EMPLOYMENT TRIBUNALS

Claimant: **Mrs A Morgan**

Respondent: **Marks and Spencer PLC**

Heard at: **Cardiff** **On: 6, 7, 10 and 11 August 2020**

Before: **Employment Judge S Jenkins**
Members:
Mr W Horne
Mr C Stephenson

Representation:
Claimant: In person
Respondent: Ms K Parker (Counsel)

JUDGMENT having been sent to the parties on 13 August 2020, and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Background

1. The hearing was to deal with the Claimant's claims of unfair dismissal, discrimination arising from disability (Section 15 Equality Act 2010), and failure to make reasonable adjustments (Sections 20/21 EqA 2010). We heard evidence from Mr Aled Bonnell, Store Manager; Ms Katie Jakeman, Store Manager; Mr Andrew Trotman, Section Manager; and Mrs Debbie Dickerson, Section Manager; on behalf of the Respondent, although the last two had only been involved in managing the Claimant's absence historically and their evidence was of no great benefit to us. Regrettably, we were not able to hear from the employee who took the decision to dismiss the Claimant, Ms Arnie Venzon, as she had unfortunately passed away in June 2020. We heard from the Claimant on her own behalf.

2. We also read the documents within the bundle, spanning 516 pages in total, to which our attention was drawn, and that helpfully included contemporaneous notes of the meetings between Ms Venzon and the Claimant.

Issues and Law

3. There had been two earlier preliminary hearings in this case which had clarified the claims and issues. The first was before Employment Judge Beard on 14 August 2019 and he identified the following issues, which remained relevant for us.

Time limit/limitation issues

(a) Were the Claimant's complaints presented within the time limits set out in Sections 123(1)(a) and (b) of the Equality Act 2010 ("EqA")?

(b) Dealing with this issue may involve consideration of subsidiary issues including: Whether there was an act and/or conduct extending over a period, and/or a series of similar acts or failures; whether time should be extended on a "just and equitable" basis.

Unfair dismissal

(a) What was the principal reason for dismissal and was it a potentially fair one in accordance with Sections 98(1) and (2) of the Employment Rights Act 1996 ("ERA")? The Respondent asserts that it was capability, arising from a series of long-term absences with no prospect of improvement.

(b) Did the Respondent hold that belief in misconduct on reasonable grounds, following a reasonable investigation?

Judge Beard recorded six specific matters identified by the Claimant as giving rise to unfairness as follows:

(i) Failure to provide adjustments at earlier meetings to allow the Claimant to return to work.

(ii) Failure to re-refer the Claimant to Occupational Health.

(iii) Notes of the meeting prior to dismissal were altered to remove the indication of a return to work date.

(iv) Bias in that the person making the decision was aware that the Claimant was complaining of being bullied by that person.

(v) By failing to make or provide for adjustments the absence was unnecessarily prolonged.

(vi) *Failure to allow time for the Claimant to take up a suggested change of role as an adjustment.*

(c) *Was dismissal for that reason fair in all the circumstances pursuant to Section 98(4) ERA?*

4. In addition to those issues, with regard to the unfair dismissal claim, we were mindful of the guidance provided by the Inner House of the Court of Session in the case of ***BS -v- Dundee City Council*** **[2014] IRLR 131**, that the fairness of a dismissal on the grounds of ill health will involve three essential matters:

(1) The critical matter of whether, in all the circumstances, any reasonable employer would have waited longer before dismissing the employee.

(2) The need to consult the employee and take their views into account.

(3) The need to take steps to discover the employee's medical condition and their likely prognosis, although this only requires the obtaining of proper medical advice and does not require the employer to pursue a detailed medical examination.

5. That guidance built on earlier English and Welsh EAT Authorities of ***Spencer -v- Paragon Wallpapers*** **[1976] IRLR 373** and ***East Lindsay District Council -v- Daubney*** **[1977] ICR 566**.

6. Judge Beard also identified the issues arising in relation to the claim under section 15 EqA as follows, the Respondent having subsequently conceded that the Claimant was disabled at the relevant times:

<u>Discrimination arising from disability</u>

(a) Did the Respondent treat the Claimant unfavourably by dismissing her because of her sickness absence?

