EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Miss N Saward	AND	Citizens Advice Plymouth

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD BY CLOUD VIDEO PLATFORM **ON** 1, 2 and 3 February 2021

EMPLOYMENT JUDGE N J Roper

Representation

For the Claimant: **Mr T Challacombe of Counsel**
For the Respondent: **Miss M McGee of Counsel**

JUDGMENT

The judgment of the tribunal is that the claimant's claims are dismissed.

RESERVED REASONS

1. In this case the claimant Miss Nicola Saward, who was dismissed by reason of capability, claims that she has been unfairly dismissed, and that she was discriminated against because of a protected characteristic, namely disability. The discrimination claim is for discrimination arising from disability, and because of the respondent's failure to make reasonable adjustments. The respondent concedes that the claimant is disabled, but contends that the reason for the dismissal was capability, that the dismissal was fair, and that there was no discrimination.
2. This has been a remote hearing which has been consented to by the parties. The form of remote hearing was by Cloud Video Platform. A face to face hearing was not held

because it was not practicable and all issues could be determined in a remote hearing. The documents that we were referred to are in a bundle of 608 pages, the contents of which we have recorded. The order made is described at the end of these reasons.

3. I have heard from the claimant. For the respondent I have heard from Mrs Emma Handley, Mr Gary Neeves, and Mrs Louise Clements.
4. There was a degree of conflict on the evidence. I have heard the witnesses give their evidence and have observed their demeanour in the witness box. I found the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after listening to the factual and legal submissions made by and on behalf of the respective parties.
5. The Facts
6. The respondent is Citizens Advice Plymouth, formerly known as the Citizens Advice Bureau or CAB. It has approximately 80 employees in the Plymouth office who are employed mainly in an administrative capacity. It also has a number of volunteers and advisers. The respondent has a number of employment policies and procedures, including a Sickness and Absence Management Policy, the purpose of which is to address and manage extended periods of sickness amongst its employees. Employees are also encouraged to discuss potential adjustments to the workplace and/or working conditions with their line managers, or alternatively to complete a form to request reasonable adjustments in appropriate circumstances. This Policy also gave scope for a stress risk assessment to be undertaken on an employee's return to work in appropriate circumstances.
7. The Sickness and Absence Management Policy was reviewed and amended in June 2019 during the course of the events below. Under the previous policy potential dismissal for extended absence was considered at Stage 4, but the new policy was limited to three stages with potential dismissal considered at Stage 3. There were certain trigger points which engaged the policy, and the formal process was likely to be followed "for long term sickness absence of four weeks or more or 12 days or 5 short-term absences".
8. The claimant Miss Nicola Saward commenced employment with the respondent as an Administrator on 27 June 2015. The respondent terminated her employment by reason of capability following long-term sickness absence on 17 January 2020. Unfortunately the claimant suffers from very poor health. The conditions in which she suffers include anxiety and depression; post-traumatic stress disorder; Ehlers Danlos Type III Syndrome and joint hypermobility; greater trochanteric pain syndrome and left trochanteric bursitis; asthma; congenital hip dysplasia; irritable bowel syndrome; nerve damage in the left side arm and neck; tinnitus, and vertigo.
9. For the purposes of these proceedings, the claimant relies upon four impairments which amount to a disability. These are fibromyalgia; chronic fatigue syndrome; seasonal affective disorder; and anxiety and depression. These four conditions are all long-term and all have a substantial adverse effect on the claimant's normal day-to-day activities.
10. The claimant had a poor attendance record. Some of absences were disability related, and some were not. The claimant and the respondent had a number of discussions and the respondent put in place a significant number of workplace adjustments to assist the claimant. These included the following 32 adjustments: an Ergo chair and adapt 360 with 1234 armrests, and headrest; an Ergo chair Double leg rest; a Gold touch Goo ergonomic keyboard; an extra-large double monitor screen; a pair of Goldtouch palm support gel wrist rests; a noise reducing headset; a supportive DSE mouse; an impact specialised stapler; a tower fan; a laptop to attend meetings to take notes; extra desk space to accommodate a Seasonal Affective Disorder lamp; permission to wear green glasses in the office to reduce glare and fatigue; an increased sickness absence trigger point prior to commencing any capability procedures; phased returns following periods of sickness absence; a reduction in hours from 37 hours per week to 32.5 hours per week to allow a 4 pm finish; an agreed 12 pm lunch break to support taking medication; an additional 15 to 20 minute break each afternoon; 30

minute regular meeting appointments with her manager whenever the claimant wished in order to discuss workload and stress levels; audio recording of informal meetings for the benefit of the claimant; written confirmation via email of all informal discussions; an empty space next to the claimant's desk for her walker so that she had easy access to the same throughout the day; additional electrical points to allow the claimant to use a heated blanket; transporting the Ergo chair to support the claimant to attend away days and off-site meetings; moving the post-station next to her desk for ease of access; antibacterial hand gel to mitigate her increased susceptibility to infection; additional storage space in the kitchen fridge to store cold packs to manage her health condition; an additional panel added to the office air conditioning to manage her health condition; additional handrails installed in the toilets; moving the under desk power points and cable tracks to create more space for the claimant; reviewing accessibility when considering venues for off-site meetings; recording any jobs or knocks to the claimant's chair in the accident book; and providing the claimant with a copy of the whole office Risk Assessment when requested.

