EMPLOYMENT TRIBUNALS

Claimant: Ms P Stevenson

Respondent: Iceland Foods Ltd

Heard at: Manchester **On:** 29 and 30 September 2020

Before: Employment Judge Dunlop
Ms F Crane
Dr H Vahramian

REPRESENTATION:

Claimant: Ms L Halsall, Counsel
Respondent: Mr R Hignett, Counsel

RESERVED JUDGMENT

The judgment of the Tribunal is that:

1. The claimant's complaint of discrimination arising from disability (section 15 Equality Act 2010) succeeds;

2. The claimant's complaint of unfair dismissal succeeds;

3. The claimant's complaint of failure to make reasonable adjustments (sections 20-21 Equality Act 2010) is dismissed upon withdrawal;

4. No reduction shall be made to the claimant's compensation to reflect the possibility that she would have been subject to a fair and non-discriminatory dismissal by reason of ill health at a later date;

5. A remedy hearing will be held on **10 December 2020** to determine the compensation payable to the claimant.

REASONS

Introduction

1. By a claim form presented on 23 March 2018 the claimant brought claims of discrimination arising from disability, failure to make reasonable adjustments and unfair dismissal. These claims arose out of her dismissal on 13 November 2017, which followed a period of long-term sickness absence.

2. This was a re-hearing. The matter had previously been considered before a differently constituted panel of the Employment Tribunal on 2 and 3 October 2018. The resulting Judgment was the subject of a successful appeal (and cross-appeal) to the Employment Appeal Tribunal. By a Judgment dated 13 February 2020 the Employment Appeal Tribunal directed that the matter should be remitted for a re-hearing before a differently constituted panel.

3. The Code V in the title of this Judgment indicates that this was a hearing conducted partly by Cloud Video Platform ("CVP"). In this case both non-legal members attended by CVP. The Judge, the parties and their representatives and all witnesses were present in the tribunal room.

The Hearing

4. We heard the claim over two days and heard from the following witnesses:

   (1) For the claimant: Ms Stevenson herself;

   (2) For the respondent: Ms Linda Ashton, HR Manager.

   (3) The Tribunal also had regard to the statement of Mr Peter Knott, Store Manager. Mr Knott had given evidence to the Tribunal on the previous occasion. By the time of the re-hearing he had left the respondent's employment. A witness order was sought by the respondent to compel his attendance. Although the order was granted Mr Knott was later released from it following provision of evidence relating to his current ill-health.

5. The Tribunal had regard to an agreed bundle of documents prepared by the parties. No additional documents were introduced during the hearing.

The Issues

6. The Tribunal had regard to an agreed List of Issues which had been prepared between the parties. We do not set out the issues here as they simply replicated the various elements of the legal tests in respect of the claims the claimant is bringing.

7. The List of Issues indicated that a claim in respect of an alleged failure to make reasonable adjustments (under ss. 20-21 Equality Act 20010) was being pursued by the claimant. That claim had been dismissed by the first tribunal and had not been subject to an appeal. It was not clear from the Order from the Employment Appeal Tribunal whether it was envisaged that the re-hearing would allow the

claimant to re-open this part of the claim, but in any event Ms Halsall confirmed at the outset of the hearing that it was not being pursued. We have therefore recorded that complaint as being dismissed upon withdrawal.

Findings of Fact

8. We were assisted by a list of agreed facts prepared by the parties and indeed most of the factual background of this case is uncontroversial.

Early sickness absence

9. Ms Stevenson worked for the respondent as a Sales Assistant in its Accrington store from 11 November 2012 to her dismissal on 13 November 2017. She had had a period of absence during 2015 following the death of her husband, but aside from that, had a good attendance record before the events giving rise to this case. There were no disciplinary or performance concerns at any point.

10. In around December 2016 Ms Stevenson suffered an assault (away from her work) resulting in an injury to her right shoulder. She was treated in hospital; her arm was placed in a sling and immobilised. Subsequently, she was signed off work by her GP.

11. On 17 February 2017 the claimant underwent surgery to have her shoulder "plated and pinned" in order to promote the recovery of the broken bone. This surgery was followed by physiotherapy. Her absence at this point was certified by sick notes from her GP. On each occasion she was signed off sick for a one-month period.

12. The respondent arranged for welfare visits starting on 20 February 2017 and continuing on approximately a monthly basis. Initially these took place with Mr Knott. There was some discussion at these sessions about duties that Ms Stevenson might be able to perform, and also about whether other stores had a back-to-back till set-up which would mean that she could use her left hand more than right hand (the till set up at Accrington required her to lift items with her right hand). We are satisfied, however, that these discussions were hypothetical. At no point during the period when she was meeting with Mr Knott would the claimant have been well enough to return to her role. There were no adjustments which would have made a return feasible. Her shoulder was not healing: she remained in significant pain and her mobility remained severely restricted. Mr Knott made only brief notes of his visits with the claimant on the respondent's electronic HR system, Nexus.

