EMPLOYMENT TRIBUNALS

Claimant | *Respondent*
Ms L Rawkins | EDF Energy Ltd

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT NORTH SHIELDS ON 11-13 February 2020

EMPLOYMENT JUDGE GARNON
Members : Ms. J Johnson and Mr. R Dobson
Appearances
For Claimant Mr. J. McHugh of Counsel
For Respondent Mr. T. Sidiq of Counsel

JUDGMENT

Our unanimous judgment is none of the claims are well founded so are dismissed

REASONS (bold print is our emphasis and italics quotations)

1. Introduction and Issues

1.1. The claim presented on 5 July 2019 is of unfair dismissal and two types of disability discrimination under the Equality Act 2010 (the EqA). The claimant, born on 16 August 1971, was employed as a Customer Services Advisor (CSA) from 1 May 2009 to 27 February 2019. She was diagnosed with Chron's disease 26 years ago and told the respondent ("EDF") of this prior to starting. It started to have a major effect in 2018. EDF accepts she is a disabled person.

1.2. All unlawful conduct under the EqA requires a discriminatory act and a type of discrimination. The acts in s. 39 include dismissal or subjection to other detriment. As for types in this case both s20/21 and s 15 are engaged and, as we will explain, linked. The issues previously recorded appear at times to confuse s15 and s20.

1.3. EDF asserts the reason for dismissal was the claimant's sick absence record and its genuine belief she would not, due to her ill health, in future be able to maintain regular attendance at work. The claimant agrees that was their reason and it related to her capability, a potentially a fair reason under section 98(2) Employment Rights Act 1996 (ERA). Having regard to the relevant law, the real issues are as follows.

1.4. Unfair Dismissal

1.4.1. Did EDF have reasonable grounds for its belief and act reasonably in all the circumstances in treating that reason as sufficient to dismiss the claimant?
1.4.2. Did it follow a fair procedure and, if not can it show the claimant could have been fairly dismissed in any event?

1.5. Failure to Make Reasonable Adjustments
1.5.1. Did EDF apply provisions criteria or practices (PCP's) to the claimant which put her at a substantial disadvantage compared with non-disabled employees?
1.5.2. Were there any steps EDF ought reasonably to have taken to reduce that disadvantage but failed to take?
The step the claimant suggests is following occupational health (OH) advice and revising her working hours to 5 six hour shifts per week when she made her flexible working request thereby not placing her in a position where she was more likely to need to take sick leave.

1.6 In the s15 claim the claimant's dismissal is clearly unfavourable treatment and the "somethings" arising in consequence of her disability are her need to revise her working hours and periodically to take sick leave. The only issue is whether EDF show that treatment was a proportionate means of achieving its legitimate aims to provide effective service to its customers and ensure fairness of granting flexible working requests as between those who made them.

2.The Relevant Law

2.1. Section 98 of the ERA provides:
"(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair it is for the employer to show –
(a) the reason (or if more than one the principal reason) for dismissal
(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
(2) A reason falls within this subsection if it
(a) relates to the capability.. of the employee for performing work of the kind he was employed by the employer to do,
(3) In subsection (2) (a) –
(a)" capability" , in relation to an employee , means his capability assessed by reference to skill, aptitude ,health or any other physical or mental quality.

2.2. Section 98(4) says:
"*Where an employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –*
(a) depends on whether in all the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee
(b) shall be determined in accordance with equity and the substantial merits of the case."

2.3. Helpful cases on fairness in capability dismissals are Spencer-v- Paragon Wallpapers and East Lindsay DC –v-Daubney both of which place great emphasis on the need to consult the employee and not come too hastily to decisions her sick absence is unlikely to improve. In all aspects substantive and procedural we follow the clear rule in Iceland Frozen Foods v Jones (approved in HSBC v Madden) and Sainsburys v Hitt, we must not substitute our own view for that of the employer unless it falls outside the band of reasonable responses.

2.4. In Polkey v AE Dayton Lord Bridge said " *an employer having prima facia grounds to dismiss . will in the great majority of cases not act reasonably in treating the reason as a sufficient reason for dismissal unless and until he has taken the steps, conveniently classified in most authorities as "procedural" which are necessary .. to justify that course of action. Thus in the case of incapacity the employer will not normally act reasonably unless he gives the employee fair warning and an opportunity to mend his ways and show that he can do the job…*

2.5. Section 15 (1) of the EqA says
(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.
In Basildon & Thurrock NHS Trust v Weerasinghe [2016] ICR 305 Langstaff P explained there must be "something" arising in consequence of the disability and the unfavourable treatment must, at least in part , be "because of" that "something". In Pnaiser -v-NHS England Simler P agreed this approach. The employer does not need to know the something arose from the disability City of York Council-v-Grosset. Physical impairments may produce psychological effects. In Olaleye v Liberata UK Ltd EAT/0445/13 the EAT said the claimant's physical condition had given rise to stress and anxiety as a result of the underlying condition and the attitude others had taken to it .This claimant is in a similar position so her stress related absence is relevant without her having to show a separate mental impairment.