11. Despite these various adjustments the claimant's attendance record remained poor, and her absences triggered the Sickness and Absence Management Policy. A Step 1 meeting took place on 26 October 2017. The respondent sought a report from the claimant's GP, who advised by letter dated 18 December 2017 that the claimant suffered from chronic fatigue syndrome and fibromyalgia and that this caused tiredness, lethargy, bouts of joint and muscle pain, with symptoms which occasionally lasted longer and required her to take time off work. It was reported that the claimant was able to manage by altering her hours of work on most occasions and ought to be able to perform her job role adequately. There was on a Stage 2 formal meeting under the policy on 5 February 2018. At that meeting the respondent made it clear that they continued to wish to support the claimant, and the claimant confirmed that she agreed to reduce her hours to 32.5 hours per week. She was invited to raise any other matters by way of potential reasonable adjustments but declined to do so.
12. The claimant's poor attendance record continued, and the respondent referred the claimant to Occupational Health, and obtained a report dated 9 November 2018, in advance of a review of the claimant's attendance under Stage 3 of the Capability Review procedure under the Policy. This had previously been put on hold pending receipt of the Occupational Health report at that time. By email dated 21 November 2018 the claimant's manager Mr Gill wrote to her to confirm that they were putting in place the following adjustments following the Occupational Health recommendations: (i) reviewing all current reasonable adjustments and discussing if any further ones would be required; (ii) if necessary undertaking and completing a new display screen equipment (DSE) assessment in order to review necessary adjustments; (iii) to request an Access to Work assessment because the last one had been two years previously and there might be further recommendations which might help; (iv) completing a risk assessment on potential emergency evacuation; and (v) completing a stress risk assessment. The respondent also agreed to put the Stage 3 capability review on hold pending completion of these actions. By email dated 3 December 2018 the claimant confirmed that she was happy with these arrangements and that there were no further reasonable adjustments which she wished to be considered.
13. Meanwhile the claimant's absences were beginning to have an effect upon her colleagues in the office. By email dated 17 December 2018 Mr McKessick wrote to the respondent's managers to complain that the amount of cover which he was having to provide in the claimant's absence was not manageable, and that his own work was suffering because on average he was spending one week in four having to do the claimant's job as well as his own, and that this was affecting the service which the respondent was providing to its clients.
14. The Access to Work process is sponsored by the Department for Work and Pensions and the service provides independent reviews, assessments and reports. The respondent engaged this process to assist the claimant and an assessment took place on 17 December 2018. The resulting report made five recommendations as follows: A

- Dragon voice recognition software to avoid the need for manual typing; B - training on Dragon for three sessions of one half day each; C - a headset which was compatible with Dragon as well as the current telephone system; D - an Evoluent Vertical Mouse (which is a keyboard mouse in a "shake hands" position rather than the normal mouse clicking downwards); and E - a keyboard forearm support, which is a padded support attaching to the desk because: "it is possible this may help with the management of the discomfort she experiences".

15. This report was obtained in advance of a Stage 4 Capability hearing which took place on 1 February 2009. The letter inviting the claimant to that meeting made it clear that dismissal with notice was a potential sanction under consideration. The claimant was represented at that meeting by Mr Marshall her recognised trade union representative from Unison. Mrs Brown of the respondent took the meeting and confirmed that the respondent considered the claimant to be disabled and that the respondent would consider any adjustments which were reasonable. It was noted that the claimant's sickness absence had recently reduced and the claimant explained that she been absent because of stress following an accident to her father which had caused previous absences, but he had recently recovered. With regard to reasonable adjustments, the claimant confirmed that she had discussed the Access to Work report with her manager Mr Gill and it was explained that the Dragon software was not compatible with the claimant's telephone system and therefore recommendations A and B (the Dragon voice recognition system and training for it) would not be implemented. It is clear that the claimant understood that "I can't have that but everything else was OK", meaning the other three recommendations (the headset the mouse and the forum support) were agreed and available.
16. Following that meeting, Mrs Brown prepared a detailed Formal Capability Outcome Report dated 12 February 2019. She recorded the claimant had had 28 days of sickness absence between April 2016 and the end of March 2017, and then 47 days of sickness absence up to the end of January 2018. For the next 12 months to the time of the hearing on 1 February 2019 the claimant had taken 13.5 days sickness absence. Mrs Brown went on to analyse the reasons for absence in the last 12 months, and concluded that only one half of one day of the 13.5 days sickness was disability related but that because "stress is known to lower the immune system, a duty of care must be applied when considering the remaining 13 days". She concluded that: "to impose a formal sanction at this stage would, in my view, seriously impact on Nicola's motivation and stress levels and is likely to be counter-productive." She therefore decided not to impose any formal disciplinary sanction, and made five recommendations, as follows: (i) that a period of three months is allowed in order for the Access to Work aids to be installed and to give Nicola the chance to get used to working with them before any further capability review is undertaken; (ii) that 4.5 hours available for EDF administration support could be used to provide additional cover thus mitigating any potential impact on the business; (iii) all jolts or knocks to Nicola's chair need to be recorded promptly in the Accident Book; (iv) that Nicola is provided with a copy of the whole office Risk Assessment as requested; and that (v) antibacterial hand gel is provided from Nicola, to mitigate against her increase susceptibility to infection. As is now explained, the first recommendation was not implemented, but the remaining four were.
17. The claimant was then absent again for a further three and a half days from 19 February 2019. Her self-certification form gave the reason as "Virus (headache, dizziness, nausea)". She then met with Mrs Pollard, one of the claimant's managers, to discuss the outcome of the Stage 4 hearing. The discussions were confirmed in an email from Mrs Pollard dated 4 March 2019. This dealt with two issues, the claimant's sickness absence, and her behaviour. The second aspect, under the heading Behaviours, related to the fact that Mrs Pollard felt that she had been misled by the claimant about various matters and: "Although it was decided that no formal action would be taken, we did discuss the importance of how you must always be factual

when relaying information and if you make comments that aren't true, you could face disciplinary action."

