EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		*Respondent*
Mrs Susan Boyers	**AND**	**Department of Work and Pensions**

JUDGMENT OF THE TRIBUNAL

Heard at: Newcastle upon Tyne On: 4 November 2020 (in Chambers)

Before: Employment Judge A M Buchanan (in person)
Non-Legal Members: Mr S Carter (in person) and Mr R Dobson (by cloud video platform)

Appearances – by written submissions

For the Claimant: Mr S Wyeth of Counsel
For the Respondent: Mr A Tinnion of Counsel

JUDGMENT ON REMITTED ISSUE

It is the unanimous judgment of the Tribunal that the decision to dismiss the claimant was not proportionate for the purposes of the claim of discrimination arising from disability advanced pursuant to section 15 of the Equality Act 2010 ("the 2010 Act").

REASONS

Preliminary matters

1. On 13 May 2019 a Judgment ("the Judgment") of this Tribunal was sent to the parties which dealt with numerous claims advanced by the claimant. The claimant succeeded in her claim of discrimination arising from disability advanced pursuant to section 15 of the 2010 Act in respect of her dismissal and in her claim of unfair dismissal advanced pursuant to sections 94/98 of the Employment Rights Act 1996 ("the 1996 Act"). Other claims of failure to make reasonable adjustments, harassment related to disability and of unauthorised deduction from wages were dismissed.

2. The respondent appealed the Judgment to the Employment Appeal Tribunal (EAT) in respect of the claim advanced under section 15 of the 2010 Act and the claim of unfair dismissal. There was no cross appeal. On 24 June 2020 the EAT handed down its judgment ("the EAT Judgment"). The appeal in relation to unfair dismissal was dismissed. The appeal in relation to the section 15 claim succeeded on the issue of proportionality and the question of whether the dismissal of the claimant by the respondent on 10 January 2018 was proportionate pursuant to section 15(1)(b) of the 2010 Act was remitted to this Tribunal to reconsider.

3. We have paid close attention to the EAT Judgment which directed this Tribunal to reconsider the issue of proportionality without hearing further evidence. At a Telephone Private Preliminary Hearing ("TPPH") on 10 September 2020, it was decided to deal with the remitted issue by written submissions from the parties which were to be exchanged on 1 October 2020 and commented on by 15 October 2020.

4. As a result the Tribunal now has before it:

4.1 Submissions from Mr Tinnion dated 1 October 2020 extending to 49 paragraphs (10 pages) together with Appendix A (Chronology) and Appendix B (summary of the law).

4.2 Submissions from Mr Wyeth dated 30 September 2020 extending to 40 paragraphs (17 pages).

4.3 Comments on the submissions of Mr Wyeth from Mr Tinnion dated 15 October 2020 extending to 35 paragraphs (7 pages)

4.4 Comments on the submissions of Mr Tinnion from Mr Wyeth dated 12 October 2020 extending to 111 paragraphs (4 pages)

5. The Tribunal is grateful for the submissions and has paid close attention to them. The submissions are held on the Tribunal file.

Submissions

6. The submissions now before us are briefly summarised.

7. For the respondent, Mr Tinnion stated that it was inconceivable that the claimant would ever have returned to her contracted place of work to carry out her contracted duties. The claimant had been absent from duty since 13 February 2017 when she was dismissed on 10 January 2018.That is a significant period and the respondent did not jump the gun in moving to dismiss. In that time the team of which the claimant was a member was one team member down resulting in additional pressure on the team and the provision of a reduced service to the respondent's customers. There was no evidence at the time of dismissal that the claimant was fit to return to her post. The claimant had made plain there was no prospect of her returning to work at James Cook House. The claimant had received a great deal of management support during her absence. The respondent considered alternatives to dismissal before moving to dismiss. The claimant had been absent for 289 days at the time of her dismissal. As a result of her dismissal

the claimant was paid full pay for the period of her notice and 100% compensation under the Civil Service Compensation Scheme. The claimant made numerous decisions which contributed to her dismissal. The Tribunal should afford the required substantial degree of respect for the judgment of the dismissing officer in moving to dismiss in January 2018.

