EMPLOYMENT TRIBUNALS

Claimant: **Mrs J Grant**

Respondent: **Commissioners for Her Majesty's Revenue and Customs**

Heard at: **Cardiff via CVP** **On: 12, 13 and 14 April 2021**

Before: **Employment Judge S Jenkins**

Members: **Mrs L Bishop**
Ms C Peel

Representation:
Claimant: Mr G Pollitt (Counsel)
Respondent: Mr D Ruck Keene (Counsel)

RESERVED JUDGMENT

1. The Claimant was unfairly dismissed and her claim of unfair dismissal therefore succeeds.

2. The Claimant was treated unfavourably because of something arising in consequence of her disability and therefore her claim of discrimination arising from disability, pursuant to Section 15 Equality Act 2010, succeeds.

3. The Respondent failed to take such steps as were reasonable to take to avoid the substantial disadvantage caused to the Claimant by its application of a provision criterion or practice relating to its sickness absence procedures and therefore the Claimant's claim of failure to make reasonable adjustments in respect of that, pursuant to Sections 20 and 21 Equality Act 2010, succeeds.

4. The Respondent did not fail to take such steps as it was reasonable for it to take to avoid any substantial disadvantage caused by the application of any provision criterion or practice relating to telephony matters and therefore the Claimant's claim in respect of those matters fails.

5. The compensatory award for unfair dismissal and/or compensation for financial losses in relation to the discrimination claims are to be reduced by 25% to reflect the "*Polkey*" principle.

6. Unless the parties can resolve the question of compensation to be paid by the Respondent to the Claimant between themselves, a separate Remedy Hearing will be listed.

REASONS

Background

1. The hearing was to consider the Claimant's claims of unfair dismissal, discrimination arising from disability (Section 15 Equality Act 2010 ("EqA")) and failure to make reasonable adjustments (Sections 20/21 EqA). The Claimant had also initially pursued a claim of breach of contract but confirmed that that was no longer proceeding.

2. We heard evidence from Mr Nick Mullins, Complaints Team Manager; and Mr Byron Hawkins, Business Manager; on behalf of the Respondent and from the Claimant and her husband on her behalf. We considered the documents within the hearing bundle spanning 396 pages to which our attention was drawn.

3. The hearing had originally been listed for four days, but had been reduced to three days the week prior to its commencement due to the lack of judicial availability. The summary of a Preliminary Hearing prepared by Employment Judge Powell, following a hearing before him on 12 December 2019, noted that the proposed timetable of the hearing would involve evidence over the first two days, submissions at the start of the third day and deliberations by the Tribunal for the rest of the third day with the fourth day being retained to deal with remedy if required. We also noted that there appeared to be no evidence within the bundle or the witness statements regarding remedy. We therefore proposed that, bearing in mind that only three days were now available, we would proceed to consider liability only and that if the claims succeeded then a separate hearing would need to be listed to deal with remedy. This was agreed by the parties who noted that they had between themselves discussed the appropriateness of proceeding in that manner in any event.

Issues

4. The parties had agreed a list of the issues to be determined as set out below.

Unfair Dismissal

1. Was the Claimant dismissed for a potentially fair reason within the meaning of s98 ERA 96? Following a period of long-term sickness absence, the Claimant's employment was terminated on ill health (capability) grounds.

2. *Did the Respondent genuinely and honestly believe in the Claimant's lack of capability to perform work of the kind which she was employed to do?*

3. *Did the Respondent have reasonable grounds for the belief detailed above?*

4. *Was the dismissal fair or unfair in all the circumstances having regard to the size and administrative resources of the Respondent? Was dismissal within the band of reasonable responses available to the Respondent?*

   In considering the above, the Tribunal may consider if the Respondent had reasonably acted upon medical advice, whether it had considered alternative employment for the Claimant and whether it failed to make reasonable adjustments and/or whether there had been discrimination contrary to section 15 of the Equality Act 2010.

5. *Alternatively, was the Claimant dismissed for some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the Claimant held? If so, was dismissal within the band of reasonable responses?*

6. *If the Claimant's dismissal was procedurally unfair what are the chances that the Claimant would have been dismissed in any event had a fair procedure been followed?*

Disability

7. *The Respondent concedes that the Claimant has a disability for the purposes of s6 of the Equality Act 2020. The Claimant's disability is a recurring depressive disorder and generalised anxiety/stress induced anxiety disorder.*

8. *The Respondent concedes that is had knowledge of the Claimant's disability at the relevant times and that it had knowledge the Claimant was likely to be placed at the substantial disadvantages in the workplace, as listed below.*

Discrimination arising from disability

9. *Did the Respondent treat the Claimant unfavourably? The Claimant claims that her dismissal on ill health (capability) grounds was unfavourable treatment.*

10. *If so, did the Respondent treat the Claimant unfavourably because of something arising in consequence of her disability? The Claimant asserts that the "something arising" was her disability-related sickness absence.*

11. *Can the Respondent show that that treatment was a proportionate means of achieving a legitimate aim within the meaning of section 15(1)(b) of the Equality Act 2010?*

12. *The legitimate aim R relies upon is: 'The Claimant's sickness absence exceeded the Respondent's trigger levels for absence review meetings and warnings were issued to the Claimant to improve her attendance'.*

Failure to make reasonable adjustments (s20 Equality Act 2010)

13. *Did or would the Respondent apply a provision, criterion or practice (PCP) to the Claimant, which it would also apply to employees who do not share the Claimant's disability?*

Dismissal

14. *In regards to the dismissal the PCP relied upon is the application and use of the Respondent's attendance / absence / long term sickness procedure which includes the requirement to maintain a certain level of attendance at work or face sanctions (warnings) and/or dismissal.*

15. *The Claimant claims that she was put at a substantial disadvantage due to this PCP because she was more likely to have absences than a non-disabled person.*

16. *The adjustments sought are: to not dismiss the Claimant when she was dismissed, to give her a suitable period of time for her new medication to work to see if she could return to work and to allow a phased return when she was ready and also the adjustments set out below.*

Telephone

17. *The PCPs relied upon are:*

17.1 the Respondent expected the Claimant to take a certain number of calls from customers; and

17.2 the Respondent allocated a particular vexatious caller's case to her.

18. C claims that this caused substantial disadvantage because of the Claimant's disability because they caused her additional stress that she was unable to deal with and work effectively.

19. The adjustments the Claimant considers to be reasonable are:

19.1 to either transfer the vexatious caller to another worker; and/or

19.2 to reduce the amount of incoming calls the Claimant received.

20. Further suggested adjustments are:

20.1 to allow the Claimant to have specific training on dealing with abusive callers; and/or

20.2 to give her additional support / a mentor to help her with the difficult caller.

20.3 Finally, the Claimant suggests that the Respondent should have given her time off work to attend and money to pay for CBT to help combat the work stress caused by these calls.

