# EMPLOYMENT TRIBUNALS

**Claimant:** Ms Caroline Debono

**Respondent:** Great Places Housing Group Limited

**HELD AT:** Manchester **ON:** 2-4 September 2020

**BEFORE:** Employment Judge A M Buchanan
Mr A G Barker
Ms B Hillon

**REPRESENTATION:**

**Claimant:** Ms Laura Halsall of Counsel
**Respondent:** Mr James Barron - Solicitor

**JUDGMENT** having been sent to the parties on 7 September 2020 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

## REASONS

### Preliminary matters

1. The claimant instituted these proceedings on 21 September 2019 supported by an early conciliation certificate on which Day A was shown as 7 August 2019 and Day B as 7 September 2019. A response was filed on 11 November 2019 in which the respondent denied all liability.

2. At a private preliminary hearing held before Employment Judge Ryan on 17 January 2020 the claims advanced were identified and the issues arising in them were resolved.

3. This matter came before the Tribunal for a full hearing and reasonable adjustments were made to the conduct of the hearing to accommodate the disability of the claimant as requested by her.

4. The claims which are before the Tribunal are two in number:

(1) A claim of discrimination arising from disability relying on the provisions of section 6, 15 and 39(c) of the Equality Act 2010 ("the 2010 Act"); and

(2) A claim of "ordinary" unfair dismissal relying on the provisions of sections 94 and 98 of the Employment Rights Act 1996 ("the 1996 Act").

5. The issues for the Tribunal to determine were set out in the orders of Employment Judge Ryan and are as follows:

**Unfair dismissal**

5.1 Was the claimant dismissed? – this was admitted.

5.2 What was the reason for the dismissal? The respondent asserts that it was a reason related to capability which is a potentially fair reason for section 98(2) of the 1996 Act. It must prove that it had a genuine belief in the claimant's inability to attend work.

5.3 Did the respondent form that belief having carried out a reasonable investigation?

5.4 Was the decision to dismiss within the range of reasonable responses for a reasonable employer?

5.5 If the dismissal was unfair, can the respondent prove that, if it had adopted a fair procedure, the claimant would have been fairly dismissed and at what point? Alternatively, is there a chance that the claimant would have been fairly dismissed?

**Discrimination arising from disability**

5.6 Did the respondent treat the claimant unfavourably because of something arising in consequence of her disability. The respondent admits that the claimant was a disabled person for the purposes of section 6 of the 2010 Act at the material time by reason of a mental impairment. The claimant asserts that her dismissal was unfavourable treatment and that the dismissal was in consequence of her sickness absence which arose from her disability.

5.7 If so, can the respondent show that the treatment was a proportionate means of achieving a legitimate aim?

6. At the conclusion of the hearing the Tribunal issued an oral judgment on liability and made it clear that were written reasons to be requested the written reasons would prevail over the oral reasons. The parties asked for a short time to discuss remedy and reported to the Tribunal that terms of settlement on remedy had been reached. Accordingly, the Tribunal issued an appropriate judgment to reflect both its findings on liability and the settlement of the question of remedy. In the event a timely request was made by the respondent for written reasons but there was a considerable delay in that request being passed to the Employment Judge. These reasons are issued as soon as possible after that request was communicated. The reason for the request for written reasons is said to be for training and audit purposes and to inform an appropriate report to funding bodies.

## The Evidence and the Documents

7. In the course of the hearing, we heard evidence from the claimant who called no other witnesses. For the respondent we heard from Chantelle Seaborn, who was then the Head of Service Development with the respondent and who became the dismissing officer. We also heard from Simon Robinson, the Director of Neighbourhoods with the respondent and who became the appeal officer. The evidence we heard from the respondent's witnesses was given in an entirely straightforward and, we are satisfied, in a truthful way. The claimant's evidence was a little more problematic in that the claimant frequently sought to answer questions which were not those which had been put to her. We made allowances for the claimant in respect of the disability from which she suffers and drew no adverse conclusion of any kind from that situation.

8. We had an agreed bundle of documents before us running to 238 pages and any document to which we refer in this Judgment has the same page number reference.

## Findings of Fact

9. Having considered all the evidence, both oral and documentary, placed before us, and in particular the submissions from both representatives, we make the following findings of fact on the balance of probabilities.

10. The claimant was born on 26 June 1968 and commenced work for the respondent on 1 June 2015. She filled various roles but at the point of dismissal was undertaking the role of Welfare Benefits Adviser subsequent to a restructure within the respondent's organisation. That restructure had resulted in the role being fulfilled by the claimant on what was a trial basis initially.

11. The claimant did not have a good sickness record and in the period up to 31 December 2017 had lost some 90 days' work through absence, but for the purposes of this matter the respondent has concentrated only on the claimant's absences from 1 January 2018.

12. In the period from 1 January 2018 until her dismissal on 20 June 2019 the claimant worked at most 16 days. The claimant was a part-time employee contracted to work 17½ hours per week generally over three days. Those three days varied.

