THE EMPLOYMENT TRIBUNALS

Claimant: Miss A Bleanch

Respondent: The Commissioners for Her Majesty's Revenue & Customs

Heard at: North Shields Hearing Centre **On** 23 & 24 October 2019
In Chambers 29 October 2019

Before: Employment Judge Langridge

Members: Mrs CE Hunter
Mr M Ratcliffe

Representation:

Claimant: Mr S Kitson (Counsel)
Respondent: Mr A Tinnion (Counsel)

RESERVED JUDGMENT

1. The respondent did not discriminate against the claimant because of something arising in consequence of her disability.

2. The claimant's claim is dismissed.

REASONS

Introduction

1. This was a claim for unlawful discrimination contrary to section 15 Equality Act 2010 and arose from the claimant's dismissal for poor attendance during her employment. An unfair dismissal claim had previously been dismissed on withdrawal, leaving only questions relating to the Equality Act to be considered. By the time of the hearing the respondent had conceded that the claimant was a

disabled person within the meaning of section 6 of the Act and accepted that it had knowledge of the claimant's disability. The impairments relied on by the claimant were depression/anxiety and dysthymia, a persistent depressive disorder.

2. The Tribunal was provided with an extensive bundle of documents comprising around four hundred and sixty pages, and we heard evidence from four witnesses. The claimant gave evidence on her own behalf, and for the respondent evidence was given by Abigail Briggs, Front Line Manager, David Walker, Higher Officer for Resources & IT and Brooke West, Senior Officer Delivery Manager. Ms Briggs line managed the claimant in the latter part of her employment. Mr Walker was the manager who took the decision to terminate the claimant's employment and Ms West dealt with the appeal against dismissal.

3. Both representatives provided the Tribunal with written submissions and chronologies of the key facts, though this was a case where the evidence of fact was not in dispute at any stage.

4. One dispute did arise during the hearing during Mr Tinnion's cross-examination of the claimant, when he sought to ask questions derived from her detailed GP records (in the bundle but not introduced into evidence by any witness up until then). His purpose was to demonstrate, by reference to the claimant's inability to work in the months following her dismissal, that the respondent had been correct to conclude that her poor attendance would have continued had she not been dismissed. The Tribunal indicated that it was not minded to allow questions about the claimant's sickness in the post-dismissal period, principally because her mental health would undoubtedly have been substantially affected by the fact of the dismissal. Mr Tinnion submitted that the information was relevant because the claimant had fit notes from her GP in the months following dismissal and she delayed starting her new job. He said this evidence vindicated the respondent's decision to dismiss. For the claimant, Mr Kitson submitted that the counter-factual evidence rendered the value of this line of enquiry nugatory. The claimant had responded to Mr Tinnion's initial questions about this issue by becoming tearful and upset.

5. Having heard the submissions of both representatives, the Tribunal retired briefly to discuss the issue, and decided not to allow detailed questions deriving from the GP records because they were not relevant to the issues. We took the view that exploring this evidence would not help us to determine the questions in the case, as it would never be possible to know the extent to which the claimant's dismissal caused further problems for her mental health, or whether it contributed to her inability to deal with other matters affecting her mental health. The Tribunal indicated that Mr Tinnion could nevertheless ask questions about the delay in the claimant starting her new job, as this could be dealt with without reference to her GP records, and without the need to carry out a disproportionate exercise in addressing the detail of those personal records.

6. Mr Tinnion's immediate response to the Tribunal's decision was to request a review, directing us to a sample entry in the claimant's GP records which indicated that she had been feeling anxious and asking for a fit note until her new job started. The Tribunal reviewed its decision and confirmed that it remained

unchanged. We acknowledged that it can sometimes be helpful to look at the future in order to examine the past, but given that the claimant's dismissal was likely to have had a significant impact on her mental health, it would never be possible to unravel the fact of the dismissal from what actually happened. Examining the state of the claimant's health by reference to her medical records would not help the Tribunal to reach its decision on the proportionality of the respondent's decision to dismiss. We were not prepared to have the GP records reviewed, after balancing the impact on the claimant and the relevance of the evidence to the respondent's case. We indicated that we might have reached a different decision if, for example, the claimant had gone straight into a new job and then embarked upon a pattern of intermittent absence in that new position. This was not such a case.

7. That issue aside, there was no conflict between the evidence given by any of the witnesses, and indeed the claimant very fairly conceded whenever asked, that the respondent's extensive and detailed records of their interactions with her were accurate.

8. The claimant was offered the opportunity to take additional breaks if needed, but apart from one occasion when she became upset, the claimant was able to give her evidence and participate in the hearing without any further adjustments.

The issues

9. This claim revolved around section 15 Equality Act 2010 which provides that:

> *15(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.*

10. The above provision does not apply if the employer did not know and could not reasonably have been expected to know about the employee's disability, but that was not in dispute here. The respondent conceded before the hearing began that the claimant was disabled throughout her employment. It further conceded that its decision to dismiss the claimant amounted to unfavourable treatment, and contended that the reason for dismissal was the claimant's absence record. The first issue the Tribunal had to determine was whether the dismissal arose in consequence of the disability. The respondent said it made no concession about that, and relied on the underlying reason for the claimant's absences as being a mixture of ill-health and family circumstances.

