



THE EMPLOYMENT TRIBUNALS

Claimant: Mrs J Moment

Respondent: Humankind Charity

Heard at: Newcastle Hearing Centre **On:** 4, 5 and 6 January 2021
By: Cloud Video Platform (CVP)

Before: Employment Judge Martin
Members: Mrs J Johnson
Mrs B Kirby

Representation:

Claimant: In Person
Respondent: Ms L Quigley (Counsel)

This has been a remote hearing which has not been objected to by the parties. The form of remote hearing was CVP (V). A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing.

RESERVED JUDGMENT

1. The claimant's complaint of unfair dismissal is not well founded and is hereby dismissed.
2. The claimant's complaint of disability discrimination is not well founded and is hereby dismissed.

REASONS

Introduction

1. Ms Rachael Pickering, project manager and Mr Brian Younger, HR adviser gave evidence on behalf of the respondent. The claimant and her husband gave evidence on her behalf. The tribunal were provided with an agreed bundle of documents marked Appendix 1. A number of additional documents were added to that bundle at the beginning of the hearing namely:- notes of the capability hearing

page 140 and a number of additional documents from the claimant – page numbers 141- 149.

The law

2. The tribunal considered the following law:-
3. Section 98 (1) of the Employment Rights Act 1996 “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 for the dismissal and
 - (b) that it is either a reason falling within 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.”
4. Section 98 (2) ERA 1996 “a reason falls within this subsection if it (c) relates to the capability of the employee”.
5. Section 98 (4) ERA 1996 “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 sufficient reason for dismissing the employee, and
 - (b) shall be determined in accordance with equity and the substantial merits of the case.”
6. Section 6(1) of the Equality Act 2010 “a person (P) has a disability if :- (a) P has a physical or mental impairment and (b) the impairment has a substantial and long-term adverse effect on P’s ability to carry out normal day to day activities.
7. Section 15 of the Equality Act 2010. “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.
8. Section 20/21 of the Equality Act 2010 – where a provision, criterion or practice of A’s puts a disabled person (B) at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, A is required to take such steps as it is reasonable to have to take to avoid that disadvantage.

Section 212(1) states that ‘substantial’ means ‘more than minor or trivial’.

9. The Equality and Human Rights Commission Code of Practice 2015 (EHRC). The Tribunal is obliged to and did take into account and was referred to the Code in particular paragraphs 4.28 and 4.31 thereof.
10. The case of *Alidair v Taylor* 1986 IRLR 420 where the Court of Appeal held that in a case of dismissal for capability the employer has to show that it has reasonable belief that the employee was incapable and there were reasonable grounds to sustain that belief.
11. The case of *Spencer v Paragon Wallpapers* 1976 IRLR 373, where the EAT held:-
“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 may include: – the nature of the illness and the job; the needs and resources of the employer; the effect on other employees; the likely duration of the illness; alternative employment; and length of service.
12. The case of *East Lindsay District Council V Daubney* 1977 IRLR 566 where the EAT held “Unless there are wholly exceptional circumstances, before an employee is dismissed on the ground of ill health it is necessary that he should be consulted and the matter discussed with him, and that in one way or another steps should be taken by the employer to discover the true medical position. We do not propose to lay down detailed principles to be applied in such cases, for what will be necessary in one case may not be appropriate in another. But if in every case employers take such steps as are sensible according to the circumstances to consult the employee and to discuss the matter with him, and to inform themselves upon the true medical position, it will be found in practice that all that is necessary has been done. Discussions and consultation will often bring to light facts and circumstances of which the employers were unaware, and which will throw new light on the problem. Or the employee may wish to seek medical advice on his own account, which, brought to the notice of the employers' medical advisers, will cause them to change their opinion. There are many possibilities. Only one thing is certain, and that is that if the employee is not consulted, and given an opportunity to state his case, an injustice may be done'
13. The case of *Hardy and Hansons PLC v Lax* 2005 IRLR 1565 and in particular paragraphs 32 and 33 thereof. In that case the Court of Appeal held that “The principle of proportionality requires the tribunal to take account of the reasonable needs of the business, but at the end of the day it was for the tribunal to make its own judgment as to whether the rule imposed was 'reasonably necessary'. It is not enough that the view is one which a reasonable employer could take.”
14. The case of *Buchanan v Commissioner of Police of the Metropolis* 2016 IRLR 918 where it was established that the focus is on whether the treatment i.e. dismissal was proportionate as opposed to the procedure adopted.
15. The case of *McCulloch v ICI* 2008 IRLR 846 where the Court of Appeal set out a four state test to determine justification, namely: 1) the burden of proof is on the respondent to establish justification; 2) the tribunal must be satisfied that the measures must “correspond to a real need... are appropriate with a view to