21. Did the PCPs put the Claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled?

The substantial disadvantage relied on by the Claimant is as described in Paragraph 18.

22. Did the Respondent take such steps as it was reasonable to have to take to avoid the disadvantage?

<u>Remedy</u>

23. If the Claimant has been successful in her claims for unfair dismissal and disability discrimination, what remedy is she entitled to?

23.1 The parties accept the Claimant would be entitled to a basic award.

23.2 What compensatory award is just and equitable in the circumstances?

23.3 Is an award for injury to feelings appropriate?

23.4 Has the Claimant mitigated her loss and should there be a deduction of sums earned for such mitigation, or to reflect a failure by the Claimant to take reasonable steps in mitigation?

23.5 Should any compensatory award be reduced on the basis of Polkey, namely that a fair procedure would have resulted in a dismissal anyway?

23.6 Has the Respondent failed to comply with the ACAS Code of Practice in respect of the Claimant's grievances and/or dismissal?

23.7 If so, what level of adjustment is the Claimant entitled to under section 207A and Schedule A2 of the Trade Union and Labour Relations (Consolidation) Act 1992 (as amended by the Employment Act 2008)?

5. In short, from an evidential perspective, there were two areas of focus. The first related to the act of dismissal, which formed the basis of the unfair dismissal claim, the discrimination arising from disability claim and one of the two claims relating to a failure to make reasonable adjustments; with the second being telephony issues, which formed the basis of the second reasonable adjustment claim.

6. Having read the List of Issues at the time we read the witness statements prior to commencing the live stage of the hearing, we made two observations to the parties:

    (1) With regard to the legitimate aim identified at paragraph 12, we observed that what was included there did not really make any sense as any form of legitimate aim as it simply appeared to record what led to the action taken by the Respondent. The Respondent's representative indicated, at that point, that the legitimate aim was that often maintained in cases of dismissals arising from ill health, i.e. along the lines of ensuring that appropriate service to customers was maintained through consistent attendance. Ultimately

however in his closing submissions he recorded that the legitimate aim was "ensuring the Claimant as an employee was capable of performing her duties and had a sufficiently satisfactorily [*sic*] attendance record".

(2) Although we had noted that the hearing would focus only on matters of liability and not remedy, we observed that the list of issues made reference to the question of whether any account should be made of *Polkey*, i.e. whether compensation should be reduced on the basis that even if the dismissal was found to be unfair and/or discriminatory, had a fair procedure been followed, it would have led, or there was a chance that it would have led, to a fair dismissal. We indicated in the circumstances that this hearing would address the question of any *Polkey* deduction in terms of evidence and submissions.

7. The Claimant's representative questioned the appropriateness of allowing the Respondent to alter its contended legitimate aim. He also, in his closing submissions, raised a point that the Respondent had also conceded, in paragraph 8 of the List of Issues, that it had knowledge that the Claimant was likely to be placed at substantial disadvantages in the workplace as listed later in the List, and yet appeared to be resiling from that in relation to its knowledge of any substantial disadvantage caused by the application of any PCPs relating to telephony, and should not be allowed to do so.

8. The Claimant's representative maintained that the Court of Appeal decision in ***Scicluna -v- Zippy Stitch Limited and others*** **[2018] EWCA Civ 1320** confirmed that it would only be in an exceptional case that it would be legitimate for a Tribunal not to be bound by the precise terms of an agreed List of Issues, maintaining that this case was not an exceptional one. The Respondent's representative contended that the Court of Appeal had, more recently, in the case of ***Mervyn -v- BW Controls Limited*** **[2020] ICR 2020** revisited this issue and had noted that there was no requirement of "exceptionality" before a Tribunal could depart from an agreed List of Issues and that a Tribunal is not required to stick slavishly to an agreed list where to do so would impair the discharge of its core duty to hear and determine the case in accordance with the law and the evidence.

9. Having considered the parties' representations, we considered that it would be appropriate to consider the List of Issues as subsequently clarified. With regard to paragraph 12, as we had already noted, what was included there as a purported legitimate aim simply did not make any sense and could not therefore stand as a legitimate aim. The aim ultimately expressed was broadly the normal type of aim contended to apply in cases of ill health dismissal. The Claimant was in a position to challenge, and did indeed challenge, the proportionality of the Respondent's method of fulfilling any legitimate aim it may have advanced along those lines, and therefore we did not consider that the Claimant would suffer any prejudice through the reformulation of paragraph 12.

10. With regard to paragraph 8, we noted that the witness statement of Mr Mullins, the Manager involved in the allocation of telephone duties to the Claimant, clearly disputed the knowledge of any impact that telephone calls, whether generally or specifically, had had on the Claimant. We were not therefore convinced that the parties had fully considered the extent of the concession purportedly set out in paragraph 8 of the List of Issues, and we doubted that the parties intended to agree that the extent of the Respondent's knowledge went beyond that of the fact of disability itself and the, not uncommon, concession that the act of dismissal would be considered to have been known to have involved unfavourable treatment of the Claimant and/or to have placed her at a substantial disadvantage.

11. We noted the Judgment of Bean LJ in the ***Mervyn*** case, in which he quoted the earlier Judgment of Mummery LJ in the case of ***Parekh -v- Brent London Borough Council*** **[2012] EWCA Civ 1630** which was, "*As the employment tribunal that conducts the hearing is bound to ensure that the case is clearly and officially presented, it is not required to stick slavishly to the list of issues agreed where to do so would impair the discharge of its core duty to hear and determine the case in accordance with the law and the evidence*". We considered that, in order to consider the claims, and the defences to them, in accordance with the applicable law and evidence, it was in the interests of justice that we treated paragraph 8 of the List of Issues as applying a concession on the Respondent's part of any knowledge of any disadvantage to which the Claimant was likely to be placed in the workplace as relating only to the application of its sickness

procedures and its ultimate decision to dismiss the Claimant and not to telephony matters.

The Law

12. The underlying basis of the various claims is encapsulated within the List of Issues. Both representatives provided detailed submissions to us of the relevant law and cited a number of authorities. We bore the following additional legal principles in mind

Unfair dismissal

13. We noted that it was for the Respondent to establish a potentially fair reason for dismissal, and that its contended fair reason in this case was capability which falls within Section 98(2)(a) of the Employment Rights Act 1996.

14. If we were satisfied that the reason for the Claimant's dismissal had been capability, our consideration of whether dismissal for that reason was fair in all the circumstances would need to be assessed from the perspective of whether the decision fell within the band of reasonable responses open to an employer acting reasonably in the circumstances. In the context of incapability dismissals arising from ill health, we noted that the Employment Appeal Tribunal ("EAT") in ***Monmouthshire County Council -v- Harris*** **(UK EAT/0332/14)**, had noted that the Employment Tribunal's reasoning would need to "*demonstrate that it had considered whether the respondent could have been expected to wait longer, as well as the question of the adequacy of any consultation with the Claimant and the obtaining of proper medical advice*".

