EMPLOYMENT TRIBUNALS

Claimant: Mrs J Wilkinson

Respondents: The Co-operative Group Limited

Heard: Remotely (by video link) **On:** 7, 8 and 9 April 2021

Before: Employment Judge S Shore
NLM – Mr R Greig
NLM – Mrs J Maughan

Appearances

For the claimant: Miss J Wilson-Theaker, Counsel
For the respondent: Miss S Bowen, Counsel

JUDGMENT ON LIABILITY

The unanimous decision of the Tribunal is that:

1. The claimant's claim of discrimination arising from disability (contrary to section 15 of the Equality Act 2010 ("the EqA")) was well-founded and succeeds. The respondent treated the claimant unfavourably by dismissing her and not following occupational health advice. Its actions were not a proportionate means of achieving aims that we found to be legitimate.

2. The claimant's claim of failure to make reasonable adjustments (contrary to sections 20 and 21 of the EqA) was well-founded and succeeds. The respondent applied the PCP of requiring attendance at work and/or a certain level of attendance. The PCP put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled. The respondent should have known that the claimant was likely to be placed at the disadvantage and did not take such steps as were reasonable to avoid the disadvantage.

3. The Tribunal will consider remedy.

REASONS

Introduction

1. The claimant was employed as Funeral Arranger by the respondent's funeralcare business from 1 February 2018 until 17 May 2019, which was the effective date of termination of her employment for the stated reason of capability because of ill health absence. The claimant started early conciliation with ACAS 31 July 2019 and obtained a conciliation certificate on 14 September 2019. The claimant's ET1 was presented on 10 October 2019. The respondent is a diverse organisation consisting of retail businesses including: food retail and wholesale; e-pharmacy; insurance services; legal services and funeralcare. It has approximately 70,000 employees.

2. The claimant presented claims of:

    2.1. Discrimination arising from disability (contrary to section 15 of the EqA);

    2.2. Failure to make reasonable adjustments (contrary to sections 20 and 21 of the EqA).

3. From the joint bundle, we note that the claims were case managed by Employment Judge Green on 17 December 2019. EJ Green made case management orders, including listing the case for a three-day hearing to start on 3 August 2020. Employment Judge Sweeney held a preliminary hearing on 3 August 2020 that adjourned the case to today. The adjournment was because of the pandemic. Provision was made for the final hearing to be conducted by remote video hearing. Neither party objected to this method of hearing.

4. There are three matters to note arising from the preliminary hearings:

    4.1. Lists of documents were exchanged on 6 April 2020. Copies were sent to the claimant on 17 April 2020 and bundles were sent to the claimant on 27 August 2020. The relevance of this point is that the claimant said on multiple occasions in this hearing that she had only seen the documents for the first time on the day before the final hearing started.

    4.2. The scope of the claimant's claim changed on a number of occasions, and was not finalised until the first morning of this hearing.

    4.3. Witness statements were not exchanged until 21 March 2021.

Issues

5. The case management order of EJ Sweeney dated 20 August 2020 required the parties to send the Tribunal an agreed list of the key factual and legal issues. A list was submitted to the Tribunal, but on the first morning of the hearing concessions were made by both sides that meant that the submitted list was no longer accurate. We are grateful to both counsel for producing a definitive list that was sent to us whilst we completed our reading. It set out the issues as follows:

Section 15 - Discrimination arising from disability

1. *The Respondent concedes that it treated the Claimant unfavourably by:*

    1.1. Dismissing the Claimant (paragraph 10.2 of the Grounds of Claim); and
    1.2. Not following Occupational Health advice. [page 50 of the bundle]

2. *The Respondent concedes that the unfavourable treatment was because of something arising in consequence of her disability? in the following respects [50]:*

    2.1. Absence from work; and
    2.2. Need for adjustments to be implemented to allow a return to work.

3. *If so, has the Respondent shown that dismissing the Claimant was a proportionate means of achieving a legitimate aim? The Respondent relies on the following (paragraph 11 of the Grounds of Resistance, [37] and [49]):*

    3.1. Ensuring policies are adhered to.
    3.2. Maintaining adequate levels of attendance.
    3.3. Managing obligations in respect of health and safety.
    3.4. Ensuring there were sufficient staffing levels in order to meet service demand (i.e. efficient running of the service and ensuring the service is effectively staffed).
    3.5. The need to maintain a healthy and stable workforce.
    3.6. Efficient service delivery.