18. Under the heading of Sickness, Mrs Pollard reported: "There was a recommendation that a period of three months is allowed for the Access to Work aids to be installed and to give you chance to get used to working with them before a further capability review is undertaken. I advised you that this recommendation was reviewed by Emma Handley and she declined this recommendation. This is because she felt that providing you with three months discretion was unfair in line with our policy as the periods of sickness you have had since your Access to Work meeting have not been related to your disability and having these aids in places isn't relevant. I appreciate this is disappointing for you, but you said you could understand why Emma had made this decision. I confirm that the period of sickness you had from 19 to 22 February 2019 will not trigger any further action, however any further periods of sickness from 28 February 2019 will trigger a Stage 2 hearing.
19. I have heard from Mrs Emma Handley, who is the respondent's Chief Executive Officer. She had had no day-to-day involvement with the claimant, but she had received a complaint from the staff representative after the claimant had let it be known that it was recommended that she was to enjoy a three-month moratorium on the sickness absence process in order to get used to the new headphones, mouse and armrest. Although there is no specific provision in the Sickness Absence and Management Policy to deal with such an eventuality, Mrs Handley decided to review that recommendation in order to ensure fairness and consistency in the application of the respondent's procedures. She decided that the recommendation for the three-month moratorium had been based on the suggestion that there should be Dragon voice recognition software and training for the same, but that in circumstances where Mrs Brown had either being mistaken or misled on the installation of Dragon, given that these aids were not going to be provided, there was no need for a three-month moratorium for the claimant to assess the suitability of the three remaining recommendations, being headphones, mouse and armrest. This was because the claimant was already using these three items of equipment, namely a specially adapted mouse, headphones and a wrist rest, which were comparable to the three new suggestions. Mrs Handley checked that these three recommendations had been actioned, but did not agree that there should be a three-month moratorium on any further action under the Sickness Absence and Management Policy, particularly because the claimant had received no sanction following the recent Stage 4 capability hearing and was not therefore in any detrimental position. Mrs Handley felt that the recommendation was inconsistent with the Sickness and Absence Management Policy, and its implementation would have an effect on others going through the same process. She explained to Mrs Pollard why she had overruled this recommendation, and as noted above Mrs Pollard explained this to the claimant who replied that she understood why Mrs Handley had made that decision.
20. The claimant was then absent again on sickness absence from 1 March 2019. A Statement of Fitness for Work from her GP on 6 March 2019 confirmed that the claimant was not fit for work by reason of "Stress at work". The certificate did not to suggest any adjustments to assist. The claimant's sickness absence continued for the next ten months, and she did not return to work thereafter pending her dismissal on 17 January 2020.
21. This continuing sickness absence resulted in a Stage 2 Review meeting on 24 April 2019. Just before the meeting the claimant's trade union representative indicated that the claimant did not intend to attend, and Mr Gill of the respondent proceeded to review the matter. He decided to obtain a further Occupational Health report, but only to request advice on whether the claimant was capable of attending a further hearing. The resulting report was dated 19 June 2019, and advised that the claimant was fit to attend a meeting. The report also noted that the claimant had suggested that her absence was triggered by the respondent's refusal to implement all the recommendations and that the claimant was potentially fit to return to work subject to

these. The report also recommended that a stress risk assessment should be undertaken to identify any issues that the claimant might wish to raise before any return to work.

22. Meanwhile the claimant raised a formal written grievance by letter dated 1 May 2019. She gave four grounds for raising the grievance: (i) that the Chief Executive had interfered with the findings of the independent hearing and removed the support that was a key outcome of the hearing (without any provision in the respondent's procedures for doing so); (ii) that other employees were unhappy with the claimant receiving support, despite the fact that it was lawfully required, which amounted to bullying and harassment; (iii) that it was inappropriate for her line managed to refer to her union membership as a factor in how sickness should be managed; and (v) that the meeting which she had attended on 28 February 2019 should not have occurred without union or HR representation.
23. There was then a formal grievance meeting which the claimant attended on 22 July 2019 at which she was accompanied by Mr Marshall her Unison representative. The grievance was heard by Mr Miller, a Trustee of the respondent and in a detailed letter dated 4 September 2019 running to four pages Mr Miller explained his reasons for rejecting that grievance. His findings with regard to Mrs Handley were that she had not "interfered" with the intention of undermining or frustrating any process, and that her intervention was as a result of legitimate concerns which had been expressed by the staff representative to her. Having reviewed the matter she took the decision that it was unreasonable to put on hold the sickness absence process because it would not take three months for the claimant to become used to working with a headset, a mouse and a wrist rest. Mr Miller noted that none of the existing modifications or reasonable adjustments which the claimant was already receiving suffered any impact by way of Mrs Handley's intervention.
24. The claimant then appealed against the rejection of that grievance by email dated 21 September 2019. She complained about the unacceptable delay between raising her grievance on 1 May 2019, the grievance hearing on 22 July 2019, and the outcome letter on 4 September 2019. She also complained that the decision relating to Mrs Handley did not take account of the fact that the three-month period was the result of "careful consideration of my disabilities and of what I needed in order to maintain my attendance at work whilst getting used to new equipment. This was a reasonable adjustment for my disability. I believe that this reasonable adjustment was removed without due process or consideration of the impact upon me, and without even speaking to me or my union rep."
25. The claimant then issued these proceedings which were presented on 22 September 2019 claiming disability discrimination. There was then a grievance appeal meeting on 18 October 2019 which was chaired by Mr Fisher, the Chair of the respondent's Trustees. He upheld the grievance with regard to the delay in the process, for which he apologised. However, he rejected the complaint with regard to Mrs Handley's involvement on the basis that Mr Miller had properly considered all the factors and had dealt with the grievance appropriately, and he made the point that recommendations by definition are not requirements, and can be considered in the light of what is reasonable, and that Mrs Handley as Chief Executive Officer was fully within her remit to choose not to uphold a recommendation on the grounds that she did not consider it to be reasonable.
26. The claimant remained on certified sickness absence and in November 2019 the respondent undertook a detailed review. This included the number of the claimant's absences, her reasons for absence, the fact that at least 32 reasonable adjustments had been implemented, the formal sickness meetings which had taken place and concluded that the respondent: "has been more than reasonable and cannot sustain this ongoing level of sickness. Other members of staff have had to cover additional duties from Nicola's role once she moved to SSP. Until this time advisers and caseworkers have had to complete their own administration. Targets have been impacted because there has been no admin cover for work queues. 12 hours of 1:2:1

support and additional support from line managers since 5 October 2018 until 28 February 2019. This level is not sustainable and not supported Nicola to remain in work. Nicola has had a huge amount of support and reasonable adjustments put in place and all reasonable steps have been covered." The review panel therefore recommended that the claimant was moved to what was now the final stage in the capability process namely Stage 3. Accordingly by letter dated 15 November 2019 Mr Gary Neeves, the respondent's Partnership Manager from whom I have heard, required the claimant to attend a formal hearing on 25 November 2019. He advised the claimant that dismissal on notice was a potential outcome of the hearing and that she had the right to be accompanied by work colleague, staff representative or certified trade union representative.