2.6. Section 39 (5) imposes the duty to make reasonable adjustments and section 20 explains it. There are three requirements, though the first is the only relevant one today
(3) The first requirement is a requirement, where a ***provision, criterion or practice*** *of (the employer) puts a disabled person at a* ***substantial disadvantage*** *in relation to a relevant matter* ***in comparison with persons who are not disabled****, to take* ***such steps as it is reasonable to have to take to avoid the disadvantage****.*

Section 21 says a failure to comply with the requirement is a failure to comply with a duty to make reasonable adjustments and an employer discriminates against a disabled person if it does.

2.7. In Newham Sixth Form College v Sanders [2014] EWCA Civ 734 Laws L.J. approved Environment Agency v Rowan [2008] ICR 218 which said a Tribunal must identify (a) the PCP applied by or on behalf of an employer, (b) the identity of non-disabled comparators (where appropriate) and (c) the nature and extent of the substantial disadvantage. Laws LJ continued

14. ... An employer cannot, as it seems to me, make an objective assessment of the reasonableness of proposed adjustments unless he appreciates the nature and the extent of the substantial disadvantage imposed upon the employee by the PCP. Thus an adjustment to a working practice can only be categorised as reasonable or unreasonable in the light of a clear

understanding as to the nature and extent of the disadvantage. Implicit in this is the proposition, perhaps obvious, that an adjustment will only be reasonable if it is, so to speak, tailored to the disadvantage in question; and the extent of the disadvantage is important since an adjustment which is ***either excessive or inadequate will not be reasonable.***

2.8. Langstaff P said in Nottingham City Transport Ltd v Harvey EAT/0032/12 *…"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.* In Ishola v Transport for London, the Court of Appeal upheld this saying an employment tribunal was entitled to conclude requiring an employee to return to work without a proper and fair investigation of his grievances was not a PCP, as it was a *'one-off act in the course of dealings with one individual'*. HH Judge Shanks said in Carphone Warehouse Ltd v Martin EAT/0371/12:*…What the Employment Tribunal found, in effect, was the lack of competence or understanding by The Carphone Warehouse in preparing the claimant's wage slip for July 2010 was capable of being a "practice" . and the reasonable step they should have taken was .. not delaying payment of the correct amount of pay. Mr Hutchin says, in effect, this approach is misconceived. We are afraid we agree with him in this contention, for two related reasons. First, a lack of competence in relation to a particular transaction cannot, as a matter of proper construction, in our view amount to a "practice" applied by an employer any more than it could amount to a "provision" or "criterion" applied by an employer.*

2.9. The concept of "*arrangements*" in the Disability Discrimination Act 1995 (DDA) was replaced by that of a PCP "*applied by* ***or on behalf of*** *the employer*". It covered not only what the employer insisted upon but what it **expected**. What an employer "provides" **should** happen (a **provision**) or a standard it says should be met (a **criterion**) may differ from what in **practice does** happen or standards which are in **practice** expected. Any one may trigger the duty.

2.10. The task of "defining the PCP" is often made a complex exercise in precision pleading. Contrast Lord Hope's simple approach in Archibald -v-Fife Council 2004 ICR 954

Mrs Archibald was employed by the council as a manual worker. It was an implied "condition" or an "arrangement" of her employment .. that she should at all times be physically fit to do her job ... She met this requirement when she entered the council's employment on 6 May 1997. She … became disabled. As a result she was no longer physically fit to do this job. This exposed her to another implied "condition" or "arrangement" of her employment, which was that if she was physically unable do the job she was employed to do she was liable to be dismissed.

2.11. Section 20 requires it disadvantages the claimant *in comparison to persons who are not disabled* . If the practice disadvantages everyone to whom it is applied **equally**, whether they are disabled or not, there is no comparative disadvantage. But if it disadvantages the claimant **more for a reason inextricably linked to her disability**, it is self evident she is at such a comparative disadvantage. As Cox J. said in Fareham College-v-Walters

In the present case the provision, criterion or practice identified by the Tribunal was the Respondent's refusal to permit this Claimant to have a phased return to work. That meant, in this case, that it required her to return and to resume her work without a phased return. It is entirely clear from this that ***the comparator group is other employees*** *of the Respondent* ***who are not disabled and who are able forthwith to attend work and to carry out the essential tasks required of them in their post.*** *Members of that group are not liable to be*

dismissed on grounds of disability, whereas because of her disability the Claimant could not do her job, could not comply with that criterion and was liable to dismissal. ..She was thereby placed at a substantial disadvantage in comparison with other, non-disabled employees.

