EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mrs A Koenig	**v**	**Highways England**
Heard by Cloud video		**On**: 8-12 February 2021

Before: Employment Judge Reed
Ms C Whitehouse
Ms A Brown

Appearances

For the Claimant: In person
For the Respondent: Mr T Kirk, counsel

JUDGMENT

The unanimous judgment of the tribunal is that

1 The claimant was not unfairly dismissed

2 The claimant's claims of unlawful discrimination fail and are dismissed.

REASONS

1. In this case the claimant Mrs Koenig said she had been unfairly dismissed by her former employer, Highways England (HE) and unlawfully discriminated against on the ground of disability. HE resisted the claims.

2. We heard evidence from Mrs Koenig and, on behalf of HE, from Mr Welby-Everard, her former manager; Ms Naylor, Head of Business Improvement; Ms Clarke, who dealt with a grievance lodged by Mrs Koenig; Mrs Hallett, who dismissed Mrs Koenig; Ms Brookes who dealt with the appeal against dismissal; and Ms Davis, HR Manager. On the basis of their evidence and the documents we were shown we made the following findings.

3. Mrs Koenig began working for HE (or more precisely its predecessor) in October 1990. At the time of the events in question she was a programme leader.

4. In 2015 and 2016 Mrs Koenig was under considerable work pressure. As HE would subsequently acknowledge, her workload was too high. From early 2016 she was showing signs of stress and in June of that year she raised the matter with her manager Mr Simmonds.

5. In April 2016 she was told that she had been awarded "box 3" on her annual assessment. This was lower than she had been expecting and caused her considerable distress.

6. In August 2016 she consulted her GP about stress, and again in October.

7. In November Mr Simmonds carried out a stress risk assessment on Mrs Koenig and as a consequence a stress management programme was drawn up the following February by Mr Welby-Everard, who by then was her manager. In the meantime, he had also taken over elements of her work in order to reduce her workload.

8. On 11 November 2016 Mrs Koenig lodged a grievance, complaining about her workload and the outcome of her annual assessment in April. A meeting to address the grievance took place on 27 January 2017 and an outcome was sent to her on 28 April 2017 which upheld the grievance in part.

9. In February 2017 she applied for unpaid leave, which HE granted. However, before her leave was due to start, on 8 March 2017 she was signed off sick by reason of stress. She never returned to work.

10. On 10 March 2017 she was sent an email by HR which referred to her having "resigned" by taking unpaid leave. That was a clumsy error which upset to Mrs Koenig.

11. On 31 March she indicated that she would not be taking unpaid leave (since she was now on sick leave) and in accordance with the advice she had received from her GP she asked for there to be no contact with her.

12. On 10 May 2017 Mrs Koenig lodged an appeal against the grievance outcome and a meeting took place on 26 May to address it.

13. On 30 June Mrs Koenig was informed that her appeal against the outcome of her grievance had failed.

14. Mrs Koenig was due to meet an occupational health doctor on 19 July 2017 but that meeting was postponed because she was unhappy with the arrangements. However,in July 2017 Mrs Koenig consulted a psychologist, Dr Smith, who recommended counselling sessions. They were arranged by HE, not with Dr Smith, and took place in September and October. Mrs Koenig was not helped them.

15. HE's attendance management policy provided for a review after 21 days' absence but no meeting took place at that stage of her absence. However, a 6 month review took place on 15 September 2017.

16. A further absence review meeting took place on 1 November 2017.

17. On 9 November 2017 and 12 January 2018 reports were produced by, respectively, Dr Smith and HE's occupational health advisors.

18. In March 2018 Mrs Koenig's occupational sick pay ceased, since she had been absent for a year. In the same month she attended a 12 month review. It was agreed that she could have further counselling, this time provided by Dr Smith herself and funded by HE. That took place in March to May 2018 and a further occupational health report was produced on 30 June 2018.

19. Another sickness absence review meeting took place on 10 July 2018 and Dr Smith issued another report on 1 August. Another occupational health report was produced in September.

20. There was an "options review" meeting with Mrs Koenig on 27 November 2018 at which it was agreed that HE would bear the cost of further counselling.