13. The claimant's absence began on 2 January 2018 and it is the absences which follow on from that date which are at the heart of this case.

14. The claimant is accepted by the respondent to be a disabled person by reason of a mental health impairment. The claimant has had a troubled family life which sadly led to her being diagnosed with depression at an early stage. For a long time, the diagnosis given to the claimant was one of endogenous depression but in or around November 2017 it appears that that diagnosis changed to borderline personality disorder.

15. The respondent accepted that it had knowledge of the depression and that that amounted to a disability. The respondent also accepted that borderline personality disorder amounts to a disability for the purposes of section 6 of the 2010 Act although

there was some question as to whether or not the respondent had ever had sufficient information of that particular impairment. In fact, nothing turns on the label to be attributed to the impairment for it is accepted by the respondent that the claimant was at all material times a disabled person.

16. The fact that there remains some confusion as to the exact diagnosis is apparent from the fit notes which we see at pages 225-238. They were handed to us at a late stage and did not feature in cross examination. It is clear from an examination of those fit notes that the diagnosis begins as "*recurrent depressive disorder"* and then moves in March 2018 to emotionally unstable personality disorder ("EUPD" or borderline personality disorder) and then in August 2018 the diagnosis reverts back to depression or depression with anxiety and that remains the diagnosis through to the point of dismissal. The last fit note which was in the respondent's possession at the time of dismissal was one dated 29 April 2019 (page 238) which gave as the reason for absence "recurrent depressive disorder" and took the claimant through for a period of four months until 26 August of that year. That was the first fit note which provided for such a lengthy period of absence.

17. The respondent organisation is an industrial provident society. It provides housing support and other services to a very vulnerable client group. It has some 22,000 properties under its control and at the time of the claimant's dismissal there were some 650 fellow employees or thereabouts.

18. By way of further background, it is relevant to note that, subsequent to her diagnosis of borderline personality disorder in November 2017, the claimant began to undertake a course of intensive therapy with the Greater Manchester Cognitive Therapy Group. That was to be a two-year course which was due to finish at the end of 2019 but in fact finished in September 2019. In the period leading up to her dismissal, the claimant had undertaken work with the Greater Manchester Mental Health Team both on a voluntary and also on a self-employed basis.

19. The claimant began a period of illness on 2 January 2018 and an Occupational Health report was received on 7 February 2018 by the respondent (page 79). That report indicated that the claimant's absence was likely to be measured in terms of months rather than weeks. There was some suggestion of the claimant seeking redeployment into a role with "*a less emotional element to it"* given that the claimant was herself at that time in a very vulnerable state and was dealing with equally vulnerable people.

20. The claimant met with her then line manager, Mike Glennon, on 20 March 2018 to discuss that report, and in a letter at page 83 dated 21 March 2018 Mr Glennon confirmed the outcome of that meeting which was that a further Occupational Health report be obtained. That report was obtained and was dated 29 March 2018 (page 85) and indicated a much improved position. It was hoped the claimant would be fit to return to work at around the end of April 2018. On 19 April 2018 the claimant returned to work on a phased return in a temporary role as Neighbourhood Officer - that being an adjustment made to try and ease her return to work.

21. Unfortunately that return to work was not sustained and on 20 April 2018 the claimant became ill again resulting in a further reference to Occupational Health on 4 June 2018 (page 86). That report indicated that the claimant remained mentally fragile

and vulnerable and suggested that she remained unfit to carry out her then role of Financial Support Coordinator. A recommendation was made that, if operationally feasible, redeployment into a role without customer interaction was a step which would be sensible. There was a meeting on 19 June 2018 to discuss that matter which was confirmed by letter of 11 July 2018 (page 93) from Mike Glennon. That letter sets out the matters which were discussed. It was subsequently agreed that the claimant would return to work on 5 July 2018 on a phased return which she did. There was then the longest period of sustained employment between 5 July 2018 and 1 August 2018 when the claimant became ill again. On 27 July 2018 the claimant raised concerns (page 95) about the role on the Lettings Section which she was trialling. She said that she found the role to be incredibly negative for her wellbeing, that she had gone home crying every night and that she was not in a position to fulfil her duties. That communication naturally concerned the respondent. A meeting was arranged for 1 August 2018 between the claimant and Mike Glennon and the record is at page 97. In that meeting the claimant recorded feelings of being devastated and very sad and therefore a further reference to Occupational Health was made on 1 September 2018. The resulting report (page 107) indicated that any role within the organisation was likely to prove problematic for the claimant and it was unlikely that she could "*provide sustainability within the organisation"* and that management might therefore look to a capability hearing to consider dismissal on the grounds of ill health. It was noted that the claimant was a disabled person for the purposes of the 2010 Act.