Reasonable adjustments: sections 20 and 21

4. *Did the Respondent apply the following provision, criteria and/or practice ("PCP") generally?*

    4.1. Requiring attendance at work/a certain level of attendance; (R concedes that it applies this to staff and it is capable of amounting to a PCP)

    (Disputed)
    Did the application of any such PCP put the Claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled?

    4.2. Claimant avers that the PCPs prevented her from returning to work and this made it more likely that she would be dismissed, as indeed she was.

5. *Did the Respondent not know, or could the Respondent not be reasonably expected to know that the Claimant was likely to be placed at the disadvantage set out above?*

6. *If so, did the Respondent take such steps as were reasonable to avoid the disadvantage?*

    Claimant avers the following reasonable adjustments should have been made:

6.1. Temporarily move her place of work to another of the Respondent's premises where there were other staff working as well until such time as her medication had stabilised so as to ensure that she was not lone-working and there were first-aiders available;
6.2. It would have been reasonable to have created a role in the short term for the Claimant; and
6.3. The Respondent should have reasonably ensured that there was a first aider on site where she was working.

7. If so, would it have been reasonable for the respondent to have to take those steps at any relevant time?

Remedy

8. The Claimant claims a declaration and compensation:

8.1. What is the correct award for injury to feelings and interest in respect of any claim of discrimination?
8.2. What is the correct award for compensation in its totality?
8.3. If it is possible that the Claimant would still have been dismissed at some relevant stage even if there had been no discrimination, what reduction, if any, should be made to any award as a result?
8.4. Has the Claimant taken reasonable steps to mitigate her loss?

Law

6. The statutory law relating to the claimant's claims is as follows:

Section 15 EqA 2010

(1) A person (A) discriminates against a disabled person (B) if—

(a) A treats B unfavourably because of something arising in consequence of B's disability, and

(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

Section 20 EqA 2010

(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A. –

(2) The duty comprises the following three requirements.

(3) The first requirement is a requirement, 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, to take such steps as it is reasonable to have to take to avoid the disadvantage.

(4). The second requirement is a requirement, where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

(5). The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid.

(6). Where the first or third requirement relates to the provision of information, the steps which it is reasonable for A to have to take include steps for ensuring that in the circumstances concerned the information is provided in an accessible format.

(7). A person (A) who is subject to a duty to make reasonable adjustments is not (subject to express provision to the contrary) entitled to require a disabled person, in relation to whom A is required to comply with the duty, to pay to any extent A's costs of complying with the duty.

(8). A reference in section 21 or 22 or an applicable Schedule to the first, second or third requirement is to be construed in accordance with this section.

[…]

Section 21 EqA 2010

(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.

(2). A discriminates against a disabled person if A fails to comply with that duty in relation to that person.

(3) A provision of an applicable Schedule which imposes a duty to comply with the first, second or third requirement applies only for the purpose of establishing whether A has contravened this Act by virtue of subsection (2); a failure to comply is, accordingly, not actionable by virtue of another provision of this Act or otherwise.

7. We were referred to the guidance given in paragraph 6.28 of the EHRC Employment Code of Practice and took this into account.

8. We were referred to a number of precedent cases by the representatives, which we have quoted in this decision where appropriate:

    8.1. **Griffiths v The Secretary of State for Work and Pensions** [2015] EWCA Civ 1265;

8.2. **Dr J Ali v Drs Torrosian, Lechi, Ebeid & Doshi T/A Bedford Hill Family Practice** UKEAT/0029/18/JOJ;

8.3. **Smith v Churchill's Stairlifts plc** [2006] IRLR 41;

8.4. **Garipis v VAW Motorcast Limited** ET 1803194;

8.5. **Chief Constable of South Yorkshire Police v Jelic** [2010] IRLR 744;