27. Mr Neeves wrote to the claimant's GP seeking an update on the claimant's medical position. By letter dated 9 December 2019 the GP confirmed that the claimant suffers from fibromyalgia, chronic fatigue syndrome, congenital hip dysplasia, asthma, stress-related illness, seasonal affective disorder and hypermobility. However, the GP declined to respond to Mr Neeves' request for further advice concerning adjustments at work and suggested that occupational health experts might offer further support and advice.
28. The Stage 3 capability meeting then took place on 12 December 2019. It was chaired by Mr Neeves, and the claimant attended and was accompanied by Mr Marshall her Unison representative. All parties were aware that the relevant policy been updated, and what had previously been the Stage 4 final capability hearing was now this current Stage 3 hearing. They discussed the claimant's sickness absence, the reason for it, and the relevant adjustments which were in place in considerable detail. At the end of this process, Mr Neeves asked the claimant the following question: "The question I want to ask you is, bearing in mind obviously what has gone on with the big period of absence regarding mental health and stress related to the workplace that has been recorded, do you feel that you would want to come back into the organisation?" The claimant responded: "as things stand no, because I don't feel safe. The issue with my chair is the biggest problem because I have said people knocking my chair triggers my health condition and that it makes me ill and there is no way I can treat it. I have tried antispasmodics, I am allergic to them, I have had the tongue swelling and everything to them so I can't take them and I don't feel like it is taken seriously. The other issue that I have got is people going behind my chair, this chair has a rocking facility built into it where I recline the chair and I can rock to boost my circulation so if someone is standing behind me I'm going to go into them when I'm doing that and that is something that when I originally got the chair I was told to do because I've got limited mobility …" There was then a more detailed discussion concerning health and safety with regard to the claimant's working position, the position of her walker, and how she might be evacuated if there were an emergency. Following this discussion Mr Neeves asked the question of the claimant as to where she saw herself in the organisation. She responded: "I love the job Gary, I just don't feel safe there, that is the main issue". Mr Neeves asked if it was intention ever to return to work and she responded: "I would like to but honestly I need to feel safe, I need that understanding and the impact that it has had on my mental health with the changes in the reasonable adjustments because having reviewed the Stage 4 meeting notes we know that Dragon was discussed at the meeting with Lorraine and that was taken into consideration with that three-month recommendation that is the reason I was given for the withdrawal."
29. Mr Neeves prepared an Outcome Report on his decision which he sent by email to the claimant on 18 December 2019. He recorded that the claimant's absence at the time of the Stage 2 hearing was 159 days during the 12 months to 27 September 2019, and that subsequently further periods of sickness had occurred resulting in an additional 59 days up to and including 12 December 2019. He noted a large proportion of the sickness absence during the past 12 months had been due to poor mental health and stress. He noted that Mr Marshall the claimant's Unison representative had argued that her recent sickness was the direct result of the respondent not implementing the three-

month period of grace to allow the claimant to be trained in the use of a keyboard mouse armrest and headphones. Mr Neeves noted however that these last three recommendations had been implemented. Mr Neeves noted that the matter of Mrs Handley deciding not to implement the recommendation had been addressed through the grievance and appeal process. He noted that the claimant had felt unable to return to work unless she felt that she was safe. He noted that the respondent had put in place 32 reasonable adjustments in the workplace in order to support her in achieving an acceptable level of attendance but this had not been successful. He noted that she stated during a grievance process that she intended to return to work but that had not happened. She had also had significant support in the workplace by a line manager. She claimed that she felt unsafe in the workplace because of colleagues accidentally knocking her chair when walking past, but the difficulty was that the office was open plan with 88 paid staff and 30 volunteers and although efforts had been made to reduce the possibility of this happening it was impossible to remove that eventuality altogether. He concluded that the level of absence was not sustainable for the respondent and that everything had been reasonably done to ensure that the stated disabilities were addressed and supported in the workplace. He gave his Outcome as follows: "Given all the evidence and the impact your sickness levels have had on the EDF energy contract I have taken the decision to terminate your employment with notice due to the unacceptable level of sickness absence as per the sickness absence policy based on capability. Your contract of employment with Citizens Advice Plymouth will end on 17 January 2020 and will include outstanding annual leave. I have looked at redeployment options, however there are currently no suitable opportunities at present. In considering redeployment I note staff work in an open office environment and therefore the concerns raised regarding your chair being accidentally knocked ..."

30. The claimant appealed against her dismissal by letter dated 20 December 2019. She raised six grounds of appeal as follows: (i) the sickness absence was a direct result of the failure to implement a reasonable adjustment which was recommended in February 2019; (ii) the ongoing absence was caused by the respondent's failure to address the causes of the work related stress; (iii) the resolution sought in the grievance was the reinstatement of the three-month period of grace and return to Stage 2 of the capability procedure and that if that had been implemented then the claimant would have returned to work; (iv) the respondent's statement that all had reasonably been done to ensure that her stated disabilities were addressed and supported was not correct because the three-month period of grace would have provided benefits which were both psychological as well as physical; (v) the respondent failed to obtain medical or occupational health advice on the provision or withdrawal of the three-month period of grace; and (vi) the decision to dismiss was a further act of disability discrimination.
31. The appeal hearing was arranged 24 January 2020, and postponed at the claimant's request because she was unable to attend. It then took place on 3 February 2020. Mrs Louise Clements, a Trustee of the respondent from whom I have heard, chaired the appeal hearing. The claimant chose not to attend, but again was represented by her chosen trade union representative, namely Mr Simon Wintle. During the hearing it became clear that the claimant was seeking confirmation that the decision to dismiss was overturned and that she wanted compensation, rather than a return to work. Mr Wintle confirmed: "I've had a brief discussion with Nicola about it before the meeting, and she does feel that returning at this stage isn't really an option for her. She doesn't feel that the organisation can support her adequately."
32. Mrs Clements confirmed her decision on 24 February 2020, which was to reject the claimant's appeal. She concluded: "Nicola has not provided any medical evidence to support her appeal and I can see no attempt from Nicola to return to work since 1 March 2019. I find the process has been completed fairly and there has been no new evidence submitted with Nicola's appeal. Citizens Advice Plymouth could not sustain this level of sickness going on and Simon confirmed that there was no imminent return to the workplace. After due consideration of the evidence, the decision I have made is

to uphold the original decision to terminate Nicola's employment with notice on the grounds of unacceptable levels of sickness absence."