22. That then led to a meeting on 10 September 2018 which was confirmed in writing by Mike Glennon on 5 October 2018 (page 116). That letter reviewed all the steps taken to date and concluded that the claimant would discuss the latest report from Occupational Health with her GP, that the claimant would email her comments on the report after discussion with her GP and her own reflection and that the respondent would review the report and the resulting comments before making any decision on next steps. It is clear from reading that letter that, given the situation then prevailing, the respondent indicated that it would have to consider moving to a capability hearing and would have to consider termination of the claimant's employment.

23. Very shortly after that a letter dated 15 October 2018 (pages 118/9) was sent to the respondent from the claimant's General Practitioner, Dr Nigel Guest, in which he refers to the previous difficulties encountered by the claimant and which were still present at the time of the Occupational Health report of 1 September 2018. The doctor continued that after 1 September 2018, there had been a thorough review of the situation and the claimant had started on new medication. The doctor reported a dramatic improvement in the condition of the claimant to a point that he thought the respondent would not recognise the claimant if the respondent's officers saw her. He continued:

*"She continues to have medication and continues to engage and her mental health state has improved dramatically to the point which I believe she is able to be employed……I am more than happy to discuss this in more detail with occupational health, but I do believe that given the traumatic (sic) change in circumstances, it would only be sensible to re-evaluate the situation".*

24. That was a very positive report which led to a further referral to Occupational Health in October 2018. The resulting report dated 30 October 2018 (page 120) stated:

"…… *it is clear that she has significantly improved and she looked better than anytime I have seen her over the last couple of years. She appears to have her life back on track…".* The report continued "*It would be reasonable to suggest that as she is now, outside of Great Places, working alongside vulnerable people with severe mental health problems that she would be able to return to a customer facing support role, which is what she is requesting, and that placing her in a non-customer focus role would not be stimulating enough for her…".* Thus, there was a complete change in the circumstances which had prevailed with the health of the claimant over the course of 2018 and before.

25. That resulted in a meeting with Mike Glennon on 12 November 2018, which he confirmed by a letter of 23 November (page 125). The letter began by saying that the meeting had been organised to bring to a conclusion a significant period of long term sickness and also to agree an outcome from the Neighbourhood Services restructure which had coincided with the claimant's period of time out of the business. It was agreed that the claimant would return to work as a Welfare Benefits Advisor on a trial period.

26. The role of Welfare Benefits Advisor had arisen by reason of a restructure which had taken place within the respondent organisation in 2018. The claimant was ringfenced to that role but it was a role which she was not able to undertake, it was thought, because of it being a customer facing role and the claimant not being able to deal with such a role. However, once the medical evidence of September and October 2018 had been received that situation altered and so it was that the claimant accepted a trial period in that role and she returned into work on 7 January 2019.

27. Within a very short time the claimant had told her manager, Jo Russell, that she did not feel that that role was for her because of the travelling involved and because of the duties that it involved dealing with the particular service users, and so it was that the claimant was signed off work again following a meeting on 14 January 2019 where redundancy had been referenced. On 15 January 2019 the claimant emailed her manager and stated that she had "*hit a low"*. Those matters are all confirmed to the claimant in writing by letter of 18 January 2019 (pages 136-8).

28. There then followed a further reference to Occupational Health (page 141) on 21 February 2019 and the opinion from the Occupational Health Director was to this effect:

*"…it is my opinion that working within the organisation will continue to prove problematic for her. The company have appropriately supported Caroline but despite reduced hours and job changes Caroline is clearly unable to provide sustainability……I advise that Caroline is currently unfit for work in any capacity".*

29. A meeting with the claimant took place on 6 March 2019 which was confirmed in writing on 29 March 2019 (page 152). That letter again set out the background to all that had happened in the previous 15 months and indicated that there would be a further, but probably final, reference to Occupational Health. That referral resulted in a report dated 17 May 2019 (page 155). That report stated that the claimant continued to struggle with her mental health. It was opined that the role carried out by the claimant was not conducive to her mental wellbeing and that it was unlikely that she would be able to provide sustainability within the organisation.

30. So it was that the claimant was invited to a capability hearing which indeed took place on 20 June 2019 before Chantelle Seaborn from whom we heard in evidence (she no longer works for the respondent organisation). Having discussed matters with the claimant at length, the decision which Ms Seaborn reached was that the claimant's employment was no longer sustainable and she was dismissed with immediate effect on 20 June 2019 with pay in lieu of notice.

31. That meeting was confirmed to the claimant by a letter of 24 June 2019 (pages 170-2) and sets out the rationale for that decision, which was that the GP and the Occupational Health adviser were not able to indicate a likely return to work date in the near future, that there was no assurance that the claimant could sustain a role for even a short time and that in those circumstances the claimant was dismissed.