15. With regard to obtaining medical advice, the EAT in ***East Lindsey District Council -v- Daubney*** **[1977] ICR 566**, noted that steps should be taken by the employer to discover the true medical position prior to any dismissal, and also stressed the importance of consultation, noting that, "*Unless there are wholly exceptional circumstances, before an employee is dismissed on the ground of ill health it is necessary that he should be consulted and the matter discussed with him, and that in one way or another steps should be taken by the employer to discover the true medical position. We do not propose to lay down detailed*

principles to be applied in such cases, for what will be necessary in one case may not be appropriate in another. But if in every case employers take such steps as are sensible according to the circumstances to consult the employee and discuss the matter with him, and to inform themselves upon the true medical position, it will be found in practice that all that is necessary has been done".

16. The Claimant contended in her evidence that the Respondent had been responsible for the sickness absence which led to her dismissal, although we noted that the Respondent did not accept that it had been the cause of the Claimants' illness. In relation to that, the case of ***Royal Bank of Scotland -v- McAdie*** **[2008] ICR 1087** provided guidance in relation to dismissing employees where the underlying illness which led to the employee's dismissal was attributed to the conduct of the employer. In that case, the Court of Appeal confirmed that it may be necessary to "go the extra mile" in such circumstances, for example by being more proactive in finding alternative employment or putting up with a longer period of sickness absence. However the Court emphasised that the fact that an employer may have been at fault for causing the incapacity does not in any sense mean that a resulting dismissal for that incapacity will be unfair.

Discrimination arising from disability

17. We noted that the Respondent accepted that dismissal could be considered as unfavourable treatment and also that it had been aware of the Claimant's disability, or at least of the potential that she was disabled at the relevant times, prior to the decision to dismiss. The focus was therefore on the question of justification, i.e. whether the decision to dismiss was a proportionate means of achieving a legitimate aim. Whilst a legitimate aim may often, indeed will usually, be in the mind of the employer at the particular time of dismissal, it can be called in aid subsequent to such a dismissal.

18. The question of whether an employer's actions have been a proportionate means of achieving a legitimate aim is to be judged objectively and, as noted by the EAT in ***Department of Work and Pensions -v- Boyers*** **(UK EAT/0282/19)**, in order to assess proportionality, a Tribunal must weigh the real needs of the undertaking against the discriminatory effect of the proposal. There must be an objective

balance between the discriminatory effect of the measure and the reasonable needs of the employer.

Reasonable adjustments

19. Our focus here would be, as identified by the EAT in ***Environment Agency -v- Rowan*** **[2008] IRLR 20**, on identifying:

(i) The provision criterion or practice applied by or on behalf of an employer;

(ii) The identity of non-disabled comparators, where appropriate; and

(iii) The nature and extent of the substantial disadvantage suffered by the Claimant, in comparison to the non-disabled comparators.

20. In this regard, the Claimant was relying on a hypothetical non-disabled comparator. The focus was again an objective one, assessing whether a PCP had indeed been applied, whether the employee was, as a result, placed at a substantial disadvantage, and then whether the employer had taken such steps as were reasonable to avoid any disadvantage caused.

Findings

21. The Claimant was initially employed by the Respondent in April 2004, and latterly was employed as an Assistant Officer in the Complaints Department. It was not entirely clear when she started work in that department but Mr Mullins became her Line Manager in early 2017 and therefore she had been working in that department at least since then.

22. Whilst her medical records were not in the hearing bundle, from Occupational Health reports it appears that the Claimant was diagnosed with depression and anxiety in approximately 2008, and that it had been generally well managed.

23. In terms of the Claimant's sickness absences from 2015 onwards, she was absent for 35 working days in 2015, recorded as "stress related", and also had three other periods of absence in that year, two of one working day and one of four working days. She had no absence at all in 2016 and 2017.

24. On 11 January 2018, the Claimant was absent for fourteen working days due to a chest infection and, whilst she returned at the start of February, she was then absent for a further nine working days from 16 February 2018 due to a recurrence of the chest infection.

25. The Respondent operates an attendance management policy which notes that after certain "trigger points" action under the policy will be taken. In relation to the Claimant, who worked four days per week, her trigger points were a total amount of seven days absence or four separate periods of absence within a twelve month period.

26. In light of the Claimant's absences in January, February and March of 2018, she had been absent for some 23 working days and therefore had passed the relevant trigger point. That led to a formal meeting between the Claimant and Mr Mullins on 6 March 2018 and the issuing by Mr Mullins of a first written improvement warning to the Claimant on 20 March 2018. Mr Mullins, in his letter confirming that, noted that he would monitor the Claimant's attendance for six months through to 20 September 2018, and that if her attendance was unsatisfactory at any time within that period he would consider her case again and may give her a final written improvement warning. The letter confirmed that attendance would be unsatisfactory if absences reached 50% of her normal trigger point, i.e. four days, or there were four separate spells of absence. The Claimant was advised of her right to appeal against the decision but did not do so.

27. In light of the Claimant's absence, Mr Mullins commissioned a report from the Respondent's Occupational Health Adviser, and a report was received dated 29 March 2018. The report referred to the Claimant informing the Adviser that she took prescribed medication for her mental health, which she noted was well controlled, but made no other reference to mental health issues.

28. The Claimant then was in work regularly until 17 July 2018, although within the hearing bundle there was a note of a telephone conversation between the Claimant and one of the Respondent's managers on 10 May 2018 regarding what appeared to be absence in relation to the Claimant's husband. Several of the documents within the bundle made reference to the Claimant's husband's health,

and the fact that she had caring responsibilities for him, although the precise nature of the condition was not referred to.

29. The Claimant was then absent on 17 July 2018 until 30 July 2018, a period of eight working days. This was as a result of problems with her right knee which affected her mobility. The condition was subsequently diagnosed as gout but a later diagnosis indicated that the problem may have been arthritis.

30. As a result of the absence, Mr Mullins made a further referral to Occupational Health, and a report dated 6 August 2018 was received. The report did not make any reference to any mental health issues, even in passing, and noted that the Claimant had expressed no difficulties in relation to her work and had said that her manager had been very supportive since she had returned to the workplace. The report concluded that the Claimant was fit for work at that time but would benefit from regular positional breaks.

31. During a return to work meeting on 31 July 2018 Mr Mullins confirmed that an allocated parking space had been arranged for the Claimant on her return and also that she would not do any telephony work or take any "warm handovers" during her first week back as part of her phased return. Warm handovers were calls referred by the Respondent's front line telephone staff who would then transfer complaint calls into the Complaints Team. This is how calls come in to the Complaints Team, and came to the Claimant individually, with calls being allocated by computer to available assistants. In addition to the allocation of initial calls by that method, the Claimant would then deal with complaints subsequently which would involve speaking to individual customers via her direct line, with employees being encouraged to provide their direct line numbers to customers in order to facilitate contact. Mr Mullins also confirmed in the return to work meeting that he would make sure that the Claimant's workload was cleared for her return, and that she would only have one case to look at to give her a chance to get back up to speed.