(b) Did that arise in consequence of her disability?

(c) *If so, had the Respondent shown that dismissing the Claimant was a proportionate means of achieving a legitimate aim; the Respondent relying on the aim of maintaining adequate staffing levels and matters connected with that. The issues of whether the Claimant was disabled for the purposes of Section 6 EqA and whether the Respondent knew or ought reasonably to have known that the Claimant was disabled were also identified by Employment Judge Beard, but the Respondent had conceded those points before this hearing.*

7. In that preliminary hearing, there was also a discussion over a potential amendment to the Claimant's claim to include a claim of failure to make reasonable adjustments, and Judge Beard noted that the Claimant would need to seek permission to amend her claim to pursue that. That was then discussed further at a second preliminary hearing before Employment Judge Sharp on 20 January 2020 in which she granted the Claimant's application to amend, and directed that the claim be amended to include the following matters:

   That the provision criteria or practices of which she complains are:

   (i) The practice of ignoring Occupational Health recommendations.

   (ii) The practice of requiring the employees working in the coffee shop to carry loads heavier than a domestic kettle filled with water.

   (iii) A policy that employees in the coffee shop will work alone.

   (iv) That an auxiliary aid of a chair to support her back should have been provided by the Respondent following a recommendation from Occupational Health in 2009.

   That the substantial disadvantage suffered by the Claimant for each of those four issues was:

   (1) Not being placed on light duties, which resulted in pain and stress

   (2) Pain

   (3) Suffering stress which exacerbated the Claimant's disability

   (4) Discomfort

8. *The Claimant says that the reasonable adjustments not made for each PCP or auxiliary aid complained of by the Respondent are:*

(i) Follow Occupational Health recommendations.

(ii) Not require the Claimant to carry loads heavier than the weight of a filled domestic kettle.

(iii) Not require the Claimant to work alone in the coffee shop.

(iv) *Provide the chair recommended by Occupational Health.*

9. We considered that the issue of time limits identified by Judge Beard would need to be considered closely in relation to the reasonable adjustments claim.

10. In addition to the issues identified by Judges Beard and Sharp, we also noted that if the Claimant's claims, or any of them, succeeded, we would need to consider the remedy to award. In the context of unfair dismissal that would involve the assessment of the basic and compensatory awards, taking into account the Claimant's mitigation efforts and whether any deductions should be made from them to reflect any contributory conduct on the part of the Claimant or the application of the *Polkey* principal, i.e. considering whether, even if the dismissal had been unfair at the time, a fair dismissal would nevertheless have been likely to ensue in the future.

11. With regard to any successful discrimination claim, in addition to assessing what sums, if any, to award in respect of compensatory loss we would need to consider how much to award the Claimant by way of injury to feelings and whether to make any recommendation that the Respondent take specified steps for the purposes of obviating or reducing the adverse effect of any matter.

Findings

12. The Claimant was employed by the Respondent from 26 October 2003 at its Swansea store. By the time of her dismissal, on 18 March 2019, she was a Section Coordinator in the Respondent's coffee shop, working for 30 hours per week. In that role she was line managed by Ms Arnie Venzon, the Manager of the coffee shop and also the menswear department.

13. From the medical evidence in the bundle it could be seen that the Claimant had suffered from a range of conditions over a lengthy period of time which had led to many periods of sickness absence, some for significant periods. Her physical health conditions include osteoarthritis and fibromyalgia, and her mental health conditions include depression, anxiety, PTSD and emotionally unstable personality disorder.

14. In the Respondent's record of the Claimant's employment, absences due to issues relating to her back are recorded from 2005 onwards, and absences due to depression are recorded from 2010 onwards.

15. As we have noted, the Respondent conceded that the Claimant is disabled by virtue of one or more of her mental health conditions and that it had knowledge of that. The Respondent did not concede that the Claimant was disabled by reference to her physical conditions, and as the Claimant's last lengthy absence which led to her dismissal arose from her mental health, we did not need to reach any conclusions on the impact of the Claimant's physical conditions on her beyond noting that they had been the cause of some lengthy periods of absence in the past.