2.12. What Parliament has always intended was explained by Baroness Hale in Archibald

*57. … the Act entails a measure of positive discrimination, in the sense that **employers are required to take steps to help disabled people which they are not required to take for others**. It is also common ground that employers are only required to take those steps which in all the circumstances it is reasonable for them to have to take.*

*58. … **The control mechanism lies in the fact that the employer is only required to take such steps as it is reasonable for them to have to take.***

2.13. The test of what is reasonable is objective. As Maurice Kay LJ said Smith-v-Churchills Stairlifts 2005 EWCA Civ 1220

43 " The objective nature of the test is further illuminated by section 6(4). Thus, in determining whether it is reasonable for an employer to have to take a particular step, regard is to be had, amongst other things, to"(c)the financial and other costs which could be incurred by the employer in taking the step and the extent to which taking it would disrupt any of his activities."

44. It is significant the concern is with the extent to which the step would disrupt any of his activities, not the extent to which the employer reasonably believes such disruption would occur.

2.14. However, an employer at the time need not necessarily make an exhaustive and individual assessment of each employee's request for change. In Griffiths-v-DWP Elias LJ said

"Thus, so far as reasonable adjustment is concerned, the focus ..is upon the practical result of the measures which can be taken. It .. is irrelevant to consider the employer's thought processes or other processes leading to the making or failure to make a reasonable adjustment.

This replicates , Spence-v-Intype Libra where His Lordship said. :

38…. The issue…, is whether the necessary reasonable adjustment has been made; whether it is by luck or judgment is immaterial.

40. A tribunal will be fully entitled in the light of all the evidence before it to conclude that an employer has failed to make a reasonable adjustment, and his ignorance of the employee's requirements, .. will not avail the employer one iota. He may carry out an assessment and fail to make reasonable adjustments; equally, he may fail to carry out the assessment but make all necessary reasonable adjustments. Mr Spence's contention is even if he takes such steps as are reasonable to mitigate or eliminate the harm, he will be potentially liable for any failure to carry out an assessment. We do not think that is compatible with the language of the legislation…

48.In short, what s4(A) envisages is that steps will be taken which will have some practical consequence of preventing or mitigating the difficulties faced by a disabled person at work. It is not concerned with the process of determining which steps should be taken.

2.15. Project Management Institute v Latif 2007 IRLR 579 held that, in order to shift the burdenof proof onto the employer, the claimant must establish the duty has arisen and facts from which it can be reasonably inferred, absent an explanation, it has been breached. So, by

the time the case is heard, there must be evidence of some apparently reasonable adjustment that could achieve the end of reducing the disadvantage.

2.16. Tarbuck-v-Sainsbury's Supermarkets said there is no obligation on an employer to create a post which is not otherwise necessary, for a disabled person. In Chief Constable of Lincolnshire –v-Weaver EAT /0622/07 H.H.Judge McMullen said *"**the Tribunal assessed the reasonableness of allowing the Claimant onto the scheme merely by focusing on his own position. They were obliged to engage with the wider operational objectives of the force**.*

2.17. The DDA in s 6(4) listed factors to take it into consideration in deciding whether a proposed adjustment was reasonable. The EqA does not, but the Equality and Human Rights Commission Code of Practice, which we are obliged to take into account, does identify factors which include the size of the employer; the practicability of the proposed step; the cost of doing it ; the extent of the employer's resources and **the extent of any disruption caused to its activities.** It may not be clear whether the step proposed will be effective or not. It may still be reasonable to take the step even though success is not guaranteed; the uncertainty is one of the factors to weigh up when assessing reasonableness, as Lewison LJ said in Paulley v First Group plc [2014] EWCA Civ 1573. In O'Hanlon-v-HMRC Hooper LJ explained an employer can legitimately take into account not only the cost of making an adjustment for the claimant but others who would demand similar steps. In that case the claimant wanted full sick pay to last longer for disabled people and Hooper LJ said it would be rare the duty under s 20 would reasonably involve paying disabled people more. By analogy in this case, paying them to be in work when they were not needed will rarely be reasonable . **The test of reasonableness involves striking a balance.**

2.18. A "proportionate means of achieving a legitimate aim" used to be called "Justification" Balcombe LJ said in Hampson v Department of Education and Science [1989] ICR 179, 191: *"justifiable" requires an objective balance between the discriminatory effect of the condition and the reasonable needs of the party who applies the condition."* Pill LJ in Hardys and Hanson -v-Lax provided an overview of justification first citing Sedley LJ in a sex discrimination case Allonby v Accrington and Rossendale College [2002] ICR 1189 *,:*

" 27. The major error, which by itself vitiates the decision, is that nowhere, either in terms or in substance, did the tribunal seek to weigh the justification against its discriminatory effect. On the contrary, by accepting that "any decision taken for sound business reasons would inevitably affect one group more than another group" it fell into the same error as the appeal tribunal in the Brook case [1992] IRLR 478 and the Enderby case [1991] ICR 382 and disabled itself from making the comparison.

28. Secondly, the tribunal accepted uncritically the college's reasons for the dismissals. They did not, for example, ask the obvious question why departments could not be prevented from overspending on part-time hourly-paid teachers without dismissing them. They did not consider other fairly obvious measures short of dismissal which had been canvassed and which could well have matched the anticipated saving of £13,000 a year. In consequence they made no attempt to evaluate objectively whether the dismissals were reasonably necessary – a test which while of course not demanding indispensability, requires proof of a real need.