32. Due to the fact that the Claimant's absence in July exceeded the trigger point, a further formal meeting was held between the Claimant and Mr Mullins on 15 August 2018. During the meeting, the Claimant confirmed that there were no other

temporary workplace adaptations or reasonable adjustments which would assist her return, confirming that she was doing shorter days and coming in later if she needed to and had also not taken calls for the first week. Following the meeting, on 16 August 2018, Mr Mullins wrote to the Claimant with a final written improvement warning, noting that her attendance would be monitored for a further six months, i.e. up to 16 February 2019, and that if attendance was unacceptable at any time in that period she could be dismissed or downgraded. Similar levels of attendance were to be viewed as unsatisfactory, namely absences of 50% of the normal trigger point days, in the Claimant's case four days, or four separate periods of absence.

33. Probably the only significant area of dispute between the parties then related to the period of early September 2018. The Claimant contended that she informed Mr Mullins in early September of problems she was having with a vexatious customer who had been emailing her and calling her several times a day including, in one afternoon, calling incessantly. The Claimant's evidence was that she asked Mr Mullins for the customer to be treated as a "vexatious customer" so that the customer could be passed to a specialist colleague but that that was refused. However she also confirmed that she spoke to one of the other managers and one of the technical advisers about the issue and had been told by them that it was too much of an administrative burden to designate the customer as a vexatious customer.

34. The Claimant also indicated in her statement that Mr Mullins knew that telephone work was a trigger for her anxiety and that she asked him if she could reduce the time she spent on the telephone to assist with that, referring to it having been noted in the return to work meeting on 31 July 2018. We noted however that the note of that meeting, whilst referring to the Claimant requesting not to do any telephone work, recorded it as simply "to help her catch up", and no reference was made to any stress or anxiety being caused by the Claimant receiving calls. Indeed in this note, the Claimant said that stress could sometimes cause her knee to flare up, and when asked by Mr Mullins whether that was work related or home related the Claimant confirmed that it was outside of work as she was a full time carer to her husband. We observed that that comment cannot have been completely factually accurate as the Claimant worked for four days a week at the Respondent.

35. Mr Mullins' evidence was that the first knowledge he had about any condition of anxiety was on 18 September 2018 when he was approached by the Claimant. The note of this conversation indicated that the Claimant initially spoke about her knee and that the results of a scan had become available from which she had been diagnosed as having arthritis in her knee. The Claimant then went on to mention that she had been suffering from stress at home and that her GP was referring her to a psychiatrist and she asked if she could be taken off telephone duties as she was struggling to cope. Mr Mullins agreed to reduce her telephony duties to one call a day and told the Claimant to let him know how she was managing with her case load and that if she had too many cases he would review that. Mr Mullins' evidence was that the first refence made to any problems with the vexatious customer were made in a telephone call he had with the Claimant on 5 October 2018, by which time the Claimant had commenced the period of sickness absence which led to her dismissal. The note of this conversation indicates that the Claimant confirmed that the stress that she was suffering with was to do with her home life, but also said that some of it was down to work and that she had just dealt with a vexatious customer before going off sick and that that had contributed to her health issues.

36. On balance, we accepted that the Claimant had raised issues of the vexatious customer, albeit not with Mr Mullins, during the early part of September 2018. Mr Mullins in his evidence appeared to accept that other managers had been aware of the issue and that the particular customer had subsequently been allocated to a different adviser, albeit we observed that that would have had to have happened in practice in any event due to the Claimant's absence. We did not however consider that matters had been raised by the Claimant with Mr Mullins about the vexatious customer until 5 October 2018. We also observed, with regard to the discussion the Claimant had with other managers, that we did not consider that the discussion had gone beyond the fact that the calls were unpleasant and unwanted, and did not get to the level where there was any knowledge on the Respondent's part about the Claimant's condition being caused by the vexatious customer.

37. We noted that the Claimant worked in the Complaints Department and had done so for several years, and considered that it would not be unusual for callers to be agitated and even aggressive. We also noted that the Claimant did not go off work

immediately following her concerns about this particular customer, and that what the Claimant contended to have been the trigger for her period of illness due to anxiety and depression in September changed on several occasions. The reasons ranged from the Claimant's home life entirely, to a mixture of the Claimant's home life and work, to the Claimant's work entirely. Even in the context of work, the contended cause of the Claimant's condition varied, from the amount of work she was allocated, to the vexatious caller, to the imposition of warnings, and to the contact made with her while she was absent.

38. We noted that in the record of discussions that Mr Mullins had with the Claimant prior to the commencement of her final sickness absence, no mention was made of stress at work, let alone of problems with the vexatious customer. We considered that had that been the primary cause of the Claimant's illness she would have mentioned it in the discussion on 18 September, and also would have mentioned it when she notified her sickness absence on the morning of 20 September 2018, whereas the form completed by Mr Mullins indicates, in answer to a question of whether the job holder would be able to come into work if a temporary adjustment was made stated, "*We discussed further adjustments, but Julie did not feel this would benefit as she felt the stress was home life related and not to do with work*".

39. Ultimately we concluded that, whilst the calls from the vexatious customer were no doubt unpleasant, we felt that the primary reason for the Claimant's sickness absence was her home circumstances.

40. The Claimant then was absent on 20 September 2018 and indeed never returned to work. The Claimant initially submitted a self-certificate of absence on 24 September noting that her absence was due to anxiety and depression.

41. As noted, a conversation took place between the Claimant and Mr Mullins on 5 October 2018. During this conversation, the Claimant indicated that she did not think that she would be returning to work for a period as, whilst she had not been diagnosed, she believed she had suffered a mental breakdown. She confirmed that she was hopeful of getting a psychiatric appointment within four weeks for them to review her medication. She noted that she felt her medication was no

longer working and believed that it needed to be changed. She went on to say that when her medication was changed it normally took six weeks to kick in.

42. A further Occupational Health Report was then obtained dated 11 October 2018. In this, the Adviser reported that the Claimant described symptoms of anxiety, constant worry, feelings of fear and panic, feelings of being overwhelmed, low mood and fatigue. The report also indicated that the Claimant described a reduction in her emotional resilience and that those symptoms had an impact on her ability to concentrate, retain/recall information, organise, prioritise and multi-task.

43. The Adviser recorded that the Claimant described some stresses in her personal life but attributed her own symptoms solely to stresses within the workplace. The Report indicated that the Claimant had sought the advice of her GP and was taking prescribed medication but with minimal effect. The Adviser also reported that the Claimant had been referred for a psychiatric assessment and had an appointment on 23 November 2018, and that it was likely that her current treatment plan would be reviewed at that appointment, and potentially altered with the aim of reducing her symptoms. The Report also recorded that the Claimant had made contact with appropriate services for additional support and was awaiting confirmation of an appointment to commence cognitive behavioural therapy.