33. The claimant subsequently amended her current Tribunal proceedings to include a claim for unfair dismissal and for disability discrimination arising from that dismissal.
34. Finally, the following findings of fact are important to put this matter into context. Between the commencement of the claimant's employment in June 2015 and her dismissal she had been absent on more than 250 occasions. Allowing for a five-day working week and holidays this approximated to an entire working year having been missed in only a four-year period. These considerable absences were for a variety of different reasons, and were not all disability related. The claimant accepted that her role was at least 90% workstation based, but even so it has never been the claimant's case that these absences were related to work equipment. The respondent dealt with the claimant throughout as if she were disabled within the relevant legislation, and during a capability and absence management process which has been ongoing since 2017 had put in place at least 32 adjustments by the end of 2018. At that stage the claimant confirmed that she was satisfied with the workstation and the adjustments which had been made, and in evidence agreed that in her view there were no other adjustments needed to the workstation, but that she was always open to new ones if someone else identified them. In particular, the claimant had confirmed that she was satisfied that the issue regarding her chair had been resolved. During this process other members of staff through their staff representative complained to the respondent about the pressure they were under having to cover for the claimant's absences, and these absences were having an adverse effect on the respondent's ability to carry out its core functions. The claimant's position at the dismissal hearing was that she did not feel safe enough to return to work for fear of her chair being knocked. The claimant's position at the appeal hearing was that she did not wish to return to work but rather was seeking compensation. She complained during the grievance process that the recommendation for a suspension or moratorium of three months in the capability procedure should not have been overruled, but no disciplinary action was taken as a result, and following her subsequent absence for stress at work, and despite having the assistance of an experienced trade union representative, she did not engage in a constructive manner to address how she might return to work. Indeed, the contrary was the case, because as noted she indicated that she did not feel safe to return because her chair might be knocked, and subsequently did not wish to return at all. The common sense conclusion is that throughout the claimant's short period of employment the respondent bent over backwards to assist the claimant and to accommodate her disabilities and other illnesses, but with the result that the claimant was ultimately unable to demonstrate acceptable levels of attendance, and eventually did not wish to return to work.
35. Having found the above facts, I now apply the law.
36. <u>The Law</u>
37. The reason for the dismissal was capability which is a potentially fair reason for dismissal under section 98(2)(a) of the Employment Rights Act 1996 ("the Act").
38. We have considered section 98 (4) of the Act which provides "…. the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) – (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and – (b) shall be determined in accordance with equity and the substantial merits of the case".
39. This is also a claim alleging discrimination because of the claimant's disability under the provisions of the Equality Act 2010 ("the EqA"). The claimant complains that the respondent has contravened a provision of part 5 (work) of the EqA. The claimant alleges discrimination arising from a disability, and failure by the respondent to comply with its duty to make adjustments.

40. The protected characteristic relied upon is disability, as set out in section 6 and schedule 1 of the EqA. A person P has a disability if she has a physical or mental impairment that has a substantial and long-term adverse effect on P's ability to carry out normal day to day activities. A substantial adverse effect is one that is more than minor or trivial, and a long-term effect is one that has lasted or is likely to last for at least 12 months, or is likely to last the rest of the life of the person.
41. As for the claim for discrimination arising from disability, under section 15 (1) of the EqA a person (A) discriminates against a disabled person (B) if A treats B unfavourably because of something arising in consequence of B's disability, and A cannot show that the treatment is a proportionate means of achieving a legitimate aim. Under section 15(2), this 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.
42. The provisions relating to the duty to make reasonable adjustments are to be found in sections 20 and 21 of the EqA. The duty comprises of three requirements, of which the first is relevant in this case, namely that where a provision criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, there is a requirement to take such steps as it is reasonable to have to take to avoid that disadvantage. A failure to comply with this requirement is a failure to comply with a duty to make reasonable adjustments. A discriminates against a disabled person if A fails to comply with that duty in relation to that person.
43. The provisions relating to the burden of proof are to be found in section 136 of the EqA, which provides in section 136(2) that if there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred. However by virtue of section 136(3) this does not apply if A shows that A did not contravene the provision. A reference to the court includes a reference to an employment tribunal.
44. I have considered the cases of Environment Agency v Rowan [2008] IRLR 20 EAT; Newham Sixth Form College v Sanders EWCA Civ 7 May 2014; Sheikholeslami v University of Edinburgh [2018] IRLR 1090 EAT; Pnaiser v NHS England [2016] IRLR 170 EAT; McCullough v ICI Plc [2008] IRLR 846; Kapenova v Department of Health [2014] ICR 884; Hardy & Hansons plc v Lax [2005] IRLR 726 CA; O'Brien v Bolton St Catherine's Academy [2017] EWCA Civ 145; Birtenshaw v Oldfield [2019] IRLR 249 EAT; Hensman v Ministry of Defence UKEAT 0067/14/DM; Spencer v Paragon Wallpapers Ltd [1976] IRLR 373 EAT; GE Daubney v East Lindsey District Council [1977] IRLR 181 EAT; and BS v Dundee City Council [2013] IRLR 131 CS. I take these cases as guidance, and not in substitution for the provisions of the relevant statutes.
45. I have also considered section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992, and in particular section 207A(2), (referred to as "s. 207A(2)") and the ACAS Code of Practice 1 on Disciplinary and Grievance Procedures 2009 ("the ACAS Code").
46. Case Management
47. There have been four case management preliminary hearings dealing with this case, not least because the claimant was dismissed after her proceedings had first been issued, and the issues to be determined developed following her new claims relating to her dismissal. It was agreed by the parties that the issues to be determined by this tribunal were limited to the following matters which appear below.
48. In the first place, the claimant relies on four specific and different impairments to establish her disability status under the EqA as follows: (a) fibromyalgia; (b) chronic fatigue syndrome; (c) seasonal affective disorder; and (d) anxiety and depression. The respondent concedes that the claimant is a disabled person by reason of each of these four impairments, and further concedes that it knew at all material times that the claimant was a disabled person by reason of these impairments. For the avoidance of doubt, I find that this was the case.

