EMPLOYMENT TRIBUNALS

Claimant: **Mrs Kerry Duley**

Respondent: **NHS Sheffield Clinical Commissioning Group**

Heard at: Sheffield **On:** 10 to 12 March 2020

Before:

Employment Judge JM Wade

Mr PR Kent

Mr DW Fields

Representation:

Claimant: Mr P Morgan (counsel)

Respondent: Mr J Boyd (counsel)

Note: A summary of the written reasons provided below were provided orally in an extempore Judgment delivered on 12 March 2020, the written record of which was sent to the parties shortly thereafter. A request for written reasons was received from the respondent on 18 March 2020. The intervening Covid Virus has contributed to the delay in providing these reasons for which I must apologise. An update having been sought by the claimant, these reasons are now provided, corrected for error and elegance of expression, in accordance with Rule 62 and in particular Rule 62(5) which provides: In the case of a judgment the reasons shall: identify the issues which the Tribunal has determined, state the findings of fact made in relation to those issues, concisely identify the relevant law, and state how the law has been applied to those findings in order to decide the issues. For convenience the terms of the Judgment given on 12 March 2020 are repeated below:

JUDGMENT

1 The claimant's complaint of unfair dismissal is not well founded and is dismissed.
2 The claimant's complaints of failures to make reasonable adjustments are dismissed.

3 The claimant's complaints that failures to allow her to return to work and her dismissal were contraventions of Section 15 of the Equality Act 2010, are dismissed.

REASONS

Introduction and issues

1. This is a case concerning the interaction between grief and disability. I would hope everything said this afternoon pays due regard to that and the very difficult circumstances in which the claimant found herself in 2017 and into 2018. The claimant was a disabled person by reason of anxiety at all material times.

2. At a case management hearing in September 2019 the complaints (unfair dismissal, Section 15 discrimination and a failure to make reasonable adjustments) were discussed and the issues arising from very clear professional pleadings were set out. The issues were revisited at the start of this hearing to clarify that the pleadings had supremacy, which resulted in one amendment. The claimant accepted that her the reason for her dismissal in 2019 from an administrator post related to her capability. The complaints and issues appear as headings to our conclusions.

Evidence

3. The tribunal has heard in in this case from the claimant herself. We also had a written statement from the claimant's statement, who was her fiancée at the time of the material events. He could describe very helpfully the effect of her condition of anxiety upon her at times. We had regard to that both in the management of the hearing over the two days of evidence, but also for wider context.

4. On behalf of the respondent we heard from Ms Burt, who became the claim's line manager in May 2018 and also from Ms Doherty, who was the director of the relevant directorate within the "CCG" in which the claimant worked. We had a written statement from Mr Hughes, who heard the claimant's appeal against dismissal but he was not able to attend this hearing.

5. The Tribunal paid tribute to the claimant for the way in which she gave her evidence, which was thoughtful and considered. It is not a surprise to this Tribunal that she found employment not long after her employment with the CCG came to an end, which is proving to be a success. Prior to that she had undertaken further education with the Open University. It is evident from all the papers that she has written in the case and all that she said that she has considerable abilities. We had no doubt about the reliability of her evidence as a good historian. We also had no doubts at all about the evidence from Ms Doherty as a witness of truth.

6. We had a great number of documents in the case which could help us to understand the underlying course of events, but as it turns out, fact-finding has been relatively straightforward. We would like to thank Mr Boyd because his chronology has been tremendously helpful in navigating events over a couple of years.

7. Much of the most telling evidence that we have heard has come from cross examination by both advocates. That has assisted us in understanding the underlying thoughts and decision-making processes that were taking place, and what was really in the minds of people making decisions at the material times.

8. We have taken the morning to record the chain of events. It has not escaped us that there is a great detail in the papers in our file, which perhaps was not capable of being ventilated in the course of time allocated to this hearing, but we have had the opportunity to look at some of those documents again and make comprehensive findings of fact.

9. <u>The outline facts found, many of which were undisputed (references to p. or pp). are to pages in the bundle;</u>

9.1. The claimant was employed by the respondent in April 2013 as a primary care support administrator. Her duties included monitoring the primary care email inbox, attending meetings with colleagues, taking minutes, compiling reports and on occasion, becoming involved in project work as the team took on different initiatives. The respondent is a body which emerged after the abolition of primary care trusts to support GP and other care in the community in Sheffield and to enable local GPs to commission health services the community need.

9.2. Day-to-day routine business involved a proportion of work that required the claimant's presence at the respondent's offices, but when she was involved in minute taking and other writing activities that could be done from home.

9.3. The claimant had suffered from symptoms of chronic anxiety for many years and the respondent accepted that throughout the events about which we heard the claimant was a disabled person by reason of her diagnosed anxiety condition.

9.4. The claimant's attendance work had been relatively stable in the early part of her employment. In 2013, 2014 and 2015 she had had two or three short spells of absence, per year. In 2016, and her absences had increased to 6 spells in that year, none of which were identified directly as arising from anxiety, but were for colds, coughs and other common conditions. In 2016 her uncle had passed away, but there was no bereavement leave taken in relation to that.

9.5. On 13 February 2017 her younger brother died as a result of an overdose. The claimant was absent from work from 14 February until 19 March. In July 2017 her grandmother passed away after an unsuccessful operation and the claimant was absent from 3rd July to 11 September 2017. She then had two short spells of absence in October/November.

