amount to a reasonable step. "Incompetence, a lack of application or a failure to stick to time limits cannot be properly be characterised as a provision, criterion or practice.", Carphone Warehouse Ltd v Martin [2013] EqLR 481.

92. Langstaff J, President, Employment Appeal Tribunal, Nottingham City Transport Ltd v Harvey [2013] EqLR 4, held,

> "Practice" has something of the element of repetition about it. It is, if it relates to a procedure, something that is applicable to others than the person suffering the disability…disadvantage has to be by reference to a comparator, and the comparator must be someone to whom either in reality or in theory the alleged practice would also apply.", paragraph 18.

93. Guidance has been given on the duty to make reasonable adjustments in the case of Environment Agency v Rowan [2008] IRLR 20**,** a judgment of the EAT. An employment tribunal considering a claim that an employer had discriminated against an employee by failing to comply with the duty to make reasonable adjustment must identify:

> (1) the provision, criterion or practice applied by or on behalf of an employer, or
>
> (2) the physical feature of premises occupied by the employer;

(3) the identity of a non-disabled comparator (where appropriate), and

(4) the identification of the substantial disadvantage suffered by the claimant may involve a consideration of the cumulative effect of both the provision, criterion or practice applied by or on behalf of an employer and the physical feature of premises. Unless the tribunal has gone through that process, it cannot go on to judge if any proposed adjustment is reasonable because it will be unable to say what adjustments were reasonable to prevent the provision, criterion or practice, or feature, placing the disabled person concerned at a substantial disadvantage.

A tribunal deciding whether an employer is in breach of its duty under section 4A, now section 20 Equality Act 2010, must identify with some particularity what "step" it is that the employer is said to have failed to take.

94. The employer's process of reasoning is not a "step". In the case of General Dynamics Information Technology Ltd v Carranza [2015] ICR 169, the EAT held that the "steps" an employer was required to take by section 20(3) to avoid putting a disabled person at a disadvantage, were not mental processes, such as making an assessment, but practical actions to avoid the disadvantage. In order to decide what steps were reasonable, a tribunal should, firstly, identify the pcp. Secondly, the comparators. Thirdly, the disadvantage. In that case disregarding a final written warning was not considered to be a reasonable step.

95. In relation to the shifting burden of proof, in the case of Project Management Institute v Latif [2007] IRLR 576, EAT, it was held that there must be evidence of a reasonable adjustment that could have been made. An arrangement causing substantial disadvantage establishes the duty. For the burden to shift;

> "…it would be necessary for the respondent to understand the broad nature of the adjustment proposed and to be given sufficient detail to enable him to engage with the question of whether it could reasonably be achieved or not.", Elias J (President).

96. Paragraph 6.10 of the Code 2011 provides:

> "The phrase 'provision, criterion or practice' is not defined by the Act but should be construed widely so as to include, for example, any formal or informal policies, rules, practices, arrangements or qualifications including one off decisions and actions."

97. In relation to the comparative assessment to be undertaken in a reasonable adjustment case, paragraph 6.16 of the Code states:

> "The purpose of the comparison with people who are not disabled is to establish whether it is because of disability that a particular provision, criterion, practice or physical feature or the absence of an auxiliary aid disadvantages the disabled person in question. Accordingly and unlike direct or indirect discrimination - under the duty

> to make adjustments there is no requirement to identify a comparator or comparator group whose circumstances are the same or nearly the same as the disabled persons."

98. The proper comparator is readily identified by reference to the disadvantage caused by the relevant arrangements. It is not with the population generally who do not have a disability, Smith v Churchills Stairlifts plc [2006] IRLR 41, Court of Session.

99. In the case of Griffiths v Secretary of State for Work and Pensions [2016] IRLR 216, a judgment of the Court of Appeal, Elias LJ gave the leading judgment. In that case the claimant, an administrative officer, was employed by the Secretary of State for Work and Pensions. She started to experience symptoms of a disability identified as viral fatigue and fibromyalgia. She was absent for 62 days for a disability related sickness. After her return to work her employer held an attendance review meeting. Its attendance management policy provided that it would consider a formal action against an employee if their absence reached an unsatisfactory level known as "the consideration point". "The consideration point" was 8 days per year but could be increased as a reasonable adjustment for disabled employees. The employer decided not to extend the consideration point in relation to the claimant and gave her a written improvement notice which was the first formal stage for regular absences under the policy. She raised a grievance contending that the employer was required to make two reasonable adjustments in relation to her disability, firstly, that the 62 days disability related absence should be disregarded under the policy and the notice be withdrawn. Secondly, that in future "the consideration point" be extended by adding 12 days to the eight days already conferred upon all employees. Her employer rejected her grievance and proposals.