32. The dismissal came as a shock to the claimant. That it did so is an indication of the mental health condition from which she suffered at the time because, having listened to that chronology, it is difficult to understand why it would come as a shock to the claimant - but it did. The claimant appealed that decision in a lengthy and cogent letter of appeal (pages 173-5) which set out various reasons for the appeal. It is pertinent to note those reasons. The reasons were:

(1) That she stated it was her intention to have discussions with the therapeutic community and with her GP about her wish to return to work. The "*therapeutic community"* referred to was a group of fellow mental health sufferers with whom the claimant had been engaging for some time at that point;

(2) That there had been incorrect and inadequate investigation into her mental health. There had been undue regard paid to the incorrect diagnosis of a stress related recurring depressive disorder rather than the correct diagnosis of borderline personality disorder;

(3) That the Occupational Health report of October 2018 had been a positive one;

(4) That the work she was doing with the therapeutic community over two years had had a very beneficial effect and was continuing to do;

(5) That she was doing self-employed and voluntary work for the Greater Manchester Mental Health Service and that that too was assisting her in being able to return;

(6) That the respondent itself had greatly assisted her in what they had done to enable her to return but that a further period of time would ensure that that was successful.

33. The appeal meeting was scheduled for 24 July 2019 and took place before Simon Robinson. Before that appeal, however, a letter was received by the respondent from the claimant's GP, Dr Guest, on 16 July 2019 (page 178), and it is this document which is the centre of this case and which effectively is what our decision revolves around. In that letter he recalls the fact that he had previously seen his patient make a good recovery following a period of illness (he is referring there back to 2018) and he goes

on to say that unfortunately, due to unforeseen circumstances, there was an episode of deterioration which resulted in changes being made to her medication. He goes on:

*"She has been off work since that period but I am very happy to report that there has now been a significant improvement in her condition again, this time without the complications of the previous medication, and one hopes therefore that there will be no triggers to cause this current situation to change. Obviously, we will monitor this closely. Caroline is therefore in a much more positive position and at present is able to work. Clearly which capacity this would be in would be up to your good selves. This is a very positive situation and I do hope you may be able to offer your support, although I do appreciate the complexity of the situation from your point of view. I would be very pleased to talk about this or provide further information should you require it."*

34. So it is with that background that the matter came before Mr Robinson at the meeting on 24 July 2019 which is recorded at pages 181-4. There is no doubt that Mr Robinson approached his role with thoroughness and with care in going through what he saw his duties in looking at that appeal and, ultimately, he decided to adjourn and to see the claimant again on 7 August 2019 to deliver his decision in person. The claimant told Mr Robinson that she would return to work on the expiry of her then current fit note on 26 August 2019. At that second meeting he confirmed his decision which was to dismiss the appeal and uphold the decision to dismiss. He set out his reasons in a letter dated 7 August 2019 (pages 187-190). His reasons were effectively that there had been a long period of absence and that he was not satisfied that there was any possibility of the claimant returning to work and sustaining that return to work. The claimant had only worked 14 days in 2018 and 2019. Her role as welfare benefits advisor was critical to the success of the respondent's new service delivery framework. Her absence had had a negative impact on customer service and service delivery. The language used in the letter from the GP of the claimant dated 16 July 2019 was "*rather non-committal in terms of providing certainty of the sustainability of your employment".*

35. The appeal brought the claimant's relationship with the respondent to an end and these proceedings were subsequently instituted as set out above. It is noteworthy that in his deliberations and in the work that he undertook, Mr Robinson did not make any assessment of any aims which are now advanced to us as legitimate aims by the respondent. He did not make any reference to the claimant's colleagues in respect of the effect which her absence was having on them, if any, and no consideration was given as to the discriminatory effect of fulfilling the aims which are now advanced as legitimate aims by dismissal as opposed to some other less discriminatory effect in this case. The fact that a return to work, in his view, was not sustainable was the main driver, and he did not see that he had any additional duty to the claimant as a disabled employee, and indeed that is true also of the dismissing officer. The appeal officer (the question was not asked of the dismissing officer) had had training in the duties of an employer in dealing with disabled employees.

**Submissions**

36. We received both written and oral submissions from both representatives for which we were grateful. The submissions are briefly summarised. The written submissions are held on the Tribunal file.

**Claimant**

37. Ms Halsall set out a detailed chronology of events and the relevant law. This was not a case where the credibility of either party was in contention rather whether the dismissal of the claimant was reasonable in terms of the unfair dismissal claim and a proportionate means of achieving a legitimate aim in terms of the section 15 claim.

38. Reference was made to the aims of the respondent said to be legitimate aims set out at page 73. No evidence had been provided by the respondent that it was failing to meet customer demand and if the respondent had allowed the claimant a further six weeks of absence, she could have returned to the work. A more proportionate alternative would have been to wait for the claimant a little longer in this instance. The absence of the claimant was not costing the respondent any money in terms of salary and the ongoing cost of management time was small. No evidence was shown that the absence of the claimant was placing a burden on her colleagues. It was disproportionate to dismiss the claimant when there was medical evidence provided which explained the setback she had had and the significant recovery she had made and that she was fit to return to work. It was not proportionate to dismiss in order to prevent further harm to the claimant's mental health and well-being because the medical evidence supported a return to work. Balancing the reasonable needs of the respondent's business against the discriminatory effect of the employer's action demonstrates that the effect on the claimant significantly outweighs the business needs in this case. A further short period of absence until 26 August 2019 could have satisfied the aims of the respondent whilst at the same time lessening, if not removing, the discriminatory effect of those aims of the claimant.