11. The second issue for the Tribunal to determine was whether the dismissal was a proportionate means of achieving the respondent's legitimate aims. Helpfully, the claimant conceded that in principle the respondent's aims were legitimate, providing the dismissal served one or more of them. The four aims relied on by the respondent were:

i. operational effectiveness and efficiency of the respondent's operations;
ii. ensuring the respondent's ability to meet customer demands;
iii. ensuring a sufficient and reliable workforce;
iv. encouraging satisfactory attendance among the respondent's workforce.

12. The respondent's position was that it was following its probation policy when considering the claimant's dismissal, rather than its attendance management procedure. The claimant's claims did not include any allegations of a failure to make reasonable adjustments under section 20 of the Act, nor was any argument put forward that reasonable adjustments should have been made to the respondent's policies and procedures. In essence, the claimant's argument was that the respondent should have exercised its discretion not to dismiss her, and should have dealt with the case in some other way.

Findings of fact

13. The claimant was employed by the respondent as a call handler in its call centre in Newcastle upon Tyne from 9 January 2017. She worked full-time and initially worked on a tax credits helpline.

14. The respondent operated a rotating shift pattern with a flexi-time policy, the core hours falling between 8am and 10pm. The shift pattern planned for the contingency of one person being off, but it was not possible to plan for more than one emergency absence and the respondent needed to be able to rely on employees attending work on a consistent basis.

15. The claimant's employment was subject to a twelve month probationary period, information about which was set out in a welcome letter to her dated 9 January 2017. The welcome letter provided an overview of the probationary procedure and identified the steps that would be taken in the event of unsatisfactory performance or poor attendance. Under the latter heading, it was stated that the claimant was "expected to give regular and effective service". This was necessary to enable the respondent to provide continuity in its services to customers phoning the call centre.

16. The welcome letter also explained that managers were responsible for deciding when it was appropriate to take action for poor attendance, taking account of individual circumstances and with concerns being raised first on an informal basis. The trigger points for formal action were identified as either a total of eight working days, or four separate spells of absence taken during a rolling twelve month period. The letter went on to explain the process for issuing a written warning and advised the claimant that if there was no improvement in attendance after a written warning, "then a recommendation will be sent to the decision-maker which may lead to your dismissal".

17. The claimant was therefore aware from the first day of her employment that the respondent regarded good attendance as necessary for the successful completion of her probationary period.

18. Under the respondent's working arrangements the claimant had the benefit of flexi-time outside the core hours of the normal rotating shift patterns. For most of her employment the claimant was in deficit with her flexi-time hours in that she took more hours than she had accrued and, having built up this deficit, was never able to make up the hours to decrease it.

19. The respondent operated a lengthy and detailed probation policy and a similarly lengthy and detailed attendance management procedure. Under the probation policy it was made clear that:

> "If the probationer's performance, attendance and conduct and behaviour are satisfactory throughout the probation period we will confirm their appointment."

20. The policy stated that the purpose of the probation period was to:

> "enable probationers to demonstrate that they are suitable for the job and are able to achieve and maintain our expected standards of […] attendance."

21. A commitment was made that managers would provide guidance and support to help probationers successfully complete their probation. It was stated that:

> "If, despite appropriate guidance, probationers are unable to achieve and maintain a satisfactory standard of performance, attendance, conduct and behaviour they will be dismissed".

22. Under the probation policy the respondent was able to extend the probationary period. More specifically:

"The manager may recommend extending a probation period by three or up to six months if either of the following applies:

> The manager believes that the probationer will be able to achieve or sustain the required standards given a little more time.
>
> Where the manager needs more time to obtain medical evidence or properly assess the impact of reasonable adjustments made under the Equality Act 2010…"

23. The policy did not provide for any further extension beyond six months.

24. The probation policy included a section on dealing with poor attendance. This required managers to discuss concerns with the employee in question, and make efforts to resolve problems through day to day management.

25. The trigger points for addressing concerns about attendance were not only set out in the welcome letter but also in the respondent's attendance management procedure. At the beginning of the claimant's employment the usual trigger points (four episodes of ill-health or eight working days in a rolling twelve month period)

applied to her like other employees, though they were later changed in accordance with the respondent's guidance on trigger points for disabled employees. The procedure said it was “expected that the vast majority of increased trigger points will be an increase in the region of 25% or 50% on the standard trigger point”. A further mechanism employed by the respondent under its attendance management procedure was a Workplace Adjustments Passport. This provided a way of recording adjustments put in place for disabled employees. It included revised disability trigger points, and also provided a tool to enable managers to monitor how well the adjustments were working.

