# EMPLOYMENT TRIBUNALS (SCOTLAND)

**Case Number: 4109681/2021**

**Hearing held in Glasgow on 14 – 17 September 2021**
**Deliberations 17-19 September 2021**

**Employment Judge D Hoey**
**Tribunal member J Burnett**
**Tribunal member P McColl**

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| **Ms C Sweeney** | **Claimant**<br>**Represented by:**<br>**Miss Bowman (Solicitor)** |
| **Lloyds Bank plc** | **Respondent**<br>**Represented by:**<br>**Mr Maguire (Counsel)**<br>**Instructed by Messrs Evershed Sutherland** |

**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

The unanimous Judgment of the Employment Tribunal is that each of the claims is dismissed.

**REASONS**

1. The claimant had raised claims for unfair dismissal and disability discrimination by ET1 which was presented on 21 May 2021 with ACAS Early Conciliation beginning on 23 March 2021 and ending on 4 May 2021.

2. The hearing was conducted in person with the claimant's agent, the claimant and the respondent's agent attending the entire hearing, with witnesses attending as necessary, all being able to contribute to the hearing fairly. One witness attended the hearing remotely and there were no issues arising.

**Case management**

3. The parties had worked together to focus the issues in dispute and had provided a statement of agreed facts and a list of issues. The latter required to be refined as the case progressed.

4. We agreed a timetable for the hearing of evidence and the parties worked together to assist the Tribunal in achieving the overriding objective, in dealing with matters justly and fairly taking account of the issues, cost and proportionality.

5. At the start of day 2 of the hearing, the claimant's agent applied to amend the basis of the claim for section 20 of the Equality Act 2010. The claimant wished to add 2 new PCPs that had not previously been identified in the pleadings (and had not been included in the finalised and agreed list of issues). The respondent objected on the grounds that they had not been given fair notice of the issues arising and there may be prejudice to the respondent as they would have had insufficient time to consider the issues.

6. After retiring to consider the matters we gave oral reasons for deciding to allow one of new PCPs (an attaining competence policy) but decline another (in relation to PIP benefits). This was decided on the basis of the overriding objective, taking account of the interests of justice and balancing the prejudice to the parties.

7. With regard to the PIP issue, the claimant had been given sufficient time to focus the issues in dispute and this had been done. There was no good reason why the additional issue had not been identified in advance. This was something that ought to have been known to the claimant at the time and raised in advance and when the issues were finalised. It would have required

additional evidence from the respondent and was not something about which fair notice was given (and could have been given). Balancing the interests of both parties, we declined to allow that adjustment to the case.

8. We decided it was in the interests of justice to allow the adjustment with regard to the attaining competence policy. This was in part due to the fact it was the respondent which had lodged an additional production late in proceedings, at the commencement of the first day which related to this policy. This was not something the claimant could have foreseen and the amendment related to the issues arising from that document. It was in the interests of justice to allow that amendment. We ensured any unfairness to the respondent was resolved by allowing the respondent to recall their first witness, Ms Muir, to speak to the matter, and gave the respondent time to ensure full instructions were received.

**Issues to be determined**

9. The issues to be determined are as follows (which is based on the agreed list which was revised during submissions).

**Unfavourable treatment claim (section 15, Equality Act 2010)**

a. It was conceded the claimant was dismissed and that was unfavourable treatment arising in consequence of her disability. It was also conceded that the respondent knew of the disability at the material times.

b. The issue in this case was whether dismissal was a proportionate means of achieving a legitimate aim of appropriate management of employees who are unable to attend work due to sickness absence and/or the impact upon customers. It was conceded the aims were legitimate but argued to be disproportionate.

**Breach of the duty to make reasonable adjustments (section 20, Equality Act 2010)**

c. It was argued the duty was triggered around June/July 2020 such that the claim was out of time. The Tribunal required to determine whether the claim was in time and if not whether it was just and equitable to extend the time limit pursuant to section 123(1)(b) of the Equality Act 2010.

d. It was conceded that the respondent applied the PCP of requiring to work from the office and of having to complete 5 assessed calls before being able to work from home.

e. The issue was whether the PCPs put the claimant at a substantial disadvantage compared to someone without a disability (namely make it difficult for the claimant to achieve a reasonably acceptable level of attendance). It was this difficulty the claimant alleged having to work in the office (and not have her assessment expedited) created.

f. The Tribunal would require to assess whether or not the respondent knew or could reasonably be expected to know the claimant was likely to be placed at such a disadvantage.

g. Did the respondent fail to take such steps as were reasonable to alleviate the disadvantage, the principal steps being to allow the claimant to work from home (which was what the claimant's agent focussed upon during oral submissions)?

**Unfair dismissal**

h. Did the respondent have a potentially fair reason to dismiss the claimant, namely capability?

i. Did the respondent act reasonably or unreasonably in treating that as sufficient to dismiss the claimant, taking

account of whether the respondent had reasonable grounds to support its belief

**Remedy**

j. What compensation should be awarded in the event of a successful claim or claims?

**Evidence**

10. The parties had agreed a productions running to 343 pages with a further document added on the first day of the hearing, by the respondent, bringing the total productions to 346 pages.

11. The Tribunal heard from the claimant, Ms Muir (Senior Team Manager) and Ms Sinclair (Senior Area Support Manager). The witnesses were each asked appropriate questions.

**Facts**

12. The Tribunal is able to make the following findings of fact which it has done from the evidence submitted to it, both orally and in writing. The Tribunal only makes findings that are necessary to determine the issues before it (and not in relation to all disputes that arose nor in relation to all the evidence led before the Tribunal). Where there was a conflict in evidence, the conflict was resolved by considering the entire evidence and making a decision as to what was more likely than not to be the case.

**Background**

13. The respondent is a large banking group with around 40,000 staff in total. There were 800 employees (excluding management) in the Glasgow office where the claimant worked. The claimant was employed by the respondent from 12 February 2001 until the date of her dismissal on 12 January 2021.

14. The claimant had a disability in terms of section 6 of the Equality Act 2010, having the impairment of degenerative disc disorder and anxiety and depression. This was known by the respondent at the material times in this case.

15. The claimant was employed as a Fraud Investigator. She had moved to telephony fraud around December 2019. This was a new area of the business and one in which she required to be trained. She had carried out training in December 2019 but due to her health issues did not feel she was fully competent and was glad to have been given another opportunity to attend the training in Summer 2020.

16. The claimant had various line managers during her time with the respondent, including Mr McClymont and Ms Romano. Ms Muir was a senior manager who oversaw the department in which the claimant worked. Ms Sinclair was a senior area support manager. Both Ms Muir and Ms Sinclair were very experienced managers and had dealt with absence issues at work on a considerable number of occasions (including dismissals and appeals).

**The work the claimant did in her role**

17. The work the claimant, in the role she had moved into, was a role that required trust. She dealt with calls from customers (and on occasions fraudsters posing as customers), some of whom had lost thousands of pounds. In order to carry out her role she had access to confidential information and details that ordinarily would not be available to staff. The role was complex and involved sensitive issues for customers. Calls could be lengthy, lasting sometimes up to 2 hours and required to be handled sensitively.

18. The claimant had been working in the office in the new role during the periods she was at work and following her (re)training. She had passed independent assessment in respect of 4 calls prior to her dismissal.

**Contract and policy documents**

19. The claimant worked under a contract of employment supplemented by policy documents. One such policy was entitled "Health Attendance and Sick Pay Policy" which set out the arrangements for managing colleagues during sickness absence. Reasonable support was to be given to help colleagues return to work and improve their attendance, including reasonable adjustments on a temporary or permanent basis. A formal process was set out comprising formal reviews and a final meeting, with a right of appeal.

20. If an acceptable level of attendance is reached the process would cease but be reinstated if the colleague failed to sustain a reasonable level of attendance. Completion of the formal process may lead to dismissal if reasonable support had been provided (and this could take place before sick pay had been exhausted).

21. In terms of the formal steps, there would normally be a maximum of 3 formal meetings working to an agreed action plan. The first formal meeting would to set to discuss health and attendance and set out an agreed action plan. A second formal meeting would discuss progress. If required a final formal meeting would set out the final position, which could include dismissal.

22. The respondent ordinarily expected a 95% attendance rate and attendance that fell below this would be something that would normally result in formal proceedings being commenced which could lead to dismissal. Similarly issues would arise if a colleague was absent on 3 occasions within a 6 month period or absent for 10 days or more (28 days if related to a disability).

**Absences prior to 2019**

23. The claimant had been subject to an action plan in 2016 which she had successfully passed but due to further absence the formal process had been

reinstated in 2017. Workplace adjustments had been made, including a large monitor, clamp, visor, footrest and chair. The claimant had been given discretionary medical breaks and her working hours had been reduced from 35 per week to 30 hours per week. An action plan had been agreed. A final review meeting had been convened on 20 September 2017 when it was confirmed that the claimant's absence had reached an acceptable level and no further action was to be taken. If the claimant's attendance deteriorated the formal process could be reinstated, at the second or final formal meeting stage.

24. Following further absence in 2018 the claimant was invited to a second formal meeting on 27 June 2018 and had a further discussion on 26 September 2018. By letter dated 7 October 2018 the claimant was advised that following the second formal meeting and action, plan the claimant's attendance had improved to an agreed acceptable level and no further action was to be taken at that time. If her attendance levels were to deteriorate during the next 12 months the formal process could be reinstated.

**Absence in 2019**

25. The claimant attended a **first formal meeting** on 9 May 2019. At the meeting it was noted that the workplace adjustments to date had comprised electronic desk riser, visor, ergonomic chair.

26. The claimant had been absent from 26 January to 4 February 2019 with back pain, from 14 to 16 November 2018 with back pain and from 20 July to 26 July 2018 with back pain. She had absence from 30 May to 4 June 2018 with an infection. The claimant had explained that she was suffering considerable pain as a result of her back pain. Medication was helping.

27. The claimant had previously been working later shifts (3pm until 11pm) but she requested to work 10am to 6pm to support her which was agreed subject

to review. Further interim meetings were to take place to support the claimant and understand her attendance and overall wellbeing. She would progress to stage 1 in the formal absence process for a 3 monthly period. Monthly interim formal meetings would take place.

28. An **interim meeting** took place on 24 June 2019 following the claimant's return to work on a phased basis. She was to monitor her return and back pain and inform her manager if further additional support was needed. The action plan was reviewed and it was agreed that the claimant would aim to return to full time work by the end of a 4 week period.

29. Another **interim meeting** took place on 20 August 2019. The claimant's stage 1 had been extended due to the absence of her manager. The claimant did not consider any further support from the respondent was needed. The claimant had moved to another team with later shifts which had suited her.

30. On 9 October 2019 the claimant attended a **second formal meeting**. Since moving to stage 1 the claimant had 3 absences. Over a 12 month period she had 8 absences, 7 in the past 9 months and 5 in the last 6 months. 3 of the absences were for back pain, 2 for migraine and 1 for a chest infection. The claimant had explained she was receiving support to allow her to get a taxi to work to minimise the pain. The claimant was told that she would move to the second formal stage to help the claimant improve her attendance.

31. The claimant noted that her mental health was ok, good when she could get out and see friends but when in severe pain she is stuck at home. Home working at that stage was "being piloted" and not available at that time. Other options would be considered at stage 2, including redeployment or different business areas that offer things like homeworking if needed.

32. It was noted that there had not been an improvement in attendance. The first quarter's attendance had been 88.9%, the second quarter 9% and the third quarter 82%.Stage 1 had already been extended but stage 2 would be in place for 3 months to allow the claimant to improve her attendance. The aim

was to reach 90% attendance within the 3 month period (a reduction from the normal 95%). If there was a deterioration in absence, the final stage could be introduced. A second formal action plan had been agreed.

33. The respondent had decided to adjust the normal target for attendance (which was 95%) with a view to supporting the claimant, by having an attendance target of 90%. The claimant agreed to this.

34. An **interim meeting** took place on 12 November 2019. At this stage she had 1 part day absence and had 98% attendance. The claimant explained she had not been sleeping and was not feeling good. She was reminded of the services available, including the Samaritans and Employee Assist. She was suffering from stress and depression as a result of the pain she suffered and lack of sleep.

**Absence in 2020**

35. On 17 January 2020 the claimant reported to the respondent that a serious matter arose as a result of the claimant's mental health. The claimant took a period of sickness leave from 17 January 2020 until 17 March 2020 when she returned to work.