8.6. **Tameside Hospital NHS Foundation Trust v Mylott** EAT 0352/09;

8.7. **North Lancashire Teaching Primary Care NHS Trust v Howorth** EAT 0294/13;

8.8. **Leeds Teaching Hospital NHS Trust v Foster** EAT 0552/10;

8.9. **Tarbuck v Sainsbury's Supermarkets Ltd** [2006] IRLR 664;

8.10. **Southampton City College v Randall [**2006] IRLR 18, EAT;

8.11. **Secretary of State for Justice and anor v Dunn** EAT 0234/16**;**

8.12. **Pnaiser v NHS England and anor [**2016] IRLR 170, EAT;

8.13. **Department for Work and Pensions v Boyers** EAT 0282/19;

8.14. **Land Registry v Houghton and others** UKEAT/0149/14;

8.15. **Hensman v Ministry of Defence** UKEAT/0067/14;

8.16. **Naeem v Secretary of State for Justice** [2017] UKSC 27; and

8.17. **The Trustees of Swansea University Pension & Assurance Scheme and another v Williams** UKEAT/0415/14.

Housekeeping

9. The parties produced a joint bundle of 178 pages.

10. We had not finished reading the bundle when the hearing started at 10:00am on the first morning, so we adjourned the hearing until 12:15pm to complete our reading.

11. The claimant gave evidence in person and produced a witness statement that ran to 29 short paragraphs. We did not find that the statement dealt with all the matters that were raised in her claim and the respondent's response and certainly did not set out claims that the claimant went on to make in her oral evidence.

12. Evidence was given in person on behalf of the respondent by:

14.1. Mrs Julie Pattison, who is a Funeral Service Manager for the respondent. At all material times in this case, Mrs Pattison was the claimant's line manager, as she was responsible for 11 of the

respondent's sites. Her witness statement dated 23 March 2021 consisted of 67 paragraphs.

14.2. Mr Douglas Potts, the Regional Operations Manager for Northumberland Tyne and Wear for the respondent. He heard the claimant's appeal against dismissal. His witness statement dated 23 March 2020 (sic) consisted of 31 paragraphs.

15. If we refer to pages in the bundle, the page number(s) will be in square brackets.

16. We were supplied with a chronology by the respondent.

17. At the end of the evidence, we received written and heard closing submissions from Miss Bowen and Miss Wilson-Theaker. We considered our decision and gave an oral judgment and reasons. We did not have the facility to record the oral judgment, so written judgment and reasons is made from our notes and may differ in some respects to the oral reasons given on the day.

18. The hearing was conducted by video on the CVP application and ran intermittently, with some IT issues. We are grateful to all who attended the hearing for their patience and good humour in the face of the technical glitches.

Findings of Fact

19. All findings of fact were made on the balance of probabilities. If a matter was in dispute, we will set out the reasons why we decided to prefer one party's case over the other. If there was no dispute over a matter, we will either record that with the finding or make no comment as to the reason that a particular finding was made. We have not dealt with every single matter that was raised in evidence or the documents. We have only dealt with matters that we found relevant to the issues we have had to determine. No application was made by either side to adjourn this hearing in order to complete disclosure or obtain more documents, so we have dealt with the case on the basis of the documents produced to us. We make the following findings.

Background

20. We should record as a preliminary finding that a number of significant facts were not disputed:

20.1. The claimant met the definition of 'disabled person' in section 6 of the EqA at all material times because of the impairment of epilepsy.

20.2. The respondent accepted that it knew, or should have known that the claimant was a disabled person at all material times.

20.3. The claimant had worked as a cleaner and waitress for the respondent for approximately 10 years at its Benwell branch before leaving in 2017. She returned to the Westerhope branch on 1 February 2018.

20.4. The respondent's Westerhorpe Branch was a small, but busy branch. It was divided into an area where customers would come to arrange

funerals, which is where the claimant worked alone and a Masonry Department, which was based upstairs.

20.5. The claimant worked 20 hours per week on an opposite hours job share. She had had issues with her job share colleague, but these were resolved by the time of the incidents with which we are concerned and form no part of our decision.