44. In terms of recommendations and advice, the Adviser recorded that, in her opinion, the Claimant was likely to meet the requirements of the definition of disability within the Equality Act. She recorded that she had not made arrangements for a further review, but that the Respondent may wish to refer the Claimant for a further Occupational Health Assessment once an effective treatment plan had been established, and at that point they may be able to provide further information regarding the prognosis of her condition and any specific workplace adjustments that may be of benefit.

45. Due to the Claimant's absence, Mr Mullins arranged a formal meeting with her on 22 October 2018 at her home, with the Claimant's Union Representative, Mr Gavin Harman, also being present. In the meeting, the Occupational Health Report was discussed, as was the prospective psychiatric assessment. Mr Mullins reminded

the Claimant about completing the stress reduction plan that he had previously sent her to enable the Respondent to identify stressors and put temporary adjustments in place. The discussion also encompassed possible further adjustments beyond the reduction in telephony work and reduced case load on return and the allocation of the car parking space, and the Claimant indicated that there was nothing else she could suggest at that moment but that she would wait until she had had her psychiatric assessment. Mr Mullins asked if the Claimant could give a return to work date and the Claimant confirmed that she would ask the psychiatrist for a return date at the appointment. She confirmed that once her medication was adjusted it could take six weeks for her to see any improvements in her wellbeing.

46. Following the meeting, Mr Mullins concluded that it would be appropriate to refer Mrs Grant to a Decision Maker under the terms of the Respondent's attendance management policy in order to decide whether the Claimant should be dismissed or downgraded or whether her sickness absence level could continue to be supported. He wrote to her to that effect on 26 October 2018, noting that Mr Hawkins would be the Decision Manager and that he would write to invite her to a meeting. He completed a referral to a Decision Maker form and submitted that to Mr Hawkins, who also considered various documents relating to the Claimant's absences over the previous four years, the recent Occupational Health Reports, the recent warnings, and the minutes of various recent meetings.

47. Mr Hawkins wrote to the Claimant on 7 November 2018 inviting her to a meeting on 15 November 2018. He did not in this letter make reference to dismissal being an appropriate sanction but did conclude the letter by saying that if the Claimant did not attend or make written representations he would make a decision about her future soon after. Taken with Mr Mullins' earlier letter, we were satisfied therefore that the Claimant was aware that a potential outcome of the meeting was her dismissal. In the event, as the date was not convenient, the meeting was reconvened for 22 November 2018.

48. On 22 November 2018, the Claimant spoke to Mr Mullins, although it was not clear whether this was before or after the meeting with Mr Hawkins, as part of Mr Mullins' general keep in touch approach as her manager. The Claimant had seen

the psychiatrist the day before and confirmed that she had been diagnosed with recurrent depressive disorder and generalised anxiety disorder. She explained that her current medication was no longer effective, that it would take three weeks for her to get off that medication, and then she would start on her new medication, and that she would be aware if the new medication caused any side effects within a further five days.

49. Mr Mullins asked therefore if January 2019 could be a realistic return date and the Claimant replied that January was realistic. Mr Mullins asked the Claimant if she had completed the stress reduction plan, to which she replied that this was something she thought she could complete when she returned to work, and ultimately the Claimant suggested she may get her psychiatrist to help her complete that.

50. The Claimant and Mr Hawkins then met in the afternoon on 22 November 2018 at the Claimant's home, with Mr Harman again present as the Claimant's Union Representative. In terms of the change to medication, the Claimant confirmed that it would take three weeks for her to come off the old medication and then five days for the new medication to kick in, and that she would not know until then if there would be any side effects. In response to a question from Mr Hawkins as to whether the Claimant could give a date when she expected to be able to return, she replied, "*4 to 6 weeks*", that she could not give an exact date, but was hoping that if everything went well it would be early in 2019.

51. Mr Hawkins and the Claimant also discussed that a possible outcome of the meeting was downgrading. Mr Hawkins indicated that downgrading the Claimant to an Administrative Assistant would be difficult as there were few available roles and the Claimant indicated that she did not wish to be downgraded. At this point the Union Representative commented that the best outcome would be to get the Claimant back to work, with which all parties appeared to agree.

52. A further keep in touch call took place between the Claimant and Mr Mullins on 29 November 2018, during which the Claimant confirmed that she would be starting her new medication in a further two weeks and would know within five days of taking that if she was likely to have any side effects. Mr Mullins again asked the

Claimant about the stress reduction plan and the workplace action plan he had provided to her, and the Claimant indicated that she had not completed them but was going to see the Pathways charity (a mental health assistance charity) and would ask them to help her complete it.

53. Mr Hawkins, having initially indicated that he would respond to the Claimant within five days, noted that he was not able to reach a decision within that period and therefore wrote to her on 29 November indicating that he needed more time to consider the case, and that he hoped to be able to let her have his decision within the following two weeks.

54. A further keep in touch call took place between the Claimant and Mr Mullins on 6 December 2018. During this the Claimant indicated again that she hoped to be able to return to work on 2 January 2019 when her latest Fit Note expired and, when asked by Mr Mullins if she would definitely be back to work on that date she said "*Yes depending everything goes well*".

55. Mr Mullins confirmed that he provided notes of his subsequent conversations with the Claimant, i.e. those that post-dated the meeting between the Claimant and Mr Hawkins on 22 November 2018, and Mr Hawkins confirmed he had received them. Mr Hawkins did not however have any other conversations with Mr Mullins about the Claimant specifically, or the impact of the Claimant's absence on the Complaints Team more generally. Mr Mullins confirmed under cross-examination that the Complaints Team would have been able to cope without the Claimant until January, and even up to March.

56. Mr Hawkins sought internal HR advice on 26 November 2018 in which he provided information about the process to date and the note of that discussion recorded that he said, "*At the moment I am inclined to dismiss, but is this appropriate considering the information given above?*". The summary of the advice recorded by the Adviser was that it was Mr Hawkins' decision to make as the Decision Maker, but highlighted the risk that if he went ahead with dismissal the job holder, i.e. the Claimant, would have the right to appeal "*as his decision has not been supported by the information that has been made available to him*". The note recorded the advice as being that Mr Hawkins "*may wish to consider supporting*

the absence at least until the business has seen whether the new medication has worked for the JH. Suggest that if still no return to work after the new medication has taken effect, then can always be referred back for consideration of abs dismissal. The JH has been absence [sic] for just over 2 months, so does not appear unreasonable to continue to support for now".