36. On 29 January 2020 an **interim meeting** took place with the claimant, Ms Muir and Mr McClymont. It was noted that she had been moved to a stage 2 formal stage from 9 October 2019 for 3 months. The aim was to achieve 90% attendance. It had been agreed to extend the stage 2 formal for a further 3 months until 9 April 2020. For 2019 the claimant's absence had been 11.1% in the first quarter, 91.5% in the second quarter, 18.1% in the third quarter and 12.1% in the fourth quarter. The absence level by the date of the meeting for 2020 was 42.6%.

37. The claimant explained she was feeling low and anxious some of which was attributable to the medication she was taking. Family issues were also taking

their toll on the claimant. A further interim meeting was to take place to discuss her return to work.

38. Another **interim meeting** took place on 14 February 2020 with Ms Muir and Mr McClymont. By this stage the 2020 absence rate was at 42.6%. The claimant had been suffering from bad days but hoped her medication would settle. Her friends helped her. The claimant said she did not feel ready to return to work. To assist the claimant when she is ready to return to work someone would sit with the claimant and help her with her calls. The claimant was reminded that the second formal review had been due to end on 9 January 2020 but had been extended for a further 3 months.

39. At the **interim meeting** on 13 March 2020 the claimant's absence had increased for the quarter to date to 70.7%. The claimant had been struggling with sleep and was aware of her support networks for help. The claimant had experienced some flare ups in her back and was trying to manage it was medication. A return date of 16 March 2020 was aimed and support was offered to the claimant. Buddying was to be arranged with a further training session covering the areas the claimant had been trained upon before her absence. The claimant was grateful for the training since she did not take in the materials due to her illness. The claimant said she did not need anything else from the respondent. The claimant made no reference during this meeting (nor indeed any other meeting) about any other colleagues being able to attend any training from home (or that she considered having to come to the office for training to be unfair in any way).

40. The agreed actions were to be a phased return to work, building up a training plan and that a final meeting would be confirmed following the ending of the second stage on 9 April 2019.

41. The claimant returned to work on 17 March 2020. The claimant had been feeling anxious but felt better the following day. Steps were agreed to help the claimant return to work to build up her return. It was agreed to arrange the final meeting but that would not be rushed, to avoid overloading the claimant.

It was agreed that the claimant would be given buddying during her first few weeks of return to and core training. The claimant noted she needed more support with areas of her role and it was agreed to help ease her into the role.

42. The claimant was advised that her shift pattern would be considered. It was understood that occupational health had considered 2pm until 10pm to suit the claimant but this would be reviewed. The claimant confirmed she did not require anything further.

**Pandemic and home working within the respondent**

43. As a result of the pandemic's onset in March 2020 the respondent required to consider how to manage its staff and whether or not to allow staff to work from home. The pandemic fundamentally changed how the respondent worked (and how and where staff worked).

44. The Governance and Assurance Panel (which comprised senior members of staff from the respondent and trade union representatives) had agreed a policy to assist managers in determining who would be permitted to work from home, given the nature of the work and data staff were managing. To be able to work from home staff required (amongst other conditions) to have at least 12 month's service, to be deemed competent in their role and for there to be no outstanding informal or formal performance plan or disciplinary investigation or sanction. That was a policy that was known by the trade unions recognised by the respondent.

**Training and competence scheme**

45. As a regulated industry the respondent required to ensure that all staff are suitably trained and competent in the roles carried out. Each area of the respondent's business had different rules as to how staff were "deemed competent" in respect of their role or tasks that they required to carry out.

There was a policy document but this had not been presented to the Tribunal. If they were not "deemed competent" they were "attaining competency".

46. In the area of the business for which Ms Muir was responsible, which included the claimant's area, in order to be "deemed competent" in the role the claimant was carrying out, staff required to complete the relevant training and then be assessed (independently) on 5 calls, over a 3 to 12 month period.

47. Calls were recorded for training purposes and an independent unit within the respondent would choose 5 calls over a 3 month period and make an assessment.

48. While this policy was known generally within the respondent's business, the claimant had no recollection of the specific policy, which had not been brought to the claimant's attention. The claimant believed that once training had been completed and one call had been assessed, a colleague was considered to be competent but this was a policy that was in place, irrespective of the claimant's lack of knowledge.

**Further interim meetings in 2020**

49. An **interim meeting** took place on 8 April 2020. During 2019 her absence had been 11.1% in the first quarter, 91.5% in the second quarter, 18.1% in the third quarter and 12.1% in the fourth quarter. At this stage in 2020 the claimant's absence stood at 74.4%. The claimant had been absent since 17 January 2020 and returned on a phased basis on 17 March 2020. On 19 March 2020 the claimant had begun self isolation for 12 weeks.

50. The claimant was advised that the respondent had decided to place on hold all formal meetings which resulted in the claimant's final absence meeting being put back. It was agreed to continue with the interim meetings. The claimant explained she was working on a better sleep pattern and that she was working on her wellbeing.

51. The respondent noted that as a result of the pandemic, upskill training had been cancelled. Ms Muir told the claimant that if she was able to return to work, the training position would be reviewed, including whether one to one training was possible. The claimant confirmed that she required no further support from the respondent.

52. At the **interim meeting** on 6 May 2020 the claimant explained she was still at home and working with her psychologist. There was no further support the claimant needed from the respondent.

53. On 3 June 2020 at the **interim meeting** the claimant explained she had been suffering from anxiety (which was not work related). The claimant's self isolation was about to end and the claimant said she had been pushing herself to be more positive. Her sleep had improved. The claimant was reminded of the need to check with her GP about being safe and her return to work. The claimant's medication was more settled and her mood had improved.

**The claimant returned to work on 29 June 2020**

54. The claimant returned to work in the office on 29 June 2020 in Online Telephony Fraud. Prior to her sickness leave the Claimant worked in the Debit Card Fraud and Disputes Team until December 2019. The Claimant moved to Online Telephony Fraud in December 2019 prior to starting her sick leave on 17 January 2020.

**Further meetings from July 2020**

55. On 2 July 2020 the claimant attended an **interim meeting**. The claimant had felt anxious but she had felt good about returning to work. Her sleep had improved. She felt safe in the workplace. The claimant was feeling good about going back to training as she had forgotten the previous session. From a support point of view the claimant would be in the office so she has one to

one interaction and once she was “deemed competent” she would be able to work from home. The claimant agreed that was the best option for her. Reference to being “deemed competent” was a reference to the respondent’s policy in this area set out above.

56. The clamant agreed that she would continue with her 2pm until 10pm shifts and the claimant would consider the impact on her health and wellbeing especially sleep pattern. No further support was needed from the respondent.

57. On 3 July 2020 the claimant sent Ms Muir an email thanking her for allowing her to do the training again. She said she was taking so much more in and understanding better as her sleep pattern was improving.

58. On 10 July 2020 the claimant emailed Ms Muir saying she had thought about her shifts. She said later starts help with sleeping but later finishes tended to isolate her from her friends. She thought an 11 to 7 or 12 to 8 would be suitable allowing a later start but earlier finish so she could socialise with her friends and not feel cut off from her network. It would allow her to talk to friends especially if having a tough time with her mental health.

**Final formal review meeting**

59. On 7 August 2020 the claimant attended a **final formal review meeting** with the respondent. Ms Muir chaired that meeting. The claimant’s absences were discussed and the claimant explained that she had been suffering for backpain. She felt she had to go to work but struggled. She felt coming to work made her more sore and was on a lot of painkillers. The claimant felt better being back and her mental health had been improving.

60. As to medication, the claimant explained she took a nerve blocker which she kept to 3 a day but when the pain flared up, she took up to 12 but that affected her. She also took up to 8 pain killers a day and diazepam to relax her body

but that made her sleepy. She was also taking medication for her mental health.

61. The claimant explained that she had moved home which had helped her. She had made a comment on social media for which she had apologised and was worrying about things. She had completed her training and was working with customers within the office.

62. The claimant explained that she knew she was in the midst of a formal process but she needed to be in work and could not not be in work. To be at work she needed to take her pain killers. Ms Muir reminded the claimant of the available support, including Employee Assistance Programme, Samaritans and others, which the claimant said she had been using. The claimant said she had been thinking about what further support the respondent could offer but there was nothing more the respondent could do.

63. With regard to the current position Ms Muir noted the claimant was off from 20 March 2020 and returned on 29 June 2020. The claimant said she had been feeling better but the previous few days had been challenging. The access to work support had helped by providing taxis to and from work.

64. The claimant had suffered a panic attack on 24 July 2020 while at work when the claimant said she had been on a call and felt should could not do it.

65. Ms Muir noted that the respondent would support the claimant by providing medical shift slides which allowed the claimant flexibility with regard to her shift start and end times.

66. The claimant explained that on 5 August 2020 her back had flared up when picking something from the floor. She was able to walk but it was sore. She needed to keep herself moving.

67. With regard to shifts Ms Muir explained that she understood the claimant had wanted her shifts reviewed but at the discussion on 21 July and having reviewed a previous Occupational Health report, it was suggest the current

shift pattern remain for 4 to 6 weeks to see how it works. The claimant agreed with this.

68. Ms Muir then took the claimant through her absence from 2018 which had an absence rate of around 4%. In 2019 that had increased to around 15% (with one quarter 91%). In the first quarter of 2020 the claimant's absence had reached 63.1%. The claimant accepted that it was "really high" and "it's bad" She said she knew it was high but with her back she could not tell when it was going to go. Sometimes she had come to work and been unable to work. She took pain killers but when the pain is horrendous there was nothing she could do. She had to decide whether to come to work and make the pain worse or try and relax and ease it. Her immune system was lower.

69. With regard to her back, the claimant explained that she hurt it in 2009 and had been managing it. Ms Muir explained that the claimant's attendance was much lower than the business would expect. She asked the claimant whether she thought the business could sustain it. The claimant said her name was down for a lap top and if the respondent could support her when her back pain gets to the stage she could not work then she would be working from home and could find a comfortable position which would reduce the pain killers she would need.

70. Ms Muir asked the claimant about the difference working from home would make and the claimant explained she would ensure she was comfortable and she could walk or sit when she experienced pain. She accepted there would be periods when the claimant would be unable to work (and working from home would not change that). The claimant accepted that there may be improvements but that would depend on the pain and time off may still occur.

71. The claimant accepted that avoiding the travel to and from work would help alleviate the pain she suffered. That included getting into and out of the taxi.

72. Ms Muir asked the claimant whether having a laptop would help given the other reasons the claimant had been absent from work, including bugs, chest

infection and mental health. The claimant said if she suffered with her mental health it may not improve and the position with regard to bugs and chest infections would depend on how serious they were. The claimant thought a laptop could help.

73. The claimant was asked whether the trends shown in terms of her absence are indicative of what could happen in the future. The claimant said that with regard to her back, it will get worse not better. She said she could hopefully mitigate some absences if she went on the phone while being able to relax.

74. Ms Muir asked what reassurances she could get that an acceptable level of absence could be sustained. The claimant said she was trying to get her mental health under control and she was trying everything with regard to her back. With regards to changes going forward she would chase BUPA for an appointment which she accepted she could have done sooner and she would progress the pain management clinics.

75. The claimant was asked whether the occupational health position had changed since 2019. That report had stated that the claimant's health conditions were likely at that stage to continue to impact on attendance at work for at least 4 to 6 months. The occupational health physician had recommended the claimant continue working on 2pm until 10pm shift to manage her symptoms.

76. It was agreed that a further occupational health report would assist particularly given the claimant's mental health had changed.

77. The claimant was asked if any further support could have been given by the respondent and she said no.

78. Ms Muir had considered the claimant's request to change her shifts but Ms Muir wanted to maintain the position as had been recommended by the occupational health report in October 2019. The claimant had not raised the issue again following her email of 10 July 2020 and had confirmed that there was nothing further the respondent needed to do to support the claimant.

79. Ms Muir said that she had not considered redeployment or ill health retirement given the health position and the claimant agreed such matters were not relevant at the time.

80. The claimant accepted at the end of the meeting that there was nothing further required. The actions flowing from that meeting were all related to returning to the office (such as arranging a suitable chair for her). It was clear that at the 7 August 2020 meeting the respondent was not going to adjust their position and allow the claimant to work from home (whether by expediting the training policy or otherwise). The claimant understood that.

81. By the end of this meeting the Tribunal considered the respondent knew that requiring the claimant to work from the office (and preventing home working or adjusting the attaining competence/homeworking policy) was likely to make it more difficult for the claimant to meet the attendance targets expected by the respondent.