21. Mrs Koenig was called to a meeting on 19 March 2019 at which her continued employment with HE was to be discussed. At that hearing, Mrs Koenig indicated she was not fit to return. A decision was taken by Ms Hallett that she should be dismissed on the basis that she had been absent for 2 years and there was no prospect of a return to HE in the reasonably foreseeable future. She was sent a letter to that effect on 28 March.

22. On 2 April Mrs Koenig lodged an appeal against dismissal and there was a telephone meeting between her and Ms Brookes on 5 June 2018. Ms Brookes decided to reject the appeal and wrote to Mrs Koenig to inform her of that on 13 January 2020.

23. Mrs Koenig brought claims of unfair dismissal and disability discrimination.

24. Under s.98 of the Employment Rights Act 1996 there are 5 potentially fair reasons for dismissal. If a respondent establishes a potentially fair reason for dismissal, the tribunal must go on to determine whether the respondent acted reasonably or unreasonably in treating that reason as a sufficient reason for dismissing the employee.

25. Under s.6 of the Equality Act 2010, a person has a disability if she has a physical or mental impairment and the impairment has a substantial and long term adverse effect on her ability to carry out normal day to day activities. An adverse effect will be regarded as long term if it has lasted at least 12 months or is likely to.

26. Disability is a protected characteristic and pursuant to s.13 of the 2010 Act, a person (A) discriminates directly against another (B) if, because of the protected characteristic, A treats B less favourably than A treats or would treat others.

27. Under s.15 of the 2010 Act, 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.

28. Under s.20 of the 2010 Act, where a provision, criterion or practice of an employer 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 the disadvantage.

29. Under s123 of the 2010 Act, a claim of unlawful discrimination must be presented to the tribunal within 3 months of the act complained of, or such other period that the tribunal thinks just and equitable.

30. In advance of this hearing the parties had agreed a list of issues. Upon closer examination, it became clear that that did not precisely address the issues that Mrs Koenig wished to take forward and did not properly categorise them within the provisions of the Equality Act. Accordingly, a new list of issues was drawn up and agreed by the parties and it is that we shall address, below.

Unfair dismissal

31. Mrs Koenig was clearly dismissed because of her long term absence and the view HE took as to the likelihood that she would return. The reason for dismissal was therefore capability and the dismissal was therefore potentially fair.

32. We then had to consider whether HE acted reasonably in treating capability as justifying the dismissal of Mrs Koenig.

33. Within the original list of issues (which we did not amend in relation to unfair dismissal) eight distinct grounds of unfairness were alleged. We shall address them separately below. However, the essence of the issue for us was whether HE reasonably took the view that Mrs Koenig was unlikely to be able to return to work in the reasonably foreseeable future. In order to answer that question we had to look at the evidence before Mrs Hallett in March 2019 although clearly she would have to be aware of how matters had developed to that stage.

34. From the very early stages of her sickness absence both Mrs Koenig and her medical advisers appeared to consider that her prospect of return to work was very slim. That was the view Mrs Koenig herself expressed to Mrs Hallett in no uncertain terms. Mrs Koenig pointed out to us that the medical evidence before Mrs Hallett was somewhat dated and indeed that HE's own policies appeared to provide for medical evidence being no older than three months. That would

clearly be a very important consideration if, for example, Mrs Koenig had insisted to Mrs Hallett that she would be able to return at some point in the near future. That was simply not the case. On the contrary, she expressly told Mrs Hallett that she would not be able to return to HE in any capacity.

35. Mrs Hallett was aware that HE, on the face of it, bore a great part of the responsibility for the fact that Mrs Koenig was absent in the first place. It had been accepted in the course of her grievance that she had been overworked by HE. In that situation, it was quite right that Mrs Koenig should expect HE to "go the extra mile" in accommodating her. That, however, they had already done. By the time of her dismissal Mrs Koenig had been away from work for some two years. In any situation that would be a long time.

36. This was not a case in which reasonably Mrs Hallett was required to obtain any further medical evidence. Mrs Koenig was in a position to inform her exactly what the prognosis was, in relation to a return to work. Mrs Hallett was entitled to accept what she said at face value. She was also bound to bear in mind the difficulties Mrs Koenig's absence had caused HE. She was in a senior position within the organisation. There was some dispute between the parties as to whether her role had been filled by a permanent or temporary (contractor) worker but it was clear that manpower within her particular region was problematical at the best of times and that her absence was a source of some problem to HE. Specifically, her absence was bound to result in a greater use of contractors, who would be far more expensive to employ than permanent employees.