13. Things changed with the visit on 28 June 2017, which was the first visit attended by Ms Ashton, who was the HR Manager for the area that included the Accrington store.

14. Ms Ashton wrote a longer follow-up letter from this meeting which carries the same date. In that letter she summarises the history of the claimant's case and notes that Ms Stevenson had reported her doctor had said it could take up to 12 months for her to recover from the operation (at this point she was five months after the operation). Ms Ashton had proposed a referral to Occupational Health and the letter included a consent form which the claimant duly signed and returned. Ms Ashton

concluded by arranging a follow-up meeting on 31 July 2017 at which she hoped the Occupational Health report would be available.

15. Following discussion, the parties agreed that we would not hear evidence or submissions as to remedy, save that, we would hear submissions and reach conclusions as to whether, in principle, there should be any reduction to compensation in accordance with **'Polkey'** principle.

Occupational Health Report

16. In the event, the Occupational Health appointment only took place on 27 July and the report was not available by the time of the 31 July meeting. Ms Ashton's summary letter from that meeting records that Ms Stevenson had told her she now had an appointment with her consultant on 29 August 2017. It was therefore agreed to arrange a further welfare meeting for 4 September 2017, at which point it was hoped that the Occupational Health report would be available and that Ms Stevenson would have some further information from her consultant.

17. The Occupational Health report was in fact produced on 1 August 2017. It records that the claimant "*has now been discharged from physiotherapy*" as there was nothing more that physiotherapy could achieve at this point. It records that she "*remains in severe pain*" and that her movement "*is severely restricted*". At this time, as recorded in the Occupational Health report, Ms Stevenson could only undertake activities and movements for short periods of time – for example when she tried to do ironing she only managed to iron three t-shirts before the pain was severe and she had to stop. We find that report accurately reflects the effects of Ms Stevenson's physical impairment at this time.

18. The report goes on to reference the appointment with her surgeon due on 29 August 2017 and speculates that it is possible that she may need the metalwork removed. Under the heading "Summary and Recommendations" the report includes the following:

> "*She is seeing her surgeon again on 29 August and it is likely that she may require further surgery, if this is not the case and there is nothing more that can be done she may be referred to a pain clinic however until she has seen her surgeon we have no way of offering any further advice. In my opinion Ms Stevenson is currently not fit for work, I am unable to comment on a timescale for a return to work at this time as it will depend on the recommendations of her surgeon and her response to treatment*."

19. There were then some specific questions which had been asked in the respondent's referral and responses from the Occupational Health adviser. In respect of questions about adjustments and phased return to work, the thrust of the advice is that it is too early to consider this, but it would be appropriate to consider adjustments or a phased return at the point where a return to work might be feasible. In response to the question "*is a full recovery expected?*" it is stated, "*This is unknown and will depend on her response to any further treatment*."

20. The report includes a recommendation that Ms Stevenson is "*re-referred back to Occupational Health when she has seen her specialist and further treatment has been planned. We will then he able to advise*".

21. Finally, in response to the question of whether the employee is likely to be covered by the Equality Act the Occupational Health adviser writes:

> "*Ms Stevenson suffered this assault in December 2016 and so has had this issue for the last eight months. It is likely that she is going to have issues with the shoulder for at least another four months and therefore it is likely that she will be covered under the Equality Act 2010*."

22. We pause here to note that the respondent from the outset of this case has conceded that the claimant is a disabled person within the meaning of section 6 of the Equality Act 2010 (EqA) from 1 August 2017. Clearly, this concession is based on the Occupational Health report which was prepared on that date. However, under cross examination Ms Ashton commented that she believed that the claimant would become protected by the Act at the point where she had been incapacitated for 12 months. In re-examination she was referred to the Occupational Health report and asked to comment on the claimant's disability status, but again repeated her understanding that the claimant became protected at the point of hitting 12 months of incapacity. That understanding is at odds with the respondent's concession and appears to indicate that she was confused in her understanding of when protection under the Equality Act would commence.

23. We find that, as at 1 August 2017, the respondent did not know (and could not know) whether the claimant's incapacity would be temporary, as had originally been anticipated, or whether the injury would in fact lead her to being permanently incapacitated such that she would be unable to resume her role.

Dismissal

24. There was a further meeting with Mr Knott and Ms Ashton on 4 September and Ms Ashton drafted an outcome letter on 8 September. The outcome letter records that Ms Stevenson had reported she was now due to have an operation to remove the pin and plates from her shoulder as her consultant thought this may reduce the pain and increase mobility. Ms Ashton records that she asked if there was a timescale around the recovery period for this operation, and Ms Stevenson responded that the consultant was unable to provide her with that information or whether the operation would be successful. Ms Ashton concluded by suggesting that another meeting took place in four weeks' time "*to see if your operation had improved the pain you are currently suffering with and increase the movement in your shoulder*".