**Occupational health report – 20 August 2020**

82. Following this absence review meeting the claimant was referred back to Occupational Health. Occupational Health compiled a report which was sent to the respondent on 20 August 2020. The report was completed by an occupational health physician and medical director who carried out a telephone medical assessment. The report noted that he claimant suffered back pain and anxiety/depression.

83. With regard to the back pain, this had been constant since 2013. Workstation equipment had dealt with that but there had been a flare up in 2019. While the claimant had recovered, she still suffered recurrent exacerbations which lasted varying amounts of time. If she can catch the exacerbation early enough and rest during the day from physical activity the episode may be mild and only last a day. More severe episodes of back pain can last up to a couple of weeks. More severe back pain resulted in the claimant being unable to

walk. With mild exacerbations she could walk for up to 10 minutes and sit for up to 90 minutes before needing to move. She was taking medication which had side effects of drowsiness and reduced concentration.

84. Her anxiety and depression had worsened in November 2018 when she suffered a panic attack and had low mood. Sleeping had been difficult. The impact of lack of sleep, chronic back pain affected her resilience. The claimant was seeing a psychologist and had increased her medication to the highest dose. Her mood and concentration was variable. The back pain was distracting causing her to lose focus. Her support network was important to help her cope.

85. The occupational health physician's view was that the claimant was fit for work with adjustments. The current physical adjustments needed to continue. Evidence based treatments for depression and her support network of friends was important. Discussion around her working hours could help the claimant and her sleeping.

86. At the time of flare up the claimant's mobility was significantly affected and on days she suffered exacerbations flexible working from home was suggested as a way to help the claimant cope. If back pain was kept under better control there may be less need for fully dosing herself with medication which would reduce the chance of impaired focus because of the medication and pain.

**Correspondence in August 2020**

87. On 24 August 2020 the claimant sent an email to Ms Muir explaining that she had secured an appointment with a specialist with regard to her back. She explained that she had been having difficulty sitting, standing and even lying down without being in pain and discomfort. She emailed her line manager that night saying that she was finding it very uncomfortable sitting and standing and that she was in a lot of pain and that she had taken nearly her full allocation of painkillers. She said she would have to go home.

88. On 27 August 2020 Ms Muir telephoned the claimant. It was agreed that there were no further adjustments needed. With regard to working from home the claimant said due to being heavily medicated and the absence of sleep, she would be unfit to log on. Ms Muir offered to change the claimant's shifts but the claimant wanted to remain on the current pattern as they helped her. No further support was needed from the respondent.

89. The occupational health report was discussed between the claimant and her line manager at the meeting on 27 August 2020 when the claimant said she had spoken with occupational health and believed if she had a laptop and was working from home she would be unfit to work when heavily medicated but would be able to log on if taking less medication. She was told that she was on the list for a laptop and would be given an update. We considered this meant that once the claimant had been deemed competent she would be permitted to work from home.

**Return to work and meetings in September 2020**

90. On 1 September 2020 the claimant attempted to return to work. She was unable to manage and so went home.

91. On 7 September 2020 the claimant returned to work. The claimant met with Ms Romano and explained that she was still suffering pain as a result of her back. The claimant said she would rather be at work and amongst colleagues.

92. On 8 September 2020 the claimant attended a meeting with Ms Muir and Ms Romano and explained she was awaiting the result of her BUPA appointment and MRI scan. She felt her back pain had reduced a little. The claimant said the respondent could not do anything further to help her.

93. On 17 September 2020 the claimant attended a meeting with Ms Muir and Ms Romano. The claimant explained that she had sold her flat and was moving to a new home which should help her. She felt she nearly suffered a panic attack due to anxiety but logged off the phones to avoid this.

**Meetings in October 2020**

94. On 5 October 2020 the claimant attended a meeting with Ms Muir and Ms Romano. The claimant explained that she was still in pain but was doing her best, including using medical breaks at work. Her medication had changed but she was adjusting. The sale of her flat had caused anxiety but she felt better.

95. On 15 October 2020 the claimant took a day off due to a hospital appointment.

96. On 19 October 2020 the claimant advised the respondent that she was required to self-isolate due to a receiving a notification from track and trace.

97. On 30 October 2020 the claimant returned to work.

**November 2020 return to work issues and meetings**

98. On 4 November 2020 the claimant had a meeting with Ms Muir and Ms Romano. The claimant confirmed that the MRI scan was scheduled for 7 November 2020. This had been delayed due to her need to self-isolate pending outcome of the COVID test. The claimant explained that her back was sore which was due to colder weather.

99. On 18 November 2020 the claimant called in sick due to back pain. She would require to take painkillers and could not attend work.

100. On 19 November 2020, the claimant went home sick from work due to back pain. The claimant advised the respondent that she thought she would be required to take diazepam and if she took this she would be unable to take calls.

101. On 23 November 2020 the claimant asked Ms Romano if she could get medical time to attend an appointment for an emergency chiropractor and the

claimant also updated Ms Romano on the outcome of the MRI scan which was that it was not possible to operate on her back. Ms Romano advised the claimant to take a medical exception as she was upset.

102. On 24 November 2020 the claimant attended a meeting with Ms Romano and Ms Muir to discuss the results of her MRI scan. The claimant explained that an operation was not possible and she had to rely on medication.

103. The claimant said she had applied for PIP a few months before and had an assessment booked for 4 December 2020 to see whether or not she would be eligible. She said she could look at reducing her hours in work which could help relieve the pressure. The claimant said she could not afford to reduce her hours without PIP.

104. Ms Muir explained that the claimant's laptop was not ready but that she was concerned, based on discussions with the claimant, that she would at times be unfit to complete her role due to medication. The claimant had agreed and said when she was on such medication she would require to inform the respondent and log off.

105. On 24 November 2020 following their meeting the claimant wrote to Ms Muir with further details of her back condition. The claimant was concerned as to how matters were progressing and as to her future employment. She explained that the issue with her back began around 2011 after a chair jolted forward and she was off work for around 4 weeks. She had put her name forward for redundancy around 2015 as she felt her back would get worse but she was not chosen and decided to manage the pain with medication. She said she continued to look for positions that allowed homeworking so her attendance would not be impacted with flare ups of her back.

106. She explained she had gone to work in extreme pain as she wanted to improve her attendance. The chronic pain affected her mental health and she was trying to see if she could get PIP to enable her to reduce her hours so her back was not placed under so much pressure. The claimant said she

wanted to give the respondent full background to show she had tried everything. She said she knew she was in the situation where her employment could be ended and wanted to ensure a fully informed decision was made.

107. The claimant reiterated the point in that email that getting to work caused her difficulties and she thought home working would help increase her attendance.

108. Ms Muir had a discussion with the claimant on 1 December 2020 suggesting that a further occupational health report be obtained to ensure a decision can be made with all the information possible. The claimant agreed.

**Further occupational health report – December 2020**

109. On 8 December 2020 Occupational Health complied a further report. This was carried out by the same occupational health director who had carried out the October assessment. The assessment was again by telephone.

110. It was noted that an operation was not possible for her back and the medication was not controlling the pain and there had been two episodes of sickness absence since the last consultation, one for 2 weeks and the other for 2 days.

111. The claimant reported at the times of exacerbation she had experienced worsening back pain and leg pain which prevented her ability even to get out of bed.

112. The claimant said when she does not suffer from an exacerbation she is constantly in pain. She reported she suffered from pain when walking in the office and had a sitting tolerance of thirty minutes and standing tolerance of five minutes.

113. The occupational health physician's view was that the claimant was fit for work with adjustments. The current adjustments should continue. He said: *"There*

*are times where her back pain would be worse and may possibly lead to further episodes of sickness absence. But this is largely unavoidable. I would feel that to reduce the impact of travelling and working in the office consideration should be given to working from home either exclusively or in combination with working in the office or with a flexible approach to working at home when her symptoms are bad. With regard to working from home it would be important to ensure her workstation adjustments are mirrored at home."*

**Claimant moves house**

114. The claimant was on annual leave from 11 December 2020 until 4 January 2021. The claimant had sold her flat and was able to move into her new home on 24 December 2020. It was agreed that the Final Formal Meeting would be arranged for 5 January 2021.

**Claimant's absences**

115. A summary of the claimant's absences from 2018 were as follows:

| Absence Start Date | Reason for Absence | Number of Days |
|---|---|---|
| 5 April 2018 | Neurological | 2 days |
| 30 May 2018 | Infection | 4 days |
| 14 November 2018 | Back pain | 1.71 days |
| 26 January 2019 | Back injury | 5.86 days |
| 1 April 2019 | Sickness, diarrhoea and back pain | 50 days |
| 26 June 2019 | Back pain | 0.57 days |
| 7 August 2019 | Migraine | 0.33 days |
| 27 August 2019 | Back pain | 2.29 days |

| | | |
|---|---|---|
| 13 September 2019 | Chest infection | 5 days |
| 28 October 2019 | Back pain | 0.5 days |
| 14 November 2019 | Depression | 10 days |
| 17 January 2020 | Depression | 39 days |
| 20 March 2020 | COVID-19 shielding | 71 days |
| 25 August 2020 | Back pain | 4.36 days |
| 1 September 2020 | Back Pain | 3.79 days |
| 15 October 2020 | Medical appointment | 1 day |
| 19 October 2020 | COVID-19 self-isolation | 7 days |
| 18 November 2020 | Back pain | 1 day |
| 19 November 2020 | Back pain | 0.79 days |

**Invite to final formal meeting**

116. On 21 December 2020 the claimant was invited to a final formal meeting to be held on 5 January 2021 which followed the final formal meeting that had taken place on 7 August 2020. The purpose of the meeting was to explore the progress following the final formal review meeting and discuss the medical report and make a final decision as to the claimant's ongoing employment.

**Final formal review meeting – 5 January 2021**

117. On 5 January 2021 the claimant attended the final formal review meeting. It was chaired by Ms Muir with Ms Romano in attendance. The claimant was there with her union representative.

118. We did not find that the meeting had been entered into the diary as a leaver's interview. We found that the meeting had been fixed by Ms Muir to listen carefully to what the claimant had to say with regard to her absence and attendance. We consider that Ms Muir approached this meeting with an open

mind and had not reached a firm view as to the outcome. She was prepared to listen to what the claimant said and decide thereafter how best to proceed.

119. The meeting began by summarising the claimant's absence from August 2020. The claimant had been off on 4 separate occasions due to her back since August. The claimant agreed that she had probably returned to work too soon and said her mental health was not good. She said she thought it would be better to be around people but the pain had been so bad she had to go home.

120. The claimant noted she remained on medication which on occasion resulted in her being unable to work due to the strength of it and the consequence, in that it can make the claimant drowsy. During such periods the claimant would not be able to work in the office or at home.

121. With regard to her mental health, she explained that it had improved and she felt more in control. She explained her friends were her support network and were closer to her given she had moved.

122. The claimant said she had received all adjustments that she needed from the respondent. Ms Muir asked the claimant to explain how she would cope with regard to her mental health if she were working from home. The claimant said it would depend on the hours but she could see her friend. Ms Muir said she was concerned that the claimant had said she wanted to be around people which would not happen if she was working from home.

123. In 2020 the claimant's absence had been 2% in the second quarter, 16.9% in the third quarter and 2.5% in the fourth quarter. The claimant said she could not do anything about that because she did not know when her back was "going to go".

124. Her absences were mainly due to her back and if she could control when her back flares up she would. For example, she tried to take holidays in the winter months as it flares up in cold weather. As the pain is so bad it can affect her

mood and simple things can trigger the flare ups from picking up something to her dog.

125. The claimant said that her back pain had started in 2011 and worsened in 2013. Her sleeping had been improving and she had been using medical breaks to help her get through the day.

126. Ms Muir turned to the occupational health reports. She noted the August report said that during mild episodes of back pain the claimant was able to stand unaided for about 10 minutes and sit for up to 90 minutes. The claimant said that was accurate – as to what a good day looks like. She agreed that on a bad day she would need assistance in getting ready and even in bathing.

127. With regard to the December report she noted that the pain had not been controlled and asked if that had been discussed with pain management. The claimant said the focus was on her mental health first but it was going to happen. She accepted that the pain had resulted in periods the claimant could not get out of bed. The claimant agreed that on those occasions she would not be able to work, even from home.