20.6. The Benwell branch was much larger and had 2 full time Funeral Arrangers, AR and JP. There were approximately 8 other staff.

20.7. The claimant had not had a major seizure for approximately four years until 28 August 2018, when she had a major seizure that resulted in her sustaining a serious facial injury.

20.8. She never returned to work after 28 August 2018.

20.9. It was not disputed that the claimant always wished to return to work in her role at Westerhope.

21. We also find that a number of concessions about issues were made by the parties:

21.1. That the claimant had a disability at the material time by reason of epilepsy.

21.2. That the respondent had knowledge of the claimant's disability from August 2018 when her sickness absence commenced.

21.3. For the purposes of the section 15 EqA claim the "something arising" was in consequence of disability and that the dismissal was because of that.

21.4. For the purposes of the reasonable adjustments claim:

21.4.1. Requiring attendance at work/a certain level of attendance was conceded as a PCP and was applied to the claimant.

21.4.2. On day one of the hearing, the claimant confirmed that she was not pursuing the further two PCPs listed in the draft list of issues.

22. The claimant challenged the accuracy of notes of meetings and other matters in cross examination:

22.1. the contents of the 2nd OH report [85-7];

22.2. various notes from health review meetings;

22.3. the final meeting on 17 May 2019 [112], which the claimant alleged is entirely false; and

22.4. the appeal minutes [118 onwards].

23. We make a general finding that the evidence of the claimant about the issues raised in the preceding paragraph did not meet the standard of proof required because:

23.1. The claimant was advised by solicitors at all times.

23.2. The claimant did not challenge the accuracy or validity of any document in the bundle in her statement.

23.3. The documents were provided to the claimant almost 12 months prior to the hearing on 17 April 2020. They are not complicated or lengthy documents.

23.4. The claimant was also on occasion added to evidence suggesting that information was coming back to her in evidence (over 2 years after some events).

23.5. The claimant directly alleged that statements were made in the meetings that are not documented and were not raised before by her at any stage, including:

23.5.1. That she told Mr Potts in the appeal meeting that she was fit to work without reasonable adjustments. The Tribunal accepted Mr Potts' evidence.

23.5.2. That Mrs Pattison on several occasions (the dates of which were not specified) said "would you not be better off leaving as my husband was on a good wage or better off on disability" (paragraph 23 of her statement). This was an expansion of an allegation contained on appeal, which was of one event and which did not mention anything about disability benefit [115].

23.5.3. That letters from her consultant, Dr. Ellwella, were provided to the respondent.

24. We find on the balance of probabilities that the documents are more likely to be an accurate record of what was said than the claimant's recollections nearly two years after the event, and which have not been made before the final hearing. Her explanation that she had only seen the documents for the first time on the day before the final hearing was not credible, not least because she referenced one of the documents in paragraph 16 of her witness statement.

25. The claimant's ill health absence was continuously certified by MED3 certificates ("fit notes") from her GP dated 28 August 2018; 31 August 2018; 12 September 2018; and 5 November 2018. It was not suggested by either party that the claimant was fit to work at any time from the date of her seizure to the end of 2018. We do not need to deal with that period in any detail, other than to mention the first Occupational Health report by Dr Bastock dated 23 October 2018 [66-68]. The report stated that the claimant would be safe to work alone, although there was a health and safety risk, if managed by a safe system of work. That safe system involved the use of a special watch that detected the effect of seizures. We have heard evidence that the watch was not effective, so the value of the recommendation is somewhat irrelevant. We also find that the agreed evidence was that she was not fit to return to work in 2018.

26. From 11 January 2019, the respondent held a series of Health Review Meetings with the claimant, all of which were held by Mrs Pattison. The meeting on 11 January 2019 [70-76] noted that the claimant felt really good, but had had episodes on 10 January and 11 January.

27. On 11 February 219, there was a second Health Review Meeting [78-83] at which the claimant said that working alone and stress brought on epileptic seizures. The respondent commissioned a second OH report.

28. We note that on 20 March, a copy of the OH report was sent by email by Mrs Pattison to the respondent's HR department and Mr Potts. She asked for advice on the next steps to be taken.