9.6. In February 2018 the claimant's father died, having been diagnosed in January with terminal cancer. After 2 short spells of absence connected with anxiety in January and February 2018, the claimant was then absent from 5 March until June 2018, a spell of a hundred days. She embarked on a phased return in June and July, but was absent again with anxiety from 2 August until 6 September and then two further short spells in October and November, followed by continuous absence from 30 November and into January 2019

9.7. The respondent then employed between 200 and 300 people. It had the type of terms and conditions for staff and policies and procedures one would expect in a well-resourced NHS organisation.

9.8. Those included paid sickness leave entitlement, depending on length of service such that by the 5th year of service any member of staff was entitled to 6 months' full pay and 6 months' half pay. Its policy also provided commentary about situations where GPs could advise that an employee was either fit to work, not fit to work, or may be fit to work (subject to conditions). A GP could advise which conditions could assist a possible return to work.

9.9. The usual types of adjustments were: phased return, amended duties, altered hours, workplace adaptations. The policy went on to say that any such recommendations should be discussed and agreed with the individual and line management prior to commencement of work at a return to work meeting. The policy provided. If the recommendations made by the doctor/GP on the fit note cannot be accommodated, the medical note should be used as though the doctor/GP had advised "not fit to work" for the duration of the note. This means the employee does not need to return to their doctor until the expiry of the note".

9.10. The respondent also has a policy for bereavement leave which could grant up to 6 days' special leave; and it had an absence management procedure which established triggers for a procedure which, in its first aim, was to provide support to enable colleagues to attend work regularly.

9.11. The claimant had had stable management for the years of employment from 2013 to 2018 and had progressed through stages 1 and 2 of the absence management procedure, perceiving those discussions and interventions as helpful and supportive and enabling specific measures to be put in place to address her anxiety.

9.12. In December 2017 the claimant's line manager had written to her to confirm the meeting they had held under the procedure, and the line manager said this: "we acknowledged that your anxiety - related illness is recognised as a long-term condition and as a result of this agreed that we would augment the triggers to 4 episodes in 4 months or 6 episodes in 12 months or 25 days in total with regard to this condition."

9.13. This adjustment compared with the standard organisational triggers for a return to work meeting and possible action which were: 3 separate occasions in 4 months or

20 days in total; 5 separate occasions in 12 months or 20 days in total; and 4 weeks or more continuous sickness absence or planned absence for a known medical condition, where medical advice may be required prior to planned return to work.

Events from February 2018

9.14. The claimant's line manager approved compassionate leave of 6 days in relation to her father's death from Friday, 23 February to Friday, 2 March, but then herself commenced annual leave. The claimant's line manager, who held the position of Head of Primary Care did not then return to the organisation after the commencement of that leave. Her boss, the Program Director for primary care commenced sickness absence herself in May 2018 and did not return to the organisation, starting a career break September 2018.

9.15. Those two individuals had comprised the team, present in the office, to whom the claimant primarily provided administrative support. There was, in addition, one full-time locality manager, but other members of the team were typically practice managers of local GP surgeries, who undertook their coordinating role in addition to their practice manager functions. They were not, therefore, part of the claimant's core team - that was the line manager and the program director.

9.16. The results of this period of difficulty for the primary care team was that Ms Burt was asked by Ms Doherty to take over the running of the primary care team, in addition to her ordinary duties. The team for which Ms Burt was also responsible was stable, functioning well, and some additional resource was deployed there to assist them in the interim.

9.17. As a first step in addressing the difficulties in the primary care team, which also included the claimant's continued absence from March until June, Ms Doherty approved an agency appointment for 4 days a week to ensure that the core business of the administrator, including monitoring the inbox and routine work, was undertaken while the claimant was unable to do so.

9.18. From May 2015 the claimant had been referred to occupational health for review and support by her line manager on 3 occasions, resulting in the recommendations for adjustments of the kind described above. They included the claimant being able to work from home for up to 2 days a week and having the ability, "to take short breaks during the day when needed to manage your anxiety". The arrangements also identified her line manager as the person and to whom she, and others, could turn if she were to suffer an anxiety attack. All of those arrangements had proved helpful to the claimant, before she encountered the bereavements that started in 2017.

9.19. The claimant was then referred by HR to occupational health and was subject to a telephone consultation on 31 May 2018. The reports as a result of that referral recorded the claimant's underlying health condition and bereavements and identified the loss of her father as the trigger for a flare up in her anxiety symptoms. The report recorded anti-anxiety medication and treatment through counselling, and that the

claimant would seek longer term counselling. The report concluded that a return date would likely to be in a further 2 to 4 weeks.

9.20. The report included that the claimant had mentioned work-related stressors, including organisational change, and that it would be useful to explore those and minimise them. A stress risk assessment was said to be a useful tool through which work related stress that could be addressed, with a view to minimising it.

9.21. The report went on to recommend consideration of a phased return over a period of 4 weeks, with a graded increase in hours, workload, and responsibility, with flexible hours and various other practical measures, including the continued access to a quiet room to prevent symptoms escalating when breaks were required.
9.22. The report went on to say: "it is not possible to accurately predict an individual's future sickness absence. In general previous sickness absence patterns are the best predictor of future attendance." And "I would regard her as psychologically vulnerable to stress and, as above, would recommend any perceived work-related stresses are monitored and minimised".