100. Before the Employment Tribunal the claimant argued that her employer failed to make the adjustments and was in breach of the section 20 EqA 2010, the duty to make reasonable adjustments. It was conceded that she was disabled within the meaning of the Act. The tribunal, by a majority, found that the section 20 duty was not engaged as the provision, criterion or practice, namely the requirement to attend work at a certain level in order to avoid receiving warnings and possible dismissal, applied equally to all employees. The Employment Appeal Tribunal dismissed the claimant's appeal upholding the tribunal's findings and adding that the proposed adjustments did not fall within the concept of "steps". It further held that the comparison should be with those who but for the disability are in like circumstances as the claimant.

101. The Court of Appeal held that the section 20 duty to make reasonable adjustments had been engaged as the attendance management policy had put the claimant at a substantial disadvantage but that the proposed adjustments had not been steps which the employer could reasonably have been expected to take. The appropriate formulation of the relevant pcp in a case of this kind is that the employee had to maintain a certain level of attendance at work in order not to be subject to the risk of disciplinary sanctions. Once the relevant pcp was formulated in that way, it was clear that a disabled employee's disability increased the likelihood of

absence from work on ill health grounds and that employee was disadvantaged in more than a minor or trivial way. Whilst it was no doubt true that both disabled and able-bodied alike would, to a greater or lesser extent, suffer stress and anxiety if they were ill in circumstances which might lead to disciplinary sanctions, the risk of this occurring was obviously greater for that group of disabled workers whose disability resulted in more frequent, and perhaps longer, absences. They would find it more difficult to comply with the requirements relating to absenteeism and would be disadvantaged by it.

102. The nature of the comparison exercise under section 20 is to ask whether the pcp puts the disabled person at a substantial disadvantage compared with a non-disabled person. The fact that they are treated equally and may both be subject to the same disadvantage when absent for the same period of time does not eliminate the disadvantage if the pcp bites harder on the disabled, or a category of them, than it does on the able-bodied. If the particular form of disability means that the disabled employee is no more likely to be absent than a non-disabled colleague, there is no disadvantage arising out of the disability but if the disability leads to disability related absences which would not be the case with the able-bodied, then there is a substantial disadvantage suffered by the category of disabled employees. Thereafter the whole purpose of the section 20 duty is to require the employer to take such steps as may be reasonable, treating the disabled differently than the non-disabled would be treated, in order to remove a disadvantage. The fact that the able-bodied are also to some extent disadvantaged by the rule is irrelevant. The Employment Tribunal and the Employment Appeal Tribunal were wrong to hold that the section 20 was not engaged simply because the attendance management policy applied equally to everyone.

103. There is no reason artificially to narrow the concept of what constitutes a "step" within the meaning of section 20(3). Any modification of or qualification to, the pcp in question which would or might remove a substantial disadvantage caused by the pcp is in principle capable of amounting to a relevant step. Whether the proposed steps were reasonable is a matter for the Employment Tribunal and has to be determined objectively.

104. In the case of Kenny v Hampshire Constabulary [1999] IRLR 76, a judgment of the Employment Appeal Tribunal, it was held that the statutory definition directs employers to make reasonable adjustments to the way the job is structured and organised so as to accommodate those who cannot fit into existing arrangements.

105. The test is an objective test. The employer must take "such steps as….is reasonable in all the circumstances of the case." Smith v Churchills Stairlifts plc [2006] IRLR 41.

106. Section 136 EqA is the burden of proof provision. It provides:

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

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

107. In relation to discrimination arising in consequence of disability, section 15 provides,

> "(1) A person (A) discriminates against a disabled person (B) if --
>
> (a) A treats B unfavourably because of something arising in consequence of B's disability, and
>
> (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.
>
> (2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability."

108. In paragraph 5.7, Equality and Human Rights Commission Code of Practice on Employment (2011), unfavourable treatment means being put at a disadvantage. This will include, for example, having been refused a job; denied a work opportunity; and dismissal from employment, paragraph 5.7.