29. … Once a finding of a condition having a disparate and adverse impact .. had been made, what was required was at the minimum a critical evaluation of whether the college's reasons demonstrated a real need to dismiss the applicant; if there was such a need, consideration of the seriousness of the disparate impact of the dismissal on women including the applicant; and an evaluation of whether the former were sufficient to outweigh the latter.

Then Pill L.J. said

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

33. The statute requires the employment tribunal to make judgments upon systems of work, their feasibility or otherwise, the practical problems which may or may not arise from job sharing in a particular business, and the economic impact, in a competitive world, which the restrictions impose upon the employer's freedom of action. The effect of the judgment of the employment tribunal may be profound both for the business and for the employees involved. This is an appraisal requiring considerable skill and insight. As this court has recognised in Allonby .. a critical evaluation is required and is required to be demonstrated in the reasoning of the tribunal.

2.19. The DDA expressly provided an employer could "justify" disability related treatment only if it had first complied with the duty to make reasonable adjustments. Though the EqA does not expressly say so, it is logically impossible to justify discrimination under s15 unless the employer has first complied with the duty as Elias LJ said in <u>Griffiths</u> *"An employer who dismisses a disabled employee without making a reasonable adjustment which would have enabled the employee to remain in employment - say allowing him to work part-time - will necessarily have infringed the duty to make adjustments, but in addition the act of dismissal will surely constitute an act of discrimination arising out of disability. The dismissal will be for a reason related to disability and if a potentially reasonable adjustment which might have allowed the employee to remain in employment has not been made, the dismissal will not be justified".* However, if it has done all that it is reasonable there is usually little more to be done to justify dismissing an employee who simply cannot be predicted to be likely maintain regular attendance. **Reasonableness under s 20 and "justification" both involve striking a balance.**

2.20. It is the treatment of the claimant which must be justified not just the policy on granting flexible working requests or dismissing those who cannot maintain regular attendance <u>Buchanan v The Commissioner of Police of the Metropolis</u> EAT/0112/16 is a good illustration. The claimant, a police motorcyclist, had a serious accident when responding to an emergency, as a result of which he had not been able to return to work. When he had been absent for eight months the respondent began to take steps under a procedure called Unsatisfactory Performance Procedure ("UPP"). In the claim form the claimant complained of "the respondent's decisions to instigate and continue with the informal management action process

and the formal UPP process", saying they could not be objectively justified. The Tribunal noted he did not attack the scheme itself on grounds of proportionality, only the way it was operated, including the points at which certain steps were taken and persisting with the UPP process when it should not or done so in a more measured way. The Employment Tribunal majority held it was the procedure, rather than its application to the claimant, which had to be justified; and found for the respondent. The EAT allowed an appeal. The procedure and the policies which the respondent developed to apply it allowed for individual assessment in each case at each stage. The steps held by the Employment Tribunal to amount to unfavourable treatment were not mandated by the procedure or by any policy of the respondent. Section 15(1)(b) required the Employment Tribunal to consider whether the treatment of the claimant was justified and in this case it was not sufficient to ask whether the underlying procedure was justified.

2.21. As for the relationship between s15 and s20 Elias LJ said in Griffiths-v-DWP

76. I would observe it is unfortunate that absence policies often use the language of warnings and sanctions which makes them sound disciplinary in nature. This suggests the employee has in some sense been culpable. That is manifestly not the situation here, and will generally not be the case, at least where the absence is genuine, as no doubt it usually will be. But an employer is entitled to say, after a pattern of illness absence, that he should not be expected to have to accommodate the employee's absences any longer. There is nothing unreasonable, it seems to me, in the employer being entitled to have regard to the whole of the employee's absence record when making that decision. As I mention below, the fact that some of the absence is disability-related is still highly relevant to the question whether disciplinary action is appropriate.

79. As I have already discussed, the positive duty to make reasonable adjustments is only a part of the protection afforded to disabled employees. The fact that the employer may be under no duty to make positive adjustments for a disabled employee in any particular context does not mean that he can thereafter dismiss an employee, or indeed impose any other sanction, in the same way as he could with respect to a non-disabled employee. The employer is under the related duty under section 15 to make allowances for a disabled employee. It would be open to a tribunal to find that the dismissal for disability-related absences constituted discrimination arising out of disability contrary to section 15. This would be so if, for example, the absences were the result of the disability and it was not proportionate in all the circumstances to effect the dismissal.

3. Findings of Fact

3.1. We heard the claimant and for the respondent Mr Barry Patterson ,Ms Hayley Lackenby and Ms Kerry Lawson, We had a concise agreed document bundle.

