# EMPLOYMENT TRIBUNALS

**Claimant:** Miss Perrin

**Respondent:** Liverpool University Hospital NHS Foundation Trust

**Heard at:** Manchester (CVP) **On:** 22 & 23 October 2020 & 9 November 2020 (In Chambers)

**Before:** Employment Judge Hill
Mrs C Bowman (Member)
Ms P Owen (Member)

**REPRESENTATION:**

**Claimant:** Ms K Perrin (Mother)
**Respondent:** Ms Bryony Clayton (Counsel)

# RESERVED JUDGMENT

The unanimous decision of the Tribunal is that the claimant's claims for unfair dismissal and disability discrimination are well founded and succeed.

# REASONS

1)The Claimant presented a claim form (ET1) on 4 November 2019 and brought claims for unfair dismissal (contrary to section 98 of the Employment Rights Act 1996) and disability discrimination (contrary to section 15 Equality Act 2010). The Claimant also brought claims of failure to pay notice pay and holiday pay but both claims were withdrawn and dismissed at a Preliminary Hearing on 3 February 2020.

2)The Respondent presented a response form (ET3) on 20 December 2019 resisting the claims. The Respondent accepts that the Claimant was at the material time disabled within the meaning of section 6 of the Equality Act 2010 and that it had knowledge of the same.

**The Issues**

3)A preliminary Hearing was held on 3 February 2020 where the parties agreed a list of issues which is set out below. An additional issue agreed between the parties in respect of an alternative to dismissal was that the Respondent failed to offer the Claimant a career break.

Unfair Dismissal

4)It was agreed between the parties that the sole or principal reason why the claimant was dismissed was that she was absent on long-term sick leave and the respondent believed that there was insufficient prospect of her returning to work within a reasonable time. The claimant accepts that this is a reason that related to her capability.

5)The fairness or otherwise of the dismissal therefore turns on one question: Did the respondent act reasonably or unreasonably in treating that reason as a sufficient reason to dismiss the claimant? When addressing this question, the claimant will argue, that the respondent acted unreasonably by:

i) Failing to consider the claimant for ill-health retirement or a career break as an alternative to dismissal.
ii) Failing to carry out a final review meeting (with Occupational Health in attendance) prior to dismissal; and
iii) Failing to delay the dismissal decision to await the outcome of two further medical procedures.

Discrimination arising from Disability

6)One act of unfavourable treatment is alleged, namely the claimant's dismissal. As with unfair dismissal there is much on which the parties agree:

i) There is no dispute that the claimant was disabled at all material times.
ii) The respondent knew about the claimant's disability throughout her sickness absence
iii) It is common ground that the claimant was dismissed because of her past long-term absence and expected future absence. That reason arose in consequence of her disability.
iv) Dismissing the claimant was a means of achieving the aim of ensuring continuity of patient care. It was agreed between the parties that this was a legitimate aim
v) The only issue in dispute between the parties is whether it was a proportionate means of achieving the legitimate aim and the focus will be on whether the respondent the respondent could have achieved the same

legitimate aim otherwise than by dismissing the claimant. The claimant relies substantially on the same argument as set out under the heading unfair dismissal (see 5. I above).

**The Evidence**

7) The Tribunal was provided with a bundle of documents consisting of 308 pages. Two written witness statements were provided for the claimant; the claimant and Ms K Perrin (the claimant's mother) and three written witness statements for the respondent; Ms Deborah Herring, Chief People Officer (Appeals Officer); Ms Jane Williams, Matron for Gastroenterology and General Surgery (Dismissing Officer) and Ms Lesley Black, Clinical Business Manager for Surgical Specialities (Complaint's Officer). All witness gave oral evidence.

8) The Respondent was represented by Counsel and the Claimant was represented by her mother. Counsel for the Tribunal helpfully provided a chronology and reading list and the Tribunal spent time the first morning reading the witness statements and suggested reading list.

9) The claimant remains unwell and it was agreed that we would take regular breaks throughout the that the claimant would ask if further breaks were required.

**Findings of Relevant Facts**

10) This was a case where the parties were largely in agreement on the facts.

11) The Claimant was employed by the Respondent as a Nursing Assistant in the Surgical Assessment Unit (SAU) from 23 January 2017 until her dismissal on 24 June 2019. The Respondent confirmed that throughout her employment her performance was never in question and she was considered to be a hard worker and valued employee.

12) The Claimant became unwell and was admitted to hospital on 25 June 2018 due to pyelonephritis and bowel problems. The claimant has now been diagnosed with a rare and debilitating medical condition, a complex visceral pain syndrome causing severe chronic abdominal pain and objectively demonstrate bowel dysfunction. This has had a devastating effect of the claimant's quality of life. The Respondent has accepted that the Claimant is disabled for the purposes of the Equality Act 2010 and that it became aware of the Claimant's condition in June 2018 when the Claimant was hospitalised (para 44 ET3).

13) The Respondent has a detailed attendance management policy. Extracts of the policy are set out in the bundle. In summary the Respondent operates a four-stage procedure which may lead to dismissal and a further opportunity to appeal. The Respondent implemented this process and details of the procedure are set out at pages 92 – 110 of the bundle.

14) The purpose of the attendance management policy is set out on page 95. The main points being that there is a clear framework through which attendance is

managed; that sick employees are treated reasonably, fairly and consistently; that employees are aware of appropriate support and assistance to enable a return to work at the earliest opportunity and appropriate on-going support and that the needs of the Trust are satisfied in securing the attendance of employees at work.