26. At the time when her employment began, the claimant's disability was a mental health impairment, described initially as anxiety and/or depression, for which she had been treated for some years with a combination of medication and group therapy. The claimant had not found the group therapy helpful.

27. The claimant had her first sickness absence on 9 and 10 April 2017. This was the first of eight episodes of sickness which together totalled forty eight days. Almost all the absences related to the claimant's disability, except for one spell in April 2018 when she was off with flu and a chest infection. On every occasion that the claimant was off sick, her line managers (who changed a number of times during her employment) had extensive telephone contact with her, generally on a daily basis. Records of those telephone conversations were made and from these it was clear to management (and to the Tribunal) that the claimant felt she was being supported by her employer throughout. In addition to the telephone contact during sick leave, the respondent conducted return to work meetings on each occasion and similarly these were recorded in detail.

28. Following the initial two day absence in April 2017, the claimant was off sick again on two further occasions that year. The next absence was between 24 April and 1 May, four working days. On 10 May the claimant then began a fifteen day absence which ended on 31 May.

29. During this last absence the claimant was referred to Occupational Health on 15 May and again on 30 May 2017. On the second occasion Occupational Health made recommendations for the claimant to return to work on a phased basis. She did so on 1 June with temporary adjustments in place. It was recommended that she resume her normal working hours, but with modified duties so that she was not carrying out telephone work all day, starting with a half day of telephone work in the first week, increasing to three quarters of the day, and then carrying out normal duties in the third week.

30. A workplace adjustments passport was completed on 1 June 2017 recording a recommendation that the claimant work on off-line duties, including webchat with customers. Other adjustments were also put in place, enabling the claimant to attend weekly group counselling sessions and to take increased breaks as necessary. By this time the claimant had reached the usual trigger points for absence management, as she had had 21 days’ absence on three occasions. The respondent wrote to her on 6 and 28 June 2017, identifying its concerns about attendance and suggesting that a meeting take place. It does not appear that any such meeting did take place, at least formally, but by this point the claimant was

undoubtedly on notice from the respondent's letters that her attendance was a concern. On 20 June the claimant's then line manager, Mr Jordan Laffey, considered the disability trigger point under the attendance management procedure, and increased the number of days from eight to twelve, leaving the number of episodes of absence unchanged at four. The increase to twelve working days represented a 50% increase compared to other employees, the maximum envisaged by the policy.

31. Following this period the claimant was able to maintain good attendance until taking a day off on 18 August 2017, and after this her attendance was good for around two and a half months. The claimant then had a period of sickness due to disability lasting sixteen days from 3 October to 5 November 2017. Following a formal attendance review meeting on 31 October (triggered by 34 days' absence on four occasions) the claimant received a formal letter from the respondent. The letter said that a written warning would not be issued on this occasion, but the respondent would keep the claimant's attendance under review and continue to provide her with support.

32. A further workplace adjustments passport was issued on 8 November 2017, identifying some additional adjustments which had been made. These included allowing the claimant to slide her shifts to a later start and finish time, and to take short five minute breaks as needed. This enabled the claimant to self-manage the need for breaks if, for example, she found taking calls too distressing. She was also able to alternate telephony work with off-line duties.

33. On 13 November the respondent produced the first of several stress reduction plans in discussion with the claimant, identifying the main issues and stressors, as well as an action plan for both the claimant and management. The stress reduction plan was reviewed on 30 November and again in 2018 on 9 April and 3 May.

34. Meanwhile, on 18 November 2017 a further Occupational Health review took place. The claimant reported that management were supportive, and she found the adjustments helpful including the stress reduction plan, the adjusted trigger points and off-line duties.

35. On 30 November the claimant attended a meeting with Mr Laffey to discuss concerns about her working hours. It was noted that she was not building up additional hours to deal with the deficit on her flexi-time. The claimant said she was not coping well with work and family life and was advised by the manager to concentrate on herself as her work was in decline. It was pointed out that she was sometimes not attending for a full shift and may not pass probation. It was the respondent's practice to record a full day's absence on the employee's absence record, but if (as happened with the claimant) only a part of a shift was worked due to ill-health, that was not recorded.

36. The claimant attended a formal attendance review meeting on 5 December 2017 which led to a first written warning being issued on 8 December. She was told that she was being put on a three month review period to show a sustained improvement, and if she failed to demonstrate that by the end of the period, the respondent would consider ending her employment. Throughout the process the

claimant was made aware in clear terms of the steps the respondent was taking and the risk to her ongoing employment if standards of attendance were not met. Following this written warning, the claimant's attendance did improve during the following three months. Her next absence was not until 3 April 2018 when she had time off for flu and a chest infection. In the interim the claimant had asked for (and was given) unpaid leave in December 2017, for reasons relating to her brother's health.

37. An informal meeting with the claimant took place on 17 January 2018, to discuss her line manager's concerns about the amount of time off she had been taking. Although she was not taking sick days, the claimant was booking a large amount of her annual leave as soon as it became available. This had also been the case in the previous year and the line manager felt that a pattern was being continued in the new holiday year. Another concern was that the claimant had a very high negative balance on her flexi-hours, and had taken a number of days' special leave (unpaid) to cover sickness. This meant that in reality, the claimant's sickness absence record was worse than appeared, because it was being masked by other types of leave.