49. In addition, it is to be noted that the parties both agreed in writing that this claim should be dealt with by an Employment Judge sitting alone, rather than a full tribunal, pursuant to section 4(3(e) of the Employment Tribunals Act 1996.
50. The Disability Discrimination Claims
51. Reasonable Adjustments
52. With regard to the claim for reasonable adjustments, the claimant only relies upon the impairment of fibromyalgia for the purposes of this claim. The PCP relied upon is the respondent's requirement for the claimant to comply with its attendance requirements at a time when the claimant was or would be getting used to the following work aids, namely keyboard, mouse and headset. The respondent accepts that it applied this PCP but denies that it put the claimant to the substantial disadvantage relied upon, namely that the claimant required these additional aids and needed time to get used to them whereas a non-disabled person would not have needed to do so. The reason the respondent denies that there was any substantial disadvantage is that many of the claimant's absences were not disability related, and the claimant did not as a matter of fact need a three-month moratorium to get used to these work aids.
53. The adjustment which the claimant asserts would have been reasonable was the suspension of the capability process for three months which would have avoided the progression of the capability procedure and her subsequent dismissal. The claimant's case has developed somewhat during this hearing to the effect that she was allowed insufficient time to consider the efficacy of the new proposed adjustments, and that this caused her stress and anxiety, with the result that she was absent on certified sickness absence for work-related stress, which ultimately resulted in her dismissal. The respondent denies that any such adjustment would have been reasonable and that it would not have alleviated any disadvantage having regard in particular to: (a) the fact that she did not require the moratorium to get used to the aids; and (b) the various reasonable adjustments which had already been put in place to assist the claimant to try to maintain the attendance requirements; and (c) the claimant's previous and continuing absences from work.
54. The constituent elements of claims in respect of an alleged failure to make reasonable adjustments are set out in Environment Agency v Rowan. Before considering whether any proposed adjustment is reasonable, the Tribunal must identify: (i) the provision, criterion or practice applied by or on behalf of the employer; (ii) the identity of the non-disabled comparators (where appropriate); and (iii) the nature and extent of the substantial disadvantage suffered by the claimant.
55. Environment Agency v Rowan has been specifically approved by the Court of Appeal in Newham Sixth Form College v Sanders - the authorities make it clear that to find a breach of the duty to make reasonable adjustments, an employment tribunal had first to be satisfied that there was a PCP which placed the disabled person at a substantial disadvantage in comparison with persons who were not disabled. The tribunal had then to consider the nature and extent of the disadvantage which the PCP created by comparison with those who were not disabled, the employer's knowledge of the disadvantage, and the reasonableness of proposed adjustments.
56. In this case the PCP was identified and confirmed in the preliminary hearings dated 17 April 2020 and 5 January 2021 as being the need for the claimant to comply with the respondent's attendance requirements at a time when the claimant was or would be getting used to the following work aids, namely the keyboard/wrist rest, mouse and headset. The respondent accepts that it applied this PCP because it continued to apply the capability and attendance management process to the claimant at a time when she was using the work aids identified.
57. The next question to address is whether this PCP put the claimant at a substantial disadvantage as compared to someone who was not disabled by reason of fibromyalgia. In this context substantial disadvantage means "more than minor or trivial", see for instance Sheikholeslami v University of Edinburgh. The respondent denies that there was any substantial disadvantage because (a) many of the claimant's

absences were not disability related; and (b) the claimant did not as a matter of fact need a three-month moratorium to get used to the work aids.

58. Pausing there for a moment, it is important to reflect on and not to conflate the recommendations made, the proposed adjustments, and the alleged disadvantage caused by the agreed PCP. In the first place the Access to Work report made five recommendations as to adjustments which might prove reasonable. The first two (A and B) related to the introduction of Dragon voice recognition software, and training in the use of that software. Unfortunately, the respondent's existing telephone and IT systems were not compatible and that could not be introduced, and the claimant understood and accepted that conclusion. The third recommendation under C was a headset which was compatible with both Dragon and the respondent's existing systems. However, the claimant already used a headset, and there was therefore no need for a new headset to be compatible with Dragon because Dragon was not being introduced, and the claimant's existing headset would obviously remain appropriate and sufficient. The remaining two recommendations, D and E, were for an Evoluent Vertical Mouse (which is a keyboard mouse in a "shake hands" position rather than the normal mouse clicking downwards); and E - a keyboard forearm support, which is a padded support attaching to the desk. At this time, it is to be noted that amongst the 32 reasonable adjustments already implemented by the respondent and which were being used by the claimant these included (iii) a Goldtouch Goo ergonomic keyboard; (v) a pair of Goldtouch Palm Support Gel wrist rests and (vii) a supportive DSE mouse. In other words, the claimant had already been using for a considerable period of time an adapted mouse with wrist rests for an ergonomic keyboard. It beggars belief to suggest that the claimant would need three months to assess the efficacy of a headset which had little if any difference to the one she was already using (and which she could still use because a Dragon compatible one was not needed), a slightly different adapted mouse, and a slightly different way of supporting her wrists at the keyboard.
59. Be that as it may the PCP relied upon is not the requirement on the claimant to work in a certain way at her keyboard, but it is rather the requirement to attend work with that new equipment in place without allowing a suspension of three months to the Sickness and Absence Management Policy. The respondent asserts that this did not put the claimant at any substantial disadvantage (in the sense that any disadvantage is more than minor or trivial). The respondent makes the following points: (i) the claimant had never needed a similar suspension in the past despite having accepted a substantial amount of workplace adjustments; (ii) the claimant did not ask for such a suspension; (iii) the respondent's Chief Executive Officer was entitled to conclude following detailed consideration that any such suspension was unnecessary; and (iv) in any event Mrs Handley's refusal to allow the recommendation for the suspension did not alter Mrs Brown's conclusion that there would be no formal action under the capability process, and no formal action did take place under the policy, and therefore no disadvantage was suffered. It is also clear that the claimant explained to the respondent that her main reason for being off work after these events was because she was feeling unsafe when colleagues knocked her chair, (and was not because she was made ill through stress because she was denied time to assess the efficacy of any suggested adjustments), and the claimant only asked for the three-month period to be instigated at the appeal hearing at which stage it was clear she had no intention of returning to work in any event.
60. I agree with these submissions, and for these reasons I find that there was no substantial disadvantage caused to the claimant by the respondent's failure to suspend the policy for three months when compared to a hypothetical comparator who was not disabled by reason of fibromyalgia. The new equipment provided was clearly similar to adjustments already in place and there is no evidence to suggest that the claimant's fibromyalgia resulted in a stress-related condition caused by the failure to afford three months to assess the efficacy of that new equipment. Given that there was no substantial disadvantage suffered by the claimant the statutory duty to make adjustments did not arise, and I therefore dismiss this claim.

