# EMPLOYMENT TRIBUNALS

**Claimant:** Mrs A Lake

**First Respondent:** Lawton Group Limited

**Heard at:** Bury St Edmunds (remote via CVP) **On:** 1 to 3 September 2021

**Before:** Employment Judge K Welch
Ms C Carr
Ms C Tufts

**Representation**

Claimant: Mr S Lake, her husband
Respondent: Mr P Singh, Solicitor

## REASONS

1. This decision was given orally on 3 September 2021. The Claimant requested written reasons.
2. The Claimant brought claims for unfair dismissal, direct disability discrimination, discrimination arising from disability, failure to make reasonable adjustments, breach of contract (notice pay) and unlawful deductions from wages.
3. The Claimant had withdrawn her breach of contract (notice pay) and unlawful deductions from wages claims at an earlier case management hearing.
4. The claim form was presented on 1 November 2019, following a period of early conciliation from 22 July until 22 August 2019.
5. The hearing was a remote public hearing, conducted using the cloud video platform (CVP) under rule 46. The tribunal considered it as just and equitable to conduct the hearing in this way.

6. In accordance with Rule 46, the tribunal ensured that members of the public could attended and observe the hearing. This was done via a notice published on Courtserve.net No members of the public attended.
7. The parties were able to hear what the tribunal heard and see the witnesses as seen by the tribunal. From a technical perspective, there were no major difficulties encountered. The participants were told that was an offence to record the proceedings.
8. Following discussion, we agreed the issues for the Tribunal to decide. The Respondent conceded that the Claimant was at all material times disabled due to epilepsy and that it knew of her disability.
9. The Claimant had failed to fully particularise her failure to make reasonable adjustments claim. At the earlier case management hearing she was ordered to provide further and better particulars of this claim. The Claimant's attention was drawn to the Equality and Human Rights Commission: Code of Practice on Employment (2011) and was directed to where she could find it. She was ordered to provide:
   9.1. The provision, criterion or practice ('PCP')/lack of auxiliary aid.
   9.2. The substantial disadvantage.
   9.3. The reasonable adjustment/provision of auxiliary aid.
10. Despite attempting to do so, the Claimant had not provided the PCP and/or the substantial disadvantage to substantiate her claim. The Respondent had provided a response pointing this out. The Claimant confirmed that she was not relying upon a lack of auxiliary aid for her claim and was therefore given further time to confirm the PCPs relied upon for the purposes of her failure to make reasonable adjustments claim, and the substantial disadvantage alleged to have been suffered. They are as set out below.

**Issues**

11. Direct discrimination s13 Equality Act 2010 (EqA)

11.1. Has the Claimant proved facts from which, in the absence of any other explanation, the Tribunal could decide that the Respondent treated her less favourably because of her disability than it treated or would treat others, contrary to section 13 EqA?

The Claimant relies upon her dismissal as the less favourable treatment;

11.2. The Claimant relies upon a hypothetical comparator. This was agreed to be a manager with similar levels of absence who does not have epilepsy and who is unable to return to work for 3 months.

Discrimination arising from disability

11.3. Was the Claimant treated unfavourably because of something arising as a consequence of her disability?

It was accepted that the dismissal dated 10 May 2019 was unfavourable treatment arising from the Claimant's sickness absence record due to her epilepsy.

11.4. In treating the Claimant in that way, what aim was the Respondent seeking to achieve?

11.5. Was that aim legitimate?

The Respondent relies on the legitimate aim of maintaining staffing levels and ensuring effective levels of attendance amongst staff by applying its absence policy.

11.6. Was the treatment a proportionate means of achieving that aim?

The Respondent relies upon the elongated application of its standard absence procedure.

Reasonable adjustments

11.7. Did the Respondent apply a provision, criterion or practice (PCP)?

11.8. The Claimant relies upon the following PCPs:

11.8.1. Failure to carry out return to work interviews;

11.8.2. Failure to carry out OH reviews after 3 months;

11.8.3. Failure to provide laptops or access to the computer system;

11.8.4. Failure to refer employees to the Access to work scheme;

11.8.5. Failure to carry out stress risk assessments as recommended by OH;

11.8.6. Failure to carry out regular risk assessments.

11.9. If so, did those PCPs place the Claimant at a substantial disadvantage in comparison with employees who did not share the Claimant's disability?