38. A second meeting took place on the same date to discuss a "minor misconduct" issue, which is how the respondent viewed the claimant's failure to reduce her flexi-time deficit. This was outside the respondent's policy on flexi-time. The claimant commented at this meeting that she had taken half her annual leave to mask sickness.

39. On 22 January 2018 a formal probation meeting took place with another manager, Rachel Webber. They discussed problems with the claimant's attendance, and support was offered as had previously been the case. Ms Webber said that she would notify the claimant of the outcome and said that dismissal was one of the options. In the event Ms Webber decided to extend the claimant's probationary period by a further six months, the maximum envisaged under the policy. In a letter dated 8 March the claimant was told that she had passed the three month attendance review period, and that her good attendance had to be maintained for a further twelve months. She was advised that any further sickness could lead to consideration of her employment being ended. The claimant was then off sick for a few days from 3 April with flu and a chest infection.

40. On 25 April 2018 the claimant was given unpaid special leave because her father, for whom she was a carer, was unwell.

41. On around 15 May 2018 the claimant joined a team supervised by Abigail Briggs, Front Line Manager. Ms Briggs was a mental health advocate with a good understanding of the issues, and made the claimant aware of this in an early telephone conversation on 11 May.

42. The claimant's sickness absence recurred on 9 May 2018 when she was off for reasons related to her disability for four working days. On her return to work on 15 May the claimant met Ms Briggs to discuss her health issues and the support the respondent could offer. A further adjustment was made when the respondent allowed the claimant to deal with phone calls relating to PAYE enquiries rather

than tax credits. The respondent agreed to continue the existing adjustments which had previously been put in place. The claimant explained that she had been affected by her father's illness and that as his carer she had been struggling to balance work and home life. She found the adjustment of allowing her to slide back her shift start times especially helpful when she had trouble sleeping, as she could come into work later. It was also agreed that the claimant would work phased hours on her return to work that week. The claimant was very emotional during this discussion, and had been on a number of other occasions when she came into work distressed. On those occasions Ms Briggs had taken the claimant to a private room and had offered her one-to-one support. The claimant would then calm down enough to return to her duties, though she was far from well.

43. On 30 May the claimant met with Ms Briggs again. They discussed a new diagnosis the claimant had been given after seeing a psychiatrist: persistent depressive disorder, also known as dysthymia. The claimant perceived this to mean she had been misdiagnosed in the past, but it was far from clear to the Tribunal that the previous diagnosis was in fact incorrect. The new diagnosis led to a minor change in the claimant's medication in that she was prescribed a slow release version of the same anti-depressant she had been taking previously. This amounted to a minor change in treatment, as the claimant conceded in answer to the Tribunal's questions. It had come about because she had been experiencing withdrawal symptoms before taking a second dose of the previous version of the medication. It was clear from this discussion with Ms Briggs that all the adjustments the respondent had previously arranged had been helping the claimant and would continue to help her. That support did not need to change and the only significant difference in the treatment of the claimant's disability was the recommendation that she start CBT at the earliest opportunity.

44. On 1 June 2018 the claimant was given a further day's special leave to deal with her father's ill-health.

45. On 5 June the claimant was referred back to Occupational Health, who noted the psychiatrist's recommendation for "a slight change in medication" and for CBT. At that time it was unclear when the CBT sessions would start. The claimant said she was keen to carry on attending work, because she was aware that her attendance was a cause for concern. She was considered fit for work with a recommendation that her duties be modified so as to exclude tax credit calls. Like other colleagues, the claimant found these calls stressful. Callers were sometimes upset, angry or even very distressed, due to the circumstances which led them to phone.

46. Occupational Health recommended that management consider whether the claimant's "previously undiagnosed and untreated condition may have contributed to her absence levels through no fault of her own". The report concluded that "the outlook is good".

47. On 7 June the claimant made a further request for unpaid special leave relating to her father's health, but on this occasion the request was refused. Ms Briggs noted that the claimant was already sliding her shifts back, and she had come in late and emotionally distressed, but only because Ms Briggs had told her that the time would need to be recorded as sick leave if she did not attend.

48. In a discussion with Ms Briggs on 11 June about the recent Occupational Health report, the claimant said she was feeling well supported with the existing adjustments, which now included the switch to dealing with calls on the PAYE helpline.

49. Ms Briggs prepared an initial probation report on 12 June 2018, which she found difficult to do because she had only recently taken over line managing the claimant, and during those early weeks the claimant had had time off sick. The report was compiled based largely on Ms Briggs speaking with the claimant and without the benefit of a full review of all the documents on her file. Ms Briggs expressed the view that she was "confident [the claimant's] attendance could improve in the future" following her new diagnosis. She referred to the fact that the claimant had appropriate reasonable adjustments in place. Ms Briggs' recommendation was that the claimant's probationary period should be extended for a three month period ending on 8 October 2018. In making this recommendation Ms Briggs did not appreciate that the probation policy did not permit an extension beyond a six month period.