25. That meeting took place on 10 October 2017. The follow-up letter is dated 9 October 2017 (which is evidently a dating error as noted by Ms Ashton in her witness statement). We accept that the letter would have been sent no more than a few days after the meeting, which was in line with Ms Ashton's practice following earlier meetings. The letter stated:

> "*During this meeting you explained you had not had the operation to remove the pins and plates from your shoulder that we had discussed when we last met as you had been referred to another consultant, who told you this operation could not be done until the bone in your shoulder had healed. Therefore the consultant had arranged to see you in December to see if it had*

> *healed and decide whether this operation could be done or whether he would have to delay it again.*"

26. The letter went on to rearrange a further meeting for 13 November, but this time it was made clear to Ms Stevenson that the next meeting would be considering the termination of her employment on the grounds of incapability through continued ill health. It also set out her right to be accompanied at that meeting.

27. We pause to make findings on matters as they stood as at 10 October 2017. Again, it remained unknown whether this would be a temporary disability, as hoped from the outset, or whether it would actually turn into a permanent disability. It remained the case that the claimant was unable to work and that there were no adjustments which would have facilitated a return to work at that time. As things stood at this point, the soonest reasonable date when a return might be possible would be some weeks into 2018: that would allow for the December appointment to review Ms Stevenson, possible surgery after that, and recovery period for the operation. That would take the absence to over the 12 month period which had been the initial prognosis.

28. We also find that there was nothing that could reasonably be done before the December review to get more certainty on prognosis or timescale. It has been suggested that it would have been appropriate to refer back to Occupational Health at this point. Although it would often be the practice for employers to refer back to Occupational Health before making a final decision on a capability dismissal, particularly where the last Occupational Health report had been inconclusive, there is nothing in this case that would allow us to find that the conclusion would have been any different if a further Occupational Health referral had been made in September, October or November.

29. The final meeting went ahead on 13 November 2017. It was a very short meeting and we were referred to handwritten notes taken at the time and signed by both Ms Ashton and Ms Stevenson. Ms Ashton is recorded as noting that the last time they met the claimant had seen the consultant and the operation could not be done. Ms Stevenson then responds, "*I have an appointment in December. The break in my shoulder is still broken. This will be reviewed at the appointment. I received a letter regarding this*". The notes then record Ms Ashton saying, "*Nothing has changed, it is still the same, so based on what you have said today you have been off for ten months alongside with the medical reports. There is no timescale of when you are going to return at this stage, therefore based on these reasons we have to make that decision of dismissal on the grounds of ill health*". There is then a discussion about notice pay and Ms Ashton notes that it is not a dismissal based on performance and that Ms Stevenson would be welcome to reapply for a role with the respondent in the future if her health should improve. The outcome of the meeting was confirmed in a letter of the same date. The second paragraph of that letter reads as follows:

> "*During this meeting I asked if anything had changed since we last met on 10 October 2017. You said nothing had changed, as you were still waiting to see the consultant in December, and as your shoulder bone was still broken he would decide at this appointment whether they would be able to operate at this time or wait until it had healed*."

30. The Tribunal finds, in accordance with the handwritten notes, that it was in fact Ms Ashton who had said at the meeting that nothing had changed and not the claimant. Ms Ashton did not ask to see the letter Ms Stevenson had about the December appointment, nor did she question her further about her expectations for the period after December. The claimant told the Tribunal that she felt that Ms Ashton had walked into this meeting with her mind made up that she was going dismiss Ms Stevenson. We agree that Ms Ashton attended the meeting having made the decision to terminate the claimant's employment. The fact that she had attended the meeting with this decision already in mind and the short length of the meeting, however, must be set against the relatively extensive background of previous meetings.

31. Ms Ashton emphasised to the Tribunal that the reason for the dismissal in her mind was the length of time that the claimant had been off for combined with the fact that there was by this point still no fixed date for her to return. We find that any consideration about the impact of this absence on the Accrington store was very much secondary to Ms Ashton. By this point, Mr Knott was no longer the manager of the Accrington store. Ms Ashton had not sought to involve the new manager in any of the later absence meetings with Ms Stevenson, nor had she discussed with the new manager the impact that the absence was having on the store in practice.

32. There was nothing in the invitation letter or the outcome letter which framed the dismissal procedure against any sort of company policy. Ms Ashton referred us to some passages in the Employee Handbook with deal with long-term sickness absence. The only thing said in the handbook about termination related to long-term sickness absence is this:

> "*Please be aware that persistent absence and/or failure to report in accordance with the company absence policy, may result in disciplinary action*."

33. We were also referred to the attendance policy and long-term sickness absence procedure which deal with matters such as sick pay and return to work, however none of these policy documents set out the circumstances in which the company will consider dismissal for an employee on long-term ill health absence, nor do they set out the factors which should be taken into account in deciding if (and when) dismissal may be appropriate in such a case.