37. We now turn to the eight separate grounds of unfairness alleged by Mrs Koenig.

Failing to follow procedure

38. It is correct that HE did not carry out a 21 day review immediately following the commencement of Mrs Koenig's absence, as the relevant procedure provided. It was suggested that the reason for that was Mrs Koenig's express intention that HE should not contact her but it was not clear to us whether it was a result of that consideration or simply an oversight. Whichever it was, however, it clearly could not have had an impact on Mrs Hallett's decision, some two years later, unless Mrs Koenig could say she had been prejudiced by that failure. In our view she could not. There were a number of other meetings that took place subsequently and no reason to believe that if one had taken place at or shortly after the 21 day initial period the outcome might have been in any way different.

The respondent failed to take steps to make reasonable adjustments

39. We expand upon this issue below. The short answer for the purposes of this part of the decision is that there were no reasonable adjustments that HE could make that would have returned Mrs Koenig to work. In any event, we are again here focusing on the actions of Mrs Hallett and the information she had before her. At that particular time Mrs Koenig was certainly not suggesting that there

were steps that might be taken by HE, the result of which would be her imminent return to work.

The decision officer was not impartial

40. Mrs Hallett's manager was also the person to whom ultimately Mr Welby-Everard reported. In other words they were in the same management line. That is not an unusual situation in a case of this sort. Sometimes that will be unacceptable. If, for example, Mrs Hallett had been called upon to determine the credibility of Mr Welby-Everard or her own manager, then perhaps this would be a ground with some substance. That was not the situation here. She was simply taking an independent view on the basis of the evidence produced to her and there was no reason to believe that she was an improper person to carry out that task.

HE failed to take into account the cause of Mrs Koenig's disability

41. As we have said Mrs Hallett was indeed aware of the background of the case and in particular the concession had already been made to Mrs Koenig's workload. As we have also said, HE went the extra mile by permitting in particular an extensive period of absence

The referral to Mrs Hallett contained incorrect and inaccurate information

42. Mr Welby-Everard produced a report to go to Mrs Hallett. Mrs Koenig had sight of that document and herself produced a lengthy document taking issue with a number of matters within it.

43. Mrs Hallett had the opportunity of reading those documents before she took her decision. In fact, the issues raised by Mrs Koenig were not ones that were relevant to the decision she (Mrs Hallett) had to take. The accuracy or otherwise of Mr Welby-Everard's report in relation to those matters was therefore irrelevant.

Mrs Hallett was not empowered to dismiss given the failure to comply with the attendance management procedure

44. Mrs Koenig said that in addition to the failure to carry out the 21 day review, there had also been a failure to obtain sufficient occupation health and other medical reports on her. The implication appeared to be that if there had been some breach of the procedure, then Ms Hallett did not have power to dismiss her. The logical conclusion of that submission is that if at any point HE had been in breach of the procedure, then Mrs Koenig could never be dismissed. Clearly, that was not the case.

45. Mrs Koenig was certainly at liberty to submit that further steps might have been taken by HE in accordance with the procedure before her dismissal but she was not prejudiced by any failure to do so and more specifically in this instance, Mrs Hallett was not disempowered from being a dismissing officer by reason of any such shortcoming.

HE did not follow its appeal process

46. Timescales were set out within the appeal process that on the face of it Mrs Koenig might reasonably have expected would be met by HE. They were very much exceeded. However, we remind ourselves that this was an appeal. Mrs Koenig had already been dismissed. Although the timescales, which appear to be largely aspirational, were not met, that did not affect the fairness of the overall process.

Mrs Koenig was refused a response to her appeal for more than 10 months

47. It was certainly 10 months between the appeal being made and it being disposed, which was an excessively long time. In no sense could this be regarded as a "refusal" to entertain her appeal, however. It was always clear that the appeal was being handled by HE.

48. In all the circumstances we concluded that Mrs Hallett acted reasonably in concluding that dismissal was the appropriate outcome. There was simply nothing before her that might have persuaded her that a further reasonable period of absence was likely to result in Mrs Koenig returning to work. It followed that we concluded that the dismissal was fair.