16. The position revealed by the documents was that the Claimant had had lengthy absences in 2006, 2007, 2010, 2011 and 2012, some of which had led to referrals to Occupational Health and the application of the Respondent's underlying ill health procedures which it applies in relation to long term sickness absences. Further absences arose in 2016, 2017 and 2018, and the percentage levels of the Claimant's absences in those periods were: April 2016 to March 2017 - 43%, April 2017 to March 2018 - 20%, and April 2018 to March 2019 - 54%.

17. The Claimant's last period of absence commenced on 1 September 2018, and lasted until her dismissal on 18 March 2019. The absence was due to the Claimant's mental health, and following an initial self-certificate was covered by a number of Fit Notes all of which described the reason for the Claimant's absence as "*low mood*". The initial note covered one week, several of them covered four weeks, before the last note issued on 12 February 2019 covered the eight-week period up to 2 April 2019.

18. Other than the Fit Notes, the only information the Respondent had on the Claimant's state of health was in the form of a letter from its external Occupational Health Adviser dated 21 December 2018. That letter recorded that the Claimant perceived that she had been bullied by her immediate supervisor, and that, in the Adviser's view, that perception of conflict and bullying would be likely to be a barrier to the Claimant's return to work. The report noted that the Claimant's GP was reluctant to allow her to return to work at that time, that she may not have been fit to return until later in the new year, and that her return would need to be guided by her treating Specialist and her GP. The Adviser recommended short term adjustments of the Claimant being moved to a different work area and a phased return over a period of three to four weeks.

19. The report also noted that both the Claimant's mental health and muscular-skeletal conditions were unpredictable and quite likely to recur, although it was difficult to be precise about timescales or how often

absences were likely to occur. With specific regard to the Claimant's mental health, the Adviser noted that, if well-supported within the workplace, there was likely to be some improvement so that the Claimant could return, but that that could be in a further two to three months, i.e. from that time, by around February to March 2019. The Adviser also recommended a further Occupational Health assessment in January 2019 to assess the Claimant's fitness to return.

20. Prior to that report, whilst the Claimant commented in her evidence that she felt that she had been bullied in the past, the only evidence we heard of a specific issue being raised occurred in August 2018 when the Claimant spoke to Mr Bonnell, the Store Manager, saying that she was unhappy and felt unsupported by Ms Venzon. The discussion encompassed the possibility of the Claimant raising a formal grievance, but it was left that Mr Bonnell would speak to Ms Venzon to try to facilitate a formal resolution. Following that conversation Ms Venzon had a discussion with the Claimant, which Mr Bonnell felt had clarified matters and, as he described it, had drawn a line under matters. The Claimant did not agree that that had happened, and in fact her sickness absence commenced shortly after, and she contended that that was due to the treatment from Ms Venzon. There was however, no further reference to any concern of bullying until the Occupational Health letter and indeed the only grievance relating to bullying was raised after the Claimant's employment had ended.

21. Following the receipt of the Occupational Health report at the end of December, two attempts were made by Ms Venzon to schedule a meeting with the Claimant in January but the meeting was unable to proceed then. In both cases the letters scheduling the meeting stated that its purpose was to discuss the reasons for the Claimant's current absence and the support that could be offered to help her return. The letter arranging the meeting which finally took place was not before us, but we had no reason to doubt that its recorded purpose was the same.

22. The meeting between the Claimant and Ms Venzon then took place on 13 February 2019. The Claimant was accompanied by a colleague, and Ms Venzon was accompanied by a notetaker who took what appears to be a comprehensive note. Each page of the notes was signed by the Claimant. She has contended that the notes were subsequently altered, but we saw no evidence to support that, and were satisfied that the notes were an accurate record of the meeting.