achieving the objectives pursued and are necessary to that end” (paragraph 36). The reference to “necessary” has subsequently been held to mean “reasonably necessary”; 3) The principle of proportionality requires an objective balance to be struck between the discriminatory effect of the measure and the needs of the undertaking. The more serious the disparate adverse impact, the more cogent must be the justification for it; 4) it is for the employment tribunal to weigh the reasonable needs of the undertaking against the discriminatory effect of the employer’s measure and to make its own assessment of whether the former outweigh the latter.

16. The case of *Sheikholeslami v University of Edinburgh* 2018 IRLR 1090 where the EAT held Section 20 (3) does not contain a strict causation test but requires a comparative exercise to test whether the PCP has the effect of disadvantaging the disabled person in comparison with others who do not have any disability.

The Issues

17. In relation to the complaint of unfair dismissal the tribunal had to consider the reason for dismissal. The respondent asserted that it was for a reason related to the claimant’s capability. In that regard, the tribunal had to consider whether the respondent had a reasonable belief that the claimant was incapable and whether they had reasonable grounds to believe that the claimant was incapable. The tribunal had to consider whether the respondent had consulted with the claimant; whether they had undertaken appropriate medical investigations and whether they had considered other options including alternative employment.
18. The tribunal had to go on to consider whether the respondent acted fairly in dismissing the claimant for capability, in particular it had to consider all the circumstances including, whether the respondent should be expected to wait for the claimant to recover and, if so, how long - taking account of the nature of the illness; the likely length of continuing absence; the need for the respondent to get the job done and all the circumstances of the case.
19. The tribunal had to consider whether the respondent followed a fair procedure and whether the decision to dismiss was within the band of reasonable responses open to a reasonable employer.
20. In relation to the claim for discrimination arising from disability, the tribunal had to consider whether the respondent treated the claimant unfavourably. The unfavourable treatment relied upon was dismissal.
21. The tribunal had to consider whether the unfavourable treatment was because of something arising in consequence of the claimant’s disability. The something arising was the claimant’s absence and her inability to do the job.
22. The real issue for the tribunal to consider was whether the respondent could show that the treatment was a proportionate means of achieving a legitimate aim. The legitimate aims relied upon were :- the duty to ensure the Service was appropriately staffed within contractual obligations and to ensure delivery to service users; the duty of care to employees, being the claimant and other employees; the

requirement for regular service (attendance). The main issue that the tribunal had to consider in this aspect was the question of whether the means adopted were proportionate.

23. There was no issue about whether the respondent knew or could reasonably have been expected to know that the claimant had the disability.
24. In relation to the complaint of a failure to consider reasonable adjustments, the tribunal had to first consider what was the provision, criteria or practice (PCP). The PCP relied upon by the claimant was the requirement to return to work within a short period; in January and/or before she was ready.
25. The tribunal had to consider whether that PCP put the claimant at a disadvantage in comparison to persons who were not disabled.
26. The Tribunal had to go on to consider whether the respondent took such steps as were reasonable to avoid any disadvantage. The reasonable adjustment relied upon by the claimant was to delay making the decision to dismiss with a view to allowing the claimant to return on a phased basis.
27. Finally the tribunal had to consider whether the respondent knew or could reasonably be expected to know that the claimant had a disability and was likely to be placed at the disadvantage. There was no real dispute in that regard.