15) The Tribunal heard evidence from the Respondent's witnesses in respect of the impact long-term sickness absence has on the Trust's ability to deliver services to patients, and the Trust's inability to continue to sustain long term non-attendance. Both Ms Deborah Herring and Ms Jane Williams gave evidence that working on the SAU ward required consistency of well-trained staff and the use of bank staff was not a long-term option and ultimately impacted on the quality of care for the patients. This was accepted by the Tribunal.

16) The Respondent's policy set out trigger points/levels which could be implemented ranging from a stage 1 an informal meeting, to stage 4 which may result in dismissal. The normal length of time it would take for a person on long term sickness to progress through the stages of the procedure is six months absence in a rolling 12-month period. As an employee progresses through the stages, in the case of long-term sickness, the policy provides that the employee would be referred to occupational health four times before dismissal: after the stage 1 meeting where is not possible to establish a return date within 20 days; after the second stage meeting where it is not possible to establish a date for return; prior to stage 3 meeting and prior to stage four meeting. The Tribunal accepts that the Claimant was referred to occupational health in accordance with this policy and copies of the reports are included in the bundle.

17) The sections of the policy that are of particular relevance and importance to the Tribunal are set out at sections 4.14.2; 4.15; 4.17 and 4.21.

a) 4.14.2 Additional considerations relating to the nature of long-term sickness absence - Final paragraph: '*There may be occasions where the employee and manager jointly agree to an employment break for a period of time where, for example, the employee undergoes a course of supportive adjustment or treatment. The terms of the Career Break Policy may apply in such cases. The Attendance Management Policy process should be suspended at this time.*'

*b)* 4.15 of the policy the final sentence reads *'NHS ill health retirement may also be an applicable option for the employee'.*

*c)* 4.17 reference is made to the Trust's obligations under the Equality Act and the final sentence states*, 'NB in all cases where the employee has a disability, reference much also be made to the Trust's Policy for Supporting Staff with Disabilities'.* The Tribunal was not provided with a copy of that policy, neither was any reference made to it during the attendance management process or at this hearing.

*d)* 4.21 Ill Health Retirement *'An employee who is a member of the NHS Pension Scheme may indicate his/her wish to retire on the grounds of ill health and may be eligible to apply if they have the minimum qualifying period of 2 years. This*

*action will be conducted totally separately to termination of employment by the trust on the grounds of ill health and will not be dependent upon the outcome of a decision from the NHS Pensions Agency. The trust cannot influence or be responsible for any decisions made by the NHS Pensions Agency. For further information refer to the Line Managers Toolkit Guide for Managing Attendance.'* The Tribunal was not provided with a copy of this Toolkit.

18) Although the Tribunal was not provided with a copy of this toolkit further reference is made to the ill health retirement scheme on page 112Y2 of the bundle:

a) '*Staff contributing to the NHS Pension Scheme who are permanently prevented from performing their duties due to ill health may make an application to NHS Pensions for ill health retirement. It is most usual for such cases to be linked to sickness absence and therefore to arise during discussions with employees under the terms of the Trust's Attendance Management Policy. Reference should therefore be made to this policy when considering ill health retirement.'*

19) At page 112 Z reference is made to Ill Health Retirement and states:

*a) 'The decision as to whether or not the application is accepted rests solely with the NHS Pension Agency.'*

20) The Career break policy is set out at pages 110A – 110k of the bundle which states that in order to be eligible, an employee must have been continuously employed by the Trust for one year at the time of application, which the Claimant satisfied. The policy also includes at 4.4 acceptable reasons for a career break which states:

*a) 'Childcare/eldercare; the care of a dependant person; sabbatical; training; working abroad; return to full time education' travel; voluntary or charitable work'* and further states *'other appropriate reasons may be considered under the scheme.'*

*21)* Further details of the scheme were set out at pages 112 O – 112 R which provides that the minimum length should be no less than 3 months and maximum length of a breaks should not exceed 5 years with provision of the break to be extended or shortened. In addition, it guarantees that if the applicant returns within one year the same job will be available (as far as is reasonably practicable) and if longer than one year the employee may return to a similar job and that the period of the break should count towards continuous employment for statutory purposes.

22) The Claimant first went off sick on 25 June 2018 and in accordance with the absence management policy the claimant was required to attend an informal stage 1 meeting to discuss her absence and arrangements were made to speak to the Claimant by telephone on 17 July 20218. The outcome of this meeting was that the Claimant was formally placed on stage 1 of the procedure.

23)A referral was made to Occupational Health (OH) and the Claimant attended this meeting on 9 August 2018. The outcome of this referral was that the Claimant was unfit for work and a review was required after a period of six weeks.

24)The Claimant remained off sick and was invited to a stage 2 meeting 19 September 2018, however the Claimant did not receive the notification and it was therefore rearranged for 9 October 2018. The respondent was informed by OH that the claimant was too unwell to attend the meeting and it was therefore rearranged again for 6 November 2018. The Claimant did attend that meeting and the outcome of that meeting was that the Claimant was formally placed on Stage 2 of the procedure.

25) The claimant continued being off sick while she was undergoing further tests and treatment and expected to have another appointment with OH. The Claimant's line manager agreed to follow this up in January 2019 and a further telephone appointment was made with the Claimant for 30 January 2019, the outcome of which was that the Claimant remained unfit for work.

26)The Claimant was then invited to a stage 3 meeting on 13 March 2019 which took place at the Claimant's home. The Claimant was formally placed on stage three of the Trust's Attendance management policy. A letter confirming the outcome of this meeting is set out on pages 120-121 of the bundle. The letter referred to the fact that the Claimant was likely to fall under the remit of the Equality Act 2010 and that consideration may need to be given to adjustments to the sickness absence triggers. Whilst the Tribunal finds that the Respondent did agree to rearranging dates of meetings either due to the Claimant's health issues or on one occasion because she had not received a letter, there was no evidence of the Respondent taking positive steps to make adjustments to the process and the fact that the Claimant exceeded the usual six month period to reach stage four was because she requested meetings to be moved rather than any formal decision by the Respondent to vary the triggers to the absence management procedure.

27)The Respondent made reference to the adjustments it had made to the procedure several times but it appeared to be adjustments instigated by the Claimant rather than the Respondent.

28)The Tribunal did not have access to the Trust's policy in respect of disabled employees and therefore it is not known if there are other adjustments that could or should have been made to the policy.

29)The letter advised the Claimant that if she moved to stage four then a potential outcome would be dismissal. The Claimant at that time was worried about triggering a level four meeting and was anxious to return to work. The letter states, *'You became visibly upset by the fact that you were anxious to return to work however were worried about the triggers if your absence continued due to slow progress as a result of delays in your treatment. Clair explained the policy and advised you that if you did trigger Stage 4 a potential outcome could be termination of your employment, however she did try to reassure you that this was not the only outcome and each case is assessed individually, if it can be demonstrated that*

*there is an expectation of a return to work. She also explained that if your contract was to be terminated due to not being able to sustain your absence levels, if your health improved in the future, we would welcome an application for you to return.'* At this stage it is evident that the respondent was keen for the Claimant to return to their employment if the Claimant was dismissed at the next stage, but no consideration was given to a career break.

30) A further OH review took place on 28 March 2019 where again the Claimant was declared unfit for work but with optimism that the Claimant's health may improve over the coming weeks.

31) The Claimant attended a further occupational health meeting on 20 May 2019 where it was reported that the claimant was due to undergo further interventions to help ease her condition and in particular her pain management. At this stage OH reported that it was possible if the interventions were successful that the Claimant may be able to return to work on a phased return by the end of July.

32) The Claimant remained absent from work and was then invited to a Stage Four meeting on 6 June 2019. The Claimant was too unwell to attend and it was rearranged for 24 June 2019. The letter inviting the Claimant to the stage four meeting confirmed that this meeting may result in her dismissal.

33) At this meeting it was agreed that the Claimant had been diagnosed with a hypertonic bladder and bowel condition and that currently there was no cure. The treatment available to the claimant at that time was for symptom management, pain control and managing her nutritional status. The Claimant was required to self-catheterise three times a day and use manual irrigation to assist her bowel emptying. The Claimant had nasogastric tube fitted and the long-term goal was for the claimant to have a PEG tube fitted.

34) The Claimant obtained medical evidence from her clinicians prior to attending the stage four meeting. A letter dated 14 June 2019 from Professor G L Carlson, who stated that the Claimant was suffering from a long-term complex chronic health condition at that time he considered provided she received support from her colleagues in respect of pain management and implement feeing through a gastrostomy tube he considered that her quality of life was likely to improve significantly and that her condition should not 'automatically disqualified' from being able to work. He further stated that *'I do think it is important that your employers are aware of your chronic ill health, and the need for you to receive expert medical attention as and when required, without potentially subjecting you to anxiety caused by regular notification of your future capacity for work and sickness absence'.* A second letter by Professor Carlson dated 14 June 2019 where he suggested that the Claimant should be fitted with a PEG tube which would allow her to return to work and feed herself in an unobtrusive manner.

35) The Claimant confirmed at the stage four meeting that she had also seen her consultant on the 18th June where the insertion of the PEG tube had been discussed. The Claimant confirmed at that time and in evidence before this Tribunal that her return to work would have been dependent on several factors

including waiting for the procedure to take place and a recovery period of 12 – 16 weeks including effective pain management control. The Claimant did not have a date at that time and the Tribunal understands that the PEG procedure has not yet taken place due a second opinion who considered the operation too dangerous.

36) The Outcome of the stage four meeting was dismissal. A letter to the Claimant confirming her dismissal is set out at pages 131 and 132 of the bundle. The letter confirmed the discussions of the stage four meeting and confirmed that the claimant's employment was that her employment was being terminated with immediate effect (24th June 2019) and that she would be paid 4 weeks' pay in lieu of notice and outstanding holiday pay. The letter also stated that the Respondent hoped the Claimant's health would improve and that they would welcome an application from her in the future should she be able to return to work.

37) There is no evidence the Respondent discussed the option of a career break or ill health retirement with the Claimant at any of these meetings. It is not clear if notes were taken at any of the meetings but not notes were provided to the Tribunal.

38) The Claimant appealed the decision to dismiss her. A letter setting out her appeal grounds can be found at page 190-192 of the bundle. In summary the grounds for appeal were that

a) The Respondent's had failed in their duty of care in keeping in regular contact with her during her absence
b) Options regarding ill health retirement were not discussed with her
c) The Respondent had not clarified whether extension to the trigger points in the attendance management process were under the remit of the Equality Act 2010.
d) That she had maintained regular contact with the Respondent and pursued all avenues to speed up her prognosis and treatment with the aim of returning to work.

39) An appeal hearing was held on 5 September 2019. The claimant was accompanied by her mother. The Appeal panel consisted of Debbie Herring (Director of Workforce & Performance) who chaired the meeting; Ian Jones (Director of Finance and Sue Musson (Chair Interim Board). Also in attendance was Vicky Roper (Workforce Transformation Lead) as Panel Support; Jane Williams, (Matron) and Steven Richardson (HR Business Partner) for the management side.

40) During this meeting, the Claimant and her mother said that the Claimant wanted to be able to return to work in the future. Her mother also pointed out that although Marie was not getting any pay and although she could not have an open-ended job up until stage four, she felt that she was able to return to work and that the Claimant was aware of other people who rehabilitated for up to two years and the dismissal was too soon. She explained that the Claimant felt like she had been 'written off and would never work again'.

41) The Claimant acknowledged that she may not be able to return to her old role and would consider shorter hours or a lighter work in the future. The Respondent did look at alternative roles but at that time the parties agree that she was not able to take up those offers at that time. The Claimant stated that she felt like she had a goal to go back to work. The Claimant acknowledged that she may not be able to return to the ward and that she had been honest about that throughout the process.

42) This appeal hearing primarily focussed on the desire by the Claimant to be able to return to work and the focus of this tribunal has been on that point, either retirement on ill health grounds or a career break. Although the Claimant raised other issues in her appeal and has also referred to them in her ET1 and statement she confirmed that the issues for the tribunal to determine were those referred to above (paragraph 6)

43) The notes of the appeal hearing set out at pages 213A – 213 G. The notes record that Ian Jones raised the issue of the Claimant being able to return to work. On page 213C he asks, '*Can I reconfirm that if MP (the claimant) health improves in the future and she is capable and able you would reemploy her with a role in the organisation?'* It was confirmed by Jane Williams that if she was capable of a return to work, she would have no doubt that she would be successful. Jane Williams also said that she would take the claimant back *'in a heartbeat and that she could apply for a job and would encourage her to do so.'*

44) Throughout these proceedings the Respondent has stated on several occasions that the Claimant was an excellent employee and very good at her job and that they would welcome her back into employment.

45) The claimant's mother specifically asked why the Claimant had not been finished on health grounds so that she could return to work in the future and was told by Jane Williams that she was not permitted to do so and that she had to be guided by occupational health. No reference had been made in the OH reports to early retirement and indeed it was suggested that after treatment or other interventions that the Claimant was likely to be able to return to work. The Tribunal accepts that the medical evidence available at the time indicated that the Claimant was likely to be in a position to return to work at some point in the future.

46) The appeal panel upheld the Respondent's decision to dismiss. However, the panel stated at Page 213 bundle *'your point that it was hope while you felt you were still in the system and aiming for a future, you were going to get well, resonated with us a as Panel. We would like to offer you some support to get access back I to work in the next 6/12 months if an improvement. Not just process and registering but looking at a package of keeping in touch with you and need to think about how that works.'* The Tribunal finds that the Trust had in place a policy that applied to circumstances such as this, a career break.

47) The Respondent did contact the Claimant in early January 2020 to discuss whether she was fit enough to do some bank work but at that time the Claimant was not in a position to discuss it further.

48) Ms Williams gave oral evidence to the Tribunal that long term absence impacts significantly on patient care. Particularly as working on the SAU Unit requires highly trained staff and a consistent team. Whilst temporary staff can assist in emergency situations for example short term absence or other unforeseen absences this was not a viable option long term. The Claimant did not dispute this and in cross examination. The Tribunal accepted the evidence of Ms Williams in regard to the impact and the need for consistent patient care.

49) Giving oral evidence Ms Williams was questioned on why after receiving additional medical evidence from the Claimant, she did not refer the Claimant back to occupational health. Ms Williams stated that as the further evidence provided by the Claimant did not suggest that the Claimant would be able to return to work within a reasonable period and therefore, she did not consider that a further OH report would be of assistance. The Tribunal accepted this evidence and found that it was reasonable for Ms Williams to have relied upon the latest medical evidence available to her from occupational health.

50) When asked about why a career break had not been discussed Ms Williams said that she did not know she was able to offer it on the grounds of sickness and that as the Claimant was not fit to work so it was not an option. She also said, *'I can only apologise my understanding was it was not an option and therefore it was not given any consideration'*. Ms Williams stated that she understood it was only used quite infrequently and that she understood employees are unable to access any form of income or benefits during the period of a career break. Ms Herring's statement she says, *'Marie was very clear that she wanted to return to work when she felt well enough to do so and ill health retirement would close the door to this possibility'*. Ms Williams did discuss with the Claimant returning to work when she was fit enough to return but did not raise the option of a career break.

51) Ms Herring's evidence was that a career break was considered at the appeal hearing and that the panel considered it. She states that the reason it was rejected was because the Claimant would have been unable to access any income or benefits. There is no reference in the appeal hearing notes to any discussion taking place with the Claimant regarding a possible career break or asking the Claimant what the impact on her finances would be should she take one. Ms Herring's evidence was that she asked the Claimant at the beginning of the hearing what outcome she hoped for because '*ultimately it is important to understand each individual's position and circumstances.'*

52) The Claimant's evidence when cross examined, was that the decision in respect of any financial impact it may or may not have had was a decision for her and that the Respondent was not aware of her financial circumstances. She had moved in with her mother and had the support of her family. The option of a career break was never discussed with the claimant. The Tribunal found that the Respondent failed to consider all the facts because it did not speak to her about the option.

53) The Tribunal was not provided with any evidence in support of the Respondent's assertion that the Claimant would not have been able to claim benefits or obtain other income neither did the Respondent provide any evidence that the financial

impact of a career break was discussed with the Claimant. The notes of the appeal hearing do not show that any discussions took place around this issue and the Respondent concedes that the financial implications, if any, were not discussed with the Claimant.

54) The Claimant wanted to return to work and knowing she was still 'employed' by the Respondent was a motivating factor in her recovery. The Claimant's mother accepted that she may not have used the correct terminology at the appeal hearing but that did not prevent the Respondent from considering it. In fact, the evidence shows that the Respondent did consider it but did not discuss it with the Claimant because of its perceived understanding of her financial situation or the effect it would have on her financial situation. The Respondent at no time has said either during or prior to these proceedings that they did not want to allow the Claimant to return to work. The Respondent was looking at ways to ensure that the Claimant was able to return to work. Ms Herring stated that the Trust '*wanted to ensure a programme was put in place by the Trust to enable Marie to return to work at the trust as and when her health improved'.* Ms Herring also says in her statement at para 44 that the panel considered the option of terminating her employment and offering to support her back into work at a later date was a better option because of their view that the Claimant would be worse off.

55) The Claimant's evidence when it was suggested to her that she would have been in a worse financial position had the Trust put her on a career break was that she was living with her mother and her financial circumstances would not have prevented her from taking a career break. She also stated, *'it would have been my decision'*. The Tribunal accepts this evidence and finds that the Claimant was never given an opportunity to discuss the impact of a career break and that consideration of it was done behind closed doors and not referred to until these proceedings.

56) Ms Herring states at paragraph 6 of her witness statement that she is very familiar with the Trust's absence management policy and that she is responsible for all HR policies and procedures. Ms Williams also confirms that she has had specific training on the Trust's Attendance and Management policy and has had guidance from the Trust's HR department. The Tribunal finds that Ms Williams was not aware of the option of giving a career break and her evidence was that she did not know and apologised. Ms Herring's evidence was that she was aware because she states that she considered it with the panel but gave no explanation as to why she did not discuss it with the claimant. The only reason given by the Respondent for not agreeing to the option of a career break with the claimant was Ms Herring's understanding that agreeing to a career break would result in financial difficulties for the Claimant. The Tribunal finds that it was therefore possible to in these circumstances for a career break to have been offered.

57) The Claimant had raised a complaint about her treatment which was raised at the hearing and Ms L Black gave evidence. However, it was agreed that this was not relevant for these proceedings.

**The Law**

Unfair dismissal

58) Section 98 ERA provides that it is for the employer to establish the reason for the dismissal and to show that it was a potentially fair reason.

59) If the reason for dismissal relates to the capability of the employee to perform work of the kind that the employee was employed by the employer to do, then it is potentially fair (section 98 (2) (a) ERA).

60)Where the employer satisfies the Tribunal that there was a potentially fair reason for dismissal, then section 98(4) ERA provides:

"The determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)

> (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a reason for dismissing the employee, and
>
> (b) shall be determined in accordance with equity and the substantial merits of the case."

61)In deciding the reasonableness of the decision to dismiss the starting point is always the words of section 98(4) themselves. The Tribunal has to consider the reasonableness of the employer's conduct but must not substitute its decision for that of the employer. The function of the Tribunal is to determine whether in the particular circumstances of the case and whether the decision to dismiss fell within a band of reasonable responses, which a reasonable employer might have adopted. ***Iceland Frozen Foods Ltd v Jones [1982] IRLR 439.***

62)Where dismissal is for a reason relating to ill health, guidance has been given in ***BS v Dundee City Council [2014] IRLR 131*** as follows:

> *First, in a case where an employee has been absent from work for some time owing to sickness, it is essential to consider the question of whether the employer can be expected to wait longer. Secondly, there is a need to consult the employee and take his views into account. We would emphasise, however, that this is a factor that can operate both for and against dismissal. If the employee states that he is anxious to return to work as soon as he can and hopes that he will be able to do so in the near future, that operates in his favour; if, on the other hand he states that he is no better and does not know when he can return to work, that is a significant factor operating against him. Thirdly, there is a need to take steps to discover the employee's medical condition and his likely prognosis, but this merely requires the obtaining of proper medical advice; it does not require the employer to pursue detailed medical examination; all that the employer requires to do is to ensure that the correct question is asked and answered.*

63) In ***Spencer v Paragon Wallpapers Ltd [1976] IRLR 373***. Phillips J emphasised the importance of scrutinising all the relevant factors:

> *'Every case depends on its own circumstances. The basic question which has to be determined in every case is whether, in all the circumstances, the employer can be expected to wait any longer and, if so, how much longer?' Relevant circumstances include 'the nature of the illness, the likely length of the continuing absence, the need of the employers to have done the work which the employee was engaged to do'.*

64) In the case of long-term ill health dismissals, as well as the general requirement to adopt a fair and proper procedure, there are three matters which go to the issue of fairness:

i) It is essential to consider the question of whether or not the employer can be expected to wait longer for the employee's return.
ii) There is a need to consult with the employee and take his or her views into account.
iii) There is a need to take steps to find out about the employee's medical condition and his or her likely prognosis. This merely requires the obtaining of proper medical advice.

65) The importance of consultation has been stressed in various cases. What is required, as stated in ***Spencer v Paragon Wallpapers***, is *'a discussion so that the situation can be weighed up, bearing in mind the employer's need for the work to be done and the employee's need for time in which to recover his health'*.

<u>Disability Discrimination</u>

66) Section 15 of the Equality Act provides:

Discrimination arising from disability

(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.

67) Section 15(1)(b) therefore allows that the unfavourable treatment identified for the purposes of section 15(1)(a) to be justified if it is a proportionate means of achieving a legitimate aim. Justification of the unfavourable treatment requires there to be an objective balance between the discriminatory effect and the reasonable needs of the employer.

68) In assessing the legitimate aim defence, the EAT has held that there is a requirement to consider fully whether (i) there is a legitimate aim which the

respondent is acting in pursuance of, and (ii) whether the treatment in question amounts to a proportionate means of achieving that aim (***McCullogh v ICI PLC [2008] IRLR 846***).

69) In ***Hensman v Ministry of Defence UKEAT/0067/14/DM*** Singh J held that when assessing proportionality while an ET must reach its own judgment, that must in turn be based upon a fair and detailed analysis of the working practices and business considerations involved, having particular regard to the business needs of the employer.

70) When determining whether or not a measure is proportionate a Tribunal is required to consider whether or not any lesser measure might nevertheless have served the employer's legitimate aim. In other words, could alternative measures have met the legitimate aim, without such a discriminatory effect? If proportionate alternative steps could have been taken, the unfavourable treatment is unlikely to be justified. ***Aster Communities Ltd (formerly Flourish Homes Ltd) v Akerman-Livingstone [2015] UKSC 15***

## Conclusions

71) The issues for us to determine are essentially the same issues for both claims. There is some overlap between in terms of our findings of fact and conclusions. However, we reminded ourselves of the need to consider the two claims separately and therefore both claims have been addressed separately although many aspects are applicable to both and the judgment should be considered in the whole.

Unfair dismissal

72) The Parties agree that there was a potentially fair reason for the dismissal, capability. Once a potentially fair reason has been established the Tribunal is required to decide whether the employer acted reasonably or unreasonably in dismissing for that reason.

73) The Tribunal was helpfully directed to the case of ***Spencer v Paragon Wallpapers Ltd [1976] IRLR 373*** which provides useful guidance when considering cases which involve long term absence, see above. The Tribunal and the parties accept that the Claimant was at the time of her dismissal still very unwell and that any return to work was not likely before further treatment and a recovery period. The Claimant had at the time of dismissal been absent from work for 12 months.

74) There was much common ground between the parties in respect of the chronology of events leading to the Claimant's dismissal. The issues for the Tribunal to consider in determining whether the respondent acted reasonably or unreasonably in dismissing the Claimant were whether the Respondent could be expected to wait any longer and if so, how much longer and whether the Respondent failed to

a) consider the claimant for ill-health retirement or a career break as an alternative to dismissal.

b) carry out a final review meeting (with Occupational Health in attendance) prior to dismissal; and
c) to delay the dismissal decision to await the outcome of two further medical procedures.

Issue 1 – Ill Health Retirement or Career Break

75) The Claimant argues that the Respondent should have considered the claimant for ill health retirement or a career break.

76) The Respondent argued that neither the career break nor ill health retirement were raised as issues at the stage 4 meeting but say they were considered in detail at the appeal stage of the process. Further the Respondent argues that ill health retirement was not in their 'gift' and a career break would have been a financial detriment to the claimant. The Respondent suggests that for these reasons it does not render the dismissal unfair.

77) The Claimant argues that these things were never discussed with her and she was never given an opportunity to explore the options.

78) Consultation in any ill health dismissal process is important. It gives both parties an opportunity to discuss options that are available and allows due consideration to be given to alternatives to dismissal. We have concluded that the Respondent failed to appropriately consult and explore alternatives to dismissal with the Claimant.

79) The Respondent had a comprehensive absence management policy which included provision for ill health retirement or a career break in relation to employees who were on long term sickness absence. We have found no evidence that either of these options were discussed with the Claimant either prior to the decision to dismiss or in the case of ill-health retirement in any detail and in the case of a career break at all, at the appeal stage.

80) The Respondent argued that based on the medical evidence available to it at the point of dismissal and at appeal stage the Claimant did not satisfy the criteria for ill-health retirement. The Respondent also argued that it was not a decision it could make and that any decision regarding retirement on the grounds of ill-health is taken by an outside agency and is designed for members who are permanently prevented from performing their duties. The Claimant also accepted that at the time of dismissal it was anticipated that she would be able to return to work at some point in the future. We are satisfied that the Respondent was not able to make that decision and that at the time of dismissal and at the appeal stage the medical evidence did not support an application for ill health retirement. The Tribunal, however, does find that the when the Claimant raised the issue of ill health retirement this was not explained clearly to her at any stage of the process and she was never informed of how to make an application.

81) In respect of the career break option, the Respondent argued that it would not be usual to use a career break in such circumstances where there has been a defined

period of absence. However, Counsel for the Respondent submitted that a career break (along with ill health retirement) was considered 'in detail' at the appeal hearing. The evidence before us was that Ms Herring asked the Claimant at the beginning of the appeal hearing what outcome she hoped for and in her words *'as ultimately it is important to understand each individual's position and circumstances'.* We find that the Respondent failed to take into account her position and circumstances and made assumptions on her financial position without speaking to her to obtain her views.

82) We also considered that Ms Williams at the Stage 4 hearing, the dismissal hearing, knew that the Claimant anticipated that she would be able to return at some point in the future and that the medical evidence supported that view. Ms William's gave evidence that as a result she confirmed to the Claimant that when she was in a position to return to work, she would welcome an application from her. Ms William's evidence in cross examination was that she did not know she could offer a career break and apologised. Ms Williams was familiar with the policies of the Respondent and said that she had support from HR during this time. Although the Tribunal accepted Ms Williams evidence that she did not know this was an option it is not sufficient for an employer to rely on their lack of knowledge in these circumstances. However, in this case whilst Ms Williams may not have been aware it is clear that by the appeal stage Ms Herring was aware and did consider it.

83) Whilst we accept that it would appear there were brief discussions during the appeal hearing regarding ill health retirement there was no evidence that discussions around a career break were raised at all during this hearing. Further in Ms Herring's statement she says, *'Marie was very clear that she wanted to return to work when she felt well enough to do so and ill health retirement would close the door to this possibility'* and yet the Claimant's views were not sought on this issue despite there being an opportunity to do so at the appeal hearing. The Respondent clearly understood that a career break was an option because their evidence is that it was considered during the panel discussion. We consider this to be 'behind closed doors' without any input from the Claimant who was not able to discuss the perceived financial implications it would have on her.

84) We also considered that the appeal notes themselves and there is no evidence that the option of a career break was discussed or mentioned. We considered that the Respondent had a clear policy that included an option for a career break and that it was included in the Absence Management Policy. It was a reasonable alternative to dismissal. No evidence other than the financial circumstances of the Claimant was provided as to why this option could not have been offered and implemented. Indeed, the Respondent's own case is that they wanted the Claimant to return to work when she was well. Ms Herring went further, and her evidence was that the appeal panel *'wanted to ensure a programme was put in place by the Trust to enable Marie to return to work at the trust as and when her health improved'.*

85) We find that the Respondent did have such a programme, a career break. Ms Herring also says in her statement at para 44 that the panel considered the option of terminating her employment and offering to support her back into work at a later

date was a better option because of their view that the Claimant would be worse off.

86) We find that the Respondent failed to consult with the Claimant about the option of a career break. The Respondent's set out how a tribunal is required to approach this issue in its submission

> *The importance of consultation has been stressed in various cases. What is required, per* **Spencer v Paragon Wallpapers***, is 'a discussion so that the situation can be weighed up, bearing in mind the employer's need for the work to be done and the employee's need for time in which to recover his health'.*

87) We find that the Respondent failed to consult properly with the claimant about all the options available to her or have a discussion regarding the option of a career break, an option that was within the Respondent's policy and one which would have met both the respondent's need for the work to be done and the claimant's need for time in which to recover her health.

Issue 2 – Further meeting with Occupational Health

88) We considered whether the Respondent should have obtained a further occupational health report or convened a further meeting with occupational health in attendance. The evidence before us was that the Respondent had followed their own procedure and had obtained occupational health reports throughout the absence management process.

89) We have also considered the medical evidence that was available at both the stage 4 meeting and the appeal hearing. At the time of dismissal and at the appeal stage we have concluded that the Respondent had sufficient medical evidence as was reasonable in order for it to make a decision on whether the claimant was likely to be able to return to work within a reasonable period.

90) All the medical evidence indicated that the Claimant's condition was likely to improve but that it would only do so with further medical interventions and in particular the fitting of a PEG tube. The Claimant would also require a further period of rehabilitation. The Claimant agrees that at the time of dismissal and at the appeal hearing that she did not have a date for the procedure and that even on a conservative estimate it is likely that the Claimant would have been absent for a further period of 12-16 weeks for an appointment and then a further period to manage pain relief and so that adjustments could be made to the Claimant's diet. The Claimant agreed in evidence that there would need to be a further period of time after the operation for recovery and that was unknown.

91) We concluded a further review meeting or further intervention/report from occupation health was unlikely to have made any difference to what was already known at the time. The medical evidence available to the Respondent was largely in agreement on the likely time the Claimant would continue to be absent from work and further medical evidence was unlikely to have been different.

92)We agreed that it was reasonable for the Respondent to have relied upon the medical evidence it had before it at the time the Claimant's employment was terminated and at the appeal.

Issue 3 – to delay the decision to await the outcome of the medical procedures

93)The Tribunal accepts that the medical evidence at the time indicated that the Claimant was likely to be in a position to return to work after further medical interventions. However, all parties agree that this was likely to be at least 4-6 months away. We therefore considered whether it was reasonable for the Respondent to have made its decision before waiting for the outcome of the further medical procedures.

94)We agreed that it was reasonable for the respondent not to have waited any longer. We accept the Respondent's submission that even at the appeal stage some 10 weeks after the decision to dismiss the Claimant did not have a date for the PEG being fitted or any date of when she was likely to be able to return to work.

95)The Respondent argued that the Claimant had already been absent for a year and that her absence was likely to continue for a further significant period. The Tribunal finds that it was not reasonable to expect the Respondent to wait any longer before making a decision.

96)We are satisfied that that the reason for dismissal was capability based on the claimant's continued unfitness to carry out her role. We are also satisfied that there was sufficient medical evidence available to the respondent at the time for it to form that belief without the need for further investigation. However, we are not satisfied that the Respondent explored properly the possibility of alternatives to dismissal that were available to it. Neither are we satisfied that the Respondent consulted sufficiently with the Claimant to form a genuine belief of the effect of the alternatives to dismissal and in particular the option of a career break which would have met the Respondent's need for the work to be done and the claimant's need for time in which to recover her health.

Disability Related discrimination

97)The Respondent helpfully provided a written submission and set out that as the Respondent admits that the Claimant was subjected to unfavourable treatment (dismissal) and that the reason for the unfavourable treatment was related to her disability (i.e., sickness absence), the live issue for the Tribunal to determine is the justification defence. Section 15(1)(b) EqA 2010 puts the burden on the Respondent to establish the defence.

98)The parties agreed that the Respondent was acting in pursuit of a legitimate aim, namely, to ensure that employees return to work to do the job they were employed to do, in the interests of the service and patient care. The Tribunal accepts that that this as a legitimate aim.

99)We have therefore gone on to consider whether the dismissal was a proportionate means of achieving the legitimate aim. Although this judgment sets out our decision in respect of the unfair dismissal and disability discrimination claims separately, the findings and conclusions set out at paragraphs 70-91 above are relevant findings and conclusions in respect of the disability discrimination claim. This judgment does not therefore repeat those findings and conclusions in this section except where they go to a point on proportionality and the judgment should be read as a whole.

100)The principle of proportionality requires an objective balance to be struck between the discriminatory effect of the measure (dismissal) and the reasonable needs of the employer. We are required to weigh the reasonable needs of the employer against the discriminatory effect of the employer's measure and to make our own assessment of whether the former outweigh the latter. There is no room to introduce into the test of objective justification the 'range of reasonable responses' which is available to an employer in cases of unfair dismissal. ***Hardys & Hansons plc v Lax [2005] IRLR 726***

101)The Respondent had an Absence Management policy that allowed for the provision of a career break when an employee is on long term sick. The Respondent also had evidence that the Claimant would be in a position to return to work once further treatment interventions had taken place and a suitable period of recovery was allowed. The Policy allows for a career break of up to five years and one of the reasons for considering it in long term ill health situations is to allow for further treatment as set out in section 4.14.2 of the absence management policy. If a career break had been offered, it would have allowed the Claimant time to recover sufficiently to be able to return to work. Further the policy allowed for further occupational assessments prior to any return and for extensions to be granted. This was clearly an alternative to dismissal.

102)We have therefore considered the reasons given by the Respondent as to why this option was not considered properly and or why it was not offered. The Respondent's case is that Ms William's was ignorant of the fact that a career break was an option open to her and that Ms Herring considered it along with the appeal panel but did not consider it a suitable option because it would have had a detrimental impact of the Claimant financially.

103)The Respondent's evidence was that the Claimant was a valued, experienced member of the team and they wanted her to return to work when she was in a position to do so. Essentially the evidence was that they did not want to lose her but had no alternative but to dismiss. However, because they did not want to lose her they put in place arrangements to enable the Claimant to return to work.

104)The Claimant's evidence was that she wanted to remain employed by the Trust and that she wanted to return to work at some point in the future. The Claimant's mother gave evidence that she probably used incorrect wording at the appeal hearing because she referred to the claimant using the ill health retirement process but then returning to work. However, we are satisfied that the Respondent was

sufficiently clear that the claimant wanted to be able to return to work when she was well and that the option of implementing a career break was known to them.

105) This is evidenced by Ms Herring who stated that she considered it along with the appeal panel. Further it is submitted by Counsel that the option of a career break and ill health retirement were considered in detail at the appeal stage. In respect of ill health retirement, Ms Williams said that it was not a management decision and that the medical evidence did not support this option.

106)We are satisfied that looking at the facts objectively and looking at the reasonable needs of the employer and the discriminatory effect the dismissal has had on the Claimant, that the Respondent had a less discriminatory approach open to it, namely a career break which would have had a less discriminatory effect on the Claimant.

107)It was not only a feasible option and operationally possible but also it is what the Respondent was trying to achieve by offering the Claimant the option of applying to return to the Trust when she was well enough to do so. In effect that Respondent could have achieved their legitimate aim by less discriminatory means.

108)The other issues raised by the Claimant in respect to further medical evidence or a delay in order for further medical interventions are dealt with above and we are satisfied that the same conclusions apply in respect of the discrimination claim.

109)We find that the claimant was treated unfavourably and that the Respondent cannot show that the treatment is a proportionate means of achieving a legitimate aim. The Respondent's justification defence therefore fails.

Employment Judge Hill

Date 11 January 2021

JUDGMENT SENT TO THE PARTIES ON

20 January 2021

FOR THE TRIBUNAL OFFICE

**Note**
Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

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