9.23. The claimant's line manager, Ms Burt was a registered nurse in practice in her previous working life over many years. She had experience of mental health conditions including anxiety. In her evidence Ms Burt paid tribute to the claimant's own insight into her condition and the coping mechanisms that she deployed, was frank about her concern that the claimant was not, in truth, well enough to be back at work in June and July 2018 despite all the measures put in place.

9.24. In June and July, the claimant managed to attend by coming in later in the morning, and remaining for an hour or two before she became sufficiently unwell that she wanted to return home. She completed less than half of her contracted hours. The phased return did not succeed in returning the claimant to regular attendance and on 2 August she commenced a further period of 35 days' absence for anxiety, followed by a brief spell of return in September and then four further days of absence due to anxiety.

9.25. These events then resulted in an agreement that she reduce her hours and the HR department wrote to her on 16 October to record that it had been agreed she would work 9 days every 2 weeks and have a Friday off every 2 weeks.

9.26. After her return to work adopting those new working hours, it was a decided at a meeting on 26 October 2018, adjusted triggers having been reached by the claimant's absences, that the claimant would be placed on stage III of the absence management procedure for the next two years. The letter, recording what had been discussed at that meeting, included the following:

"Mrs Hodgson (the claimant's trade union representative) asked how your absence levels were this year compared to the previous year and Ms Elliott confirm that you had had 150 days absence in 2018 and 116 days absence in 2017…."

…."you did also raise a concern with regard to the changes in the team throughout 2018, which has resulted in both your previous line manager and her line manager no longer being in post. You explained that this had impacted on you when you returned to work, which I understood and acknowledged"…...
"….We also discussed that there were already some actions that had been taken to support you, such as a phased return, the reduction of your working hours (at your request) and the provision of more detailed structure to your working day and some further actions that were agreed in the meeting, including the extension of your phased return which will now end on 2 November, a co-production of a wellness action plan, and the testing of working from home for up to 2 days each week. We also considered a referral to occupational health but agreed that this was not necessary at this time."

9.27. That letter recorded that over the next two years, as the claimant was on stage III, if she reached a trigger point, she could, in accordance with stage IV, be invited to a formal review hearing, which could result in the termination of employment. It also recorded that the claimant had the opportunity to appeal the decision to place her on stage three, and, as with other decisions to apply the absence management procedure to her, the claimant did not appeal that decision.

9.28. The claimant was, however, in correspondence with Ms Burt to seek amendments to the outcome letter, and in particular to make it clear that the bereavements that the claimant had experienced had caused her anxiety to worsen. She said this: "would it be possible to change the wording to at least include the amount of bereavements, the fact that they were all close family members and the timeframe? I also want to reiterate that I am very appreciative of the flexibility provided to me to return to work and the request I have made being approved, such as working from home, altering my hours and extending my face return to work. I was feeling far less confident about my abilities during the sickness review meeting, but I am progressing and getting better (albeit slower than I know this organisation wants). Ms Burt made those changes to the letter as requested.

9.29. In the claimant's communications with the respondent at this time, the difference between a stress risk assessment and a well-being assessment was not raised by her. A wellbeing assessment had been sought by the claimant's union at the meeting in October and was done - it was to be a living document which was to assist the parties. Had the claimant not become so well again, it would no doubt have been developed further and/or, the claimant would, if she felt there was a material practical difference, have pursued a separate stress risk assessment.

9.30. Very sadly, the claimant was unable to sustain a return to work and became unwell again from 30 November 2018. The claimant's sick pay was due to reduce to half pay from 25 January of 2019. The respondent's payroll provider wrote to her on 3 January 2019 to provide information about that.

9.31. In January 2019, Ms Burt was herself absent on sick leave following diagnosis in May 2018 and treatment for cancer. She had surgery on 27 December and then returned to work later in January. On 21 January the claimant's GP provided her with a fit note assessing her as unfit for work for a period of 2 weeks from 14 January to 27

January by reason anxiety disorder. Also on or around 21 January, the claimant had been in touch with Ms Burt to ask to return to work.

9.32. Ms Burt then arranged to meet her face to face on 24 January but indicated she would like to have occupational health advice about the claimant's fitness to work before she returned and that was agreed. The claimant herself considered it reasonable for Ms Burt to seek advice before she returned to work, but the date that was offered for a consultation was the anniversary of her brother's death in February. That was not a date which had been organised by Ms Burt, but she did explain to the claimant it could be rescheduled for that reason, but the claimant had indicated that because of the delay and the fact that she was on half pay, she would go. The delay was undesirable at that time and she would go ahead and, .. "at least occupational health would see her at her worst" or words to that effect.

9.33. The claimant then saw her GP on 28 January and fit note which provided that she may be fit for work from 28 January until 24 February 2019 with a phased return.

9.34. On 21 January 20 the respondent's HR representative Ms Elliott had done the paper referral for the claimant to occupational health, saying this, after setting out the chronology of recent absence: "as a result she was placed on stage III of our sickness absence management procedure in October 2018 and the most recent absence means that she has reached another trigger in accordance with policy. This means that a stage four final review hearing will now be convened to consider her ongoing employment with the organisation as this is the final stage of the procedure and the frequency and volume of Kerry's absences have become unsustainable."