34. Ms Ashton informed us that she applies a 'rule of thumb' whereby she will begin to consider dismissal once an employee has been absent through ill health for a period of six months. She will at that point consider whether there is a defined timescale for the employee's return. This fits in with what happened in Ms Stevenson's case whereby Ms Ashton became involved in June, which was seven months after the claimant's absence started and five months after her surgery. From the point of becoming involved Ms Ashton's focus was on identifying a definite timescale within which a return could be expected. Ms Ashton told us that the six month rule came from her own previous experience with Iceland and at other employers. As will be apparent from what we have said above, there is nothing to this effect in Iceland's company policies (or at least not in the 2017 policies presented in the bundle of documents for this case).

35. Although the dismissal letter was dated 13 November 2017 Ms Stevenson did not receive it until December 2017. She did not appeal the decision to dismiss. In her witness statement she said she did not appeal the decision as she did not think that an appeal would make any difference. In her oral evidence she said that she did not appeal the decision as she thought that she was too late to do so. The letter had stated that an appeal was available within five days of receipt of the letter. We find that the primary reason Ms Stevenson did not appeal is because she felt that such an appeal would be pointless. The delayed receipt of the letter may have played a part in that conclusion on her part, but it was mainly based on her perception that she had not listened to by Ms Ashton and that Ms Ashton had made an irrevocable decision to terminate her employment.

36. After her dismissal Ms Stevenson did have the review with her consultant and was told that an operation could go ahead. That operation happened in March 2018. The claimant was signed off sick until 1 May 2018 at which point she commenced employment with another retail business, B&M. There was a suggestion from the claimant that she had been looking for work following her operation and may have been fit to start work a little before 1 May 2018. Given the chronology of the case, if she was fit to start work before 1 May 2018 it can only have been by a short period of time. For the purposes of these proceedings we find that the claimant would not have been fit to return to the respondent before 1 May 2018, but that at that point she would have been able to return to her role. Of course, these findings do not undermine our findings that, at the time of dismissal, neither the respondent nor the claimant knew what the timescale for the claimant's recovery would be (or even if she would recover at all).

The Accrington Store

37. We also found it necessary to make some findings of fact about the working arrangements at the Accrington store, and those are as follows.

38. The claimant was contracted to work a minimum of 7.5 hours a week. Her colleagues in sales assistant roles had the same contract, however it is the practice of the respondent to offer more hours and the claimant (it was agreed by both parties) worked an average of around 25 hours a week. The average hours worked by colleagues would depend on both the needs of the store at any particular time and also on their individual needs and availability. By employing sales assistants on minimum hours contracts such as these, the respondent retains flexibility to cover its changing operational needs without incurring excess staffing costs.

39. Each store has a store profile which determines the overall number of staff that will be employed in various roles. The store profile for the Accrington store determined that 18 or 19 staff members were needed. By having the claimant filling one of these positions, albeit unable to offer any hours during her long-term sickness absence, the respondent would have reduced flexibility to cover the sales assistant hours required for this store. Store Managers required permission from Area Management to recruit, and would not be able to recruit additional staff above the profile for the store.

40. Paragraphs 14 and 15 of Mr Knott's witness statement set out some background about the staffing arrangements for the store. Having set out arrangements around opening hours and the number of staff required in the store at

any one time, he described that two members of staff resigned in February 2017. He therefore considered he was three members of staff short (bearing in mind the claimant's absence). He said he was able to recruit another member of staff in February but the remaining employees in the store were required to pick up the additional hours. It was not clear to the Tribunal (and Ms Ashton and the claimant were unable to help us) whether Mr Knott was only able to recruit one additional member of staff in February because he had only been authorised to recruit one additional member of staff at that time, or whether he was authorised to recruit for an extra role which went unfilled. He went on to describe recruiting two further assistants in August 2017 but also losing one assistant at that time. We accept this evidence about staff changes which was not challenged.

41. We were taken to spreadsheets showing fluctuations in staff numbers over a period of time towards the end of Ms Stevenson's employment. Ms Halsall sought to use this to demonstrate that the store was not 'down' on staff. We didn't find this evidence particularly helpful as it doesn't shed light on whether the existing staff could adequately cover the hours (Ms Stevenson, for example, was part of the headcount but was obviously covering no hours).

42. Mr Knott's witness states that covering extra hours using existing members of staff did not normally cause a problem in the short-term but did cause a problem in the longer term. Staff may be reluctant to pick up such hours due to, for example, childcare issues. Ms Stevenson's evidence, in contrast, was that most staff members were keen to pick up extra hours and maximise their income.