Findings of fact

28. The respondent is a charity which offers support services to service users which include children and young people; offender rehabilitation; people with substance abuse and mental health issues.
29. The claimant was employed as a housing support worker. Her employment commenced in June 2001. She was initially employed by the Richmond Fellowship. Her employment then transferred, ultimately transferring to the respondent in 2015.
30. Her job description is a page 75 of the bundle. Her job involved providing support to vulnerable people with differing needs, some of whom would have mental health problems or issues with substance abuse and other social and economic problems. Her role was in providing housing support to those service users to assist them to maintain a tenancy and live independently in the community (page 75).
31. The project on which the claimant worked was funded for three support workers to provide support to service users who are referred to the project. The project also offered support at drop-in sessions where anyone who required support could turn up. Under the commissioned project, the respondent did not know who might turn up at a drop in session or what problems those people might have. Sometimes this would involve people turning up at a drop-in session with mental health problems.

32. The claimant suffers from depression and anxiety. The respondent accepts that mental impairment amounts to a disability under section 6 of the Equality Act 2010. The claimant was sectioned under the Mental Health Act on 22 February 2019. She was discharged in March 2019, but continued to receive support in the community following her discharge during the continued period of her employment.
33. The claimant went off sick in January 2019. This was initially with tinnitus. She subsequently suffered from serious mental health problems following on from that condition.
34. The claimant worked for the respondent for a total of 18 years as a support worker. There was no history of any concerns whatsoever with the claimant's performance or conduct during the course of her employment.
35. A telephone conversation took place between the claimant and the respondent on 30th January 2019, when her line manager contacted her expressing concern for her mental health following a post that she had put on Facebook (page 94). The claimant does not dispute the note of that conversation. She was very ill at that time.
36. A meeting took place with the claimant on 1 February 2019, when the claimant came into the office with a sick note. She was still very unwell at the time and had just started medication. It is noted that she agreed that the respondent would not contact her but she would contact them. The claimant does not dispute the note of this discussion at page 94.
37. The respondent was made aware that the claimant had been sectioned and admitted to hospital on 13th March 2019. The claimant's line manager visited her in hospital and collected the work diary as requested by the claimant. The respondent agreed to keep in touch with the hospital rather than the claimant.
38. An absence review meeting took place in early June 2019 at the claimant's home. The claimant was still very unwell at that time. The respondent decided to refer her to their occupational health advisors. Her line manager offered to assist her if she wished to try to attend the office. The notes of that meeting are at pages 89 - 90 of the bundle.
39. The first occupational health review took place by telephone on 20th June 2019. The occupational health report is at pages 91–93 of the bundle. It notes that the claimant has been diagnosed with depression. The report noted the episode when the claimant was sectioned. It noted she was taking her medication. It was noted that she was under the care of the community health team. The report also stated that it was unlikely that her condition amounted to a disability at that stage because it had not lasted 12 months. The report confirmed that the claimant was capable of attending meetings with management. Occupational health stated that the claimant was not fit to work. The report stated that it was difficult to predict when the claimant would be fit to return to work, but suggested it would be a few months and that a phased return would be required.