9.35. The referral also recorded: "Kerry has been undertaking regular counselling and was on a new regime of medication and following a number of exercises to manage her anxiety on a daily basis. She was also proactive in taking action when anxiety was affecting her at work by going to a quiet space, but we were concerned that she seemed to need to do so quite often. Kerry was on an extended phased return to work on amended workload and able to work from home up to 2 days per week as part of a return to work."

9.36. The occupational health report following an in-person consultation provided advice to the respondent's HR department, answering the specific questions posed in the referral as follows: *As to likely date of return to work, "she is hoping to return to work on 4 March 2019. You may wish to allow her to try to return to work at this time. She would benefit from a phased return to work as discussed above".*

9.37. As to, is the ill health work related.. "*She attributed her anxiety to some difficulties at work, which I have discussed in the body of my report. She, however, mentioned that it was also the run-up to Christmas, which she felt impacted on her emotional health.* On attending the appointment, the claimant describes breaking down during the appointment, but that this did not appear in the report.

9.38. The report confirmed that the claimant's condition was likely to be disability within the Act and said this hope. "Apart from the adjustments already discussed, you may also wish to consider adjusting her triggers for absences relating to her disabling condition" That was an adjustment which had already been made by the respondent.

9.39. The report went on to advise that the claimant was vulnerable to relapses impacting on her service and attendance in the future and that she had not yet managed to achieve stability in her emotional health. The report confirmed that the claimant was keen, even in the absence of that emotional stability, to return but that she "remained vulnerable to relapses." And it said this: "I do have some reservations about her ability to sustain her attendance at work if she returns at this time, however, you may wish to allow her to try to return to work with additional support as mentioned above."

9.40. That report was provided on 19 February or thereabouts. The claimant took annual leave from 25 February to 1 March. Ms Burt spoke to the claimant on 4 March to let her know that she was being requested not to come into work, until after a final absence review hearing, which was to go ahead on 13 March 2019.

9.41. The statements of case for that hearing and the invitation to it were sent to the claimant on 4 March. Ms Burt concluded in a summary as follows: "It is acknowledged that Kerry has a number of long-term health conditions and her experience of anxiety disorder is significant and has a detrimental impact on her ability to undertake day-to-day activities both at home and at work. As such is accepted Kerry will be likely to have a disability which imposes on CCG the duty to make reasonable adjustments. It is also acknowledged that Kerry has unfortunately experienced four close family bereavements in 2 years, which has impacted significantly on her emotional health. It is also noted that there have been a number of changes in the team, but that a significant amount of support had been in place for the claimant. It is therefore recommended that consideration be given to whether Kerry can sustain regular and reliable attendance at work and whether her persistent levels of absence are sustainable to the organisation."

9.42. The claimant submitted a detailed statement of case setting out her own position and why dismissal should not be considered. That included lengthy criticism of the occupational health report from 19 February. Her submission was sent before the midday on Monday 11 March, as the invitation to the meeting required. Further details of her material complaints about it appear in our conclusions, below.

9.43. The claimant and her trade union representative attended that hearing on 13 March, and in an adjournment following substantial discussion, Ms Doherty considered alternative deployment for the claimant, accepting the management case that she was not able to deliver regular attendance in her then post. She considered the creation of a post for the claimant in other departments within the respondent, but was of the view that there was no department or environment more likely to support the claimant's condition, and it was not appropriate to redeploy the claimant in light of the occupational health reservations about her ability to sustain attendance. Ms Doherty knew that the organisation would be required to make significant organisational

changes in the coming months, and even a role created for the claimant could well pose change. She simply did not consider that the organisation would be able to devote significant enough resource to protecting the claimant from that kind of organisational change and the potential impact on her. She decided to dismiss the claimant.

9.44. Part of the dismissal outcome was to treat the claimant's absence from 24 January to 13 March 2019 as medical suspension, and that absence was not considered as part of the absence record giving rise to dismissal.

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9.45. The claimant appealed the decision to dismiss her with the support of her union and presented a letter from her GP in support of that appeal, giving further information that her condition had been stable over the past three months, as at 1 May 2019. She sought reinstatement. The appeal took place on 10 May 2019 and Mr Hughes refused the appeal. That was communicated to her on the day after the hearing.

The Law

10. The claimant has the right not to be unfairly dismissed (Section 94 of the Employment Rights Act 1996). The reason for dismissal is not in dispute, it relates to the capability of the employee for performing work of the kind which she was employed to do (Section 98 (2)(a)). Capability in this case means her capability assessed by reference to her health (Section 98(3)(a)), as opposed to skill or aptitude). The question for the Tribunal is whether in the circumstances the respondent acted reasonably or unreasonably in treating the claimant's health as a sufficient reason for dismissing her. There are well established principles which reasonable employers apply in these circumstances: having up to date medical evidence, understanding a likely return date, and consulting with the employee. There is clearly a range of reasonable decisions in relation to any given set of circumstances.

11. The claims in this case are also of contraventions of the Equality Act 2010 ("the 2010 Act"). Much of the case law, particularly on reasonable adjustments was developed in relation to the predecessor provisions in The Disability Discrimination Act 1995, ("the 1995 Act").

12. Section 39(2)(d) of the 2010 Act prohibits an employer discriminating against an employee by subjecting him to "any other detriment". Any other detriment means objectively viewed unfavourable treatment, rather than a subjective and unjustified sense of grievance. The respondent took issues with whether not letting the claimant return in or after the end of January 2019 was a "detriment", or unfavourable treatment.
13. Section 39(2) deal also describes specific types of detrimental treatment at work: terms and conditions of employment, access to opportunities and benefits, and dismissal. Section 39(2)(d) above is the catch all.

14. In this case two types of discrimination are pursued: discrimination by way of a failure to make a reasonable adjustment (Section 21) and discrimination because of something arising in consequence of disability ("Section 15" discrimination).

Section 15 Discrimination

15. In section 15 cases, the key question is the reason why the claimant was subjected to the alleged unfavourable treatment. Section 15 says:
(1) A person (A) discriminates against a disabled person (B) if—
(a) A treats B unfavourably because of something arising in consequence of B's disability, and
(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

16. The "something arising in consequence of B's disability" sometimes has to be proven by a claimant, but in this case the "something", the claimant's absences, was accepted as in part arising from disability, and was put by the respondent as, "an inability to sustain an appropriate level of attendance".

17. This type of "justification" defence in section 15(1)(b) is common to many other types of discrimination, including direct discrimination because of age, and indirect discrimination. Whether the employer's "means" are "proportionate" requires the Tribunal to determine whether they were "appropriate and necessary" (taking into account less discriminatory measures) (see Homer v Chief Constable of West Yorkshire [2012] UKSC 15 paragraphs 22 to 25). Section 15 does not derive directly from the European Equality Directive, but there is no judicial decision that the Homer approach should not be applied to Section 15 (2). Even on the bare statutory language, a structured approach is required to considering whether an employer has made out the defence.

Failures to make reasonable adjustments

18. Section 39 (5) imposes the duty to make adjustments on employers and Section 20 explains it:
(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.
(2) The duty comprises the following three requirements.
(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

19. Section 21 deals with failure to comply with the duty:

(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.
(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.

20. There was no issue of knowledge of either disability or disadvantage in this case.

21. As to the type of adjustments that were envisaged by the 2010 Act, the guidance from the 1995 Act is rehearsed in the Code. The Tribunal must take into account those parts of the Code which appear to be relevant:

At paragraph 6.28: *whether it is reasonable for a person to have to take a particular step in order to comply with a duty to make reasonable adjustments, regard shall be had, in particular to:*
the extent to which taking the step would prevent the effect in relation to which the duty is imposed;
the extent to which it is practicable for him to take the step;
the financial and other costs which would be incurred by him in taking the step and the extent to which taking it would disrupt any of his activities;
the extent of his financial and other resources
the availability to him of financial or other assistance with respect to taking the step;
the nature of his activities and the size of his undertaking.

22. At paragraph 6.33, the following are examples of steps which a person may need to take in relation to a disabled person in order to comply with a duty to make reasonable adjustments

allocating some of the disabled person's duties to another person;
transferring him to fill an existing vacancy;
altering his hours of working or training;
assigning him to a different place of work or training;
allowing him to be absent during working or training hours for rehabilitation, assessment, or treatment;
modifying procedures for testing or assessment;
providing supervision or other support.

23. We also note that the purpose of the statutory code, approved by parliament, is to provide a detailed explanation of the 2010 Act and to provide practical guidance on compliance. In Spence-v-Intype Libra Elias P (as he then was) summarised the position in relation to reasonable adjustments under the 1995 Act at paragraphs 43 and 48:

24. "We accept that the concept of reasonable adjustment is a broad one, but we do not consider that this assists the argument. The nature of the reasonable steps envisaged in s4(A) is that they will mitigate or prevent the disadvantages which a disabled person would otherwise suffer as a consequence of the application of some provision, criterion or practice. That is in fact precisely what Lords Hope and Rodger say in the paragraphs relied upon; the duty is not an end in itself but is intended to shield the employee from the substantial disadvantage that would otherwise arise… In short, what s4(A) envisages is that steps will be taken which will have some practical consequence of preventing or mitigating the difficulties faced by a disabled person at work."

25. This statement of principle is now clear and further developed to the effect that the making of an assessment is not capable of being a reasonable adjustment under the terms of the 1995 Act (and by logical extension, the 2010 Act). There is a line of authorities to this effect, including the decision of Elias J, as he then was, presiding over the Employment Appeal Tribunal in Tarbuck v Sainsbury's Supermarkets Ltd [2006] IRLR 664, HM Prisons Service v Johnson [2007] IRLR 951, Environment Agency v Rowan [2008] ICR 218, Smith v Salford NHS Primary Care Trust UKEAT/0507/10 and Rider v Leeds

City Council UKEAT/0243/11. The principle applied in these cases is that a reasonable adjustment must be an adjustment designed to enable the employee to attend work or return to work. The carrying out of an assessment achieves neither of these ends in itself.

Conclusions – applying the law to the facts

26. We are very grateful for the written submissions provided and we heard oral submissions from both advocates – in an extempore Judgment we do not repeat them here at length but mean no discourtesy in that. They included a comprehensive narrative of the relevant law in this area. Having said that, the legal principles are well trodden territory for this Tribunal.