128. The claimant believed that when the pain is manageable she can come into the office but when she is in a lot of pain it aggravates her back when she tries to get ready for work. Rest helps. If it was really bad she needed to take diazepam but cannot then work due to the drowsiness.

129. She was asked if she felt she had been fully supported by the respondent and said yes. She was asked if anything else could have been done to support her and she said there was no other equipment needed. She said when the pain was manageable she could work but when there is a severe episode, she could not get dressed or work.

130. Upon being asked whether she saw her attendance improving she noted she did not have a crystal ball and would like to improve her attendance but her back dictated her life. She had pain management and a physiologist. It could stop being painful but that was years down the line. She noted when she

suffered pain it affected her mental health. She got frustrated as she did not know if she could make it into work. She wondered if working from home would help as it would reduce the mobility issue.

131. Ms Muir said the claimant was on the list to home work and as soon as the equipment was available she would get set up but she was concerned that the claimant would be unable to work even at home when the pain flared up.

132. The claimant was asked if her past absence history was an indication of her future absence and she said she did not know as she did not know when her back would flare up.

133. The meeting was adjourned to allow Ms Muir to consider the outcome.

**Impact of home working on the claimant and flare ups**

134. The act of getting ready for work, getting into a taxi, walking to her desk and the other tasks associated with office working had the potential to, and on occasion did, aggravate the claimant's health. Greater movement by the claimant exacerbated the pain she had and could potentially lead to greater flare ups in her back.

135. Nevertheless even without travelling to the office, the claimant would still be subject to pain and flare ups, over which she had no control. During some of those flare ups the claimant would be unable to work, even from home. It was not possible to determine when or for how long such flare ups would occur or last. The occupational report had indicated flare ups could last for considerable periods of time.

**Outcome of final formal meeting letter**

136. On 12 January 2021 Ms Muir sent the claimant her outcome letter. She noted that the claimant's absence rate was as follows: second quarter in 2018 9.1%, third quarter 2018 3.7%, fourth quarter in 2018 3.7%, first quarter in 2019

11.1%, second quarter in 2019 91.5%, third quarter in 2019 18.1%, fourth quarter in 2019 12.1%, first quarter in 2020 63.1%, second quarter in 2010 2%, third quarter in 2020 16.9% and fourth quarter of 2020 2.5%.

137. Ms Muir noted that this was the third occasion where the claimant had been invited to a final formal meeting to review her employment. There had been persistent absence since 2018 when the claimant had been unable to work and maintain an acceptable level of attendance, with similar trends having occurred prior to 2018.

138. The support that had been given to the claimant during her employment included medical shift slides, BUPA assessments, Employee Assistance Programme, Samaritans, workplace adjustments, medical breaks, shift reviews and others.

139. The recent occupational health reports had indicated the claimant was fit for work with the adjustments but the adjustments had not supported a sufficient improvement in attendance.

140. Ms Muir said: "*The impact of homeworking has been considered however based on updates from yourself and Occupational Health whereby they advise that during severe episodes of backpain you would be unfit to complete your role at home or in the office*."

141. She also stated that the claimant's status under the Equality Act had been recognised and accommodated. She also noted that a 5 month extension to the outcome of the final formal meeting in August 2020 to allow further medical support had not led to an improved attendance at work.

142. The letter said there were no other adjustments that would make it possible for the claimant to improve her attendance.

143. Ms Muir concluded that she had no confidence the claimant's health and attendance would improve going froward. Her current level of attendance was

not at a level that the business could support due to the impact on resourcing and customer service.

144. Ms Muir accordingly decided to dismiss the claimant on grounds of capability with 12 week's notice, her employment ending on 12 January 2021. She was paid in lieu of her notice period.

145. In short, Ms Muir believed that the claimant's attendance at work had not been and was not reasonably likely to be at a level that was acceptable. She concluded that home working would not significantly reduce the absence to a material extent. She had considered home working but in light of the information before her, including what the claimant had said, she decided that home working was not likely to result in the claimant's attendance improving to a reasonable level. She took account of the flare ups over which the claimant had no control. Even although these may be reduced by home working, since the claimant's movement would be less (than it would if she had to attend the office), the claimant would still suffer periods of absence (over which she had no control). She also believed that the claimant's mental health could potentially be adversely affected by being isolated at home, rather than amongst her colleagues. She took into account the claimant's home move and that she was closer to her support network. In short she concluded that home working would not result in sufficient improvement in attendance.

146. The letter ended noting that if the claimant felt there was any important or relevant information that had not already been looked at, she could formally appeal the decision within 14 days.

**Impact upon the business by absence**

147. A worker in the claimant's position would ordinarily be expected to deal with around 300 calls each month. When a colleague is absent from work, there are no other replacement colleagues who can take up the slack. The calls would fall to be dealt with by existing colleagues who already have their own

workload. The nature of the calls in the area the claimant worked were sensitive and involved customers who had potentially been the victim of fraud and who had lost potentially very significant sums of money. It was important to the respondent that these calls were answered promptly and dealt with sensitively.

148. The absence of the claimant from work resulted in the calls having to be dealt with by colleagues, thereby creating more pressure upon such colleagues, who required to deal with these calls in addition to their existing full workload. It had the potential to affect morale and added pressure since such colleagues may require to extend their working time to deal with the calls.

149. The absence of the claimant also impacted upon customers given some customers may simply hang up instead of waiting for the call to be answered. Customers were likely to have to wait longer for their calls to be answered. The absence of the claimant therefore had the potential to create an adverse impact for customers.

**Issues with regard to working from home**

150. Ms Muir applied the policy of the respondent which was that working from home was only permitted by those who were “deemed competent” (having had 5 calls independently assessed in a 3 month period, something the claimant had not yet achieved). Ms Muir did not know if that policy was capable of adjustment and did not request any adjustment to it. She was of the view that the information before her resulted in there being no need to adjust the policy because even if the claimant did work from home, the claimant’s absence was not likely to reach a reasonable level.

151. Given the type of work the claimant did, working from home created additional risks for colleagues, customers and the respondent. This was because of the additional information to which the claimant had access as a result of her role. That created additional security issues.

152. Working from home also resulted in there being no supervisor nearby who could listen to calls, on an ad hoc basis (since the worker would be alone at home rather than within a working environment with others). That also meant colleagues were unable to urgently seek help while on a call, since the colleague would be at home rather in an office environment with colleagues (and managers) nearby.

153. For someone who had not been "deemed competent", working from home presented a greater risk given the added difficulty with regard to supporting the colleague where assistance was needed.

**Claimant's appeal**

154. The claimant appealed the decision to dismiss on 25 January 2021. She said that the majority of her absences had been caused by the back condition which was a disability and had affected her since 2011. She made 4 points with regard to adjustments.

155. Firstly she said earlier intervention could have made a difference. Given the issues affecting the claimant in January 2020 every support mechanism should have been explored and yet no referral was made to Occupational Health.

156. Secondly home working never materialised. The last two occupational health reports suggested working from home and shift changes might improve her attendance. She referred to the report stating that if she could catch exacerbations early and rest from physical activity her pack pain may be very mild and only last a day. The claimant said: "*Home working isn't just about facilitating a way to work when experiencing pain, it would allow me to catch an episode, minimise its impact, reduce my pain killer dependency and to be back at full health quicker. Despite many other colleagues being offered home working form the start of the pandemic where there was no legal or medical imperative to do so it never materialised for me*."

157. Thirdly she referred to workplace adjustment leave. She said home working was a critical reasonable adjustment and would have made a significant improvement to her attendance. The lack of that adjustment aggravated her flare up through all the physical activity in attending work leading to longer absences. She argued the only humane thing to do was to put her on workplace adjustment leave until home working became available.

158. Finally she referred to working hours. She said the occupational health reports suggested that changing her shifts would help her depression and isolation so show could contact her friends. She worked 2 til 10 which had a negative impact on her life. The exacerbation would not have been near as bad. The failure to provide the adjustments caused unnecessary pain and led to losing her job.

**Appeal meeting**

159. On 17 February 2021 the claimant was invited to an appeal meeting on 23 February 2021 which was chaired by Ms Sinclair. The claimant was in attendance with her union representative.

160. The claimant explained that the main issue was not being allowed to work from home. She said she believed she had never been given the opportunity and her mental health had been affected. Having to travel and the movement caused pain and her entire body was in pain during a flare up. That made her absence worse. She explained that when she hurt her back in August she was in pain as soon as she opened her eyes. She could not get an operation and felt she had done everything to help herself and home working could have improved that because she would not need to travel if she had a flare up.

161. She said she had been asked in January if her absence would improve working from home and she said she did not have a crystal ball and had not experienced it but based on what happened 3 weeks ago when she was off she had a flare up but because she was in the house with reduced movement she needed fewer pain killers.

162. With regard to shift work the claimant said there was a bit of confusion at it had been agreed it would be looked at. Ms Sinclair noted that the notes from the January meeting suggested the claimant had been content to leave the shifts as they were. The claimant said if she had got home working she would not need to change her shifts. She wanted home working so she could see her friend.

163. Ms Sinclair noted that at the final formal meeting in August and January home working was discussed and the claimant had said she did not think it would improve attendance because when she takes pain killers it would always impact servicing customers. The claimant said she had also mentioned in January that she wanted her absence to improve and did not have a crystal ball and only took diazepam for 1 day on the last flare up because she was at home. It is the diazepam that affected her. She explained that as that is a very powerful relaxant she had to choose between working or diazepam because of the pain. If it is not exacerbating, the pain was more manageable.

164. The claimant explained that if it happened at home she would try and move when on a call. She said that the whole thing about not exacerbating herself was missed. She said she had referred to movement in meetings and exacerbation but it was missed.

165. With regard to home working it was discussed at the start of 2020 but she had to get back to work first. She said she did 35 hours per week which could perhaps have been reduced if she got PIP which she secured at the beginning of January. That had not been discussed with Ms Muir as she only secured it in January.

166. The claimant was of the view that home working would have helped a lot since there would be less travelling. She was not happy at not having been given the chance.

167. Ms Sinclair summarised that he main issue was not having been given the opportunity to work from home because she believed her absence would have

improved. The claimant concluded the meeting by saying that she believed Ms Muir did not intend to offer home working and the respondent had picked and chose what recommendations to do and forced the claimant into absence which was not good for her mental health. Home working would help by having her friend nearby.

**Further investigation**

168. As a consequence of the appeal meeting Ms Sinclair decided to take further information from Ms Muir which she did on 4 March 2021. The first issue was why the claimant had not been given the opportunity to explore homeworking before she was dismissed. Ms Muir told Ms Sinclair that the claimant had been off on long term sick and returned around July 2020. She then had to go through retraining as she was "attaining competence". That meant the claimant was unable to work from home as she required to be competent. 5 calls need to be assessed over a 3 month period .That had been delayed due to absences. Ms Muir said she had ordered the laptop early so as soon as the claimant had been deemed competent she could work from home. She had not become competent prior to her dismissal.

169. Ms Sinclair asked about PIP and Ms Muir said she had not been given the outcome and did not know if the claimant had secured it or not.

170. Ms Sinclair also asked Ms Muir that the claimant had said she would be on lengthy calls, sometimes lasting 2 hours or more and wanted to know the impact on her health such calls would have. Ms Muir said that the 2019 occupational health report recommended the claimant be placed on a more fixed shift pattern to support her sleep. That was agreed and she was given 2 until 10 shift. The claimant had said she was happy with the shift pattern but if she returned to work it could be looked at. While the claimant had asked to move to a morning shift, occupational health had suggested she stay on the current shift as it would help her sleep. Ms Muir said she would have real concerns with the claimant dealing with lengthy calls given her back and mental health.

171. While working at home Ms Muir said medical breaks could be accommodated but Ms Muir said the claimant had advised her that the claimant wanted to be around people and had returned from absences early because it impacted on her mental health. While the respondent tried to give the same support to those working from home it is more difficult than being in the office. The other concern would be if the claimant was marked as "attaining" she would not be allowed to work from home. It was not clear the absence would improve if she was coming into the office for the 3 month period.

172. Ms Muir also noted that the claimant's absence was mainly made up of her back issues which was around 50% of her absence. Ms Muir said that during October and November the claimant was asked by occupational health if she would have worked from home with a lap top and said no as she was in bed full time. The latter point mentioned by Ms Muir was an error given the report did not state this but we did not consider that error to have had a material impact on the decision (and we considered it to be a genuine error).