Disability discrimination

49. Our first task under this head was to determine the date upon which Mrs Koenig became disabled by reason of stress and depression. It was conceded by HE that she was disabled from July 2017, when a specific diagnosis was given by Dr Smith. However, Mrs Koenig insisted that she was disabled from March 2016.

50. We accepted the evidence of Mrs Koenig to the effect that she was suffering from stress well before 2016. In particular we accepted that her interactions with others – in particular, her friends and her husband's relatives - was severely adversely affected from early 2016 at the latest. In other words, her ability to carry out normal day to day activities was substantially and adversely affected from that time.

51. She would not, however be disabled at that particular point. The impairment would not have lasted 12 months and nor would it, at that stage, be likely to. That situation would obviously change as time went on. In our view by August 2016, when she first saw her GP on this subject, and despite the fact that there appeared to be some grounds for optimism at that stage, we concluded that it was likely that the condition would last 12 months and therefore that from August 2016 she was indeed disabled.

52. In relation to the claims of failure to make reasonable adjustments and discrimination arising from disability, the question of HE's knowledge of disability is relevant. That did not detain us. It was clear in the early part of 2016 to HE that Mrs Koenig was not well and she expressly alerted them in

June of that year that she was suffering from stress. We consider that they had actual specific knowledge of her condition from that point. They had sufficient knowledge of the situation by the date she became disabled, in August, such that they could not claim they were reasonably ignorant of disability at any time thereafter.

Direct discrimination

The allegations and our findings in respect of them were as follows.

Mrs Koenig was pushed to accept unpaid leave.

53. Mrs Koenig submitted her first application for such leave in January 2017, following discussions on that subject between herself and Mr Welby-Everard. There was no evidence before us to the effect that she had been somehow coerced or pressured into making that application and indeed that does not appear to be what she says in her written witness statement. Rather, she says that her application was a last resort as she did not know what to do. We remind ourselves that the application was made before she went off sick and essentially she told us that this was an alternative to sickness absence. Her real complaint under this head was that HE had not taken other steps by that time in order to address her mental health issues, such that getting away from work was the only viable option. Since she did not want to take a period of sickness absence, unpaid leave was the alternative. It did not make any sense, in that context, to say that she was in some way "pushed" to take unpaid leave. Rather her real complaint was that inadequate steps had been taken by way of "reasonable adjustments" to otherwise address her disability. For those reasons her claim under this head failed.

Mrs Koenig was obliged to hide the reasons for her application for unpaid leave

54. Mrs Koenig's first application did go in some detail into her medical conditions and included some criticism of HE. Mr Welby-Everard suggested to her that she should change what she said so that the application was simply a request and that this was not a proper forum for her to air her frustrations. We accepted this evidence that his purpose in doing so was to try to enhance her prospects of having her application approved. He was not motivated to act in that way by the fact that she was disabled (and in any event it was difficult to see how this could be less favourable treatment than any hypothetical comparator might have had).

The leave request was manipulated to a forced resignation

55. Mrs Koenig's application for unpaid leave was approved and submitted to HR for it to be processed. She then received an email from HR dated 10 March 2017 which wrote… "…I am writing to formally acknowledge and accept your resignation…" It was clearly a source of some distress to her that her application should be treated (incorrectly) in that way.

56. HE's position was simply that this was a mistake on behalf of HR and it did not appear to us that Mrs Koenig considered otherwise. Whilst clearly she was distressed upon receiving the email, the motivation for the reference to resignation in it was not her disability and accordingly her claim under this head failed.

A decision maker who was not impartial was appointed

57. Mrs Koenig's case under this head was not that she had any evidence that Mrs Hallett was prejudiced against her but rather that she should not have been appointed in the first place given her position within the management chain. We have referred to this already, under the heading of unfair dismissal. There was nothing inappropriate with her appointment and there was no basis upon which we could sensibly conclude that she had been appointed in some way on the grounds of Mrs Koenig's disability.

The appeal was improperly delayed

58. Mrs Koenig launched an appeal on 2 April 2019. It was over two months before she had a telephone meeting with Ms Brookes to discuss it and she was not notified of the outcome until January 2020.