Unfair dismissal

26.1. Did then the Respondent hold its belief in the Claimant's incapability on reasonable grounds and was the decision to dismiss within the reasonable range of responses for a reasonable employer? The claimant relies upon:
26.1.1. the Respondent refused to allow the claimant to return to work on 24 January 2019 when she was fit and able to do so
26.1.2. the Respondent failed to permit the Claimant to rearrange the occupational health appointment
26.1.3. the Respondent failed to obtain a further occupational health report following the Claimant's concerns being raised
26.1.4. Respondent unreasonably proceeded with the capability hearing before allowing the Claimant to return to work
26.1.5. the Respondent's belief that the Claimant's medical condition warranted dismissal was unreasonable
26.1.6. the Claimant was ready to return to work
26.1.7. the Respondent failed to consider alternative employment/duties and/or a reduction in hours before making the decision to dismiss

27. The reason for dismissal in this case was never in doubt. It was the ability of a member of staff to come into work reliably whilst also having the significant disability of anxiety, over a significant period of time. That reason was also at the heart of the claimant's section 15 complaints. Her allegations were very clearly presented on her behalf by her solicitors and counsel.

28. The decisions that we reached in relation to the list of issues is as follows.

29. Did the respondent act outside the band of reasonable responses in the seven ways that were alleged by the claimant? The first allegation was a refusal to allow a return to work on or after 24 January 2019, when she was fit and able to do so. That, as a factual allegation is not made out on the facts. The factual position is considerably more nuanced.

30. The claimant had had a spell of absence from late November 2018 and had endured Christmas, a difficult time for those grieving the loss of close family. She

was unfit for work in the immediate aftermath of that. Our findings include that because of the respondent's sick pay entitlements her 2018 absences were paid. By the time she arrived at January 2019, she was properly given the signpost to relevant sources of help because her pay was to end.

31. The claimant's fit note had declared her unfit to work until 27 January. She met Ms Burt on 24 January, then visited the GP on 28 January. She knew at that visit that an occupational health appointment was due, reasonably, to have advice prior to return to work. Her GP advised that the claimant **may** be fit for work between 28 January and 24 February, not **was** fit for work, with a phased return.

32. At this time, Ms Burt, who had been the claimant's line manager since May 2018, had experienced attempted phased returns of the claimant following spells of absence. Faced with a GP suggesting that the claimant may be fit for work, and following the provisions of the respondent's absence management procedure, she acted reasonably (accepted by the claimant) in wanting to have occupational health advice about whether a further phased return was the right course. In short, whether it in the claimant's interest to return to work and whether she could sustain a return in the context of two failed returns the previous year. This course of action was not outside the band of reasonable responses and it is far from the allegation made.

33. As to the failure to permit a rearrangement of the occupational health appointment, again, the allegation mischaracterises the chain of events. There was no act on the part of the respondent to put the claimant in a difficult position by an external provider allocating a date which was the anniversary of the claimant's brother's death, which was the tenor of some of the correspondence. The claimant had the ability to change the date if she wished, but her financial circumstances were such that she chose not to because she did not wish to delay matters. She said words to the effect, at least they will see me at my worst, or words to that effect in a somewhat resigned way. Factually this allegation is not made out, and in no way did the respondent act outside the band of reasonable responses in this matter.

34. The third allegation: the respondent failed to obtain a further occupational health report following the claimant's concerns being raised. The point at which the claimant raised concerns was when she presented her statement of case resisting the management case for consideration of whether the claimant's employment should be continued or not. She was very clear in her lengthy criticisms, but our findings also include that she was content to have that report at the same time as the employer was to receive it (19 February). The criticisms were not raised at that point or at the point that the date for the fourth stage hearing was sought to be arranged, they were criticisms made in the context of a report which, on the one hand expressed reservations about a return to work, and on the other hand, said that if the respondent was to permit a return, these are the adjustments we would recommend. It is a helpful report.

35. The claimant said this in her submission document: "*my ability to put together this response statement (a vast improvement on my response to previous review meetings) within a strict deadline, after agreed plans had been changed, without needing medication without suffering an anxiety attack should be proof enough of my recovery. It is with this in mind I feel confident I am able to sustain a more reliable, regular attendance if Sheffield CCG feel confident it can commit to its duty of care".*

36. The claimant has inadvertently summarised the somewhat "*rock and a hard place"* of employers in this situation. The context is a member of staff with an underlying condition which has been exacerbated by some very sad life events, of a scale, we agree with Mr Boyd, which is very rarely seen. She wishes to return to work, which may help, or hinder, in her recovery, depending on the circumstances in play in that work place. Being at work can no doubt be part of therapeutic treatment, or at least be helpful in these circumstances. Everyone who has heard the evidence in this case probably has a much better understanding of that now.

37. The claimant's case is that the respondent should have sought a further occupational health report because of the claimant being at her worst on the day of the report. There are a number of points. In our judgment to do so is requiring a health investigation to be "perfect". Secondly, it is going to be a very rare clinician indeed who says, "I can give you a firm view that the claimant should be at work (or should not be at work), or is or is not well enough to sustain a recovery", whatever the circumstances on the day of the consultation, looking at the claimant's history. Thirdly, the claimant herself identified that the clinician had not reported on, or appeared not to have noted or noticed, any particular episode that she experienced at the start of that consultation. That cannot be prejudicial to her in these circumstances – had it been noticed or noted, it is possible the clinician would have been more clearly against a return to work. The claimant has thereby suffered no prejudice in her case that she wished to return. These matters together lead us to conclude that the respondent did not act outside the band of reasonable responses in not seeking a further report prior to or after the meeting on 13 March.

<u>Proceeding with the capability hearing before allowing the claimant to return to work (the claimant being ready to return to work)</u>

38. The claimant wished to return to work - the clinician recorded that she wished to return from 5 March. This is an allegation of a second occasion, or opportunity, to allow a return to work, which was refused.

39. There were two matters playing in Ms Burt's mind when she decided with HR that this was not a sensible course. It remained the position that she had concerns about the claimant's welfare in coming back to work at that time, it being such a short time, a week, between the fourth stage hearing on 13 March and 5 March, when the claimant wished to return.

40. Secondly, the time required to successfully manage the first week of a phased return was significant, and disruption of the service in facilitating that return to work. Where the history was such that she could have little confidence of a successful return, she had to tread very carefully. What I say next, which is at the heart of the landscape of unfair dismissal complaints, is that this tribunal must have regard to equity and the substantial merits of the case in weighing up whether this employer acted reasonably.

41. Of course, some employers with different employee benefits and different policies and procedures may have handled things differently. Some employers may have said, to the effect, you take as long as you need to recover, or perhaps, take a career break and come back to us when you feel ready. Some employers may have done that at an earlier stage in this course of events. Other employers would have trodden more robustly in the circumstances, and the claimant may have already been dismissed. This employer had undertaken a number of adjustments over a lengthy period of time to support the claimant, which she acknowledged and appreciated.

42. In these circumstances, to say, “we can await another seven to ten days”, before we make that decision as to whether to permit a return to work, is, in all the circumstances of this case, within the band of reasonable responses. That was all the more so when the respondent treated the time as medical suspension with full pay.

<u>The final allegation is a failure to consider alternative employment and/or a reduction in hours.</u>

43. The alternative posts which might have been available for the claimant were considered, not with the claimant and her union representative, but in private by Ms Doherty. We accepted her evidence about that. The primary care team in which the claimant had worked had been subject to change and disruption. From May 2018 there had been in place agency cover for the the core elements of the claimant's duties, the routine business of the day. It was within the band of reasonable responses for this employer to consider that this team could not sustain further potential disruption, or indeed provide the necessary support to the claimant without impacting service delivery.

44. This was also a case where the claimant had the opportunity to draw attention to any posts reporting to particular managers which she knew, where that particular manager might be suitable, and to ask to talk about that. Ms Doherty had a good udnerstanding of obligations on an employer in these circumstances, and the claimant’s statement of case. She considered the creation of a post or reduction in hours for the claimant, but that would require both a post, and/or a suitable person to support or job share with the claimant. She concluded there was not such a position or potential positions for which that would be workable. This was an employer which was already under strain and was going to continue to be under strain. The duty of care consideration was uppermost in Ms Doherty's mind.

45. In these circumstances, there was no failure to consider these matters. The respondent clearly had a genuine belief that the claimant's health made it unlikely she could deliver reliable service, which is a reason related to her capability. It cannot be outside the range of reasonable responses for this employer to conclude at this time: we cannot manage the employer's duty of care in a way that we know will be sustainable, and in a way which we can know, or judge with any certainty, that the claimant can return to work and deliver some kind of regular service to enable the business of the organisation to be done.

46. That position remained on appeal, albeit the claimant's medical position was said to have been stable for three months (February, March and April). There was no criticism of the appeal decision or process in the pleaded case. It was a reasonable examination of the decision taken by Ms Doherty, taking into account that stability in the condition while not at work, did not go so far as to suggest that there would be stability in attendance at work. For all these reasons, the unfair dismissal complaint is not well-founded and it does not succeed.

<u>The Section 15 complaints</u>

47. Was the respondent's failure/refusal to allow the claimant to return to work on or after 24 January unfavourable treatment/a detriment? The respondent says it was a supportive measure?

48. Was its dismissal of her because of attendance (something accepted to arise in consequence of disability), a proportionate means of achieving a legitimate aim? The Respondent relies on the need to maintain an effective service with necessary staffing levels within the budgets and taking an equitable approach to absence management.

49. The complaints of section 15 discrimination involve us asking and answering some different questions, but our factual conclusions remains the same. The respondent's legitimate aims as set out in its response were not in any doubt in this case. The need to maintain an effective service for the public in Sheffield, in accessing primary care and other care through the commissioning done by the respondent, maintaining the necessary staffing levels within budget and an equitable approach to absence management are just such aims.

50. It will be apparent from our conclusions above in relation to unfair dismissal, that we considered the decision not to permit a return to work was within the band of reasonable responses in all the circumstances. That does not mean that objectively it cannot amount to detriment or unfavourable treatment. To answer that question requires further objective conclusions, including consideration of whether it was a supportive decision.

51. We take into account that the absence management procedure was one tool in achieving the respondent's aims, and its deployment in this case, the Tribunal

unanimously concluded, has been in a way which went above and beyond common industrial practice, no doubt out of respect and empathy for the life events affecting the claimant.

52. Our outline findings are perhaps insufficient to communicate the level of work that was done by the respondent to be equitable between staff, and particularly in this case. This included communicating with the claimant as to when triggers were met, (whilst in this case adjusting them for disability), carrying out many review meetings and occupational health referrals and acting on the advice, and always setting out the discussions and arrangements for adjustment in comprehensive letters.

53. That was the practice of Ms Pickering, the claimant's original manager, and it remained the practice of Ms Burt. The length of time over which this work was done was considerable. The trigger adjustment was done in a very considered and careful way to give the claimant some comfort about the number of occasions which she could be absent for her anxiety symptoms and the length of those absences. That is an approach rarely seen by this Tribunal, particularly undertaken with the care evident in this case.