173. With regard to managing the pain, Ms Muir said that when she was in pain the claimant would not be able to work, either from home or the office. It might reduce the days of absence but not the absence.

174. Finally Ms Sinclair asked Ms Muir why there had been 3 final reviews. Ms Muir said that the final review was in April 2020 but the pandemic led to the respondent pausing all final meetings. The final meeting took place in August but this was extended to await the outcome of the MRI scan. The claimant continued to have other absences after that point and when the final meeting came Ms Muir felt she had supported the claimant in every way possible.

**Outcome of appeal**

175. On 15 March 2021 Ms Sinclair issued the outcome of the appeal to the claimant. Ms Sinclair decided not to uphold the appeal. She said she believed that every possible support mechanism had been explored including medical

shift, BUPA, Employee Assistance, Samaritans, shift reviews, breaks and delayed outcome to meetings. Even during the period when the final meeting had been delayed there were further absences.

176. On reviewing the claimant's overall absence history, Ms Sinclair pointed out the claimant had attended a final formal meeting on 3 occasions and since 2018 had failed to maintain an acceptable level of attendance. There was no indication this would improve now or in the future.

177. Ms Sinclair said that when the claimant returned to work after a significant period of absence in July 2020 she was placed in the "attaining competence" category which is the usual policy where colleagues return from work after lengthy absence. Ms Sinclair said it had been agreed that to work from home a colleague required to be competence. 5 calls needed to be listened to over 3 months. That had not been completed for the claimant which meant it was not possible to work from home.

178. Ms Sinclair confirmed that a laptop had been ordered but the claimant required to be competent to work from home.

179. She was also concerned about the claimant managing lengthy calls given the pain the claimant can experience and the impact on customer service.

180. Ms Sinclair was also concerned that the claimant would not have the work support network around her when working from home. There had been occasions when the claimant had returned to work too soon because of how isolated she felt. Ms Sinclair did not feel working from home would be a healthy environment for the claimant given the issues the claimant had experienced. Shift patterns had been agreed with the claimant.

181. Ms Sinclair concluded: "*I feel that the bank has fully supported you with your medical conditions in recent years... After reviewing all the case notes and levels of absence (which have been about 50% due to back problems and 50% mental health and other concerns) as well as discussing with your line manager, I don't believe working from home would have made any significant*

*difference to your overall absence and I would be more concerned that it would have an adverse effect on your overall wellbeing. I therefore find that it was fair and reasonable for the Group to have dismissed you.*"

**Issues arising following dismissal**

182. The claimant was aged 42 when dismissed. She sought alternative work and secured a temporary role with effect from 1 June 2021 paying the net sum of £236.88 per week. She earned £369.23 net per week with the respondent £498.21 gross. She did not secure any relevant recoupable benefits.

**Observations on the evidence**

183. Each of the witnesses gave evidence clearly and cogently. We were satisfied that the witnesses did their best to recall matters. There were few fundamental disagreements as to the factual position. We turn to the areas where there were disputes on material issues and give our reasons why we found what we did.

184. The first issue was with regard to the training and competence policy. We considered that it was more likely than not that there was a training and competence policy. Regrettably this had not been provided to the Tribunal despite there being a document setting out the position. Nevertheless we accepted Ms Muir's evidence (which was broadly confirmed by Ms Sinclair) that for the role the claimant was undertaking the policy in place was that staff required to be assessed competent within 5 calls over a 3 month period.

185. We accepted the claimant's evidence that she could not recall the policy but she did not, as such, say that the policy was not in place. Indeed she was aware of a central place where her calls were assessed and comments were given for such assessed calls. We considered that it was more likely than not that, during the claimant's employment, there was an attaining competence policy that required her to be assessed as competent. We considered that

was why Ms Muir had referred to deeming the claimant competent during the meeting on 7 August 2020.

186. Ms Muir had ordered a laptop for the claimant as she wished to assist the claimant and ensure that once she had reached the stage of being "deemed competent" she would be able to work from home. This showed that Ms Muir was keen to support the claimant and had not closed her mind to the potential for the claimant's attendance to reach a reasonable level. She had sought to support the claimant where she could.

187. We considered that given the nature of the respondent's business it was more likely than not that the policy set out by Ms Muir was the policy that applied in respect of the claimant and was one on which the working from home policy was based. Ms Sinclair's evidence broadly corroborated what Ms Muir had said.

188. With regard to the claimant's assertion that the January 2021 meeting had been entered into the diary with the title "leaver's interview" we preferred Ms Muir's evidence. That was not an icon that was available and was, in our view, not likely to have been how the meeting was described. We found that Ms Muir attended the meeting with an open mind. While the claimant believed dismissal was predetermined, Ms Muir did attend the meeting prepared to listen to what the claimant said. It was not surprising the claimant believed that dismissal may be an outcome of the meeting given the levels of absence and uncertainty going forward but we did not find that dismissal had been predetermined. We considered that the claimant was mistaken in her recollection (and that she did not intend to mislead the Tribunal).

**Law**

*Jurisdiction of discrimination claims*

189. The complaints of disability discrimination were brought under the Equality Act 2010. By section 109(1) an employer is liable for the actions of its employees "in the course of employment".

*Burden of proof*

190. The Equality Act 2010 provides for a shifting burden of proof. Section 136 so far as material provides as follows:

> "(2) If there are facts from which the Court could decide in the absence of any other explanation that a person (A) contravened the provision concerned, the Court must hold that the contravention occurred.
>
> (3) But subsection (2) does not apply if A shows that A did not contravene the provision."

191. The section goes on to make it clear that a reference to the Court includes an Employment Tribunal.

192. It is for a claimant to establish facts from which the Tribunal can reasonably conclude that there has been a contravention of the Act. If the claimant establishes those facts, the burden shifts to the respondent to show that there has been no contravention by, for example, identifying a different reason for the treatment.

193. In **Hewage v Grampian Health Board** 2012 IRLR 870 the Supreme Court approved guidance previously given by the Court of Appeal on how the burden of proof provision should apply. That guidance appears in **Igen Limited v Wong** 2005 ICR 931 and was supplemented in **Madarassy v Nomura International plc** 2007 ICR 867. Although the concept of the shifting burden of proof involves a two stage process, that analysis should only be conducted

once the Tribunal has heard all the evidence, including any explanation offered by the employer for the treatment in question.

194. However, if in practice the Tribunal is able to make a firm finding as to the reason why a decision or action was taken, the burden of proof provision is unlikely to be material.

195. It was confirmed by Lord Justice Mummery in the Court of Appeal that it is not always necessary to address the two-stage test sequentially (see **Brown v London Borough of Croydon** 2007 ICR 909*)*. Although it would normally be good practice to apply the two-stage test, it is not an error of law for a tribunal to proceed straight to the second stage in cases where this does not prejudice the claimant. In that case, far from prejudicing the claimant, the approach had relieved him of the obligation to establish a *prima facie* case.

196. In this case the Tribunal has been able to make positive findings of fact without resort to the burden of proof provisions.

*Discrimination arising from disability*

197. Section 39(2)(c) of the Equality Act 2010 prohibits discrimination against an employee by dismissing him. Section 15 of the Act reads as follows:-

> "(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".

198. Paragraph 5.6 of the Equality and Human Rights Commission Code of Practice ("the Code") provides that when considering discrimination arising from disability there is no need to compare a disabled person's treatment with than of another person. It is only necessary to demonstrate that the unfavourable treatment is because of something arising in consequence of the disability.

199. In order for the claimant to succeed in his claims under section 15, the following must be made out:

(a) there must be unfavourable treatment (which the Code interprets widely saying it means that the disabled person 'must have been put at a disadvantage' (see para 5.7)).

(b) there must be something that arises in consequence of the claimant's disability;

(c) the unfavourable treatment must be because of (i.e. caused by) the something that arises in consequence of the disability;

(d) the alleged discriminator cannot show that the unfavourable treatment is a proportionate means of achieving a legitimate aim;

200. Useful guidance on the proper approach was provided by Mrs Justice Simler in the well-known case of **Pnaiser v NHS England** 2016 IRLR 170:

*"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 s.15 case. The "something" that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it*."

201. As to justification, in paragraph 4.27 the Code considers the phrase "a proportionate means of achieving a legitimate aim" (albeit in the context of justification of indirect discrimination) and suggested that the question should be approached in two stages:-

- is the aim legal and non-discriminatory, and one that represents a real, objective consideration?
- if so, is the means of achieving it proportionate – that is, appropriate and necessary in all the circumstances?

202. As to that second question, the Code goes on in paragraphs 4.30 – 4.32 to explain that this involves a balancing exercise between the discriminatory effect of the decision as against the reasons for applying it, taking into account all relevant facts. It goes on to say the following at paragraph 4.31:-

> "*although not defined by the Act, the term "proportionate" is taken from EU directives and its meaning has been clarified by decisions of the CJEU (formerly the ECJ). EU law views treatment as proportionate if it is an "appropriate and necessary" means of achieving a legitimate aim. But "necessary" does not mean that the [unfavourable treatment] is the only possible way of achieving a legitimate aim; it is sufficient that the same aim could not be achieved by less discriminatory means."*

203. The Code at paragraph 4.26 states that *"it is for the employer to justify the provision, criterion or practice. So it is up to the employer to produce evidence to support their assertion that it is justified. Generalisations will not be sufficient to provide justification. It is not necessary for that justification to have been fully set out at the time the provision criterion or practice was applied. If challenged, the employer can set out the justification to the Employment Tribunal."*

204. In ***Chief Constable v Homer*** 2012 ICR 704 Baroness Hale stated that to be proportionate a measure has to be both an appropriate means of achieving the legitimate aim and reasonably necessary in order to do so. She approved earlier authorities which emphasised the objective must correspond to a real need and the means used must be appropriate with a view to achieving the objective and be necessary to that end. It is necessary to weigh the need against the seriousness of the detriment.

205. The question is whether the action is, objectively assessed, a proportionate means to achieve a legitimate end. The employer has to show (and the onus is on the employer to show) that the treatment is a proportionate means of achieving a legitimate aim. The Tribunal can take account of the reasonable needs of the respondent's business but the Tribunal must make its own judgment as to whether the measure is reasonably necessary. There is no room for the range of reasonable response test.

206. The Tribunal is required to critically evaluate, in other words intensely analyse, the justification set out by the employer. The assessment is at the time the measure is applied and on the basis of information known at the time (even if the employer did not specifically advert to the justification position at that point). Flaws in the employer's decision-making process are irrelevant since what matters is the outcome and now how the decision is made.

207. There must firstly be a legitimate aim being pursued (which corresponds to a real need of the respondent), the measure must be capable of achieving that aim (ie it needs to be appropriate and reasonably necessary to achieve the aim and actually contribute to pursuit of the aim) and finally it must be proportionate.

The discriminatory effect needs to be balanced against the legitimate aim considering the qualitative and quantitative effect and whether any lesser form of action could achieve the legitimate aim.

208. Chapter 5 of the Code contains useful guidance in applying the law in this area and we have had regard to that guidance.

**Reasonable adjustments**

209. Section 39(5) of the Equality Act 2010 provides that a duty to make reasonable adjustments applies to an employer. Further provisions about that duty appear in sections 20 and 21 and Schedule 8. Paragraph 20 of Schedule 8 states: "A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know, … that an interested disabled person has a disability and is likely to be placed at the disadvantage". This is considered in chapter 6 of the Code.

210. Therefore the duty does not apply if the employer did not know, and could not reasonably be expected to know that the employee had a disability and was likely to be placed at the disadvantage in question by the PCP (Schedule 8 paragraph 20) (for which see **Wilcox v Birmingham CAB** 2011 EqLR 810).

211. The burden is on the employer to show it was unreasonable to have the required knowledge.

212. The importance of a Tribunal going through each of the constituent parts of section 20 was emphasised by the Employment Appeal Tribunal in **Environment Agency v Rowan** 2008 ICR 218 and reinforced in **Royal Bank of Scotland v Ashton** 2011 ICR 632.

213. As to whether a "provision, criterion or practice" ("PCP") can be identified, the Code at paragraph 6.10 says the phrase is not defined by the Act but "should be construed widely so as to include for example any formal or informal policy, rules, practices, arrangements or qualifications including one off decisions and

actions". The question of what will amount to a PCP was considered by the Employment Appeal Tribunal in **Nottingham City Transport Limited v Harvey** UKEAT/0032/12 and **Ishola v Transport for London** [2020] EWCA Civ 11, LJ Simler.