3.2. The claimant was employed at a call centre in Sunderland ("the Centre") from May 2009 until 27 February 2019. Her primary duties involved answering inbound telephone queries, writing letters and replying to emails. EDF is a major energy supplier in the UK employing about 13,000 people about 1000 at the Centre. It is open for calls 8am-8pm weekdays and 8am-5pm Saturdays The claimant's case is put briefly in the next 3 paragraphs and factually there is little dispute.

3.3. Crohn's disease causes pain, fatigue, frequent sickness and diarrhoea, and a weaker immune system. It can go into remission but will flare up . In early 2018, she started to struggle badly with the effects and in about March, she attended an assessment by Occupational Health (OH) . An OH report and a letter from Dr King to EDF at page 90 recommended shorter than standard 8 hour shifts for a period of 1 year. The OH advice was that working **beyond** around 6 hours a day led to significant tiredness and fatigue. She submitted a flexible working request in May 2018 (pages 91 to 96) to reduce her hours from 37 to 30 worked six hours per day over 5 days a week. EDF refused this request on the ground it would have a detrimental effect on the business. She appealed unsuccessfully (notes at pages 98 to 101 and outcome at pages 102 to 103). **At all significant meetings the claimant had a Trade Union representative**

3.4. In or around September 2018, she was certified unfit for work due to work related stress and confirmed her stress was due to the worry of potentially losing her job because of her disability She attended further OH assessments in October and November 2018. She returned to work on 7 January 2019 without adjustments to the length of her shifts. Her sick pay was due to drop to half pay on 14 January. Her husband was not in work at the time. She was due an OH assessment in January but forgot to attend. She had two further absences in February

3.5. On 27 February 2019, following a meeting on 25th, EDF dismissed her due to incapability to attend work on a regular basis. She says her attendance had been affected by the failure to implement the adjustments recommended by OH. Although that is not clearly evidenced by any doctor, it may well be so.

3.6. EDF's case is more complex. The Centre is EDF's main customer contact centre in the UK. It primarily handles telephone calls to and from customers. Until fairly recently it handled some written correspondence, but low in comparison to telephone calls, which together with some other work, has been gradually offshored and/or outsourced and some voluntary redundancies made.

3.7. Ideally EDF aim to employ staff on a contract for 37 hours per week 7.4 hours per day with a 36 minute lunch. Employing all staff on that basis would **maximise** efficiency. However, EDF does not expect perfect efficiency and will flexibily amend working times provided it has enough cover to match demand with supply. Accommodating varying flexible working requirements of staff, primarily for childcare but also in respect of sickness and disability, has been challenging. EDF operate in a highly regulated market and the requirements/ expectations placed on it are ever increasing, including customer service. The Centre has Key Performance Indicators (KPI's) to achieve, such as call waiting times, call handling times and customer satisfaction. Therefore, it is key to ensure it is **adequately** staffed, staff are trained, supervised, sufficiently motivated and not over worked. EDF is under cost pressures, so it is important not to be paying staff who are surplus to requirements at certain times.

3.8. Historically, there had been a number of flexible working requests granted, many in respect of childcare. At one point in time EDF had about 460 different working arrangements in place at the Centre. It was becoming increasingly difficult to manage performance or provide support and training or achieve consistency in management.

3.9. Further it became increasingly difficult to meet customer demand, as shifts were not aligned to call numbers and busy periods, so either “spikes” in work were not always adequately resourced or, during “troughs”, EDF had more staff at the Centre than required putting it to unnecessary cost. **In consultation with the unions,** EDF created shift patterns that would be offered to staff who required flexible working, devised to accommodate their needs and those of customers and the business . They did not amend existing working patterns, as it would have been unfair to go back on arrangements already agreed. The new shift patterns are kept under review and amended from time to time based on customer, employee and management needs. They usually operate between 6 and 9 patterns at any one time. They allow EDF to organise the workforce into identifiable teams that share knowledge and assist each other. It ensures consistency in management, coaching and training. The flexible shifts rarely cover the hours 2pm-4pm, as EDF know they are fully resourced and do not require any more staff then.

3.10. Kerry Lawson has been employed by EDF since November 1995 and in recent times been the Resource Deployment Manager at the Centre. She is responsible for developing resource plans which involves planning and scheduling of telephony, non- telephony and “soft skill” time (i.e staff training and team meetings etc). Her statement contains a great deal of language special to her role eg “*partner lockdown processes, usage of internal levers*”. We took care during her oral evidence to ensure we could simplify it without losing its meaning. A “partner” is a contractor EDF uses to supply labour and which will do so for companies other than EDF. They employ people at other locations. Calls to the Centre’s number by its customers are diverted to staff there who are trained in EDF’s methods. “Internal levers” are staff employed by EDF in non telephony jobs but who can at peak times do telephone work. In addition, telephony staff may be given overtime to cover periods when, due to sickness of other staff , not enough are on duty.