54. Notwithstanding all the adjustments in place, the claimant's circumstances were such that she was unable to regularly attend work. There was no criticism from the respondent about that. This was a situation in which she simply was unable, for all the reasons we know, to do that. Her wishing to return at the point she did, was admirable, but not necessarily a reliable indicator of her health at the time, because of the imperative to restore earnings. Her position, objectively was worrying; on the one hand expecting to be at her worst understandably in February and on the other hand obtaining a fit note from her GP that she may be fit for work with a phased return at that time. She then put back her desired return date to 5 March at the occupational health consultation, resulting in seven to ten days when she could, had Ms Burt permitted it, been at work. Her position on detriment was that being at work helped her recovery, but the track record on that was mixed.

55. In 2019 the interaction of grief and anxiety was not something that was predictable and that was no doubt one of the reasons why the occupational health advice was equivocal. Nobody could really know and no doubt, nobody can still know how the claimant will be affected on a day to day basis. We now know that the claimant has made a great success of her new role, and that is something to be celebrated, but it is not just to look at these events through the lens of hindsight knowing that.

56. In all these circumstances, applying the principles of law above, taking into account all these matters, we consider that the return to work allegation is a matter about which the claimant has an unjustified sense of grievance. It does not amount to a detriment. That complaint is dismissed.

57. Even if we are wrong about that, weighing the discriminatory effect on the claimant, a possible improvement in her condition but not guarantee of that, and the

legitimate aims of the respondent, including doing its ordinary business of serving the public of Sheffield, Ms Burt's decisions about return were appropriate and reasonably necessary.

58. As to the dismissal, again, we have to weigh the discriminatory effect on the claimant, which for dismissal, was considerable - Ms Doherty herself identified the loss of the claimant's employment rights established over some years as a material factor she weighed. We ask whether taking that effect into account dismissal was appropriate and reasonably necessary in the round.

59. Again, we assess that at the end of the appeal against dismissal, taking into account the claimant's additional information from her GP. That information was not any clearer in its terms about whether or not the claimant could have sustained a level of health attendance at the adjusted triggers. The less discriminatory alternatives had also been examined, and they too posed unsustainable challenges for the respondent delivering its purpose to the Sheffield community, not to mention fairness and equity in the application of the absence management procedure. In these circumstances the respondent has demonstrated that dismissal of the claimant was a proportionate means of achieving a legitimate aim and this complaint is also dismissed.

<u>Reasonable adjustments: section 20 and section 21</u>

60. Did the Respondent take such steps as were reasonable to avoid the disadvantage to the claimant from its requirement for a certain level of attendance in light of her disability?
61. It is accepted that its attendance requirements placed the claimant at a substantial disadvantage because she was more likely to cross trigger thresholds and attract cautions and potential dismissal. The duty therefore arose.

62. The adjustments asserted as reasonably required were:
    - 62.1. carrying out a risk assessment
    - 62.2. discounting absences that relate to disability
    - 62.3. excluding some or all disability-related absences
    - 62.4. not dismissing the claimant or delaying the process
    - 62.5. alternative employment.

63. The law is against the claimant in respect of the first adjustment relied upon: carrying out an assessment is not a reasonable adjustment to address risk of increased exposure to dismissal capability procedures because of potential absence through anxiety – it may identify possible caused and measures to be put in place, but it is those measures which were potential reasonable adjustments, and none were relied upon.

64. Discounting anxiety related absences and the excluding of some or all anxiety related absences are conveniently addressed together. Given that the respondent had adjusted triggers as the means to discount some disability related absence, the question for the Tribunal is whether it was reasonable for this respondent to

have to entirely discount the claimant's anxiety related absence such that she would not risk engagement with the procedure, or dismissal, for those absences.

65. Adopting our range of reasonable responses analysis, some employers, perhaps with less support - very beneficial sick pay and absence management procedures to support and provide equity across a great number of staff - might reasonably have agreed to discount anxiety related absence, particularly where that has arisen or worsened through bereavement. In effect to say, come back to work when you are ready.

66. This employer was, for much of the time, under the financial constraints of financing through public funds a permanent replacement for the business of the day, and from May 2018 financing the claimant's sick pay until January 2019. This employer was also operating within its established and union agreed framework - it had to consider equity towards other staff who might have had lengthy absences in difficult circumstances in addition to disability. It seems to the Tribunal that wholly discounting anxiety related absence was not an adjustment which reasonably this employer ought to have done. Yes, it would have removed the risk of dismissal for anxiety related absence (because of the way the procedure worked), but it would also have removed the claimant from the support and discussion arrangements. Examining all the relevant code factors above, which will be apparent through the entirety of these conclusions, this an adjustment this employer was bound to make in all the circumstances of his case.

67. We then come finally to address dismissal and alternatives to dismissal, but through the lens of the reasonable adjustment provisions. Both would have avoided the risk of dismissal, and whether Ms Doherty considered these is not the issue – she plainly did. Do we, as a Tribunal, consider this employer reasonably should have had to find or create alternative employment, or not dismiss the claimant from her post, because the duty to make adjustments arose? It will be apparent that we do not in all the circumstances of this case.

68. The complaints are dismissed – that is a unanimous decision of this Tribunal.

Employment Judge JM Wade
Date: 12 November 2020