214. For the duty to arise, the employee must be subjected to "substantial disadvantage in comparison to a person who is not disabled" and with reference to whether a disadvantage resulting from a provision, criterion or practice is substantial, section 212(1) defines "substantial" as being "more than minor or trivial". The question is whether the PCP has the effect of disadvantaging the disabled person more than trivially in comparison to those who do not have the disability *(***Sheikholeslami v University of Edinburgh,** 2018 IRLR 1090*).*

215. The obligation to take such steps as it is reasonable to have to take to avoid the disadvantage is one in respect of which the Code provides considerable assistance, not least the passages beginning at paragraph 6.23 onwards. A list of factors which might be taken into account appears at paragraph 6.28 and includes the practicability of the step, the financial and other costs of making the adjustment and the extent of any disruption caused, the extent of the employer's financial or other resources and the type and size of the employer.

216. Paragraph 6.29 makes clear that ultimately the test of the reasonableness of any step is an objective one depending on the circumstances of the case. It is for the Tribunal to assess this issue. Examples of reasonable adjustments in practice appear from paragraph 6.32 onwards. Paragraph 6.33 notes that allowing a worker to work from home might be a reasonable adjustment in some cases.

**Time limit in respect of reasonable adjustments**.

217. Section 123 of the Equality Act 2010 deals with time limits and says:

(1) Proceedings may not be brought after the end of (1) 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.

(2) …

(3) (a) Conduct extending over a period is to be treated as sone at the end of the period and (b) Failure to do something is to be treated as occurring when the person in question decided on it.

(4) In the absence of evidence to the contrary a person is to be taken to decide on failure to do something When they do an act inconsistent with doing it or if there is no inconsistent act on expiry of the period when they might reasonably have been expected to do it.

218. With regard to a failure to comply with the duty to make reasonable adjustments and time limits, a difficult issue is whether a failure to make adjustments a continuing act or is it an omission. In **Humphries v Chevler Packaging Ltd** EAT 0224/06 the Employment Appeal Tribunal confirmed that a failure to act is an omission and that time begins to run when an employer decides not to make the reasonable adjustment.

219. The Court of Appeal provided further guidance in **Kingston upon Hull City Council v Matuszowicz** 2009 ICR 1170. The Court of Appeal noted that, for the purposes of claims where the employer was not deliberately failing to comply with the duty, and the omission was due to lack of diligence or competence or any reason other than conscious refusal, it is to be treated as having decided upon the omission at what is in one sense an artificial date. In the absence of evidence as to when the omission was decided upon, the legislation provides two alternatives for defining that point in section 123. The first is when the person does an act inconsistent with doing the omitted act. The second presupposes that the person in question has carried on for a time without doing anything inconsistent with doing the omitted act, and it then requires consideration of the period within which the respondent might reasonably have been expected do the omitted act if it was to be done. In

terms of the duty to make reasonable adjustments, that requires an inquiry as to when, if the employer had been acting reasonably, it would have made the reasonable adjustments. That is not at all the same as inquiring whether the employer did in fact decide upon doing it at that time.

220. Sedley LJ stated that: '*claimants and their advisers need to be prepared, once a potentially discriminatory omission has been brought to the employer's attention, to issue proceedings sooner rather than later unless an express agreement is obtained that no point will be taken on time for as long as it takes to address the alleged omission'*.

221. In determining when the period expired within which the employer might reasonably have been expected to make an adjustment, the Tribunal should have regard to the facts as they would reasonably have appeared to the claimant, including what the claimant was told by his or her employer.

222. In **Abertawe Bro Morgannwg University Local Health Board v Morgan** 2018 ICR 1194, the claimant brought a claim of failure to make a reasonable adjustment based on a failure to redeploy her to another role. The tribunal considered that the Board would reasonably have been expected to have made the adjustment by 1 August 2011 and so this was when time began to run.

223. Before the Court of Appeal, the Board argued that this meant that it could not have been in breach of duty before that date but the Court disagreed. Not all time limits are fixed by reference to the date on which a cause of action accrued. In the case of reasonable adjustments, the duty arises as soon as the employer is able to take steps which it is reasonable for it to take to avoid the relevant disadvantage. In that case, the situation arose around April 2011. However, the Court observed that if time for submitting a claim began to run at that date, the claimant might be unfairly prejudiced. He or she might reasonably believe that the employer was taking steps to address the disadvantage, when in fact the employer was doing nothing. By the time it became (or should have become) apparent to the claimant that the employer

was doing nothing, the time limit for bringing proceedings might have expired. Accordingly, for the purposes of the time limit, the period within which the employer might reasonably have been expected to comply had to be determined in the light of what the claimant reasonably knew. In that case the Tribunal found that by June/July 2011 it should have been reasonably clear to the claimant that the Board was not looking for suitable alternative roles for her. Although the Tribunal was generous in finding that time did not begin to run until 1 August, it could not be said that this conclusion was not open to it.

224. Legatt 's LJ set out the legal principles at paragraph 14 onwards of the judgment which we apply. We have also taken into account Richardson HHJ's judgment in **Watkins v HSBC** [2018]I IRLR 1015. That judgment makes clear that failure to comply with the duty to make reasonable adjustments ought to be considered a continuing failure (rather than an act extending over a period) such that section 123(3) and (4) should be applied (see paragraph 48).

225. Section 123 of the Equality Act 2010 requires that any complaint of discrimination within the Act must be brought within three months of the date of the act to which the complaint relates, or such other period as the Tribunal thinks just and equitable. When considering whether it is just and equitable to hear a claim notwithstanding that it has not been brought within the requisite three month time period, the Employment Appeal Tribunal has said in the case of **Chohan v Derby Law Centre** 2004 IRLR 685 that a Tribunal should have regard to the Limitation Act 1980 checklist as modified in the case of **British Coal Corporation v Keeble** 1997 IRLR 336 which is as follows:

- The Tribunal should have regard to the prejudice to each party.
- The Tribunal should have regard to all the circumstances of the case which would include:
    - Length and reason for any delay
    - The extent to which cogency of evidence is likely to be affected

- The cooperation of the respondent in the provision of information requested
- The promptness with which the claimant acted once he knew of facts giving rise to the cause of action
- Steps taken by the claimant to obtain advice once he knew of the possibility of taking action.

226. In **Abertawe v Morgan** 2018 IRLR 1050 the Court of Appeal clarified that there was no requirement to apply this or any other check list under the wide discretion afforded to Tribunals by section 123(1). The only requirement is not to leave a significant factor out of account. Further, there is no requirement that the Tribunal must be satisfied that there was a good reason for any delay; the absence of a reason or the nature of the reason are factors to take into account. A key issue is whether a fair hearing can take place.

227. In the case of **Robertson v Bexley Community Services** 2003 IRLR 434 the Court of Appeal stated that time limits are exercised strictly in employment law and there is no presumption, when exercising discretion on the just and equitable question, that time should be extended. Nevertheless, this is a matter which is in the Tribunal's discretion.

228. That has to be tempered with the comments of the Court of Appeal in **Chief Constable of Lincolnshire v Caston** 2010 IRLR 327 where it was observed that although time limits are to be enforced strictly, Tribunals have wide discretion.

229. Finally we have also taken into account the judgment of Underhill LJ in **Lowri Beck Services v Brophy** 2019 EWCA Civ 2490 and in particular at paragraph 14. Ultimately the Tribunal requires to make a judicial assessment from all the facts to determine whether to allow the claims to proceed.

Unfair Dismissal

230. The unfair dismissal claim was brought under Part X of the Employment Rights Act 1996. Section 98(1) places the burden on the employer to show the reason or principal reason for the dismissal and that it is one of the potentially fair reasons identified within Section 98(2), or failing that some other substantial reason. The potentially fair reasons in section 98(2) include a reason which:- "relates to the capability or qualifications of the employee for performing work of a kind which he was employed by the employer to do".

231. Section 98(3) goes on to provide that "capability" means capability assessed by reference to skill, aptitude, health or any other physical or mental quality.

232. Where the respondent shows that dismissal was for a potentially fair reason, the general test of fairness appears in Section 98(4):

> "…the determination of the question whether the dismissal is fair or unfair (having regard to the reasons shown by the employer) –
>
> (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
>
> (b) shall be determined in accordance with equity and the substantial merits of the case".

233. It has been clear ever since the decision of the Employment Appeal Tribunal in **Iceland Frozen Foods Limited -v- Jones** 1982 IRLR 439 that the starting points should be always the wording of section 98(4) and that in judging the reasonableness of the employer's conduct a Tribunal must not substitute its decision as to what was the right course to adopt for that of the employer. In most cases there is a band of reasonable responses to the situation and a Tribunal must ask itself whether the employer's decision falls within or without that band. This approach was endorsed by the Court of Appeal in **Post Office –v- Foley; HSBC Bank Plc –v- Madden** 2000 IRLR 827.

234. The application of this test in cases of dismissal due to ill health and absence was considered in **Spencer –v- Paragon Wallpapers Limited** 1976 IRLR 373 and in **East Lindsey District Council –v- Daubney** 1977 IRLR 181. The **Spencer** case establishes that the basic question to be determined when looking at the fairness of the dismissal is whether, in all the circumstances, the employer can be expected to wait any longer, and if so how much longer. Matters to be taken into account are the nature of the illness, the likely length of the continuing absence, and the overall circumstances of the case. In **Daubney**, the Employment Appeal Tribunal made clear that unless there were wholly exceptional circumstances, it is necessary to consult the employee and to take steps to discover the true medical position before a decision on whether to dismiss can properly be taken. However, in general terms where an employer has taken steps to ascertain the true medical position and to consult the employee before a decision is taken, a dismissal is likely to be fair.

235. The Employment Appeal Tribunal considered this area of law in **DB Shenker Rail (UK) Limited –v- Doolan** UKEATS/0053/09/BI). In that case the Employment Appeal Tribunal (Lady Smith presiding) indicated that the three stage analysis appropriate in cases of misconduct dismissals (which is derived from **British Home Stores Limited –v- Burchell** 1978 IRLR 379) is applicable in these cases. In **BS v Dundee City Council 2014 IRLR 131** in which at dismissal the employee had been off sick for about 12 months (after 35 years' service) with a fit note for a further four weeks, the Court reviewed the earlier authorities and said this at paragraph 27: "*Three important themes emerge from the decisions in Spencer and Daubney. First, in a case where an employee has been absent from work for some time owing to sickness, it is essential to consider the question of whether the employer can be expected to wait longer. Secondly, there is a need to consult the employee and take his views into account. We would emphasize, however, that this is a factor that can operate both for and against dismissal. If the employee states that he is anxious to return to work as soon as he can and hopes that he will be able to*

*do so in the near future, that operates in his favour; if, on the other hand he states that he is no better and does not know when he can return to work, that is a significant factor operating against him. Thirdly, there is a need to take steps to discover the employee's medical condition and his likely prognosis, but this merely requires the obtaining of proper medical advice; it does not require the employer to pursue detailed medical examination; all that the employer requires to do is to ensure that the correct question is asked and answered*."

**Submissions**

236. Both parties had prepared written submissions and were given the chance to comment upon each other's submissions in addition to making oral submissions. We are grateful to both parties for taking the time to do so and for fairly refining the issues in dispute. We set out below a summary of the parties' submissions, which were taken into account in full. We provide a summary below.

**Submissions from respondent**

**Section 15, Equality Act 2010 claim**

237. It was accepted that the claimant was disabled and her dismissal constituted unfavourable treatment and that the dismissal arose, in part, because of her absences and that those absences were, in part, a consequence of her disability. The question was whether dismissal was justified.

238. In all the circumstances the decision to dismiss was a proportionate means of achieving the aims. The appropriate management of employees who are unable to maintain an acceptable level of attendance is obviously necessary to ensure consistent attendance of employees at work. The main issue is whether dismissal was a proportionate means of achieving this aim. Ms Muir

gave evidence of the effect of one employee being absent from work for one month and that an employee would normally manage around 300 calls in one month. These calls (or at least some of them) would have to be dealt with other colleagues or would not be dealt with at all. There was an impact on customers.

239. The claimant accepted that her level of absences was 'bad' and 'not great'. The claimant accepted that there will be times - even at home – when she will not be able to work. She had "no control" over her disability (relating to her back). It is difficult to see how working from home would assist the claimant.

240. Further the claimant would only be eligible to work from home when she had been deemed competent (as was explained to her in the interim meeting on 2/7/2020. The policy had been agreed with unions and the claimant had not been deemed competent.