61. Section 15 EqA:
62. The claimant raises two allegations of unfavourable treatment, namely (a) the continuation by the respondent of the capability process without the three-month moratorium to allow her to become familiar with the agreed auxiliary aids; and (b) her dismissal. The claimant relies on all four disabilities in support of this claim.
63. The proper approach to section 15 claims was considered by Simler P in the case of Pnaiser v NHS England at paragraph 31: (a) Having identified the unfavourable treatment by A, the ET must determine what caused it, i.e. what the "something" was. The focus is on the reason in the mind of A; it involves an examination of the conscious or unconscious thought processes of A. It does not have to be the sole or main cause of the unfavourable treatment but it must have a significant influence on it. (b) The ET must then consider whether it was something "arising in consequence of B's disability". The question is one of objective fact to be robustly assessed by the ET in each case. Furthermore: (c) It does not matter in precisely what order the two questions are addressed but, it is clear, each of the two questions must be addressed, (d) the expression "arising in consequence of" could describe a range of causal links … the causal link between the something that causes unfavourable treatment and the disability may include more than one link, and (e) the more links in the chain there are between the disability and the reason for the impugned treatment, the harder it is likely to be to establish the requisite connection as a matter of fact.
64. In the first place, the respondent accepts that two allegations do both amount to unfavourable treatment, and I so find. The next question is whether either amounts to "something arising" in consequence of any of the claimant's four disabilities relied upon.
65. The claimant asserts in the first place that the "something arising" following the respondent's refusal to implement the three-month moratorium was (a) the need for and the requirement for the claimant to get used to the specialised aids to help with the discomfort, sensory overload, and brain fog experienced by the claimant as a result of her fibromyalgia; (b) the "breathing space" it would have for the claimant to help reduce stress and anxiety; which, (c) in turn, would allow the claimant to achieve the necessary attendance as required by the respondent.
66. The respondent disputes the logic of this claim, which it asserts is more properly presented as a claim for reasonable adjustments as explained above. I agree with that contention. The first stage under s15 EqA is to analyse the unfavourable treatment and this is identified and agreed as the suspension of the recommended three-month moratorium. The next stage is to determine what caused this, in other words what the "something" was, which involves an examination of the respondent's thought processes. It is not the case that Mrs Handley suspended the moratorium for any of the three reasons relied upon as "something arising" by the claimant. These three reasons arguably address subsequent substantial disadvantage caused by that suspension which could have been ameliorated by a reasonable adjustment, which is the reasonable adjustments claim dealt with above. It misses the point that these issues are not something which were the sole or main cause, or even a significant influence on, Mrs Handley's decision not to implement the recommendation to suspend the moratorium. As confirmed in the findings of fact above, Mrs Handley took this decision for a number of reasons. These included in short that she felt the suspension was inconsistent with the Policy and she wished to ensure consistency with others involved in the process, particularly because there had been a staff complaint; the Dragon software could not be installed; there was simply no need for a three month assessment period for a headset and one was already in use, for wrist rests when armrests were already in use, and a slightly different mouse when an adaptive mouse was already in use; and in circumstances where no disciplinary sanction had been applied. It is simply not the case that Mrs Handley made this decision, or was influenced in making it, because of something arising in consequence of the claimant's disabilities. For these reasons I dismiss this element of the claimant's claim under section 15 EqA.

67. The position is different with regard to the claimant's dismissal. This was clearly unfavourable treatment. The claimant's dismissal arose because of the claimant's inability to meet the respondent's requirements of effective service under its Sickness Absence and Management Policy. Although not all of the claimant's sickness absences were disability-related, a substantial number were, and I find that the respondent decided to dismiss the claimant because of her extended sickness absence which was something arising in consequence of her four disabilities relied upon. As I understand the respondent's position, it does not dispute this initial conclusion, but argues that the dismissal was justified in that it was a proportionate means of achieving a legitimate aim.
68. I therefore now address the issue of justification. As confirmed in the relevant case management orders, the respondent contends that it was a legitimate aim to ensure reasonable levels of attendance for the purposes of the proper and efficient operation of the respondent. The claimant agrees that this was a legitimate business aim. For the record I agree and I so find. The respondent also contends that in order to achieve this legitimate aim it is necessary to implement a fair capability policy where attendance falls below a sustainable level and that therefore there is a reasonable necessity for this treatment. The claimant also agrees that such treatment is reasonably necessary. For the record I agree and I so find.
69. This leaves the matter of proportionality. The respondent asserts that dismissal was a proportionate and reasonable response to the claimant's prolonged and continued absences where all reasonable adjustments had already been considered and implemented. The claimant disputes this, and asserts that it was not appropriate or reasonably necessary to dismiss the claimant. The claimant argues that the had been an improvement in her attendance before her final period of absence, and that this new reason for absence was not explored appropriately the three reasons: (i) it was the first time that absence had been recorded as work-related stress; (ii) the claimant asserted that the refusal to accept the recommendation for the moratorium had triggered her absence; and (iii) that this stress-related absence should have resulted in a stress risk assessment under the Sickness Absence and Management Policy. The claimant relies on Birtenshaw v Oldfield as authority to suggest that there must be an objective balancing exercise and that to be proportionate the conduct in question has to be both an appropriate and reasonably necessary means of achieving the legitimate aim.
70. in assessing the legitimate aim defence, the tribunal must consider fully whether (i) there is a legitimate aim which the respondent is acting in pursuance of, and (ii) whether the treatment in question amounts to a proportionate means of achieving that aim (McCullough v ICI Plc). As noted in O'Brien v Bolton St Catherine's Academy in cases involving capability dismissals, the aim will almost inevitably be legitimate. The central issue for the tribunal in the majority of cases, and particularly in this, is whether dismissal was a proportionate means of achieving that aim.
71. In Hensman v Ministry of Defence Singh J held that when assessing proportionality, while an ET must reach its own judgment, that must in turn be based upon a fair and detailed analysis of the working practices and business considerations involved, having particular regard to the business needs of the employer. Indeed, a tribunal with err if it fails to take into account the business considerations of the employer but the tribunal must make its own assessment on the basis of the evidence then before it.
72. In addition, the defence of justification does not fail merely because there is a less discriminatory means of achieving the legitimate aim in question (Kapenova v Department of Health). It is for the 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 (Hardys & Hansons Plc v Lax).
73. Applying these principles, I find as follows. At the time that Mr Neeves took the decision to dismiss the claimant his reasons were based upon the following conclusions: (a) a significant number of adjustments had already been made to encourage acceptable levels of attendance, but these had not worked; (b) the claimant had been off work

since 1 March 2019 with work-related stress and absences were in excess of 250 days; (c) the claimant had suggested that her absence was related to Mrs Handley's decision to overrule the three-month moratorium, but her grievance process and grievance appeal had not upheld these complaints; (d) the claimant said that the reason she did not feel that she was able to return to work was that she did not feel safe because she was afraid that her chair would be knocked; and (e) the claimant has already been given substantial management support throughout her time with the respondent. At the time of her appeal against her dismissal the claimant did not want to return to work at all, but rather with the assistance of her trade union representative decided to seek compensation instead.