59. Again, we have dealt with this to a certain extent in connection with the unfair dismissal claim. It was regrettable that it took the length of time that it did for the appeal to be disposed of, but we accepted Ms Brooks' evidence to the effect that the delays were simply down to workload and logistical issues and that she was not in any way motivated to delay matters by reason of Mrs Koenig's disability. It followed that this claim failed.

Discrimination arising from disability

60. The claims under this head and our positions in relation to them are as follows.

Ms Naylor said of Mrs Koenig "It was only her that was complaining so it was her that had the problem"

61. Mrs Koenig said that the thing arising from disability that gave rise to this statement was her inability to cope with her workload, due to her disability.

62. We heard from Ms Naylor on this subject and we accepted her evidence to the effect that she had not made any such statement. She may well have expressed the view that employees in the south east region complained more than those in the rest of the country and indeed that there were more severe problems there, but we did not accept that she had made any statement directly criticising Mrs Koenig herself or that any statement she did make was in some way related to the problems Mrs Koenig was clearly experiencing dealing with her workload at the time.

The grievance was not dealt with promptly

63. The claimant said that the thing arising that resulted in that treatment was her absence on sick leave.

64. Firstly, we remind ourselves that she was only on sickness absence from March 2017 and the grievance was actually resolved in the following month. In other words, insofar as Mrs Koenig could complain of delay, the vast majority of that delay had already occurred by the time she went off sick.

65. In any event our conclusion was that Ms Clarke had not delayed the grievance deliberately and that none of her steps were motivated by the fact that Mrs Koenig was off sick.

Mrs Koenig was pushed to accept unpaid leave

66. Again, Mrs Koenig said that her inability to cope with her workload was a thing arising as a consequence of disability and caused her to be put under improper pressure or "coerced". As we have already mentioned, we did not believe she was in any way "pushed" to accept unpaid leave and therefore this claim had to fail.

Mrs Koenig was dismissed

67. As Mrs Koenig correctly pointed out, her dismissal was a consequence of her sickness absence, which clearly arose from her disability. It followed that this would amount to unlawful discrimination unless HE could establish the dismissal was a proportionate means of achieving a legitimate aim.

68. Clearly, it was a legitimate aim of HE to run an efficient service. In order to do so they had to have employees who were capable of carrying out their contractual duties.

69. At the time of Mrs Koenig's dismissal she had been off work for two years and there was no reasonable prospect of a return in the reasonably foreseeable future.

70. As we have already stated, we concluded that HE acted reasonably in treating Mrs Koenig's absence as justifying her dismissal in the circumstances. The same argument applies in relation to this claim. Taking into account all of the matters we have referred to in relation to unfair dismissal, we conclude that dismissal was indeed a proportionate means of bringing about a legitimate aim.

Reasonable adjustments

71. In respect of each of the claims under this head, we had to consider firstly whether there was a relevant provision criterion or practice applied to Mrs Koenig: whether that PCP substantially disadvantaged her in comparison with persons who were not disabled: whether HE knew or should reasonably have known that she would be so disadvantaged at the relevant time: and what steps reasonably HE should have taken in order to avoid the relevant disadvantage. The suggested adjustments and our position in relation to them were as follows.

Steps that would have enabled her to return to work

72. Clearly, there was a provision, criterion or practice of HE that Mrs Koenig was required to undertake her job role. Equally clearly, once she was on sick leave she could not do so. She was therefore substantially disadvantaged and that gave rise to an obligation on HE to take steps that would enable her to return to work.

73. HE accepted that responsibility but said that there were simply no steps that could have been taken throughout that period that would have brought about that result.

74. Mrs Koenig identified to us a number of such steps, namely further reducing her workload, offering her time off, therapy, relocation or redeployment.

75. The first point to make in this context is that if a return to work is being sought, the steps being suggested can only be relevant to the period when Mrs Koenig was off sick, ie from March 2017.

76. By that date her workload had already been substantially reduced after Mr Welby-Everard had become her manager towards the end of 2016. We did not understand her to be saying (nor did it appear from the contemporaneous documents) that the workload she would return to would still be excessive. In other words, a reduction of workload of itself (or more accurately a further reduction) would not have enabled Mrs Koenig to return.