109. In paragraph 4.9 it states the following,

> " 'Disadvantage' is not defined by the Act. It could include denial of an opportunity of choice, deterrence, rejection or exclusion. The courts have found that 'detriment', a similar concept, was something that a reasonable person would complain about - so an unjustified sense of grievance would not qualify. A disadvantage does not have to be quantifiable and the worker does not have to experience actual loss (economic or otherwise). It is enough that the worker could reasonably say that they would have preferred to be treated differently."

110. In the case of Pnaiser v NHS England [2016] IRLR 170, the EAT, Mrs Justice Simler DBE, held that the "something" that causes the unfavourable treatment need not be the main or sole reason but must have at least a significant or more than trivial, influence on the unfavourable treatment and amount to an effective reason for or cause of it. A tribunal should not fall into the trap of substituting motive for causation in deciding whether the burden has shifted. A tribunal must, first, identify whether there was unfavourable treatment and by whom in the respects relied on by the claimant. Secondly, the tribunal must determine what caused the treatment or what was the reason for it. An examination of the conscious and unconscious thought processes of the alleged discriminator will be required. Thirdly, motive is irrelevant as the focus is on the reason or cause of the treatment of the claimant. Fourthly, whether the reason or cause of it was something arising in consequence of the claimant's disability. The causation test is an objective question and does not

depend on the thought processes of the alleged discriminator. Fifthly, the knowledge required in section 15(2) is of the disability.

111. A similar approach was taken in the case of City of York Council v Grosset UKEAT/0015/16 relying on the guidance in Basildon and Thurrock NHS Foundation Trust v Weerasinghe [2016] ICR 305, Langstaff P.

112. In determining justification, an Employment Tribunal is required to make its own judgment as to whether, on a fair and detailed analysis of working practices and business considerations involved, a discriminatory practice was reasonably necessary and not apply a range of reasonable responses approach, Hardy & Hansons plc v Lax [2005] ICR 1565.

113. Capability is a potentially fair reason for dismissing an employee, section 98(2) Employment Rights Act 1996, "ERA 1996".

114. Where the employer has shown that the reason or, if more than one reason, the principal reason, for dismissing an employee was capability, whether the dismissal was fair or unfair the tribunal must have regard to section 98(4) ERA 1996.

115. Section 98(4) states,

> "Where the employer has to fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –
>
> (a) depends on whether in the circumstances (including the size and administrative resources the employer's undertaking) the employer acted reasonably or reasonably 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."

116. We have also taken into account the following Goodwin v The Patent Office [1999] IRLR 4; Kapadia v Lambeth London Borough Council [2000] IRLR 14; Cruicshank v VAW Motorcast Limited [2002] IRLR 24;College of Ripon and York St John v Hobbs [2002] IRLR 185; Power v Panasonic (UK) Limited [2003] IRLR 151; Ministry of Defence v Hay [2008] ICR 1247; Hall v Chief Constable of West Yorkshire Police [2015] IRLR 893; Basildon and Thurrock NHS Foundation Trust v Weerasinghe [2016] ICR 305; O'Brien v Bolton St Catherine's Academy [2017] IRLR 547 CA; Buchanan v Commission of Police of the Metropolis [2017] ICR 184; City of York Council v Grosset [2018] IRLR 746 CA; Baldeh v Churches Association of Dudley & District Limited UKEAT/0290/18/JOJ 11 March 2019; Sheikholeslami v University of Edinburgh [2018] IRLR 1090; and Khan v Stripestar Limited [2016] All ER (D) 217.

Conclusion

Disability

117. On the issue of the disability, the claimant relies on her IBS and asthma. In relation to IBS, Mr Olubokun referred us to pages 325, 322, 321, 313, 320, the medical records in the bundle showing that the claimant suffered from stomach cramps as a result of her IBS but they were not available to the respondent during the claimant's employment.

118. In her Particulars of Claim sent on or around 6 August 2019, the claimant wrote with reference to her IBS and the substantial adverse effects, difficulty dressing, washing, cooking and eating; frequent trips to the toilet; inability to drive; and interrupted sleep. She would experience fainting spells, cramping and abdominal pain. (89)

119. During the Stage 1 meeting held on 1 October 2016, she said that her IBS was triggered by stress. It "inflames and grips you every five seconds, I lay on the floor" and took Colofac for the pain. (115 – 118)

120. We find that the claimant experienced stomach problems since April 2015 which continued and was later diagnosed as IBS. We accept that this is a recurrent condition that had lasted longer than 12 months. We also accept that when she experiences her IBS, she suffered in the ways she described in her Particulars of Claim. The adverse effects **were** more than minor.