241. The decision to dismiss the claimant was made only after a lengthy absence management procedure that was varied/extended for the claimant's benefit. She had the benefit of a reduced attendance requirement. The claimant agreed during the absence management procedure that when she is required to take diazepam have could not work in the office or at home and when her back pain is severe, she could not work at home. She had managed to improve her attendance in Q2 and Q4 of 2020 at times when she was working in the office. Therefore, there is little evidence that the claimant working at home would have improved her attendance overall.

**Claim for breach of duty to make reasonable adjustments**

242. It was accepted that each of the PCPs is a PCP for the purposes of section 20. It was not accepted that the PCP of being required to work in the office put the claimant at a substantial disadvantage compared with persons who were not disabled. She had not established that the requirement to work in the office led to an exacerbation of her symptoms of her mental and physical

impairment; that it led to absences which caused her to trigger the Absence Management Policy; or that it led to her dismissal. In any event it was submitted that the respondent was not aware and could not reasonably have been aware of the substantial disadvantage relied upon. It was argued that the duty to make reasonable adjustments did not therefore arise.

243. Even if it did it was submitted that the duty to make reasonable adjustments did arise, it was unclear at which point in time the claimant alleges it arose.

244. In any event it was argued that the adjustments proposed by the claimant were not reasonable adjustments. It was unlikely that allowing the claimant to work from home would have avoided the substantial disadvantages relied upon. The claimant was able to attend the office to work for substantial periods of time. There was evidence that at times she would not been able to work even if at home. The 'Attaining to Competence' process that required the claimant to work in the office until she was deemed competent could not be varied. This is not an unreasonable position.

245. For present purposes the first time the claimant raised the issue of working from home was at the Final Formal Meeting. The claimant had not suggested before that point that she should be allowed to work from home. The respondent was not aware before that point that the claimant considered that working from home could have improved her attendance.

246. It was submitted that the potential adjustments relied upon– allowing the claimant to work from home and amending the "Attaining to Competence" policy - were not reasonable adjustments. The claimant was not able to work from home because she had not attained 'competency' in terms of the Attaining Competency process for homeworking. The claimant accepted that at certain times when her discomfort is severe, she could not work from home (even if 'based' there). There were times when the claimant would have to take diazepam at home, and she would not be able to work on those occasions.

**Time bar points**

247. It was argued that the claim was time barred. The time for bringing a claim would normally start running on the expiry of the period when the respondent could have been reasonably expected to make the reasonable adjustment.

**Unfair dismissal**

248. The claimant was dismissed for a 'potentially fair' reason of capability (due to ill health). The process leading to her dismissal was fair and the claimant accepted that she was aware of the process and did not have any substantial complaints or criticisms as to how that process was carried out.

249. It was submitted that the central question in cases involving ill-health related dismissals is whether a reasonable employer would have waited longer to dismiss and, if so, how long. An employer should have regard to the whole history of the employment and to take into account a range of factors including the nature of the illness and the likelihood of its recurrence, the length of the absences compared with the intervals of good health, the employer's need for that particular employee, the impact of the absences on the rest of the workforce and the extent to which the employee was made aware of his position.

250. In the present case, the respondent delayed the final decision from August 2020 to January 2021. This was to allow the claimant the opportunity to find out if surgery woold be a possible way of assisting her back pain and to obtain a further Occupational Health Report. Unfortunately, the claimant reported that she had been advised that she could not safely undergo surgery for her back condition. She had a poor history of absence and there was no indication or evidence that her attendance would improve. On the contrary the Occupational Health Report of 8 December 2020 should be considered.

251. The statement that further episodes of sickness absence were largely unavoidable is not qualified by the comments on working from home. The upshot is that there was little evidence that working from home would reduce sickness absence. This is consistent with the claimant's acceptance that there would be periods when she was working at home when she would be unable to work due to her back pain or unable to take calls (and therefore work) due to having to take diazepam. There was little evidence that allowing the claimant to work from home would improve her attendance (even if she was eligible to work from home).

252. On the basis of the information available to the respondent, the decision to dismiss was clearly within the range of reasonable responses and her dismissal is fair.

253. None of the points listed at in the agreed List of Issues would render the dismissal unfair. In particular it is submitted that her dismissal was not pre-determined. The evidence demonstrated that Ms Muir approached her task with professionalism, diligence and an open mind. She decided – for the claimant's benefit – to delay making her decision after the Final Meeting in August 2020 so that the claimant had the opportunity of obtaining information that could potentially strengthen her case. The minutes of the further Final Meeting held of 5 January 2021 demonstrate that the claimant was given the opportunity to make the points she wanted to make as regards her absences.

254. It was simply not the case that the Occupational Health Reports were not considered. It was argued that this was not a recommendation that the claimant should work from home and, in any event, is qualified by the terms of the later report to the effect that further absences of sickness absence were largely unavoidable.

**Remedy**

255. It was submitted that the tribunal does not have sufficient evidence to find that a connection between any discrimination and injury to feelings had been

established. There was not sufficient evidence to establish that any acts of discrimination caused injury to feelings.

256. Even if the claimant had established a causal connection between an act of discrimination and injury to feelings it was submitted that any award of compensation should be in the lowest Vento band. The respondent made a number of adjustments for the claimant to the Absence Management Policy and in relation to workplace adjustments and the provision of equipment. The claimant frequently agreed that there was no further assistance that could be given to her. The respondent made its decision to dismiss the claimant in good faith and following a length absence management procedure. These matters all pointed to an award in the lowest Vento band.

**Claimant's submissions**

**Section 15 claim**

257. The claimant's agent indicated that the only unfavourable treatment being relied upon was the dismissal. As that was conceded by the respondent to be unfavourable treatment and it was accepted that the claimant's absence arose in consequence of her disability the issue was agreed to be one of justification. The claimant's agent accepted that the 2 aims relied upon, were legitimate but argued that dismissal was not a proportionate means of achieving it.

258. It was argued that subjecting the claimant to dismissal was not a proportionate means of achieving the aims relied upon. There was no detailed evidence on this. There was a generalised statement about impacting upon colleagues and customers, but nothing more. Ms Muri was unable to point to any exact instances where colleagues were affected, or how many customers could not get through.

**Breach of the duty to make reasonable adjustments**

259. The claimant contended that the failure to make reasonable adjustment was "conduct extending over a period" in terms of s123(3)(a). The failure to do something is to be treated as occurring when the person in question decided on it. The claimant says that this occurred when she returned to work at the end of June 2020, and the adjustment she required were not put in place. The claimant contended that it was Ms Muir who decided to not put these adjustments in place and that she acted in a way inconsistent with doing the act.

260. The claimant contended that the conduct extending over a period was as follows:

- 29/6/2021 – Return to work
- 2/10/2021 – request for 2-10 shift to be changes.
- 5/8/2020 – Claimant's back condition worsens after a spasm
- 7/8/2020 – Capability Meeting –Claimant identifies the adjustment of working from home
- 20/8/2020 – OH identify working from home as a possible adjustment
- 27/8/2020 – Claimant has discussion with Ms Romaro re working from home and Laptop
- 24/11/2020 – Claimant identifies working from home as reasonable adjustment and in meeting with Loraine
- 8/12/2020 – OH recommend working from home
- 5/1/2021 – final capability meeting – claimant again asks for working from home
- 12/1/2021 – decision to dismiss– refuse to allow working from home

261. As the claimant commenced early conciliation on 23 March 2021 with the certificate being issued on 4 May 2020 and the claimant presented her claim on 21 May 2020, this claim was presented in time.

262. The claimant 's agent confirmed that the only PCPs being relied upon was the requirement to work in the office and adjust the attaining competence policy. The respondent had accepted that these were applied to the claimant and so the issue was whether the PCPs put the claimant at a substantial disadvantage compared to someone without the claimant's disability.

263. The claimant's evidence was that this caused an exacerbation in symptoms of her mental and physical impairment. Due to the nature of her back impairment this caused her disadvantage in comparison with her non-disabled colleagues, as mobility issues, pain and pain triggered depression, led to increased likelihood of sickness absence. The claimant contended that attending the office, in terms of travelling to and from and getting ready in the morning, would not put her non-disabled colleagues at disadvantage. It caused her pain to get worse. The claimant was unable to "capture" the instances of back pain, thus causing it to worsen.

264. It was submitted that the respondent knew the disadvantaged faced by the requirement to work in the office:

- Ms Sinclair accepted that travelling to the office could made the back pain worse.
- On 7 August 2020 the claimant said that working from home would be able to assist her.
- OH report 20 August 2020 – exacerbations of back pain - flexible working from home could be an option
- 24 August 2020 – sick leave – being in the office cause her pain.
- 1 September 2020 she comes back to work then leaves again.
- Returns to work on 7 September – exacerbation in mental health symptoms due to pain
- 19 November 2020 – pain severe and she goes home
- 24 November 2020 – saying working from home would help increase her attendance
- OH report 8 December 2020 – recommended working from home

- 4 Jan 2020 – dismissal meeting

265. With regard to steps it was argued the respondent should have allowed the claimant to work from home. The claimant asked for this on 7 August and 24 November and beyond and occupational health recommended it. The claimant contended that working from home in the context of a global pandemic was practical and would not have crested too much of a financial difficulty for an employer the size of the respondent given 30% of the workforce worked from home at the start of the pandemic and if the claimant attained "competence" then home working could have been tried, with the pain management levels being under review.

266. It was argued that the respondent focused to too narrowly on the claimant saying that when she has severe pain and requires to take diazepam, that she would be unable to work from home in this instance. What the respondent neglected was the fact that should the claimant work from home it would minimise the likelihood of her back pain becoming so unmanageable that she would require to take diazepam. The claimant believed that this was purposefully not considered by the respondent, in order for them to justify dismissal. The respondent, instead of probing the answers the claimant gave regarding the diazepam and working from home, purposefully took it at its highest, making the assumption that this meant the claimant would regularly be unfit to work at home, instead of considering the reality that the claimant's pain would be minimised and she would be less likely to require to take her full complement of medication should she be allowed to work from home.

267. It was submitted that it was not for the claimant to prove that the reasonable adjustments would have alleviated the disadvantage completely - itis the claimant's position that working from home would have given her a chance to improve her absence. The claimant had moved house and was nearer her support network. It does not appear that this was taken into consideration by the respondent to alleviate their concerns are isolation and the deterioration in her mental health.

268. It was submitted that it was reasonable to take the steps on various occasions from 7 July 2020 to 20 August 2020 up to the final meeting in January 2021.

**Unfair dismissal**

269. It was submitted that the respondent did not reasonably believe the claimant was incapable of performing here duties. The respondent based its belief around mental health and isolation on the September absences. The claimant's mental health deteriorated not because she was at home, rather as her medication had changed.

270. The claimant's absences had been improving and the respondent should have waiting longer before dismissing and other options should have been explored. The respondent did not raise any issue with her capability or ability to perform work- claimant unable to achieve "competence" as she was unable she was "attaining". Back Pain was the large majority of absence.

271. Had the reasonable adjustments been implemented her attendance would have improved. Dismissal was also predetermined given what had been entered into the calendar. No alternative roles were considered for the claimant.

272. Finally the claimant had also moved house and was nearer her support network. It does not appear that this was taken into consideration by the respondent to alleviate their concerns are isolation and the deterioration in her mental health.

**Remedy**

273. Having regard to all of the circumstance, and in particular, to the claimant's testimony about her feeling relating to the failures to allow her to work from home and impact it had on her mental and physical health, it was argued that injury to feelings should be placed in the middle band. This was a cause of

and worry for the claimant and caused an exacerbation in her mental health complain.

274. The claimant said that she felt she needed to push herself to get into the office. She became tearful as she spoke of September 2020 and her feeling the need to attend work when she was in pain. She said she was worried about being on a "stage" and she was worried about losing her job. She said she was constantly worried about work as every third absence she triggers a stage. After the flare up in August she said that she was" hurting myself every day" to get into work. The claimant said she wrote the email of 24 January 2020 as she was anxious about losing her job.

275. Although she could mitigate her pain if she catches it, she was unable to do this when working in the office. She said that the back pain causes her mental health to dip. She said in September 2020 she was finding it difficult to work. When she was dismissed she said humiliated and that she felt the respondent did not care about her mental health. She said she was escorted out of the building. She was dismayed and shocked about the appeal outcome.

