EMPLOYMENT TRIBUNALS

Claimant: X

Respondent: North Cumbria Integrated Care NHS Foundation Trust

Heard at: Manchester (by CVP) **On:** 21 June to 29 June 2021

Before: Employment Judge Phil Allen
Ms C S Jammeh
Mr J Murdie

REPRESENTATION:

Claimant: Mr L Bronze, counsel
Respondent: Ms A Niaz-Dickinson, counsel

JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The claimant was not unfairly dismissed. Her unfair dismissal claim does not succeed and is dismissed.

2. The respondent did not breach its duty to make reasonable adjustments contrary to Sections 20 and 21 of the Equality Act 2010. The claim for a failure to make reasonable adjustments does not succeed and is dismissed.

3. The claimant was not dismissed because of something arising from her disability contrary to Section 15 of the Equality Act 2010. The claimant's claim for discrimination arising from disability does not succeed and is dismissed.

REASONS

Introduction

1. The claimant was employed by the respondent from 4 November 2013 until she was dismissed by reason of capability (health) on 23 May 2017, with the dismissal being effective on 14 August 2017. The claimant had, at the relevant time, the disability or disabilities of generalised anxiety disorder and moderate depressive episode (as accepted by the respondent). The claimant contended that her dismissal

was unfair and amounted to discrimination arising from disability. The claimant also alleged that events in April and May 2016 were also discrimination arising from disability. The claimant also contended that the respondent had failed to comply with its duty to make reasonable adjustments. The respondent contended that the dismissal was fair by reason of capability (health) and/or some other substantial reason and denied discrimination.

Claims and Issues

2. This claim is subject to a Restricted Reporting Order made by Employment Judge Sherratt on 24 June 2019. That order was stated to remain in force indefinitely. The order was made pursuant to Section 12 of the Employment Tribunals Act 1996 and Rules 50(1) and 29 of the Employment Tribunals Rules of Procedure 2013, it being in the interests of justice to do so. It prohibits the publication in Great Britain in respect of these proceedings, of identifying matter in a written publication available to the public or its inclusion in a relevant programme for reception in Great Britain. Identifying matter means any matter likely to lead to members of the public to identify the claimant. The order highlighted that the publication of any identifying matter, or its inclusion in a relevant programme, is a criminal offence. That order remains in place and applies to this judgment.

3. The case had a lengthy procedural history with preliminary hearings having been conducted on: 12 February 2018; 7 June 2018; 4 June 2019 and 18 May 2021.

4. The disability relied upon by the claimant was generalised anxiety disorder and/or moderate depressive episode. The respondent conceded that the claimant had this disability or disabilities at the relevant time. It conceded disability as at 15 April 2016 and thereafter. The claimant stated that she had a disability at all material times from April 2014 onwards. It was not necessary for the Tribunal to determine when the claimant first had a disability.

5. In advance of the hearing the respondent had prepared a list of issues. That list was amended at the very start of the hearing and a revised list of issues provided in the course of the first day. Both parties agreed that that revised list of issues stated the issues which needed to be determined.

6. The issues identified which needed to be determined were as follows:

<u>Section 98 of the Employment Rights Act 1996 Unfair Dismissal</u>

1. Was the claimant dismissed due to capability?

2. Did the respondent act reasonably when it relied on the above reason to dismiss the claimant?

3. Did the respondent hold a genuine belief based upon a reasonable investigation that the claimant could not work effectively within the acquired brain injury service (known as ABI) if she was not physically based in the same room as the ABI Team and only had contact with other team members via the Team Leader and during team meetings? Did the respondent have a genuine belief that a trial period was not reasonable?

4. If so, did the respondent act reasonably in the fast tracking of the claimant's absence from her substantive role to stage number four of the Absence Management procedure?

5. Did the respondent take adequate steps to seek alternative employment for the claimant?

6. Did the claimant unreasonably refuse to return to work in the ABI Team?

7. If so, did the respondent dismiss the claimant for this reason?

8. Did the respondent act reasonably in treating this as a Some Other Substantial Reason to dismiss the claimant (see grounds of response paragraph 55)?

9. Did the respondent follow a fair and reasonable procedure when dismissing the claimant?

10. Did the respondent adequately consider alternatives to dismissal?

<u>Section 20 of the Equality Act 2010 Failure to make reasonable adjustments</u>

11. Did the respondent operate a PCP of requiring the claimant to work in the same physical environment as the ABI Team? [this was conceded by the respondent in submissions]

12. If so, did this have the effect of putting the claimant at a substantial disadvantage as compared with non-disabled persons who did not suffer from the claimant's disability? The claimant says that working within the same physical proximity of the ABI Team on a permanent basis caused her stress and/or anxiety because of her disability. [This issue was conceded by the respondent in submissions].

13. If so, would allowing the claimant to work separately from the ABI Team, either in a separate room in the same building or a separate location have been a reasonable step that would have alleviated the substantial disadvantage caused by the PCP?

14. Would attempting mediation or issuing a reasonable management instruction for staff to attempt mediation [or moving other parties to different working areas] or any other reasonable adjustment as determined by the Tribunal have alleviated the substantial disadvantage caused by the PCP? [in submissions the claimant's representative accepted that the words "*moving other parties to different working areas*" should be deleted from this allegation']

15. Did the respondent's decision to fast track the claimant to stage 4 of the absence management procedure amount to a PCP? [The respondent conceded that it did, during submissions]

16. If so, did the PCP put the claimant at a substantial disadvantage as compared with non-disabled persons who did not suffer from the claimant's disability? [the respondent conceded this point in submissions]

17. If so, were the following reasonable steps that would have alleviated that disadvantage:

    (a) discounting disability related absences; and/or

    (b) not fast tracking to stage number four of the procedure;

    (c) any other reasonable adjustments as determined by the Tribunal.

18. Did the respondent fail to make reasonable adjustments?

<u>Section 15 of the Equality Act 2010 Discrimination arising from disability</u>

19. Was the claimant subjected to the following unfavourable treatment?

    (i) The claimant was informed by Fiona Dixon in April 2016 that she ought to behave professionally, or she would be fired?

    (ii) Linda Coulson and Amy Burns did not consult with the claimant regarding the manner of her reintroduction to the ABI Team in May 2016.

    (iii) Dismissal [this was accepted by the respondent in submissions]

20. If so, was the treatment in 19 (i) and (ii) in consequence of something arising from the claimant's disability i.e. her anxious state and the effect of her anxiety on her behaviour?

21. Do the allegations amount to acts extending over a period?

22. Were any of the claims brought out of time?

23. If so, is it just and equitable that time should be extended to allow the claimant to pursue these claims?

24. Was the unfavourable treatment at paragraph 19(iii) because of something arising from her disability i.e. her absence or because her anxiety was increased when physically present within the ABI Team? [this was accepted by the respondent in submissions]

25. If the claimant was dismissed because of something arising from her disability, was her dismissal a proportionate means of achieving a legitimate aim? The respondent relies on the legitimate aim of ensuring that the ABI was staffed with a clinical psychologist who was willing and able to work in an collaborative inter-disciplinary manner with her ABI colleagues in order to ensure an integrated level of care to the vulnerable patients served by the ABI. [At the start of day two of the hearing the

respondent's representative highlighted that this contention applied to 19 (i) and (ii) as well as 19 (iii) (dismissal)]

7. As is explained in the elements included in square brackets within the list of issues above, a number of the issues identified at the start of the hearing were in fact conceded by the respondent in submissions and therefore did not need to be determined by the Tribunal.

Procedure

8. The claimant was represented throughout the hearing by Mr Bronze, counsel. The respondent was represented by Ms Niaz-Dickinson, counsel.

9. The hearing was conducted by CVP remote video technology. The parties and all witnesses attended remotely and gave evidence by video. The claimant attended the hearing whilst located in Malta.

10. On the first day of the hearing the name of the respondent was amended by consent to North Cumbria Integrated Care NHS Foundation Trust.

11. An agreed bundle of documents was prepared in advance of the hearing. The bundle comprised of three volumes and ultimately ran to 1,168 pages. During the course of the hearing a few documents were identified which were added to the bundle and addressed in evidence. Where this judgment refers to a number in brackets that is a reference to the page number in the agreed bundle of documents. The Tribunal read only the documents to which it was referred either within witness statements, from representatives during the hearing, or in a list of pages which should be read which was identified at the start of the hearing.

12. Witness statements were provided to the Tribunal from: the claimant; Fiona Dixon, the respondent's Senior Network Manager for its Acquired Brain Injury Service; Clare Parker, who at the time of the relevant events was the respondent's Associate Director of Nursing for Specialist Services, but who has ceased to be employed by the respondent; Pamela Travers, previously the respondent's Associate Director of Operations for Mental Health, who has also left the respondent's employ since the relevant events; and Yannick Raimbault, currently the respondent's Associate Director of Operations for the Emergency Care and Medicine Group, but at the material time General Manager for Community Services (South). At the start of the hearing the Tribunal read all the witness statements.

13. The Tribunal subsequently heard evidence from each of the witnesses, who were cross examined by the other party's representative as well as being asked questions by the Tribunal. During the hearing generally and, in particular, during the cross-examination of the claimant, the Tribunal ensured that regular breaks were taken, and longer and more frequent breaks were taken when requested.

14. After the evidence was heard each of the parties made submissions. In advance of the last day on which the hearing was conducted, the claimant's representative had provided a written skeleton argument and the respondent's

representative had provided a submission document. Both representatives referred to their written documents but also made oral submissions.

15. It had been agreed with the parties during the first week of the hearing that judgment would be reserved, and accordingly the Tribunal provides the judgment and reasons outlined below.

Facts

The start of the claimant's employment and her time working in the ABI team

16. The claimant commenced employment with the respondent as a Clinical Psychologist in the respondent's Acquired Brain Injury Service (ABI) on 4 November 2013. In taking up the role, the claimant had relocated to Cumbria.

17. The claimant's role with the respondent involved working as part of an interdisciplinary department team (IDT). This meant that other employees including Occupational Therapists, Speech and Language Therapists, and a Case Manager (Social Worker), worked together with the claimant in identifying the care to be provided to service users. Those for whom the team were responsible were usually vulnerable individuals who had become disabled after a brain injury. The team was a community team, who were responsible for a patient group spread over a very wide geographic area.

18. The Tribunal heard a considerable amount of evidence about the issues which occurred within the team early in the claimant's employment. It is not necessary or appropriate for this judgment to record in detail exactly what occurred, as the Tribunal needed only to address the evidence relevant to the issues to be determined. In broad summary, the way in which the claimant and the team worked together within the IDT team, was not successful from the outset (or at least from very shortly after the employment commenced).

19. The timeline prepared by the claimant herself as part of her grievance (169), recorded that the claimant had considerable difficulty at the second IDT meeting she attended, which was held on 13 November 2013. The claimant felt that she was being ignored and the opinions she offered were dismissed by the team. The team had been operating without a Clinical Psychologist for some time before the claimant joined the team, and the other team members had worked together for a long period. Issues also arose with regard to: induction (or the lack of it); the geographic area which the claimant needed to cover; and the difference of view between the claimant and some members of the team as to whether the claimant should have her own office (the claimant's view was that she had been promised a separate office at interview).

20. The claimant's timeline also recorded that she confronted the team about their behaviour towards her on 18 December 2013. It said that she informed them that she did not like working in that atmosphere and did not feel welcome.

21. The claimant subsequently had a meeting with Alison Kitson, the Interim ABI Team Leader, on 18 December 2013, when the claimant expressed her dissatisfaction. The claimant had a further meeting with Ms Kitson on 7 January

2014 when the claimant expressed her view that she had felt "*bribed*" into accepting the job, as had been told at interview that it was a "*friendly supportive close-knit team*" when in fact she found otherwise.

22. In her evidence to the Tribunal the claimant contended that members of the team would snigger at her and pass comments between themselves. She alleged various incidents of non-verbal aggression such as sighing and eye-rolling. Her statement also put forward the view that the team seemed to have a grudge against psychologists.

23. The Tribunal does not need to record in detail the matters that arose or the competing evidence about what occurred. However, it is appropriate to identify that the claimant was particularly aggrieved in relation to two comments: one relating to communion; and the other being that the claimant alleged that she was told that she should go back to Malta (the claimant described herself as naturalised Maltese but with some British heritage).The person who it was alleged made those two comments subsequently left the respondent's employment in Spring 2015. In her evidence to the Tribunal, the claimant described the person who left in Spring 2015 as the "*main culprit*". Her complaints also related to two other members of the team. The claimant was also aggrieved about the removal of a plaque from the door of the office which showed that the office was the Clinical Psychologist's. In summary, the team's view was that the office was a shared quiet room for use for any member of the team and the claimant believed it should be her own private office. In the Tribunal hearing, the claimant placed considerable emphasis upon the statement of a Community Rehabilitation Assistant, that is another member of the team, provided during the grievance process. That individual also raised issues about difficulties in working with the team.

24. The claimant actively worked in the ABI Team from 4 November 2013 until 28 or 29 April 2014. From the end of April 2014, she commenced a period of absence on ill health grounds. Save for a short period of phased return which is addressed below, the claimant never returned to working as part of the ABI Team after April 2014. In the grievance document emailed by the claimant on 3 September 2014 (178) the claimant stated:

> "*I cannot put into words, the hard work, the emotional repercussions and misery that trying to work in such a dysfunctional environment has left on me and indirectly on my family … I cannot possibly think and will not entertain the idea of going to work in that environment again as I do not trust the ABI colleagues anymore and I am afraid of my own health too".*

Subsequent medical reports and meetings

25. The respondent obtained a large number of reports from occupational health advisors in the course of the claimant's employment. The Tribunal will not record all of those reports or their contents, in this judgment. The first report was obtained on 18 June 2014 (135). That referred to the claimant being absent from work associated with work related stress. It recorded that

> *"it is my opinion that [the claimant] is physically fit for work with temporary adjustments in place to sustain a return; however I am unable to offer a*

> *timescale for return to work as the work related issues are a continued barrier … The deteriorating mental well being is situational, reactive to work related stressors".*

26. The claimant attended a stage one sickness review meeting on 14 July 2014 and was accompanied by her trade union representative. In an email sent following the meeting, on 17 July 2014 (145), the claimant's trade union representative put forward the view that management should address issues without requiring a formal complaint from the claimant. What he also said was

> "W*ith regard to the possibility of mediation, [the claimant] is understandably sceptical as to whether it could ever be possible to return to such a toxic working atmosphere. For this reason, she is uncertain whether to go down this route or not".*

27. In a medical report of 22 July 2014 (149) the occupational health advisor stated

> "*In my opinion [the claimant] remains unfit for work due to the ongoing work related situation. I recommend management investigate the issues relating to her perception of bullying and discuss the outcome with her*".

28. A formal grievance was raised by the claimant's trade union representative on her behalf on or around 6 August 2014 (158). The form completed sought:

> "*1. A formal apology for the failings identified; 2. Rapid, effective investigation and resolution of the bullying; 3. Establishment of a clear plan for return to work in a role and environment that is safe from bullying; 4. Recommendations to be made to ensure that the situation was better managed in future."*

29. On 3 September 2014 the claimant met with Tim Evans, the General Manager for Specialist Services. They discussed the claimant's complaints. A manager was appointed to investigate the complaints. During the meeting the claimant provided a detailed timeline recording the issues about which she complained (169 – as recorded above). Following the meeting, Mr Evans confirmed to the claimant that arrangements were in hand for the claimant to return to work, initially in a non-clinical role.

The grievance and related events

30. On 3 November 2014 the claimant met with the person undertaking the grievance investigation and provided a detailed account of the issues that she raised. At the end of the meeting (224) she was told that the investigator was looking to complete the investigation by 5 December, but she was due to go off for an operation. In fact, the investigator commenced a period of absence from work much more quickly than expected, so it was necessary to identify an alternative person to complete the grievance investigation. It was initially proposed that Fiona Dixon, the Senior Network Manager (and the Commissioning Manager for the investigation), would undertake the investigation, but the claimant requested that she did not do so. As a result, an alternative Investigating Officer was identified, being someone who

only worked part time. She took a very considerable amount of time to complete the investigation.

31. Whilst the grievance investigation was being undertaken, the claimant initially returned to work undertaking a research role working alongside the respondent's Head of Psychology. This was not a funded post. It facilitated the claimant's return to the workplace. She did not need to work as part of the ABI team.

32. In June 2015 the investigation report into the grievance/disciplinary issues was prepared and provided to Mrs Dixon (259). In respect of each of the three named individuals the Investigating Officer's opinion was that there was insufficient evidence to uphold the primary allegations. However, in each case, the Investigating Officer concluded that there was sufficient evidence to suggest that a number of other factors had contributed to the claimant's perception that the other individuals were behaving in an inappropriate manner. Amongst other things, the report identified: a lack of senior leadership around induction, which had resulted in issues arising; and evidence that the claimant's expectations in the role, from what she perceived during the interview process, differed from reality. The Investigating Officer's recommendation was that there should be a well-structured mediation involving the claimant and team members in order to promote communication and positive behaviour, with a focus on future positive working relationships.

33. The grievance outcome was sent to the claimant on 14 July 2015 by Mrs Dixon (421). The letter confirming the outcome stated that it followed a face to face meeting which had taken the previous week, between the claimant, Mr Evans, Ms Dixon and the claimant's trade union representative. The letter largely reflected the matters identified in the investigation. The outcome letter recommended three things. It recommended: formal mediation between the claimant and team members; appropriate line management and leadership; and a review of the original induction programme to identify and remedy any gaps. The outcome letter suggested meeting with the claimant to discuss a return to work in the team.

34. The investigation report appended a number of transcripts of lengthy and detailed investigatory interviews which had been undertaken with all of those involved. For the two specific allegations referred to above, the other individual denied that the comments had been made in an offensive way, explaining the context in which the comment had been made (and for the second comment said that what was alleged was not actually what had been said). The other team members also denied bullying the claimant. The statement of the Community Rehabilitation Assistant did support the claimant's complaints in many respects, albeit she also identified some aspects of the claimant's approach which she believed had not assisted the claimant in integrating into the team.

35. During the course of the questioning of the claimant in the Tribunal hearing, it became evident that the claimant had never in fact read the transcripts of the interviews which the Investigating Officer had undertaken with other individuals, save for having read the statement from the Community Rehabilitation Assistant.

36. The Tribunal does not need to determine any of the disputes of fact about what occurred whilst the claimant worked in the ABI Team, as doing so was not necessary to determine the issues before the Tribunal. The Tribunal did not hear

evidence from the other individuals involved. It was very clear at the Tribunal hearing that the claimant was dissatisfied with the outcome of the investigation. She placed particular emphasis on one interview statement (being the one that she had read) and felt that more stringent action should have been taken.

The grievance appeal and related events

37. On 29 July 2015 the claimant appealed against the grievance outcome (425). The appeal raised (in detail) the concerns which the claimant did not feel had been fully addressed. It raised the length of time taken to complete the procedure. Towards the end of the appeal letter, the claimant identified that one of the team members about whom she had raise her grievance had left. The claimant welcomed the recommendation of mediation. The claimant sought the following outcomes:

> "*1. An acknowledgment that my colleagues and managers failed in promoting a good and supportive working environment and that I was treated unfairly; 2. A formal apology; 3. A review of working practices and setting up of standards or bench marks for effective, inclusive and supportive team working and environment.*"

38. On 3 August 2015 (430) Mr Evans sent a letter to the claimant responding to her letter setting out her reasons for appeal. He stated:

> "*Having carefully read your letter, I would like to formally apologise to you for the Trust not promoting a supportive working environment when you joined the ABI Team and for the distress caused*".

39. For a period during the grievance investigation and for a period thereafter the claimant worked in the respondent's Learning Disabilities Team. That is, she undertook psychology work with service users, but in an unfunded post. This was not a post that utilised her specialism of Neuro Psychology. The claimant did undertake patient work supervised by the respondent's Head of Psychology. The claimant worked in the same building as the ABI team but did not need to work with the members of the team as part of the work undertaken.

40. In an occupational health report of 29 October 2015 (461) it was recommended that the claimant should not work in the team that her appeal was against and it was recommended that she should avoid working in an open office environment, as the constant noise stimulation was a factor impacting upon her levels of concentration and anxiety. With regard to the likelihood of the claimant being able to return to work within the ABI Team the report recorded:

> "*The issues remain with the team itself and not the work she completes within the team therefore the barrier will continue to be the team if the only option of this type of work is within the current team*".

41. The claimant's evidence to the Tribunal was that her symptoms worsened from September 2015. She suffered extreme anxiety and found it difficult to drive. Her evidence was that she asked to remain part of the ABI Service, but to work in a different building, but that proposal was rejected. Her evidence in her witness

statement said that on 2 December 2015 she became ill again. The claimant had a period of extended absence in December 2015.

42. The claimant's grievance appeal was heard on 25 November 2015 by Mrs Parker. The hearing was attended by Mrs Dixon, the claimant, the claimant's trade union representative, an HR Advisor, and a note taker. The Tribunal was provided with notes of the hearing (470). The claimant stated that she wanted justice, as justice had not been given. The claimant's trade union representative stated that the claimant needed an acknowledgment that there had been bullying. In relation to the use of an office, Mrs Dixon confirmed that it had been made clear to the claimant that she could use a particular office. After an adjournment, and at the end of the hearing, Mrs Parker recorded that it had been agreed that there was no value in reopening the investigation.

43. In her evidence to the Tribunal, Mrs Parker explained that the claimant wanted apologies not just from management, but from her team colleagues as well. Mrs Parker's evidence was that she was keen to focus on specific practical steps that would resolve issues, but she felt that the claimant was particularly focused on an apology from her team colleagues and wanted the Trust to agree that the claimant had been bullied and harassed. Mrs Parker's evidence was that, from reading through the documents, she could see that the claimant had been treated poorly on occasions and had experienced unacceptable behaviour from some of her colleagues, however, she felt that there was also evidence of unacceptable behaviour from the claimant. Mrs Parker's view was that it was not correct to label what had been found as bullying.

44. In her outcome letter of 27 November 2015 (481) Mrs Parker recorded that everyone had agreed that reopening the investigation would not result in different recommendations and that the claimant had confirmed that she was happy with the existing recommendations. Mrs Parker recorded that there was evidence of the claimant experiencing unacceptable behaviour. Reflecting on the claimant's request for an apology from team members, Mrs Parker's view was that this could only be achieved through mediation.

45. Mrs Parker also met with and explained the outcome of the grievance appeal to the two other individuals whose behaviour had been addressed in the statements who remained employed by the Trust. On 10 and 15 March 2016 those individuals raised separate grievances in which they asked the respondent not to allow the claimant to return to the ABI Team. When Mrs Dixon was challenged about those requests, her response was that those individuals were able to make the requests, but the respondent was not obliged to comply with them. In fact, the individuals did not pursue their grievances.

16 April 2016 meeting

46. On 16 April 2016 the claimant met with Mrs Dixon and Mrs Coulson. There was a direct dispute between the witnesses about what occurred in this meeting. The claimant's allegation was that she was told by Fiona Dixon that she expected her to "*behave professionally or else I would be fired*". The claimant said she was upset by this and spoke immediately afterwards to Prof Dagnan, the Head of Psychology. Mrs Dixon denied that what was said in the meeting was an ultimatum or was the words

alleged. Her evidence was that she: undertook a meeting with the claimant and with the two other team members at approximately the same time; and in each meeting she said the same thing. Mrs Dixon's evidence was that she explained that it was important for everyone to look forward and not back. She did explain that if the working relationships and behaviours didn't improve, even after the various improvements to the management and organisation of the team, disciplinary action could be the next step. Mrs Dixon denied that either Mrs Coulson or herself threatened to sack the claimant.

47. On this dispute of fact, the Tribunal prefers Mrs Dixon's evidence to that of the claimant. The Tribunal finds that Mrs Dixon was focussed on trying to get the claimant back into work in the ABI Team and trying to get the team to work effectively going forward. Her evidence was that she said the same thing to all three people and the Tribunal accepts that evidence. The Tribunal accepts that the claimant may have left the meeting with the perception that she had been told what she alleged, however it finds that what Mrs Dixon actually said was what Mrs Dixon confirmed in her evidence.

Mediation

48. The respondent appointed an independent external mediator to undertake the mediation which had been recommended in the grievance outcome. The mediator met with the claimant. The mediator also met with each of the two individuals about whom the grievance had been raised that remained in employment. The claimant contended that she had been told by the mediator that the other parties had declined mediation.

49. The Tribunal was provided with an exchange of emails between Mrs Dixon and the appointed Independent Mediator (558). The emails recorded the mediator as highlighting that mediation could only be successful if all parties could see some benefit to themselves in doing it. She confirmed that as it was a voluntary process, it meant people had the right to say no if it was not for them. The mediator recorded that she had decided that mediation was not suitable at this time. The emails recorded that the other two individuals had decided against proceeding.

50. As a result, mediation could not and did not proceed beyond the initial meetings with the mediator. The respondent did not make any ultimatum or demand that anyone took part in mediation. The external mediator concluded that mediation could not be successful.

The phased return to the ABI team

51. The claimant commenced a phased return to work to the ABI Team from 25 April 2016. The timetable involved a gradual return to the ABI team under the supervision of Mrs Coulson, the ABI Team Leader. It had been agreed as part of the proposed return that the claimant would only attend IDT meetings when Mrs Coulson was also in attendance. On 21 June 2016 the claimant attended a team meeting at which Mrs Coulson was not present. The claimant was aware she would not be. One of the individuals about whom the claimant had complained in her grievance, left the meeting. He did so without saying anything to the claimant or addressing the claimant directly. He was not disciplined for doing so. The respondent's case was

that (albeit that the Tribunal did not hear from the individual) he felt the need to do so, because the claimant had not complied with what had been agreed about attending the meeting. He had been subject to criticism by the claimant in the past. He felt uncomfortable being in attendance without Mrs Coulson and was concerned about how the claimant might react to him. Save for this occasion/issue, the claimant's evidence was that the phased return to work initially started successfully.

52. The claimant needed to have neuro psychology supervision arranged for her when working for the respondent. Mrs Coulson met with Amy Barnes, a Clinical Neuro Psychologist, to ask her to supervise the claimant. The claimant confirmed in evidence that she had no issue whatsoever with being supervised by Ms Barnes. In her statement, the claimant said that she found out that the meeting had been conducted without her input and the claimant questioned why a supervisee would not be involved in those discussions. She felt that was unfair. There was no record of the claimant having raised the issue at the time.

53. Unfortunately, the claimant's phased return to the ABI Team was not successful. In a report of 27 June 2016 (512) the respondent's Occupational Health Advisor recorded that the claimant's return to the ABI team (and exposure to triggers she associated with the ABI team) *"appear to be exacerbating the symptoms associated with anxiety and resulting in a loss of confidence and trust. In fact [the claimant] describes even working in the same building can result in experiencing the symptoms*". She advised that "*the situation appears to have reached an impasse*". Later in the report, what the Occupational Health Advisor said was "*It is my opinion that [the claimant] is fit for work with the following recommendations until there has been further advice from the Occupational Physician: Avoid working within the ABI Team*". That advice was not subject to any subsequent caveats or statements about circumstances in which the claimant could work in the ABI team (without impacting upon her health).

The Consultant Occupational Physician's report

54. A report from the Occupational Physician was subsequently provided by Mr Milne, a Consultant Occupational Physician, on 25 July 2016. The Tribunal considered this report to be particularly important. The report recorded that the claimant

> "*was unfit for work today*. *The barriers preventing work, were work-related. She felt unable to work in the ABI Team again*" (514).

55. In response to specific questions asked, the report recorded (515):

> *"Question: "Is [the claimant] able to return working within the ABI Team and carry out the duties expected of her.*
>
> *Answer: No"*

56. The report did not provide any caveat to the Consultant's advice that the claimant was not able to return to work in the ABI Team. The Consultant did not state that the claimant would be able to return to work in the ABI team if certain things were done or adjustments were made. His advice was unequivocal.

57. In answer to a question about whether returning to the ABI Team would be likely to have a negative impact on the claimant's health, the answer given was "*Yes*".

58. In answer to a question about whether the Trust should be looking for alternative employment for the claimant, the answer was:

> "*Yes. Suitable alternative, less stressful work may help her return to work*".

September 2016

59. On 14 September 2016 the claimant met with Mrs Dixon and Prof Dagnan, in a meeting that was also attended by the claimant's trade union official and a senior HR Advisor. Notes of this meeting were provided (519). At the meeting there was a discussion about mediation. The claimant expressed the view that she was dissatisfied with how the mediation process had ended, which she said had ended abruptly, without really starting. Later in the meeting, the notes record the claimant as stating that mediation had not been the right solution, as mediation would usually take place before a grievance not after it.

60. With regard to the claimant's position within the ABI Team, the claimant stated in the meeting on 14 September that she did not feel she could go back to the ABI Team due to the exacerbation in her symptoms. Prof Dagnan reported that, as far as he knew, there were no other posts vacant in the Trust commensurate with the claimant's skills and experience. The claimant's trade union official proposed that the other two members (about whom the grievance had been raised) should be moved out of the team. However, the claimant's evidence at the Tribunal hearing was that she did not support this proposal and it was not something which she had sought. In the notes of the meeting, the claimant was recorded as saying it would be "*tragic*" for that to happen. In her evidence to the Tribunal, the claimant was absolutely clear that she did not expect the other individuals to be moved out of the team.

61. At the end of the meeting Mrs Dixon informed the attendees they would be looking to terminate the claimant's employment with the Trust on the grounds of capability. When challenged about what was said, Mrs Dixon was clear that she did not have the authority to dismiss, but she had been proposing that the process would be considered under the relevant procedure. The notes record that the decision was not final, as another meeting would be held to explore options with another senior manager (other than Mrs Dixon). The notes record that the claimant's trade union representative asked what the grounds for termination would be, and the HR Officer present reported that it would be under capability for ill health.

62. In an email of 29 September 2016 (523) the claimant emailed Mrs Dixon complaining about the fact that she had been penalised by the way the situation had been managed. She stated that she had been categorically advised not to go back to the ABI Team to avoid exacerbating her symptoms.

63. The HR Business Partner who had attended the meeting wrote to the claimant on 20 October 2016 confirming the meeting's outcome (525). The letter recorded that Mrs Dixon had informed the claimant that

> *"in light of the medical advice received and as there are currently no funded vacancies which might provide alternative employment for you, it will be necessary for the Trust to discuss with you your employment position".*

The stage four hearing and process

64. The respondent operates a management of sickness absence policy (750). In common with most such policies, it addresses both short term sickness absence and long-term sickness absence. In relation to the procedure for managing long term absence (759) it provides an indicative timescale for formal review meetings, beginning with one review after four weeks of absence and culminating with a stage four hearing after twenty-four weeks of absence.

65. The policy also contains an element to which the Tribunal was referred on a number of occasions during the hearing (760), which provides the following:

> "*Where medical advice is received which deems that an employee is unlikely to be fit to return to their full duties in the foreseeable future and, where all other options for adjustments and redeployment have been considered, it may be deemed appropriate for the long term absence procedure to be fast tracked with the employee being progressed to Stage Four without the requirement to move through all of the other three stages first"*.

66. The procedure then goes on to say:

> "*Where a decision to fast-track is taken, this will be discussed fully with the employee and the reasons for this decision will be provided in writing by the manager before the Stage Four meeting is arranged".*

67. A management case was prepared by Mrs Dixon on 21 November 2016 (532). That document said, on the front page, that it was part of a stage four sickness review. The report appended a number of documents relating to the claimant's health and stated inability to return to the ABI team. The conclusion of the management case was that, given that there were no existing funded posts which would be deemed as suitable alternatives and given the length of time that the ABI Team had been without regular clinical psychology and the inability of the claimant to fill the post, it was financially and clinically unsustainable to carry on the existing arrangements. The management case document recommended the termination of the claimant's employment.

68. On 25 November 2016 the claimant was sent an email inviting her to a sickness review meeting. The invite confirmed the details. It *stated, "I must advise you that a possible outcome of the meeting may be the termination of your employment on the grounds of capability due to health" (601).*

69. The claimant prepared a lengthy response to the management statement of case. The document addressed the points which had been made and the claimant's responses to them (603).

70. Mr Yannick Raimbault was appointed to undertake the stage four process. He was a manager who had only very recently joined the respondent Trust and who had no knowledge (at that time) of the claimant or of the department in which she

worked. He asked that an up to date occupational health report was obtained before the meeting took place.

71. An occupational health report dated 10 January 2017 was obtained (664). The occupational health advisor's report recorded that the claimant had informed the advisor "*of her possible termination of employment on the grounds of medical incapacity".*

72. The claimant was sent a further invite to the meeting which also made it clear that a potential outcome was the termination of employment on 1 February 2017 (666). Prior to the hearing Mrs Dixon also prepared a management response to the issues raised by the claimant in response to the management statement of case (673).

73. The first of the stage four sickness review hearings took place on 15 March 2017. It was attended and conducted by Mr Raimbault who was accompanied by an HR Business Partner. Mrs Dixon and a different HR Business Partner presented the management case. The claimant was accompanied by her trade union representative (who was a different representative to the one who had been involved earlier in the process). A minute-taker also attended and notes were provided (684). They record the meeting as lasting from 11 am until 2.30 pm. Mr Raimbault's evidence was that this meeting lasted for 3½ hours and therefore the notes did not provide a complete account of what had occurred in the meeting.

74. At the start of the meeting the claimant's trade union representative challenged why it was a stage four hearing and why it was being fast tracked. He stated that the policy was being breached. A break was taken and Mr Raimbault and the HR Business Partner supporting him spoke and subsequently sought advice from a more senior HR advisor within the Trust. Mr Raimbault's evidence was that he concluded that stage four was the correct approach. He was also satisfied that the claimant knew what the meeting was going to discuss, based on the letters which had highlighted that it would be to discuss the potential termination of her employment and from the occupational health report on 10 January 2017 which recorded the claimant as informing the Occupational Health Advisor of that fact.

75. Following the break, Mr Raimbault confirmed that the hearing would be conducted under stage four. There was a lengthy discussion. Amongst other things:

a. the claimant stated that she did not wish to go back to her substantive role (685);

b. Mr Raimbault stated that he was looking at the claimant's employment position, in the light of the medical advice that she couldn't go back to her substantive role and the organisation's standpoint that there was no alternative employment in her specialised area;

c. the claimant said that decisions needed to be made now, referring to matters being very stressful;

d. the claimant said she was relieved she didn't have to go back into the ABI team (686);

e. Mrs Dixon stated that the psychologist's role needed to be embedded in the IDT service;

f. the claimant stated that mediation had not been the right option at the stage it was introduced;

g. the claimant stated that the option for her to work remotely had never been explored;

h. Mrs Dixon stated it wasn't possible for her to work remotely because it was a non-reasonable adjustment that would not benefit the service; and

i. the claimant stated that remote working wouldn't be a long term solution.

76. At around this time the claimant was absent from work on ill health grounds, albeit the Tribunal heard little evidence about the claimant's absence. The chronology recorded that the claimant had 62 days absence from 1 December 2016 and 147 days from 21 March 2017.

77. At the first stage four meeting the claimant was invited to put forward a written proposal about what she believed would be required for her to be able to return to work in her substantive role. The claimant prepared such a proposal on 2 May 2017 (691). The proposal put forward six points that the claimant said she required. The respondent's evidence was that the first five of these were agreed. These included that the claimant's supervision hours be increased to 1½ hours every two weeks, for which the respondent's evidence was that this was outside the norm but was something they were able to agree to. The sixth issue was the sticking point.

78. The sixth issue included (693)

> "*The accommodation is another outstanding issue. For my own sanity, I feel that the less dealings I have with the previous members of staff the better. I do not feel that my being physically removed from the CCABIRT office base will make any difference to patient care. After all, I do not depend on other professionals to do my work, in terms of conducting psychological assessments and interventions however I do recognise that liaison will be important, and this could be done through the team leader. I will also be happy to attend team meetings…the conditions are still not right in the CCABIRT team for me to come back to it".*

79. Following receipt of the written proposal document, Mr Raimbault spoke to Mr Evans, Mrs Dixon, Ms Coulson, Prof Dagnan and Elspeth Desert (a Consultant Clinical Psychologist specialising in Neuro Psychology and the Clinical Lead for all the psychologists in the network). In that conversation he explained what the claimant was proposing and asked the other individuals to discuss and report back on the proposal. During the course of the cross examination of Mr Raimbault, he was questioned about whether he had also met with the other individuals to discuss the feedback. In the light of his answers, the Tribunal finds that he tasked that group with looking into the issues, but he did not receive or discuss their feedback prior to the

next meeting attended by the claimant. The feedback to that meeting was provided by Mrs Dixon.

80. Mrs Dixon provided lengthy evidence about the sixth proposal and about the discussions that were undertaken. Her evidence was that IDT working was the most optimal approach within neuro rehabilitation and that was why the ABI specification provided for IDT as the way of delivering rehabilitation services. The proposal that the claimant would only liaise through the team lead was, in her view, indicative of uni-disciplinary working with a static perspective rather than the dynamic perspective provided through IDT working. It was felt that the claimant working remotely from the rest of her team and liaising with them only through a team leader would ultimately result in her working in isolation from the rest of the ABI service and that would severely impede the service provided. It would impact on delivery of the patient pathway and would cause delays. Mrs Dixon's evidence was that the claimant's proposal would remove the collaborative working aspect which was crucial to treatment plans in this field and would result in patients only being seen in isolation, fundamentally not inter-disciplinary working.

81. Throughout the hearing questions were asked about the difference between the claimant's proposal under step six and remote working. Mrs Dixon's evidence was that there was no issue with the claimant working in her own office, she was not being required to be in exactly the same open plan office as the remainder of the team. Mrs Dixon's view was that the claimant needed to be located in the same building. However her evidence was that the crucial issue in relation to proposal six, which led to the conclusion that it was unworkable, arose from the claimant's references to having the least dealings possible with the members of staff and, in particular, her proposing that she needed to work with the team through a team leader.

82. The stage four hearing reconvened on 4 May 2017 with the same attendees. Notes were provided (695). Mr Raimbault's evidence was that the meeting lasted three hours. The notes record the meeting lasting from 11 am to 2 pm. In the meeting notes, the claimant is recorded as stating that she would be unable to go back to the same working environment as it would affect her mental health, because of the issues she had raised. Mrs Dixon described the claimant's proposal at point 6 as not being possible to facilitate as it was not practical or safe for the service. The notes record Mrs Dixon as saying that the Trust was unable to redesign services due to situations such as this one and that for the Trust it was the safety of the patients and the quality of service which was of paramount importance.

83. There was one element of the notes which led to some disagreement during the hearing. The notes record the claimant's trade union representative as asking Mrs Dixon what would have been acceptable for the claimant to write as point six. The notes record there being a break. Thereafter Mrs Dixon is recorded as saying that the only option for the service would be for the claimant to return and be fully integrated into the team, which Mrs Dixon acknowledged went against what the occupational health advisor had advised. Mr Raimbault's evidence was that the notes were only a summary of what was discussed (being self-evident from the fact that they are two and a half pages long, but the meeting lasted for three hours). The Tribunal accepts that the notes are not a verbatim record. They do appear to reflect Mrs Dixon not responding to the trade union representative's question specifically.

84. In his evidence to the Tribunal, Mr Raimbault explained that Mrs Dixon was quite insistent that implementing an independent working model like that proposed by the claimant, would have a detrimental impact on the care received by the team's patients. He also recorded that the claimant agreed that she had tried to go back into the ABI Team but every time she had tried, she had become ill.

85. The claimant's trade union representative asked for the hearing to be adjourned so the claimant could consider her options and take legal advice. Mr Raimbault agreed to do so and said that, in the meantime, he would obtain an occupational health referral.

86. On 8 May 2017 the respondent's occupational health advisor provided a further report, following an assessment of the claimant on the same day. Under the heading capability for work, the report stated that the claimant "*is medically fit for work, she tells me is she is unable to work in the previous team, this needs to be resolved through management means*". In response to a specific question the report records:

> *"Question: "Could [the claimant] with a robust plan and support be able to integrate back into the ABI Team"*
>
> *Answer: [the claimant] tells me this is not possible as it would make her ill since the issues remain".*

87. Prior to the final meeting the claimant prepared a personal statement (700). The meeting reconvened on the 22 May 2017 with the same attendees. Notes were provided (704) which record that it lasted for one and a half hours between 11 am and 12.30 pm. A break was taken in the middle of the meeting. At the start of the meeting the personal statement and another document prepared by the claimant were read out and the occupational health report was also referred to. The decision was made that the claimant was to be dismissed.

88. Mr Raimbault's evidence in his statement was that:

> "*I believe that dismissal was the only suitable option. The view of occupational health was clear that [the claimant] should not return to work alongside the ABI Team and that doing so would have a detrimental impact on her health. She confirmed this herself on numerous occasions throughout the various hearings. I also believed that having a clinical psychologist working entirely separately from the rest of the ABI Team, only liaising with them via line management would not be a suitable and safe method of delivering that crucial service to the Trust's patients.*"

89. With regard to the learning disability team, Mr Raimbault concluded that wasn't her substantive post and wasn't long term. He said "*Essentially, she wasn't well enough to work in the ABI Team and there was no indication of when that might change*". He described that the claimant was adamant that she could not go back to work in the team and the medical advice explained that it would be detrimental to her health to do so. He said, "*It came down to a horrible choice between what was right for [the claimant] and what was right for the service and its patients"*.

90. What Mr Raimbault concluded was the claimant's proposal would see her working for the ABI Team but not as part of it. Given the need for really well co-ordinated care, his view was that her proposal could not be accepted without a risk to the care of patients. In verbal evidence to the Tribunal, Mr Raimbault also emphasised that the service was provided in accordance with what was agreed with (and required by) the commissioners, which in these circumstances involved inter-disciplinary team working.

91. Dismissal was confirmed in writing (706). The letter of 23 May 2017 highlighted that it had been agreed that five of the six specific points proposed by the claimant could be accommodated, but Mr Raimbault stated that the sixth could not be accommodated due to the potential risks it posed for patients, the Trust, and the team. The claimant was also advised of her right to appeal. The termination date for the claimant's employment (following notice) was 14 August 2017.

92. The Tribunal found Mr Raimbault to be an impressive and credible witness, who reached the decision with care and after much consideration. It accepted his evidence about the reasons why he reached the decision to dismiss.

Appeal

93. The claimant appealed against her dismissal on 4 June 2017 (708). The grounds of her appeal were that: there had been insufficient consideration of her explanation of the circumstances leading up to the dismissal; the dismissal was inappropriate and too harsh a penalty given the circumstances; and there had been a failure to follow procedure.

94. At a meeting of 7 June 2017 minutes recorded: the team being told that the claimant was not returning; and that Mrs Dixon had spoken to someone who was interested in the vacant role which was to be advertised.

95. The appeal hearing was on 19 July 2017. It was conducted by Ms P Travers and was also attended by an HR Business Partner, the claimant, and her trade representative, as well as a minute taker. Mr Raimbault attended and presented the reasons for his decision. The Tribunal were provided with minutes of the appeal hearing (721) which record that it lasted from 10.30 am until 1 pm. The notes record that the claimant pointed out that in four years of employment with the respondent she had only been in her substantive post for, what she described as, the duration of nineteen weeks in total. She felt that everything had been fast-tracked unnecessarily with a view to pushing her out of her post. Mrs Travers' evidence was that it became difficult to keep the claimant focussed on her grounds of appeal as she talked about the grievance, mediation, and the fact that she thought the whole thing had been pre-judged.

96. The appeal outcome was provided in writing on 25 July 2017 (730). The appeal was not upheld. The decision addressed each of the points raised in the appeal. Mrs Travers said that she regretted to confirm that the claimant continuing to work in a non-funded role was an untenable position for the Trust. The letter confirmed that the claimant's details had been added to the respondent's redeployment register and that she would be contacted if any suitable positions at her grade became available during her notice period. It was also stated that if the

claimant became aware of any other vacancies which she believed were suitable, then she could contact the named HR Business Partner.

97. In her evidence to the Tribunal Mrs Travers explained the decision that she reached. The Tribunal found Mrs Travers to be a credible and genuine witness who had carefully considered the issues. In relation to the penalty, she highlighted that it wasn't a question of imposing a sanction or penalty on the claimant (as the claimant asserted), but it was about her continuing employment in circumstances where she had been unable to fulfil her substantive post for a long period of time. In her evidence, Mrs Travers explained that her clinical background was as a Psychiatric Nurse and she had a good understanding of working in ABI services. In her statement she emphasised that ABI patients need significant and wide-ranging support, which was why a wide spread of clinical expertise is required in their care. She explained that staff working in ABI Teams generally all worked for the same patients and that was why members of the ABI Teams needed to work closely and collaboratively. Her conclusion was that she could understand why the claimant's request to work remotely wasn't sustainable, as with ABI patients there was a need for a comprehensive and holistic approach to their care and treatment.

Other roles

98. In the course of the hearing the Tribunal was provided with emails from the claimant, that she said demonstrated that she had applied for two roles, or at least started to do so (1143 and 1146). The Tribunal was also provided with a list of vacancies in the Trust during the relevant period (1147).

99. The claimant applied for the role of Older Adult Psychologist in Carlisle on 15 March 2016. She had identified the role herself. That was a role which was advertised some time before Mr Raimbault's decision on 22 May 2017. It was before the stage 4 process commenced. The claimant's evidence was that she applied for the role, although no application itself was provided. The respondent did not know what had happened to the claimant's application.

100. The list of vacancies included the role of Principal Psychologist at 8B, which was recorded as being available. A job description for that role was provided (1152). The claimant's evidence was that by that time in her career she could have stepped up and fulfilled the 8B role. The respondent's position was that it only informed the claimant about and considered as equivalent roles at her grade. This was a role for which the claimant could have applied. It was a vacancy to replace someone who had previously supervised the claimant.

101. The Tribunal also heard evidence about the role of Neuropsychologist in the ABI Team in the south area. That was a comparable role to that filled by the claimant, but in a different geographic area. The claimant printed off the information about the role which showed she had started to apply (on 29 September 2017), as she had identified it at the time, but her evidence was that she did not actually apply for the role. The respondent's evidence was that this was a maternity cover role, as the role holder was absent on maternity leave.

102. The Tribunal was provided with the MAT B1 form for the substantive role-holder which was stamped as being received by human resources on 24 August

2017 (1166). Mrs Dixon's evidence was that she only became aware of the need to fill the role (as maternity cover) when she was provided with a copy of the MAT B1 form and, shortly thereafter, it was advertised. That is, she only became aware of the need to cover the role during maternity leave after the claimant's employment had terminated.

103. The claimant's representative contended that the respondent must have been aware that this role would be available. However, there was no evidence before the Tribunal that any of the key decision-makers (including Mrs Dixon) knew about the pregnancy of the substantive role holder prior to the MAT B1 form being submitted. Accordingly the Tribunal finds, based upon the evidence presented to it, that the respondent only knew about the need to fill the role on a maternity cover basis after the claimant's employment had terminated (at least in terms of the decision-makers for the claimant being aware, being those who could have considered the maternity cover role as an alternative to dismissal).

104. The evidence before the Tribunal was that all of the respondent's roles were advertised on NHS Jobs, a site which was accessible to anyone. The claimant therefore could have applied for any of these roles had she wished to do so. Her evidence was that she returned to Malta almost immediately after the termination of her employment with the respondent, partly due to accommodation issues. She did however give evidence that she had applied for roles with other NHS Trusts in the UK from Malta. The Tribunal accepts that, as the roles were advertised externally, the fact that the claimant was not able to access the Trust intranet during her notice period (or for some of it), did not stop the claimant from being able to apply for any vacant roles had she wished to.

The Law

Unfair dismissal

105. The unfair dismissal claim was brought under Part X of the Employment Rights Act 1996.

106. The respondent bears the burden of proving, on the balance of probabilities, that the dismissal was for capability or some other substantial reason, being the two fair reasons relied upon (in the alternative). If the respondent fails to persuade the tribunal that it dismissed the claimant for one or other of those reasons, the dismissal will be unfair.

107. If the respondent does persuade the tribunal that it did dismiss the claimant for one of those reasons, the dismissal is only potentially fair. The tribunal must then go on and consider the general reasonableness of the dismissal under section 98(4) Employment Rights Act 1996. That section provides that the determination of the question of whether a dismissal is fair or unfair depends upon whether in the circumstances (including the respondent's size and administrative resources) the respondent acted reasonably or unreasonably in treating the misconduct as a sufficient reason for dismissing the claimant. This is to be determined in accordance with equity and the substantial merits of the case. The burden of proof in this regard is neutral.

108. Section 98 of the Employment Rights Act 1996 provides:

> *(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show —*
>
> *(a) the reason (or, if more than one, the principal reason) for the dismissal, and*
>
> *(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.*
>
> *(2) A reason falls within this subsection if it—*
>
> *(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,*
>
> *(3) In subsection (2)(a) —*
>
> *(a) "capability", in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, …*
>
> *(4) [Where] the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—*
>
> *(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and*
>
> *(b) shall be determined in accordance with equity and the substantial merits of the case.*

109. The proper application of the general test of fairness in section 98(4) is well documented and addressed in a number of cases. The Employment Tribunal must not substitute its own decision for that of the employer. The question is rather whether the employer's conduct fell within the "band of reasonable responses": **Iceland Frozen Foods Limited v Jones [1982] IRLR 439 (EAT)** as approved by the Court of Appeal in **Post Office v Foley**; **HSBC Bank PLC v Madden [2000] IRLR 827**.

110. **BS v Dundee City Council [2014] IRLR 131** identifies three important themes from the authorities: whether or not, in the circumstances of the case, a reasonable employer would have waited longer before dismissing the employee; there is a need for the employer to consult the employee and take her views into

account; and there is a need for the employer to take steps to discover the employee's medical condition and her likely prognosis. A fair procedure is essential.

111. The claimant's representative in his submissions did not refer to or rely upon any specific law or authority in respect of unfair dismissal. The respondent's representative relied upon **Lynock v Cereal Packaging Ltd [1988] IRLR 510** re capability and **Harper v National Coal Board [1980] WL 149224** re some other substantial reason. Mr Justice Wood in the former of those authorities said:

> "*The approach of an employer in this situation is, in our view, one to be based on those three words which we used earlier in our judgment – sympathy, understanding and compassion. There is no principle that the mere fact that an employee is fit at the time of dismissal makes his dismissal unfair; one has to look at the whole history and the whole picture. Secondly, every case must depend upon its own fact, and provided that the approach is right, the factors which may prove important to an employer in reaching what must inevitably have been a difficult decision, include perhaps some of the following – the nature of the illness; the likelihood of recurring or some other illness arising; the length of the various absences and the spaces of good health between them; the need of the employer for the work done by the particular employee; the impact of the absences on others who work with the employee; the adoption and the exercise carrying out of the policy; the important emphasis on a personal assessment in the ultimate decision and of course, the extent to which the difficulty of the situation and the position of the employer has been made clear to the employee so that the employee realises that the point of no return, the moment when the decision was ultimately being made may be approaching."*

Discrimination arising from disability

112. Section 15 of the Equality Act 2010 provides:

> *(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.*

113. For unfavourable treatment there is no need for a comparison, as there would be for direct discrimination. However, the treatment must be unfavourable, that is there must be something intrinsically disadvantageous to it. In **Williams v Trustees of Swansea University Pension and Assurance Scheme [2018] IRLR 306** Bean LJ said of another Judgment that it was:

"not authority for saying that a disabled person has been subjected to unfavourable treatment within the meaning of s 15 simply because he thinks he should have been treated better"

114. In **Sheikholeslami v University of Edinburgh [2018] IRLR 1090** the Employment Appeal Tribunal held that:

"the approach to s 15 Equality Act 2010 is now well established and not in dispute on this appeal. In short, this provision requires an investigation of two distinct causative issues: (i) did A treat B unfavourably because of an (identified) something? and (ii) did that something arise in consequence of B's disability? The first issue involves an examination of the putative discriminator's state of mind to determine what consciously or unconsciously was the reason for any unfavourable treatment found. If the "something" was a more than trivial part of the reason for unfavourable treatment, then stage (i) is satisfied. The second issue is a question of objective fact for an employment tribunal to decide in light of the evidence."

115. **Pnaiser v NHS England [2016] IRLR 170** outlines the correct approach to be taken:

"From these authorities, the proper approach can be summarised as follows:

(a) A tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises.

(b) The tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a s.15 case. The 'something' that causes the unfavourable treatment need not be the main or sole reason but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.

(c) Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A's motive in acting as he or she did is simply irrelevant: see Nagarajan v London Regional Transport. A discriminatory motive is emphatically not (and never has been) a core consideration before any prima facie case of discrimination arises….

(d) The tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is 'something arising in consequence of B's disability'. That expression 'arising in consequence of' could describe a range of causal links. Having regard to the legislative history of s.15 of the Act (described comprehensively by Elisabeth Laing J in Hall), the statutory purpose which appears from the wording of s.15, namely to provide protection

in cases where the consequence or effects of a disability lead to unfavourable treatment, and the availability of a justification defence, the causal link between the something that causes unfavourable treatment and the disability may include more than one link. In other words, more than one relevant consequence of the disability may require consideration, and it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability.

(e) For example, in Land Registry v Houghton a bonus payment was refused by A because B had a warning. The warning was given for absence by a different manager. The absence arose from disability. The tribunal and HHJ Clark in the EAT had no difficulty in concluding that the statutory test was met. However, the more links in the chain there are between the disability and the reason for the impugned treatment, the harder it is likely to be to establish the requisite connection as a matter of fact.

(f) This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.

(h) Moreover, the statutory language of s.15(2) makes clear … that the knowledge required is of the disability only and does not extend to a requirement of knowledge that the 'something' leading to the unfavourable treatment is a consequence of the disability. Had this been required the statute would have said so. Moreover, the effect of s.15 would be substantially restricted on Miss Jeram's construction, and there would be little or no difference between a direct disability discrimination claim under s.13 and a discrimination arising from disability claim under s.15.

(i) As Langstaff P held in Weerasinghe, it does not matter precisely in which order these questions are addressed."

116. Section 15(1)(b) provides that unfavourable treatment can be justified where it is a proportionate means of achieving a legitimate aim. That requires: identification of the aim; determination of whether it is a legitimate aim; and a decision about whether the treatment was a proportionate means of achieving that aim. The Court of Appeal in **City of York Council v Grosset [2018] IRLR 746** said that

"the test under s 15(1)(b) EqA is an objective one according to which the ET must make its own assessment"

117. The claimant's representative relied upon a number of authorities with regard to justification (but did not rely upon any authorities on any other element of discrimination arising from disability). His skeleton argument made the following contentions:

a. To be proportionate, the unfavourable treatment has to be both an appropriate means of achieving a legitimate aim and a reasonably necessary means of doing so (**Homer v Chief Constable of West Yorkshire [2012] UKSC 15)**;

b. It is for the Tribunal to balance the reasonable needs of the respondent against the discriminatory effect of the employer's actions on the employee (**Land Registry v Houghton and others UKEAT/0149/14**);

c. Tthe Tribunal is required to undertake a fair and detailed assessment of the employer's business needs and working practices as per **Hensman v Ministry of Defence UKEAT/0067/14** and **Department of Work and Pensions v Boyers UKEAT/0282/19**;

d. When determining whether or not a measure is "proportionate" it is relevant to consider whether or not a lesser measure could have achieved the employer's legitimate aim as per **Naeem v Secretary of State for Justice [2017] UKSC 27**; and

e. Reliance was placed upon **Ali v Torrosian and others (t/a Bedford Hill Family Practice) UKEAT/0029/18** and **O'Brien v Bolton St Catherine's Academy [2017] IRLR 547** (see below) including in relation to the need for an employer to consider alternatives.

118. For cases arising from a dismissal following absence where there is both a discrimination arising from disability claim and an unfair dismissal claim, previous case law has indicated that the outcome is often the same, but It is also clear following **Grossett** and **O'Brien v Bolton St Catherine's Academy [2017] IRLR 547**, that there is not a necessary inconsistency between the Tribunal, on the one hand, rejecting the claim of unfair dismissal and, on the other, upholding a claim under Section 15 of the Equality Act 2010 in respect of that same dismissal. That is because the issue of whether a dismissal is unfair or not is determined by reference to the question of whether that dismissal was within the range of reasonable responses open to a reasonable employer (see **The Secretary of State for Justice v Edwards UKEAT/0049/20** at paragraph 21). The claimant's representative relied upon the following passage from **O'Brien** in support of his submission that the considerations are likely to be similar:

> *"it would be a pity if there were any real distinction in the context of dismissal for long-term sickness where the employee is disabled within the meaning of the 2010 Act. The law is complicated enough without parties and tribunals having routinely to judge the dismissal of such an employee by one standard for the purpose of an unfair dismissal claim and by a different standard for the purpose of discrimination law. Fortunately, I see no reason why that should be so."*

119. The respondent's representative relied upon the following in her submission document with regard to discrimination arising from disability and justification:

a. The causal test set out in **Basildon and Thurrock NHS Foundation Trust v Weerasinghe [2016] ICR 305** "*There are two links in the chain, both of which are causal, though the causative relationship is differently expressed in respect of each of them. The tribunal has first to focus on the words "because of something", and therefore has to identify "something" – and second on the fact that the "something" must*

be "something arising in consequence of B's disability", which constitutes a second causative (consequential) link. These are two separate stages. In addition, the statute requires the tribunal to conclude that it is A's treatment of B that is something arising, and that it is unfavourable to B";

b. The guidance on the assessment of proportionality in **Hensman v Ministry of Defence [2015] UKEAT/0299/14/BA**;

c. The summary of the application of the proportionality test in **Department of Work and Pensions v Boyers [2020] UKEAT/0282/19/AT** "*the ET must balance the needs of the employer, as represented by the legitimate aims being pursued, against the discriminatory effect of the measure on the individual concerned. This involves consideration of the way in which the legitimate aims being pursued represent the needs of the business, and a balancing of those needs against the discriminatory effect of the measure concerned"; and*

d. The EAT Judgment in **General Dynamics Information Technology Ltd v Carranza [2015] IRLR 43** on justification.

120. The Tribunal has taken into account the Guidance in relation to objective justification contained in paras 5.11, 5.12 and 4.25-4.32 of the EHRC Code of Practice on Employment. That says that it is for the respondent to justify the practice and it is up to the respondent to produce evidence to support its assertion that it is justified. The Tribunal must ask itself whether the aim is legal, non-discriminatory, and one that represents a real, objective consideration? The Tribunal must then ask itself whether the means of achieving the aim are proportionate? Treatment will be proportionate if it is 'an appropriate and necessary' means of achieving a legitimate aim. Necessary does not mean that it is the only possible way of achieving the legitimate aim, it will be sufficient that the same aim could not be achieved by less discriminatory means.

121. The Guidance also says (in paras 5.8 and 5.9) that something that arises in consequence of the disability means that there must be a connection between whatever led to the unfavourable treatment and the disability. The consequences of a disability include anything which is the result, effect or outcome of a disability. Some consequences may not be obvious.

The duty to make reasonable adjustments

122. Section 20 of the Equality Act 2010 provides:

(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.*

123. Section 21 of the Equality Act 2010 provides that a failure to comply with the first requirement is a failure to comply with a duty to make reasonable adjustments. Schedule 8 of the same Act also contains provisions regarding reasonable adjustments at work.

124. **Environment Agency v Rowan [2008] IRLR 20** is authority that the matters a Tribunal must identify in relation to a claim of discrimination on the grounds of failure to make reasonable adjustments are:

a. the provision, criterion or practice applied by or on behalf of an employer;

b. the identity of non-disabled comparators (where appropriate); and

c. the nature and extent of the substantial disadvantage suffered by the claimant.

125. The requirement can involve treating disabled people more favourably than those who are not disabled (**Redcar and Cleveland Primary Care Trust v Lonsdale UKEAT/0090/12**).

126. **Tarbuck v Sainsbury Supermarkets Ltd [2006] IRLR 664** is authority for the fact that a duty to consult is not of itself imposed by the duty to make reasonable adjustments, the only question is, objectively, whether the respondent has complied with its obligations to make reasonable adjustments or not. The duty involves the taking of substantive steps, rather than consulting about what steps might be taken. The respondent's representative relied upon **Salford NHS Primary Care Trust v Smith [2010] EAT 0507/10** with regard to a similar point, in which it is said:

> "*Adjustments that do not have the effect of alleviating the disabled person's substantial disadvantage ..are not reasonable adjustments within the meaning of the Act. Matters such as consultations and trials, exploratory investigations and the like do not qualify"*

127. In terms of knowledge of disability and reasonable adjustments, the duty only applies if the respondent: knew or could reasonably be expected to know that the claimant had the disability; and knew or could reasonably be expected to know that the claimant was likely to be placed at a substantial disadvantage compared with persons who are not disabled (that is aware of the disadvantage caused by the application of the PCP). The question of whether the respondent could reasonably be expected to know of the disability and/or the substantial disadvantage is a question of fact for the Tribunal. The focus is on the impact of the impairment and whether it satisfies the statutory test and not the label given to any impairment (**Jennings v Barts and The London NHS Trust UKEAT/0056/12**).

128. With regard to reasonable adjustments, the claimant's representative placed reliance upon **Smith v Churchill's Stairlifts plc [2006] IRLR 41** as authority for the proposition that the Tribunal is required to substitute its own opinion for that of the respondent. No other case law was cited or relied upon.

129. The respondent's representative relied upon four authorities from which she cited at some length in her submissions (and those citations will not be reproduced in full in this Judgment) including the **Salford PCT** and **Carranza** cases already referred to. Particular emphasis was placed upon **Griffiths v Secretary for Work and Pensions [2015] EWCA Civ 1265** in relation to disability-related absence and the imposition of a sanction, in which the Court of Appeal held that in that case the Tribunal was entitled to consider that it was not reasonable to expect an employer to write off an extended period of disability-related absence when applying the relevant procedure, saying

> "*There is nothing unreasonable, it seems to me, in the employer being entitled to have regard to the whole of the employee's absence record when making that decision"*.

130. **Royal Bank of Scotland v Ashton [2010] UKEAT/0542/09/LA** was relied upon for guidance on the parameters of reasonable adjustments:

> *"The duty, given that disadvantage and the fact that it is substantial are both identified, is to take such steps as are reasonable to prevent the provision, criterion or practice…having the prescribed effect – that is the effect of creating that disadvantage when compared to those who are not disabled. It is not, therefore, a section which obliges an employer to take reasonable steps to assist a disabled person or to help the disabled person to overcome the effects of the disability, except insofar as the terms to which we have referred permit it"*

131. When considering reasonable adjustments, the Tribunal also took into account the EHRC Code of Practice on Employment. This included: paragraphs 4.5 and 6.10 on provision criterion or practice; the section on what is meant by reasonable steps at 6.23 to 6.29 and, in particular, the list of some of the factors which can be taken into account at 6.28; and the section on reasonable adjustments in practice at 6.33-6.34.

Time limits/jurisdiction (discrimination)

132. Section 123 of the Equality Act 2010 provides that proceedings must be brought within the period of three months starting with the date of the act to which the complaint relates (and subject to the extension for ACAS Early Conciliation), or such other period as the Tribunal thinks just and equitable. Conduct extending over a period is to be treated as done at the end of the period. A failure to do something is to be treated as occurring when the person in question decided on it.

133. The key date is when the act of discrimination occurred. The Tribunal also needs to determine whether the discrimination alleged is a continuing act, and, if so, when the continuing act ceased. The question is whether a respondent's decision can be categorised as a one-off act of discrimination or a continuing scheme. The Court of Appeal in ***Hendricks v Commissioner of Police for the Metropolis [2003] IRLR 96*** makes it clear that the focus of inquiry must be not on whether there is something which can be characterised as a policy, rule, scheme, regime or practice, but rather on whether there was an ongoing situation or continuing state of affairs for which the respondent was responsible in which the claimant was treated less favourably. **Lyfar v Brighton & Sussex University Hospitals Trust [2006] EWCA Civ 1548** highlights that Tribunals should look at the substance of the complaints in question as opposed to the existence of a policy or regime and determine whether they can be said to be part of one continuing act by the employer. **Aziz v FDA [2010] EWCA Civ 304** shows that one relevant factor is whether the same or different individuals were involved in the incidents, however this is not a conclusive factor.

134. If out of time, the Tribunal needs to decide whether it is just and equitable to extend time. Section 123(1)(b) of the Equality Act 2010 states that proceedings may be brought in, *"such other period as the Employment Tribunal thinks just and equitable"*. The most important part of the exercise of the just and equitable discretion is to balance the respective prejudice to the parties. Factors which are usually considered are contained in section 33 of the Limitation Act 1980 as explained in the case of **British Coal Corporation v Keeble [1997] IRLR 336**. The respondent's representative submitted that those factors remained the ones to be considered and she emphasised the first factor: the length of, and reasons for the delay

135. Subsequent case law has said that those are factors which illuminate the task of reaching a decision but their relevance depends upon the facts of the particular case, and it is wrong to put a gloss on the words of the Equality Act to interpret it as containing such a list or to rigidly adhere to it as a checklist. This has recently been reinforced by the Court of Appeal in **Adedeji v University Hospitals Birmingham NHS Foundation Trust [2021] EWCA Civ 23** where it was emphasised that the best approach for a Tribunal in considering the exercise of the discretion under section 123(1)(b) is to assess all the factors in the particular case which it considers relevant to whether it is just and equitable to extend time and that factors which are almost always relevant to consider when exercising any discretion whether to extend time are: the length of, and reasons for, the delay; and whether the delay has prejudiced the respondent (for example, by preventing or inhibiting it from investigating the claim while matters were fresh).

136. **Robertson v Bexley Community Centre t/a Leisure Link [2003] IRLR 434** confirms that the exercise of a discretion should be the exception rather than the rule and that time limits should be exercised strictly in employment cases.

137. The respondent's representative also relied upon **Abertawe Bro Morgannwg University v Local Health Board UKEAT/0305/13/LA.** Both parties relied upon **Rathakrishnan v Pizza Express (Restaurants) Ltd** UKEAT/0073/15/DA, but contended that it was authority for different things. For the reasons explained below, it is not necessary for the Tribunal to address this authority or to determine what it provides when no explanation is given for a failure to enter a claim in time. The

claimant's representative also relied upon **Bahous v Pizza Express Restaurant Limited UKEAT/0029/11**

Conclusions – applying the Law to the Facts

138. In reaching its decision the Tribunal followed the issues outlined in the agreed list of issues provided at the start of the case (see paragraph 6). It was notable that the Tribunal heard a considerable amount of evidence and some argument, which addressed matters which did not fall within the issues which the Tribunal ultimately needed to determine.

The principal reason for dismissal

139. The first issue was whether the claimant was dismissed due to capability. The Tribunal would emphasise that capability in this context relates to the claimant's ability to undertake the duties of her substantive role from a health perspective. There was no question at all during the hearing about the claimant's capability to undertake the role of clinical psychologist in terms of ability and skills. That is, there was no question whatsoever raised about the claimant's performance in her role.

140. The evidence heard by the Tribunal was that Mr Raimbault made the decision to dismiss the claimant. His evidence was that, after obtaining occupational health advice and meeting with the claimant, his decision was that the claimant was not able to return to undertaking her substantive role without it being detrimental to her health. His decision was that this, in the absence of any available alternative funded roles, meant that she should be dismissed. He undertook meetings with her on the 15 March 2017 (which lasted for three and a half hours) and 4 May 2017 (which lasted for three hours), prior to a decision meeting on 22 May 2017 (which lasted for one and a half hours).

141. The Tribunal finds that the reason why Mr Raimbault reached his decision was because of his conclusion about the capability of the claimant to fulfil the role for which she was employed, that is capability assessed by reference to her health. The claimant was dismissed by reason of capability, applying the definition of capability from section 98(2)(a) of the Employment Rights Act 1996.

142. The claimant's representative in his submissions invited the Tribunal to examine carefully the respondent's use of the management of sickness absence policy. The Tribunal has done so and has addressed the use of the so-called fast track procedure in considering reasonableness below. It is correct that, at the time the claimant was dismissed (or at least at the start of the stage four sickness review hearings), the claimant was not absent from the workplace. However, as at the date upon which the decision to dismiss was made (23 May 2017) she had not undertaken the full duties of her substantive role at any time since 28 April 2014, having undertaken only some limited duties of the role during an unsuccessful phased return during mid-2016.

143. The Tribunal finds that the reason why Mr Raimbault made the decision to dismiss was made because the claimant was not capable of fulfilling the substantive role for which she was employed (due to her health).

Did the respondent act reasonably

144. As a starting point in considering this issue, the Tribunal considered the respondent's policy and, in particular, what was described as the fast track procedure (760).

145. In terms of the procedure generally, the respondent was able to rely upon the so-called fast track procedure. Medical advice had been received which deemed that the employee was unlikely to be fit to return to her full substantive duties in the foreseeable future. All other options for adjustments and redeployments had been considered (or at least were being considered). The wording used in the procedure focuses on the fact that the claimant was unlikely to be fit to return to her full duties which made clear that this part of the procedure was not only about someone who was incapable of returning to the workplace at all (as was submitted by the claimant's representative). The circumstances in which the claimant's dismissal was being considered in 2017 fitted within exactly what that policy said for this so-called fast-track procedure.

146. As at the date of the stage four hearings, the claimant was fully aware that the respondent was considering terminating her employment on ill-health grounds and the basis for that decision. That was recorded in the occupational health notes of December and January 2017 and it was clear from the various letters sent to the claimant. Whilst, save for the management statement of case, the terminology of a stage four procedure was not used, the Tribunal finds that it was clear to the claimant and her representative what would be considered.

147. The Tribunal finds that the respondent did not comply with the second paragraph cited above in the policy (see paragraph 66). The use of the so-called fast track procedure was not discussed with the claimant and the reasons for the decision to use the procedure were not provided in writing by the manager before the stage four meeting was arranged. That is a factor which has been considered when determining the fairness of the dismissal. The impact of non-compliance was, however, to some extent offset by the number of meetings held and the length of the process undertaken.

148. The claimant had been absent from her substantive role for considerably more than the twenty-six weeks envisaged by the procedure at stages one to three. The stage four process itself lasted from September or November 2016 until May 2017, depending on when it is treated as having started. As there were three stage four meetings conducted over a period of over two months, the respondent did not move through the process quickly or genuinely fast-track the decision reached.

149. With regard to Mr Raimbault and his decision, the Tribunal found him to be an impressive and credible witness. In submissions, the claimant's representative suggested that he was unduly influenced by Mrs Dixon. The Tribunal did not find that was the case. It was clear from Mr Raimbault's evidence that he did not accept what Mrs Dixon said and her position without challenge. He made his own decision based upon his own interpretation of what he considered. He was new to post. He followed a lengthy process, including some long meetings, in considering the issues raised.

150. The Tribunal has particularly taken into account the medical advice which was provided in relation to the claimant. In that respect the most important report was that of the occupational health consultant of the 25 July 2016 (514) and the further report provided during the stage four process on 8 May 2017 (698). Those reports made clear that the claimant could not return to working within the ABI Team, as to do so would make her ill. The reports contained no caveats; they did not qualify the advice that returning to the ABI team would make the claimant ill.

151. The claimant's case was very much presented as if there was a degree of negotiation or discussion to be undertaken with her about a return and, in particular, around point six of her proposal. The Tribunal finds that these arguments misunderstood the basis upon which the respondent's decision was reached. The decision was reached on the grounds of capability based upon occupational health advice. Whilst the Tribunal finds that it was sensible and good and fair practice that Mr Raimbault invited the claimant to put forward her proposals about what it was she believed needed to happen for her to return to the team, nonetheless her proposals needed to be considered in the light of the occupational health advice that the claimant was not fit to return to the team (as returning would make her ill).

152. With regards to the claimant's proposals, the Tribunal accepts that point six was not one with which the respondent could agree, whilst retaining genuine ABI inter disciplinary team working. The Tribunal accepts the respondent's position on the importance of the requirements for the ABI Team and accepts the evidence of Mrs Dixon, Mr Raimbault and Ms Travers about the reasons for the need for genuinely integrated team working and why that meant the team working with the claimant through a manager or with limited contact, would not provide the care which the respondent needed to provide.

153. The decision to dismiss on the grounds of capability needed to be considered in the context of the claimant's absence from her substantive role. The claimant worked in that role only for the period from 4 November 2013 until 28 or 29 April 2014. Thereafter, during a period of three years, she had been unable to return to her substantive role, save for a short unsuccessful phased return in mid 2016 (which had resulted in the claimant's health deteriorating). The clear advice from the occupational health advisor provided in May 2017 was that returning to the team would make the claimant ill. In the circumstances, the Tribunal finds that a reasonable employer would not have waited longer before dismissing the claimant. The claimant was certainly consulted and her views taken into account before the decision was made. The respondent took exhaustive steps to discover the claimant's medical condition and the likely prognosis. Mr Raimbault did approach the decision with understanding, sympathy and compassion. He also took into account the need for the team and its patients to have a dedicated clinical psychologist available, something which had not listed for a long period of time.

154. The Tribunal has also considered the issue of mediation in relation to the fairness of the dismissal. When the grievance had been concluded, the approach taken by the Trust was to appoint an independent external mediator. The mediator met with each of the people involved, that is the mediation process commenced. The decision of others to decline to engage in mediation was an informed decision. It appears to the Tribunal that by that point positions were entrenched. Indeed, the claimant from her own observations as recorded in the facts above, appeared to

have already decided that mediation would be unsuccessful. The respondent had taken the possibility of mediation as far as it was able to, with the appointment of the mediator and with her confirming that mediation could not go ahead. Mediation cannot be a compulsory process.

155. It is true that the respondent did not write to everyone urging them to participate in mediation, but those involved would have known they were being encouraged to participate in it. Whilst the claimant's representative submitted that in some way the respondent could have used its authority to push the mediation, the Tribunal's view is that that would have been counter-productive and in any event there was no obligation on the respondent to do so. Nothing in the respondent's approach to mediation or to the involvement of people in it, means that the decision to dismiss was otherwise rendered unfair.

156. In terms of the grievance outcome, the position was that the claimant appears to have wished to have received an apology from the two members of the team personally (about whom she had raised the grievance and who were still in employment) and that was why she was unhappy with the outcome. The respondent apologised to the claimant for its shortcomings. However, when the claimant was asked about the apology that was provided during the hearing, the claimant's evidence was essentially that the apology provided by the respondent was not the right apology. In circumstances where the respondent's internal grievance procedure had not found that the colleagues had bullied or harassed the claimant, the respondent was not able to impose a sanction or to require those individuals to apologise (if indeed it could ever require other employees to apologise). From the claimant's evidence during the hearing, the absence of an apology from the two colleagues appeared to be the main blocker to her return to the team (at least in her view, albeit that is not what was said in the occupational health advice). The non-provision by other employees of an apology in these circumstances and/or the respondent not endeavouring to require them to do so, was not something which meant that the dismissal (on capability/health grounds) was otherwise rendered unfair.

157. The issues of alternative employment are addressed in relation to issue five below, and for the reasons explained in that part of the Judgment the Tribunal does not find that any such matters rendered the dismissal unfair

158. Considering all of the issues, the Tribunal finds that the respondent did act reasonably when it relied upon the claimant's incapability (health) to return to her substantive role, as being a reason to dismiss her.

Issue Three

159. The Tribunal has considered issue three as it was recorded in the list of issues. The Tribunal has not found that the respondent had a genuine belief that the claimant could not work effectively within the ABI team if she was not physically based in the same room. By the time of the grievance appeal meeting, it had been agreed that the claimant could work in a separate office. Mrs Dixon's evidence was that the claimant couldn't work effectively within the ABI team from a separate building, but that was not an issue in dispute. The respondent's issue was not about the physical location of the claimant's office working, it was about her integration into

the team (which functioned with inter-disciplinary working). The Tribunal accepts the respondent's case that there needed to be free and effective communication between team members in an ABI Team. The claimant's proposal that she would communicate only via the team leader and during team meetings would have destroyed the model of care and team working, that the respondent required and provided. The Tribunal therefore finds that the respondent did hold a genuine belief that the claimant could not work effectively within the ABI Team if she only had contact with other team members via the Team Leader and during the team meetings, as she proposed. That decision was reasonable and one that the Trust was able to reach within the range of reasonable responses.

160. Issue three also raised the question of trial periods. The Tribunal does not believe that a trial period was necessary or appropriate in these circumstances. A trial period would not have achieved anything. The claimant's position was that she could not liaise with the team other than through a team leader and that proposal was not stated to be only for an initial period of time. A trial period where the claimant did not liaise with the team directly would not have alleviated or addressed the claimant's inability to undertake integrated team working (due to her health). In any event, the medical reports obtained by the respondent did not say that their advice was temporary or that a trial period or a phased return would resolve the issue. The medical reports, after three years of absence from the team, were very clear that the claimant could not return without being made ill. In the circumstances, a trial period was not reasonable or necessary and offer of one was not required for the dismissal to be fair.

Issue Four – fast tracking

161. The issue in relation to the use of the fast-track procedure has been addressed above. In reality the relevant procedure as followed by the respondent cannot genuinely be described as having been fast-tracked in circumstances where the claimant had been out of her substantive role for three years and where the process followed took the time that it did in this case. The respondent was able to follow stage four and acted reasonably in doing so.

Alternative employment

162. Issue five was whether the respondent took adequate steps to seek alternative employment for the claimant.

163. The respondent did seek to identify any other posts at the claimant's grade during the period of the claimant's stage four process and termination. There was no evidence that there were any other such posts available.

164. As recorded in the facts above, the 2016 Psychology post was one that was vacant too early. That is, it was vacant and filled before the stage four process. In any event, the claimant's evidence was that she applied for it.

165. The maternity cover role was one that was available too late, as the vacancy occurred after the claimant's employment had terminated. There was no evidence before the Tribunal that Mrs Dixon or those responsible for the stage four process

were aware that a maternity cover role would be available. The Tribunal accepts that the MAT B1 form triggered the filling of the vacancy.

166. In any event, the claimant could have applied for the maternity cover role when it became available. She chose not to do so. The Tribunal does not accept the respondent's submissions that this was not an appropriate job or that a need for a handover would have made it impossible for the claimant to take the role. It appears that this may have been a job which could have averted the need for dismissal (at least for a period) had it been available during the stage four process or notice period. However, unfortunately, the role became available too late. The dismissal was not rendered unfair by the need for maternity cover of this role being identified after the decision had been made and after the claimant's employment had terminated.

167. With regard to the 8B role, the Tribunal accepts the respondent's submission that there was no evidence that the clamant was working at an 8B level. That was, accordingly, a role which was more senior than the one she filled. It was not a role at the claimant's grade and it was not an appropriate role which the respondent was required to consider for the claimant. Not having done so, did not render the dismissal unfair.

Some Other Substantial Reason – issues six to ten

168. The respondent's reliance on some other substantial reason is recorded as issue six as based on the contention that the claimant unreasonably refused to return to work in the ABI Team. At paragraph 55 of the amended grounds of response (64) this contention is recorded as follows:

> *"In the alternative, given the claimant's contention that she was fit for work but refusing to return to her substantive post, the respondent submits that her dismissal was fair for some other substantial reason".*

169. The Tribunal finds that the claimant did not refuse to return to work in the ABI Team. The evidence before the Tribunal was that the claimant wanted to return to work in the ABI Team (albeit with the limitations addressed above). The position was that both the claimant and the respondent were being told that the claimant's health would suffer if she did so and therefore, she did not return. The medical evidence, as recorded for the capability issue above, was that she was unable to go back to her role. Accordingly, the respondent did not dismiss the claimant because she refused to return to work or because she refused to return to her substantive post. It was not the reason why Mr Raimbault dismissed the claimant. Accordingly, the respondent did not dismiss the claimant for some other substantial reason either as recorded in issue six or paragraph 55 of the amended grounds of response. As a result, the Tribunal does not need to consider issues eight to ten, as they only applied if the Tribunal had determined that the reason for dismissal was some other substantial reason.

Failure to make reasonable adjustments

170. As recorded in the list of issues (issue eleven), the respondent conceded that it operated a PCP of requiring the claimant to work in the same physical environment

as the ABI Team. That is, the respondent required the claimant to work in the same building, not the same open plan office.

171. With regard to issue twelve, that was also conceded by the respondent in submissions. The PCP had the effect of putting the claimant at a substantial disadvantage as compared to non-disabled persons who did not suffer the claimant's disability.

172. Issue thirteen asked whether allowing the claimant to work separately from the ABI Team, either in a separate room in the same building or a separate location would have been a reasonable step that would have alleviated the substantial disadvantage caused by the PCP.

173. The claimant was allowed to work in a separate room. It was agreed that she be given an office and not be required to work in an open plan environment alongside other members of the ABI Team. Accordingly, the respondent did make the adjustment of allowing the claimant to work in a separate room in the same building.

174. The Tribunal finds that it was not a reasonable adjustment for the claimant to be allowed to work in an entirely separate location/building. The claimant had worked in the same building during her temporary role. Accordingly working in a different location entirely was not required by her. Her concerns were specifically about team integration and working with and alongside other team members. Those issues were not addressed by working in a different building. Proposal six, which the respondent could not accommodate, was not about working in a different building. Allowing the claimant to work in a different building would have had a significant adverse impact on the provision of care for the reasons already explained, and would have effectively meant the respondent ceasing to operate the ABI team as one which provided inter disciplinary care. The primary issue was about the way in which the claimant worked with the team, not where she worked. The Tribunal does not find that allowing the claimant to work in an entirely separate building was a reasonable step the respondent was required to make.

175. Issue fourteen as described in the list of issues was somewhat more complicated in practice than it at first appeared.

176. As was highlighted to the claimant's representative at the time of submissions, the claimant's own evidence was that she did not ask for other employees to be moved to different work areas. The claimant's representative accepted that and agreed that those words could be removed from issue fourteen.

177. The first reasonable adjustment therefore proposed within issue fourteen was attempting mediation. The respondent did attempt mediation. The respondent arranged for an independent external mediator to undertake mediation. She met with the individuals involved. As mediation was attempted, the respondent did not breach its duty to make reasonable adjustments by not attempting it, as alleged.

178. The other reasonable adjustment proposed was for the respondent to make a management instruction that staff attempt mediation. As described in the facts above, the other staff did attend mediation meetings and it was clear that they were

encouraged in broad terms to do so. Instructing staff to attend mediation is not, in the view of the Tribunal, a reasonable step to take. In any event, the proposed adjustment does not address the PCP or the substantial disadvantage relied upon. The PCP and the substantial disadvantage related to the physical environment and the proximity of the ABI team, an adjustment relating to how strongly mediation was pressed upon other employees does not address that substantial disadvantage.

179. Issue fifteen was conceded in submissions. The respondent's decision to fast-track the claimant to stage four of the absence management procedure did amount to a PCP.

180. Issue sixteen was also conceded, that is that using the fast track process did place the claimant at a substantial disadvantage.

181. In relation to issue 17(a), discounting disability related absences was not a reasonable step to alleviate the disadvantage effectively. The claimant's very criticism of the fast track process was that the respondent did not follow the steps which it would normally, which took account of cumulative absence. The fast track process was not undertaken because of the number of days the claimant had been absent, it was undertaken because the claimant was unlikely to be fit to return to her full duties in her substantive role in the foreseeable future. Accordingly, the reasonable step sought did not address the disadvantage suffered.

182. For 17(b), the reasonable step proposed, that is not fast tracking, is effectively a contention that the PCP should not have been applied at all, rather than an adjustment to it. The Tribunal does not find that after three years of the claimant being unable to fulfil her substantive role and in the light of the fact that the team had been working without a Clinical Psychologist within it for a number of years, it was a reasonable step for the respondent to have to take. In any event Mr Raimbault took his time in reaching his decision, including three meetings over a two-month period. What was contended was not a reasonable adjustment.

183. Under issue 17(c), the Tribunal was also asked to consider any other reasonable adjustments it identified. In submissions the claimant did not suggest any other reasonable adjustments. The Tribunal has not identified any other reasonable adjustments the respondent should have made.

184. In answer to question eighteen, therefore, the respondent did not fail to comply with its duty to make reasonable adjustments.

Discrimination arising from disability – unfavourable treatment

185. The claimant's claim for discrimination arising from disability relies upon three different allegations.

186. In relation to issue 19(i) there was a dispute of evidence between the claimant and Mrs Dixon about what Mrs Dixon told her in April 2016. Mrs Dixon accepted that the claimant was told to be professional and that, if she was not in the future, action may result. Mrs Dixon was keen to emphasise in her evidence that she treated the claimant comparably to the other two individuals. The Tribunal accepts Mrs Dixon's

evidence that she did not say exactly what the claimant alleged. Accordingly, the Tribunal does not find that what was alleged in issue 19(i) occurred as alleged.

187. What Mrs Dixon did say to the claimant, was in the claimant's own perception unfavourable treatment. Discrimination arising from disability differs from other areas of discrimination which consider less favourable treatment, because the test is only whether the treatment was unfavourable. The claimant's treatment was the same as the other two individuals involved, but the Tribunal nonetheless finds that what was actually said to the claimant (as found in paragraphs 46 and 47) amounted to unfavourable treatment of the claimant.

188. Considering issue 20 in relation to what is listed at issue 19(i), the respondent submitted that there was no causal connection between: the claimant's anxious state and the effects of the anxiety on her behaviour; and Mrs Dixon's actions. The Tribunal finds that Mrs Dixon's actions were purely her attempt to return the claimant to a substantive role and to enable the team to work together in the future. Accordingly, the Tribunal agrees with the respondent's submission. The statement made by Mrs Dixon, as found by the Tribunal, was not in consequence of something arising from the claimant's disability. The statement had nothing to do with the claimant's anxiety or her anxious state. As a result, the discrimination arising from disability claim as it related to the matters described in issue 19(i) as found by the Tribunal, does not succeed because what occurred was not in consequence of something arising from the claimant's disability (even though it was unfavourable).

189. In relation to issue 19(ii), there was a paucity of evidence about this allegation. The fact that a manager met with a proposed supervisor to establish whether she would supervise the claimant, is not something the Tribunal finds amounted to unfavourable treatment. The claimant was positive about her return to work in May 2016 and indeed her evidence was that she contributed to the plan proposed. Her complaint was simply that Mrs Coulson and Ms Barnes had talked about the latter supervising the claimant (without her being involved). The Tribunal would observe that on many occasions managers will need to speak about an individual without that individual being involved in the conversation. In the circumstances of this case, such a conversation was not of itself unfavourable. There was no suggestion that there was anything negative which came out of the discussion, as the claimant was happy to be supervised by Ms Barnes. In any event, the Tribunal does not find that the absence of meeting with the claimant was in consequence of something arising from the claimant's disability (issue 20).

190. With regard to issue 19(iii), clearly dismissal was unfavourable treatment, as the respondent accepted. It was also accepted (issue 24) as being because of something arising from the claimant's disability. Therefore, the only question in relation to the matters addressed in issue (iii) that needed to be determined, was that stated to be issue 25: whether the dismissal was a proportionate means of achieving a legitimate aim?

191. The first question the Tribunal needed to consider was whether the legitimate aim of ensuring that the ABI Team was staffed with a Clinical Psychologist who was willing and able to work in a colloborative inter-disciplinary manner with her ABI colleagues in order to ensure an integrated level of care to the vulnerable patients served by the ABI, was a legitimate aim. The Tribunal's conclusion was that this

clearly was a legitimate aim. The care model operated by the respondent for ABI was for integrated care and it required the Clinical Psychologist to be embedded in the team. It was a legitimate aim.

192. The Tribunal then went on to consider whether the dismissal was a proportionate means of achieving that aim. The Tribunal has carefully considered what is set out at paragraphs 116 to 120 above. Considering those matters the Tribunal identified that:

- The respondent had a service to provide;
- The only way that the respondent could provide it in accordance with service specification was with the claimant actively in post in the team (or with another Clinical Psychologist);
- There was a potential breach of the commissioner's specifications, as evidenced by Mr Raimbault, if the service was not provided with a Psychologist embedded and integrated into the team;
- The Tribunal accepted the respondent's extensive evidence of the importance of the Psychologist being embedded in the service; and
- There was no other way to achieve that legitimate aim of the embedded service, without a Clinical Psychologist interacting directly with the team.

193. Based upon these factors, the Tribunal finds that dismissing the claimant was a proportionate means of achieving the legitimate aim relied upon.

194. In her final submissions, the respondent's representative cited the legitimate aim as being: expecting the attendance of someone at work in their substantive role. It was not recorded as such on the list of issues. The Tribunal accepts that expecting the claimant to be able to fulfil her substantive role is something that the respondent could legitimately expect. Taking account of the occupational health advice, the length of time for which the claimant hadn't been able to fulfil her substantive role, the needs of the service, and the absence of suitable alternative funded roles at the relevant time, dismissal of the claimant was a proportionate approach to achieving the legitimate aim described by the respondent's counsel in submissions. All of these matters were also part of the matters taken into account in the Tribunal's finding that dismissal was a proportionate means of achieving the legitimate aim relied upon in the pleaded case and list of issues.

Time Issues

195. In relation to the discrimination arising from disability claims, issues 21 to 23 related to time. As the claimant alleged that dismissal was an act of discrimination arising from disability, if that had been found to be discrimination arising from disability all the matters alleged might have been found to be part of a continuing act (which was in time). It would not necessarily have been the case, as the decision makers for each of 19(i), (ii) and (iii) were different and, as explained in the determination of the facts above, the Tribunal found that Mr Raimbault was

independent in the decision that he reached. As the Tribunal has not found that any of the alleged discrimination arising from disability claims succeed, it does not need to determine whether those matters would have been continuing acts (had they been found to have been unlawful discrimination). Similarly, the Tribunal does not need to determine whether it would have been just and equitable to extend time.

Other matters

196. The Tribunal does observe that the claimant was treated very badly when inducted into her role in 2013 and early 2014. There is no doubt that this failure of induction was the starting/initial cause of the issues which subsequently occurred. The claimant was put into a team with very fixed and long-term ways of working, with a difficult client group, covering an enormous geographic area, with little or no management, and no genuinely appropriate induction. The respondent apologised to the claimant in August 2015 for not promoting a supportive working environment when the claimant joined the ABI Team, and they were right to do so.

197. The Tribunal would also like to emphasise that in this judgment, in determining that the claimant's dismissal on capability grounds was fair, the Tribunal was considering capability in relation to the claimant's health and not in relation to her performance or ability to fulfil her role. There was no suggestion during the Tribunal hearing that the claimant had any performance issues as a Clinical Psychologist. The Tribunal was shown a document provided by Professor Dagnan of the 23 October 2018 (1003) which recorded that in his experience the claimant in professional supervision was always highly reflective and positively engaged and that her clinical work was always of a very high quality. The use of the word capability throughout this judgment addresses the claimant's ability to undertake her substantive role on health grounds and not her ability to undertake work effectively and capably as a Clinical Psychologist.

Summary

198. For the reasons explained above, the Tribunal finds that the claimant does not succeed in any of her claims.

Employment Judge Phil Allen
9 August 2021

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON
10 August 2021

FOR THE TRIBUNAL OFFICE