43. There was considerable discussion during the hearing about the fact that Mr Knott was not present and the extent to which we could have regard to the evidence that he had given to the hearing on the last occasion. Mr Hignett cautioned that the first Tribunal's approach to making findings of fact had been subject to criticism in the EAT decision and that we risked being led into error by adopting findings of fact that had been made by the earlier Tribunal. Whilst we accepted the validity of that argument up to a point, it seems to the panel that if there were matters in respect of which Mr Knott gave evidence on the last occasion which were departed from his witness statement, and were significant enough to be recorded in the Tribunal's Judgment, it would be proper for us to have regard to those matters. That would not be the same as adopting the previous Tribunal's findings on a contested issue of fact but rather would prevent either party from being deprived of relying on relevant evidence which had come from Mr Knott, simply due to the fact that Mr Knott was unable to be in attendance on this occasion. The Tribunal must base its findings on the best available evidence. Mr Knott's witness statement augmented by his evidence from the last hearing, as recorded in that judgment, is better evidence than Mr Knott's witness statement alone.

44. Ms Halsall sought (and we consider it was proper of her to do so) to direct Ms Ashton as the respondent's only live witness to the relevant sections of the first Tribunal's Judgment to allow her the opportunity to comment on these factual matters. After some considerable argument about the appropriateness or otherwise of referring Ms Ashton to the Judgment, in the event the only reference that was made was to one paragraph, that is paragraph 26, which reads as follows:

> "*Ms Ashton told us that the respondent found it generally difficult to recruit temporary staff, but the Tribunal finds that it is not consistent with the specific evidence of Mr Knott in Tribunal*

> *about the store where the claimant worked. When questioned he stated that he had been able to recruit a temporary employee in August. When asked about covering the claimant's absence he also stated that other staff at the store welcomed working additional hours because they were on a minimum hours' contract of 7.5 hours per week. He told us that at that store some of the employees particularly welcomed the chance to work additional hours to pay nursery fees. The Tribunal is not satisfied that the respondent has shown us that it was finding difficulty in covering the claimant's absence*."

45. After Ms Ashton had been referred to the paragraph by Ms Halsall, we questioned her on whether she had any knowledge of the willingness (or otherwise) of staff in the Accrington store in 2017 to pick up extra hours. Her answer was that she could not comment.

46. Taking into account the evidence we have heard from the claimant and the evidence of Mr Knott as recorded in the Tribunal's Judgment from the last hearing, we reject the contention in Mr Knott's witness statement that he had difficulty in covering the hours and find that, generally, staff in Accrington at this time were keen to pick up additional hours. That does not necessarily mean that Mr Knott or the successor store manager would always have found it easy to cover every shift (we suspect there are very few retail store managers who always it easy to cover every shift).

47. Mr Knott also made comments in his witness statement about it being difficult to recruit to the Accrington store. However, as touched on above, there was no specific evidence of positions being advertised which could not be filled within a reasonable time frame. We understand that Mr Knott (and perhaps those above him) were reluctant to authorise the recruitment of temporary staff due to the training cost, and were reluctant to take on extra permanent staff and potentially end up with 'too many'. However, choosing not to recruit additional shop floor staff is not the same as being unable to recruit additional shop floor staff.

48. There is no evidence of Mr Knott feeding any concerns about staffing back to Ms Ashton in the context of her decision about the claimant's employment. Mr Knott moved to another store in September 2017 and Ms Ashton did not find it necessary to even speak to his successor at the Accrington store about whether there were any problems with recruitment and/or covering shifts to help her make the decision to terminate Ms Stevenson's employment. There was no discussion with Ms Stevenson in any of the meetings about any difficulties being faced by the respondent due to the continued absence. Indeed, Ms Ashton's evidence was very clear that it was not such practical difficulty that she based her decision to dismiss on, but rather it was the length of time that the claimant had been absent for combined with the lack of a firm timescale for her return.

49. On the basis of those findings we conclude that the respondent has not demonstrated any specific difficulty that the claimant's long-term absence led to as regards the staffing of the Accrington store.

The Law

50. We have had regard to the EHRC Code of Practice on Employment (2011) ("the Code").

Section 15 – Discrimination arising from disability

51. Section 15 Equality Act 2010 ("EqA") provides:

"(1) A person (A) discriminates against a disabled person (B) if--

(a) A treats B unfavourably because of something arising in consequence of B's disability, and

(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability."

52. The elements of discrimination arising from disability can be broken down as follows:

(a) unfavourable treatment causing a detriment;

(b) because of "something";

(c) which arises in consequence of the claimant's disability.

53. The respondent will have a defence if it can show:

(a) The unfavourable treatment is a proportionate means of achieving a legitimate aim – "objective justification"; or

(b) It did not know and could not reasonably have been expected to know that Ms Stevenson had the disability – the "knowledge defence".

54. In this case the respondent accepts that the dismissal was unfavourable treatment that arose from the claimant's long-term absence which itself arose in consequence of her disability. There was no reliance on the knowledge defence, therefore the only issue which falls to be determined was whether the dismissal was justified. This being the case we have not set out the relevant law relating to the other parts of the test.

55. The respondent will successfully defend the claim if it can prove that the unfavourable treatment is a proportionate means of achieving a legitimate aim. This is the same test as for indirect discrimination and for direct discrimination on the grounds of age. Although there is limited legal authority on justification in the context of s.15 claims, principles developed from the application of the test in those other jurisdictions will be highly relevant.