11.10. What is the alleged substantial disadvantage? The Claimant states that the substantial disadvantage was a lack of understanding of what she needed to return to work, her inability to return to work sooner, lack of support, reliance on friends and colleagues to drive her to work and the likelihood of increased seizures (stress risk assessment).

11.11. Would it have been reasonable for the Respondent to make reasonable adjustments in order to avoid the substantial disadvantage in question?

11.12. The Claimant relies on the following reasonable adjustments:

11.12.1. More regular risk assessments (including stress risk assessments);

11.12.2. Phased return to work;

11.12.3. Change in hours;

11.12.4. Shared office;

11.12.5. Off site/ home working;

11.12.6. Care plan;

11.12.7. Additional leave for appointments;

11.12.8. Place to rest and relax;

11.12.9. Advise welfare/ OH and first aiders so that they are equipped to provide assistance;

11.12.10. Training;

11.12.11. Including epilepsy in bullying and harassment policies;

11.12.12. Breaks;

11.12.13. Clear routine and work schedule; and

11.12.14. Exchanging work with colleagues.

11.13. In respect to the proposed reasonable adjustments, would each of the adjustments have alleviated the disadvantage suffered by the Claimant and did the Respondent offer to make any of those reasonable adjustments?

Unfair dismissal

11.14. What was the reason(s) for the Claimant's dismissal? The Respondent relies on capability.

11.15. If the reason was because of capability, was that sufficient to justify the Claimant's dismissal?

11.16. Was the decision to dismiss the Claimant fair and reasonable in all the circumstances?

11.17. Did the Respondent follow a fair procedure?

11.18. The Claimant relies upon the following as alleged unfairness:

11.18.1. The failure to provide reasonable adjustments to facilitate the Claimant's return to work;

11.18.2. The Claimant was dismissed because she had epilepsy;

11.18.3. There was a lack of support for the Claimant;

11.18.4. There was a lack of communication with the Claimant.

11.18.5. No account was taken of the Claimant's 9 years' service.

11.19. Was the decision to dismiss the Claimant within the range of reasonable responses?

Remedy

11.20. What remedy is appropriate should any of the claims above be successful?

11.21. If the Tribunal finds that the Respondent discriminated against the Claimant, should the Claimant be entitled to compensation, including compensatory losses and injury to feelings and, if so, how much (in accordance with the Vento guidelines (as amended))?

11.22. Has the Claimant mitigated her loss?

11.23. Does Polkey apply?

**Background**

12. The parties had agreed a bundle of documents and references to page numbers in this judgment relate to documents within that bundle.

13. The tribunal ensured that each of the witnesses, who were all in different locations, had access to the relevant written materials which were unmarked.

14. The Tribunal heard evidence in an agreed order which best suited the parties and their witnesses. We heard from:

    14.1. CT, dismissing officer

    14.2. JM – appeal officer

    14.3. SM – former colleague and the Claimant's sister;

    14.4. CL – Claimant's friend who attended some of the hearings with her; and

    14.5. the Claimant.

15. All of the witnesses had provided written statements as their evidence in chief (with some supplemental questions allowed with approval).

16. The Tribunal ensured that appropriate breaks were given, and asked the parties to request any additional breaks if they were required.

**Findings of fact**

17. The Claimant was employed by the Respondent as House Manager at the Hempton Field Care Home, having commenced employment on 1 April 2010. The Respondent operates a care home business.

18. The Claimant worked 30 hours a week. Her role was to manage the domiciliary staff including the domestic, kitchen, gardening, handyman, laundry and being the first contact for general enquiries. She liked her role, despite it being stressful and busy. She was a good employee who was well liked and respected in the home. The Claimant's employment was terminated by the Respondent on 10 May 2019.

19. The Claimant suffers with epilepsy, which began with her first seizure on 6 January 2017; she was officially diagnosed with epilepsy on 17 May 2018.
20. The Respondent accepted prior to the commencement of the hearing that the Claimant was a disabled person at all material times by reason of epilepsy, and that the Respondent knew of this disability.
21. The Respondent has a Sickness Absence Policy [p47-96] which applied to all its employees. This provides:

    "*All staff should be made aware at the earliest opportunity during their employment of the regular attendance that the Company expects, and of the effects that absenteeism has on patients, residents, other staff and the business…It is vital please that all potential employees are made aware of the high standards we expect*" [page 48].
22. Unfortunately, the Claimant suffered numerous seizures, both at home and at work between January 2017 and her dismissal in 2019. Her diagnosis took time due to the multiple tests required and the different medications being trialled.
23. Following a period of absence returning on 14 March 2017, the Claimant attended an Occupational Health (OH) appointment and a report was obtained dated 22 March 2017 [p98-100]. At this point, the Claimant had had two seizures, the last being on 24 January 2017. The OH report confirmed that the Claimant was fit to continue with her normal duties, although recommended a phased return to work, and flexibility within this plan, which was agreed by the Respondent. The OH report also recommended that the Respondent may wish to maintain periodic welfare checks/ open door policy, flexibility to attend essential hospital appointments, and a local risk assessment and a stress risk assessment.
24. On 14 December 2017, a meeting was held during which the Claimant was offered reduced hours, adjustments to her role, regular supervision meetings with her manager and to make contact with her GP and specialist to support the Claimant in her return to work. These

adjustments were to be reviewed on 29 January 2018. This was confirmed in a letter dated 15 December 2017 [p101-2].

25. The Claimant commenced a further period of sick leave on 29 December 2017, from which she did not return prior to her dismissal from the Respondent's employment.
26. In April 2017, CT prepared a time line [p107-8] on reviewing the Claimant's file which identified the days of sickness that the Claimant had had. It also confirmed that return to work interviews had been undertaken on most occasions, since detail was provided in the time line concerning those return to work meetings. There were, however, 3 occasions on which there was no evidence within the Claimant's file that return to work interviews had been carried out.
27. The Respondent invited the Claimant to a long term sick welfare meeting by letter dated 6 April 2018 [page 105] due to take place on 18 April 2018. The Claimant had a pre-booked EEG appointment and so requested an alternate date. The Respondent offered her two other dates. The Claimant wrote on 17 April 2018 [p112-3] to say that she could not attend a meeting in the imminent future due to medication, forthcoming tests and uncertainty in her treatment.
28. On 24 April 2018, the Respondent requested that the Claimant attend a further OH appointment or consent to the Respondent contacting her GP directly. The Claimant agreed to both and a further OH appointment was arranged for 3 August 2018. The Claimant requested to see a copy of her referral immediately prior to the appointment and did not feel able to attend without having seen it first, due to the increased stress she might suffer, which could result in a seizure. Whilst it was not normal policy for employees to see the referrals to OH, this was sent to the Claimant on 15 August 2018 [p127].
29. An OH report was obtained dated 10.9.18 [p128-130] which confirmed that the Claimant was "temporarily unfit" to undertake her normal duties. There was criticism of the OH adviser by the Claimant and her witness, CL, who both said that he appeared to know nothing about the Claimant during the appointment. It was clear from the report, however, that at least by the

time of writing the report, he referenced that he had provided the report based upon the referral, his assessment and the previous OH report he himself had provided.

30. The report advised that there were "*no adjustments presently that would enable [the Claimant] to transition to work until her epilepsy has been stabilised*.." [p130]. The report confirmed that the OH adviser was "*afraid until there is further stabilisation in her condition that I am unable to advise you of a potential return in to work*." It went on to state that a phased return to work was not appropriate at that time and nor were alternative duties possible. It recommended a GP report be obtained after the Claimant had seen the Neurological team in December, followed by a face to face appointment with OH.
31. The Respondent wrote to the Claimant on 24 October 2018 [p131] confirming what the report had said and asking for her consent for the OH adviser to contact her GP in order to avoid a face to face meeting, which it recognised was stressful for the Claimant. This was chased by the Respondent on 11 January 2019 [p134].
32. A further referral was made to OH on 15 January 2019 [p135-139] which, at the time did not have the Claimant's consent to contact her GP. Consent was provided on 21 January 2019 [p140].
33. The Claimant attended a further OH appointment on 18 February 2019. The report dated 1.3.19 [p149-151] advised that the Claimant was temporarily unfit for her role. It said, "*because of the unpredictability of her seizures she is not left on her own…..[The Claimant]* ***perceives*** *a lack of support and contact from her employe*r." [Emphasis from OH report].
34. It confirmed that there were no adjustments that would facilitate a return to work within the next three months. Additionally, there were recommendations that "*an OH re assessment is recommended for three months' time*" and also for "*a phased return to work programme would be advised at the appropriate time*". The OH report confirmed that as regards lighter duties in a less stressful role, "*In my opinion she is unlikely to be able to do even this modified role for at*

*least the next three months*." It went on to confirm, "*In my opinion she is unlikely to be able to return to work within the next three months*."