77. She next suggested that she should be offered time off. In fact, she was, albeit unpaid. That was a subject that Mr Welby-Everard himself raised with her and steps to bring it about were advanced by January 2017. Again, this claim can only relate to the period when she was absent from work. It had already been agreed before she became absent that she could have time off so this head of claim must fail.

78. Turning then to therapy, this was a subject canvassed with Mrs Koenig by HE on several occasions before she actually took it up. Indeed, in the general course of correspondence she was alerted to the availability through the employee assistance programme of help of this sort. Again, this claim can only relate to the period from March 2017 onwards. Therapy was secured for Mrs Koenig shortly after she went off and took place in September and October 2017. Since that round of therapy was actually unhelpful, it did not remove the relevant disadvantage. Her evidence to us was that as a result of the further therapy that she had with Dr Smith in 2019, her issues had actually been resolved. However, there was nothing to alert HE to the fact that that was likely to be the case at an earlier stage. In any event, they had secured therapy for her through Dr Smith. She had already undertaken one such session before the decision to dismiss was taken. Further sessions were arranged for the period thereafter.

79. In short, she did undertake therapy during her period of absence, in two distinct sessions. It did not succeed in returning her to work. She may suggest that further therapy would have done so but there was no reason for HE to believe that was likely to be the case or to criticise them for the failure to secure further therapy for her before dismissal.

80. Although Mrs Koenig referred to relocation as a potential reasonable adjustment, she informed us that it was not. In any event, the position in relation to relocation would be the same as that relating to redeployment, to which we now turn.

81. Redeployment was actually raised by HE at various points in the course of the sickness absence and Mrs Koenig's attitude was entirely negative. She simply indicated that it was not possible for her to be redeployed.

82. In any event, redeployment could only be a relevant consideration at such point that she was actually in a position to return to work. That point was never reached. It follows that it would not have been a reasonable adjustment that would have resolved the issue and enabled her to return to work.

Dealing with the grievance promptly

83. Mrs Koenig said HE had a provision, criterion or practice of departing from the timescales in the relevant procedures, which would give rise to a substantial disadvantage to her in that she would be especially stressed by that action because of her disability. That gave rise to an obligation on HE to adhere to the timescales by way of a reasonable adjustment.

84. The problem with that argument was that there was simply no evidence that such a provision, criterion or practice existed. We were not convinced that it did and accordingly that head failed.

Investigating the grievance properly

85. Mrs Koenig said that there was a provision, criterion or practice of not undertaking proper investigation, which substantially disadvantaged her since such a failure would impact substantially upon her given her disability. HE was therefore under an obligation to investigate the grievance properly. In short, we considered the grievance was properly investigated by Ms Clarke and indeed in the course of her evidence Mrs Koenig broadly appeared to accept that that was the case.

86. According to Mrs Koenig, the provision, criterion or practice of the respondent of requiring her to work placed her at a substantial disadvantage, since she could not work by reason of her disability. The grievance outcome would have flagged to HE that in order to rectify that situation her workload should have been reduced, she should have been provided with therapy or permitted unpaid leave.

87. In essence, this adds nothing to the claim as it is set out above under paragraphs 72-82. The grievance outcome followed Mrs Koenig going off sick. The relevant steps therefore relate to that period and for the reasons we have explained above, they would not have had the desired effect of avoiding the disadvantage to which she was put.

Accelerating the appeal process

88. Mrs Koenig said the provision, criterion or practice of delaying the appeal process substantially disadvantaged her: because of her mental state it would cause her particular stress, such that HE should have accelerated the process.

89. Again, however, there was simply no evidence to the effect that there was such a practice, as opposed to it simply being the case in relation to Mrs Koenig. On that basis this claim could not succeed.

Reducing workload

90. Mrs Koenig said there was a provision, criterion or practice of subjecting employees to excessive workloads. Because she was disabled this substantially affected her, in that it caused her particular stress, giving rise to an obligation to reduce or further reduce her workload.

91. We accepted (as indeed HE did) that Mrs Koenig was subjected to an excessive workload. This appeared to be a wider problem, namely that in the south east region they were under particular pressure. We accepted that the arrangements of HE that permitted the application of that pressure amounted to a practice and furthermore that that practice substantially disadvantaged Mrs Koenig, given her mental state.