23. During the meeting, the content of the Occupational Health Report was discussed, as was the Claimant's current state of health. Ms Venzon asked a specific question about her support of the Claimant, to which the Claimant replied that she could not say that Ms Venzon had not supported

her, as there was not a lot she could have done. The Claimant went on to say that it was not an "*overnight thing*" and that there was no "*magic wand*".

24. At this stage, the Claimant commented that she had felt bullied by Ms Venzon, principally in the form of continued references to her absences being made. Ms Venzon responded by saying that she had had no intention of bullying the Claimant, that she apologized if she felt that way, and that she had thought they were "*ok*" after previous conversations. The Claimant commented that she would like to move on and that she did not wish Ms Venzon to feel bad.

25. In relation to the Claimant's possible return, Ms Venzon asked if a relocation would help, to which the Claimant replied that she would like to move to the beauty section, but that she did not wish to move to the food section as the cold there would impact on her arthritis. In her evidence before us the Claimant stated that she also said that she did not wish to move to menswear, the implication to us seeming to be that she did not want to remain under the supervision of Ms Venzon who controlled the menswear department as well as the café. However, the notes of the meeting do not support that, and when Ms Venzon, later in the meeting, asked the Claimant what would happen if they could not find another role for her, the Claimant replied that she would just have to stay in the café and see how it went. In our view therefore, the discussion did not encompass any indication that the Claimant was reluctant to move to the menswear department at that time.

26. The discussion also covered the timing, or the potential timing, of the Claimant's return, with Ms Venzon commenting that it would be useful to get a realistic date for the Claimant's return, to which the Claimant replied that she could not say until both her Psychiatrist and her GP were happy. She also mentioned that her Psychiatrist may be happy for her to return on a phased basis at the end of February, having earlier in the meeting noted that her Psychiatrist was happy with her as she was not picking her skin at that time. Ms Venzon returned to the question of whether the Claimant could get a realistic time frame for her return from her GP, to which the Claimant commented that her GP would ask what could be put in place for her return. She said that she would ask her GP and Psychiatrist to find out when an appointment could be made, suggesting aiming for a potential return in middle or late March, with a possibility also of using up her holidays at that point before the year end on 31 March 2019.

27. Ms Venzon commented that a return could be made on 18 March 2019 with the Claimant then taking her holiday, and the Claimant's evidence was that she thought a practical return, subject to her GP's approval, on

25 March 2019 had been agreed. In the event we did not find that a firm agreement had been reached to that effect, although there had been a broad conclusion that a return at around that time would be aimed for. It would however, be subject to the Claimant's GP's approval, which, in turn, would be subject to the GP receiving information about the role to which the Claimant would return and how a return would be phased in.

28. It appeared to us that there may have been confusion between Ms Venzon and the Claimant as to what would happen next. The Claimant was clearly waiting for information from Ms Venzon about how she was to return. and was then intending to provide that to her GP. Without hearing from Ms Venzon, it was impossible for us to judge that definitively. However, it seemed to us that Ms Venzon may have been waiting for the Claimant to provide her with a return date before providing that information. However, regardless of the background to any confusion there was then a period of 3 weeks when nothing happened.

29. The Claimant incidentally had an appointment with her GP on 5 March, but did not discuss her potential return as, from her perspective, there was nothing she could discuss. The Claimant texted Ms Venzon following that appointment to ask her to let her know what was due to happen about her return, and Ms Venzon called the Claimant later on that day (but seemingly without knowledge of the text sent by the Claimant earlier that morning) to query when she was returning. It was only after that, on 6 March 2019, that Ms Venzon issued a letter to the Claimant.

30. In that letter, Ms Venzon summarised the discussion on 13 February, and noted that she was pleased to say that the Respondent could accommodate the Occupational Health recommendations and operate a phased return over four weeks with the Claimant moving to menswear for that period. The letter concluded with Ms Venzon referring to their most recent phone call, which we took to have been that on 5 March, in which it had been agreed that, now that the Claimant had the detail of what her return would look like, she would speak to her GP as soon as possible to discuss her return.