121. We, therefore, conclude that she suffered from a physical disability in relation to her IBS.

122. We further conclude that the respondent was aware of her disability on 1 October 2016, when she said that she had regular flare ups of IBS caused by stress and that the pain during these flare ups incapacitated her. The substantial effects are as described in paragraph 33 of her Particulars of Claim.

123. In relation to her asthma, on 16 February 2015, the medical notes recorded that she had "well-controlled asthma, currently not got any inhalers at home." (326)

124. The medical record from her doctors' surgery, Ellis Practice, issued on 10 October 2018, it states that the claimant was diagnosed with asthma on 18 October 2007, but this was not available to the respondent during her employment. (328)

125. We find that the claimant informed the respondent, for the first time, on 10 January 2018, that she suffered from asthma and that there was a "bug going round that was a bit nasty". She also said that she only used her inhaler when she needed it. (181)

126. She did not disclose her asthma in the medical questionnaire. (96)

127. As we have already found, her evidence on the use of her inhalers was inconsistent and unreliable. Notwithstanding what she stated in her Particulars of Claim in paragraphs 26 to 29, we have come to the conclusion that her asthma did not have a substantial adverse effect on her ability to carry out normal day to day activities. It was not a disability as set out in section 6, schedule 8, paragraph 20 Equality Act 2010. Her disability is IBS.

Discrimination arising in consequence of disability

128. The claimant relies on being subjected to the capability procedure and being dismissed as unfavourable treatment. The respondent has accepted that it subjected her to the procedure, and she was dismissed.

129. She submitted that her absences on 17 to 24 December 2016, for three shifts; 26 May to 13 July 2017, 26 days and 13 December 2017, 6 shifts, should have been disregarded due to her disabilities.

130. The 17 to 24 December 2016, for three shifts, were authorised by Mr Bailes on 15 February 2017and the claimant remained on Stage 1 and did not move on to Stage 2. Her absence from 26 May to 13 July 2017, 26 days, was authorised by Mr Blackman at Stage 3, who decided not to dismiss her. She remained on Stage 2 with a warning that one further absence would move her on to Stage 3. Both periods were because of her IBS. In relation to 13 December 2017, for 6 shifts, her absence was because of a chest infection and not her asthma, as she claimed. Even if it was asthma, we have found that it was not a disability at the material times. It was right that the respondent applied its Attendance Management policy to the claimant. Consequently, this aspect of her claim is not well-founded.

131. Even if the claimant was discriminated under section 15, the respondent's legitimate aim was and is to manage sickness absences in a fair and reasonable manner in order that it is able to provide an excellent service to its customers. The means adopted were both necessary and appropriate. An Attendance Management procedure takes into account disability related absences and other absences which may be disregarded. The procedure was applied in the claimant's case as some of her absences were authorised. Her IBS absences were disregarded but her absence on 13 December 2017, relating to a chest infection, was not.

132. In the case of Bray, it was held that even in case of disability related absences, it would not be a reasonable adjustment to ignore them entirely. In this case her absence on 13 December 2017, was not disability related. There was, therefore, no "something arising in consequence of disability". The respondent followed its procedure. We accept Mr Tahib's submissions that as at the date of the claimant's dismissal she had been absent on 11 distinct occasions over 45 shifts. Applying Griffiths it is not unreasonable for an employer to take into account the employee's absence record when making its decision. The claimant's absence record was taken into account. We have come to the conclusion that her dismissal was not

because of something arising in consequence of her IBS but her absence in breach of the warning given to her at the first Stage 3 meeting. She was dismissed for capability. This aspect of her claim is not well-founded.

Failure to make reasonable adjustments

133. The claimant's case is that the respondent applied two provisions, criteria or practices. The first being "triggering the Attendance Management procedure when an employee had been absent on three occasions or ten or more shifts absences since the beginning of their employment", and second, "that all periods of absence would be investigated and may be authorised by non-medically trained staff".

134. In relation to the first, there is no dispute that this is a pcp because the respondent applies its Attendance Management procedure in cases of absences. What the claimant has to establish is that the pcp put her at a substantial disadvantage in relation to a relevant matter in comparison with non-disabled persons or those without her disability, section 20 EqA.

135. Her disability is IBS. The Attendance Management procedure deals with absences. Knowledge of her IBS is imputed on the respondent from 1 October 2016. The claimant did not adduce evidence to show that there was a greater propensity to be absent because of this condition. She said at the attendance meetings that her IBS was unlikely to result in further absences.

136. We were not satisfied that because of her IBS she would be absent more than her work colleagues who were non-disabled or without her disability. Indeed, she had been absent from work for a variety of reasons, not only because of her IBS.

137. Even if her IBS put her at a substantial disadvantage, in that she would be susceptible to absences, applying Bray, it would not have been a practical step to disregard all of her IBS absences. Her absences on 31 July 2016 and 3 to 10 September 2016, were considered on 1 October 2016, at the Attendance Management meeting and were not authorised but her absences on 17 December 2016 and May to July 2017, were authorised.

138. Although we accept that if the 2016 IBS absences were authorised she would not have been on Stage 1 when she was, we have, however, taken into account the judgment in Bray, that being an employer is not required to authorise, or disregard all disability related absences.

139. Accordingly, we have come to the conclusion that this aspect of the claimant's section 20 claim is not well-founded.

140. In relation to the second alleged pcp, that all periods of absence would be investigated and may be authorised by non-medically trained staff. It is true that the managers involved in the Attendance Management procedure are not medically trained when dealing absences, but this applies to all absences under the procedure irrespective of whether the employee is disabled or not. We would agree that this is a pcp as it is a practice of the

respondent and is of general application. Had the claimant been substantially disadvantaged by this pcp compared with non-disabled employees or those without her disability? She had not established that this pcp substantially disadvantaged her in relation to her IBS as those who have non-disability related absences would also be dealt with by non-medically trained staff. In her case, as we have already found, the non-medically trained managers did authorise some of her absences.

141. Even if the respondent was under a duty to make reasonable adjustments in relation to this pcp, the claimant's case is that the respondent should have disregarded all absences relating to her disability. In Bray such a step was not considered reasonable as it is likely to result in no action being taken in relation to an employee who is on long term sick or has periods sick leave because of a disability.

142. The claimant also contends that, as a reasonable step, the respondent should obtain medical advice when considering which of her disability-related absences to authorise. Such an approach is the respondent's procedure. When considering whether to authorise an absence it takes into account the available medical information.

143. we have come to the conclusion that this claim it is not well-founded and is dismissed.

Unfair dismissal

144. We accept that the claimant was dismissed for capability. At the Stage 3 Attendance Management meeting held on 27 March 2018, Ms Parker explained to her that since the start of her employment, which was slightly over two years, her absences were unacceptably high. She had two live absences since she was placed on Stage 2 on 29 July 2017. Her chest infection on 13 December 2017 and car insurance on 7 March 2018, were taken into account. Ms Parker came to the conclusion that the claimant's attendance had been unsatisfactory and decided to dismiss her on four weeks' pay in lieu of notice. This was confirmed in her letter of dismissal. The reason for her dismissal was capability.

145. At each stage in the Attendance Management procedure the claimant was warned about the possible consequences should she be absent in the future. She was also warned about the possibility of dismissal on 10 January 2018 by Mr Blackman who said that should she be absent on one or more occasion, she would be put on Stage 3 leading to her possible dismissal.

146. We refer to the list of issues as set out in paragraph 19 above.. In relation to paragraphs 19(a)-(d) which seem to be related, we are satisfied that the respondent in taking into account the claimant's history of absences, was satisfied that she was unlikely to maintain a high level of attendance. Her most recent absences for IBS were authorised and there was no medical evidence to show that such absences were unlikely to be repeated. She

was asked during the staged meetings, whether her absences were likely to be repeated. She responded by saying that it was unlikely, but her absences continued. No evidence had been adduced to challenge Ms Parker's genuine belief in that regard. There were five staged meetings and on Long Term Absence meeting. During which the respondent was informed of the claimant's reasons for her absences which varied over time and were not only to do with her asthma and IBS, but babysitting, car insurance, gas issue and her sister being unwell. It was entitled to conclude that having regard to the claimant's history and the warning about further absences, she was unlikely to achieve an acceptable level of attendance.

147. In relation to paragraph 19(e), that the respondent did not asked the claimant for medical evidence, the respondent did ask her when she last saw her doctor and she responded. She was asked about counselling sessions. She was required to complete the medical questionnaire on 29 July 2017 that would have enabled the respondent to obtain and occupational health report. In any event, as she returned to work a report was not required.

148. As regards paragraph 19(f), that the respondent decided which absences to authorise and between May to July 2017, her absence was on account of her disability and the respondent did authorise that period of absence. It could only be the respondent, as an employer, with the authority to authorise any period of absence. Not all absences were disability related, neither is it reasonable to disregard all disability related absences, Bray.

149. In paragraph 19(g), the claimant alleged that the respondent dismissed her in a formulaic fashion because having met Stage 3, dismissal was a procedural necessity. Some of the claimant's absences during the period of her employment, were authorised. At each stage of the respondent's process she was told about what was expected of her in relation to her attendance and the consequences should she failed to meet up to expectations. The respondent wanted staff who were able to deliver the high level of service it provides to its customers. Its procedure is staged affording the employee opportunities to improve his or her attendance. There were two Stage 3 meetings during which the claimant's absence employment and attendance history were considered. She was not dismissed at the first Stage 3 which goes counter to her assertion that dismissal is formulaic. Such is the flexibility of the process. During the second Stage 3, Ms Parker adjourned for nearly two hours to consider her decision. The procedure, in our view, could not be described as formulaic nor could the decision to dismissed be viewed in the same way.

150. In relation to paragraph 19(h) with reference to clause 10 of her contract of employment, the claimant did not pursue as it is more relevant to a conduct case. Clause 10 is about disciplinary and performance management which the respondent did not apply to her.

151. With regard to paragraph 19(i), the claimant asserted that her level of absenteeism was low and not serious enough for a reasonable employer to dismiss her. The claimant commenced her employment with the respondent on 17 March 2016 and was dismissed on 27 March 2018. During her two years' service she had been absent on 11 separate occasions, for a total of 45 shifts. The respondent considered her absences as high and unacceptable. Although a number of them were authorised, some were unrelated to her disability. She failed to heed the warning given at the first Stage 3 meeting. Her absence on 7 March 2018, was for a car insurance issue, unrelated to her asthma and her absence on 13 December 2017, was for a chest infection.

152. Having regard to the above, it cannot be said that dismissal fell outside the range of reasonable responses. It fell within the respondent's Attendance Management procedure.

153. In relation to paragraph 19(j), the allegation that the respondent failed to take into account the claimant's long service or paid lip service to it without giving it genuine consideration, we find that Ms Parker did take into account the claimant's length of employment in considering her Stage 3 outcome. She concluded that taking her period of employment into account, the level of absences was unacceptably high. It was a factor that did not go in her favour but was taken into account.

154. Paragraph 19(k) is the allegation that the respondent failed to consider other, less draconian sanctions or paid lip service to it without giving genuine consideration. At Stage 3, Ms Parker did consider whether to authorise the absences, but the claimant was reluctant to talk them as she considered that they were personal and she did not have a favourable relationship with Ms Parker.

155. In relation to paragraph 19(l), the claimant asserted that the respondent was in breach of the provisions of the Equality Act 2010 in dismissing her and in the process leading up to it. She asserted that a reasonable employer could not dismiss contrary to the Act. We conclude, having regard to the above matters, that the respondent was not in breach of the provisions in the Equality Act in relation to the protected characteristic of disability. It considered the claimant's employment and absence history. It took into account the first Stage 3 outcome and concluded that the claimant's level of absences was unacceptably high. Her employment was comparatively short, but her absences were high notwithstanding the authorised absences. Her absence on 7 March 2018, was to do with her car insurance, unrelated to her disability.

156. We have to the conclusion that the respondent had evidence that the claimant's attendance had not improved and that it was unlikely to improve. Having been given the warnings at each stage including the first Stage 3 outcome, her absence continued. Her most recent was unrelated to her disability. The respondent needed to have staff capable of delivering the high standard of service to its customers. Her level of

absences was such that she was unable to fulfil this function. Applying section 98(4) ERA 1996, dismissal fell within the range of reasonable responses. The claimant's unfair dismissal claim is not well-founded and is dismissed.

157. The provisional remedy hearing listed on 13 May 2020, is hereby vacated.

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Employment Judge Bedeau

Date: …21 February 20……..

Sent to the parties on: .....

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For the Tribunal Office