40. Around this time, there was a change in the claimant's line manager. Rachel Pickering took over managing the claimant's sickness absence.
41. On 19th July a meeting took place at the respondent's offices. The claimant's husband drove her to that meeting which was to review her sickness absence. At the time of this meeting, she was still very unwell and anxious. She was not in a position to return to work and did not feel able to deal with the stresses of her job. At that stage she was struggling to leave the house. The notes of that meeting are at page 96 of the bundle. The claimant does not dispute those notes, although she cannot recall the conversation.
42. On 16th of August 2019, a further sickness absence review took place at the office. By this stage absence review meetings were taking place every four weeks. At this meeting, the claimant was still not driving and still feeling very anxious. During the meeting, the claimant expressed some concerns about attending West Park Hospital with service users because of her recent admission as a patient. In her evidence, she said that such visits were infrequent and it was likely that any visit could be covered by another colleague. By the time of that meeting, the claimant was not sure when she would be able to return to work. In her evidence she acknowledged that she was not able to return to work at that stage nor was she indicating that she would be able to return to work at that stage. The notes of that meeting are at page 96 of the bundle. The claimant does not dispute those notes but cannot confirm if they are accurate, as she cannot recall all the details of these meetings.
43. A further absence review meeting took place on 13th September 2019. By that stage the claimant was still very unwell and could not see herself returning to work at that time. There was little improvement in her condition. In her evidence she acknowledged that she was not looking to return at that stage and was still very unwell. She was still unable to drive and unable to go on public transport so would not be able to visit service users in their homes or go to the hospital or on any other visits with service users.
44. The possibility of drop in sessions was discussed at that meeting. The claimant did not consider that was an option at that stage. In her evidence to the tribunal, the claimant acknowledged that she would not have been able to do drop-in sessions at that stage. The notes of that meeting are at page 97 of the bundle. Again, the claimant said she could not recall the meeting but does not dispute the notes of that meeting.
45. Following that meeting, the respondent decided to refer the claimant back to occupational health. They contacted her on 19th September 2019 to make that referral.
46. The Claimant was referred to occupational health and was assessed by them on 31st October 2019. The report from occupational health following that assessment is at page 98 - 101 of the bundle.
47. At Page 99 of the report, the occupational health physician sets out the current position regarding the claimant's health. He concluded that the claimant had some

way to go to regain her usual baseline. He stated that she had significant ongoing symptoms which included situational anxiety, reduced confidence, and low mood. He did say that there were some positive signs. Occupational health also gave a prognosis stating that the expectation is that the claimant will continue to gradually improve. He said that she may be some 3 to 4 months away from approaching her normal baseline and commented that a supported phased return to work may prove possible in roughly 2 months' time. He stated that in the long term the prognosis was good.

48. The occupational health report also answered some specific questions. It stated that the claimant's condition will be temporary and a full recovery is anticipated. It also stated that the claimant may be ready to contemplate a return to work in around two months' time. It did however state that she was unlikely to be ready for normal duties and hours at that time. He recommended that her hours were initially reduced significantly. He also recommended that her duties should be low-pressure and predictable. He stated that her recuperative arrangements are likely to be required for between 2 to 3 months. Occupational health also confirmed that the claimant was capable of attending meetings with management. He suggested that she be allowed to be accompanied should she so wish. He stated that the claimant was not yet well enough to engage with work and that a further occupational health assessment may be helpful in around eight weeks' time. He noted that the claimant had recently started to drive again. He also stated that her condition was likely to amount to a disability.
49. The claimant confirmed that she had seen and read the occupational health report.
50. A further review took place with the community mental health team at West Park Hospital on 12th November 2019. It was noted that there was some change in medication. It was also noted that there was little improvement in the claimant's condition (page 106/107 of the bundle).
51. The claimant was seen again by the community mental health team on 25th November 2019. Her medication was changed. She started some new medication on 26 November 2019. At that stage there was no real improvement in her condition (page 108).
52. On 28th November 2019, claimant was invited to a meeting. She was informed that she could be accompanied by her husband. She was informed that the meeting was to discuss her long-term sickness absence and the occupational health report. She was informed that the meeting could result in her dismissal (page 110 of the bundle).
53. The respondent had managed to obtain relief cover for the claimant's role from a former support worker to cover the claimant's absence from January initially up to September 2019. The relief support worker then continued to provide cover until December 2019. However the relief support worker was not able to provide cover after December 2019, as the relief worker was moving out of the area.
54. There were three support workers on the project on which the claimant was employed. Of those three support workers attached to the contract, the claimant's

position was being covered by the temporary relief worker; one of the other support workers was on long-term sickness absence and the other was struggling with an increase in workload.