35. The Respondent invited the Claimant by letter dated 8 March 2019 [page 154-5] to attend a telephone long term sick hearing on 15 March 2019. The letter included a precis of what the OH report had stated, including that she was unfit to carry out her normal duties at present and was likely to remain so for at least 3 months. It also included a copy of the OH report. The Claimant requested alternate dates in order to be represented and raised a concern that this letter appeared to escalate her case to potential dismissal.
36. The hearing was rescheduled for 28 March 2019 [the minutes appear at p162-173]. The Claimant agreed with the findings of the OH report, specifically that a return to work was not likely within the next three months in any capacity. Alternative roles within the Home were discussed with the Claimant. The Respondent told the Claimant that if she remained incapable of returning to work in her current role or any alternative role, the Respondent may need to consider terminating her employment on the grounds of ill-health.
37. The Respondent sent a letter to the Claimant on 19 March 2019 [p174-5] confirming the discussions and inviting the Claimant to a further hearing on 23 April 2019. This letter identified the other roles which the Claimant might be considered for and which had been discussed in the meeting on 28 March; it included job descriptions for those roles. It was brought to the Claimant's attention that these roles involved lone working on occasion.
38. The Claimant was unable to attend this hearing, and it was therefore rearranged to 9 May 2019. The Claimant indicated that she could not attend, but in fact did so, when the Respondent confirmed that the hearing would go ahead in her absence, as it had already been rescheduled on more than one occasion. The hearing went ahead on 9 May 2019 [minutes p188- 192].
39. The Claimant was accompanied to the telephone hearing by her companion, CL, during which she highlighted that she felt her health was improving and that she wanted to return to work. She confirmed that she had had a further seizure the week before and had been signed off sick

until 13 July 2019, but that she had a follow up meeting with her GP for further test results and to review her medication. The Claimant's evidence was that she clearly stated that she was able to return to her role in July and wished to discuss how she might adjust and reintegrate into the role and whether the Respondent had any other reasonable adjustments.

40. The panel were satisfied that the Claimant was not fit to return to work as at 9 May 2019 and that the clear medical evidence was that she would not be fit to return in any capacity for at least 3 months. The panel also considered that there was no guarantee that she would be able to return in any capacity at the end of this 3 month period. Also, that her role and all of the roles identified by the Respondent as alternate roles within the Home, required an element of lone working, which the Claimant agreed (and the medical evidence supported) that she could not do.
41. CT decided to terminate the Claimant's employment on grounds of ill-health on 10 May 2019. This was due to the fact that the Claimant was unfit for work and there was no evidence that she could return in the foreseeable future. The Claimant was paid in lieu of notice and her last day of employment was therefore 10 May 2019.
42. A letter confirming the Claimant's dismissal was sent on 10 May 2019 [p193-194]. The letter made clear that the reason for the dismissal was ill health. It referred to the Claimant saying she felt better and that she was awaiting results of further tests. It confirmed that the Claimant did not consider the other roles to be appropriate, and explained why some of the suggestions put forward by the Claimant were not practical. The letter therefore confirmed her dismissal and gave her the right of appeal.
43. The Claimant appealed on 21 May 2019 [p195-202] which was outside the period of time given by the Respondent in which to appeal, but which was accepted in any event.
44. The Claimant was invited to an appeal hearing by letter dated 24 May 2019 [p203]. The Claimant was unable to attend the appeal hearing due to other appointments and her companion being unavailable.