3.11. Prior to the introduction of the new shifts patterns, a lot of management time was taken up in considering flexible working requests but there was no consistency in approach. On average the Centre received approximately 85 flexible working requests per month. The decisions whether or not a request was granted often came down to the subjective view of the person considering the request with little consideration of the impact on service. The reason for the request was the primary determining factor rather than an assessment of the ability of the Centre to operate efficiently. EDF wanted consistency in decision making. It spoke with the unions to get the views of staff and sought to devise patterns that aligned the needs of staff wishing **or needing** to amend their hours of work, as much as possible, with the demands of the Centre.

3.12. Erlang is a standard approach within the call centre industry proven successfully to predict call centre load. Using it, EDF forecasts long term telephony demand, which is refined the closer it gets to the date. It forecasts demand volume at 15 minute intervals level based upon up to 6 weeks actual data to determine how many CSA’s are needed by skill type to answer calls promptly and ensure adequate supervision training and management time for staff Shifts are then profiled against this resource requirement to give a view of net surplus or deficit per 15 minute period. They use this to decide the requirement for **“partner”** hours. They provide partners with a gross total productive hour requirement ie the number of telephony hours they are contracted to provide weekly, 12 weeks ahead, an hourly view 4 weeks ahead and per 15

minutes 1 week ahead. At the time of the claimant's flexible working request, the aim for telephony was an average Time to Answer of under 180 seconds (currently under 90 seconds). The forecasting methodology allows them to set different service level goals and this will change the staff requirement.

3.13. We have simplified Ms Lawson's evidence as best we can but **the key point we wish to make is that how many CSA's are needed and at what times to ensure adequate, not perfect, performance is not guesswork by EDF but the result of scientific analysis**.

3.14. The first shift patterns were put into place on 11 April 2016. On 8 August 2016 they were amended following feedback from staff via the unions. They are now on version 6. The last change was in September 2019 and before that it was October 2018. About 400 staff have left since 2016 and EDF had a recruitment freeze until May 2019 so resource levels have been tight. Given the pressure on costs it cannot afford to be over resourced. The response from the unions has been positive as they too were frustrated for their members by the previous regime.

3.15. Whilst Ms Lawson was not involved in deciding the claimant's flexible working request she explains why it was not reasonably practicable to extend the working hours of Option 7 (version 3) by 1 hour per day. There will always be a potential need to require overtime, however EDF aims to minimise the need to do so. When the initial decision was made and also the appeal, throughout May and June 2018, EDF needed overtime for telephony as shown in a table in her statement. By way of example only between 9 and 9:30 am and 2:30 and 3:30 pm Monday to Wednesday there was no requirement for overtime , which shows at those times EDF had a good balance of staff supply to meet demand. These were the times the claimant requested outside of the shift pattern she was offered. Earlier finishes compared to a full time worker, which she requested, would have to be covered at a premium cost to EDF either by overtime of partner hours. **It short, at the times when, for health reasons, she could work , no-one was needed, and at times she could not, someone was.**

3.16. Barry Patterson, employed by EDF since December 1995, has been an Operations Manager at the Centre for three years but in a management role for the past 21 years. Prior to her flexible working request he had no dealings with the claimant.

3.17. He confirmed that before new shift patterns were developed with the unions, there were great difficulties managing the multiple bespoke shift patterns that existed. There could be occasions where they would have a team of 15 people all working different shift patterns making it difficult to build a cohesive team. Arranging team meetings was difficult, as was cascading information to, from and between colleagues. It was difficult to organise and deliver training. Evening and morning shifts were particularly adversely impacted, as people tended to be scattered across the Centre rather than in defined teams. There could be only one or two people on a team. Support is provided not only by managers but peer to peer discussion therefore, small teams can have a negative impact on performance. They were not always resourced to meet customer demands, as the shift patterns were not aligned to call handling requirements but to individual want or need.

3.18. Mr Patterson heard the claimant's appeal against her line manager, Deborah Brown's decision to refuse her flexible working request endorsed by Ms Brown's manager Cherilyn

Ferguson/. He met with her on 12 June 2018. She did not consider any then existing shift pattern appropriate, as she wished to work 6 hours per day but could not do “split shifts”. The OH report said she should not , ideally, work 8 hour shifts because of the fatigue they caused and **her shifts should be no more than 6 hours**

3.19. EDF had a previous shift pattern of 25 hours per week, five hours a day with the potential for overtime when available, so he offered it. **She declined the offer because she could not afford to drop her hours below 30 as her husband was at the time out of work.**

3.20. Mr Patterson was conscious he needed to agree a pattern that matched the requirements of the Centre and , if he **departed more than he did by offering the 25 hour week** from the shift patterns agreed with the unions, **there would be ever increasing requests and they would end up back to the previous unmanageable situation.** If EDF varied the approach to shifts for one person it would need to do the same for others who had equally good reason to request changes. It did not have any shift patterns that matched the claimant’s request. He confirmed the outcome by letter dated 26 June 2018 and did not have any further dealings with her.

3.21. The sickness absence policy includes separate procedures for short and long term absence Short term is less than 4 weeks, long term is more. It involves progression from Stages A to D to give staff the opportunity to improve their attendance and provide assistance to them. Stage D is potential dismissal.

