THE EMPLOYMENT TRIBUNALS

Claimant Ms R Cook

Respondent Cumbria, Northumberland, Tyne & Wear NHS Foundation Trust

Heard at **Newcastle upon Tyne Hearing Centre (via CVP video link)**
On

Before **Employment Judge Langridge**
Members **Ms E Wiles**
Mr G Baines

Representation:

Claimant Mr Y Bakhsh

Respondent Mr A Webster, counsel

JUDGMENT

(1) The Tribunal does not have jurisdiction to hear the claimant's claim under section 20 Equality Act 2010. The Tribunal does not consider that it is just or equitable to exercise its discretion to extend the time for bringing such a claim under section 123 of that Act.

(2) The claimant's claim under section 15 Equality Act 2010 is not well-founded and is dismissed.

REASONS

Introduction

1. In her claim form the claimant stated that she has a disability of bipolar disorder and that the respondent failed to provide sufficient support and supervision for her after she joined them as a support worker at Saint Nicholas hospital on 1 June 2016. She made two claims under the Equality Act 2010 ('the Act'): a failure to make reasonable adjustments under section 20 in the context of a redeployment exercise, which led to her now being employed in a lower banded role; and a claim under section 15 relating to a requirement to maintain a certain level of attendance in order to avoid disciplinary sanctions.

2. The claimant gave evidence on her own behalf, and for the respondent evidence was given by Jacqueline Mills, Ward Manager and the claimant's line manager from late 2016 to October 2017, and Laura Whitaker, Clinical Manager and the claimant's line manager from October 2017. The parties produced a joint bundle of around 600 pages and an agreed chronology.

3. The respondent asserted that the section 20 claim was not brought within the statutory three month time limit, as the alleged failure to make reasonable adjustments arose in July 2017. There was no time point in relation to the section 15 claim. We agreed to hear the merits of the section 20 claim and determine the time point when making our decision as a whole.

Issues & relevant law

4. The respondent accepted that the claimant was disabled throughout the relevant time period, and that it had knowledge of her bipolar disorder from around November 2016.

5. The issues were agreed by the parties as set out in the Case Management Orders dated 8 January 2020, as follows:

Section 20 claim:

a. Did the PCP applied in 2017 that all staff should interview for posts in the restructure place the claimant at a substantial disadvantage in comparison with persons who are not disabled?
b. If so, what if any step would it have been reasonable for the respondent to take to reduce such disadvantage?
c. Is the Tribunal precluded from considering such claims by section 123, ie are they out of time? If so, would it be just and equitable to extend time?

Section 15 claim:

d. Does the claimant show primary facts from which it could be inferred she was treated unfavourably because of something arising in consequence of her disability?
e. If so, does the respondent provide an explanation to show she was not?
f. If not, does the respondent show that the treatment was a proportionate means of achieving a legitimate aim?

6. For the purposes of the section 15 claim, the alleged unfavourable treatment was the application of the respondent's Absence Management Policy. The claimant did not present any particular argument as to how the triggers under that Policy should be relaxed.

7. The relevant statutory provisions are set out below. The key cases are referred to in the summary of the parties' submissions.

8. Sections 20-21 of the Act provides:

20 Duty to make adjustments

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

(2) The duty comprises the following three requirements.

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

21 Failure to comply with duty

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

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

9. Section 15 protects disabled people from adverse consequences arising from their disability:

15 Discrimination arising from disability

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

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

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

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

10. Under section 123 both claims have to be brought to the Tribunal within three months of the act(s) of discrimination complained of, or the last such event where there is a continuing course of conduct or state of affairs:

123 Time limits

(1) Subject to section 140B, proceedings on a complaint within section 120 may not be brought after the end of—

(a) the period of 3 months starting with the date of the act to which the complaint relates, or

(b) such other period as the employment tribunal thinks just and equitable.

(3) For the purposes of this section—

(a) conduct extending over a period is to be treated as done at the end of the period;

(b) failure to do something is to be treated as occurring when the person in question decided on it.

Findings of fact

11. On 1 April 2016 the claimant began her employment as a nursing assistant on Band 3, working on the Alnwood unit at St Nicholas hospital. This was a medium secure inpatient care unit for adolescents with mental illness or learning disabilities. The Ashby Ward where the Claimant worked was a mixed gender ward for adolescents with mental illness.

12. The respondent operated a Managing Sickness Absence Policy ('the Policy'). In its introduction the Policy states that:

> "The Trust aims to treat absence sensitively but appropriately in order to achieve improved attendance. It recognises that although absence due to illness is inevitable, such absences:
>
> - Are disruptive;
> - Place additional work pressure on work colleagues;
> - May lead to additional costs being incurred;
> - Can impact on the quality of care given to service users."

13. Its purpose is said to be "to ensure that absence is managed consistently, fairly and within explicit time frames".

14. Paragraph 9 deals with disability-related absence:

    > "The trust and its employees have a duty not to treat disabled staff less favourably than it / they would treat non-disabled staff either because of a disability or, for a reason arising in connection with that person's disability or, by applying a provision criterion or practice which applies to all employees alike, but which puts a disabled person at a particular disadvantage when compared to Trust staff who do not share the disability in question. This includes a duty to make reasonable adjustments where the duty arises."

15. The Policy sets out in paragraph 11 a description of the process to be followed in managing short term sickness absences. The events which trigger the process are that an employee has either three sickness absences or a total of eight days' absence, in a rolling 12 month period. The Policy does not make separate provision for employees with disabilities, but it does provide that:

    > "If at any stage in the process a manager wants to show discretion this must be agreed with a member of the manager's Workforce and OD team in order to ensure fairness and an equity in approach. The reasons for discretion either being applied, or not, must be clearly documented by the manager."

16. The procedure allows for an exploratory meeting followed by a two month monitoring period, after which a meeting at Stage 1 takes place. If the improvement target has been achieved, the employee is monitored at Stage 1 for 12 months, with the same triggers continuing to apply. If during this time the employee triggers, then a further two month monitoring period takes place followed by a meeting at Stage 2. The third and final stage involves a 24 month monitoring period with the same triggers. If there is a further trigger then Stage 3 is followed and the respondent considers the employee's continued employment. Dismissal is a potential outcome.