50. After writing this initial probation report, Ms Briggs spent about a week organising and reviewing in detail the extensive file, and she took advice from HR and from more senior managers. As a result she wrote to the claimant on 18 June saying that she could not in fact extend the probation period any further. Instead, she was referring the case to David Walker, Higher Officer for Resources and IT, for a final decision on whether or not to dismiss the claimant. Ms Briggs followed the respondent's protocol by creating a note entitled "Decision-making – Manager's Record". This identified the decision being contemplated, the information assessed, the factors taken into consideration, the advice sought and the decision arrived at. Such notes were prepared by all the respondent's managers in their handling of this case and were provided to the claimant at each stage. In her decision-making record, Ms Briggs noted:

> "I found AB has used all of her AL up to December 2018, has exceeded her allowable flexi debit and taken five days' unpaid special leave so far in 2018, she has admitted to masking sickness with other types of leave in the past so I believe her sickness record could be worse than is officially showing".

51. In her record Ms Briggs noted that her initial opinion had been to extend the probation period, and that she had been advised this was not possible given the previous six month extension. Ms Briggs noted the recent contact she had had with the claimant, and the claimant's requests to slide her shifts back because her grandfather was ill. On one occasion the claimant had started work two hours late, using flexi-time because she was unwell that day. On 28 June the claimant had sent a text message saying her grandfather was in hospital and she would not be in work that day, saying: "I don't know what you will have to put today down as, but I need to be at the hospital today. I'm sorry." Ms Briggs replied saying that she could not authorise another day of special leave. The claimant disputed that she should have to treat the day as sick leave, and said she would challenge this on her return to work, involving her union if need be.

52. Ms Briggs made another note of the occasions between 16 May and 3 July 2018 when the claimant's shifts were slid back for reasons relating to her health. These totalled thirteen instances in a seven week period. At that time the claimant had been reporting anxiety and related sleep problems.

53. As time went on, Ms Briggs had been finding the level of support she was providing to the claimant increasingly onerous, both emotionally and in terms of the management time it was taking. There was a knock-on effect in that Ms Briggs had less time to spend with others in her team. Furthermore, the respondent was conscious that every time the claimant was absent, or transferred away from the tax credits helpline, that work had to be passed to other colleagues. Tax credit calls were distressing or stressful for everybody to some degree, and other call handlers would have liked to be taken off those calls. Ms Briggs felt that the claimant's absences were impacting on the morale of other staff who had to pick up those calls, and colleagues noticed the amount of time off the claimant was taking. Ms Briggs felt that rifts were forming and there was tension in the team, with resentment and frustration.

54. Ms Briggs was also concerned about the fact that the claimant was using up her flexi-time and annual leave to cover sickness. This meant there was no cushioning because the claimant was not available in the pool of employees to provide cover. In a call centre environment that was problematic, as the respondent operates a 'power of one' principle by which every single person helps when taking calls at peak periods. If there were not enough people on the phone lines and it was busy, the respondent had to bring in people from postal work to handle calls, which then slowed down the postal work. There was an impact on call times for all staff, as call handling times were measured, as well as customer dissatisfaction. This in turn caused additional stress for staff dealing with those calls as customers could become irate if they were kept waiting for calls to be dealt with. Ms Briggs explained to the Tribunal that this was a time-sensitive environment, in that all team members needed to be where they were supposed to be at the right time.

55. On 5 July a further stress reduction plan was put in place for the claimant, and this was reviewed again on 12 July, 19 July and 2 August. The respondent was still talking to the claimant about building back her flexi-debit balance, which remained a cause for concern as it was not improving.

56. On 12 July the claimant came to work in a distressed and tearful state and was again given support by Ms Briggs. On 16 July the claimant slid her shift back and then asked to use emergency leave to push it back even later, ultimately only working four hours of her eight hour shift.

57. On 19 July the claimant was invited by letter to a formal meeting on 1 August with David Walker, Higher Officer for Resources & IT, to discuss her sickness absence. She understood the purpose of the meeting and that one outcome of the meeting could be the ending of her employment. Shortly before the meeting, the claimant wrote a note for Mr Walker in which she acknowledged her high sickness absence, but saying that there were mitigating circumstances. The claimant expressed her

confidence that the position would be brighter in the future, now that she had started her CBT therapy.