3.22. Ms Lackenby, employed since March 1997, has been an Operations Manager at the Centre since November 2016 but at the same level of management seniority for about 14 years. She has overall responsibility for 75 staff in the operations department, which includes inbound calls and internal transfers from other departments. Prior to being involved with the claimant’s sickness absence Ms Lackenby did know her, as she had worked in her department about 5 years earlier. They had a good relationship. Ms Lackenby had managed her through the sickness absence process before. Page 133 shows the claimant had significant levels of absence. Since she had started in May 2009, she had been absent for approximately 23% of her working time, around 53 days each year. On average, she had only managed to work 2.3 months before an occasion of absence and only managed to work six months without any absences on one occasion. The impact of such level of absence cannot be sustained. Sickness absence makes the efficient running of the Centre much more difficult. increases the workload on others, reduces the level of customer service and increases management time spent .From early 2013 to November 2016 the claimant had been at Stage C on 3 occasions. On 2 occasions dismissal was considered at Stage D but Ms Lackenby kept her in employment by “extending” stage C thus exercising a discretion not to dismiss because she made allowance for the claimant’s disability .

3.23. Ms Lackenby met with the claimant on 15 October 2018, 9 and 28 November 2018 to discuss absence, including the OH report of 23 October 2018. She had commenced absence on 10 September 2018 while at Stage C, which she had entered on 9 April 2018.

3.24. During the meetings the claimant explained she was suffering from stress and they discussed ways in which EDF could help her. She was upset her flexible working request had

been refused and felt it was a personal decision made by her manager at the time Ms Brown She had appealed unsuccessfully to Mr Patterson. She felt that decision also was unfair.

3.25. They agreed to meet again. Following a further OH report dated 27 November 2018 they met on 14 December 2018. Ms Lackenby agreed to review the process of her flexible working request and consider what could be done to enable her to return to work and/or assist her. On reviewing she found the correct process had been followed, the request had been considered but the shift pattern she had proposed was unworkable. She was offered the 25 hour alternative.

3.26. EDF did not have a shift pattern at the time Ms Lackenby was involved that met the claimant's wishes However, she again offered the 25 hours per week. **She refused due to the reduction in pay**. If EDF had merely added an hour at the start or end of the shift to meet her request it would have staff it did not require at times as there was sufficient cover. In answer to questions from Mr McHugh and our Employment Judge Ms Lackenby acknowledged, as had Mr Patterson, no individual assessment of how much the claimant's requested shifts would have caused cost and disruption was made but anything which went markedly outside the existing "menu" of part time shift patterns inevitably would. We looked critically at their argument and found it was correct.

3.27. Ms Lackenby knew EDF had permitted the claimant to perform alternative duties to call handling where possible but this type of work had diminished. It had allowed her to do shift slides (i.e. to bring shifts forward to an earlier time on an ad hoc basis) and to move her rostered day off. Having listened to her concerns the decision was personal and her relationship with Ms Brown had broken down, Ms Lackenby said she could change teams and be managed by someone different. Given her skill set she could work in Mr Duncan Bain's team , as the CSA's there had the same skill set as her , so relevant support would be available. The claimant agreed to this. She was given a further opportunity to raise a flexible working request. Ordinarily, she would not have been able to, as only one per 12 months is permitted. She did not make a further request. Ms Lackenby confirmed their discussions in a letter dated 9 January 2019 and reminded her she was at Stage C so if her absences did not improve dismissal would be considered.

3.28. She returned to work in Mr Bain's team on 7 January 2019 but had further absence in the sense of having to leave early on 8 February due to a back problem and from 11 to 13 February 2019 due to a stomach upset which may have been linked to her Crohn's disease but was likely to trigger a flare up anyway. By letter dated 19 February 2019, she was requested her to attend a meeting on 25 February 2019.

3.29. At the meeting (notes are pages 121 to 126 and the outcome letter pages 127 to 129) she and Ms Lackenby discussed her health. She confirmed there was nothing further EDF could do to assist her at work and she did not consider her absence levels were likely to improve though she hoped they would . This appeared consistent with the OH report from October 2018, which advised her past attendance was a useful indicator of future attendance. Ms Lackenby adjourned to consider her decision. It was that her level of absenteeism was unlikely to improve, there was nothing further EDF could do to help reduce it so dismissal was the most appropriate step. She confirmed her decision by letter dated 18 March 2019

3.30. Mr Patterson endorses Ms Lackenby's comments regarding the impact sickness absence has on the management of the Centre. Whilst some level of sickness absence is inevitable it does put pressure on all colleagues in the Centre which is tightly resourced to ensure staffing levels meet customer demand, as cost is a key factor in running the Centre. They are sympathetic to staff who are unwell and assist where they can but absences have an impact on the service to customers and on other colleagues so EDF cannot sustain high levels of absence