45. The appeal hearing was therefore held by JM on 17 June 2019. [The minutes for the meeting were at p208-209].
46. The appeal was dismissed by letter dated 1 July 2019 [p214-6].
47. The panel accept that a risk assessment was carried out in 2017 regarding lone working [p137] but no further risk assessments were undertaken. However, the Claimant went off long term sick from December 2017 and did not return prior to her dismissal. The panel accepts that the Respondent would have carried out a risk assessment should the Claimant have been fit to return to any roles, with or without reasonable adjustments being required.
48. The Claimant complains that there were many months (totalling 7) during her long term absence where she had no contact from the Respondent. There was evidence within the bundle that she had written to the Respondent on 17 April 2018 [p112/3] saying that she felt, "*at the present time in line with the dates given [she] would be best served focussing completely on [her] recovery as [she] cannot commit to a date at present but expect to provide you with an update in due course*." There were also some messages/ statements within the bundle confirming that the Respondent's view was that the Claimant did not want to be contacted [p104, P139].
49. There was also some evidence in the referral to OH dated 26 June 2018 [p120] that the Claimant had been invited to social events at the Home, which the Claimant accepted whilst giving evidence, but said that she had not attended as these would prove stressful to her.
50. Whilst we accept the Claimant felt that the Respondent had not contacted her, and in her words she had been 'forgotten', it was clear to the panel that the Respondent believed that it was abiding by the Claimant's wishes in focussing on her health and corresponding with her by email. Also, we accept that the Claimant was able to contact the Respondent herself if she had any queries and the Tribunal understand that the Claimant would have been kept abreast of changes within the Respondent's home, due to her sister working there.

**Submissions**

51. The parties provided the Tribunal with written submissions at the start of the final day of the hearing. Both parties were given the opportunity to respond to the other party's submissions and expand upon their submissions orally. The Respondent did so, but the Claimant's representative was happy that his written document provided everything.
52. In brief, the Respondent contended that the Claimant's dismissal was not because of the Claimant's disability, but her levels of absence. She was highly regarded and well liked and a hypothetical comparator would have been treated in the same way. It was accepted that the Claimant's absence was something arising from the Claimant's epilepsy, and that dismissal was unfavourable treatment, but the Respondent could objectively justify this as showing a legitimate aim which was achieved proportionately. In this case, the need to maintain effective staffing levels and adhere to the Respondent's absence policy. The measures taken were reasonably necessary rather than having to be the only course of action. Finally, the PCPs were misconceived for the failure to make reasonable adjustments claim and were not borne out by evidence before the Tribunal. There was no evidence of substantial disadvantage nor that any of the adjustments would have been overcome any such disadvantage. In oral submissions, it was finally contended that at the heart of the Claimant's claim was a lack of compassion, but the Respondent did not consider that this related to the discrimination complaints. It went to the Claimant's unfair dismissal claim, but in the Respondent's view, there had been a reasonable procedure followed. The Respondent therefore requested the Tribunal to dismiss the claims.
53. The Claimant's submissions were that the Claimant's dismissal was unfair due to the failure to make reasonable adjustments, the lack of support and communication and no account being taken of her 9 years' service. The Claimant was dismissed due to her disability which rendered the dismissal unfair and discriminatory. There was a complete failure to consider reasonable adjustments for the Claimant. There was a failure to carry out risk assessments, stress risk assessments and OH review follow ups. The Respondent could have waited a further 3 months

before making a decision about the Claimant's employment. The case was not one of bitterness but about fair and just treatment for the Claimant, who had an excellent career prior to her disability.

**LAW**

**Burden of Proof and discrimination claims**

54. The Tribunal had regard to the burden of proof in discrimination claims. This lies with the Claimant. However, if there are facts from which a Tribunal could decide in the absence of another explanation that the employer contravened the provisions of the Equality Act 2010 (EqA), the Tribunal must hold that the contravention occurred by virtue of section 136 (2) EqA.
55. In considering the reverse burden of proof as it relates to a duty to make reasonable adjustments, which is one of the claims brought by the Claimant, we had regard to Project Management Institute v Latif [2007] IRLR 579. *"The Claimant must not only establish that the duty has arisen, but there are facts from which it could reasonably be inferred, absent an explanation, that it has been breached. Demonstrating that there is an arrangement causing substantial disadvantage engages the duty, but it provides no basis on which it could properly be inferred, that there is a breach of that duty. There must be some evidence of some apparently reasonable adjustment which could have been made".*

**Section 13 EqA: Direct Discrimination**

56. This provides:

*"A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."*

57. It is therefore necessary to consider whether the Claimant was being treated less favourably because of her epilepsy. The approach to be adopted in direct discrimination cases is as set out in *Law Society v Bahl [2003] IRLR 640* where the EAT provided at paragraph 91: "*It is trite but true that the starting point of all Tribunals is that they must remember that they are concerned*

*with the rooting out of certain forms of discriminatory treatment. If they forget that fundamental fact, then they are likely to slip into error".*