58. At the meeting on 1 August the claimant was accompanied by her trade union representative. She had a full opportunity to put forward her position and Mr Walker listened to what she had to say. He had already reviewed all the relevant documents and written information, and he adjourned the meeting to consider his decision. Mr Walker noted the various adjustments that had been made to help the claimant. He looked at the total period of her probationary period, including the time after she was issued with a written warning on 8 December. He took the view that, looking at the period of employment as a whole, there was no guarantee that the claimant's attendance would improve in the future. He had in mind all the information he had been given about the claimant's flexi-time usage and her using annual leave to cover sickness absence. He noted that the probationary period had been extended by the maximum of six months. Mr Walker felt that a disproportionate amount of time and resource had been needed from the claimant's line managers, to manage her absences. This had also caused resentment because line managers were being taken away from the rest of the team. Mr Walker also took account of the additional stress being placed on Ms Briggs personally.

59. Having weighed up all the circumstances, and having concluded that it was appropriate to dismiss the claimant, Mr Walker wrote to her by a letter dated 9 August 2018 confirming his decision. He said that the claimant's attendance had not met the required standard during her probationary period. He gave her five weeks' notice of dismissal to expire on 14 September, and offered her a right of appeal. The claimant exercised this right by setting out grounds of appeal in a letter dated 16 August. A hearing took place before Brooke West, Senior Officer Delivery Manager, on 5 September. Ms West organised her records to reflect the key grounds of appeal which were that:

    - There was new evidence
    - The process had been unfair
    - The decision was unreasonable

60. In addition to the above, the claimant argued that Mr Walker had disregarded the new medical diagnosis, had not allowed time for reasonable adjustments to take effect, and had been prejudiced in his view that the claimant would take more sick leave. She said he had not exercised his discretion, either to extend the probationary period or to not dismiss.

61. The appeal did not take the form of a full rehearing, but Ms West read and took account of all the information considered by Mr Walker. She reviewed his handling of the matter and concluded that Mr Walker's decision had been properly arrived at. Ms West upheld the decision to dismiss. She agreed with her fellow managers that it was important to have a reliable and sufficient workforce to ensure that they met customer demands.

Submissions

62. On the claimant's behalf Mr Kitson submitted that her attendance record demonstrated that disability was the principal cause of her absences from work, there being only 6 days in a total of 48 days' absence which were not attributable to the claimant's mental health conditions. Following the EAT decision in Basildon & Thurrock NHS Foundation Trust v Weerasinghe UKEAT/0397/14, he submitted that two distinct tests have to be applied to this question:

    - Did the claimant's disability cause, have the consequence of, or result in, "something"?
    - Did the employer treat the claimant unfavourably because of that "something"?

63. It was submitted that the claimant had established a prima facie case that she was treated unfavourably because of something arising in consequence of her disability, meeting the first part of section 15(1) Equality Act 2010. Accordingly, the main issue for the Tribunal to decide was whether the respondent, in pursuing aims that were accepted to be legitimate, acted proportionately in dismissing the claimant.

64. Mr Kitson referred the Tribunal to several authorities on the question of proportionality, including Homer v Chief Constable of West Yorkshire [2012] UKSC 15 in support of the proposition that the unfavourable treatment has to be both an appropriate means of achieving the legitimate aim, and a reasonably necessary means of doing so. Following Dansk Jurist- og Okonomforbund v Indenrigs- og Sundhedsministeriet [2013] EUECJ C-546/11, dismissal will not be considered reasonably necessary if the respondent could have achieved its objectives with less discriminatory means. The question whether a lesser measure could have achieved the respondent's legitimate aims was also considered in Naeem v SS for Justice [2017] UKSC 27. One such lesser measure might be to offer part-time work.

65. In Land Registry v Houghton UKEAT/0149/14 the EAT said that a balance must be struck between the respondent's reasonable business needs and the discriminatory effect of the dismissal. Proportionality has to be assessed at the time of the unfavourable treatment, following Trustees of Swansea University Pension & Assurance Scheme v Williams UKEAT/0415/14.

66. Another authority relied on by Mr Kitson was Cockram v Air Products plc UKEAT/0122/15, in which the EAT highlighted the importance of the Tribunal considering all the evidence on justification put forward by the employer and providing clear findings on the aim, why it was legitimate and whether the steps taken to implement it were appropriate and necessary.

67. Applying those principles Mr Kitson submitted that the facts of this case did not show that the dismissal was justified. He referred to the lack of direct evidence from the respondent about the informal communications between the claimant and her line manager, Mr Laffey, who was not called to give evidence. He drew attention to the absence of quantified data from the respondent to show the impact

on its business of the claimant's absences. Likewise, there was no evidence directly from the claimant's colleagues to show how their morale had been affected, only the hearsay evidence of managers.

68. In response to the way the claimant was cross-examined during the hearing, Mr Kitson submitted that the trigger for the claimant's mental health problems was not relevant. Until May 2018 the claimant had been misdiagnosed and after this she had no more absences before the respondent took the decision to dismiss. He referred to the Occupational Health report dated 5 June 2018 in which the outlook for the claimant was said to be good, and the view was expressed that her "previously undiagnosed and untreated condition may have contributed to her absence levels through no fault of her own". When Ms Briggs first carried out her review of the probationary period, she was optimistic that the claimant's attendance could improve in the future, and recommended a further extension.