29. The OH report itself from Dr Chauhan was dated 6 March 2019 [85-87]. We find that the only sensible way of interpreting Dr Chauhan's words in the paragraph that spans pages 85 and 86 of the bundle is that the clamant told the doctor that she had not had any further seizures since August 2018 and she typically got 20 to 50 mini-seizures per day, meaning that this was an account of her symptoms at the date of the consultation. The claimant challenged this interpretation for the first time at the hearing.

30. We further find that Dr Chauhan's report made the following conclusions:

    30.1. Lone working should be avoided "at the current time" until more reasonable control [of her epilepsy] had been achieved;

    30.2. The claimant did not need to be shadowed or followed around as long as "there is someone who can attend to any emergency quickly";

    30.3. Video monitoring or a seizure watch could be used; and

    30.4. A first aider should be present when the claimant was on duty.

31. There were other recommendations, which are not relevant to this decision.

32. The report went on to state that "It would be very difficult to predict how long [the claimant's Ill health] would continue to affect her performance, although "typically I would anticipate this to be weeks or months, rather than years." [87].

33. Dr Chauhan concluded that with the adjustments recommended, the claimant would be fit for her role. An offer was made to see the claimant again to ascertain her medical fitness to resume lone-working.

34. We find that at this point, the respondent had enough medical information to start considering how the claimant could be managed back to work. Regrettably, we find that Mrs Pattison's subsequent actions demonstrate a "can't do" attitude, rather a "can do" one. What we mean by that is that Mrs Pattison appears to have focused on reasons why the claimant could not return to work, rather than looking for ways to enable her to return. We find that the duty on an employer is to look for the latter of these options.

35. We should perhaps say at this point, that whilst we are critical of the process taken by the respondent, we have been careful to bear in mind the guidance of HHJ Gullick in **Department of Work and Pensions v Boyers** (§ 30):

> *"It is…an error for a tribunal to focus on the process by which the outcome was achieved. That was explained by this Tribunal in Chief Constable of West Midlands v Harrod, [2015] ICR 1311 at [41]: "I consider also that [Counsel for the employer] is right in his contention that the Tribunal focused impermissibly on the decision-making process which the Forces adopted in deciding to utilise A19. When considering justification, a Tribunal is concerned with that which can be established objectively. It therefore does not matter that the alleged discriminator thought that what it was doing was justified. It is not a matter for it to judge, but for courts and tribunals to do so. Nor does it matter that it took every care to avoid making a discriminatory decision. What has to be shown to be justified is the outcome, not the process by which it is achieved."*

36. The third Health Review Meeting took place on 27 March 2019 [90-96]. We find that the claimant advised the respondent that she had had a seizure two weeks previously. The OH report was discussed and the note [92] indicates that Mrs Pattison told the claimant that she could not make any adjustments at Westerhope or Benwell that would be reasonable. The notes say that the claimant would be lone working and needed a first aider with her at all times. We find the last statement to be a misrepresentation of the OH professional's recommendation.

37. The claimant said she was looking for a phased return and retraining. Mrs Pattison asked the claimant if she was interested in a placement in one of the respondent's food stores, but she declined this. The claimant asked for a role to be created for her, but this does not form part of our deliberations in this case, as she no longer relies on it as a head of claim.

38. As the claimant did not substantively dispute the respondent's legitimate aims, we find that the following were legitimate aims:

    38.1. Ensuring policies are adhered to.

    38.2. Maintaining adequate levels of attendance.

    38.3. Managing obligations in respect of health and safety.

    38.4. Ensuring there were sufficient staffing levels in order to meet service demand (i.e. efficient running of the service and ensuring the service is effectively staffed).

    38.5. The need to maintain a healthy and stable workforce.

    38.6. Efficient service delivery.

39. The claimant's GP issued a MED3 on 7 April 2019 [97] stating that she was unfit for work to 1 June 2019, which covered the period to the end of her employment and beyond. The MED3 stated that the claimant could benefit from amended duties: not to work alone in an office.