58. It is not possible to infer discrimination merely from the fact that an employer has acted unreasonably (Glasgow City Council v Zafar [1998] ICR120). Tribunals should not punish employers by finding discrimination when their procedure or practices are unsatisfactory or where commitment to equality is poor (Seldon v Clarkson, Wright and Jakes [2009] IRLR 267). However, the Tribunal was clear that direct discrimination need not be consciously motivated.
59. The Claimant's disability does not need to be the only reason for the treatment in order to succeed in a direct discrimination complaint, however it must be an "effective cause" (O'Neill v Governors of St Thomas More (Roman Catholic Voluntary Aided Upper School And Another [1997] IRC33).
60. The Claimant must show that she has been treated less favourably than a real or hypothetical comparator, whose circumstances are not materially different to her as set out in section 23(1) and (2) EqA which states: "23(1) on a comparison of cases for the purposes of section 13….there must be no material difference between the circumstances relating to each case".
61. The EHRC code confirms at paragraph 3.23 that "it is not necessary for the circumstances of the two people that is (the worker and the comparator) to be identical in every way; what matters is that the circumstances which are relevant to the treatment of the worker are the same or nearly the same for the worker and the comparator".
62. Finally, the Tribunal reminded itself that direct discrimination is not capable of justification when the claim is for disability discrimination.

**Discrimination arising from disability Section 15 EqA**

63. The Claimant complained that she had been treated unfavourably because of something arising as a consequence of her disability. The protection is laid out in Section 15 which states:

*"(1) a person (A) discriminates against a disabled person (B) if -*

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

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

*(2) sub-section (1) does not apply if A shows that A did not know and could not reasonably have been expected to know that B had a disability*."

64. No comparator is required for this assessment. In order for this to apply, the employer must have treated the Claimant unfavourably. The EHRC employment code explains at paragraph 5.6 that it is sufficient to demonstrate that the unfavourable treatment is because of something arising in consequence of the disability. There must therefore be a link to the unfavourable treatment and the Claimant's disability.

65. The code states, *"Often, the disadvantage will be obvious and it will be clear that the treatment has been unfavourable; for example a person may have been refused a job, denied a work opportunity or dismissed from their employment but sometimes unfavourable treatment may be less obvious. Even if an employer thinks they are acting in the best interests of a disabled person, they may still treat that person unfavourably"* [paragraph 5.7 of the code].

66. In Ms Pnaiser v NDS England (1) Coventry City Council (2) UKEAT/0137/15, Mrs Justice Simler DBE provided the proper approach to section 15 EqA cases as:

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

*"The Tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a section15 case. The 'something' that causes the unfavourable treatment need not be the main*

*or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.*

*"Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A's motive in acting as he or she did is simply irrelevant...*

*"The Tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is "something arising in consequence of B's disability". That expression 'arising in consequence of' could describe a range of causal links… In other words, more than one relevant consequence of the disability may require consideration, and it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability…However, the more links in the chain there are between the disability and the reason for the impugned treatment, the harder it is likely to be to establish the requisite connection as a matter of fact.*

*"This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator…*

*"Moreover, the statutory language of section 15(2) makes clear … that the knowledge required is of the disability only, and does not extend to a requirement of knowledge that the 'something' leading to the unfavourable treatment is a consequence of the disability. Had this been required the statute would have said so…*

*"As Langstaff P held in Weerasinghe, it does not matter precisely in which order these questions are addressed. Depending on the facts, a Tribunal might ask why A treated the claimant in the unfavourable way alleged in order to answer the question whether it was because of "something arising in consequence of the claimant's disability". Alternatively, it might ask whether the disability has a particular consequence for a claimant that leads to 'something' that caused the unfavourable treatment."*

67. The Employer may seek to rely upon an objective justification for the unfavourable treatment where it is a proportionate means of achieving a legitimate aim.

**Section 20 EqA Duty to Make Adjustments**

68. Section 20 provides:

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

*(2) The duty comprises of the following three requirements.*

*(3) The first requirement is a requirement, where a provision criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.*

69. Section 21 Failure to comply with duty provides:

*"(1) A failure to comply with the first…..requirement is a failure to comply with a duty to make reasonable adjustments.*

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

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

70. There is no onus on the disabled person to suggest what adjustments should be made, although it is good practice for employers to ask.

71. The Tribunal must identify:-

71.1. The PCP applied by or on behalf of any employer;

71.2. The identity of non-disabled comparators where appropriate; and

71.3. The nature and extent of the substantial disadvantage suffered by the Claimant. This is an objective test. There is no need to show group disadvantage. Substantial disadvantage is more than minor or trivial although this was noted to be a low threshold to overcome.

72. The Tribunal had regards to paragraphs 6.16 of the code relating to the use of comparators in cases concerning alleged failure to make reasonable adjustments. There is no requirement, unlike direct or indirect discrimination under the duty to make adjustments, to identify a comparator or comparator group whose circumstances are the same or nearly the same as the disabled person.

73. paragraph 6.3.3 gives examples of possible adjustments that might be reasonable for an employer to make.

74. The test of whether an adjustment is reasonable is an objective one to be determined by the Tribunal. The code lists a number of factors that might be taken into account in deciding what are reasonable steps for an employer to take, these being:

a) the extent to which the steps would have prevented the substantial disadvantage;

b) the extent to which the adjustment was practicable;

c) the financial and other costs of making the adjustment, and the extent to which the step would have disrupted the employer's activities;

d) the financial and other resources available to the employer;

e) the nature of the employer's activities and the size of the undertaking.

75. Tarbuck v Sainsbury's Supermarkets Limited [2006] IRLR 664, is authority for the proposition that an employer's failure to make an assessment of a disabled employee is not of itself a failure to make a reasonable adjustment. If no reasonable adjustments can be made for a disabled employee, the employer will not have acted unlawfully, even if it failed to consider the issue and discuss it with the employee.

**Unfair dismissal**

76. Under section 98(1) Employment Rights Act 1996 ('ERA'), it is for the employer to show the reason (or, if more than one, the principal reason) for the dismissal and that it is either a reason falling within subsection (2) or '*some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held*.'

77. Once an employer has established a potentially fair reason for dismissal, the determination of the question whether the dismissal is fair or unfair, having regard to that reason '…*depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee; and that question shall be determined in accordance with equity and the substantial merits of the case.*' (Section 98(4) ERA).

78. When considering reasonableness, a tribunal cannot substitute its own view. Instead it is required to consider whether the decisions and actions of the employer were within the range of reasonable responses which a reasonable employer might have adopted. The test applies to the procedure followed by the employer and to the decision to dismiss.

**Conclusion**

79. For the direct disability discrimination claim, we are satisfied that the Claimant would have been treated no less favourably than a hypothetical comparator in similar circumstances. We consider that someone with similar levels of attendance, without epilepsy, who was unable to return to work for 3 months would also have been dismissed. The likelihood is that they would have been dismissed sooner than the Claimant. The Claimant was dismissed due to her absence levels and was not dismissed because of her epilepsy. Therefore, we do not accept that the Claimant was directly discriminated against and this claim therefore fails.

80. Turning to Discrimination arising from disability. We accept, as does the Respondent, that the Claimant's dismissal amounted to less favourable treatment and that this was due to something arising from her disability, namely her absence levels.

81. We therefore have to consider whether the Respondent can objectively justify the Claimant's dismissal as a proportionate means of achieving a legit aim. The Respondent relies upon the dual legit aim of maintaining effective staffing levels and adhering to the aims of the Respondent's absence policy. We accept that these are both legitimate aims which are non-discriminatory.

82. We therefore turn to see whether it was a proportionate means of achieving those aims, i.e. whether it was appropriate and reasonably necessary in the circumstances. We consider that it was. The absence policy was not slavishly followed and adjustments were made to it in light of the Claimant's disability. The Claimant was unable to fulfil her role for a substantial period of time before she was dismissed. The Respondent gave consideration to the medical evidence (which was clear that she could not return to work for at least 3 months in any capacity and could not carry out lone working), what the Claimant said about her return to work, and the length of time that the Claimant had been unable to fulfil her role. We are satisfied that a fair procedure was followed which we consider was appropriate and reasonably necessary in the Claimant's case. We do not consider that further investigations were required into the Claimant's prognosis before it was proportionate to dismiss the Claimant. We therefore consider that the Respondent can objectively justify the Claimant's dismissal as a proportionate method of achieving its legitimate aims.

83. In considering the PCPs for the failure to make reasonable adjustments claim, we are satisfied that return to work interviews were regularly carried out, other than on the 3 occasions referred to in the timeline [p107-8], where no documentation for them was found. We do not accept that there was a failure to provide return to work interviews and therefore we find that there was no such PCP.

84. Further, we do not accept that there was a failure to carry out OH reviews every 3 months. There was no such requirement to do so. We are satisfied that the Respondent obtained OH reviews as and when required and did so appropriately in this case.
85. We further do not accept that the Claimant was able to show that there was a failure to provide laptops or access to computer systems. No evidence was put forward in this regard. Therefore, we do not accept this as a PCP.
86. There was no PCP relating to referrals to the Access to Work scheme, as suggested by the Claimant.
87. We also do not accept that there was a failure to carry out general risk assessments. Whilst we accept that a stress risk assessment was not undertaken for the Claimant, we do not accept that there was a PCP not to do them. We accepted that the Respondent would have carried out a stress risk assessment at the point of the Claimant's return to work.
88. In light of our findings that there were no such PCPS, it is not strictly necessary for us to consider substantial disadvantage and whether the proposed reasonable adjustments would have avoided that disadvantage. However, for completeness, we did not consider that the Claimant, had been placed at a substantial disadvantage due to any such PCPs, had they applied.
89. The Respondent fully knew of the Claimant's condition, prognosis and ability to return to work due to meeting with her, receiving fit notes and obtaining OH reports. Whilst the Claimant suggests that she was unable to return to work sooner as a substantial disadvantage, the medical evidence does not support this. She was unable to return in any capacity from December 2017 until her dismissal in May 2019, and even at that point, could not return to her own role or any lesser role for at least a further 3 months.
90. We have found no lack of support for the Claimant. Whilst we accept that the Claimant may have had to rely upon friends and family to get to work, we do not consider this to be linked to any valid PCP in order to trigger an obligation to consider reasonable adjustments. Finally, we saw no evidence that a failure to carry out stress risk assessments increased the risk of seizures.

91. The Claimant was unable to return to work in any capacity from December 2017 until her dismissal in May 2019 and we are satisfied that no reasonable adjustments would have assisted her return to work sooner. The medical evidence was that she could not carry out a less stressful role for at least three months from the date of the latest OH report and the Claimant, who was honest in her evidence, said that she could not have returned to work at this time.
92. There was no lack of understanding of what the Claimant needed to return to work. She was unable to work alone, which she accepted, and all of the roles required some lone working. We do not consider that there was a lack of support for the Claimant. Whilst the Claimant wanted more support and perceived a lack of support, and lack of compassion, we do not accept that this was in fact the case.
93. We also do not consider that any of the suggested adjustments put forward by the Claimant would have avoided the disadvantages alleged to have been suffered by the Claimant.
94. Therefore, the claim for failure to make reasonable adjustments also fails.
95. Finally, turning to the unfair dismissal claim. We are satisfied that the Respondent had a potentially fair reason to dismiss the Claimant, namely capability. We do not accept that the dismissal was discriminatory for the reasons set out above, or that there was a failure to make reasonable adjustments. So we have to consider the reasonableness of the Claimant's dismissal in all of the circumstances in accordance with section 98(4) ERA.
96. We are satisfied that a fair and reasonable procedure was followed in relation to the Claimant's dismissal. We do not accept the Claimant's assertion that the Respondent failed to give reasonable notice of hearings to her. She was advised in writing of hearings well in advance, she was warned of the possible outcome of the hearings, being her dismissal due to ill health, she was given the opportunity to address the hearing and be accompanied by a friend (which was an adjustment to the Respondent's procedures).
97. We are satisfied that there was not a lack of support, nor a lack of communication by the Respondent. We accept that the Respondent believed that the Claimant did not wish to be

contacted as evidenced by documents in the bundle referred to above. We consider that the Respondent was reasonable in how it approached the Claimant's absence management and ultimately her dismissal and that Claimant's capability was sufficient to justify dismissal in these circumstances.

98. We believe that the Respondent took into account the Claimant's 9 years' service. She was a well respected and valued employee and we consider that someone with less service may well have moved to dismissal sooner.

99. We do not consider that the decision to dismiss was predetermined.

100. Overall, we consider that the employer acted reasonably in all of the circumstances and that dismissal was within the range of reasonable responses and therefore fair.

101. All of the Claimant's claims are therefore dismissed.

Employment Judge Welch

Date: 8 September 2021

JUDGMENT SENT TO THE PARTIES ON
22 September 2021
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THY
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FOR THE TRIBUNAL OFFICE

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