57. Mr Hawkins did not appear to have been satisfied with that advice as he made a further HR referral via the Respondent's internal systems on 27 November 2018, and this time spoke to a different Adviser. The summary of the action taken to date was, whether due to deficiencies of note taking by the Adviser or less information being provided by Mr Hawkins, much briefer. The note of the call did not refer to the specific potential date of return depending on the effectiveness of the new medication, which contrasted with the earlier note. The advice note also recorded that Mr Hawkins confirmed that there was no confirmed date of return and that the business was no longer able to sustain the absence. The note recorded that again it was ultimately a decision for Mr Hawkins to make.

58. Ultimately, Mr Hawkins decided that his decision would be to dismiss the Claimant. He produced a written record of his decision, in which he recorded that he had found no evidence that the Claimant would be able, or was likely, to return to work within a reasonable time. He recorded that the Claimant had remained insistent that she could not provide a return to work date even after attending a psychiatric assessment where the new treatment plan clearly gave a timescale for her to see improvements from new medication. We observed in fact however, that, whilst the Claimant had not been prepared to give a guaranteed date of return, she had clearly indicated in the meeting on 22 November that she anticipated being in a position to return on 2 January 2019.

59. Mr Hawkins also recorded that the Claimant had waited for over two months for a psychiatric assessment, which was not something over which the Claimant had had any control. He went on to say that during that time there was no evidence that she had pursued alternative treatment from her GP, but we observed that the Claimant had made clear to Mr Hawkins and Mr Mullins that, and it had been referred to within the Occupational Health Report, she had sought a referral for CBT (which had not been progressed pending the psychiatric assessment) and

had also sought advice from her GP and from a mental health charity. Mr Hawkins went on to note that in relation to her recent absences there was evidence that the Claimant had a tendency to put things off.

60. Due to the good working relationship between the Claimant and Mr Mullins, Mr Hawkins asked Mr Mullins to telephone the Claimant to inform her of his decision, which Mr Mullins did on 13 December 2018. Mr Hawkins himself then wrote to the Claimant on 17 December 2018 noting that he had decided to end her employment on the grounds of continuing sickness absence. He confirmed that the Claimant was entitled to 13 weeks' notice and therefore her last day of service would be 18 March 2019. He also reminded her of her right to appeal and to whom the appeal should be submitted.

61. There was evidence in the bundle of an appeal lodged by the Claimant, albeit some way out of time, on 18 March 2019. Despite that, it was accepted, and a hearing took place with Mr Brendan Murphy on 12 April 2019, with Mr Harman again present as the Claimant's Union Representative. Ultimately, Mr Murphy indicated in a letter dated 23 April 2019 that he did not uphold the appeal and therefore that the original decision to dismiss stood. The Claimant did not raise any contentions in her witness statement about the appeal and we did not hear from Mr Murphy directly.

Conclusions

62. Applying our findings to the issues identified at the outset of the hearing our conclusions in respect of the Claimant's various claims were as follows:

Unfair dismissal

63. First, with regard to the reason for dismissal, we were satisfied that the reason for the Claimant's dismissal was capability, falling within Section 98(2)(a) ERA, on the basis of the Claimant's ill health, as asserted by the Respondent. We saw no evidence that the Respondent had any ulterior motive to dismiss the Claimant.

64. The List of Issues noted that an alternative contention was that the Claimant was dismissed for some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the Claimant held ("SOSR"),

i.e. a reason falling within Section 98(1)(b) ERA. There were hints in the evidence of both the Respondent's witnesses that the reason for dismissal may also have encompassed an element of SOSR, in the form of the Claimant's absence being viewed as something that the Respondent could not be expected to put up with. However, we ultimately concluded that the Respondent's principal reason for dismissal was the Claimant's ill health, Mr Hawkins, who took the decision to dismiss noting, "*I have found no evidence the jobholder will be able, or is likely, to return to work within a reasonable time*", in his reasons for his decision.

65. With regard to fairness, we applied the test in Section 98(4) ERA and the guidance from the appeal courts, particularly from the EAT decisions of ***Harris*** and ***Daubney***, emphasising the importance of the Respondent having established the true medical position, having consulted with the Claimant, and having established that it could not reasonably have been expected to wait longer.

66. In this case, the Respondent had, in many respects, acted appropriately and sensitively to the Claimant during her absences, including the most recent absence which led to her dismissal. Mr Mullins appeared to be a supportive manager, and indeed the Claimant commented that she felt that she was being supported by Mr Mullins. It seemed to us however that, certainly when it got to stage of the Claimant's last absence, and once the trigger for further action under the Respondent's absence procedure had been passed, that Mr Mullins and Mr Hawkins appeared to focus very much on the procedure and not on considering the Claimant's case in the round, such that they did not appropriately address the elements required to demonstrate a fair dismissal.

67. With regard to the establishment of the true underlying medical position, the Respondent had taken care to obtain Occupational Health advice following each period of reasonably lengthy absence on the part of the Claimant in 2018, including, most relevantly for the dismissal decision, advice on the Claimant's absence from September 2018 onwards due to her mental health condition. However we did not consider that that advice could reasonably have been interpreted as having established the underlying medical position as being that there was no realistic prospect of the Claimant's return within a reasonable timeframe.

68. The Occupational Health Advice Report dated 11 October 2018 noted that the Claimant had been initially diagnosed with depression and anxiety over ten years earlier but that her condition had been generally well managed, with intermittent episodes of increased symptoms as might have been expected with that condition. The report also recorded that the Claimant had been taking appropriately prescribed medication but with minimal effect.

69. Importantly, the report noted that the Claimant had been referred for a psychiatric assessment, which was scheduled to take place on 23 November 2018, albeit it ultimately took place two days earlier than that, and that it was likely that her current treatment plan would be reviewed at that appointment and potentially altered, with the aim of reducing the Claimant's symptoms. The report also recorded that the Claimant had made contact with appropriate services for additional support and was at that time awaiting confirmation of an appointment to commence cognitive behavioural therapy.

70. The report confirmed that the Claimant was not fit to work at that time and indeed that her then current Fit Note, which expired on 28 October 2018, was likely to be extended to allow an effective treatment plan to be established. The report then went on to say that it was not possible during that assessment to determine an anticipated return date with any certainty as that was dependent on the Claimant's response to the potential changes in her treatment plan. The report concluded however by saying that the Respondent may wish to refer the Claimant for a further assessment once an effective treatment plan had been established, and that at that point further information may have been able to be provided regarding the prognosis of the Claimant's condition and any specific workplace adjustments that may have been of benefit.

71. The advice therefore gave no clear indication of when the Claimant would be able to return, but equally did not provide any indication that a return was unlikely. It noted that a psychiatric assessment was a matter of only some six weeks away and signposted the Respondent to a potential further referral once a revised treatment plan had been established. It appeared to us however that the focus of Mr Mullins, and subsequently Mr Hawkins, was on requiring a precise return date,

and the Claimant's potential ability to return following a revised treatment plan appears to have been ignored.