55. The project was stretched at this stage and likely to become more stretched from December 2019. The respondent was concerned that they would have to turn people away. Their funding was based on the premise that they would not turn away service users.
56. The service itself was funded to support three support workers. The respondent could not fill or advertise to fill any of the posts whilst the claimant was on long term sick. Therefore, they could only fill the post temporarily which they had done up to that point. However, by the end of November they still did not know how long the claimant would be off sick, or when or indeed if she might be able to return.
57. By the time of the meeting in early December 2019, the respondent had a report from their occupational health advisors, who still did not give any indication of when the claimant might be able to return to her normal role. The report suggested the claimant might be able to return to a substantially reduced role on a phased return but would not be able to undertake anything other than unpredictable and low pressure work.
58. The meeting took place on 6 December 2019. The claimant was driven to the meeting by her husband. In her evidence to the tribunal, the claimant indicated that she was having marital issues, but the respondent was unaware of this at the time and the claimant did not raise the matter in the meeting. The meeting was conducted by Rachael Pickering. Mr Brian Younger was in attendance and made some brief notes of the meeting. At the outset of the meeting the claimant was informed of the purpose of the meeting and a possible outcome of the meeting, namely her dismissal on the grounds of capability.
59. The Claimant was still very unwell at the time of this meeting. The respondent noted that the claimant seemed to be struggling in the meeting. Several times during the course of the meeting, the respondent offered the claimant the opportunity for her husband to come into the meeting to support her but she declined on each occasion.
60. A discussion took place about the occupational health report and the conclusions of the report namely that the claimant was not fit to return to work for a further two months and would then require a phased return with low pressure and unpredictable duties. The respondent told the claimant they could accommodate a phased return to work but that the nature of the job was unpredictable. At the meeting and in evidence to the tribunal, the claimant acknowledged that the work was not always predictable.
61. During the meeting there was a discussion about safeguarding and the health and safety of staff including the claimant. At the meeting the respondent indicated that they had to balance the claimant's needs against the needs of the business. There was also a discussion about the length of the claimant's absence.

62. At the meeting the claimant said she was on new medication which she had started about a week to 2 weeks earlier.
63. During the course of the meeting, the claimant was asked when she might be able to return to work. The report from occupational health had suggested about 2 months which would effectively mean a possible return in early January 2020. The claimant said she might be able to return in January to office-based duties like filing and then later possibly drop in sessions (although it appears that both the claimant and the respondent considered drop in sessions to be unpredictable). The respondent said that they did not have any filing duties or admin duties to fill.
64. The Respondent indicated they were looking to terminate her employment on the grounds of capability and outlined her entitlements. The respondent then again asked the claimant if she wished her husband to come into the meeting and she refused.
65. The respondent then gave the claimant the opportunity to consider the matter further and asked her to contact the respondent on Monday to discuss the matter and raise any issues. Mr Younger gave her his contact details.
66. In her evidence to the tribunal, the claimant did not suggest that she was able to return to work at that stage nor could she give the respondent a timescale when she could do so. She acknowledged in her evidence that, at that stage, she was still very unwell. In her evidence she said that she would have had to try the job to see if she could cope.
67. By December 2019, the respondent had the occupational health report pages 98–101 of the bundle and had also noted the claimant’s comments. They also saw how the claimant had presented at the capability hearing. As a result, the respondent said it was clear to them that the claimant was not fit to return to work in her role at that stage and it was also unclear as to when she might be able to do so or whether she would ever be able to return to that role.
68. The claimant did not discuss the matter with her husband over the weekend. However she did telephone Mr Younger on the Monday morning, 9 December to effectively accept the termination of her employment. She said in evidence that she did not think that she had any option other than to do so. Mr Younger said that the claimant telephoned to effectively accept the termination of her employment although he thought that she did so reluctantly. At that stage, the claimant was still very unwell.
69. On 13 December 2019, the respondent wrote to the claimant to confirm her dismissal. The letter of dismissal is at page 112 of the bundle. The claimant was given a right of appeal and informed that if she wished to appeal she must do so within five days.
70. In her evidence, Miss Pickering said that the respondent was concerned about ensuring that the project continued and was able to provide a service to its service users. Miss Pickering said that therefore they needed to look to replace the claimant’s role with a full-time position as soon as possible as she was concerned

about the welfare of the other support worker, who by then was the only support worker on the project and would effectively be undertaking the role of three people when the other relief support worker left in December 2019. That support worker had already indicated that they were struggling.