56. The burden of proof in establishing both elements of the justification test lies with the respondent. In many cases the aim may be agreed to be legitimate but the argument will be about proportionality. This will involve an objective balancing exercise between the reasonable needs of the respondent and the discriminatory effect on the claimant as tests established in the context of indirect discrimination in **Hampson v Department of Education and Science [1989] ICR 179 CA**.

57. We had regard to paragraph 5.12 of the Code:

"It is for the employer to justify the treatment. They must produce evidence to support their assertion that it is justified and not rely on mere generalisations."

58. In conducting this balancing exercise any failure to comply with the duty to make reasonable adjustments will be relevant. Paragraph 5.21 of the Code states:

> "*If an employer has failed to make a reasonable adjustment which would have prevented or minimised the unfavourable treatment it will be very difficult for them to show that the treatment was objectively justified*."

59. Mr Hignett relies on this principle to make the obverse point – that where an employer has not failed to make adjustments (because there were no adjustments which could be made) that should be taken into account in their favour. We accept that that must be correct, as far as it goes, but do not consider that there is any authoritative support for it being a strong factor.

60. Where ill-health absence results from an injury sustained at work, or for which there employer is in some way to blame, there may be an obligation on the employer to "go the extra mile" before dismissal (**RBS plc v McAdie [2008] ICR 1087**).

61. Cost alone will not provide a justification for discriminatory treatment (**Woodcock v Cumbria Primary Care trust [2012] ICR 1126 CA**).

62. For the purposes of objective justification there is no rule that justification has to be limited to what was consciously and contemporaneously taken into account in the decision-making process (see **Cadman v Health and Safety Executive [2004] EWCA Civ 1317**).

63. The relationship between the test of objective justification and the band of reasonable responses test (applied in unfair dismissal claims) has proved to be a problematic issue. It is not necessarily any error of law for a tribunal to find that a claimant succeeds in a section 15 claim but fails in the unfair dismissal that runs alongside it (see **City of York Council v Grossett [2018] IRLR 746 CA**).

64. However, the Court of Appeal in **O'Brien v Bolton St Catherine's Academy [2017] IRLR 547** had this to say about such cases where they arise from long-term sickness absence:

> "53. *However the basic point being made by the tribunal was that its finding that the dismissal of the appellant was disproportionate for the purpose of s.15 meant also that it was not reasonable for the purpose of s.98(4). In the circumstances of this case I regard that as entirely legitimate. I accept that the language in which the two tests is expressed is different and that in the public law context a 'reasonableness review' may be significantly less stringent than a proportionality assessment (though the nature and extent of the difference remains much debated). But it would be a pity if there were any real distinction in the context of dismissal for long-term sickness where the employee is disabled within the meaning of the 2010 Act. The law is complicated enough without parties and tribunals having routinely to judge the dismissal of such an employee by one standard for the purpose of an unfair dismissal claim and by a different standard for the purpose of discrimination law. Fortunately I see no reason why that should be so. On the one hand, it is well established that in an appropriate context a proportionality test can, and should, accommodate a substantial degree of respect for the judgment of the decision-taker as to his reasonable needs (provided he has acted rationally and responsibly), while insisting that the tribunal is responsible for striking the ultimate balance; and I see good reason for such an approach in the case of the employment relationship. On the other, I repeat – what is sometimes insufficiently appreciated – that the need to recognise that there may sometimes be circumstances where both dismissal and 'non-dismissal' are reasonable responses does not reduce the task of the tribunal under s.98(4) to one of 'quasi-*Wednesbury*' review: see the cases referred to in*

> *paragraph 11 above[2]. Thus in this context I very much doubt whether the two tests should lead to different results.[3]This part of the Judgment in **O'Brien** does not appear to have been considered by the first Tribunal hearing this case, which resulted in inconsistent decision with different conclusions reached in respect of the section 15 claim and the unfair dismissal claim. We have paid close regard to the **O'Brien** Judgment and also to the Judgment of the EAT in this case in our attempt to apply the correct analysis to the facts we have found.*

65. We take from this both a caution - that we must afford the proper "substantial degree of respect" to the respondent's judgment in taking the steps that it considered to be proportionate in furtherance of its aim - and also an indication that it is likely in long-term absence situations that the same result should be reached whether the dismissal is viewed through the lens of justification or the lens of reasonableness. The fact that the first Tribunal reached conflicting conclusions, without providing a robust explanation as to why, lies behind the success of the appeal and cross-appeal in this case. We have also, therefore, paid close regard to the judgment of the EAT in this claim (**Iceland Foods Limited v Stevenson UKEAT/0309/18**).