74. I find that the conclusions reached by the respondent at both the dismissal and the appeal stages were open to it on the facts of the case as presented. It is particularly noteworthy that the claimant did not really wish or intend to return to work. At no stage did she ask for the three-month moratorium to be applied to facilitate her return to work. She made it clear that her main concern was the safety of her chair. This was however an issue which had long been resolved, and she had earlier confirmed to Mrs Brown that she was satisfied that the issue of the chair had been resolved. The claimant has always accepted that there was no reasonable alternative employment to which she might have been redeployed. In these circumstances the options open to the respondent appear to be limited to dismissing the claimant when she said that she felt unsafe in relation to an issue which had long been resolved, or at the appeal stage paying her compensation when she requested the same and did not wish to return to work.
75. In these circumstances it is difficult to conclude that the claimant's dismissal can be anything other than a proportionate response, particularly bearing in mind the respondent's business needs, which included the requirement for staff to attend regularly, a consistent and fair application of the relevant policy, and the ability to carry out its core function for clients. I therefore find that the respondent's decision to dismiss the claimant was a proportionate and reasonably necessary decision in pursuit of a legitimate business aim, and was therefore justified. I therefore dismiss the remaining claim under section 15 EqA.
76. The Unfair Dismissal Claim
77. The claimant raises two complaints of unfairness. She asserts that (a) her dismissal was procedurally unfair; and (b) that the respondent did not have reasonable grounds to dismiss, having regard in particular to its refusal to allow the reasonable adjustment of the three-month moratorium to its capability procedure in order to allow her to familiarise herself with the agreed auxiliary aids. The claimant does not contend that there was any alternative employment for which she should have been considered in order to avoid her dismissal.
78. The starting point should always be the words of section 98(4) themselves. In applying the section the tribunal must consider the reasonableness of the employer's conduct, not simply whether it considers the dismissal to be fair. In judging the reasonableness of the dismissal the tribunal must not substitute its own decision as to what was the right course to adopt for that of the employer. In many (though not all) cases there is a band of reasonable responses to a set of factual circumstances within which one employer might take one view, and another might quite reasonably take another. The function of the tribunal is to determine in the particular circumstances of each case whether the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair.
79. It is clear from BS v Dundee City Council that three important themes emerge from the decisions in Spencer and Daubney. First, in a case where an employee has been absent from work for some time owing to sickness, it is essential to consider the question of whether the employer can be expected to wait longer. Secondly, there is a need to consult the employee and take her views into account. This is a factor that can operate both for and against dismissal. If the employee states that she is anxious to

return to work as soon as possible and hopes that she will be able to do so in the near future, that operates in her favour; if, on the other hand she states that she is no better and does not know when she can return to work, that is a significant factor operating against her. Thirdly, there is a need to take steps to discover the employee's medical condition and her likely prognosis, but this merely requires the obtaining of proper medical advice; it does not require the employer to pursue detailed medical examination; all that the employer requires to do is to ensure that the correct question is asked and answered.

80. Although the claimant earlier argued that her dismissal was procedurally unfair, this does not now appear to be pursued, and in any event in my judgment is not supportable. In short, the respondent applied its Sickness and Absence Management Policy, and at the Stage 3/Stage 4 hearing and then the appeal hearing by an independent manager the claimant was aware that her dismissal was a potential sanction and had exercised her right to be represented by a trade union representative. The respondent had also dealt with the claimant's grievance in a reasonable and appropriate manner before the conclusion of that process.
81. The allegations of unfairness as now presented on behalf of the claimant are (a) there were no assessments to give the respondent an update on the claimant's health prior to her dismissal; (b) the respondent failed to investigate properly whether the claimant would be able to return to work; (c) the claimant's attendance had previously shown an improvement; (d) there was a lack of recognition as to what had triggered the claimant's final absence; and (e) accordingly, the decision to dismiss was not within the band of reasonable responses open to the respondent.
82. I agree with the observation that the respondent did not have an up-to-date medical report or Occupational Health report to hand at the time that it took the decision to dismiss the claimant. However, in my judgment that is different from concluding (and does not mean) that the respondent was unaware of the relevant facts pertaining to the claimant's continuing absence and reasons for it. The respondent was aware that the claimant had indicated that her absence for stress at work was caused by the failure to implement the recommendation of the moratorium for three months. However, the respondent had investigated that matter, not least during the claimant's grievance process, and had concluded that Mrs Handley was entitled to decline to accept the recommendation, and in particular that it was not reasonable for the claimant to insist on three months to try the limited adaptive equipment which had been supplied. At the time of the claimant's dismissal, despite the fact that there had been an earlier improvement in attendance, the claimant's sickness absence record remained very poor, and was not all disability related. The respondent made enquiries of the claimant and her trade union representative as to when and how she might return to work. At the dismissal hearing these enquiries were met with a reluctance to return to work because of fears relating to the chair, despite the fact that this was an issue which the claimant had earlier confirmed had been resolved to her satisfaction. At the appeal hearing these enquiries were met with a refusal to return to work and a request for compensation.
83. Against this background other members of staff were complaining about the manner in which the claimant had been treated, which was perceived to be inconsistent and more generous than others, and the claimant's absences continued to have an adverse effect on the respondent's ability to carry out its core functions.
84. In addition, for the reasons set out above, I have found the respondent's actions were not tainted by unlawful discrimination as alleged by the claimant.
85. In judging the reasonableness of the dismissal, the tribunal must not substitute its own decision as to what was the right course to adopt for that of the employer. The function of the tribunal is to determine in the particular circumstances of each case whether the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. In my judgment dismissal was within that band of reasonable responses. Bearing in mind the size and administrative responses of the respondent, I find that the claimant's dismissal was fair and reasonable in all the

circumstances of the case, and I therefore also dismiss the claimant's unfair dismissal claim.

86. Accordingly, the claimant's claims are all dismissed.
87. For the purposes of Rule 62(5) of the Employment Tribunals Rules of Procedure 2013, the issues which the tribunal determined are at paragraph 1; the findings of fact made in relation to those issues are at paragraphs 5 to 34; a concise identification of the relevant law is at paragraphs 37 to 45; how that law has been applied to those findings in order to decide the issues is at paragraphs 47 to 86.

Employment Judge N J Roper
Dated: 3 February 2021

Judgment sent to Parties: 11 February 2021

FOR THE TRIBUNAL OFFICE