31. The Claimant noted that the letter was received by her on 9 March which we accept was the case. We noted, in fact, that the Respondent's internal HR record has an entry on 7 March referring to a member of PPS, the Respondent's HR department, amending the draft of the letter, which suggests that it might not have been posted out until 7 or even 8 March. However, as we saw the position in the form of the letter of 6 March, received by the Claimant on 9 March, it seemed that the Respondent was ready and willing to accommodate the Claimant's return, on a phased basis into the menswear department, some time in late March, or

potentially on 3 April at the latest, when the Claimant's current Fit Note would have expired.

32. Shortly after that, the date was not legible in the bundle, the Claimant texted Ms Venzon to confirm that she could not get an appointment with her GP until 27 March 2019. We noted, at that juncture, that the Claimant was at that time subject to a Fit Note, issued in early February, noting that she was unfit to work until 2 April. At that stage however, it appears, we cannot say for certain as no copy was in the bundle, that Ms Venzon wrote to the Claimant requesting her attendance at a further meeting to discuss her ongoing absence and the impact it was having on the store. This seems to have been in line with a third and final stage of the Respondent's underlying ill health procedure. As we have noted, no copy of the letter was in the bundle, but the opening comments of Ms Venzon, in a note of the meeting which took place on 18 March 2019, suggest that Ms Venzon was confirming the content of the letter, which included noting that the Respondent was at a stage where it may no longer be able to accommodate the Claimant's absence, and that an outcome of the meeting could be the dismissal of the Claimant.

33. The Respondent's internal HR notes record a discussion with Ms Venzon on 13 March 2019, noting that the meeting had been scheduled initially for that date but that the Claimant had only received the letter less than 24 hours before and could not attend. The note also recorded that the Claimant had needed to go back to her own GP to make sure she was ready to return, and that that appointment was not until 27 March. The note records that the manager, i.e. Ms Venzon, felt comfortable with that, but that she would like to wait until that appointment had passed and then hold the next meeting on 28 March 2019. However, as we have noted, the meeting took place on 18 March 2019, i.e. before the appointment, as Ms Venzon knew and, before therefore the Claimant had been able to check the position with her GP.

34. The meeting on 18 March, at which again the Claimant was accompanied by a colleague, went over the Claimant's absence again and indeed went over the Occupational Health recommendations again. The discussion also encompassed the Claimant's difficulties in obtaining an appointment with her GP and her wish, which we considered reasonable, to discuss things with her designated GP, who had lengthy experience of treating her, as opposed to another member of the practice. The outcome of the meeting was that the Claimant was dismissed with immediate effect, but with a payment in lieu of notice, on the grounds of her capability. This was confirmed in a letter of 18 March 2019 which also confirmed the Claimant's right of appeal.

35. The Claimant did submit an appeal which was considered by Miss Jakeman. The Claimant and Miss Jakeman met on 8 April 2019, with the Claimant again being accompanied by a colleague, and the Claimant's appeal was discussed at length, which included the Claimant raising a number of concerns as to how she felt she had been bullied by Ms Venzon. Miss Jakeman also met Ms Venzon on 11 April 2019 to discuss her perspective on events, and we note that the Claimant has raised a criticism that Ms Venzon was not present at her meeting, but we saw nothing untoward with that.

36. Miss Jakeman then sent a letter to the Claimant confirming her decision on the appeal on 12 April 2019. She commented on all the areas of the Claimant's appeal and concluded that the decision to dismiss should be upheld.

37. For completeness, we record that, at the same time as the Claimant raised her appeal, she also sent an email to the Respondent's Chief Executive, complaining about how she had been treated during her employment. This was treated by the Respondent as a formal grievance and, notwithstanding that the Claimant's employment had ended, was investigated by an independent manager, who ultimately decided not to uphold it. We did not however consider that it had any bearing on the issues before us.

Conclusions

38. Applying our findings to the issues previously identified, our conclusions on the claims were as follows.

39. In relation to the unfair dismissal claim, as we have noted, the Respondent contended that capability was the reason for dismissal, and the Claimant accepted that capability was a potentially fair reason for dismissal.