66. Finally, we had regard to various other authorities which the parties referred to as being relevant to how we should apply the test of justification, including **Hardys & Hansons PLC v Lax [2005] IRLR 726 CA**,

Unfair dismissal

67. Subject to what we have said above about the inter-relation of the two tests, in a claim of unfair dismissal involving an ill-health capability dismissal we must determine, in accordance with equity and the substantial merits of the case, whether the employer acted reasonably in treating the absence as a sufficient reason for the dismissal of the employee. The essential framework for such an enquiry was described as follows by Eady J in **Monmouthshire County Council v Harris EAT 0332/2014** as follows:

'Given that this was an absence-related capability case, the employment tribunal's reasoning needed to demonstrate that it had considered whether the respondent could have been expected to wait longer, as well as the question of the adequacy of any consultation with the claimant and the obtaining of proper medical advice'.

68. Ms Halsall brought to our attention the list of factors set out in **Lynock v Cereal Packaging Ltd [1988] ICR 670** as matters which might weigh one way or the other when considering whether dismissal was appropriate. Although that is a case of intermittent (rather than long-term) absence, we consider that this portion of Wood J's judgment remains of considerable value in a case such as this:

> *"The approach of an employer in this situation is, in our view, one to be based on those three words which we used earlier in our judgment — sympathy, understanding and compassion… every case must depend upon its own facts, and provided that the approach is right, the factors which may prove important to an employer in reaching what must inevitably have been a difficult decision, include perhaps some of the following: the nature of the illness; the likelihood of it recurring or some other illness arising; the length of the various absences and the spaces of good health between them; the need of the employer for the work done by the particular employee; the impact of the absences on others who work with the employee; the adoption and the carrying out of the policy; the important emphasis on a personal assessment in the ultimate decision and of course, the extent to which the difficulty of the situation and the position of the employer has been made clear to the employee so that the employee realises that the point of no return, the moment when the decision was ultimately being made may be approaching." (page 675, B-E).*

69. Again, we had regard to other authorities referred to by the parties including **East Lindsey District Council v Daubney [1997] ICR 566**, **BS v Dundee City Council [2014] IRLR 131** (which also includes factors which may be relevant in determining whether the respondent ought to have waited longer before dismissing) and **Hart v R Marshall & Sons (Bulwell) Limited [1977] IRLR 51**.

Submissions

70. The claimant and the respondent both produced written skeleton arguments which were amplified in oral submissions. We are grateful to both representatives for the considered and careful way in which they presented their cases.

Discussion and Conclusions

Discrimination arising from Disability

71. Although these matters were not disputed, we record for completeness that the claimant was (at least from 1 August 2017) a disabled perspn within s.6 of the EqA by reason of her shoulder injury. She was dismissed due to her continuing ill-health absence, which was itself something which arose in consequence of her disability. The decision to dismiss was in furtherance of the respondent's legitimate aim of ensuring that employees provided regular and reliable attendance at work.

72. The only real issue, therefore, is whether dismissal was a proportionate means of achieving that aim, or whether a more proportionate means would have been to permit a longer period of absence in the hope of a return at a later date.

73. Having regard to the discussion above, we weighed up the following factors for and against the decision to dismiss the claimant. We found the following points were in favour of it being proportionate to allow the claimant to continue to remain "on the books":

(1) The nature of the illness: it was a physical injury which had the potential to recover, and from which a full recovery had initially been expected within twelve months. It was not a chronic or recurring illness;

(2) At the time of dismissal, there remained a realistic possibility of a recovery and return to work within a few months;

(3) There was a specific date when more information would be forthcoming i.e. at the consultant's appointment scheduled for the end of December. This was only a few weeks away from the point of dismissal;

(4) The claimant was by this time a disabled person entitled to protection under the Equality Act 2010;

(5) The respondent had, in fact, been able to cover Ms Stevenson's absence using hours from other staff;

(6) Related to the above point, the nature of this employment meant that the claimant's hours were interchangeable with the hours of colleagues doing the same job in the same store. This type of role is easier to cover than a specialist role, for example a teacher teaching a particular

discipline within a school, or a role such as store manager where there is only one person employed in that role at the establishment;

(7) There was no crisis or change in circumstances that made it more difficult to cover the claimant's hours than had been during the already extended period of her absence;

(8) The ongoing costs of retaining the claimant on the books (for example in terms of holiday pay, administration and occupational health costs) were minimal, particularly for an organisation of this size;

(9) This was a valuable job from the perspective of the claimant. She was continually emphasising that she was keen to come back and although it was a contract for only a low number of hours she had in fact been working 25 hours a week;

(10) There were no concerns with the claimant's performance and the respondent had indicated that it would be happy to re-employ her;

(11) The claimant was a reasonably long-serving employee: that reflects both the value of the job to her and the fact that the employer could expect good service again once she was able to resume her role.