71. Miss Pickering said in evidence that, therefore as soon as the period expired for the claimant to appeal, she went ahead to advertise for the claimant's role (now a full-time position). She said that the position was filled by 15th January 2020.
72. On 17th December 2019, the claimant had a further review with the community health team when it was noted that there was some improvement in her condition.
73. The claimant acknowledged that the disability clearly had an adverse impact on her mental health. She said that, by mid-January 2020 she was starting to feel better. On 15th January 2020, she sought to appeal against the decision to dismiss her. Her email is at page 117 of the bundle. In her email of appeal she does not indicate the basis of her appeal, nor does she say why the appeal is out of time, nor does she provide any update on her condition. In her evidence, she said that she did not provide this information as she was following advice given to her by ACAS. In her email of appeal she says that she thinks that the decision to terminate her was too early without giving any basis for that assertion.
74. The claimant has produced subsequent evidence to show that her condition has improved. However, she has not produced any evidence to show that she could go back to undertake the role of a support worker. That role is a high pressured role involved in advising service users in challenging and difficult circumstances which are often unpredictable.
75. By December 2019, based on the occupational health report, following an assessment of the claimant at the end of October 2019 and having had the opportunity to assess the claimant's appearance at the meeting some six weeks later on 6 December, Miss Pickering and Mr Younger said in evidence that it was not clear when, or if at all, the claimant would be able to return to her previous role in the organisation.
76. In her evidence, Ms Pickering said the Service was at breaking point by the end of December 2019. She said the respondent had to make a decision about the claimant and her role. She said delaying a decision any further would have left two options. The first being that the only remaining working support worker on the project would have had to take on yet further work, at a time when they were already struggling, and there would clearly have been an adverse impact on that support worker's health, as they would be effectively undertaking the role of 3 people. She said that the only real option for the respondent would have been to stop drop in sessions and refuse referrals. She said that would have a seriously detrimental impact on the running of the Service and its continued funding. She also said that would mean the respondent would have to turn away vulnerable people and that, of course, would have an impact on those service users' wellbeing and could be a safeguarding issue.

Submissions

77. Both parties filed written submissions.

Conclusions

78. The claimant was dismissed for capability, which is a fair reason for dismissal under Section 98 (2) of the Employment Rights Act 1996.
79. The tribunal finds that the respondent did believe that the claimant was incapable of undertaking her role. There was no evidence available to them to indicate that the claimant was going to be able to return to work in a reasonable time period or that she might be able to return to do her job at all.
80. The respondent had reasonable grounds to believe that the claimant was not capable of undertaking her role. They had undertaken numerous consultations with her over the period of her absence, latterly on a monthly basis, yet there was no indication of any real improvement in her condition during that period and no indication of when she might be able to return to work. Further they had consulted with their occupational health advisors on two separate occasions. Following the last assessment by occupational health, there was no indication from occupational health that the claimant would be fit to return to her role. Occupational health suggested at that stage that the claimant might be able to return to a substantially reduced role with low pressure and of a predictable nature on a phased return in a few months' time. By 6 December, some six weeks later, there was still no indication that the claimant would be able to return to work, even in that capacity in January 2020. Occupational health indicated that, if the claimant returned on the phased return to work she might, and they did not put it any higher than that, be possibly able to look at some sort of return some 3 to 4 months later, which might mean a possible return to work in May April/May 2020 at the earliest. However occupational health did not indicate that the claimant would be able to return to her normal role at that time.
81. The respondent did consider alternative employment, but there was no administrative role available. No evidence was led by the claimant indicating that she might have considered alternative employment in any other service or somewhere else in the organisation. There was no alternative position for administration or low pressure/unpredictable work in the Darlington office.
82. The respondent followed a fair procedure when they dismissed the claimant. They followed their sickness absence procedures. Indeed, they did not dismiss the claimant immediately at the capability hearing as they wanted to be kind to her and give her the opportunity to discuss the matter with her husband at the weekend before confirming any decision to dismiss her to see if there was anything else she wanted to say once she had had the opportunity to talk matters over. This was because she had refused on several occasions to have anyone come into the meeting with her. However, we do find that the capability hearing could have been better handled in the circumstances. It was somewhat clumsy, although we acknowledge that it was done with the best of intentions.