40. The next Health Review Meeting took place on 3 May 2019 [98-103]. The claimant indicated that she was having good days and bad days. Mrs Pattison indicated that she would contact HR after the meeting. It was indicated that the next meeting would be in a month's time, but on 7 May 2019, Mrs Pattison wrote to the claimant [104-105] inviting her to a 'job at risk' meeting on 17 May 2019. No explanation was given as to why the respondent decided to take that step at that time.

41. At the meeting on 17 May, the claimant said she didn't know when she was going to have a seizure, but they were "more frequent now." We make this finding because we find the respondent's evidence corroborated by the notes of the meeting are more credible than the claimant's evidence. We also find that the claimant did say that she wanted to get back to work and see how she handled the stress and pressure [108].

42. In our combined experience of the workplace, we find that it is not unusual for a person who has been absent from work for a long period may be desperate to return to work for any number of reasons. That the claimant wished to return was neither disputed or surprising. Neither is the fact that she was keen to minimize her symptoms. The onus remained on the respondent to ascertain the claimant's health and fitness to return.

43. Mrs Pattison made the decision to dismiss the claimant and notified her of the decision. After she had been told that she has been dismissed, we find that the claimant made enquiries about redeployment into the food part of the business and was told that she could apply, but there were no current vacancies. The lack of vacancies was not challenged. The evidence was not disputed.

44. We find that the handwritten notes at the end of the meeting [111-112] are accurate. We find that it is more likely than not that the claimant said she would not wish to work at Benwell and made a derogatory remark about her colleagues there. We do not find this to be inconsistent with her position that she sought to be temporarily placed at Benwell on a phased return. We find that the way that Mrs Pattison put the reason for her decision to the claimant was centered on the unwillingness of AR and JP to cover the claimant's work at Westerhope, whilst she worked at Benwell, which may have coloured the claimant's view of her colleagues.

45. We find that no member of the respondent said to the claimant at any time that she would be better off on disability benefits or inferred that she would be OK because her husband had a good job. We make that finding because we find the claimant's evidence to be less credible than the respondent's, which is corroborated by the notes of meetings.

46. The claimant's dismissal was confirmed by letter of 17 May 2019 [113-114]. The letter did not give any further detail of the reasons for the dismissal, so needs no further comment from us.

47. We find that the claimant has not shown on the balance of probabilities that she was fit to return to work within 2 weeks. We agree with Miss Bowen's submissions that:

47.1. The health review meeting notes do not record the claimant suggesting that she was fit to return to work without adjustments or would be within a specified period of time.

47.2. In cross-examination, the claimant stated on several occasions that the doctors could not say when she would be able to return and it was a matter for her. During the Health Review Meetings there was no assurance given about return dates, even though it was a standard question on the meeting form.

47.3. The appeal grounds make no suggestion that the claimant was fit to return imminently. In her appeal, the claimant suggested that she needed a support worker, which contradicts her suggestion in oral evidence that she informed Mr Potts that she was fit to return without adjustments.

47.4. The appeal notes do not record that the claimant suggesting she was well enough to work without reasonable adjustments. We find that the claimant never made this statement in writing or orally at any meeting.

47.5. The ET1 and attached grounds of complaint (drafted by the claimant's solicitors) make no reference to the suggestion that she was fit to return imminently.

47.6. The claimant's evidence about this issue was inconsistent and undocumented. This is not a case where the claimant is arguing the Respondent was engineering a dismissal.

48. However, we find that the onus on an employer in contemplating the dismissal is high. The tests for discrimination and unfair dismissal are different, and we have been careful to try and not conflate the two jurisdictions. The section 15 claim boils down to the proportionality of the respondent's decision because of the concessions made by the respondent that we have set out above. We find that the decision was disproportionate, but would stress that the decision was far from clear cut. On the one hand, we considered:

48.1. The claimant's lack of credibility;

48.2. The fact that she never told the respondent that she was fit to return to work immediately or in the near future;

48.3. The undisputed evidence that she would have to lone work at Benwell, as she would have to at Westerhope;

48.4. The respondent had conducted six Health Review Meetings with the claimant;

48.5. It had also commissioned two OH reports in October 2018 and March 2019;

48.6. The respondent had made enquiries to ascertain in reasonable adjustments could be made;

48.7. Alternatives were offered to the claimant; and

48.8. There was no fixed return to work date.

49. Against this, we considered:

49.1. Mrs Pattison only spoke to AR and JP once, in a meeting in February 2019 that was not documented. Her evidence was that there was little discussion, as both refused to cover the claimant's shifts. We find that she should have gone back to them once the claimant's needs had been ascertained more precisely;

49.2. There was little evidence from the respondent as to the other alternatives to AR and JP covering the claimant's shifts, which we find would have been phased and not likely to exceed 10 hours per week in the early weeks of her return;

49.3. The respondent did not go back to the OH doctor before deciding to dismiss the claimant. The position may have changed and more focused questions could have been asked about a date of return and what would be needed to facilitate a phased return on reduced hours at a different location to Westerhope;

49.4. The OH advice was specifically *not* that the claimant had to be followed/monitored/accompanied at all times. The respondent's evidence continually stressed that the claimant would be lone working for some of her time at Benwell;

49.5. However, it was accepted that there would be less lone working than there was at Westerhope. We take judicial notice that almost every worker works alone for some of the time. The respondent seemed never to have processed exactly what periods the claimant would be alone for at Benwell and how it could manage those periods. The rationale appears to have been that *any* period of lone working was unacceptable. On that basis, the claimant could never return to work;

49.6. The OH advice that it was not necessary to have a first aider available to the claimant at all times;

49.7. The OH advice was that the claimant would be fit to return with adjustments; and

49.8. The issue of the refusal of AR and JP to cover the claimant was, to a large extent, irrelevant. Once the claimant was declared fit to return with adjustments in place, the respondent would have a fixed period in which it had to cover Westerhope. It had covered Westerhope for 9 months: we find another 2 months would not tip the proportionality balance against the clamant.

50. We were puzzled by the way in which the respondent chose to undertake the appeal process. Mr Potts met the claimant on 6 June 2019 [118-126], having seen virtually none of the documents. He then went away and talked to Mr Kell and Mrs Pattison before making his decision. He did not share with the claimant what the

witnesses had told him before he made his decision. However, we are interested in the outcome, not the process.

51. It is to his credit that Mr Potts made enquiries of Access to Work [127], but we find that his stated conclusions in the outcome letter dated 13 June 2019 do not accurately reflect the notes of his discussion with Access to Work.

52. The outcome of the appeal was to uphold Mrs Pattison's decision, which we have found to be disproportionate.

53. On the issue of the reasonable adjustments, we find that the single adjustment contended for: a temporary change of work location to Benwell until her medication had stabilised so as to ensure that she was not lone working and that there were first aiders available, was a reasonable one for the respondent to have taken steps to achieve. The sections 15 and 20/21 claims are factually interlinked, as recognised by both counsel. Put simply, if the respondent had made the reasonable adjustment contended for, the claimant would not have been absent from work and would not have been dismissed.

54. The respondent conceded that the one PCP advanced by the claimant: requiring regular attendance at work, was capable of amounting to a PCP.

55. The claimant's position on her PCP was a bit of a moveable feast through the life of these proceedings, but was fixed on the first day of the hearing and that is the PCP that we have used as the basis of our assessment of that part of the claim.

56. We acknowledge that the test of 'reasonableness' is objective and depends on the circumstances of the case. The relevant factors to be assessed are set out in the EHRC Code:

    56.1. The extent to which the adjustment was practicable;
    56.2. the extent to which the adjustment would have ameliorated the disadvantage;
    56.3. the financial and other costs of making the adjustment and the extent to which the step would have disrupted the employer's activities;
    56.4. the financial and other resources available to the employer;
    56.5. the availability of external financial or other assistance;
    56.6. the nature of the employer's activities; and
    56.7. the size of the undertaking.

57. We find that the adjustment contended for was practicable for the reasons we have set out in paragraph 49 above. The adjustment would have ameliorated the disadvantage sufficiently to give a good chance of eliminating it. We find that the cost to an organisation of the size of the respondent and the disruption caused to the respondent would be minimal, as the adjustment would have been temporary. We find that 'temporary' means 'lasting for a limited period of time'. That was the prospect that both parties anticipated. No evidence was given by the respondent that suggested that it could not afford the adjustment, even though Access to Work did not appear to be a viable source of assistance. The respondent employs approximately 70,000 people.

58. In the light of the findings above, we find that the adjustment would not impose a disproportionate burden on the respondent.

Applying the Findings of Fact to the Law and Issues

59. Using the list of issues above, we make the following findings on reasonable adjustments.

    59.1. The respondent did not take steps to avoid the disadvantage and it was reasonable to make the adjustment of a temporary move to Benwell for the following reasons:

        59.1.1. A change in work location is provided as an example of a reasonable adjustment in the respondent's policy [139-140];

        59.1.2. The respondent had one conversation with the Funeral Arrangers at Benwell in February 2019, about which no evidence has been produced;

        59.1.3. The claimant's unchallenged evidence was that temporary changes in work location did occur within the respondent's organisation and that the respondent had an expectation that its workforce would cover different locations to their usual place of work upon request;

        59.1.4. Although we reject the claimant's evidence on the inaccuracy of the minutes at [112] in respect of the derogatory comment about the staff at Benwell, that comment could have had no bearing on Mrs Pattison's decision to dismiss her. The comment is recorded after the claimant's dismissal was communicated. On appeal, Mr Potts did not put the point to the claimant at all, depriving her of any opportunity to answer it, despite this featuring in the outcome letter;

        59.1.5. There was no evidence that the respondent took account of the fact that the adjustment was a temporary measure and could be reviewed if implemented;

        59.1.6. The claimant's hours were covered by other employees within the respondent during her absence;

        59.1.7. In the event of a temporary transfer to Benwell, there was no evidence that there would have been any additional financial burden on the respondent;

        59.1.8. The respondent has access to Occupational Health support and did not consider the recommendations or seek further despite the clear evidence that the adjustment would be temporary and that the working conditions at Benwell were considerably different to those at Westerhope; and

59.1.9. The respondent never implemented a trial period to ascertain whether the adjustment could be feasibly implemented.

60. Our findings on the issue of section 15 are:

60.1. The only issue to be determined is whether the dismissal was a proportionate means of achieving a legitimate aim. The legitimate aims relied upon by the respondent were agreed and particularised at paragraph 3 of the List of Issues.

60.2. We find that the evidence demonstrates that, before dismissing her, the respondent had considerable evidence of her willingness to return to work and, that any disruption to the employer would, in all probability be temporary. If the claimant had returned, the business would return to appropriate staffing levels within a reasonably short space of time.

60.3. The proportionality of the decision to dismiss must be considered in light of the respondent's business needs and aims. There will be a point at which absence can no longer be sustained. During the claimant's absence, there is no clear evidence that respondent's service had suffered to an extent that dismissal was the only proportionate response to the claimant's absence and requirement for reasonable adjustments.

60.4. The respondent's contended concerns as to workforce harmony in the event of a temporary change in work location were based on a sole conversation with two employees. R has produced no documentary evidence about the nature and extent of the conversations that took place or how it considered those concerns could have been met by adopting a measure which did not include dismissal.

60.5. We agree with Miss Wilson-Theaker that the obvious less discriminatory means of achieving the respondent's aims would be to implement a trial period in which her duties at Westerhope were covered by the Benwell employees and C was permitted to re-train and re-integrate at Benwell.

60.6. The respondent's concerns as to the claimant's safety would have also been resolved because at a larger "hub" premises, more workers would have contact with her and any emergencies could be responded to more effectively than in an environment where she was alone for larger portions of the day.

60.7. The dismissal of the claimant was not a proportionate means of achieving an admittedly legitimate aim.

61. The claimant's claims both succeed. We will go on the assess remedy.

Note: This has been a remote hearing. The parties did not object to the case being heard remotely. The form of remote hearing was V - video. It was not practicable to hold a face to face hearing because of the Covid19 pandemic.

Employment Judge Shore
12 April 2021