72. At least initially, Mr Mullins appeared to be prepared to wait for further treatment to take place and to take stock at that time. In the formal meeting with the Claimant on 22 October 2018 he noted that, as soon as the Claimant received her diagnosis, i.e. following the psychiatric assessment, the Respondent could consider further adjustments for her. However, within four days he had taken the decision to refer the matter to Mr Hawkins as the Decision Manager to decide whether the Claimant should potentially be dismissed, as that was confirmed in a letter to the Claimant on 26 October 2018.

73. Mr Mullins appeared to take an adverse view of the Claimant in terms of her not taking proactive steps to help her return, noting, in his summary of events, that she had not completed the stress reduction plan or workplace action plan that he had asked her to complete. He also referred to this in a discussion he had with an HR Case Worker on 24 October 2018. However, the Occupational Health Report referred to the Claimant taking appropriate medication and also having sought additional support.

74. We also noted that the Claimant was suffering with a depressive order at that time and did not find it overly surprising that the Claimant was not able to complete a stress risk assessment form at that time. Subsequently, the Claimant in meetings referred to seeking assistance from a charity and from her psychiatrist to complete the form.

75. As we have noted, Mr Mullins also appeared to be troubled by the lack of any definitive return to work date as a factor in his decision to make the referral to a Decision Manager. However, as we have noted, whilst it is correct that there was no firm date for the Claimant's return, even before the psychiatric assessment had taken place, during the meeting on 22 October 2018, the Claimant indicated that once her medication was adjusted it was likely to be some six weeks before improvement was seen, at which point a date could be given, which would have taken matters up to some time early in the New Year.

76. We also noted that, from the perspective of sick pay, whilst we were conscious that the provision of employer sick pay for a particular period is no guarantee that an employee will remain employed for the entirety of that period, that, as things then stood, the Claimant would remain in receipt of full sick pay until the beginning of March 2019, and then would receive half pay through to 23 May 2019. We also noted Mr Mullins' own concession during cross-examination that the Complaints Department could readily have coped with the Claimant's absence until January 2019, and even until March 2019.

77. In addition, notwithstanding the lack of certainty of a return date at the time of Mr Mullins' meeting with the Claimant on 22 October, in a keep in touch call between the two on 22 November 2018, the day after the psychiatric assessment had taken place, the Claimant confirmed that she had received a diagnosis and that her medication was due to change and that it would take her three weeks to get off the old medication and a further five days to know if there would be side effects with the new medication. Mr Mullins asked if January 2019 would be a realistic return date and the Claimant replied that she thought it was.

78. The Claimant made similar points in her meeting with Mr Hawkins on the same day, i.e. that she could not give an exact return to work date but anticipated that it would be in a further four to six weeks, i.e. some time early in the New Year.

79. That was re-confirmed in a further keep in touch call with Mr Mullins on 29 November 2018, and again in a call on 6 December 2018 in which, in response to a question from Mr Mullins as to whether the Claimant would definitely be back in work on 2 January, she replied "yes depending everything goes well". We observed that Mr Mullins and Mr Hawkins both confirmed that the notes of Mr Mullins' discussions with Ms Grant were provided by the former to the latter before he made his decision. We also noted that, in this call on 6 December, the Claimant noted that she was waiting for an appointment with a charity who had supported her and that when she got that appointment she would ask them for assistance with the stress reduction plan and the workplace action plan.

80. Mr Hawkins however then concluded that he had found no evidence that the Claimant would be able or was likely to return to work within a reasonable time.

We did not see however that Mr Hawkins could reasonably have reached that decision.

81. As we have noted, the Claimant could not provide a guaranteed return to work date, as she had not by then even started her new medication and it would take a week or so once she commenced taking the new medication to assess how she was reacting to it. Whilst we understood that an employer would be keen to get certainty on an employee's return from a period of sickness absence, we did not consider that a reasonable employer, in such circumstances, would have reacted to the Claimant's inability to provide a cast iron return date in the way that it did. That was particularly in the light of the fact that whilst no guaranteed date was able to be confirmed by the Claimant, her consistent position was that everything pointed to a return in early January, a date comfortably within the period that Mr Mullins had confirmed the department could cope without the Claimant's attendance, albeit that Mr Hawkins had not checked that point with him.

82. We also noted that the internal HR advice received by Mr Hawkins on 26 November 2018 did not recommend dismissal. The record of that advice notes that Mr Hawkins was advised that he may wish to consider supporting the absence at least until the business had seen whether the new medication had worked for the Claimant, and that if there had been no return to work after the new medication had been taking effect then the Claimant could always be referred back for consideration of dismissal. The advice concluded by noting that the Claimant had been absent for just over two months and that it did "not appear unreasonable to continue to support for now". We noted that the Claimant sought further advice from HR the following day, and received advice from a different HR Adviser. However we also noted that the note of that contact indicated that Mr Hawkins had provided a less comprehensive background to the advice being sought and also that the advice, whilst confirming, as did the initial Adviser, that the decision was ultimately one for Mr Hawkins, did not explicitly advise dismissal.

83. Overall therefore, we were not satisfied that it could be said, as of 12 December 2018, that the medical position had established that there was no reasonable prospect of the Claimant's return within a reasonable time period. On the contrary, it seemed to us that at that point the likely outcome, albeit one that was not

guaranteed, was that the Claimant would return in early January, and even if it had taken a little longer that would still have been within the Complaints Department's period of tolerance.

84. Against therefore the background of the occupational advice anticipating a re-referral, the HR advice, and Mr Mullins's own evidence about his department's ability to cope with the Claimant's absence, we did not consider that the decision to dismiss fell within the range of reasonable responses.

85. With regard to consultation, we noted that there had been a great deal of contact with the Claimant, both formal and informal, but it did not appear that the Claimant's views had really been listened to during that contact. The Claimant's position from the end of October, through November, and into December, was consistent and was that her medication was likely to change following the psychiatric assessment at the end of November, and it would then take up to six weeks for matters to settle, and therefore a return to work was likely in the New Year, and yet there was no willingness on the Respondent's part to acknowledge the prospect of the Claimant returning at that time.

86. Ultimately therefore we considered that the dismissal was unfair. For the avoidance of doubt, we did not consider it appropriate to conclude that the Respondent had, in any way, been at fault for the Claimant's condition. As we have noted, there appeared to have been several triggers for the Claimant's absence from September onwards, but we did not consider that there was any blame to attach to the Respondent even if one or more workplace matters formed part of the causation of the Claimant's illness.

87. Also for the avoidance of doubt, we concluded that even if the Respondent had established SOSR as the reason for dismissal, we would still have considered the Claimant's dismissal to have been unfair, due to the likely relatively imminent return of the Claimant at the time the decision had been reached, at a point when there was nothing to suggest that the unfortunate three periods of ill health experienced by the Claimant in 2018 would be repeated in the future.