69. Mr Tinnion gave submissions for the respondent, relying on the four aims which the claimant had agreed were legitimate:

    v. operational effectiveness and efficiency of the respondent's operations;
    vi. ensuring the respondent's ability to meet customer demands;
    vii. ensuring a sufficient and reliable workforce;
    viii. encouraging satisfactory attendance among the respondent's workforce.

70. The authorities relied on by Mr Tinnion included an EAT decision in Monmouthshire County Council v Harris [2015] UKEAT/0332/14/DA, in support of the proposition that the dismissal of a disabled employee may serve the legitimate aim of reducing stress on other employees caused by their absence. He referred to O'Brien v Bolton St Catherine's Academy [2017] EWCA Civ 153, in submitting that the proportionality test should "accommodate a substantial degree of respect" for the judgement of the respondent's decision-makers as to the organisation's reasonable needs. Mr Tinnion cited a passage from the EAT judgment in O'Brien, which included the following:

> "The task of an Employment Tribunal when considering section 15 is to use its common sense and knowledge as an industrial jury to ask whether the dismissal was proportionate …"

71. This question should also take into account any failure to make reasonable adjustments, or the fact that none were possible: City of York Council v Grosset [2018] EWCA 1105.

72. Mr Tinnion's submissions on the facts of the case can be summarised as follows. His first point was that the claimant failed to satisfactorily complete her probationary period due to poor attendance in her first year of employment. She was then given the opportunity to achieve the required level of attendance, through an extension to the probationary period. During that extension the claimant still did not achieve a sustained level of good attendance. Secondly, the respondent needed to ensure that the office where the claimant worked was kept adequately staffed at all times when open. Thirdly, in this context the claimant's attendance record was extremely poor and comprised 8 episodes of absence

totalling 48 working days. This put additional pressure on the claimant's colleagues and also her managers.

73. Additional submissions included the fact that the claimant knew what was expected of her, was made aware of when her attendance fell below the required standard and was given considerable support during her employment. The respondent had made reasonable adjustments, and indeed the claimant made no complaint that any other adjustments were needed.

74. On the issue of proportionality the respondent submitted that the claimant's dismissal did in fact help to accomplish all four of its legitimate aims. In relation to each aim, the dismissal was a means of achieving it. Further, the respondent could have dismissed the claimant in January 2018 but instead extended her probationary period. It had no evidence that future attendance would have been satisfactory. By March 2019 (after the dismissal and appeal procedures were concluded), the claimant was still in poor mental health even though she had had the benefit of CBT therapy and a change to her medication for 9 months. Mr Tinnion also made submissions about delays in the claimant's starting her new job in 2019.

75. It was acknowledged on behalf of the respondent that the claimant's attendance record was somewhat better in the second year of employment, but in April and May 2018 she had taken 10 days' sick leave. Overall, she had not shown an ability to sustain good attendance during the total probationary period, and any improvements had been short-lived before a relapse occurred.

Conclusions

76. After reviewing all the evidence and the submissions of the parties, the Tribunal came to a unanimous decision in this case.

77. The first question for us to consider was whether, following the decision in the Basildon & Thurrock NHS Foundation Trust case, the claimant's disability caused, or had the consequence of, or resulted in, "something". Here, we were satisfied that the claimant's disability led to her poor attendance record as this was the reason for 42 of her 48 days' sick leave. The answer to the question whether the respondent treated the claimant unfavourably because of that "something" is undoubtedly yes. The claimant's dismissal resulted from her poor attendance.

78. The Tribunal then addressed its mind to the key issue of whether the respondent could justify the unfavourable treatment, in accordance with section 15(1)(b) of the Act and applying the relevant authorities. We considered whether the claimant's dismissal was an appropriate means by which to serve the four aims relied on by the respondent, and whether dismissal was a reasonably necessary means of doing so, in accordance with Homer. The question of proportionality had to be addressed in light of the evidence of the impact on the respondent of retaining the claimant in her employment, as well as the obvious detriment to the claimant of her employment being ended.

79. The respondent's four aims are clear, and the claimant conceded that in principle they are legitimate. There is a degree of overlap between them. Ensuring operational effectiveness and efficiency is a means of meeting customer demands. Ensuring a sufficient and reliable workforce and encouraging satisfactory attendance by workers are ways of achieving operational effectiveness and efficiency. These aims are manifestly legitimate, and it is to be expected that an employer would have and implement policies with those objectives in mind. The operation of those policies was not in issue in this case, except to the extent that the claimant argued that the respondent should have exercised discretion not to dismiss in her case.

80. There was limited evidence from the claimant that she would have achieved a sustained improvement in her attendance, had she not been dismissed when she was. Her attendance record showed periods of a few months when her attendance was good, but with a pattern of relapses when she was absent again. If she was not off sick, the claimant was struggling to attend work on time and to work a full shift consistently. She was struggling not only with her mental health but also with family illnesses and her caring responsibilities. The claimant was masking her sickness with annual leave, and was working partial days where she came into work then went home unwell. These part-days were not recorded. The claimant was using excessive amounts of flexi-time, in excess of what she had built up and in breach of the respondent's policy. She showed no sign of being able to reduce her flexi-time debit even after a period of months.