40. We concluded that the Respondent had established capability as its reason for dismissal. We noted that the Claimant had raised concerns about Ms Venzon's motivation in dismissing her, concerns about being bullied by her having been raised, and we noted that Ms Venzon was aware of them following the Occupational Health Report but had not seemed fazed by them in the meeting on 13 February 2019, and had not seemed motivated by them to take the steps that she did. We therefore concluded that the Respondent, in the form of Ms Venzon, had genuinely considered that the reason for dismissing the Claimant was her absence, and it had therefore satisfied us that the reason for the dismissal of the Claimant was capability.

41. Turning to the question of whether dismissal for that reason was fair in all the circumstances, we noted, as we have said, the guidance set out in the ***Dundee City Council*** case. In respect of the three matters set out there, we were satisfied that the Respondent had taken reasonable steps to discover the Claimant's medical condition and prognosis, and had consulted with the Claimant, although we observe that it had not appeared to have paid particular regard to her views. However, our major area of concern was the first matter identified in the ***Dundee City Council*** case, which had been described by the Court there as the "*critical question*" of whether, in all the circumstances, a reasonable employer would have waited longer before taking the step of dismissing. In our view, a reasonable employer would have taken longer before taking the step to dismiss, and the dismissal in this case was therefore unfair.

42. We, in fact, found several matters on which the Respondent could be commended in terms of how it had dealt with the Claimant in the past. Whilst we did not go into the Claimant's earlier absences in any detail, it seemed that the Respondent had been patient with the Claimant's many absences, often for lengthy periods, possibly more patient than many other employers would have been. We also saw nothing wrong with the Respondent seeking Occupational Health advice after the Claimant had been absent for some three months, or in the Respondent looking to tie down a return date at around the period of about six months' absence or so, the Occupational Health advice having suggested that a return at about that time would be feasible.

43. However, the meeting on 13 February 2019 suggested that the return to an adjusted position on a phased basis would be likely towards the end of March 2019, and that was confirmed by Ms Venzon in her letter of 6 March 2019. At that point, as we have noted, the Claimant was subject to a Fit Note until 2 April 2019, and it seemed to have been accepted by the Respondent that it would be appropriate for the Claimant to obtain sign off from her GP on the detail of her return. The only thing which then appeared to occur was that the Claimant could not meet the GP until 27 March, as well as an inability to attend a particular meeting on around 13 March, with the meeting then taking place on 18 March. As we have noted, we did not consider that it was unreasonable for the Claimant to wish to see her own GP with the experience of treating her rather than a separate member of the GP surgery. Also, Ms Venzon, in the note of her discussion with the Respondent's HR, appears to have been content to wait until after that appointment, and yet she then arranged a meeting only some nine days after the Claimant had received the letter following the earlier meeting in February.

44. That meeting in March then appeared to go over similar ground to that discussed on 13 February, but this time from a different perspective, i.e.

that the Claimant's absence was unsupportable. However, the meeting on 13 February, and the follow up letter dated 6 March, had appeared to indicate to the Claimant that, notwithstanding her lengthy absence and indeed her overall poor record of attendance, the Respondent was ready and willing to agree her return.

45. We did not see that anything had arisen which would have justified the Respondent's change of view, and concluded that, had it acted reasonably, it would have waited until after the Claimant had met her GP on 27 March. At that point, either the Claimant's return, presumably no later than the expiry of the Fit Note the following week, would have been confirmed, or, if not and there was still no clear return date, dismissal could have taken place, and would have been very likely to have been fair at that point. We therefore found that dismissal of the Claimant was unfair.

46. For completeness, we did not consider the specific allegations of unfairness outlined by the Claimant and identified by Judge Beard in the hearing in August 2019 should be upheld, but nevertheless, applying the guidance set out in the ***Dundee City Council*** case, we considered that the dismissal was unfair.

47. The Respondent submitted to us in the alternative, that if we found that its dismissal of the Claimant was unfair, a reduction of the compensation to be awarded should be made for what it contended was contributory conduct in light of the Claimant's delays in seeking a return to work date from her GP. However, we considered that the Claimant could not do that until she had received the information from the Respondent on 9 March, and, as we have noted, we did not consider it unreasonable for the Claimant to wait to see her designated GP on 27 March. We therefore did not consider it appropriate to direct that any reduction should take place in respect of any contributory conduct.