74. We also weighed up the following points in favour of dismissal being a proportionate step as at November 2017:

(1) The initial prognosis that the claimant might be absent for up to 12 months had proved wrong. By November it was clear that she was going to be off for longer than 12 months and there was no fixed timescale for when she would be back;

(2) This is not a case where the employer was in any way responsible for the industry (which might give rise to an obligation to “go the extra mile”);

(3) We agree that there had been no failure to make reasonable adjustments;

(4) We accept that managing staff to fulfil rotas is an ongoing issue in a retail environment and that, even without specific evidence of difficulty, having one staff member within the staff profile who is unavailable to be called on for an extended period will have made the job of Mr Knott and his successor broadly more difficult;

(5) There will have been upfront costs of the claimant's absence, specifically her holiday pay that she was accruing on the 7.5 hours in her contract and her continued access to staff discount;

(6) There are also background costs to maintaining employees on long-term sickness absence. This would include the managerial resource devoted to absence reviews and meetings and associated paperwork, occupational health fees, and also the fact that as employees accrue length of service the value of their potential cost in terms of notice and

redundancy pay increases. Both the upfront and background costs are increased with a longer period of absence;

(7) We agree that the claimant had been off for a very significant period of time at November.

75. In addition, we considered the following factors but did not consider that they weighed heavily in one direction or the other:

(1) The effect of absences on others in the store: taking the evidence as a whole, we are unable to reach a firm conclusion as to whether colleagues would have felt under pressure to cover hours for the claimant, or whether they would have been glad of the opportunity to do so. It may well have been that this varied from colleague to colleague and from week to week.

(2) It was also suggested that we should place weight on the fact that the position in the Accrington store was not at the forefront of Ms Ashton's mind and was not discussed with the claimant at the final absence review meeting. Although normally an employer is under an obligation to fully inform an employee about the reasons for their dismissal, we have some hesitation in suggesting that it is appropriate for an employee who is unfit to work and who is experiencing ill health absence to be involved in discussions about how that work is being covered, particularly in a work set-up such as this one. That could burden the employee and it is difficult to see that she could have done or suggested anything to alleviate any problems that there might be. We consider that comments in some of the cases about the importance of making the employee aware that the employer is experiencing difficulties caused by the absence are more directed to ensuring that the dismissal is not 'sprung' on the employee at a point where it is too late for them to argue their case. We consider that the repeated welfare meetings and Ms Ashton's follow-up letters, meant that by the time of dismissal the claimant was well aware that dismissal was in the respondent's mind. We do not feel that sharing details with her about cover arrangements would have assisted. We do not feel that this factor assists either side.

76. The Tribunal did find this a difficult balance to weigh up. There are strong factors pointing in both directions. Ultimately, however, we were unanimously of the view that that the dismissal in November 2017 was not a proportionate means of achieving the respondent's legitimate aim of "requiring its employees to provide regular and reliable attendance at work". The claimant was an employee who had provided such attendance in the past and who, if and when she recovered, could be expected to provide such attendance in the future. At the time of dismissal there was a clear date on which further information would be available i.e. following the consultant's appointment in December. Taking into account all of the factors outlined above, we find that it would have been more proportionate for the respondent to wait to hear the outcome of that consultant appointment. We reach this view taking account of the respect that should be afforded to the respondent's own assessment, but we disagree with that assessment.

77. If, after that appointment had taken place, there was a further delay or if it appeared that surgery was not going to be available, then the balance of factors may have been different at that later point. However, we are also satisfied that when it became apparent that the claimant was going to be offered further surgery in the early part of 2018, it would have been appropriate for the respondent to wait further for the outcome of that surgery. Had they done so then the claimant would have been able to return to work at approximately the same time as she was in fact able to take up her new role with B&M.

78. Given those findings, we find that the claimant has succeeded in establishing that her dismissal was discriminatory under s.15 EqA. We find that no reduction should be made to the claimant's compensation to reflect the possibility that, absent this dismissal, there would have been a non-discriminatory dismissal at some later date up to May 2018 when she was fit to return to work.

Unfair Dismissal

79. We are satisfied that the respondent has established a potentially fair reason for dismissal in this case. Specifically, that it was a capability dismissal brought about by the claimant's long-term sickness absence.

80. Having regard to the findings that we have made above and to the dicta from the **O'Brien** case, we are satisfied that the respondent did not act reasonably in dismissing the claimant in November 2017. In view of the balance of factors set out above, we find that no reasonable employer would have discriminated against Ms Stevenson on the grounds of her disability (as we have found occurred in relation to her successful s.15 claim) and that a reasonable employer would instead have waited for the outcome of the consultant appointment in December.

81. We therefore find that the claimant's claim of unfair dismissal succeeds. We find that no reduction should be made to the claimant's compensation to reflect the possibility that, absent this dismissal, there would have been a fair dismissal at some later date up to May 2018 when she was fit to return to work.

Remedy

82. At the conclusion of the hearing we agreed a provisional remedy hearing date with the parties of 10 December 2020. That remedy hearing will now go ahead unless the parties manage to reach an agreed resolution of the matter in the meantime. A notice of hearing and some short case management directions will be sent under separate cover.

Employment Judge Dunlop

Date: 12 October 2020

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON

14 October 2020

FOR THE TRIBUNAL OFFICE

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