92. As we have said, we considered Mrs Koenig was disabled from August 2016. We also considered that HE was aware of the substantial disadvantage being suffered by her by reason of her excessive workload. It was clear that her mental state was troubling at that point and the reason for that state of affairs was obvious to HE staff.

93. It was at least in part for that reason that in November and December 2016 Mr Welby-Everard upon becoming her manager took steps to reduce that workload.

94. It seemed to us that the only sensible criticism that could be made of HE was that those steps should have been taken at an earlier stage. It was clear rather earlier than November 2016 that Mrs Koenig was suffering and the reason was known to HE.

95. The reduction in workload was a step that should have been taken in or shortly after August 2016 and the delay amounted to a breach of HE’s obligations under s20 of the 2010 Act.

96. Since Mrs Koenig only commenced early conciliation in 2019, it was clear that this claim was well "out of time". We address this matter further, below.

Redeployment

97. In effect, this is a repetition of the claim in paragraphs 81-82 above.

98. Mrs Koenig said that the requirement for her to undertake her work duties was a provision, criterion or practice, which it undoubtedly was. She considered that that requirement substantially disadvantaged her since, by reason of her mental state, she was not able to carry them out. Again, that was undoubtedly correct.

99. However, redeployment was canvassed with Mrs Koenig and she rejected it. She was unable to return to work in any capacity and redeploying her would not have changed that. The failure to redeploy her could not be a failure to make reasonable adjustments.

Steps taken as a consequence of a 21 day review

100. Mrs Koenig criticised HE for failing to undertake a review 21 days after she went off sick. However, that review would not have avoided any disadvantage. Rather, it might have flagged up steps HE could have undertaken to remove the disadvantage, ie her inability to work. Again, this adds nothing to the matters canvassed and dealt with in paragraph 72-82 above.

Continuation of sick pay

101. Mrs Koenig's occupational sick pay ceased after one year. That clearly was a provision, criterion or practice of HE. She said it substantially disadvantaged her and that she was no longer in receipt of payment. That gave rise to an obligation to HE to extend sick pay.

102. This was an issue that was canvassed at length in the case of O'Hanlon v HMRC. While clearly ceasing sick pay is a practice that substantially disadvantages a disabled person, an extension of sick pay is not, in ordinary circumstances, to be regarded as an adjustment it is reasonable to expect the employer to take. There are clearly policy reasons for that position but there are grounds to depart from it. In particular, where there has been a failure to implement reasonable adjustments which would have enabled a return to work, it would be seen to be inequitable to permit an employer to cease sick pay.

103. For the reasons we have set out extensively above, we did not believe this was a case in which reasonable adjustments could and should have been implemented which would have had the effect of returning Mrs Koenig to work. In other words, the relevant exception or potential exception to the rule in O'Hanlon did not apply in this case and accordingly an extension of sick pay was not an adjustment HE should have implemented.

Delaying therapy

104. Mrs Koenig criticised HE for delaying therapy in relation to two periods of her employment. Firstly, she said that therapy should have been put in place for her from mid-2016, ie from the date on which she became disabled. Secondly, she said there had been an undue delay from the recommendation for her final round of therapy, in November 2018, and its implementation the following March.

105. Dealing firstly with the second of those matters, Mrs Koenig said there had been a four month delay in implementing the relevant recommendation.

106. Again, Mrs Koenig could certainly say that there was a provision, criterion or practice of requiring her to work. That substantially disadvantaged her – she could not do so. Accordingly, HE were required to take such reasonable steps that would have returned her to work.

107. We remind ourselves that by November 2018 Mrs Koenig had already had two rounds of therapy. Although the suggestion was that she ought to have had further therapy, there could not be any confidence that that would bring about a return to work.

108. In the light of the way previous rounds of therapy had gone, we could well understand that there was no sense of urgency in relation to any further sessions. The delay in implementing them was not an extensive one but more importantly there was no reason to believe that had they been implemented immediately, the outcome might have been any different. In those circumstances this could not be a reasonable adjustment.

109. Turning then to 2016, Mrs Koenig was expressly alerted to the availability of therapy through the Employee Assistance Programme of HE in an email dated on or about 14 November 2016. She failed to take advantage of it and indeed did not do so when it was subsequently flagged up to her on at least two further occasions.