48. The Respondent also submitted, in the alternative, that account should be taken of the ***Polkey*** decision, and that compensation should be reduced to reflect the possibility of the Claimant being fairly dismissed in the future. In that regard we noted that our conclusions on unfair dismissal were based on what we considered to be substantive unfairness rather than any procedural defects. We did however consider whether, in view of the Claimant's absence record, it could be said that it would be likely that the Claimant's employment would have ended fairly in the future in any event. Ultimately however, we consider that it could not. We noted that the Respondent had been patient with the Claimant in respect of her several lengthy absences, and that the Claimant had returned from such absences in the past, and we considered that we could not reasonably

consider it likely that the Claimant would again fall ill and at that point be potentially fairly dismissed.

49. Turning to the claim under Section 15 of the Equality Act, we noted the guidance of Lord Justice Underhill in the case of ***O'Brien -v- St Catherine's Academy [2017] EWCA Civ 145***, that, whilst the tests for considering unfair dismissal and discrimination arising from disability are different, the questions of the reasonableness of a dismissal and the proportionality of a dismissal for the purposes of Section 15 are broadly similar.

50. We concluded that the dismissal of the Claimant was clearly unfavourable conduct, and, based as it was on the Claimant's absence, had arisen in consequence of her disability. Our focus therefore was on whether the Respondent could justify its actions i.e. by showing that it was a proportionate means of achieving a legitimate aim.

51. In that regard, we were satisfied, as we believe the Claimant herself was, that maintaining adequate staffing levels was a legitimate aim. However, we were not satisfied that the Respondent had acted proportionately in its means of achieving that aim. Whilst having an employee on long term sickness absence is understandably frustrating and raises management difficulties, no evidence was put before us of any particular difficulties faced by the Respondent in light of the Claimant's ongoing absence. The Respondent is a large employer and we presumed, in the absence of evidence to the contrary, was capable of either recruiting temporary staff or utilising more hours from existing staff to cover the Claimant's absence. Indeed, it had done so for over six months and on several occasions in the past. Also, as it seemed, from the letter of 6 March, that the Respondent was ready to put up with the Claimant's absence for a short further period, up to broadly the end of March. It therefore seemed to us that the decision to dismiss was not a proportionate means of achieving the aim of maintaining adequate staffing levels, and therefore the Claimant's claim should succeed.

52. Turning finally to the claim of failure to make reasonable adjustments, the Claimant raised four specific complaints as were outlined in the Case Management Summary of Judge Sharp following the hearing in January 2020. We noted the time limit issue in respect of all of them, and therefore considered that point first.

53. We noted that all of the claimed adjustments, by definition, must have existed on 31 August 2018 at the latest, as that was the last date that the Claimant was physically in work before her latest absence. We also noted that, applying the early conciliation dates, only matters on or after 18 January 2019 were in time for the purposes of the Claimant's claim unless

it could be considered that the issues were part of a course of conduct up to the act of dismissal. However, we did not consider that that was the case. The adjustments complained of by the Claimant related to her physical health conditions as opposed to her mental health condition, which was the operative factor behind her dismissal. On the face of it therefore, the reasonable adjustments claim was out of time.

54. We then considered whether it would be just and equitable to extend time noting the guidance provided by the Court of Appeal in ***Robertson -v- Bexley Community Centre [2003] IRLR 434***, that there is no presumption that discretion should be exercised to extend time, and also the guidance provided by the EAT in ***British Coal Corporation -v- Keeble [1997] IRLR 336***, which indicated that the factors set out in Section 33 of the Limitation Act 1980, dealing with the exercise of discretion in civil cases should be considered. They require consideration of the prejudice each party will suffer and all the circumstances of the case, and in particular the length of and reasons for the delay, the extent to which the Respondent cooperated with any request for information, the promptness with which the Claimant acted once they knew of the facts giving rise to the claim, and the steps taken by the Claimant to obtain advice once they knew of the possibility of taking action and the impact of the delay on the cogency of the evidence.