8. For the claimant, Mr Wyeth submitted that there has been no suggestion that the findings and conclusions of the Tribunal were perverse or unsupported by the evidence. The respondent produced no evidence to support or sustain the proportionality argument advanced. Despite the respondent's assertion that it did produce evidence on the question of proportionality, there was in fact no such evidence before the Tribunal and in reality, the respondent had wrongly concluded that the Tribunal would simply assume circumstantially that the impact of the legitimate aims was obvious and the dismissal was proportionate. The burden of establishing the defence of proportionality lies with the respondent. The principle of proportionality requires the Tribunal to take into account the reasonable needs of the respondent's business but is not confined to considering whether the respondent's views as to those needs fell within the band of reasonable responses available. The Tribunal has to make its own judgment on a fair and detailed analysis of the working practices and business considerations involved as to whether the discriminatory measure of dismissal was reasonably necessary. The respondent could be expected to explore why, or even if, the work trail at Eston had failed and that was all part of the mix in deciding whether less discriminatory measures to dismissal were available to the respondent. It was incumbent on the Tribunal to consider whether delaying the dismissal to explore why, and if, the work trial had failed could have achieved the respondent's legitimate aims when undertaking the proportionality exercise required by section 15(1)(b) of the 2010 Act. There was a complete absence of evidence on the part of the respondent addressing the question of proportionality: only evidence from Mr McDonald came close. The Tribunal was right to conclude and should sustain the conclusion that the respondent could have been expected to wait a little longer whilst investigating whether the work trial should have been revived before dismissing her. There is a vacuum of evidence to support the respondent's assertion that the dismissal was proportionate.

9. In his response, Mr Tinnion took issue with various statements made by Mr Wyatt in his submissions. The point was emphasised again that this claimant had stated on numerous occasions that she would not return to work at James Cook House Middlesbrough. Detailed submissions are made on the Judgment of Underhill LJ in **O'Brien** (below) and it was noted in particular that in that case there was evidence before the Tribunal that there was some evidence that the claimant in that case might be able to return to her duties. In respect of the question of process and outcome, the Tribunal was reminded that what mattered was the practical outcome and not the quality of the decision-making process. The work trial at Eston had not been successful. The claimant does not seek to explain how either of the legitimate aims accepted by the Tribunal would have been advanced by delaying the claimant's dismissal to explore issues arising from the work trial. The claimant is attempting to impose a duty on the respondent to make reasonable adjustments when the Tribunal has decided there was no such duty in play. The cost of managing the claimant's absence would be considerable notwithstanding that the

claimant's entitlement to sick pay was about to expire. It is sufficient if the respondent's actions were proportionate to at least one of the legitimate aims for the defence to succeed.

10. In his reply Mr Wyeth submitted that the claimant has always maintained that her dismissal was avoidable and premature regardless of when it took place. The Tribunal must assess the question of proportionality on the day the dismissal was applied. That question has to be answered by reference to the evidence before the Tribunal at the original hearing. The embargo on further evidence will not extend to the remedy hearing - if there is to be one on the question of discrimination. It is not a sustainable argument that avoiding the reasonable demands of meeting its employment law obligations towards the claimant is a basis to justify the dismissal. The Tribunal must not confuse issues relevant to liability with issues relevant to remedy. The Tribunal has made a finding of fact that the decision makers of the respondent took no account of the extent to which the matters referred to at paragraphs 43a to 43k of the respondent's submissions were symptomatic of the claimant's proven disability. On the basis of all the evidence and its findings of fact, the Tribunal is entitled to conclude that moving to dismiss when it did was a disproportionate means of achieving the legitimate aims relied on. A less discriminatory measure would have been to delay dismissal to explore whether the work trial should have been revived or not terminated at all to allow for a return to work.

Review of the evidence at the original hearing.

11. We have thoroughly reviewed the evidence we heard at the original hearing from all the witnesses for the respondent to see what (if any) evidence of relevance to the remitted issue and in particular the two legitimate aims was before us. We refer to this question in our conclusions which follow.

The Law

12. The Tribunal has reminded itself of the provisions of **section 15 of the 2010 Act** which read:

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

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

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

(2) Sub-Section (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.

13. We have reminded ourselves that in considering so called justification, that we must consider an objective balance between the discriminatory effect of the act of dismissal (in this case) and the reasonable needs of the party who applies it. We have noted the words of Pill LJ in **Hardys and Hanson -v- Lax 2005.** This was a

decision of the Court of Appeal taken in the context of a claim of indirect sex discrimination but this test was applied to claims advanced under section 15 of the 2010 Act by the EAT in **Hensman –v- Ministry of Defence UKEAT/0067/14/DM**.

"Section 1(2)(b)(ii) requires the employer to show that the proposal is justifiable irrespective of the sex of the person to whom it is applied. It must be objectively justifiable (Barry) and I accept that the word "necessary" used in Bilka is to be qualified by the word "reasonably". That qualification does not, however, permit the margin of discretion or range of reasonable responses for which the appellants contend. The presence of the word 'reasonably' reflects the presence and applicability of the principle of proportionality. The employer does not have to demonstrate that no other proposal is possible. The employer has to show that the proposal, in this case for a full-time appointment, is justified objectively notwithstanding its discriminatory effect. The principle of proportionality requires the tribunal to take into account the reasonable needs of the business. But it has to make its own judgment, upon a fair and detailed analysis of the working practices and business considerations involved, as to whether the proposal is reasonably necessary. I reject the appellants' submission (apparently accepted by the EAT) that, when reaching its conclusion, the employment tribunal needs to consider only whether or not it is satisfied that the employer's views are within the range of views reasonable in the particular circumstances. The statute requires the employment tribunal to make judgments upon systems of work, their feasibility or otherwise, the practical problems which may or may not arise from job sharing in a particular business, and the economic impact, in a competitive world, which the restrictions impose upon the employer's freedom of action. The effect of the judgment of the employment tribunal may be profound both for the business and for the employees involved. This is an appraisal requiring considerable skill and insight. As this court has recognised in *Allonby* and in *Cadman,* a critical evaluation is required and is required to be demonstrated in the reasoning of the tribunal. In considering whether the employment tribunal has adequately performed its duty, appellate courts must keep in mind, as did this court in *Allonby* and in *Cadman*, the respect due to the conclusions of the fact finding tribunal and the importance of not overturning a sound decision because there are imperfections in presentation. Equally, the statutory task is such that, just as the employment tribunal must conduct a critical evaluation of the scheme in question, so must the appellate court consider critically whether the employment tribunal has understood and applied the evidence and has assessed fairly the employer's attempts at justification.

14. We have given close attention to the guidance contained in the EAT Judgment. We have reminded ourselves that the burden of proving the dismissal was proportionate to the legitimate aims advanced lies with the respondent.

15.We have given close attention to the decision of the Court of Appeal in **O'Brien - v- Bolton St Catherine's Academy 2017 ICR 737** and the Judgment of Underhill LJ at paragraph 45 onwards:

" In principle the severity of the impact on the employer of the continuing absence of an employee who is on long-term sickness absence must be a significant element in the balance that determines the point at which their dismissal becomes justified, and it is not unreasonable for a tribunal to expect some evidence on that subject. Often, no doubt, it will be so obvious that the impact is very severe that a general statement to that effect will suffice; but sometimes it will be less evident, and the employer will need to give more particularised evidence of the kinds of difficulty that the absence is causing. What kind of evidence is needed in a particular case must be primarily for the assessment of the tribunal, and the fact that Judge Serota, or I, might think that in this case the impact on the school of the Appellant's absence was obvious does not mean that the Tribunal erred in law in taking a different view….By the time of the appeal hearing the Appellant was claiming that she was fit. It is true that the Tribunal accepted that the panel might reasonably have required a

further examination before accepting that – see para. 202, which I quote at para. 31 above – but, even if that took a little time to arrange, the available evidence suggested that – to put it no higher – she might well be fit to return in the near future. In those circumstances the question of the impact of the Appellant's continuing absence on the school was thrown into sharp focus: even if her absence over the previous fifteen months had caused real difficulties, as I would for myself be very willing to accept without detailed evidence, that harm was already done, and if the school had in fact managed to cope adequately with those difficulties it might be expected it to cope a little longer. It is clear from the concluding sentence of para. 202 that that is how the Tribunal was approaching the question. I find it hard to say that the Tribunal was perverse in wanting more evidence about the school's ability to put up with the Appellant's absence for that short further period.

I can deal with ground 2 more shortly. The essence of the pleaded point is that in order to establish a defence of justification it is unnecessary that an employer demonstrate that it had itself carried out the necessary balancing exercise to establish whether the act complained of is proportionate; what matters is what the tribunal concludes on carrying out that exercise for itself. That is true, but the Tribunal plainly did not think otherwise. As appears from para. 28 above, it explicitly made its own assessment. It is true that it did in the course of doing so also refer to the fact, as it found, that neither panel had properly assessed the impact of the Appellant's absence; but that was not illegitimate, since it is well recognised that a tribunal will look more narrowly at a justification which was not articulated at the time".

16. We have given close attention to the authority of **Chief Constable of West Midlands -v- Harrod 2015 ICR 1311** referred to in the EAT Judgment and we set out the extract referred to by the EAT:

"I consider also that [Counsel for the employer] is right in his contention that the Tribunal focussed impermissibly on the decision making process which the Forces adopted in deciding to utilise A19. When considering justification, a Tribunal is concerned with that which can be established objectively. It therefore does not matter that the alleged discriminator thought that what it was doing was justified. It is not a matter for it to judge, but for courts and tribunals to do so. Nor does it matter that it took every care to avoid making a discriminatory decision. What has to be shown to be justified is the outcome, not the process by which it is achieved. For just the same reasons, it does not ultimately matter that the decision maker failed to consider justification at all: to decide a case on the basis that the decision maker was careless, at fault, misinformed or misguided would be to fail to focus on whether the outcome was justified objectively in the eyes of a tribunal or court. It would be to concentrate instead on subjective matters irrelevant to that decision. This is not to say that a failure by a decision maker to consider discrimination at all, or to think about ways by which a legitimate aim might be achieved other than the discriminatory one adopted, is entirely without impact. Evidence that other means had been considered and rejected, for reasons which appeared good to the alleged discriminator at the time, may give confidence to a Tribunal in reaching its own decision that the measure was justified. Evidence it had not been considered might lead to a more intense scrutiny of whether a suggested alternative, involving less or even no discriminatory impact, might be or could have been adopted. But the fact that there may be such an impact does not convert a Tribunal's task from determining if the measure in fact taken can be justified before it, objectively, into one of deciding whether the alleged discriminator was unconsidering or irrational in its approach. Case law is all one way on this: see Seldon v Clarkson Wright & Jacques [2012] UKSC 16; [2012] ICR 716 at paragraph 60 per Lady Hale: the aim "need not have been articulated or even realised at the time when the measure was first adopted", and per Lord Hope at paragraph 76: "..it does not matter if [the decision maker] said nothing about this at the time or if they did not apply their minds to the issue at all"; echoing the Court of Appeal's reasoning in Health and Safety Executive v

Cadman [2005] ICR 1546 at para. 28. Moreover, this approach coincides with that taken to determining proportionality in applying the European Convention on Human Rights and Fundamental Freedoms, an approach which is applicable in discrimination law as it is in the territory of Human Rights (Crime Reduction Initiatives v Lawrence UKEAT/0319/13/DA, 17th. February 2014). Thus in R (SB) v Denbigh High School [2007] AC 100 the House of Lords rejected the approach of the Court of Appeal (which was that the school should have asked itself a series of questions before determining on a ban on the wearing of the jilbab), and held that what mattered in any case was the practical outcome, not the quality of the decision-making process which led to it (see especially per Lord Bingham at paragraph 31). Belfast City Council v Miss Behavin' Ltd [2007] UKHL 19 further endorsed this."

Discussion and Conclusions

17. We remind ourselves that we concluded in the Judgment that the two aims relied on by the respondent in this matter were legitimate aims for the purposes of section 15 of the 2010 Act. Those aims were first the protection of scare public funds/resources and secondly reducing the strain on other employees of the respondent caused by the claimant's absence.

18. We note that those aims were only finally articulated by the respondent in closing submissions in February 2019 and differed from the aim originally pleaded as Mr Wyeth correctly points out in paragraph 22 of his submissions to us.

19. We have critically examined our notes of evidence to ascertain whether any of the witnesses for the respondent provided us with any evidence relevant to those two legitimate aims. Having carried out that exercise independently and then collectively we can identify no such evidence. The evidence of the dismissing officer Denise Brough contains no mention of either aim or of any evidence which might be said to be relevant to either aim. The same is true of all the other witnesses. We have noted paragraph 15 of the statement of Gary McDonald to which Mr Wyeth refers at paragraph 24 of his submissions. Mr McDonald was far removed from the decision to dismiss and his last involvement with the claimant was in November 2016 when he ceased to line manage the claimant. That was some 14 months prior to her dismissal. He would be a surprising source of evidence relevant to the question of proportionality of the decision to dismiss. In any event, we agree with the submission of Mr Wyeth that the evidence that Mr McDonald gave does not support the proportionality argument advanced but rather points to a practice of moving staff around to assist each command area, where need arises, so as to reduce any strain on employees.

20. Mr Tinnion fails to refer us in his submissions to any evidence given at the liability hearing before us relevant to the legitimate aims. That is doubtless because there was no such evidence before us and we so conclude.

21. That is not an end to the matter because this may be a case where the situation is so obvious that we do not need any evidence. We will consider that question in relation to each aim relied on in turn.

22. We consider next the effect of the dismissal on the claimant. The claimant had worked for the respondent for over 12 years and she had established a career in the

DWP. The claimant is not highly qualified and yet she had managed to establish herself in the service of the respondent earning some £18000 per annum with a valuable pension scheme attached. The claimant had experienced some unhappiness in her working relationships and had clearly lost faith in her managers as our findings of fact demonstrate. However, the claimant wished to continue her employment and had attended a work trial for six weeks at Eston which evidenced that intention. The employment was valuable to the claimant. The loss of her post had severe consequences for the claimant both financially and emotionally. The effect of the dismissal on the claimant was very severe.

23. We turn to the respondent's aims and assess each in turn.

24. We consider the question of the protection of public funds. The dismissing officer did not consider this matter as a reason to dismiss. That does not matter because it is our task to carry out the proportionality assessment. At the point of dismissal, the claimant had been absent for 289 days except for the period of time spent on the work trial at Eston. She had exhausted her entitlement to full pay whilst sick and had moved to half pay. Her entitlement to half pay was due to run out in February 2018 a matter of a few weeks after the dismissal on 10 January 2018. The ongoing cost to public funds for that reason was therefore small in the overall scheme of things. We have considered the argument advanced by Mr Tinnion that the ongoing cost of managing the claimant's absence in terms of management time would have been very considerable. We accept that by delaying the claimant's dismissal to enable a proper evaluation of the work trial to take place and to consider if it could or should be repeated or re-instated would have involved management time in terms of preparation, meetings and possible implementation but again, in the overall scheme of things, the cost of that input would be small. In any event, we accept the cogent submission of Mr Wyeth that it cannot be right that this (or any) respondent can rely as a basis for dismissal on avoiding the reasonable demands of meeting its employment law obligations in terms of managing an absence through ill health of an employee. The question is whether that absence is sustainable in terms of public funds and, on such evidence as was indirectly before us, the ongoing cost to public funds of continuing the claimant's employment for a further period to check on the question of the work trial and consequent alternative employment was small.

25. Indeed it could be said that the act of the dismissal was a greater burden to public funds than continuing the employment because the dismissal gave the claimant an entitlement (as was decided) to compensation from the Civil Service Compensation Fund of some £19000 which continuing the employment would have avoided or at least delayed. This is not a case where we can say it is obvious that the cost to public funds of continuing the employment renders the dismissal obviously proportionate to the aim of preserving public funds.

26. We balance the effect of dismissal on the claimant against the aim of preserving public funds. We afford respect to the decision of the dismissing officer in spite of her failure to consider the question of saving scarce public funds. Despite her long absence from work, there was a possibility that, had it been properly assessed and evaluated, the work trial could have resulted in the claimant retaining her employment. The cost of such a short delay was in reality minimal. That would have avoided the severe effect of dismissal on the claimant. We conclude that it was not

reasonably necessary to move to dismissal when it did given that there was another avenue open to it which might have removed the severe discriminatory impact of the dismissal on the claimant. We conclude that the dismissal of the claimant was not proportionate to the aim of preserving public funds.

27. We consider the legitimate aim of reducing the strain on other employees of the respondent caused by the claimant's absence.

28. This was not a matter relied on by the dismissing officer as a factor leading to the decision to dismiss and we had no evidence of the effect on any other employee of the claimant's absence. However, as before, we afford respect to the decision of the dismissing officer in spite of her failure to consider the effect of the claimant's absence on other employees. We have considered whether we need evidence on this point or whether the effect is so obvious that a statement from a witness to that effect would suffice. Leaving aside that we received no such statement, we do not accept that the stated effect is obvious. The respondent has a large workforce in terms of numbers and has a practice of moving members of staff around to cover absences where they inevitably occur in such a sizeable workforce as the evidence of Gary McDonald confirmed – albeit for different reasons. We are not prepared to assume, as Mr Tinnion would have us do, that the claimant's team had been one member down for 289 days resulting in additional pressure on the team and a reduced level of service to customers. We take account of the working practices and business needs of the respondent, of the lengthy absence running to 289 days of the claimant and the claimant's lack of co-operation and failure to engage with her managers which understandably caused frustration to those managers. We have balanced those factors against the effect on the claimant of the dismissal. We conclude that it was not reasonably necessary to move to dismiss the claimant when it did and the dismissal was disproportionate to achieving this legitimate aim. Another avenue was open to the respondent namely that of properly assessing the work trial and considering whether it had failed at all or, if it had, whether it should reasonably have been re-implemented. We conclude it was not reasonably necessary to move to dismiss the claimant when it did to achieve this legitimate aim.

29. The dismissal of the claimant at the point it occurred and on the specific facts of this case was not proportionate to achieving either aim relied on by the respondent considered individually or together. Accordingly, the claim of discrimination arising from disability is well-founded and the claimant is entitled to a remedy.

Final Comments

30. At paragraph 18.6 of the Judgment we referred to what will be a central issue at any remedy hearing. Many of the cogent points made by Mr Tinnion in the submissions provided to us on the question of proportionality will come into sharp focus in terms of remedy. We conclude that in dismissing the clamant when it did, the respondent effectively jumped the gun. It did not act proportionately and it acted unreasonably. Whether those actions in fact made any, or much, difference will be the central issue for the remedy hearing.

31. A TPPH will be arranged as soon as possible to complete the arrangements for the remedy hearing.

EMPLOYMENT JUDGE A M BUCHANAN
JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON 4 November 2020