4. Conclusions

4.1. Mr Sidiq submitted there were time limit issues in the reasonable adjustments claim. We agree. Matuszowicz-v-Kingston-Upon-Hull City Council 2009 IRLR 289 held a failure to make reasonable adjustments is an omission and time starts to run from the date the respondent says it will not give the claimant what she asks for. That happened when Mr Patterson wrote to her at the end on June 2018. However, we do not decide those claims on that basis. We do not agree with Mr Sadiq's reading of what HH Judge Eady , as she then was, said in Monmouth County Council-v-Harris that any failure which is time barred cannot be a stepping stone to the s15 claim just because it is out of time. If that is what HH Judge Eady meant, it appears to us contrary to what Elias LJ held in Griffiths and by analogy with the well established principles in direct discrimination cases that a Tribunal may still consider evidence of acts out of time which points to proscribed grounds being, or not being , the cause of acts of which complaint is validly made, contraryto Chattopadhay-v-Holloway School, Din-v-Carrington Viyella, Qureshi v Victoria University of Manchester all approved in Anya-v-University of Oxford.

4.2. The two PCP's EDF applied to the claimant were (a) granting flexible working requests only if they were broadly in accordance with fixed shift patterns and (b) requiring her to maintain a certain level of attendance at work or risk being dismissed . Both placed her at a substantial comparative disadvantage. EDF did not have a PCP of not following OH advice (see para 2.8.above). It is not a breach of the duty not to do more to assess the viability of proposed adjustments (see para 2.14. above).

4.3. This case poses two main factual questions (a) did the respondent take an overly rigid stance on the question of working hours and (b) if so would the claimant on reduced hours have been able to maintain regular attendance .

4.4. We accept the claimant felt discriminated against for the first time in her life. Living as normal a life as possible can be very hard for her and we see why subjectively she sees Mr Patterson's refusal of her flexible working request as making it impossible. Objectively we cannot agree. We have seen countless cases where large organisations in both the public and private sectors take an intransigent view on shift changes even where because of a protected characteristic an otherwise valued employee cannot work the hours stipulated. They say things like " *if we changed it for a disabled person it would be unfair on others* ." Such arguments fail. As Baroness Hale said in Archibald (at para 47):"*In the Sex Discrimination Act and Race Relations Act, men and women or black and white, as the case may be, are opposite sides of the same coin. Each is to be treated in the same way.Treating men more favourably than women discriminates against women. Treating women more favourably than men discriminates against men. Pregnancy apart, the differences between the genders are generally regarded as*

irrelevant. The 1995 Act, however, does not regard the differences between disabled people and others as irrelevant. It does not expect each to be treated in the same way. It expects reasonable adjustments to be made to cater for the special needs of disabled people. It necessarily entails an element of more favourable treatment. That is fundamental to an understanding of how the Act works".

4.5. However, EDF do not say that. Under the EqA people have the right not to be affected by indirect discrimination and the duty to make reasonable adjustments is a strengthened form of protection against it for disabled people. EDF also has to have regard to the danger of indirect sex discrimination if it does not alter shifts for women with childcare responsibility. They did make adjustments for the claimant but to do **everything** she asked for to accommodate her health requirements and her financial problems at the time would not have been a step it would be reasonable to require of EDF irrespective of the harm it would do to the business and other staff. Her s 20/21 claim therefore fails on its merits.

4.6. She returned to work in January 2019, almost 2 months before being dismissed. The requirement to maintain a certain level of attendance at work failing which she would be subject to disciplinary sanction, placed her at a substantial disadvantage when compared with non-disabled employees because , even on her own assessment, future flare ups were likely . Her dismissal, was unfavourable treatment because of past and anticipated future sick leave . All reasonable adjustments had been made . Ms Lackenby considered the nature of her illness; the likelihood of it recurring or of some other illness arising; the length of her previous absences and the periods of good health between them; the need of the employer to have the work done; the impact of the absences on those who work with her and reached a decision which we have , as Hardys and Hanson -v-Lax requires examined critically . Ms Lackenby's ultimate decision in our view did strike the right balance and was a proportionate means of achieving legitimate aims.

4.7. Mr McHugh submitted everything that could be said to challenge her decision saying EDF has failed to justify the treatment because it failed (i) to implement a reasonable adjustment which could have assisted in improving the claimant's attendance (ii) to seek updated medical evidence as to whether her attendance was likely to improve (iii) explore alternatives to dismissal (iv) to evidence the actual impact her intermittent absences were actually having on the business. Well made though they were we trust we have said enough in parts 2 and 3 to show why we cannot accept them .

4.8. On the unfair dismissal claim , the procedure was impeccable and as EDF has satisfied the justification test, dismissal was a sanction axiomatically within the band of reasonable responses.

4.9. The claimant impressed us as a lady who always has, and always will, try her hardest to overcome a disability which has severely affected her for over half her life. That her managers thought as well of her as we do, probably explains why they did as much as they did to help her . Dismissal was a last, but fully justified and fairly done, resort.

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TM GARNON EMPLOYMENT JUDGE

SIGNED BY EMPLOYMENT JUDGE ON 13 FEBRUARY 2020