Discrimination arising from disability

88. With regard to this claim, for very similar reasons we were also satisfied that the claim had been made out.

89. Looking at the provisions of Section 15, we considered that the dismissal very clearly amounted to unfavourable treatment, and that that had arisen due to the Claimant's sickness absence, which in turn had arisen from her condition amounting to a disability. The basis of a Section 15 claim was therefore made out, subject to the ability of the Respondent to justify its actions as a proportionate means of achieving a legitimate aim.

90. With regard to that, we noted that, whilst the test of proportionality under Section 15 EqA is not the same as the test of reasonableness under Section 98(4) ERA, it had been made clear by the Court of Appeal in ***O'Brien v Bolton St Catherine's Academy*** **[2017] ICR 737**, that both tests are objective and that there should be no real distinction between the two in the context of dismissal for long-term sickness where the employee was disabled within the meaning of the Equality Act.

91. Looking at the Respondent's justification, we noted that its legitimate aim had not been clearly expressed, but were satisfied that its aim of ensuring effective service from its employees to serve public demand was a legitimate one. However, we were not satisfied that its actions in fulfilling that aim were proportionate. The severe impact of dismissal on the Claimant outweighed any impact on the Respondent of waiting for a further month or so.

92. As we have noted in respect of the unfair dismissal claim, we did not consider that the Respondent's actions were within the range of reasonable responses when there was a prospect, indeed a likelihood, of the Claimant's return within a further month or so. For those reasons, we did not consider that it was a proportionate step for the Claimant to be dismissed in December 2018 and therefore that the Claimant's claim succeeded.

Reasonable adjustments

93. As we have noted, the reasonable adjustments claim fell into two sections, first relating to the dismissal decision, and second relating to the expectation that the

Claimant deal with telephone calls, both generally and with regard to one specific customer.

94. Looking at the dismissal aspect first, we noted that the application of the Respondent's attendance procedure was a PCP, and that clearly placed the Claimant at a substantial disadvantage in that, as a disabled person, she was likely to have more sickness absence, and therefore be subject to the terms of the policy, than a non-disabled person.

95. The key question therefore was whether the Respondent had made reasonable adjustments to its procedure to avoid the disadvantage of dismissal. For the same reasons as identified in respect of the unfair dismissal and Section 15 claims, we did not consider that it had.

96. We noted that the Respondent's procedures referred to not taking a mechanistic approach when setting trigger points in the context of a disabled employee, but felt that that was exactly what the Respondent had done in this case. It had a procedure which directed that specific steps were to be taken when particular periods of absence had been reached, and appeared then to take an almost blinkered approach in applying the policy thereafter.

97. As we have noted above, there did not appear to have been any attempt by the Respondent to pause and consider matters in the round and, in particular, consider whether there was any likelihood of the Claimant returning within a reasonable time period and then adjusting its processes to take account of that. In this regard, we have noted that there was a prospect, indeed a likelihood, of the Claimant being able to return in January 2019, and considered that it would have been a fairly straightforward adjustment to the Respondent's procedure to allow the approximate further month that would have been required to properly assess the Claimant's ability to return. We were consequently satisfied that this aspect of the Claimant's reasonable adjustment claim succeeded.

98. With regard to telephony matters, we noted that there were two claimed PCPs, first the expectation that the Claimant should take a certain number of calls from customers, and second that the Respondent allocated a particular vexatious caller's case to her. We were satisfied that the first requirement was a PCP in that

there was a broad expectation on the Respondent's part that the Claimant, and indeed all those involved with receiving calls in the Complaints Department, would take a certain number of calls from customers. We were not however satisfied that the allocation of a particular caller's case to the Claimant involved the application of a PCP. This appeared to have been a one-off management decision when the person previously dealing with the customer was promoted on a temporary basis, and we did not consider that any aspect of the allocation of the caller to the Claimant involved a provision, criterion or practice.

99. Considering the requirement to take a certain number of calls further, we felt that it was likely that the Claimant's depressive disorder would have placed her at a disadvantage compared to others without that disability. We noted that the Claimant had worked in the Complaints Department, which fundamentally involved dealing with customers over the telephone, for a substantial period without difficulty, but felt that, in circumstances where the Claimant was suffering with a depressive disorder, it would have been likely that she would have found it more difficult to deal with such calls than those without such a condition.

100. However, notwithstanding that we felt that a PCP had been applied in respect of the expectation to take a certain number of calls, and that the Claimant would have been placed at a substantial disadvantage in respect of that due to her condition, we did not consider that the Respondent had, at the time of dismissal, failed to take any reasonable steps to avoid any disadvantage caused to the Claimant.

101. We noted that Mr Mullins had been willing, even in the context of the Claimant's return from her previous illnesses, not connected to her disability, to adjust the number of calls, noting that she would be required, simply from a perspective of easing herself back into the workplace, to take only one call per day with potential for that to be reviewed further, i.e. to be reduced to zero, if required.

102. The discussions with the Claimant in October and November 2018 included discussion of a potential phased return and the fact that the Claimant would undertake limited telephony work on return, but obviously those points were not put to the test due to the Claimant's dismissal. We were however satisfied that,

had the Claimant returned, then reasonable adjustments would have been put in place regarding the Claimant's telephony work, to take account of her disability.

103. Whilst therefore the Claimant's claim in respect of reasonable adjustments succeeded in respect of her dismissal, we considered that it failed in respect of her telephony work.

Polkey

104. With regard to the question of whether any financial compensation awarded to the Claimant should be reduced to take account of the potential that she might have been fairly dismissed in the future, we noted the Respondent's submission that there should be a significant reduction on the basis that the Claimant would have been in the period of currency of the final warning up until the end of February 2019 and therefore would have been likely to have been dismissed in the New Year. However, our conclusions were that the Claimant would have been likely to return in January and that a successful return, whilst not certain, would have been probable. We noted that the Claimant had, as a matter of fact, remained on sickness absence for the whole of her notice period through to the end of March 2019, but did not consider that we could draw any material conclusions from that as the Claimant suffered a further impact on her health due to the impact of the dismissal decision.

105. However we recognised that there was a prospect that the Claimant would not have been able to return in January, or that any return may have been short lived. We were not convinced that the prospect of that was more likely than not, as the occupational health advice had confirmed that the Claimant's condition had been well managed with medication for over ten years, and we felt that a change of medication was likely to lead to sufficient improvement for her to return, and to return successfully. Nevertheless, there was certainly a not insubstantial degree of uncertainty.

106. Doing the best we could, we felt that an appropriate recognition of the possibility that the Claimant would nevertheless have been dismissed led us to consider that a reduction to her financial compensation, i.e. relating to her salary and other financial losses but not to any injury to feelings or personal injury damages that

may be established following a Remedy Hearing, should be made at the level of 25%.

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Employment Judge S Jenkins
Dated: 29 April 2021

JUDGMENT SENT TO THE PARTIES ON 30 April 2021

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FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS Mr N Roche