81. The one positive sign in the later stages of the claimant's employment was her diagnosis of dysthymia in late May 2018. Her view of this fed into the Occupational Health report of 5 June expressing some optimism for the future. The claimant presented this as meaning she had been misdiagnosed in the past, though there was no medical evidence to support that interpretation. Instead, it appeared to the Tribunal to be a refinement to the previous diagnosis of depression and anxiety. It did not lead to any significant change in treatment, nor to the workplace adjustments made.

82. We have noted the suggestion by Occupational Health that the previously “undiagnosed and untreated condition” may have contributed to the claimant's absence record through no fault of hers, but at the same time there was no real change to the existing adjustments and these had not helped the claimant to manage her depression previously. At times the claimant had maintained good attendance for a time, with the benefit of these same adjustments, but there was no reason to believe that anything would change for the better in the future.

83. Although the claimant expressed her confidence to the respondent that the position would be brighter in the future, after starting her CBT therapy, the Tribunal felt that she was presenting an optimistic view at a time when she was trying to save her job.

84. The prognosis for the future was an important element in Mr Walker’s consideration of whether to dismiss. He reviewed the whole period of the claimant's employment, not just the more recent months when her attendance had improved a little. This was in accordance with the respondent's probationary

policy, as the decision he was tasked with was a probationary review. He looked back at the past in taking a view about what was likely to happen in the future, and the evidence of 48 days' absence – well in excess of the respondent's revised trigger of 12 days in a rolling 12 month period – entirely supported his conclusions.

85. There was no evidence before the respondent or indeed the Tribunal to suggest that a step short of dismissal would have enabled the respondent to achieve its aims by any lesser means.

86. An important part of the Tribunal's consideration was whether the decision to dismiss was proportionate, given the detrimental impact on the claimant. We evaluated the evidence given by all three managers about the impact on the business of maintaining the claimant's employment. We were satisfied that their concerns were material and important to the achievement of the aims. It is unsurprising for the extensive absences of one person in a team to be felt by her colleagues and line managers. Every shift missed by the claimant meant that others had to pick up the work she was scheduled to do. A series of many one-to-one meetings with line managers (a consistent feature of the claimant's employment) took them away from managing others. Resentment and morale are likely to be affected as time goes on, and we accepted the respondent's evidence that this was the case here. We were also struck by the extensive efforts made by Ms Briggs in a relatively short space of time, to support the claimant with her mental health struggles, at no little cost to herself.

87. We took into account what adjustments the respondent had made to support the claimant in managing her disability. The claimant made no criticism that these adjustments were insufficient. On the contrary, she was clear both during her employment and in her evidence that she had felt well supported by the respondent. The adjustments and support provided were extensive. They included many informal interactions with line management, the relaxation of the 8 day trigger point to 12 days, phased returns to work after illness, referrals to Occupational Health, modified duties with the removal of tax credit duties, stress reduction plans, sliding shifts and a 6 month extension to the probationary period. In addition, the respondent allowed the claimant a certain amount of latitude with short notice requests for unpaid leave relating to members of her family.

88. We also noted that the respondent followed transparent and fair procedures at every stage., making the claimant aware from the outset of her employment that good attendance was considered necessary for the successful completion of her probationary period. Even knowing where it might lead, the claimant was unable to achieve lasting improvements in her attendance.

89. Having considered all of the steps taken by the respondent, the Tribunal concluded that its support of the claimant during her employment could not be faulted. It is difficult to conceive of anything else the respondent could have done to avoid reaching the point where dismissal was in contemplation.

90. This brings us to the core question whether that final decision to dismiss was a proportionate means of achieving the respondent's aims. Firstly, we concluded that dismissal was an appropriate means of achieving those aims, as the

claimant's dismissal would undoubtedly have an immediate and lasting impact on the reliability of the workforce as a whole. Retaining the claimant would not be compatible with the aims. We have also concluded that the claimant's dismissal was reasonably necessary in the circumstances of this case. An action short of dismissal would not have had that impact, as evidenced by the fact that the many adjustments already made had not been able to achieve lasting improvements in the claimant's attendance.

91. Taking account of all the evidence and for the reasons set out above, our conclusion is that the respondent's decision to dismiss the claimant was proportionate in all the circumstances. It had had an opportunity to dismiss the claimant at the first probation review but instead it chose to extend the period by the maximum period of six months. The extensive support had not achieved lasting improvements in attendance.

92. All four of the respondent's aims were, in the Tribunal's judgment, legitimate and all four were served by the decision to dismiss the claimant. Having weighed up the evidence as a whole, we are satisfied that the decision to dismiss was a proportionate one. For these reasons, the claimant's claim fails.

EMPLOYMENT JUDGE LANGRIDGE

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON

18 February 2020