55. Of those, the extent to which the Respondent cooperated with requests for information, and the steps taken by the Claimant to obtain advice did not have particular relevance, but the other three we felt were significant.

56. We noted, as we have said, that matters had occurred at the latest at the end of August 2018, some nine months before the Claimant submitted her claim, and indeed some eighteen months before the application to amend was granted. Furthermore, whilst August 2018 was the latest date on which the events could have occurred, it seemed to us that the likelihood was that they had occurred a great deal further back in the past, as they all related to earlier matters which had allegedly not been addressed. Indeed, the last asserted adjustment related to the provision of a chair, and we noted that that chair should have been provided as far back as October 2009.

57. In the circumstances therefore, we considered that the prejudice to the Respondent through having to obtain evidence on matters going back several years was greater than the prejudice suffered by the Claimant in not being able to pursue her reasonable adjustment claim, particularly as such a claim was not likely to give rise to much, if any, additional compensation. We therefore did not consider it appropriate to exercise our discretion to extend time and therefore concluded that the Claimant's reasonable adjustment claim should be dismissed.

Remedy

58. Having heard evidence from the Claimant regarding her job searching activities, and noted the fact that she successfully obtained an alternative position commencing on 1 September 2019 which provided her with a higher net monthly income than she enjoyed with the Respondent, taking all matters into account, our decisions on Remedy were as follows:

    Basic award

59. The Claimant was employed for fifteen years by the Respondent, nine of which were over the age of 41. 19.5 weeks therefore fell to be used to calculate the basic award and the Claimant's weekly gross pay was £293.60 which meant that the total basic award was £5,725.20.

    Compensatory award

60. We assessed the Claimant's monthly net pay at the amount of £1,114 and, covering the 5.5-month period of unemployment, that led to a total net salary loss of £6,127. We were conscious however of our need to apply the Recoupment Regulations and to deduct the sums received by the Claimant by way of Universal Credit during the period March to September 2019, which totalled £3,736.47.

61. We assessed the Claimant's monthly pension loss at £76.34 which led to a total sum in respect of that for the relevant period of £419.87.

62. We assessed the loss of statutory rights at £300 and also considered it appropriate to include an award of £200 to reflect the Claimant's loss of staff discount on the basis that she might have been likely to have mitigated her loss in terms of food by shopping elsewhere but was likely, in our view, to continue to incur losses in respect of clothing. That led to a total compensatory award of £7,046.87 but, as we have noted following the deduction of Universal Credit would leave a sum after recoupment of £3,310.40.

63. Finally, with regard to injury to feelings, we noted the content of a letter within the bundle from the Claimant's Psychiatrist in early April 2020, which appeared to suggest that the Claimant had not been significantly impacted by the dismissal decision. In terms of evidence, the Claimant noted that the previous bullying of which she complained had had a major impact on her and it was helpful for her to be away from the toxic environment such that she agreed that her dismissal had been something of a "silver lining" for her. She had confirmed however that her treatment by the Respondent had had an impact on the health of her family, notably

her granddaughter and her husband, although we noted that that was very likely to have been from the perceived bullying rather than the dismissal and, in any event, we were only in a position to make an award for injury to feelings in respect of the Claimant herself and not members of her family.

64. In the circumstances, we considered that the level of behaviour of the Respondent did not amount to any form of campaign against the Claimant and therefore considered that it was appropriate to apply the lower of the Vento bands. Following consideration of the evidence, we then considered it would be appropriate to fix the award for injury to feelings at the lower reaches of that lower band and, doing the best we could, considered that an award of injury to feelings in the amount of £3,000 was appropriate.

65. In total therefore the sums due to the Claimant totalled £15,772.07, but with the sum to be paid immediately by the Respondent, as specified in the Judgment, being less than that, to take account of recoupment.

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Employment Judge S Jenkins
Dated: 11 September 2020

REASONS SENT TO THE PARTIES ON 22 September 2020

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FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS