EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4103598/2020 (V)

Hearing held on cloud video platform on 17, 18 and 19 February 2021

Employment Judge S MacLean

Tribunal Member G Doherty

Tribunal Member J Gallacher

Ms S Cairney	**Claimant** **Represented by:** **Mr E Mowat,** **Solicitor**
The National Autistic Society	**Respondent** **Represented by:** **Mr D Gorry,** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The majority Judgment of the Tribunal is that the claims of unfair dismissal and disability discrimination are dismissed.

REASONS

Introduction

1. The claimant sent a claim form to the Employment Tribunal claiming unfair dismissal, disability discrimination and breach of contract. The respondent resists the claims. The respondent accepts that the claimant is disabled in terms of section 6 of the Equality Act 2010 (EqA) in respect of her diabetes and

skin condition (hidradenitis suppurativa). The respondent contends that the claimant was fairly dismissed by reason of capability and it did not discriminate against her.

2. At the final hearing the representatives confirmed that they had reached agreement on the breach of contract claim and that payment was being processed in the respondent's February pay run with payment being made on 26 February 2021. It was agreed that the breach of contract claim be sisted meantime.

3. The final hearing was conducted remotely by cloud video platform. For the respondent the Tribunal heard evidence from Paul Cooke, Registered Manager and the Decision Manager and Peter Yung, Head of Services and the Appeals Manager. The claimant gave evidence on her own account along with her colleague Johnnie McWhirter, Support Worker. The witnesses provided witness statements that were treated as their evidence-in-chief. They were cross examined and re-examined in the usual way. The Tribunal was referred to a joint set of documents.

4. The Tribunal has set out the facts as found that are essential to its reasons or to an understanding from important parts of evidence.

5. When the evidence was completed Mr Gorry and Mr Mowat provided written submissions on which they addressed the Tribunal. The submissions were carefully considered by the Tribunal. For ease they are summarised in the order the Tribunal considered the issues rather than the order presented by the representatives at the final hearing.

6. During the submissions it was confirmed that having heard the evidence a number of issues in relation to the disability discrimination claims were not proceeding: the allegation that the respondent's managers had been discussing the claimant's sick absence with other members of staff; the PCPs of requiring the claimant work in circumstances where she could not take breaks; and refusing to provide an alert pin. The claimant referred in her appeal to Mr Cooke's unprofessional behaviour at the medical dismissal hearing and this was considered by Mr Jung. While there was reference to this in their

witness statements the allegation was not put to Mr Cooke nor was there reference to this in the submissions. The Tribunal therefore did not make any findings as it was not material to the issues that it had to determine.

7. The Tribunal's approach was to consider the following outstanding issues.

a. What was the reason or principal reason for dismissal?

b. Did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant?

c. Did the PCP of requiring the claimant to work 40 hours per week, put the claimant at a substantial disadvantage in relation to the likelihood of having periods of sickness absence in comparison with persons who are not disabled?

d. If so by refusing to permit the claimant to reduce her shifts to 16 hours (two shifts), did the respondent fail to take such steps as is reasonable to have avoided the disadvantage?

e. Did the respondent breach section 21(2) of the EqA.

f. In treating the claimant unfavourably by dismissing her for absences related to her disability was it a proportionate means of achieving a legitimate aim: that the respondent requires employees to meet certain levels of attendance in order to provide its service to vulnerable adults.

g. What if any award of compensation should be made?

Relevant Law

Unfair dismissal

8. The law in relation to unfair dismissal contained in the Employment Rights Act 1996 (the ERA) section 98(1) provides that, in determining whether the dismissal of an employee is fair or unfair, it is for the employer to show the reason for dismissal and, if more than one, the principal one and that it is a reason falling within section 98(2) of the ERA or some other substantial reason

of a kind to justify dismissal of an employee holding the position which the employee held. Capability is one of the potentially fair reasons for dismissal.

9. Section 98(4) provides that where the employer has fulfilled the requirements under sub section (1), the determination of the question whether the dismissal is fair or unfair, having regard to the reasons shown by the employer 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 dismissal and this has to be determined in accordance with the equity and substantial merits of the case.

10. In considering the reasonableness or unreasonableness of the dismissal the Tribunal must consider whether the procedure followed, and the penalty of dismissal were in the band of reasonable responses *(Iceland Frozen Foods Ltd v Jones [1982] IRLR 439).* The Tribunal must therefore be careful not to assume that merely because it would have acted in a different way to the employer that the employer therefore acts unreasonably. One reasonable employer may act one way whilst another reasonable employer may have a different response. The Tribunal's task is to determine whether the respondent's decision to dismiss, including any procedure adopted leading up to the dismissal falls within that band of reasonable responses. If so, the dismissal is fair. If not, the dismissal is unfair.

11. The starting point lies in the duty of the Tribunal in deciding whether or not an ill health capability dismissal is fair is the EAT decision in *Spencer v Paragon Wallpapers Ltd [1976] IRLR 373.* In that case Phillips J stated, "the case depends on its own circumstances. The basic question which has to be determined in every case is whether, in all the circumstances the employer can be expected to wait any longer and, if so, how much longer?" The relevant factors to scrutinise; the nature of the illness and the job, the needs and resources of the employer; the effect on other employees, the likely duration of the illness, how the illness was caused; the effect of sick pay and permanent health insurance schemes, alternative employment; and length of service.

Disability discrimination

12. Section 20 the EqA sets out the employer's positive duty to make reasonable adjustments to address disadvantages suffered by disabled people. This duty broadly arises when a disabled person is placed at the substantial disadvantage by the application of a PCP, by a physical feature, by the non-provision of an auxiliary aid. A failure to comply with the duty amounts to discrimination under section 21(2). In this case the relevant requirement is to take such steps as is reasonable to avoid the disadvantage where a provision criterion or practice (PCP) puts a disabled person at a substantial disadvantage.

13. The duty arises only in respect of those steps that is reasonable for the employer to take to avoid such a disadvantage experienced by the disabled person. What is reasonable in any given case will depend on the individual circumstances of the disabled person. The test of reasonableness in this context is an objective one (*Smith v Churchill Stairlifts Plc [2006] ICR524 CA)* and the focus is on whether the adjustment itself can be considered reasonable, not whether the employer's process for determining that question was reasonable (*Royal Bank of Scotland v Ashton [2011] ICR632 EAT).* An adjustment from which the disabled person does not benefit is unlikely to be a reasonable one (*Romek Ltd v Rudden EAT/0067/07).* However there does not have to be a good prospect of an adjustment removing a disadvantage for that adjustment to be reasonable *(Moore v Forman Office [2011] ICR695 EAT).* The question is whether the adjustment would be effective in removing or reducing the disadvantage the claimant has experienced as a result of their disability, not whether it would advantage the claimant generally. To assess the effectiveness of a proposed adjustment, it is best practice to consult the disabled employee, who is most likely to know whether the adjustment would make a difference. Alternatively, or additionally expert opinion, such as medical or occupational health advice could be obtained and the probable effect of any proposed adjustment.

14. Section 15 of the EqA states that a person discriminates against a disabled person if he treats a disabled person unfavourably because there is something arising in consequence of that person's disability; unless it can be shown that the treatment was a proportionate means of achieving a legitimate aim.

15. Section 39 of the EqA provides that an employer must not discriminate against an employee by dismissing them.

Findings in Fact

Supported living service

16. The respondent is a company limited by guarantee and is a registered charity in England and Wales and Scotland which provides care and support to vulnerable adults with autism throughout the UK. The respondent employs approximately 3,000 staff.

17. Catrine Bank is a supported living scheme which supports around 19 autistic people. There are three houses and two bungalows housing adults who are autistic and have severe learning difficulties. They are among the most vulnerable people that the respondent supports.

18. Peter Jung is Head of Adult Services in Scotland. He line-manages the senior management team in Scotland (11 people) including Paul Cooke, Registered Manager at Catrine Bank.

19. The respondent employed Mr Cooke from September 2008 initially as a support worker, then senior support worker and team leader. As Registered Manager he oversees the running of the service; liaising with regulators (Care Inspectorate and SSSC), social work departments and parents. He line-manages three team leaders. The service is staff by a variety of team leaders; deputy team leaders (on late shift); senior support workers and support workers.

20. The role of a support worker is primarily to support with the activities of daily living, to liaise with GPs, parents and social workers and to provide a high standard of care which can range from assisting vulnerable adults with their

finances, personal care and helping them to get out and about in the local community.

21. The vulnerable adults at Catrine Bank are funded to receive up to 15 hours a day one-to-one support. Depending on the needs of the person, some will receive two-to-one support for up to 13 hours a day. It is critical to the running of the service that the respondent has the staff to deliver the level of support that they are funded to provide.

22. The support provided is very structured. Due to the nature of their needs structure, certainty and consistency is very importance to the vulnerable adults. If the care they receive on a particular day is not in line with expectation or is provided by someone different, this disruption can lead to upset and to challenging behaviours being displayed.

23. The reasons for those receiving two-to-one support is either to enable community access or to manage particular challenging behaviour. Times are scheduled for the two-to-one support and if it is cancelled at short notice then it often leads to very challenging behaviour.

24. If the respondent fails to provide one-to-one support, there would be a serious safeguarding issue. All the one-to-one support has to be provided. When faced with staff shortage due to unexpected staff absence the two-to-one support tends to be sacrificed.

Management of employees attendance

25. Given the importance of staff providing the support to the vulnerable adults the respondent endeavours to work with employees to improve their attendance level through the Coming to Work Policy setting out the principles and Procedure setting out the process (the Policy).

26. One of the core principles is that where sick absence is possibly related to disability the respondent will get specialist advice (e.g. occupational health and human resources) and reasonable adjustments to the individual's working systems will be considered where appropriate. While disability is not generally synonymous with sickness or absence from work the guidance recognises that

some people with a disability will occasionally have conditions which are subject to the Policy.

27. Employees who have passed their probation are entitled to three months full pay (66 working days) and three months half pay based on a rolling 12-month period and payments of statutory sick pay are included. This applies to both short term and long-term sickness.

28. Employees require to contact First Care 24 hours before the time and date they expect to return to work so that rotas can be adjusted and issues relating to relief of temporary workers can be resolved.

29. When the employee returns to work the line-manager holds a return-to-work meeting to discuss the reasons for the absence. Notes of the discussion should be kept by the manager and/or recorded on the return-to-work form on the First Care portal.

30. If an employee meets any of the following trigger points, they will start the informal stage or formal stage of the Policy:

    a. A total of six or more days absence over more than one occasion.

    b. Four separate absences within a rolling 12-month period.Absences causing serious problems for service delivery.

31. Short term sick absence procedures (less than four weeks in a year) involves formal stages of: initial review (stage 1); formal review (stage 2); and final review (stage 3). Where the absence continues, the possibility of making reasonable adjustments or redeployment are not practical or have been made and the absence has continued a formal panel hearing is arranged known as a medical dismissal hearing. A current medical report may be obtained before the medical dismissal hearing takes place. The appropriate course of action may include one or more of the following:

    a. Allowing for the time for recovery or further consideration as to the possibility of making reasonable adjustments or arranging redeployment.

b. Dismissing the employee with full contractual notice.

32. Long-term sick absence (20 days/four weeks or more in one year) is considered to be a continuous period or several periods of absence traced to a single underlying medical condition. A long-term sick absence requires that the sickness is kept under regular review and there are referrals to occupational health. The process for long term sick absence envisages an initial review.

33. If there is an underlying medical condition but the employee is not permanently unfit for work action depends advice received from the medical report regarding the likely length of absence, the nature of the illness (temporary or permanent), whether in the light of the needs of the organisation and demands of the job in question, the employee will be capable of regular and effective attendance in the future and whether the illness is a disability under the EqA. The appropriate management action may include one or more of the following:

a. Further time for recovery before reviewing the case again.

b. Considering whether a review of working arrangements (e.g., a shorter working week) or redeployment would result in an earlier return of work.

c. Referral to occupational health.

d. Consider reasonable adjustments.

e. Advise the employer that continued employment will be at risk unless a return to work and all regular attendance can be achieved within a reasonable time frame.

f. Immediately refer to the next level for consideration to be given to the dismissal of the employee.

g. Recommend a phased return to work

h. Redeployment.

34. The respondent encourages a phased return to work where appropriate usually four weeks unless agreed by occupational health. During the phased return to

work the employee will receive full pay for the hours and days that they work but will receive occupational sick pay, statutory sick pay or nil pay at the time that they are not. Employees may agree to use annual leave as a substitute for sick pay for nil pay periods save for them to receive normal full pay during those hours or days. Return to work to the employee's contracted hours payable will return to normal.

35. Where the absence continues, the possibility of making reasonable adjustments or redeployment are not practical or have been made and the absence has continued a medical dismissal hearing is arranged. A current medical report must be obtained before the medical dismissal hearing takes place. The appropriate course of action includes one or more of the following:

    a. Allowing for the time for recovery or further consideration as to the possibility of making reasonable adjustments or arranging redeployment.

    b. Dismissing the employee with full contractual notice.

The claimant

36. The respondent employed the claimant as a support worker from 10 September 2012 until 26 February 2020 when she was dismissed on grounds of capability.

37. The claimant was diagnosed with type 1 diabetes as a teenager. Since around 2017 the claimant has a recurrent skin condition (hidradenitis suppurativa) which requires medical and surgical treatment. The conditions qualify as disabilities under section 6 of the EqA. The respondent knew that the claimant is a disabled person.

38. The claimant was issued with a contract of employment. She was contracted to work 40 hours per week, including weekends and bank holidays. The claimant did not work a night shift. She regularly worked overtime for which she was paid.

39. The claimant was a good support worker and very good at building positive relationships with parents and vulnerable adults placed in the respondent's

care. When she attended work, she performed her role very well. The claimant had a poor attendance record.

Final review – January 2018

40. On 24 January 2018 the claimant attended a final review (stage 3) meeting. She was informed that her current 12-month warning (formal) would continue and would cease to be alive on 28 April 2018. However, her absence would continue to be monitored and calculated in the 12-month rolling period. The claimant was to have regular meetings with her manager. The claimant's final written warning ceased to be live on 28 April 2018.

Occupational Health Report May 2018

41. The respondent had obtained an occupational health report in May 2017. Given the extent of the claimant's absences a further occupational health report was obtained following a telephone consultation in May 2018 (the 2018 OH Report).

42. The 2018 OH Report explained that for the first time in the claimant's diabetes she had experience major incidents of imbalance and it was now stable. She had not incurred more sick absence related to diabetes for approximately three months.

43. In relation to factors likely to cause further absence the 2018 OH Report referred to a skin condition which due to the claimant's diabetes delayed the healing process and made it more susceptible to infection requiring clinical treatment possibly in hospital. The claimant was likely to incur "a few days' sick absence in order to allow the treated abscess to fully heal before returning to work…the healing process is delayed by this type of diabetes which is why she is likely to need time off."

44. In relation to adjustments the 2018 OH Report referred to the claimant not working night shift (which she did not work) and to the claimant having no concerns regarding the changes in the shift patterns (early/late) of her working hours.

Initial review - July 2018

45. The claimant was invited to an initial review (stage 1) meeting on 27 July 2018 at which there was discussion about the last two absences relating to the claimant's disability. The claimant was reminded that as a key member of staff her absences not only impact on her but her colleagues and the people they support. She was issued with an absence improvement plan which was to be in place for nine months; reviewed at three monthly intervals; and the absence would be calculated on a 12-month rolling period. The claimant was informed that unless there was a significant improvement in attendance she would progress to the next stage of the procedure. She was advised of her right to appeal. She did not exercise that right.

Formal review - 8 and 30 November 2018

46. A formal review (stage 2) meeting took place on 8 November 2018 the outcome of which was that the nine-month absence management review plan would continue.

47. A second formal review (stage 2) meeting took place on 30 November 2018 by then the claimant's absence levels reached 35 days over six separate periods of absence. The absences were discussed. The claimant referred to stress because of personal circumstances for which she had separately taken unpaid leave. It was noted that the claimant had an underlying medical condition.

48. On 7 December 2018 the claimant was issued with a formal written warning which would cease to be live after 12 months (30 November 2019) if there was an improvement in her attendance. During this period the claimant's absence would be monitored and she would have regular support meetings. The claimant and her manager had a responsibility for these meeting to take place. The claimant was informed that unless there was a significant improvement in attendance she would progress to the next stage of the procedure. She was advised of her right to appeal. She did not exercise that right.

49. The claimant had a further period of absence of eight days in December 2018 due to her skin condition.

Final review -2019

January

50. The claimant attended a final review (stage 3) meeting on 11 January 2019 (the January Final Review). After discussion about the claimant's absence, it was decided and confirmed in a letter dated 14 January 2019 that the existing formal written warning would continue.

February

51. After a further two spells of two days of absence in February 2019 a second final review meeting was scheduled for 4 March 2019 (the March final Review).

March

52. The March Final Review did not take place because of the claimant's absence of 60 days (6 March to 23 May 2019).

May

53. Mr Cooke conducted the claimant's return-to-work meeting on 24 May 2019. He asked the claimant what types of support the claimant may need to maximise her chances of a successful return to work and mentioned potential support measures: phased return using annual leave; temporary support measure of reduced hours; and allocations of work to suit the claimant's health.

54. The claimant said that she would appreciate not participating in long walks. Mr Cooke agreed that if a long walk was part of someone's activity this would be covered by another colleague. He also agreed to allocate the claimant with consideration to her physical health. A further discussion was to take place at a final review meeting scheduled for 11 June 2019 (the June Final Review). The claimant's shifts patterns were agreed so that she had days off between shifts in the hope that it would maximise a successful return to work.

June

55. The claimant had a two-day absence on 8 June 2019. The June Final Review scheduled for 11 June 2019 did not take place as the claimant was absent from work.

56. As the claimant remained unwell and unable to attend work a letter was sent to her dated 21 June 2019, headed, "Formal Long Term Absence Review Meeting". The letter invited her to a meeting to discuss her long-term sick absence on 25 June 2019. This meeting did not take place did not take place due to the claimant's ongoing absence.

57. The claimant was absent from 11 June 2019 to 14 August 2019 (65 days).

August

58. There was a phased return to work commencing 15 August 2019. The claimant was invited to a final review meeting with Mr Cooke on 21 August 2019 (the August Final Review).

59. At the August 2019 Final Review, the claimant agreed that in the previous 12 months she had 136 days of absence over eight episodes. The claimant explained that it was an ongoing issue with her skin condition. The claimant told Mr Cooke about the medication and the medical and surgical treatment she had received. She was consulting with a dermatologist about further treatment. The claimant said that she was struggling with walking particularly long walks. Mr Cooke confirmed that in June 2019 cover was provided for this and it would continue. The claimant would remain working in her current location. Mr Cooke explained that unless the cost of sick absence was managed the service would not be viable. He considered that while the claimant had a number of health challenges it was appropriate to issue a final written warning which would cease to be live after 18 months if there was an improvement in attendance. The claimant asked what would happen if she had another abscess. Mr Cooke said that he could not prejudge the matter but even with an underlying medical condition the claimant's level of absences were not sustainable. The claimant's absence was be monitored over the next 12

months and she would have regular support meetings with her manager. The claimant and her manager had a responsibility for these meeting to take place. The claimant was informed that unless there was a significant improvement in attendance she would progress to the next stage of the procedure. She was advised of her right to appeal. She did not exercise that right.

September

60. Around September 2019 Mr Cooke enquired if the claimant wished to consider reducing her hours. The claimant said that she would think about it. She did not follow up on the offer. There was no further discussion.

61. Rather than reducing hours her timesheets recorded additional hours worked in September and October.

November

62. The claimant had a non-medical related absence on 11 November 2019. Her timesheet recorded 41 additional hours worked.

December

63. The claimant was absent on 16 December 2019 followed by two days prearranged holidays on 17 and 18 December 2019. The claimant was then absent from 19 December 2019 to 21 January 2020 (24 days). This absence was related to the claimant's disability. It was caused by an infection. Due to this the claimant also suffered from reactive depression.

January

64. On 22 January 2020 the claimant started a phased return to work. She attended a return-to-work interview with her manager Tara Thomson. The claimant requested to cut her working hours. Ms Thomson advised that the claimant could discuss this with Mr Cooke at the absent management review meeting.

65. The claimant was invited by letter dated 28 January 2020 to an "absence review meeting" to be conducted by Mr Cooke on 20 February 2020 at which

the most recent report from occupational health would be discussed along with the options including whether the claimant's employment would come to an end.

Medical dismissal hearing February 2020

66. The clamant worked during February 2020. She worked overtime.

Occupational Report February 2020

67. The occupational report dated 6 February 2020 (the 2020 OH Report) was provided by an occupational health physician following a face-to-face consultation with the claimant on 3 February 2020. It provided advice on the claimant's medical condition, its effect on her ability to carry out her duties; the likelihood of reoccurring absences and any adjustments that could be made to alleviate her absences.

68. The 2020 OH Report stated that the claimant was attending work and was engaged in the usual hours and duties of her post.

69. The claimant's medication had recently been altered to stabilise her condition (diabetes). It was hoped that this may reduce the likelihood of future absences. She was still under review of a skin specialist condition. Any further medical/surgical intervention would depend on the claimant's response to medical treatment. The claimant also reported reactive symptoms to low mood/anxiety for which she was prescribed medication on a long term basis.

70. Based on current evidence the 2020 OH Report there was no obvious medical barrier to the claimant continuing to attend work and engage with work related activities associated with her role subject to Management's consideration of the advice and recommendations within the report. No specific restrictions on her core activities form a health perspective were suggested in advance of a risk assessment being completed. It was recommended that the assessment should encompass the claimant's continuing deployment and how she may be supported if she should experience low blood sugar while at work; a review of first aid/support arrangements for such eventuality; consideration of time

allowances for attending medical appointments associated with diabetes as well as periods of sick absence associated with the condition.

71. The 2020 OH Report stated, "Whilst she would remain at risk of experiencing further sick absences going forward and symptoms associated with underlying conditions it would not be possible to predict the timing, frequency or severity of any future symptom events." A further review of the claimant by occupational health was not suggested.

72. The "absence review meeting" was rescheduled to 26 February 2020 (the Medical Dismissal Hearing). John McWhirter accompanied the claimant. Laura Lang, HR Advisor attended to provide advice on policy and procedure and to take notes.

73. Mr Cooke considered the claimant's absences since 11 June 2019. He said that it had been intended to move the claimant to alternative work premises to support the needs of the service. At the claimant's request she remained at her current location and it had been stipulated that she should not go on long walks. The claimant confirmed that had been adhered to.

74. The clamant raised the following points:

    a. Her absences were all related to her diabetes.

    b. She had a new medication regime which seemed to have helped.

    c. Given the level of her absenteeism she wanted to move to part-time hours (three days a week) as she could manage that if she was not feeling good, whereas she could not manage 40 hours per week.

    d. The claimant did not have any support meetings since August 2019.

    e. No risk management had been done.

75. Mr Cooke adjourned the hearing. He spoke to Mr Jung about the risk assessment and/or support meetings. Mr Jung advised that Mr Cooke should consider whether these issues would have made a difference to the claimant's attendance. Mr Cooke also telephoned a colleague in relation to comments

which the claimant said that the colleague had made about discussions by management relating to the claimant's health Mr Cooke spoke to the claimant's line manager, Ms Thomson about support meetings. Ms Thomson said that they took place but were not recorded.

76. While a certain level of absence could be sustained, Mr Cooke considered that the claimant's absences had reached an unsustainable level unless there was a significant improvement over the coming months.

77. Mr Cooke considered the matters raised by the claimant. He knew that the claimant's absences were genuine and mostly related to her disability. She had returned to work on a phased basis. Her medication had changed. It was hoped that this would assist in the management of her medical condition although she would remain at risk of further absences and symptoms the timing, frequency or severity could not be predicted. The claimant offered to reduce her working hours. Mr Cooke had previously proposed this. The claimant had not pursued this but rather worked overtime. Mr Cooke considered that the claimant was only willing to consider this at the final stage which he felt was too late. There was no suggestion in the 2019 OH Report to a reduction in hours or shorter working week improving attendance. While the 2019 OH Report referred to risk assessment so far as he was aware this was not raised or discussed at previous meetings and would have been followed up if the claimant remained in employment. He was satisfied that support meetings had taken place albeit not documented and there had been plenty opportunity for the claimant to discuss support and adjustments to enable her to attend work on a more regular and reliable basis.

78. Mr Cooke reconvened the hearing. He said that he had reviewed the notes of the August 2019 Final Review and risk assessment was not noted. Support meeting were discussed. Mr Cooke did not believe that it would have made any difference to the claimant's absence if support meetings had taken place or not. He advised the claimant that her employment was being terminated with pay in lieu of notice. She had a right of appeal. The claimant said that she knew that she could not work full time and asked if it would be a different outcome if she moved to part-time. Mr Cooke said that each case is looked at individually

and it is all taken into consideration. He had to consider the bigger picture of providing support to vulnerable people. The hearing concluded.

79. The claimant was notified of the decision and right of appeal by letter dated 3 March 2020. The letter did not set out the reasons why Mr Cooke came to the decision that he did.

Appeal- May 2020

80. On 12 March 2020 the claimant sent an email appealing the decision to dismiss her.

81. Mr Jung was aware of the management of the claimant's absence from HR Forum and Mr Cooke. He knew that that Mr Cooke had decided to dismiss the claimant decision

82. Due to the restrictions in place on account of the pandemic the appeal was with agreement considered by Mr Jung on the basis of the email of 12 April 2020 and emails sent by the claimant on 28 and 29 April 2020. Mr Jung spoke to Ms Lang, Mr Cooke and Ms Thomson.

83. Mr Jung considered that the claimant's appeal was summarised as follows:

    a. The absences were not recorded accurately.

    b. The warnings/dismissal was unfair.

    c. Her request to work part-time (now two shifts per week) was overlooked

    d. Mr Cooke was unprofessional at the hearing.

    e. The claimant was not given support meetings or risk assessment.

84. Mr Jung did not consider that the recording of absences had a material bearing on the case. The claimant's absences were a mixture of short and long-term absence. A number of absences were linked to her disability, but appropriate enquiries had been made and medical advice obtained. Mr Jung considered that the claimant did not always follow reporting procedures; lacked

appreciation of the gravity of her situation; and lacked acknowledgement of the impact of those absence on the people who are supported and colleagues. He did not appreciate that the claimant's point was that she was managed under the short-term absence procedure rather than the long-term absence procedure.

85. Mr Jung's impression was that the claimant felt that because she had a disability the respondent could not manage her attendance. Her absence had been over a prolonged period and Mr Jung considered that action could have been taken sooner than it was. The claimant had not appealed at any stage warnings had been issued. She had been absent for half of the available working days over the last couple of years of employment.

86. Turning to reducing hours, Mr Jung considered that this had been offered previously and the claimant had not engaged until the very last stage of managing her absence. While he accepted that it would be more difficult for the claimant to work 40 hours each week if she was unwell, from her absence pattern and the medical evidence Mr Jung did not consider that a reduction in hours would have the desired effect on her attendance. He felt from the 2020 OH Report it was likely that there would be further absences and he did not believe a reduction in hours would have addressed that.

87. Mr Jung spoke to Ms Thomson about support meetings which she said took place. Mr Jung did not consider this a significant point as there had been various types of meetings at which discussion could take place, but the absence levels continued.

88. As regards risk assessment Mr Jung was not clear what the claimant was meant by this. He was satisfied that the appropriate training was in place to deal with hypoglycaemic attack and there were no concerns about the claimant's safety while at work.

89. Mr Jung considered that the claimant had genuine health problems. He needed to balance the extent to which the business could support such high level of absence with the impact that absence was having on the well-being of people

the business supported who require consistency. Mr Jung decided to uphold the decision and the claimant was advised of this by letter dated 18 May 2020.

Post termination of employment

90. The claimant was "devastated" to be dismissed. It affected her confidence. She felt rejected because of her ill health.

91. At the date of termination of the claimant's employment she was 27 years of age and had been continuously employed by the respondent or seven years. The claimant earned £529.30 per week gross which equates to £425.32 net per week. The claimant was in receipt of pension to which the respondent contributed £10.49 per week.

92. In June 2020 the claimant was offered a job as a senior residential childcare worker with Inspire subject to references. The respondent provided a reference by return. The reference was factual and made no reference to the claimant being dismissed or the reasons for it. The offer was withdrawn. The claimant was told that this was because one of the referees did not respond quickly enough.

93. The claimant started a part-time Open University degree course in Psychology and counselling in August 2020. She also earned £233.26 from Allneeds Recruitment Company Limited working as a cleaner at a holiday park. The respondent provided a reference.

94. The claimant found new employment with Newcross Healthcare on 25 November 2020 and does not seek loss beyond this date.

Observations on the evidence

95. All the witnesses gave their evidence in a clear way. The Tribunal considered they were giving an honest account of events as they remembered them. The Tribunal had no doubt that Mr Cooke reluctantly reached what he described as "an awful decision" not only for the claimant but for himself.

96. There was no real point of difference between the parties on most of the material findings in fact.

97. There was a dispute about the support meetings. The claimant said that they did not happen. Mr Cooke and Mr Jung understood from Ms Thomson that they did happen but there was no written record. The Tribunal noted that the claimant and Ms Thomson were both responsible for arranging support meetings. Ms Thomson did complete the return-to-work form. The Tribunal suspected that no note was taken of the support "meetings" because they were probably so short and informal that there was little point in doing so which is probably why the claimant did not consider them to be meetings.

98. The claimant said that during her consultation with the occupational health physician in February 2020 she made him aware that she had asked for reduced hours. The claimant said that he agreed that it would be sensible. This was not mentioned in the 2020 OH Report. The 2020 OH Report was made available to the claimant before the Medical Dismissal Hearing at which the claimant did not mention to Mr Cooke that she had discussed with the occupational health physician.

99. The claimant knew in January 2020 that her employment might be terminated. She mentioned "cutting" her hours at her return-to-work interview on 22 January 2020 and expected it to be discussed when she met Mr Cooke. The Tribunal considered it likely that she did mention this to the occupational health physician. As the claimant saw the 2020 OH Report before it was released to Mr Cooke the Tribunal considered it surprising if the issue was as important as the claimant now maintains that at the time, she did not challenge the occupational health physician about this. Having considered notes of the Medical Dismissal Hearing and the emails sent as part of the appeal the Tribunal's impression was that at the time the claimant's main concerns was that her colleagues did not understand the nature and extent of her disability; she was concerned about their lack of training about her condition and how to support her if she had a hypoglycaemic attack. These appeared to be the concerns that were addressed in the 2020 OH Report.

The Respondent's Submissions

Unfair dismissal

100. The claimant has been dismissed due to her capability which is a potentially fair reason to dismiss and that it is capability by reference to the claimant's health. The respondent was clear that the claimant was a very good support worker and also that she suffered genuine difficulties associated with her disabilities.

101. When assessing the fairness of the respondent's decision to dismiss on the grounds of capability the factors to be considered include an assessment of:

a. The nature of the claimant's ill health.

b. The extent of her length and frequency of her absence.

c. The impact of her absence on the respondent's service and the rest of the workforce.

d. The extent to which the respondent ascertained the medical position.

e. The extent to which the respondent made the claimant aware of the position.

f. The extent to which the respondent followed its own procedures.

g. The extent to which alternative options were explored.

The nature of the ill health

102. The nature of the claimant's conditions is well established and documented and accepted by the Respondent. The claimant's conditions will naturally make her more susceptible to period of sickness absence from time to time.

103. The Tribunal was referred to the amount of absence which has taken place over the last three years of the claimant's employment. Absence was a significant issue. From 2017 through to the termination of the claimant's employment in 2020 saw over 300 working days lost over a significant number of episodes of absence.

104. The Tribunal was referred to the respondent's evidence regarding the very vulnerable adults that the respondent supports; the need in their lives for structure and consistency of care; and the impact that absence has on its ability to provide a service to the people the respondent supports and the knock-on effect it has on the rest of the workforce. This impact on the respondent's service was a key driver behind the steps the respondent took to manage the claimant's absence.

Ascertaining the medical position

105. The respondent took appropriate and reasonable steps to ascertain the claimant's medical position. Her health concerns were well known to the respondent and the Tribunal has been referred to the 2018 OH Report and 2020 OH Health Report.

106. The respondent is entitled to take these reports at face value when considering the answers to the questions about how the claimant's role could be adjusted and also, importantly, when assessing the likelihood of there being further absences after the Medical Dismissal Hearing. The respondent's witnesses highlighted the passage from the 2020 OH Report which stated that the claimant would remain at risk of further sickness absences and it would not be possible to predict the timing, frequency or severity of any future symptom events. The respondent took the reasonable view that, in assessing the likelihood of future absences, it was instructive to look at absence patterns over recent years.

Following a fair process

107. It is the short-term absence part of the Policy that has been followed. It was accepted that, when being referred to some of the precise wording of the policy, a case can be made to say that the long-term absence process should have been followed.

108. The respondent's position was that following the short-term absence policy was a reasonable decision for the respondent to have taken in this case. Mr Jung in particular explained under cross-examination that there had been a

mixture of short-term and long-term absence and that what was important in his view was to look at the overall picture. Also, while it is accepted that the long-term process does not contain the various stages of the short-term policy, the principles from the long-term absence that process have been observed in the respondent's following of its short-term absence process e.g. OH referrals; phased returns to work; reviewing working arrangements.

109. One of the factors for the Tribunal to consider is the extent to which the respondent made the claimant aware of the position in respect of her attendance. The regular review meetings and stages associated with the short-term absence process (which the claimant accepted she was familiar with having been through it in 2017), could have left the claimant in no doubt as to which part of the policy was being implemented and what the potential consequences could be of progressing through the stages.

110. While the suggestion that this is too mechanical and inappropriate a way of dealing with disability related absences, the choice of process was reasonable and that it did encompass the supports envisaged by the long-term process.

111. The respondent should not be criticised in this case, where a case could be made for either process to be followed and where the different stages, the respondent progressed through have provided multiple opportunities to discuss matters with the claimant over the 18-month period from July 2018 to the claimant's dismissal in February 2020. The process followed would certainly meet the principles that have emerged from case law over the years regarding the necessary procedural steps an employer should take to show that a fair process has been followed.

General reasonableness of decision to dismiss

112. Taking the above factors into account, the Tribunal has to assess whether the decision to dismiss falls within the range of reasonable responses that a reasonable employer in those circumstances and in that business might have adopted.

113. The respondent says its decision has to fall within that range of reasonable responses. The respondent had concerns regarding the claimant's attendance for over three years and had spent that time going through the various stages of absence management. The process which led to the claimant's dismissal took place over 18 months and was against the backdrop of the prior year where the claimant's attendance had been managed.

114. The respondent was entitled to take the view that attendance levels over this time were not sustainable for a charity providing a service to very vulnerable adults. The respondent took reasonable steps to support the claimant to improve her attendance including taking account of occupational health information at appropriate points during the absence management process.

115. The respondent says that it was also entitled to take the view that there was a likelihood of further absences occurring in the future given the content of the 2020 OH Report and the experience of the history of absence. The respondent was entitled to take the view that, having suggested reduced hours previously in May 2019 (when the claimant was on a first written warning) and in September 2019 (when the claimant had just been given a final written warning), that it was not a solution that was going to sufficiently address the claimant's absence particularly given that neither the 2018 OH Report or the 2020 OH Report suggests reduced hours as an adjustment that would help. It is a common adjustment to see in OH reports but was not something suggested in either report in this case.

116. Accordingly, when considering alternatives to dismissal such as reduced hours, the respondent acted reasonably when, in its assessment of the case as a whole, it took the view that the absences were not sustainable and that they had reached the point after three years where it was appropriate to dismiss. Accordingly, the claim of unfair dismissal should be dismissed.

Disability discrimination

Section 21 Failure to make reasonable adjustments

117. The respondent accepted that the claimant was contracted to work 40 hours a week – which is the PCP for this part of the claim. The question here is whether the claimant was placed at a substantial disadvantage as a result of this PCP being applied.

118. This is a tricky question. There is nothing within the medical reports to suggest such a disadvantage and the evidence before the Tribunal was that, when she was feeling well, the claimant would not just work 40 hours a week but she would regularly exceed that by accepting additional hours. So, there is no substantial disadvantage on the face of it for the claimant working 40 hours a week.

119. The suggestion is that the PCP places her at a substantial disadvantage during times when she is suffering symptoms associated with her conditions. In that regard, other than the claimant saying there would be some occasions where, if not feeling great, she might be able to do a couple of days a week rather than five. There has not been any other evidence to show that a requirement to work 40 hours a week placed her at a substantial disadvantage compared to people without her disabilities.

120. The 2018 OH Report and 2020 OH Report do not suggest that full time working exacerbated the claimant's conditions or that it made absences more likely. It was acknowledged that when it was put to Mr Jung in cross examination, his words were "it stands to reason" that it would be harder for someone with the claimant's conditions to work full time than those who do not suffer the same conditions.

121. If the Tribunal accepts that a substantial disadvantage has been evidenced, it is a question of whether it would have been reasonable for the respondent to make that adjustment and to have reduced the claimant's hours.

122. In this respect, it is a slightly strange scenario whereby the respondent has expressed an openness in May and September 2019 to the claimant reducing her hours. The Tribunal heard the respondent's evidence that it cannot force the claimant to reduce her hours (which would give rise to allegations of discrimination in of itself) and that it required engagement from the claimant.

123. The claimant indicated she did wish to reduce her hours upon her return to work in January 2020. Given that the claimant was facing a medical dismissal hearing where the respondent was considering the possible termination of the claimant's employment, Mr Gorry submitted that it was not a reasonable adjustment for the respondent to make. Whether the adjustment would have been reasonable at that time has to be considered in the context of all of the other circumstances of the case.

124. By February 2020, the respondent had reached the stage where, three years into absence management, a decision was being taken about the claimant's continued employment. Had the decision been to continue with the claimant's employment then Mr Gorry suggested that a reduction in hours would have been a reasonable adjustment to have made, as it would have been if it had been explored in May or September 2019 but, by early 2020, the respondent was assessing the overall picture in respect of the claimant's attendance and its impact on service delivery and, in the context of their decision to dismiss, it was not reasonable for the respondent to reduce the claimant's hours at that time.

Section 15 Discrimination arising from disability

125. Mr Gorry accepted that accept that a decision to dismiss will meet the relatively low threshold for "unfavourable treatment" and, given the number of absences which were disability related he also accepted that that treatment has arisen in consequence of the Claimant's disabilities.

126. Accordingly, the key aspect for the Tribunal to consider in this case is whether the respondent can objectively justify the dismissal as a proportionate means of achieving a legitimate aim.

127. He said that the respondent has identified a legitimate aim in this case. The respondent's evidence has been that it requires employees to meet certain levels of attendance in order to provide its service to vulnerable adults. There ca not be any dispute that the respondent has shown a legitimate aim. The people the Respondent supports require up to 15 hours of one to one support per day and without staff attending to provide that support, the respondent would face serious safeguarding issues. On top of this is the evidence showing the need for structure, certainty and consistency of support.

128. The part of the test which is more open to debate is whether the respondent's process of managing absence and ultimately dismissal could be viewed as a proportionate means of achieving that legitimate aim.

129. This question of proportionality is very much a fact-sensitive issue for the Tribunal.

130. Could the respondent have used less discriminatory means to achieve the same objective? In this regard, when considering what other means could have been used to achieve the legitimate aim that has been identified, Mr Gorry made the following observations.

131. He did not consider it would have been proportionate for the respondent to allow further time for attendance to improve after having spent three years managing absence. He also said that the level of the claimant's absence was not compatible with the respondent's legitimate aim so that it would not have been proportionate for the respondent to simply accept such a volume of absence.

132. He submitted that the only factor in this case which could genuinely be argued as a less discriminatory way of achieving the aim is the question over the reduction to part time hours.

133. He had a commented on this as part of his submission on the unfair dismissal claim. Could a reduction to part time hours have enable the respondent to still achieve its legitimate aim?

134. His submission was that the evidence in this case suggests not. While he acknowledged that the claimant felt there would be occasions where she could work two or three shifts a week even if she was not feeling great, this has to be balanced against the fact that two medical reports did not consider part time working to be something that would support the claimant's attendance. It also has to be balanced against the claimant's absence history where there are several episodes of absence lasting for a week or more and where, whether contracted to work two days or five days, she would be absent from work. It also needs to be balanced against the passage from the 2020 OH Report which has been referred to repeatedly regarding the risk of further sickness absence.

135. In summary, when addressing whether the respondent's actions in dismissing the claimant were a proportionate means of achieving the legitimate aim of ensuring appropriate levels of attendance to provide its service to very vulnerable adults, Mr Gorry submitted to the Tribunal that the respondent has satisfied that test and that this part of the claimant's claim should be dismissed.

Remedy

136. If the Tribunal finds in the claimant's favour due to the respondent having failed to follow a fair process, the respondent's position is that, had a fair process been followed, the overall outcome would have been the same and that any compensation should be restricted to reflect that amount.

137. If the dismissal is found to have been unfair and/or discriminatory, the Tribunal will need to assess what would have been likely to happen to the claimant's employment. The respondent's position is that it is extremely likely that there would have been further absence issues (as predicted by the 2020 OH Report) so that if dismissal in February 2020 is unfair/discriminatory, there is a strong likelihood that the respondent would have been able to dismiss within the space of the next two to three months.

138. On injury to feelings, the Schedule of Loss refers to the top of the lower band of the current Vento scales. There has been little evidence provided regarding the impact of the alleged discriminatory treatment beyond a short reference

within the claimant's witness statement. In light of this, and taking into account that the alleged discrimination has been within the context of the respondent having said that the claimant was a good Support Worker and did not how genuine the absences were an award in the lower part of the lower band would be more appropriate.

The Claimant's Submissions

Unfair Dismissal

139. The respondent did not act reasonably in dismissing the claimant. It did not follow its procedures. The long-term procedure was applicable in this case. The claimant should have been managed under that procedure as most of her absences traced to her disabilities.

140. The claimant does not accept that components of the long-term procedure were cover. The review meetings were short and formulaic. They focussed on the number of days absence and number of episodes of absence. There was no detailed discussion about the underlying conditions, what supports and adjustments were appropriate, probably further medical input and the parties would have got to the point of reducing hour more quickly.

141. The claimant did engage when there was a recorded discussion about support. Other than not going on long walks and phased returns no adjustments were made. Had the long-term procedure been followed such meeting were integral. The claimant says that she did not have support meeting the Tribunal was invited to accept her evidence. There was no direct evidence to contradict her.

142. The claimant asked for a reduction of hours at the return-to work- meeting on 22 January 2020. The claimant's evidence was that she knew her absence was a concern. If she reduced her hours, even when she was not feeling her best, she would be able to work two shift a week rather than 40 hours which was not possible when she wasn't feeling right or suffering. This was effectively agreeing with Mr Cooke's proposal in September 2019. The decision was deferred but in fact implemented on a temporary basis by use of accrued annual leave.

143. There were no further absences since the return on 22 January 2020.The 2020 OH Report narrated improvement in health following a change in medication. There was reference to a risk assessment being carried out. If there was uncertainty clarification or further medical advice should have been taken. There was no risk assessment or follow up on OH on adjustments.

144. Had the respondent acted reasonably it would have followed the correct absence management procedure, implemented OH suggestion to carry out a risk assessment and sought further feedback on adjustments taken into account the improvement in health and allowed the claimant to reduce her hours. Mr Jung should not have had any involvement in the decision to dismiss. The evidence suggested that there was a clear path to a substantial reduction in risk of further absence.

Disability discrimination

Section 21 Failure to make reasonable adjustments

145. The Tribunal was referred to *Secretary of State for Work and Pensions (Jobcentre Plus) v Higgins 2013 EqLR 1180*. The Tribunal should identify the PCP; Identify the persons who are not disabled in order to compare the effect of the PCP; and identify the nature and the extent of the substantial disadvantage suffered by the employee.

146. The claimant says that the contractual requirement to work 40 hours per week is a PCP. The comparator is support worker with no disability who works 40 hour per week contract. The claimant found it very difficult to work 40 hour week if feeling unwell on account of disabilities. As such PCP placed her at substantial disadvantage in comparison with employees of respondent who are not disabled.

147. The Tribunal was referred to the disadvantage can be seen from sickness absence history. There have been various occasions when the claimant has been unable to work to work full 40 hour week due to disability related illness.

148. The claimant says that by requiring her to work 40 hours per week she was absent from work. She said that she would have been able to keep working if unwell if core hours were only 16 or even 24 hours per week, where she would have been unable to do the full 40 hours. Reasonable step to take would have been to permit reduction in hours. The respondent partially took the step by permitting the claimant to work reduced hours and use accrued leave after returning to work on 22 January 2020). This had been considered in September 2019.

149. The question is not "what ought reasonably to have been offered" to the claimant, nor whether what was offered was reasonable, but what steps it was reasonable to have to take in order to avoid a particular disadvantage. Reduction in hours would have avoided the disadvantage.

Section 15 Discrimination arising from disability

150. The respondent concedes that the claimant was dismissed because of something (absences) arising from her disability.

151. The issue is whether this was a proportionate means of achieving a legitimate aim: avoiding a detrimental impact.

152. The Tribunal should consider whether dismissal was an appropriate means of achieving a legitimate aim: avoiding detrimental impact on those being supported.

153. The Tribunal was referred to *DWP v Boyers UKEAT/0282/19/AT*. When considering whether a discriminatory measure is objectively justified, the Tribunal 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.

154. This requires evidence regarding the impact on the respondent's service users which the continued employment of the claimant would have had. The claimant accepted that her absences had had an adverse impact. We also had evidence in general terms but not detailed evidence from the respondent's witnesses on impact of absence on support provision and that it is was demoralising for other staff. There was no detailed evidence about the level of strain on service provision which the claimant's continued employment was causing.

155. If legitimate aim or aims are established, the Tribunal should weigh those needs against the seriousness of the impact of the dismissal on the claimant. The Tribunal would have to consider whether dismissal was an appropriate means of achieving the legitimate aims and reasonably necessary in order to achieve those aims.

156. In this case the answer is no. The claimant was at work and not on sick leave when dismissed. Her insulin had changed, and her health was improving. A reduction in hours would also have reduced risk of further absence.

Remedy

157. A revised schedule of loss was produced. The claimant sought compensation. A basic award of £3,175.80 (£529.30 x 6).

158. Mr Mowat said that if the Tribunal accepted that a reasonable adjustment was to reduce the claimant's hours to 16 hours per week then her loss of earning from the date of dismissal until 25 November 2020 were £6,634.68 (£170.12 x 39 weeks). From this sum pay in lieu of notice (£1,942.22) and earning from alternative employment (£233.26) should be deducted leaving a balance of £4,459.20. Added to which is pension loss of £80.52 (£4.19 x 39 weeks, that is £163,41 less pay in lieu of notice pension contribution of £82.89.

159. The claimant sought an injury to feelings award of £9,000.

Discussion and Deliberations

160. In this case the claimant claims unfair dismissal and that she has been discriminated against for reasons which relate to her disability, in particular

under section 15 and section 21 of the EqA. The Tribunal reminded itself that even if a dismissal amounts to unlawful discrimination that that does not mean that the dismissal is automatically unfair under the ERA as separate considerations of reasonableness apply. The Tribunal considered first the unfair dismissal question.

Unfair dismissal

The reason for dismissal

161. The Tribunal first considered what was the reason or principal reason for the dismissal? The Tribunal accepted that Mr Cooke highly regarded the claimant and considered her to be a good support worker. The Tribunal believed Mr Cooke's evidence that he dismissed the claimant because of her ill health. This is a potentially fair reason as it relates to the claimant's capability.

Reasonableness of dismissal in the circumstances

162. The Tribunal then turned to consider whether the respondent acted reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant.

163. The key question for the Tribunal was whether in dismissing the claimant for reasons of capability the respondent acted within the range of reasonable responses.

164. In this case the claimant has underlying conditions that amounts to disabilities under the EqA. The Tribunal acknowledged that the respondent was entitled to manage employees including those with disabilities to maintain a reasonable level of attendance.

165. While this case related to ill health due to an underlying medical condition when the decision to dismiss was taken the claimant had returned to work. In these circumstances the Tribunal agreed with Mr Gorry's submissions about the factors to be considered in assessing if the respondent had gathered sufficient evidence, conducted sufficient investigation and whether sufficient time had

elapsed to allow it to make an informed and reasonable decision in all the circumstances.

166. *The nature of the claimant's ill health and the job*: in this case, the claimant is a disabled person under section 6 of the EqA. The claimant was diagnosed with type 1 diabetes as a teenager. Since around 2017 she has a recurrent skin condition (hidradenitis suppurativa) which requires medical and surgical treatment. In 2019 the skin condition made walking long distances difficult. The claimant's job involved supporting vulnerable adults residing in a residential home who needed structure and consistency with the activities of daily living including helping with finances, personal care and community visits.

167. *The extent of her length and frequency of her absence:* there was no dispute about the length and number of episodes of medical absence. The Tribunal noted that the claimant had been subject to absence management for a number of years and in the 12 months to February 2020 the claimant had eight episodes, three of which were of long duration: 50, 65 and 24 days.

168. *The impact of her absence on the respondent's service and the rest of the workforce*: the evidence of the respondent's witnesses about the need for structured and consistent care for the vulnerable people it supports was not challenged. There was little evidence about the impact of other employees. The Tribunal accepted that during her absence the claimant's shifts would need to be absorbed by colleagues resulting in a cost to the respondent including the cost of sick pay.

169. *The extent to which the respondent ascertained the medical position*: although the claimant was a disabled person throughout her employment with the respondent, it appeared from the evidence that she was first referred to occupational health in May 2017 while the claimant's absences were being managed under the short-term procedure. The 2017 OH Report was not produced.

170. The Tribunal also noted that when the claimant's final warning expired at the end of April 2018, she was referred to occupational health. The 2018 OH

Report refers to the earlier 2017 OH Report and to the claimant working the equivalent of full-time hours, early and late shifts. It refers to her diabetes being now under control and the possibility of further absences for the treatment of her recurrent skin condition which would take longer to heal because of her diabetes. This appeared to the Tribunal to be the point at which the respondent had medical advice about the interface between the claimant's diabetes and skin condition. In particular that her diabetes exacerbated any abscesses and they would be slower to heal.

171. The respondent managed the claimant's subsequent absences from July 2018 under the Policy's short-term procedure. The claimant attended review meetings with her line manager. The amount, frequency and reason for the absences which were mostly disability related were discussed. The claimant was issued with warnings about the need to demonstrate a sustained improvement at work.

172. In May 2019 following a return to work after a lengthy absence, Mr Cooke became involved directly. He discussed the claimant's absences and offered a phased return to work and suggested a number of supports that could be put in place to assist the claimant. The claimant asked not to participate in long walks which was agreed. Mr Cooke agreed to allocate the claimant with consideration to her physical health.

173. There was to be discussion at the June Final Review. This was rescheduled to 25 June 2019 as the claimant was absent. No Final Review took place in June as the claimant had a long absence related to the claimant's skin condition.

174. When the claimant returned to work in August 2019 Mr Cooke met with her. He continued to manage the claimant's absences under the Policy's short-term procedure. During the August Final Review the claimant updated Mr Cooke about medication and the medical and surgical treatment she had received for her skin condition. She also said that she was consulting a dermatologist about further treatment. The Tribunal considered that from these discussions Mr Cooke was aware of the nature of her absences and the ongoing treatment. He agreed to continuing the adjustment relating to walking and allowing the

claimant to remain in her current location. It was at this point the claimant was issued with a final written warning.

175. Around September 2019 while the claimant was on a final writing warning Mr Cooke mentioned to the claimant the possibility of reducing her hours which she agreed to consider. The Tribunal noted that a temporary reduction of hours was mooted by Mr Cooke in May 2019 when the claimant was on a formal warning. Mr Cooke did not seek medical advice about whether this could help improve the claimant's attendance levels. The Tribunal's impression was that Mr Cooke considered it to be one of a number of supports that he could offer employees as part of absence management. The claimant did not pursue this either in May 2019 or September 2019. She worked additional hours in September 2019, October 2019 and November 2019.

176. The claimant had a further long absence in December 2019 which resulted in the Medical Dismissal Hearing being arranged. Before this took place, the respondent obtained an occupational health report by an occupational health physician following a face-to-face consultation. The referral documentation was not produced but the 2020 OH Report detailed the specific questions asked by the respondent.

177. The 2020 OH Report was obtained shortly before the decision to dismiss was taken. It explained how the claimant's condition (diabetes) had stabilised which may reduce further absences. The claimant's skin condition was still under review. There was no obvious medical barrier to the claimant continuing to attend work and engage with work related activities associated with her role subject to Management's consideration of the advice and recommendations within the 2020 OH Report. No specific restrictions on her core activities form a health perspective were suggested in advance of a risk assessment being completed. It was recommended that the assessment should encompass the claimant's continuing deployment and how she may be supported if she should experience low blood sugar while at work; a review of first aid/support arrangements for such eventuality; consideration of time allowances for attending medical appointments associated with diabetes as well as periods of

sick absence associated with the condition. The claimant remained at risk of experiencing further sick absences going forward and symptoms associated with underlying conditions. It was not possible to predict the timing, frequency or severity of any future symptom event.

178. The claimant told Mr Cooke at the Medical Dismissal Hearing that she had been in hospital because of her insulin not working. She had new medication and had not had any abscesses since then. She was hopeful about the improvement in her health and had returned to work on a phased basis on 22 January 2020. Given the level of her absenteeism the claimant wanted to work three days as she could manage that if she was unwell.

179. The Tribunal considered that at the time of dismissal Mr Cooke was aware of the claimant's health condition and understood her role as a support worker having previous undertaken the role and having supervised others in the role.

180. *The extent to which the respondent made the claimant aware of the position*: the claimant was familiar with the absence management process. She had previously received a final written warning in 2018. The Tribunal was satisfied that the clamant knew that her future employment was at risk and this was a significant factor in her offering to reduce her hours in January 2020.

181. *The extent to which the respondent followed its own procedures*: in this case that respondent admitted that it followed the Policy's short-term procedure. The Tribunal acknowledge that when employees contact First Care 24 hours the nature of the absence may be unclear but the return-to-work meeting, which failing the triggers under the Policy's short term procedure should ensure that the position is clarified and the appropriate procedure is identified and followed.

182. It seemed to the Tribunal that if the respondent has a absent management policy which has at its core principle fulfilling obligations under the EqA the managers applying and human resources advising on the Policy should carefully consider and follow the appropriate part of the procedure.

183. In this case while over the previous 12 months the claimant had episodes of absence lasting less four weeks and more than four weeks the Tribunal did not

consider that the Policy's short-term procedure was applicable even when as suggested by Mr Jung the overall picture is considered.

184. In the Tribunal's view the claimant had a continuous period and/or several periods of absence traced to a single underlying medical condition. This is a long-term sick absence under the Policy. There should have been initial review.

185. The Tribunal considered that the formal review meetings in 2018 were similar to initial review as they were set against the background of the 2018 OH Report and identified that the claimant had an underlying medical condition for which she was given time for recovery before further review.

186. In 2019 the respondent continued with Policy's short-term procedure. The Tribunal considered that by this time and especially when Mr Cooke became involved in the process the respondent should have made sure that the appropriate part of the procedure was being followed.

187. While the Tribunal acknowledge some action at the formal meeting in August 2019 was envisaged under the long term procedure such as phased return to work; continuing reasonable adjustments discussed in May 2019; allowing further time for recovery; and advising that continued employment was at risk, the Tribunal felt that had the August Final Review been conducted under the Policy's long term procedure consideration might have been given to obtaining a occupational health report at that stage about the skin condition; was it a disability; what (if any) adjustments could be considered that might improve the claimant's attendance levels; and whether she will be capable of regular and effective attendance in the future. There were to be support meetings between the claimant and manager. Mr Cooke had a discussion with claimant in September 2019 about the possibility of reducing her hours.

188. On her return to work in January 2020 the claimant worked a phased return which is encouraged where appropriate under the Policy's long-term procedure.

189. The Tribunal noted that both the short-term and long-term procedures envisage a medical dismissal hearing. The difference is that under the latter a

medical report must be obtained. The 2020 OH Report was obtained before the Medical Dismissal Hearing.

190. The claimant was offered a right of appeal to Mr Jung. The Tribunal noted that there had been discussion between Mr Cooke and Mr Jung about support meetings which was surprising given that advice could have been obtained from Human Resources. That said the Tribunal did not form the impression that Mr Cooke had robust support from Human Resources during the process. The Tribunal did not consider that Mr Jung was part of the decision-making process and his involvement at the appeal stage was not unreasonable.

191. It was understandable that the appeal hearing was not face to face. It was unfortunate that as offered it did not take place by at least conference call but given the claimant's agreement it was reasonable that the appeal was conducted in writing.

192. The Tribunal's impression was that Mr Jung approached the appeal with an open mind. While he addressed the issues that were raised in the claimant's emails the Tribunal felt that he did not necessarily grasp the point that the claimant was trying to make. For example, the claimant said that the warnings were unfair. Mr Jung checked and concluded that they were issue for right and proper reasons and were not appealed at the time. The point put to Mr Jung at the final hearing was that the procedure ought to have been the long-term procedure. Mr Jung was unsure about the point being made about risk assessment. At the final hearing it was suggested that Mr Jung should have sought clarity from occupational health. However, the Tribunal considered that while the 2020 OH Report referred to a risk assessment this related to supports while the claimant was *at* work not with bring her levels of absence to an acceptable standard.

193. At this stage in the deliberations the Tribunal was not unanimous. Tribunal Member Gallacher (the Minority) considered that the respondent did not act reasonably in following the Policy's short-term procedure. He felt that the discussion in September 2019 about shortening the claimant's working week

might have been more fruitful if the August Final Review had been arranged under the long-term procedure and a medical report had been obtained.

194. The Minority also considered that a reasonable employer, being aware of the claimant asking at a return-to-work meeting on 22 January 2020 to reduce her hours and being told that it would be discussed with Mr Cooke, would have obtained specific medical advice on whether a reduction of hours would have improved the claimant's attendance levels and discussed this the claimant at the Medical Dismissal Hearing.

195. The Employment Judge and Tribunal Member Doherty (the Majority) had concerns about the respondent following the Policy's short-term procedure where there is an underlying medical condition.

196. The Majority did not consider that on the evidence presented that obtaining medical report in August 2019 would have made a difference. The respondent indicated in May 2019 a willingness to consider a reduction in the claimant's working hours. The respondent had put in place any adjustments that had been requested by the claimant. The respondent raised with the claimant a reduction in hours in September 2019. While the claimant said she would consider this, she did not revert to Mr Cooke. He could not impose the reduction unilaterally. The claimant worked more than her contracted hours after this discussion. In any event working a shorter working week would not have in the view of the Majority have avoided the long-term absence commencing in December 2019.

197. Notwithstanding the concerns about following the Policy's short-term procedure given the leniency with timescales; the issues discussed at the various meetings; the adjustments that were put in place; the support offered and the obtaining of the 2020 OH Report the Majority could not say that the process that was undertaken in this particular case, fell out with the range of reasonable responses open to a respondent.

198. *The extent to which alternative options were explored*: in this case there was a review of working arrangements. In May 2019 following an absence of 50 days Mr Cooke mentioned to the claimant the option of a temporary measure of

reduced hours and work allocation to suit the claimant's health. The issue of a shorter working week was raised again by Mr Cooke in September 2019 after an absence in June 2019 of 65 days following by a phased return to work. The claimant did not pursue the matter further until she mentioned reducing her hours on her return to work in January 2020 after an absence of 24 days in December 2019.

199. At the date of dismissal (26 February 2020) she had returned to work on phased basis on 22 January 2020. This was a case where the respondent was considering whether recent clinical treatments and medication for the claimant's conditions would bring her absenteeism down to an acceptable level.

200. The Tribunal noted that in February 2020 while the claimant was hopeful that the change in her medication for diabetes would help manage her blood sugar levels, she remained at risk of further sick absences and symptoms associated with her underlying condition. She remained on mediation for her skin condition and anxiety/depression. The occupational health physician could not predict the timing, frequency and severity of future symptom events.

201. The Minority considered that a reasonable employer would have obtained specific medical advice on whether a reduction of hours would have improved the claimant's attendance levels and discussed this the claimant at the Medical Dismissal Hearing.

202. The Majority noted that there had been periods during her employment when the claimant had no absences. A final written warning had expired in April 2018 as there had been a sustained improvement although absence reoccurred in June 2018. The claimant also had no medical absences between 15 August 2019 and 19 December 2019. However there had also been significant lengthy absences despite offers of adjustments and having previously suggested a reduction on hours. That proposal was not pursued by the claimant and she worked additional hours. The respondent requested medical advice about workplace adjustments that the claimant felt might alleviate her absences. The respondent was unaware that the claimant had raised reducing her hours with

occupational health and in any event the 2020 OH Report did not suggest a reduction of hours as an option to improving the claimant's attendance. The claimant had sight of the 2020 OH Report before the Medical Dismissal Hearing and did not say to the respondent that it was incomplete.

203. The Majority accepted some employers may have taken the approach which the Minority considered to be reasonable, but the Majority could not say that the respondent's approach of assessing the case as a whole when an employee has return to work following several periods of long-term absence fell out with the band of reasonable responses that an employer might take.

204. Taking account of the size and administrative resources of the respondent's as well as all these circumstances, the Majority accepted that to dismiss the claimant in the circumstances in which the respondent did was not one which no reasonable employer would make and therefore could not be said to fall out with the band of reasonable responses. Accordingly, the respondent acted reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant.

Disability discrimination

205. Turning to disability discrimination, it should be emphasised that the legal tests for determining discrimination are different from the test for determining unfair dismissal. While the latter allows an employer a range of reasonable responses, the former is an objective test requiring the Tribunal to consider whether the dismissal could be said to be discriminatory in breaching the respondent's obligations under the EqA.

206. The Tribunal considered whether it was appropriate to consider section 15 or section 21 first. Although there is no longer a specific provision making a requirement to consider the reasonable adjustments duty first where there is a link between the reasonable adjustment required and a claim of discrimination arising from disability, any failure to comply with the reasonable adjustments duty must be considered 'as part of the balancing exercise in considering

questions of justification. However, it is unlikely that disadvantage which could be prevented by a reasonable adjustment could be justified.

207. The Tribunal therefore decided it appropriate to consider the reasonable adjustment duty first.

Section 21 Failure to make reasonable adjustments

208. The Tribunal started by considering the PCP applied by the respondent. The claimant relied on the provision that the respondent required her to work 40 hours per week. The respondent accepted that this was a PCP. The Tribunal noted that a PCP is construed widely, and that the claimant's contract of employment. required her to work 40 hours per week.

209. The Tribunal then considered the identity of the non-disabled comparators. The Tribunal accepted the comparator identified by the claimant: a support worker with no disability who is contracted to work 40 hour per week.

210. Next the Tribunal considered whether the requirement to work 40 hours per week put the claimant at a substantial disadvantage in comparison to a support worker with no disability who works a 40 hour per week contract. The Tribunal noted that "substantial' disadvantage means "more than minor or trivial". The Tribunal also noted that although substantial disadvantage represents a relatively low threshold the Tribunal should not assume that simply because an employee is disabled the employer is obliged to make reasonable adjustments.

211. The claimant's position was that when she was suffering from symptoms associated with her conditions, she finds it difficult to work five days (40 hours) and she was therefore was absent from work. As such she said that the PCP placed her at substantial disadvantage in comparison with full time support workers of respondent who are not disabled.

212. The Tribunal was referred to sickness absence history from which the claimant said that the disadvantage could be seen as there had been various occasions when the claimant has been unable to work to work a 40-hour week due to

disability related illness. Mr Jung accepted that it would be harder for someone with the claimant's conditions to work 40 hours per week than those who do not have those conditions.

213. The Tribunal acknowledged there were a few occasions when the claimant had an absence of one or two days. The Tribunal noted that in May 2019, the respondent proposed that the claimant temporarily reduce her hours of work. This proposal was not pursued by the claimant although she asked for another adjustment (not going on long walks) to which the respondent agreed. The claimant had a two-day absence on 8 June 2019. The claimant was then absence for 65 days. She returned to work in August 2019 following which in September 2019 the respondent raised with the claimant working a shorter week which the claimant did not pursue. The claimant was then absent on 11 November 2019. The claimant was absent on 16 December 2019 followed by and two days prearranged holidays on 17 and 18 December 2019. The claimant was then absent from 19 December 2019 to 21 January 2020 (24 days).

214. The Tribunal noted that the 2020 OH Report made no reference to the claimant's conditions being exacerbated by working full time or that the hours worked made absences more likely. The Tribunal had some difficulty understanding how working 40 hours per week disadvantaged the claimant in relation to absences of seven days or more. The Tribunal accepted the claimant could be disadvantaged by working 40 hours per week if a sick absence of a day or so might be avoided if they were non-working days. The Tribunal therefore concluded that working 40 hours per week meant that the claimant placed the claimant at a substantial disadvantage.

215. The Tribunal then asked what step was reasonable for the respondent to have taken to avoid the particular disadvantage. In so doing, the Tribunal had in mind the EHRC's Code of Practice at paragraph 6.23 when it states that what is a reasonable step will depend on all the circumstances of each individual case and paragraph 6.28 which sets out examples of matters that may be taken into account when deciding what is a reasonable step for an employer to have to

take and these include: whether taking any particular steps would be effective in preventing the substantial disadvantage and the type and size of the employer. The Tribunal noted, at paragraph 6.29 that it is stated that ultimately the test of reasonableness of any step an employer may have to take is an objective one and will depend on the circumstances of the case.

216. The Tribunal referred to its findings. On 22 January 2020 the claimant said that she could not work full time and requested to "cut her hours". The claimant was advised by her line manager that she could discuss this request at a meeting scheduled with Mr Cooke. Meantime the claimant used her remaining annual leave to take days off. The Medical Dismissal Hearing did not take place until 26 February 2020 by which point the claimant had consulted with an occupational health physician and the 2020 OH Report was produced. At the Medical Dismissal Hearing the claimant raised reducing her hours. This had been previously raised by the respondent in May 2019 and September 2019. The claimant said that she mentioned reducing her hours to the occupational health physician at the occupational health consultation. The 2020 OH Report did not refer to this or suggest that reducing hours would have any effect on the claimant's attendance nor was it suggested as an adjustment. Mr Cooke said that had the claimant's employment not been terminated at the Medical Dismissal Hearing the respondent would have been willing to reduce her hours if she wanted to do so.

217. The Tribunal noted that the fact that reducing the working hours may not have made any difference is not determinative of this being a reasonable adjustment *(Noor v Foreign and Commonwealth Office* 2011 ICR 695 EAT) because there does not have to be a good prospect of an adjustment removing a disadvantage for that adjustment to be reasonable.

218. The Tribunal was mindful that reasonable adjustments are concerned with practical outcomes rather than procedures. The Tribunal's decision was not unanimous.

219. The Minority considered that had the claimant's hours been reduced in 2020 there was a prospect that her absences would be reduced. The respondent

was able and willing to make this adjustment previously and would have done so had it not terminated the claimant's employment. The Minority considered that the respondent could have taken the step to reduce the claimant's hours in January 2020 and it was a reasonable adjustment.

220. The Majority considered that the focus was not on whether reducing the claimant's hours would advantage her generally but whether that was a reasonable step for the respondent to have taken to avoid the claimant having to take sick absence. While to be reasonable the step does not need to be completely effective it does needs to have some effect in removing or reducing the disadvantage.

221. In the Majority's view the respondent had been managing the claimant's absence for years and displayed a willingness throughout to adopt the claimant's suggestions that she felt would help sustain her attendance at work. The respondent also made its own suggestions before there was any consideration about dismissal including reducing hours. While the Majority accepted that the claimant did not refuse to cooperate with this suggestion, she did not pursue the offer instead she worked additional hours in September 2019, October 2019, November 2019 and February 2020. The Majority considered that the pattern and length of the claimant's absences in 2019 did not suggest that working reduced hours would have had an effect on the claimant's sick absence. While in January 2020 the claimant was hopeful about the improvement in her health following a change in medication which was referenced in the 2020 OH Report, there was no evidence from occupational health or the claimant's GP that reducing hours would have an effect on reducing the level of claimant's sick absence.

222. The Majority concluded that while the respondent could have reduced the claimant's hours the only evidence that this would have any effect in removing or reducing the claimant taking sick leave was her vague assertion when facing dismissal that she may be able to come in for two/three shift if she was not feeling great. The Majority considered that when weighing up what was a reasonable step in this case, there was uncertainty that reducing hours would

have been an efficacious practical benefit in terms of alleviating the substantial disadvantage. There was a willingness to explore this possibility in 2019. However, given the claimant's lack of engagement on this and working additional rather than reduced hours the Majority concluded that in February 2020 it was not a reasonable adjustment.

Section 15 – Discrimination arising in consequence of disability

223. Mr Gorry helpfully conceded that the claimant had been treated unfavourably for a reason arising in consequence of her disability. The focus for the Tribunal was then on the question whether the respondent could objectively justify the treatment.

224. The Tribunal considered that there was evidence of the level and nature of support for which the respondent is funded to provide care to vulnerable adults; the importance of certainty and consistency; the need for staff to deliver that care and the potential consequences of disruption to planned care and safeguarding issues.

225. The Tribunal then considered the discriminatory effect of the measure on the claimant. The claimant was unable to sustain the level of attendance that was required; was subject to the respondent's absence management procedure and ultimately dismissal.

226. The Tribunal accepted that the level of the claimant's absences was incompatible with the respondent's aim. The Tribunal considered that it was appropriate for the respondent to manage her absences under the Policy with a view to exploring any supportive measures and making the claimant aware of the consequences of unsustainable absences no matter how genuine.

227. The Tribunal considered whether the respondent could have used less discriminatory means to achieve the same objective. The Tribunal's decision was not unanimous.

228. The Minority considered that the claimant had returned to work; her medication had changed and she was feeling better. Had the respondent reduced her

hours as requested and made the adjustment which the Minority considered reasonable this would have been a more proportionate way of the respondent achieving its legitimate aim and avoiding the claimant's dismissal.

229. The Majority acknowledged that respondent's decision to dismiss had a discriminatory effect on the claimant. The Majority considered whether the respondent could have reduced the claimant's working hours in January 2020. The Majority had no doubt that the respondent was able to accommodate less than full time working as part of its rota system. The focus was therefore on whether the claimant having return to work and then working part time (two/three shifts per week) would achieve the respondent's legitimate aim. The Majority considered that the claimant's absence history showed that the claimant was able from time to time to work several weeks without sick absence; while there were a few absences of less than a week the majority lasted several weeks. The 2020 OH Report indicated that the claimant was a risk of experiencing further sick absences and symptoms associated with her underlying conditions and it was not possible to predict the timing, frequency or severity of any future symptom events. The Majority did not consider that allowing the claimant to work reduced hours would have achieved the respondent's legitimate aim. For the reasons expressed earlier the Majority did not considered that working reduced hours would support the claimant's attendance at work. The respondent would still need to cover the claimant's absences regardless of the number of hours worked by her. Accordingly the Majority concluded that there had been no breach of section15 of the EqA.

Remedy

230. Having reached the conclusions that it did the Tribunal did not go onto consider remedy. The Tribunal dismissed the claims.

Employment Judge: Shona MacLean
Date of Judgment: 08 April 2021
Entered in register: 24 May 2021
and copied to parties