83. The respondent acted fairly in dismissing the claimant, given that they had waited to see if she would return to work for over 11 months. Over that period there had been no real improvement in her condition. She did not present as if she would be able to come back to her role at that stage, or in the imminent future or indeed potentially ever. The service was under enormous pressure. The respondent had to consider the needs of the Service as they had a substantial reduction in staffing on the project at that time and they needed a full complement of staff in order to be able to deliver the service to service users and honour the terms of their contract and the funding around that project. Dismissal was a reasonable response in the circumstances of the case taking account of the real need the respondent had to continue to deliver the Service to service users.
84. Turning to the complaint of discrimination arising from disability there was no issue that the claimant had been treated unfavourably by being dismissed because of something arising in consequence of her disability, namely her sickness absence. There was also no issue that the respondent knew of the claimant's disability.
85. The only issue in relation to that claim was the question of whether the respondent could show that the claimant's dismissal was a proportionate means of achieving a legitimate aim. The legitimate aims relied upon was: - firstly the duty to ensure that the service was appropriately staffed and to ensure delivery to service users. That was a legitimate aim because, at that stage, the service was struggling with staffing due to the claimant's absence. The relief worker covering her role was about to leave the service for definite in December 2019 and could not continue to provide cover for the claimant. The other support worker was also on long-term sick. The third support worker on the project was struggling. The project was funded for three support workers. The respondent needed three support workers to deliver the service to the service users.
86. We have taken account of the cases of Hardy Hanson PLC and McCulloch. We find that, in balancing the proportionality of the respondent's need against the potentially discriminatory treatment on the claimant, the respondent's decision to dismiss the claimant was a proportionate measure in this case. We find that, by December 2019, the respondent's Service on which the claimant was employed was effectively at a tipping point and potentially in crisis - service users were potentially at risk - as the respondent was at risk of not being able to continue the Service or part of it due to the substantial reduction in the number of staff available to it to deliver the Service. Basically, they had one member of staff who was struggling to deliver a Service which required three members of staff. The respondent had reached the stage in December 2019 where they would have had to look to turn people away and close their drop-in service and refuse referrals which would have had a seriously detrimental effect on the running of the Service and its funding. It would have meant that they would have had to turn away vulnerable service users which would have effectively impacted on their well-being as well. Basically they could not continue to run the Service which required three people, by utilising the one member of staff left to continue the service for any length of time, as that member of staff was struggling to cope with the demands of the Service on their own. Therefore applying the case law in this case the respondent identified a real need and we think the needs of the respondent in this case did outweigh the seriously detrimental impact on the claimant.