110. We did not think HE were open to reasonable criticism in relation to the period from November 2016 but we think they could and should have done something earlier. They were well aware of Mrs Koenig's disability in August 2016. That should have been the trigger for the consideration of therapy. At that time there was no reason to believe therapy would be unsuccessful and indeed that was something HE itself flagged up to employees who might be assisted by it.

111. In short, we considered that they had not made reasonable adjustments in that they had delayed alerting Mrs Koenig to that possibility for several months.

112. As we have observed in connection with her claim in relation to a reduction in her workload, this claim was made substantially "out of time" and we return to that matter below.

Consensual departure

113. Mrs Koenig said that a provision, criterion or practice applied by HE was the relevant procedures in the attendance management procedure (ie those that might lead to dismissal on the basis of absence). In fact, it might be said that the relevant PCP was the undoubted practice of HE in dismissing employees on the basis of their attendance. That would disadvantage her substantially – she was simply not in a position to come to work. However, what she suggested would be a reasonable adjustment would be entering into a consensual departure. We know that she received a sum of over £127,000 from HE when she left. She seemed to be suggesting that had she been paid that sum but permitted to leave consensually rather than by a unilateral act of dismissal, it would have been a reasonable adjustment in order to avoid the disadvantage to which she was put.

114. On the face of it, the substantial disadvantage suffered by someone in Mrs Koenig's position would be the fact that her employment was being terminated. That would be the case whether it was by dismissal or consent, so if that disadvantage is correctly identified, there is nothing HE could have done to remove it.

115. If, on the other hand, the disadvantage is the requirement for her to go through a potentially distressing process, leading to dismissal, it is difficult to see how reasonably HE could have been required to avoid that process. There was, of course, nothing to prevent Mrs Koenig approaching HE and seeking terms for a consensual termination but HE can hardly be criticised for failing to make that approach themselves.

116. Things might have been different had this not been a "non-fault" dismissal. If the dismissal had involved a finding of misconduct, say, against her, then she could argue that avoiding that determination and the distress it might have caused her might give rise to an obligation to make adjustments. However, there was no obvious reason why a dismissal on the grounds of admitted lengthy absence would be more upsetting to her than a termination that she had gone along with.

117. Accordingly, we considered there was no substantial disadvantage to Mrs Koenig by the application of the relevant PCP and this claim therefore failed.

118. Finally, we turn to issues of limitation.

119. We found that HE had failed to make reasonable adjustments in two areas, namely reducing Mrs Koenig's workload and obtaining therapy for her. In both cases, the latest date at which the relevant cause of action could have arisen was towards the end of 2016. Mrs Koenig commenced early conciliation on 1 July 2019 so presentation was late in respect of any claim arising before 31 March 2019. It followed that these claims were substantially out of time.

120. In those circumstances they could only proceed if we considered it was just and equitable that they should do so and to that end we sought evidence from Mrs Koenig as to why the delay had taken place.

121. Firstly, she told us that she was simply not in a mental state that would enable her to take the claims forward earlier. While clearly she was in poor mental health throughout the period, that did not seem to explain her inaction. She was well able to deal with her affairs. That much was apparent from the correspondence between the parties throughout that period. She frequently composed lengthy, detailed and articulate letters and emails. There was nothing preventing her simply producing a claim document at that time.

122. She also told us that she wanted to deal with these matters internally in the first instance, and hence she took out a grievance in November 2016. That was, of course, a matter for her but effectively she had discounted and dismissed the possibility of making a claim to the tribunal. She was well able, in our view, to enquire as to how a claim might be brought before the employment tribunal or what time limits might apply to such a claim. She chose not to do so. She had elected to have matters dealt with otherwise.

123. This was not a case in which the potential failing of memories was particularly important. The factual background to the claims was not substantially in dispute. Furthermore, the balance of prejudice clearly favoured Mrs Koenig. HE was able to deal with these claims and if we were to conclude that they should not go forward, Mrs Koenig would be driven from the seat of justice.

124. The fact remained, however, that a very lengthy period had expired before the claims were brought forward and there was no real explanation for that state of affairs. On balance we consider it was not just and equitable that we should consider those claims and accordingly they were dismissed.

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Employment Judge Reed

5/4/2021

Date: …………………………………..

6/4/2021

Sent to the parties on: ....

J Moossavi

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For the Tribunal Office