17. A few months after the claimant's employment began, her attendance became a cause for concern. In the two and a half years between April 2016 and October 2018 her sick leave record showed a mixed picture of absences totalling 16 separate episodes. Of these, illness relating to mental health was noted on eight occasions: absences for "stress" totalling two days; absence attributed to "bipolar disorder" over two lengthy absences (73 days from 2 December 2016 to 12 February 2017, then 24 days from 24 March 2017 to 16 April 2017); and absence for "anxiety" on four occasions. Of the latter, two absences were very short and the others represented the longest spells of time off sick. Anxiety was given as the cause of absence lasting 102 calendar days between 6 July and 15 October 2017. Between 5 March and 24 July 2018 the absence for anxiety continued over 142 calendar days. The absence beginning on 6 July was initially attributable to the claimant's upset over her dog being unwell.

18. Aside from these illnesses relating to mental health, the claimant was off sick on eight other occasions in the same period, with reasons recorded as a cold (2

days), migraine, unspecified back problems (3 days), vomiting (1 day), and skin disorders (16 days).

19. On 21 October 2016 the claimant received an Invitation to a Stage 1 attendance meeting as a result of having had three or more episodes of sickness in a rolling 12 month period.

20. The claimant's GP wrote to the respondent on 15 November 2016 notifying them that the claimant had a longstanding diagnosis of bipolar disorder. The doctor added that the claimant "finds that she is best able to cope with part-time work predominantly working twilights and night shifts". From 2 December the claimant was absent on extended sick leave relating to her bipolar disorder, returning to work the following February.

21. On 2 February 2017 a further invitation to a Stage 1 meeting was issued, noting this latest long absence in addition to the several short absences between April and September 2016. There followed an Occupational Health report on 6 February, which suggested a phased return to work on reduced hours over a two week period. This recommendation was implemented by the respondent.

22. On 14 March 2017 the respondent began a consultation exercise about a proposed reduction to the size of the Alnwood unit, taking the numbers of staff down from 78 to 44 full time equivalents. This consultation concluded on 28 April and the proposed reduction in staffing was confirmed. It was agreed that voluntary redundancies would be sought in the first instance and a competitive interview process for the remaining posts would then take place.

23. In the meantime, a second Occupational Health report was obtained on 25 April. The report said that due to the claimant's relapse being recent, "there is likely to be increased susceptibility to the impact of psychological stress" and so a return to work on a six-week phased basis was recommended. It was also noted that the claimant "has an agreement at work that she does not work the day shifts only twilight and night shifts to accommodate the impact of her medication. I anticipate this will be a long term and permanent recommendation."

24. A short while later, on 20 June, the respondent began carrying out interviews for the remaining posts in the unit. The claimant was originally offered an interview on 21 June and then 6 July but did not attend. On the first occasion she did not give a reason for not being able to attend, and on the second date she advised that her dog was unwell. By agreement reached on 6 July the claimant's interview was rearranged for 10 July. In the interim, she was absent from 6 July for "anxiety" and had a fit note which was due to expire on 9 July. The claimant was therefore expected to return to work on the afternoon of 10 July, her shift starting after her interview.

25. The claimant felt under pressure to attend the interview on 10 July, as a result of an email circulated within the team by Ms Mills that day. The email apologised to staff for the delay in informing everyone of the outcome from the recent interviews, and acknowledged that this was "causing a great deal of anxiety". She said this was because "we have one staff member who needs to be interviewed before we

can review the interview paperwork". The claimant felt it was obvious to her colleagues that she was the person in question and that she was holding up the process. Nevertheless, she was aware of the anxiety caused to colleagues by the delay to the interview outcomes

26. The claimant attended her interview with Ms Mills and two others, hoping for a role in the restructured service. Before the interview began, Ms Mills saw the claimant in the waiting area. She did not express any concerns about attending the interview nor did she ask to postpone it. She also did not seek any adjustments to assist her. Following the interview the claimant phoned to say she was not well enough to attend her shift that day. This came as a surprise to Ms Mills, given that the claimant had been well enough to attend the interview. The claimant remained off sick after this date until mid-October 2017. Although the respondent's sickness record showed the absence as being continuous from 6 July 2017, the Tribunal found on the evidence that these were technically two separate but consecutive absences. Had the claimant not been due to return to work on 10 July, she would not have needed to phone in sick before the start of her shift.

27. The claimant was advised by a telephone call from Ms Mills that she had been unsuccessful in obtaining a post in the new structure. In that call the claimant said she wished to move to another area of work because she was finding the work stressful. She had being finding it difficult to deal with the needs of one particular patient. On 20 July the respondent wrote inviting the claimant to a meeting on 25 July to explore alternative employment and to discuss any support she might need. Due to the claimant's ongoing sickness absence that meeting did not take place.

28. On 15 August a further Occupational Health report was obtained. This confirmed that the claimant was temporarily unfit for work. The report said she had found it difficult returning to work in the area she worked in. The claimant had informed Occupational Health that her GP had suggested working in another area where the work was not so demanding. The report went on to say that "She feels that her current work area is the main cause of her ongoing anxiety. She feels that the work is too physically demanding and finds working with the young people in that area particularly difficult." The OH advisor said she would "support consideration of a move to a less demanding area of work if this was available".

29. On 4 September a meeting took place to discuss the claimant's sickness absence and possible alternative employment. The claimant attended with her trade union representative. A letter of 15 September confirmed the outcome of the meeting. It referred to the recent Occupational Health report and the recommendation that she did not return to her post on Alnwood. The claimant confirmed that her medications had been reduced and she was feeling better, particularly in the mornings. She had expressed interest in a redeployment opportunity at Walkergate Park, remaining within a clinical role. The letter said:

    > "We discussed that your redeployment is currently in relation to the consultation process on Alnwood, however as referred to in your Team Prevent report, redeployment is also recommended for health reasons."

30. The meeting ended on the understanding that a further discussion would take place following the outcome of a 'matching meeting' on 8 September, though the claimant was not well enough to attend. On 12 September she attended a welfare meeting with Ms Mills. It was agreed that the respondent would continue to work with the claimant to find alternative employment. It was agreed to continue forwarding weekly vacancies to the claimant's personal email account, and to continue to meet monthly as a supportive measure.

31. On 20 September the claimant's psychiatrist wrote to her GP to confirm the diagnosis of bipolar disorder and to discuss future treatment. The claimant's GP wrote to the respondent on 26 September confirming that she was fit to return to work on a phased basis and on reduced hours, while a suitable position was found for her. However, the claimant did not in fact return to work.

32. A further welfare meeting took place on 16 October with John Padget, Associate Director, and the claimant was again accompanied by her trade union representative. In the discussion about her health (and some issues regarding her SSP entitlement), the claimant said she was feeling worse due to the uncertainty of the situation. She acknowledged receiving the weekly vacancy list and that she was being supported, but a permanent post had not yet been identified. Potential opportunities at Ferndene and Alnwood were discussed but the claimant felt Ferndene would be too difficult to commute to as she did not drive. The letter from Mr Padget stated that:

    > "… it was felt that following advice from your Team Prevent report dated 6th September it may not be beneficial to your health to return to a post on Alnwood and so we dismissed these."

33. Mr Padget noted that at the meeting he had provided some information about the Kolvin service, where the claimant knew some of the team members and felt she could fit in. She was interested in pursuing this option and it was agreed that it could be arranged fairly quickly, though Mr Padget suggested the claimant take 24 hours to reflect on the meeting and consider all the options.

34. The claimant decided to accept the new role as a healthcare assistant on Band 2 at the Kolvin service, and started work there on 1 November. This was on a temporary basis whilst she continued to receive information about other vacancies with the respondent. Laura Whitaker was the unit manager and became the claimant's line manager. The claimant was later redeployed into a new substantive post in the Richardson Eating Disorder Service with a period of pay protection.

35. During November the claimant raised a number of issues regarding her reduced pay due to her sickness absence, and the impact this was having upon her ongoing financial worries. Mr Padget wrote to the claimant on 1 December suggesting a meeting to discuss any issues or concerns, and how the respondent might best communicate with her so as to minimise her stress and reach a solution.

36. The claimant was by this time very unhappy with the way her sick pay had been handled, and increasingly anxious about her financial position. On 15 December 2017 she raised a grievance complaining of a lack of support while off sick due to her disability, and a lack of information relating to her financial entitlements. The grievance raised issues about how her sick pay had been handled, and the impact that this had on settling into her new job. The claimant referred in her grievance to the fact that she "can only manage to work part time" due to her bipolar disorder. The grievance raised no concerns regarding the July interview, the restructuring, or the job matching process.

37. On 7 December an exploratory meeting took place with Angela Shields, team leader, to discuss the claimant's sickness absence record. The claimant was set a target of 100% attendance during a two month monitoring period. She began a further period of sick leave from 10 December which extended until 7 January 2018.

38. On 28 December Mr Padget emailed the claimant's union representative to advise that whilst the claimant had only been offered her post at the Kolvin unit for an initial period of six months, the emphasis was on her returning successfully to work, and there was no scenario of the claimant being asked to stop working at the six month point.

39. On 7 January 2018 the claimant returned to work from sick leave. The following day she was invited to a Stage 1 attendance meeting with Ms Whitaker and Ms Shields. The outcome was that the claimant was set a target of 100% attendance during a two month monitoring period, after which there would be a Stage 2 meeting to review the position again. During this two month period the claimant was on a phased return for four weeks, which the respondent felt made the 100% target more achievable.

40. During 2018 there followed a series of further steps under the Policy, including an updated report from Occupational Health on 18 January. This advised that the claimant was fit for work subject to a period of supported duties to return to her full clinical role. The view was expressed that the claimant would benefit from steps to identify a substantive post for the future at an early stage. On 19 February a stress risk assessment was carried out. On 25 April the respondent wrote to the claimant about her ongoing sickness absence and suggested a meeting, at home if she preferred. The letter offered support for the claimant's mental health difficulties and encouraged her to engage with the respondent's Policy.

41. Further Occupational Health reports were obtained on 3 May and 4 July, the former noting the claimant's wish to return to a post where she could work to her full potential and gain job satisfaction. This point was reiterated in the July report, which noted that the claimant had now found a role as a support worker in a different area "which she feels excited about". The OH advisor recommended exploring redeployment into such a role, as a positive development for the claimant's mental health, and this was done. The claimant began a phased return to work in the new role on 24 July. The respondent wrote to her confirming that she would receive 12 weeks' pay protection at her previous Band 3 salary, as the the redeployment was due to health capability.

42. In the interim arrangements had been progressed in relation to the grievance, and numerous interviews with the claimant were held in the period between May and November 2018 with the investigating officer. At the meeting on 23 May it was noted that it had not been possible for the claimant to meet Mr Padget with a view to finding an informal resolution, due to her sickness absence. At this interview the claimant introduced for the first time a complaint about the fact that "she attended an interview and that she didn't have to attend due to being off work sick at the time". This was taken up by the investigator along with other new issues raised at later meetings. The addition of new aspects to the grievance contributed to the length of time it took to investigate and deal with the issues.

43. At a grievance meeting on 6 August the claimant confirmed that her new job at Walkergate Park was a positive step and that she was well supported by her manager.

44. By late 2018 the claimant's attendance had not improved sufficiently and on 7 December she attended an exploratory meeting under the Policy with Ms Shields. On 8 January 2019 a formal Stage 1 meeting took place with Ms Whitaker, as the claimant had been unable to achieve 100% attendance in the two month monitoring period from 7 December. Since then she had been absent for a total of 28 days for reasons connected to her mental health. At the Stage 1 meeting the claimant was given a further improvement target of 100% attendance during a further two month period, at the end of which a meeting under Stage 2 would follow. Arrangements were also agreed for a four week phased return to full time hours and for a weekly meeting to take place to ensure that the claimant was managing her condition.

45. On 30 January a meeting took place to review the claimant's phased return to work, which she reported as positive. Ms Whitaker confirmed her agreement to the claimant's request to reduce her hours from 37.5 to 32.5 on a permanent basis.

46. A Stage 2 meeting was arranged for 11 April, to review the two month monitoring period. The claimant had maintained 100% attendance during that time, and was advised that under the Policy she would be monitored at Stage 2 for a further 18 months.

47. At this time the claimant was continuing to struggle with her mental health, not least because of the time it was taking to deal with her grievance. She made the respondent aware of this, though took care to explain that her current working arrangements were very positive, and it was the issues from the past that were causing problems. This in turn was creating anxiety about whether the claimant would be moved to stage 3 at some point, if she was unable to maintain good attendance.

48. On 16 May a welfare meeting took place with Ms Whitaker where these issues were discussed in the presence of the claimant's union representative. It was agreed that the respondent had made reasonable adjustments regarding management of absences, and that managerial discretion had been applied. Ms

Whitaker noted that there was evidence of supportive measures being put in place, an agreement to reduce contractual hours and also to allow flexible working to enable the claimant to attend medical appointments. In her confirmation letter of 17 May Ms Whittaker recorded the fact that the claimant would remain monitored at Stage 2 for the next 18 months as in itself a reasonable adjustment, because the claimant's most recent absence would otherwise have triggered progression to Stage 3.

49. The Stage 2 attendance meeting was reconvened with Ms Whitaker on 2 October and again the claimant's union accompanied her. Since the meeting on 16 May the claimant had had three further sickness absences, the first for gastrointestinal problems (3 days), followed by one day relating to mental health and a further day relating to headache/migraine. In her outcome letter of 3 October Ms Whittaker stated:

> "In addition to this you have also had numerous occasions of short notice leave for varying reasons. This has been mapped since you commenced with ourselves in February 2019 and it was calculated from 33 weeks available you had only worked 8 full weeks. You acknowledged this wasn't acceptable and apologised. You stated that you were grateful of all the support you had received by management […] and could understand the concern your attendance had caused."

50. At this meeting the claimant reported receiving an outcome from her grievance that she was pleased with, and said she she felt this would help improve her attendance. Ms Whitaker advised the claimant that she would be moved to the next stage of the Policy as she did not consider it reasonable to keep her at Stage 2 again. The claimant agreed with this. She was advised that the next step would be a two month monitoring period from the most recent absence on 4 September, during which 100% attendance was expected. A failure to achieve this could lead to the third and final stage where dismissal was an option.

51. On 8 October the respondent confirmed the outcome of the grievance in a detailed letter outlining the concerns and acknowledging that there had been some significant delays to which a number of factors had contributed. Several elements of the grievance were not upheld, but aspects relating to financial issues and a lack of contact during the investigation were partially upheld.

52. After receiving the grievance outcome letter, the claimant submitted her claim to the Tribunal at the end of October 2019. She had had access to advice from her union throughout the period of the restructuring in 2017, and for the duration of the grievance. Although the union had advised that she should not have had to attend the interview in July 2017 on a day when she was unwell, neither the claimant nor any adviser took any steps to pursue a complaint based on her disability until the ET1 was issued in late 2019.

<u>Respondent's submissions</u>

53. For the respondent, Mr Webster made his submissions by reference to a skeleton argument.

54. On the section 20 claim he made the following particular submissions:

    a. The claim is out of time and the balance of prejudice does not support a just and equitable extension.

    b. There is no evidence that the respondent applied a policy to the claimant or anyone else, that they had to be interviewed on a particular date or even if unwell.

    c. The claimant was not placed at a particular disadvantage by virtue of the interview going ahead on 10 July 2017, and the respondent had no knowledge of any such disadvantage (referring us to Schedule 8 Part 3 of the Act). Even on the claimant's own case she needed to move to another job.

    d. In any event it would not have been a reasonable adjustment because the claimant could not stay in the same unit.

55. The respondent's primary argument was that the section 20 claim was out of time, having been brought years after the date of interview on 10 July 2017. Mr Webster submitted that for the purposes of section 123 the alleged failure must relate to the decision to proceed with the interview on that date. In anticipation that the Tribunal might consider an extension to the time limit on just and equitable grounds, Mr Webster referred to the authority of Robertson v Bexley Community Centre [2003] IRLR 434, in support of the proposition that "the exercise of the discretion is the exception rather than the rule". On the facts of this case, Mr Webster submitted that the balance of prejudice was against granting such an extension, partly because the passage of time and because the ability to recall the detail of events was an obstacle for both parties. The claimant herself conceded in cross-examination that she could not recall the detail of the events of July 2017. Ms Mills was similarly disadvantaged by the passage of time.

56. At a Preliminary Hearing before EJ Garnon, Mr Webster said the claimant had suggested that time should be extended by reference to the duration of the grievance process, This was brought on 15 December 2017 but not resolved until October 2019. He submitted that this contention was hopeless for three principal reasons. Firstly, following Hunwicks v Royal Mail Group plc UKEAT/0003/07, the explanation for the delay must be shown to be responsible for causing the time limit to be missed. That cannot be said here because the grievance was raised five months after July 2017 and two months beyond the expiry of the three month time limit. In any case, as conceded by the claimant in cross-examination, the grievance was not a complaint about the decision to proceed with the interview. Finally, quoting Apelogun-Gabriels v London Borough of Lambeth [2002] IRLR 116, Mr Webster submitted that the pursuit of an internal grievance would not normally be a sufficient reason for such an extension of time.

57. Mr Webster further noted that the claimant had not relied on her health as an explanation for not bringing the claim within the limitation period. Even had she done so, this would not explain the delay as her absences were many but were

intermittent and there were times when she was able to work. Furthermore, the claimant was able to participate actively in the grievance and attendance management processes and had the benefit of union representation throughout.

58. Those were the submissions made for the respondent on the time limit point. In the alternative Mr Webster make submissions on the substantive merits of the section 20 claim. He said the claimant was not placed at a disadvantage by the PCP 'that all staff should interview for posts in the restructure'. In any case, it was not the claimant's position that she was placed at a disadvantage by being required to attend an interview at all, but rather she suggested the disadvantage arose because she was required to attend an interview on a particular date when she says she was ill. Furthermore, the respondent did not apply alternative PCPs that *all* candidates had to be interviewed on 10 July 2017 nor that *all* candidates had to be interviewed even if they were unwell. Both the claimant and her colleagues were interviewed on different dates and had the opportunity to have input into the arrangement of those dates. Insofar as the respondent required the claimant to attend an interview on 10 July 2017, that in itself did not amount to a PCP as it was a one off-act that did not constitute a state of affairs – Ishola v Transport for London [2020] EWCA Civ 112.

59. At the time of the interview the respondent (through Ms Mills) was not aware that the claimant was unwell and unfit to attend. Ms Mills knew that the claimant had been off work on 6 July because she was upset that her dog was unwell. The new date of 10 July was agreed with the claimant, who was due to return to work that day. She did not ask for a further postponement, nor did she present as a person who was distressed by the interview going ahead.

60. Even if the claimant had been successful at that interview, a move from the Alnwood unit would still have been necessitated on health grounds, based on the claimant's own evidence that that area of work was a significant cause of her ongoing anxiety. If that were true, he submitted, then the claimant's case as to disadvantage would fall away completely.

61. A further submission on the section 20 claim is that the respondent did not have knowledge that the claimant was placed at a substantial disadvantage by virtue of attending an interview on 10 July 2017. The claimant herself accepted that she had not asked for a further postponement even though this had been agreed twice previously. In any event, Mr Webster submitted that to have postponed the interview further would not have been reasonable, applying the objective test under Smith v Churchills Stairlifts plc [2005] EWCA Civ 1220. Adjustments which confer little benefit are not reasonable – HM Prison Service v Johnson [2007] IRLR 951. Any such postponement would have conferred little if any benefit to the claimant given that she accepted she could not remain in the Alnwood unit in any case.

62. Turning to the section 15 claim, the respondent accepted that this was brought within the statutory time limit, as it related to the application of the respondent's Attendance Management Policy from December 2018 to October 2019. Mr Webster also accepted that this amounted to unfavourable treatment because of something arising inconsequence of the claimant's disability, though it was justified

in that the respondent took proportionate steps to achieve legitimate aims. Those aims were:

a. Reducing or minimising sickness absence in order to improve or maintain service delivery and quality within the financial constraints placed upon it;
b. Providing a framework for the management of sickness absence in order to ensure that it is managed consistently, fairly and within explicit timeframes;
c. Providing supportive action to assist employees to improve their attendance.

63. Mr Webster reminded the Tribunal that the claimant had accepted on cross-examination that these aims were legitimate.

64. As to proportionality, Mr Webster referred us to Grosset v City of York Council [2018] EWCA Civ 1105, in that the test is again an objective one. He added that our consideration of this question "should give a substantial degree of respect to the judgement of the decision-maker as to what is reasonably necessary to achieve the legitimate aim provided he has acted rationally and responsibly", per Birtenshaw v Oldfield [2019] IRLR 946.

65. We were referred to a passage from Hardys and Hanson plc v Lax [2005] IRLR 726 in support of the proposition that the employer simply has to show that the proposal is justified objectively notwithstanding its discriminatory effect. The reasonable needs of the business are to be taken into account. The employer does not have to demonstrate that no other proposal is possible.

66. The judgment of the Tribunal requires a balancing of the needs of the employer against the discriminatory effect of its actions on the individual concerned, as in DWP v Boyers UKEAT/0282/19.

67. Applying these principles to the facts of this case, Mr Webster quoted from Ms Whitaker's written statement in support of the following considerations:

a. The service into which the claimant was redeployed is the only community-based service of its kind and has a waiting list. The respondent is under pressure to use resources as effectively as possible to maintain and create capacity to receive new patients.

b. The impact of the claimant's absences between October 2018 and October 2019 was such that planned services were disrupted, and colleagues regularly needed to work additional hours or adjust their hours to support continued service delivery.

c. The respondent had agreed to reduce the claimant's hours as an adjustment to assist her in maintaining attendance, though it had concerns about the staffing pressures on the service.

d. Since February 2019 the claimant had only managed to complete her full working hours in eight of the 33 weeks she had worked in the new service.

e. The primary purpose of the Absence Management Policy is to ensure that the respondent can meet the demands of caring for service users, and the claimant's absences were impacting on the staffing available to care for patients. Furthermore, the adjustments already made to the process did not appear to be having a positive impact on the claimant's wellbeing.

68. Ms Whitaker supplemented this evidence in re-examination by referring to the small and highly specialist nature of the team in which the claimant worked, dealing with complex patients who are at considerable risk. Adequate staffing levels are therefore imperative. Frequent and sometimes long term absences on the claimant's part which require her colleagues to re arrange shifts at very short notice, work additional hours and work longer hours. It became difficult to facilitate breaks and annual leave. In addition, NHS England had asked the respondent to explore whether it might expand the service due to increasingly long waiting times for patients. This was felt difficult to do because of pressures on the existing staff team.

69. Mr Webster pointed out that the claimant had readily accepted in cross-examination the impact of her absences on the service and others. She had conceded that she did not take any issue with Ms Whittaker's decision on 2 October 2019 to progress to Stage 3 and accepted that this was "totally reasonable" in the circumstances. Mr Webster submitted that the claimant's concessions were "so all-encompassing and uncaveated that they amounted in all but name to a withdrawal of her section 15 claim".

70. In these circumstances, the respondent's actions were manifestly reasonable especially bearing in mind its own needs. By saying that the respondent should have extended its standard trigger points the claimant ignores the steps it actually took, for example discounting some absences. An increased trigger point would still have created anxiety for the claimant and a more flexible approach was preferable.

71. Although this part of the claim was not brought under section 20, Mr Webster referred us to a number of reasonable adjustments taken to accommodate the claimant's disability, which was not in dispute. For example, it:

- Reduced her working hours and altered her working times;
- Redeployed her, initially to Kolvin on a temporary basis and then into a new substantive post in the Richardson Eating Disorder Service (REDS) with pay protection;
- Completed a stress risk assessment;
- Arranged numerous lengthy phased returns to work;
- Allowed the claimant to take additional breaks as needed;

- Provided access to counselling and time to attend that and other appointments during working hours.

72. Finally, on the question of trigger points under the Policy Mr Webster submitted that the monitoring periods included phased returns and were often shortened in practise by backdating them, as happened in January and October 2019. Six separate absences were discounted altogether between January 2019 and May 2019. This had the practical effect of altering trigger points and significantly slowing progress through the Policy. These actions were taken by Ms Whitaker in an effort to exercise her managerial discretion with greater flexibility and consideration of the individual circumstances.

Claimant's submissions

73. Mr Bakhsh made oral submissions on behalf of the claimant, which are summarised below.

74. First of all he responded to Mr Webster's submissions, by reference to the Tribunal decision in Ward v Northumberland Tyne and Wear NHS Foundation Trust 2501059/2017 in which Mr Bakhsh was also instructed. He recommended that the Tribunal refer to the EAT judgment in that case rather than the decision at first instance, at UKEAT/0249/18GA.

75. Mr Bakhsh said the claimant had never advanced the argument that *all* absences should be discounted. He submitted that once the provisions of section 15 are engaged, a duty on the employer arises under section 20.

76. Those were the points in reply to the respondent. Mr Bakhsh went on to make general submissions on the claimant's behalf. He said there is no dispute that the claimant had a disability which impacted on her thought processes. As for the interview, the claim rests on whether the claimant was sick with a disability-related condition on 10 July. The claimant does not deny that there were problems with her dog at around that time but she does deny that she gave that as the reason for being off sick when she rang Ms Mills on 6 July.

77. Mr Bakhsh said that a lot of Ms Mills' evidence was not supported by the documentary evidence, and took issue with whether the claimant was in fact due to be at work on 10 July after the interview. He questioned the validity of Ms Mills' evidence about the events of that day, and her evidence that the claimant was due to be on shift later that day. The claimant attended the interview under pressure, because she felt she was holding up the process for the team. He submitted that her sickness absence from 6 July to 15 October 2017 was for disability-related reasons and was a single continuous absence.

78. On the question of the PCP necessary for a section 20 claim, Mr Bakhsh said this was the competitive interview process. The claimant was disadvantaged compared to people without her disability because she could not have done herself justice. There was no attempt to consider that she may be unfit to attend the interview. He said Ms Mills had the responsibility to know whether staff were fit

or off sick, but the respondent had not produced any evidence as to why the claimant was fit on 10 July 2017.

79. Mr Bakhsh made other criticisms of the respondent's conduct, particularly in relation to the lack of a tailored adjustment plan in accordance with a blank template in the bundle (not the respondent's document, but a suggested model). The fact that Ms Mills had no idea that the claimant went off sick and had to rely on someone telling her about phoning in sick goes to the credibility of her other evidence.

80. He submitted that the PCP led to a substantial disadvantage and it was no surprise that the claimant ended up failing her interview because of her mental health. It would have been a reasonable adjustment to postpone the interview until she was well enough. Although the claimant did not want to stay working in the previous iteration of that ward, a new ward could have been different.

81. On the question of this claim being out of time Mr Bakhsh referred to section 123(1)(b) of the Act which gives us a wide discretion to look at all the circumstances. He referred us to the case of Alfonso Adedeji v University Hospitals Birmingham Trust [2021] EWCA Civ 23, in support of the proposition that a Tribunal may consider a number of factors when considering an extension. The act complained of is the interview on 10 July 2017 and the claimant was then off with disability-related illness until 15 October 2017. That took her past the three month period. On her return to work the claimant met her union representative who advised her to submit a grievance. The claimant did not raise the subject of the interview because she was preoccupied by not being paid while off sick. He accepted that the claimant's lack of understanding of the law is not a good reason.

82. The claimant did later raise this is an issue in the grievance when she was eventually interviewed on 23 May 2018. It then took the respondent a long time to sort out the grievance in circumstances where the worker had no control over the timing. The process was eventually dealt with by 8 October 2019, two years later.

83. Although the claimant was in contact with her trade union, she did not get access to legal advice. As soon as she received the grievance outcome in October 2019, the claimant submitted her claim.

84. Although it could be said that this shows incompetence on the part of the union, Mr Bakhsh disputed that there was any prejudice to the respondent. He asked us to exercise our discretion. It has been possible to have a hearing and witnesses have been able to give evidence, albeit there is a lack of documents from that time. It is not in the interests of justice to say that the claim should have been submitted while the claimant was sick, or that she should have ignored the advice she was given.

85. Mr Bakhsh moved on to the section 15 claim and pointed out that the claimant was likely to have more sickness absence because of her disability. He referred to the decision in Griffiths v Secretary of State for Work & Pensions [2016] IRLR 216 where the Court of Appeal acknowledged the likely disadvantage to a disabled person caused by an increased likelihood of sickness absence.

86. He said that it was not until this hearing that the respondent changed the position it had adopted in the ET3, where it denied that the treatment was unfavourable. During his submissions on the section 15 claim, Mr Bakhsh referred a number of times to the terminology of a claim for reasonable adjustments. He said a PCP was applied in this case, namely the application of the standard triggers under the Absence Management Policy. Some reasonable adjustments were put in place but he submitted that if the key issues are not addressed, they are of no use. Ms Whitaker discounted some absence but she did not remove the standard triggers and she imposed a requirement of 100% attendance. She moved through the Policy because the claimant failed to meet targets. This led to the claimant being disadvantaged because her disability led to more absences.

87. Mr Bakhsh clarified that the claimant never said she wanted all of her absences disregarded. That would not be a reasonable adjustment, but she never had an opportunity to take part in a tailored adjustment plan. There has to be an attempt to make a reasonable adjustment to assess whether it might work. When asked what adjustment in particular, he said that the respondent should have acted on the recommendations of Occupational Health in September 2017, to carry out a tailored adjustment plan he did not accept the respondent’s position, which is that this is what in fact happened.

88. He said it was irrefutable that the claimant did progress through the stages of the Policy and although it was slowed down, it was not stopped. At the October 2019 meeting there was reference to dismissal which had an impact on the claimant. The obvious argument is that the respondent should have created a tailored adjustment plan at the outset, which tested an adjusted trigger. Mr Bakhsh did not identify any such trigger.

89. On the question of justification Mr Bakhsh referred to the matters raised in Ms Whitaker's statement, but pointed out the absence of any supporting documentary evidence. All absences in the NHS put pressure on the team and not just the claimant’s. He submitted that it is “ridiculous” for the respondent to suggest that the claimant’s absence was causing problems. Support workers are not responsible for the impact on waiting times or patient care. He submitted that there is no justification for subjecting the claimant to discriminatory behaviour, putting her at a substantial disadvantage by reference to a PCP she could not possibly meet. It is counterproductive because she suffers from anxiety which is heightened by the fact that she is constantly set these targets. This had a direct impact on the amount of time off sick. In summary, it was not a proportionate means of achieving a legitimate aim. There was no tailored plan and the adjustments which were made did not address the issues.

90. Mr Webster replied briefly to say that section 20 is not engaged by section 15, and I confirmed that we would not be treating the section 15 claim as being brought in addition under section 20. On the Ward decision in the EAT, he referred to paragraph 64 and a specific factual issue. When the interview was mentioned in the grievance it was not raised as a complaint as such. As for why the claimant did not tell Ms Mills that she was ill on the day of the interview, this was not put to Ms Mills nor was any such evidence given by the claimant.

Conclusions

Section 20 claim - time point

91. Section 123 of the Equality Act 2010 gives the Tribunal jurisdiction to hear claims provided they are brought within 3 months of the act of discrimination complained of. In this case, it is not in dispute that the act occurred on 10 July 2017 when the respondent conducted its interview with the claimant. The decision to proceed on that day was a discrete act, a one-off decision, and not an act extending over a period of time. The clock started to run from that date. The primary time limit for the claimant to bring her claim expired on 9 October 2017, subject to the statutory extensions allowed by early conciliation. The claimant's claim was actually brought in October 2019, two years later.

92. Following Robertson v Bexley Community Centre, we have a wide discretion in deciding whether to exercise our power to extend the three month time limit on the grounds that it would be just and equitable to do so. This decision must be based on evidence and on all the circumstances of the case. As submitted by Mr Webster, the exercise of the discretion is intended to be the exception rather than the rule, in the context of the relatively short and strict time limits applicable in employment cases.

93. While each case will turn on its facts, some factors are recognised as being relevant to this question. These include the length of the delay, the explanation for it, when the claimant had knowledge of the alleged discrimination, whether the claimant took professional advice, and the potential impact on the fairness of the hearing to both parties if a late claim is allowed to proceed. Factors outlined in British Coal Corporation v Keeble 1997 IRLR 336 have been discussed and applied over a number of years, though we take note of the Court of Appeal judgment in the 2021 case of Adedeji. The court urged caution in adopting a mechanistic checklist approach to the exercise, and Underhill LJ expressed the obiter opinion that:

    '*The best approach for a tribunal in considering the exercise of the discretion under section 123(1)(b) is to assess all the factors in the particular case which it considers relevant to whether it is just and equitable to extend time, including in particular… "the length of, and the reasons for, the delay".*'

94. Pursuing internal proceedings such as a grievance may be a relevant factor to be weighed in the balance, but is not in itself a reason to extend time – Apelogun-Gabriels and Robinson v Post Office [2000] IRLR 804, EAT.

95. Taking into account all the circumstances of this case, we start by noting the excessive length of the delay which was approximately two years. The claimant's evidence made plain that the prompt for bringing the claim was the outcome of her grievance. The time taken to deal with this may be criticised, but a claimant who chooses to delay legal proceedings in the face of short time limits runs the risk that the timetable followed by her employer may deprive her of the right to pursue her complaint. The claimant had immediate knowledge in July 2017 of all the facts necessary to evaluate the prospects of a claim under section 20, and access to

experienced union advisers throughout. Another factor we take into account is the fact that the claimant's grievance was not actually raised in respect of the same subject-matter, being prompted only in December 2017 by the problems she was experiencing with her financial entitlements. By then, the primary limitation period had already expired by two months.

96. The claimant’s written witness statement did not give any particular explanation for the delay in submitting her claim in respect of the 2017 interview. Although she made general assertions that she was unwell, we heard no evidence that she was not well enough to make a claim or to instruct her union advisers to do so. The claimant accepted that she had access to senior union officials, though she found them unsupportive. Those advisers would undoubtedly have had knowledge of the statutory time limits.

97. The claimant said she consulted her union about the grievance document, and that they also looked into the fact that she had had to attend the interview a few months earlier. She said they advised that she should not have had to do that, but did not suggest they felt this gave rise to a claim under the Equality Act. The claimant spoke to the union in connection with her move to the Kolvin unit in November 2017. At some point she began to take advice from Mr Bakhsh, though she thought possibly this dated from some time in 2019.

98. In evidence the claimant said she was on sick leave in July 2017 due to her disability, and was so unwell that she had little recollection of the interview. She continued to be unwell after the interview and returned to work in October 2017. Her attendance record confirmed that the claimant had indeed had a lengthy sickness absence between July and October 2017, though we saw no medical or other evidence as to the detail of the illness and how it manifested over that period. On the evidence which was available to us, we were satisfied that the absence from 6-9 July was attributable not to her disability but to her upset over her dog being unwell. Following her return to work in October 2017, the claimant was well enough to work fairly consistently but at no time took any steps to bring a claim. Instead, she put all her energies into the internal grievance which was focussed on pay. That was understandable given her distress about finances, but does not weigh in favour of allowing this claim to proceed so long after the events.

99. The wide discretion available to us must do justice both to the claimant’s potential claim and also to the respondent's ability to defend itself. It was apparent to us from the oral evidence of both the claimant and Ms Mills that neither of them had a clear or detailed recollection of the sequence of events surrounding the 10 July interview. That was the case both in relation to the arrangements for the date to be fixed, and what was said at the interview itself. In light of that, and the passage of four years between July 2017 and this hearing, we are not satisfied that it is just or equitable to allow time for this part of the claim to be extended. There would be a real prospect of serious prejudice to the respondent in its ability to defend a claim which relies heavily on oral evidence. Furthermore, we were presented with no evidence that the claimant underperformed at her interview for reasons relating to her disability, contrary to the submission to that effect from Mr Bakhsh. The length of time elapsed would have made it very difficult if not impossible for us to

determine what might have been a reasonable adjustment at that time, even if we had been persuaded that the duty under section 20 was engaged.

100. For these reasons, we conclude that there is no evidence supporting a just and equitable extension of time for this part of the claim. In summary: no steps were taken for two years, until the grievance outcome was provided; the grievance itself was not submitted until two months after the initial time limit; and its subject-matter did not include a complaint about the interview arrangements. Furthermore, it cannot be said that the pursuit of the grievance or the delay in resolving it were actually the cause of the claim being brought more than two years later. Having conceded in her oral evidence that the grievance did not incorporate the subject-matter of the claim she now presents under section 20, the claimant does not persuade us that this is a reason to extend time. Our view is reinforced by the fact that the claimant had knowledge of all the relevant facts, which she discussed with experienced union representatives.

Section 20 claim – merits

101. Although we have decided not to extend time for the reasonable adjustments claim to be brought, having heard all the evidence we were not satisfied that the claim had any merit even if it had been within our jurisdiction to determine it formally. We therefore set out a summary of our alternative reasoning below.

102. The duty to make reasonable adjustments arises under section 20 where “a provision, criterion or practice” (PCP) of the employer’s puts a disabled person “at a substantial disadvantage” in comparison with non-disabled persons. The duty is “to take such steps as it is reasonable to have to take to avoid the disadvantage”. In other words, there should be some prospect of the adjustment avoiding or reducing the disadvantage in order for the duty to be engaged.

103. The PCP relied on by the claimant was the requirement to attend a competitive interview as part of the restructuring exercise. It was unclear to us whether Mr Bakhsh was extending his argument to say that a requirement to attend on 10 July 2017, or to attend an interview while unwell, were features of the PCP contended for. It appeared that they were. We agree with the respondent's submission that there was no PCP (whichever of these formulations is used) that placed the claimant at a substantial disadvantage in comparison to her non-disabled colleagues. Nothing in the evidence pointed to the fact that the claimant's disability precluded her from ever attending an interview, nor she even suggest that this was the case. What the claimant wanted, she said, was to postpone the interview until some unknowable future date when she felt better or her condition had stabilised. This was not in the nature of a PCP but rather a one-off decision in accordance with the reasoning in the case of Ishola.

104. We also accept that the respondent had no knowledge of the claimant being substantially disadvantaged by the arrangements for the interview. Mr Bakhsh submitted that this claim turned on the fact that the claimant had been unwell due to her disability on the day of the interview. In her witness statement the claimant asserted that this was the case, and suggested that Ms Mills knew this, but we do not accept this. Having evaluated the evidence from both witnesses, and the

respondent's records, we were satisfied that the reason for the claimant's absence beginning on 6 July 2017 related to her dog's illness. We accept the respondent's evidence that this was the reason for the second postponement of the claimant's interview. The claimant did not dispute that her dog had been ill at around this time. We have found as a fact that there were two separate absences, the one from 6-9 July relating to the claimant's dog and the one which she reported by phone on the afternoon of 10 July following her interview. We had no evidence supporting the claimant's contention that she was unfit to attend her interview, or that the reasons related to her disability. She did not make Ms Mills aware of this, nor ask for any further postponement even though two had been granted already. Mr Bakhsh's submission that the claimant was unsuccessful in her interview for reasons related to her disability, was based on no evidence.

105. We accept Ms Mills' evidence that she was not made aware on 10 July that the claimant felt unable to go ahead. Where the claimant's evidence was at odds with Ms Mills' recollection, we found the latter more reliable. We were satisfied that the the claimant was expected, and intended, to return to work on the afternoon of 10 July. Only after the interview did she phone the respondent to say she was too unwell to work, a point she conceded on cross-examination. The claimant would not have needed to make this call if it was simply a continuation of an existing absence. The lack of any complaint or grievance from the claimant in the months following the interview supported our conclusions on this point. Had she felt unjustly treated because of her disability, we would have expected that to be made plain well before the ET1 was issued in this case.

106. The adjustment for which the claimant argued at this hearing was that the respondent should have postponed the interview until she was well enough to attend. At the time no such date was or could have been identified. However, the notion that it would have been reasonable to delay the final interview, and therefore the outcome of the other interviews for the whole team, on an open-ended basis would in our opinion have been wholly unreasonable even if the duty under section 20 applied. We are not satisfied that the duty did arise, because we cannot agree that the claimant was put at a disadvantage by the requirement to attend an interview. That was the only PCP applied to her.

107. Another factor relevant to the questions of disadvantage and reasonableness is the undisputed evidence that the claimant was seeking a move away from the Alnwood unit on health grounds, a move endorsed by her Occupational Health adviser. We therefore find that there was no actual disadvantage to the claimant in any event.

108. For these reasons, even if this claim had been brought in time, we would not have found in the claimant's favour on the merits.

Section 15 claim

109. This claim arose from the application of the respondent's Attendance Management Policy in the period between December 2018 and October 2019. The respondent accepted that the application of its Policy did amount to unfavourable treatment because of something arising in consequence of the claimant's disability, but put

forward a defence that its actions were a proportionate means of achieving legitimate aims. The respondent's legitimate aims were described as:

a. reducing or minimising sickness absence in order to improve or maintain service delivery and quality within the financial constraints placed upon it
b. Providing a framework for the management of sickness absence in order to ensure that it is managed consistently, fairly and within explicit timeframes
c. Providing supportive action to assist employees to improve their attendance

110. On cross-examination the claimant accepted that these were legitimate aims, leaving only the question of proportionality to be considered. This is an objective test. Mr Webster submitted that we should respect the respondent's judgement as to what was reasonably necessary to achieve its aims, provided it acted rationally and responsibly. The reasonable needs of the organisation need to be taken into account, as should the discriminatory effect on the claimant. It is therefore a question of weighing both parties' positions in reaching a decision. In doing so we expected, and were provided with, evidence from the respondent of its reasoning. We accepted Mr Webster's submissions that the modifications made to the way the Policy was applied to the claimant were supported amply by the evidence. In fact, they were not contested by the claimant. A summary of those steps is set out at paragraphs 67 and 71 above, and demonstrated to us that an individual, personalised approach was taken by Ms Whitaker in the exercise of her managerial discretion. While this claim is not brought under section 20, we take these eminently reasonable adjustments into account in weighing the proportionality of the respondent's actions. For completeness, we would add that we see nothing in the wording of section 15 which would have the effect of engaging section 20, contrary to Mr Bakhsh's submission to that effect.

111. In assessing the case under section 15, the claimant gave us little to consider. She conceded that all the steps taken by Ms Whitaker were fair and reasonable. She had no criticism to make about the respondent's handling of the Policy beyond the undisputable fact of it amounting to unfavourable treatment. The claimant accepted in cross-examination the impact that her absences had upon the respondent, her colleagues and patients. She understood that it was putting pressure on a small team and causing a lot of people difficulties and stress. When asked whether there were any other adjustments the respondent could or should have made to its Policy, the claimant said there were none. She put forward no suggestions as to how the Policy might have been modified to accommodate her undoubted need for time off due to her disability, for example by reference to more generous trigger points. She fairly accepted that she did not expect her employer to ignore all disability-related absence, but offered nothing by way of an alternative approach.

112. We accepted the respondent's case that it did in fact comply with the Occupational Health recommendation to make tailored adjustments to the Policy, and agree with the respondent's submission that this was likely to be a more supportive approach than, say, simply substituting a different number of trigger points. Mr Bakhsh tried to persuade us that there was an absence of paperwork or process but we reject

that submission as it was not based on evidence nor formed part of the claimant's case. The important consideration is not the format of any particular document that might have been used, but what actions the respondent actually took.

113. In summary, therefore, we find that the claimant was treated unfavourably for reasons arising from her disability, in that this was a factor in her needing more time off as a result of her bipolar disorder. Without minimising the impact of that on the claimant's health, we note also the frequent absences for reasons unconnected to disability or mental health. That is a factor which weighs in favour of the respondent needing to manage and reduce sickness absence in the context of a critical service under enormous pressure of resources.

114. For these reasons, the claim under section 15 fails.

SE Langridge
Employment Judge Langridge

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON

23 September 2021

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