87. Accordingly, the respondent did have a legitimate aim and the dismissal of the claimant in this case was a proportionate means of achieving that legitimate aim.
88. The second aim of a duty of care to employees is a legitimate aim. However we would have required more evidence to consider whether it was a proportionate step to have dismissed the claimant.
89. The third aim relied upon was a requirement for regular attendance. We find that aim is linked to the first one and the need to have employees attending work regularly in order to deliver the service. Therefore, we find that it was proportionate to dismiss the claimant to achieve that legitimate aim for the reasons referred to above. In particular, due to the uncertainty of when, or even if, the claimant could return to her support worker role.
90. For those reasons the claimant's claim under section 15 of the Equality Act 2010 fails.
91. We now turn to the complaint of a failure to consider reasonable adjustments. The tribunal notes that the provision criterion or practice (PCP) relied upon by the claimant was the requirement to come back to work within a short period/ by January/ when she was not ready. It is not entirely clear whether the respondent did apply such a PCP. We accept Miss Pickering's evidence that they were not actually requiring the claimant to return to work. However, we find that it could amount to a PCP because the whole purpose of the capability meeting on 6 December 2019 was to ascertain if the claimant was able to return to work in January, or when she was able to return to work, and if so in what capacity. Indeed she was specifically asked in the meeting if she could return in January. When it became clear she could not do so, she was dismissed. Therefore the fact that they asked her about a return to work in January could in itself amount to a PCP.
92. It is not entirely clear what was the substantial disadvantage relied upon by the claimant. It would appear to be the risk of dismissal, if she did not agree to a return in January. She was in fact dismissed.
93. The real question for the tribunal was what steps it would have been reasonable for the respondent to take to avoid any disadvantage to the claimant. The reasonable adjustments relied upon by the claimant were to delay any decision and give her a few more weeks to see if she could return on a phased return in January.
94. The duty under S20/21 of the Equality Act 2010 is to consider reasonable adjustments. It is the case that respondent did consider reasonable adjustments. They considered and agreed to a phased return. However, although they could accommodate a phased return, they could not accommodate a phased return as suggested by the claimant on admin duties.as they did not have any admin duties to provide to the claimant on any sustained basis.
95. The reasonable adjustments proposed by the claimant in these proceedings, which it should be noted had not been suggested by her until she appealed the decision to dismiss her out of time and after the respondent had already recruited for her

role, was to delay any decision until January and give her a few more weeks to see if she could return on a phased basis then. However, a delay until January would not achieve anything because any delay relied upon by the claimant was a delay to enable her to return a few weeks later on a phased return, but in an administrative role. The respondent did not have such a role. The respondent had already concluded that could not accommodate such an adjustment. They could only accommodate part of that proposed adjustment, namely the phased return, but could not accommodate that phased return on admin duties because they did not have any. The claimant was not suggesting a phased return to her role in January but to a different which the respondent did not have and could not provide.

96. Accordingly it would not have been reasonable for the respondent to consider such an adjustment, as now suggested by the claimant, because it would not achieve anything by delaying any decision until January as the outcome would have still been the same. Any adjustment has to alleviate the disadvantage, which the adjustment proposed by the claimant did not do. Even if (as it transpired) the new medication worked and the claimant was able to return to work, it was not clear if she would have been able to return to her role, even though her condition had improved. Irrespective of all of that she was only requesting a return to an administrative role which did not exist and would not be able to return to her support worker role for at least another 2 to 3 months (which was the best estimate given by occupational health as a possibility) if indeed she was ever able to do so at all. No evidence was produced to say that the claimant could even now return to undertake her former role which is unpredictable and high pressured position. It is quite clear that the respondent, due to the enormous pressure on the Service could not have waited for, at best, another 2/3 months, as we accept their evidence that they would not have been able to continue to provide their Service with one support worker undertaking the role of 3 support workers for any sustained period. Therefore any delay to the decision about the claimant's role was not reasonable or feasible in the circumstances where the Service was, by that stage, at tipping point.
97. Accordingly, this tribunal finds that it would not have been reasonable to have made the adjustments suggested by the claimant for the reasons referred to above. In order for an adjustment to be reasonable it would have to avoid the disadvantage complained about. In this case the proposed adjustment of delaying the decision would have simply would not have achieved anything and would therefore not avoid the disadvantage complained of. For those reasons her claim for a failure to consider making reasonable adjustment fails.
98. Therefore, the claimant's claim of disability discrimination fails. It is not well founded and is hereby dismissed.

EMPLOYMENT JUDGE MARTIN

**JUDGMENT SIGNED BY EMPLOYMENT
JUDGE ON 30 January 2021**

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