39. In terms of the unfair dismissal claim, the dismissing officer confirmed that the absence of the claimant was inconvenient to the respondent but it was not a workplace issue at the time of dismissal. The respondent has provided no evidence as to a change in the business circumstances in June 2019 as opposed to January 2019. There would have been no need to obtain further occupational health reports on the claimant if she were to be allowed to return to work at the end of August 2019, the claimant had exhausted her entitlement to sick pay and any management time required would have been minimal. This is a large organisation which can manage without the claimant and had been doing so for a significant period of time. It was not unreasonable to wait for a short period longer. There was no good reason why the respondent could not have left the claimant's job open for a further six weeks to see if the optimistic report from her GP came good.

**Respondent**

40. For the respondent, Mr Barron submitted that there had been no substantial failure by the respondent to follow its own sickness absence policy. It was submitted that the respondent had demonstrated a genuine belief on reasonable grounds in the ill health of the claimant and that the decision to dismiss was within the band of a reasonable response. The claimant places great weight on the occupational health report of 30 October 2018 but even that report was not unequivocal in terms of the ability of the claimant to return to work. It was submitted that there were four triggers which could be identified as presenting barriers to the claimant returning to work but at no stage did the claimant say to the respondent that those triggers no longer existed. The respondent adequately understood the claimant's medical position before it moved to dismiss. Whilst the claimant had provided evidence of her belief that she could return

to work, no evidence was provided that any such return would be sustained. It was submitted that in moving to dismiss when it did the respondent had waited long enough. The case of the claimant can and should be distinguished from the situation in **O'Brien -v- St Catherine's Academy 2017 EWCA Civ 145** as at no stage was the claimant ever assessed as fit for work. The medical evidence in the O'Brien case was considerably more compelling than in this case. Reference was made to the decision in **BS -v- Dundee City Council 2013 CSIH 91**. In that case the ET had attached too much importance to the need to seek further medical evidence on receipt of a positive medical report. The obligation on a reasonable employer was only to carry out such medical investigations as were sensible. The conduct of the appeal was reasonable and Mr Robinson did all that he reasonably needed to do.

41. In terms of the section 15 claim, it was not in dispute that the claimant was a disabled person, that her dismissal was unfavourable treatment and that she was dismissed because of her absences which were caused by her disability. The issue is whether the dismissal was a proportionate means of achieving a legitimate aim. In the evidence, the dismissing officer was open and honest about what she considered to be the legitimate aim from her perspective namely the impact on the team and that it was difficult to measure the impact given the fact that it was a new team. The appeal officer also explained that the team was a "new" team and as a result the respondent is never likely to know what could have been achieved in that team if the claimant had been present. The team coped with the claimant's absence but clearly could have done more for its customers if she had been present.

**The Law**

**Discrimination arising from disability – section 15 of the 2010 Act.**

42. 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.*

43. We remind ourselves that in considering a claim pursuant to section 15 of the 2010 Act, we need to consider what breach of section 39 of the 2010 Act is established, whether there was unfavourable treatment of the claimant, whether there is something arising in consequence of the disability and finally whether the unfavourable treatment was because of the something arising from the disability.

44. We have reminded ourselves of the relevant authorities in respect of so called justification.

45. We have referred to the decision of HH Judge Clark in **H M Land Registry –v- Houghton and others UKEAT/0149/14/BA** to which we were referred by the claimant. We have noted the guidance given in that decision on the question of Justification:

As to justification, it is common ground between Counsel that at paragraph 26 this Employment Tribunal correctly directed themselves as to the classic test propounded by Balcombe LJ in Hampson v DES [1989] ICR 179 at 191E: "justifiable" requires an objective balance between the discriminatory effect of the condition and the reasonable needs of the party who applies the condition. .....Ultimately, the balancing exercise, once properly identified, is a matter for the Employment Tribunal absent any irrelevant factors being taken into account or relevant factors disregarded.

46. 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 remind ourselves that the burden of proving the dismissal was proportionate to the legitimate aims advanced lies with the respondent. 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.

47. 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".

**Ordinary Unfair Dismissal Claim – Section 98 Employment Rights Act 1996 (the 1996 Act)**

48. We have reminded ourselves of the provisions of section 98 of the 1996 Act which read:

"*98(1) In determining for the purposes of this part whether the dismissal of an employee is fair or unfair it is for the employer to show –*

*(a) the reason (or if more than one the principal reason) for the dismissal, and*

*(b) that it is either a reason falling in subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.*

*(2) The reason falls within this subsection if it –*

*(a) relates to the capability or qualifications of the employee for performing work of a kind which he was employed to do;*

*(b) relates to the conduct of the employee …*

*(4) In any other case where the employer has fulfilled the requirements of subsection (1) the determination of the question whether the dismissal is fair or unfair (having regard to the reasons 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 sufficient reason for dismissing the employee; and*

*(b) shall be determined in accordance with equity and the substantial merits of the case*".

49. We have noted the decision in **British Home Stores Limited v Burchell [1978] IRLR379** and reminded ourselves that it is for the respondent to establish that it had a genuine belief in the lack of capability of the claimant at the time of the dismissal. In answering this question, we note that the burden of proof lies with the respondent to establish that belief on the balance of probabilities. We remind ourselves that the other two limbs of the Burchell test, namely reasonable grounds on which to sustain that belief and the necessity for as much investigation into the matter as was reasonable in all the circumstances of the case at the stage at which the belief was formed, go to the question of reasonableness under section 98(4) of the 1996 Act and in relation to section 98(4) matters, the burden of proof is neutral. In considering the provisions of section 98(4), we must not substitute our own views for those of the respondent but must judge those matters by reference to the objective standards of the hypothetical reasonable employer. We have noted the words of Mummery LJ in **The Post Office-v- Foley and HSBC Bank plc –v- Madden 2000 EWCA Civ 3030:**

*"In one sense it is true that, if the application of that approach leads the members of the tribunal to conclude that the dismissal was unfair, they are in effect substituting their judgment for that of the employer. But that process must always be conducted by reference to the objective standards of the hypothetical reasonable employer which are imported by the statutory references to "reasonably or unreasonably" and not by reference to their own subjective views of what they would in fact have done as an*

*employer in the same circumstances. In other words, although the members of the tribunal can substitute their decision for that of the employer, that decision must not be reached by a process of substituting themselves for the employer and forming an opinion of what they would have done had they been the employer, which they were not".*

50. We have reminded ourselves of the provisions of Section 123 of the 1996 Act in relation to the fact that compensation must be 'just and equitable' and have reminded myself of the decision of **Polkey –v – A E Dayton Service Limited 1988 ICR142**. We note that the **Polkey** principle applies not only to cases where there is a clear procedural unfairness but what used to be called a substantive unfairness also. However, whilst a Tribunal may well be able to speculate as to what would have happened had a mere procedural lapse or omission taken place, it becomes more difficult and therefore less likely that the Tribunal can do so if what went wrong was more fundamental and went to the heart of the process followed by the respondent. We have noted the guidance given by Elias J in **Software 2000 Limited –v- Andrews 2007 ICR825/EAT.** We recognise that this guidance is outdated so far as reference to section 98A(2) is concerned but otherwise holds good. We note that a deduction can be made for both contributory conduct and **Polkey** but when assessing those contributions the fact that a contribution has already been made or will be made under one heading may well affect the amount of deduction to be applied under the other heading. We note that in cases involving allegations of misconduct a **Polkey** assessment is likely to be more difficult than in a redundancy dismissal case and that a misconduct case will likely involve a greater degree of speculation which might mean the exercise is just too speculative. We note that a deduction can be made for both contributory conduct and **Polkey** but when assessing those contributions the fact that a **Polkey** deduction has already been made or will be made under one heading may well affect the amount of deduction to be applied for contributory fault. We have noted the decision in **Rao –v- Civil Aviation Authority 1994 ICR 485** and the guidance to the effect that a deduction from compensation pursuant to section 123(1) of the 1996 Act (the **Polkey** deduction) should be first considered and then an assessment made in respect of contributory conduct. The extent of any **Polkey** type deduction may very well in many cases have a very significant bearing on what further deduction may fall to be made in respect of contributory fault.

51. We have reminded ourselves of the more recent guidance from Langstaff P in **Hill –v- Governing Body of Great Tey Primary School 2013 IRLR 274** and as to the correct approach to the Polkey issue.

*"A "**Polkey** deduction" has these particular features. First, the assessment of it is predictive: could the employer fairly have dismissed and, if so, what were the chances that the employer **would** have done so? The chances may be at the extreme (certainty that it would have dismissed, or certainty it would not) though more usually will fall somewhere on a spectrum between these two extremes. This is to recognise the uncertainties. A Tribunal is not called upon to decide the question on balance. It is not answering the question what it would have done if it were the employer: it is assessing the chances of what another person (the actual employer) would have done. Although Ms Darwin at one point in her submissions submitted the question was what a hypothetical fair employer would have done, she accepted*

*on reflection this was not the test: the Tribunal has to consider not a hypothetical fair employer, but has to assess the actions of the employer who is before the Tribunal, on the assumption that the employer would this time have acted fairly though it did not do so beforehand".*

**Discussion and Conclusion**

**Discrimination arising from disability claim**

52. We deal first with the claim advanced under section 15 of the 2010 Act. The dismissal of the claimant and the decision to uphold that dismissal at appeal was clearly unfavourable treatment and that is accepted by the respondent. It is also accepted that both the dismissal and the appeal decision are because of something arising from the claimant's disability. The disability caused the claimant to be absent from work and that absence led to the unfavourable treatment.

53. We have noted the decision in **O'Brien** (above) and in particular the guidance of Underhill LJ at paragraph 40 to the effect that a dismissal is the product of the combination of the original decision to dismiss and the failure of the appeal against that decision. We note that it is the composite decision that requires to be justified. Accordingly, we are considering both the decision to dismiss and the decision not to allow the appeal against that decision when looking at the question of justification. We turn to justification which is the central question in relation to this particular claim.

54. The first thing that we must do in dealing with this question is to identify the aims which the respondent advances as legitimate aims. We must consider whether those aims are legitimate aims. We must then consider the question whether what the respondent did, both when deciding to dismiss and later when deciding to uphold that decision, was proportionate to those aims.

55. In submissions there were various attempts made to identify the aims and we have looked at what was said and we have looked also at what was pleaded on this matter. It seems to us that three aims were identified albeit that each aim may have had various strands to it.

56. The first aim identified was to have employees in post performing their respective roles in a way to ensure the effective and efficient running of the respondent's business by meeting customer demand. That is pleaded as an aim at paragraph 17 on page 73 and we are satisfied that that is a legitimate aim. In submissions the respondent gave further detail of that aim by speaking of its employees working as an efficient team but it comes to the same thing. Howsoever it is put, we are satisfied that to seek to meet customer demand through an efficient and effective workforce is a legitimate aim. If an employer acts proportionately to that aim, then resulting conduct will be justified.

57. The second aim identified was that set out at the opening of the respondent's sickness absence policy and which is pleaded at paragraph 18 on page 73. We accept that seeking to reduce sickness absence levels to a minimum while providing a supportive environment to facilitate a return to work or an acceptable level of attendance for employees who are affected by ill health is a legitimate aim. In submissions there was reference to the claimant's wellbeing and the sustainability of

any return to work. It seems to us that those are two results of the second legitimate aim rather than aims in themselves and we treat the matter in that way.

58. The third aim set out at paragraph 19 on page 73 was not pleaded with any precision but what it comes down to is making best use of management time and we accept that for an employer to seek to ensure that the time of its managers is spent to the best advantage is a legitimate aim.

59. We have considered whether we heard any evidence from a witness for the respondent which was relevant to any one or more of the three aims now advanced as legitimate aims. We conclude that neither the dismissing officer nor the appeal officer gave us any meaningful evidence as to any assessment made by either of them in relation to any one or more of the three aims. Of course, it may be that the situation is so obvious that evidence is not required and we will factor that matter into our consideration of each of the three aims involved in this matter. We remind ourselves that, at the time of the appeal against the decision to dismiss, the respondent had before it a report from the claimant's GP which indicated that, after a very considerable period of absence, there was a real possibility that the claimant could return to work. We refer to our findings at paragraph 33 above and the GP report which refers to a significant improvement in the claimant's condition without complications from her previous medication and to there being a very positive situation.

60. We have considered the effect of the dismissal of the claimant. The claimant clearly wished to continue to work for the respondent as is evidenced by the cogent letter of appeal which she submitted. The employment was significant for the claimant in that it gave structure to her life which was important to her after a prolonged difficult period of ill-health which had for a long time not been correctly diagnosed. We are satisfied that the income earned by the claimant, albeit over part-time hours, was of significance to her. We are satisfied that the claimant's self-esteem was very much tied into the fact that she had employment available to her. We conclude that the effect of the dismissal, and in particular the denial of her appeal against dismissal, was very significant to the claimant who had been disabled over a long period of time.

61. We turn to consider whether the respondent in denying the claimant's appeal against dismissal acted proportionately to any one or more of the three legitimate aims identified.

62. In relation to the first aim, we did not have any evidence before us as to whether, and if so how, the claimant's absence meant that demands on the respondent from its customers were not being met. The evidence indicated that the employees of the respondent managed to meet the demands on them from the customers of the respondent but that they could always do more if resources were available. We are not satisfied that the absence of the claimant was causing any real difficulty for the respondent and we note that by the time of dismissal the claimant had effectively exhausted any entitlement to sick pay and there was therefore no financial imperative to move to dismiss. Against that, we have noted the effects of the decisions to dismiss and then to refuse the appeal against dismissal on the claimant. Those effects were considerable and, when we balance the effect on both the respondent in terms of its reasonable needs and the claimant, we conclude that by denying the appeal against dismissal the appeal officer did not act proportionately to that first aim. It was open to

the appeal officer to have investigated the very positive situation identified by the claimant's GP either with that GP himself or by referring the claimant again to occupational health. One of those relatively straight forward steps could have yielded more information which could have meant the claimant would not have lost her employment with the respondent.

63. In relation to the second aim, again we did not have any evidence before us of the sickness absence levels within the respondent's workforce. We note and take account of the lengthy absence from work of the claimant which, absent any disability, would clearly have been a period of absence which could have led to dismissal even in the context of providing a supportive environment for employees to return to work after illness. However, the claimant is a disabled person and the effect of dismissal on her has to be balanced against the legitimate aim identified. On the evidence available to us, we conclude that the effect on the claimant of being denied her appeal against dismissal was disproportionate to the second legitimate aim identified.

64. In relation to the third aim, we note and accept that the claimant's absence had involved very considerable management time in organising for occupational health referrals, in considering the resulting reports and in meetings with the claimant. The disruption to the work of the respondent's managers was not trivial. Furthermore, we accept that the organisation of a full evaluation of the letter from the claimant's GP letter (paragraph 33 above) would have involved management time in terms of preparation, meetings and possible implementation. However, we conclude that, in the overall scheme of things, the cost of that input would have been small. The respondent is a large employer with a large workforce. In any event, we conclude that it cannot be right that this (or any) respondent can rely, as a basis for potentially discriminatory conduct, 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 management time and cost and, on such evidence as was before us, the ongoing cost of continuing the claimant's employment for a further period of time to check on the question of the further medical evidence was small. Again, on the evidence available to us we conclude that the effect on the claimant of being denied her appeal against dismissal was disproportionate to the reasonable needs of the respondent in terms of the third legitimate aim identified.

65. It seems to us that the respondent had carried out all that could have been required of it up to the point of the appeal against dismissal. However, at that time further evidence was presented to the respondent which could have been further investigated and could have resulted in the claimant returning to work. Given that the claimant was a disabled employee, the question of justification and acting in a proportionate way to legitimate aims arises for consideration and it is the failure of the respondent to investigate further at the appeal stage which ultimately leads us to conclude that the respondent did not act proportionately to any of the three legitimate aims which we have set out above.

66. Accordingly we conclude that the claim of discrimination arising from disability advanced pursuant to section 15 of the 2010 Act is well-founded and the claimant is entitled to a remedy. At the remedy stage, it will be for the Tribunal to consider what would have happened had the respondent carried out a further investigation into the new medical evidence which came before the appeal officer.

**Ordinary unfair dismissal claim**

67. We turn to the question of the claim of unfair dismissal. It is clear that the reason for dismissal related to the capability of the claimant. The dismissing officer in this case, Ms Seaborn, had a genuine belief that the claimant was not able to sustain her employment. The reason for dismissal is proved by the respondent on the balance of probabilities.

68. We therefore move on to consider the questions posed by section 98(4) of the 1996 Act. We have considered whether the respondent carried out a reasonable investigation into the claimant's lack of capability. Given the numerous referrals to occupational health and meetings with the claimant prior to the decision to dismiss, we conclude that the investigation carried out by the respondent was reasonable.

69. We have considered whether the respondent followed a reasonable procedure and we conclude that up to the point of dismissal a reasonable procedure was followed. However, at the point of the appeal we have concluded that the respondent committed an act of disability discrimination in failing to investigate the further medical evidence which came before it at that stage. We conclude that no reasonable employer would have failed to do so and no reasonable employer would have moved to dismiss without doing so if that meant, as it did, that to do so amounted to an act of discrimination related to disability. Accordingly, it follows that the decision to dismiss was unreasonable and therefore unfair in terms both of the procedure carried out and in terms of the decision falling outside the band of a reasonable response. No reasonable employer would commit an act of disability-related discrimination in moving to dismiss. The appeal process is an integral part of the decision to dismiss.

70. Accordingly, we conclude that the claim of unfair dismissal is well-founded and the claimant is entitled to a remedy. Once again, at the remedy stage, the Tribunal will be required to critically consider whether the further medical evidence reasonably required would in fact have made any difference to the outcome. We note that the claimant had had a very lengthy period of absence despite many opportunities being afforded to her by the respondent. In this case the respondent failed at the final hurdle and did so because it did not appreciate its obligations to this disabled employee at the appeal stage – obligations which would not have arisen had the claimant not been disabled.

**Final Matters**

71. Having announced our decision, the parties asked for and were granted a short period of time to speak about remedy. We were advised that the parties had been able to agree terms as to remedy and accordingly we issued a judgment which gave the parties the opportunity to carry those terms into effect. A date was set for the parties to request a remedy hearing if those terms were not carried into effect. The date for any such request has passed and therefore the question of remedy stands dismissed in accordance with the terms of the judgment issued by the Tribunal.

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Employment Judge A M Buchanan

Date: 14 December 2020

REASONS SENT TO THE PARTIES ON

1 February 2021

FOR THE TRIBUNAL OFFICE