**Respondent's response**

276. The respondent's agent in response noted that during each of the interactions between the claimant and Ms Muir the claimant was repeatedly asked if the respondent could do anything else and she said they could not. That is relevant as to knowledge of substantial disadvantage and tends to show that there was no such knowledge.

277. The respondent's agent argued that the reasonable adjustments claim must be out of time. The claimant's agent had made it clear that it was being argued the claim arose from a breach in June. That was the claim relied upon. Even if the duty arose subsequent to that, there cannot be separate failures since the initial act is the act relied upon. The wording of the statute should be applied. While no case law was referred to, it was argued that an application

of the statutory wording showed the claim was out of time and no evidence had been lodged to show why it was just and equitable to extend the time.

## Discussion and decision

278. The Tribunal was able to reach a unanimous decision in relation to each issue. We address each of the issues arising in turn, having taken careful consideration of the evidence led before the Tribunal and each of the parties' written and oral submissions.

### Section 15 claim

### Unfavourable treatment

279. The unfavourable treatment relied upon by the claimant was her dismissal and it was accepted by the respondent that this was unfavourable. It was also accepted that the claimant's absence arose in consequence of her disability (at least in part) and that she was dismissed because of her absence. The respondent knew that the claimant was disabled and this was not a live issue.

### Justification

280. The issue to be determined therefore is whether or not dismissal was a proportionate means of achieving a legitimate aim.

281. The first aim relied upon, appropriate management of employees who are unable to sustain an acceptable level of attendance or as described during the hearing, the need to have employees attend their work, was a legitimate aim, and was conceded as such by the claimant's agent.

282. We assess the matter with regard to the information before the appeal officer as submitted by the claimant (which is identical to the information before us). In principle we find that dismissal is capable of achieving the aim since it is

necessary on occasion to dismiss as part of the absence management process to maintain a reasonable level of attendance at work. The purpose of the process is to encourage and support individuals to achieve a reasonable level of attendance at work.

283. We must balance the discriminatory effect upon the claimant against the legitimate aim relied upon by the respondent. We consider this both from a qualitative and quantitative perspective. We recognise (and take into account) the very significant effect losing her job would have upon the claimant given her length of service and clear desire to remain in employment. Equally we consider the importance to the respondent of managing attendance and the impact upon the respondent.

284. In this case we considered that dismissal was a proportionate means of achieving the legitimate aim and reasonably necessary to achieve it. We take into account that there were other things that could have been done, including changing hours due to the PIP outcome (albeit the PIP outcome was not known to the respondent as the claimant had not communicated this) and exploring alternative roles but ultimately from the information before the respondent at the time of appeal outcome, the claimant was unable and unlikely to achieve a reasonable level of attendance. The impact of dismissal was severe upon the claimant but equally the point had been reached given the impact upon the respondent that dismissal was proportionate. The evidence that was before the respondent was clear that there was no likelihood attendance would improve to an acceptable level – even taking account of the context and changes the claimant had secured. There was little reasonable prospect of an acceptable improvement overall.

285. As discussed with the claimant's agent during submissions, we did not consider we could take into account what happened with regard to the claimant's health following her employment ended since those circumstances were materially different to those which subsisted when she was engaged by the respondent. We assess the position in light of the information available at the time and reach our own view on that.

286. The key issue in this case was whether or not it would have been reasonable for the respondent to have allowed, even on a trial basis, home working for the claimant and whether that rendered dismissal disproportionate. We considered, on balance, after lengthy and careful consideration of all the material before us, that it was proportionate to dismiss the claimant without allowing home working at the time in question.

287. The nature of the respondent's organisation was such that home working was allowed in limited cases (a matter expedited with the pandemic). The claimant had significant absence and had almost completed her call assessments but there was one call assessment outstanding. Her absence had a material effect on her knowledge of the role and the claimant had undertaken the re-training and was continuing to work in the office in the role in question, which was a relatively new role for her. There were additional security issues of working from home and training issues. We found that it would not have been reasonable to have expedited the assessment given the absence the claimant had to date and aim to give her as much experience (amongst her colleagues on site) as possible.

288. We concluded that allowing homeworking would not have resulted in improvement in attendance to a reasonable level. In other words, even if homeworking had been permitted, the information showed (and the claimant accepted at the time) that her absence would continue. While it may reduce in some way, the claimant had no control over when her flare ups happened. The medical evidence before the respondent suggested that even the mildest flare up would last at least a day and potentially longer.

289. While the claimant was able to mitigate the effect of a flare up by limiting her movement, the flare ups would still occur (irrespective of whether she was working from home or not). This was something over which the claimant had no control. That was a very significant factor and one which home working would not alter.

290. We took these factors into account in considering whether dismissal was proportionate given the authorities in this area.

291. We considered that the respondent had discharged the onus of showing that dismissal was a proportionate means of achieving this legitimate aim, in terms of managing attendance at work. Even if the alternatives were attempted, there was no reasonable basis to conclude that attendance would improve to an acceptable level. The claimant's belief was one factor but looking at the context the respondent was in our view right to conclude that an acceptable improvement was not likely to occur on the evidence. We did not consider action short of dismissal would have been proportionate given the facts.

292. We balanced the effect dismissal had upon the claimant with the impact upon the respondent with regard to this aim and intensely analysed the position from both parties' perspectives. We considered that dismissal was a proportionate means of achieving that aim on the facts before us.

293. With regard to the second aim, maintaining acceptable levels of customer service. While it was clearly a legitimate aim and while dismissal could in principle be a proportionate means of achieving this aim, we had no specific evidence before us to assess the impact of this aim and to intensely analyse the impact of the aim in question.

294. The respondent failed to set out the impact upon the specific team in question. We had no evidence, other than generalisations, as to the impact the claimant's absence had upon the team and customer service. While we accept some impact would necessarily flow, there was insufficient evidence for us to find that dismissal was proportionate. For example, staff required to cover for other staff when on leave or for other legitimate reasons. There was no evidence showing why the claimant's absences had a particular impact upon customer service that could not be dealt with by other staff. We did not find on the facts before us that dismissal was a proportionate means of achieving that aim.

295. Given the first aim relied upon was legitimate and having intensely analysed the evidence, as we concluded that dismissal was a proportionate means of achieving that aim, the claim in respect of section 15 of the Equality Act 2010 is therefore ill founded.

**Section 20 claim**

296. We now consider the claim that the respondent failed in its duty to make reasonable adjustments.

**Time bar**

297. The claimant contended that the duty was triggered on 29 June 2020 when the claimant returned to work. It is then argued that there were further failures such that there was an act extending over a period in that the respondent continued to refuse to allow the claimant to work from home (or take other steps to remove the disadvantage).

298. The claimant's agent's submissions made it clear that the claimant is of the view that it was Ms Muir who decided not to put the adjustments into place and she acted in a way inconsistent with so doing, such as upon the claimant's return to work on 29 June 2020, at a capability meeting on 7 August 2020, when there is a discussion about working from home with her manager (on 27 August, which followed occupational health identifying working from home as a possibility on 20 August) with further mention of working from home to her manager on 24 November 2020. It was argued further evidence of the failure was seen following the capability meeting on 5 January 2021 and communication on the decision to dismiss on 12 January 2021.

299. The respondent argued that the claim before the Tribunal must be time barred. That was because if the duty was triggered on 29 June 2020 when the claimant returned to work, the claim was obviously time barred. Even if

the duty was breached on a later occasion, that was the same breach and as such must still be out of time. It could not be an act extending over a period.

**Decision on time bar**

300. We considered this matter carefully. While neither party provided any authority on this issue, we applied the wording of the statute and the case law that had interpreted it which we set out above.

301. While the claimant argued that the claimant raised the issue upon her return to work, from the evidence before us the first occasion when the matter was raised was during the formal meeting on 7 August 2020. At that meeting the claimant said that her name was down for a laptop and if she could work from home the pain would be less. The actions flowing from that meeting were all related to returning to the office.

302. It was clear that at the 7 August 2020 meeting the respondent was not going to adjust their position and allow the claimant to return to work. The claimant understood that. The occupational health report on 20 August 2020 raised it again saying: “flexible working from home may be a possible way for her to be able to cope with back pain”. This matter was covered during the claimant’s discussion with her line manager on 27 August 2020 when the claimant said she had spoken with occupational health and believed if she had a laptop and was working from home she would be unfit to work when heavily medicated but would be able to log on if taking less medication. She was told that she was on the list for a laptop and would be given an update. We considered this meant that once the claimant had been deemed competent she would be permitted to work from home. That remained the respondent’s position and did not change. They would only allow the claimant to work from home if she was “deemed competent”.

303. We considered carefully the law in this area which is complex. We firstly have to decide if there was a clear date when the respondent decided not to comply with the duty. If there is, the time limit runs from that date – even if there were

continuing failures in that regard. We considered this matter to fall within the situation set out in Watkins v HSBC [2018] IRLR 1015 (see paragraph 48). This was a continuing omission to make a reasonable adjustment (rather than repeated breaches) and accordingly we must apply section 123(3)(b) and (4).

304. We find on the facts that there was clear evidence as to when a decision was taken by the respondent not to make the adjustment. We find that it was possible to decern a date when a decision was taken by the respondent. We found it was at the latest by 27 August 2020. By this date the respondent knew the claimant believed working from home would assist her. They also had the recommendation from Occupational health. Their position was that the claimant should continue to work from the office. In other words they had decided not to allow the claimant to work from home. The position did not change and the respondent's view remained constant. There was no material change of circumstances and the failure continued. The claimant understood that the respondent was not going to allow her to work from home (until she had been assessed as competent).

305. For the purposes of time bar, the time limit for raising a claim in relation to section 20 was 27 August 2020. While the failure continued, that did not amount to a new claim arising (which could from the basis of an argument that there was an act extending over a period) since the duty was the same duty that had arisen in August in respect of which the time limit to raise a claim began on 27 August 2020. Given the claim form was lodged on 21 May 2021 the claim was time barred.

306. If we were wrong on that, we considered that the respondent did an act inconsistent with making the adjustment when it continued to discuss the claimant's working in the office. Given what the claimant knew, it was clear that by 27 August 2020 the claimant understood the respondent was not going to allow her to work from home or change its policy.

307. Our reasoning with regard to time bar applies both to the claim in respect of failing to allow the claimant to work from home but also the claim about the

competence policy. The claimant was told in August 2020 that she would only be allowed to work from home when she was deemed competent. She knew that policy was not going to change at that time.

308. We appreciate that this could result in unfairness, a matter that was recognised in the authorities, but we must apply the provisions. This was not a case where there were other acts which could be relied upon to support an argument of an act extending over a period since the failure to make the (same) adjustment continued and there was no material change of position. We looked at this issue from the claimant's position and when the claimant could reasonably have expected the respondent to have acted.

309. In light of the application of the law to the facts, the claim is time barred.

**Just and equitable to extend?**

310. We considered whether it is just and equitable to extend the time limit. We heard not specific evidence as to why a claim had not been raised before it was. The claimant was a member of a trade union. She was clearly intelligent and capable of seeking out advice and support. There was no evidence as to the claimant's knowledge of time limits or Tribunals or of her ability (or otherwise) to seek advice.

311. We take into account the prejudice the claimant suffers if the claim is not allowed to proceed but equally we must balance the impact upon the respondent. While the evidence was capable of being led, we find that there was no good reason from the evidence before us why the claim was not lodged in time.

312. Time limits are to be applied strictly and although it is open for a claimant to persuade a Tribunal that it is just and equitable to extend the time limits, the onus is on the claimant.

313. There was no submission from the respondent that the evidence was in some way affected or that there would be specific prejudice to the respondent in not allowing the claim to proceed to a judicial determination. The prejudice to the claimant was, however, potentially very severe in that the claim would not be considered.

314. We considered the length and reason for the delay. While a significant period of time had passed, the claimant was seeking to return to health and manage the issues she faced but we did take the time that elapsed into account. We also took of the fact that there was no suggestion the cogency of evidence was affected in any way.

315. The absence of evidence as to when the claimant learned of the legal position and when took advice was an issue that we also placed in the balance. We also did not hear evidence as to the steps taken by the claimant to obtain advice once she knew of the possibility of taking action bearing in mind she did have a trade union.

316. We balanced each of the factors and concluded that the claim was raised within such period that was just and equitable and that we should exercise our discretion and allow the claim to be considered. A fair hearing was still possible. While the claimant had the benefit of a trade union at the time, and while a number of months had elapsed since the claim ought to have been raised, there was no material prejudice to the respondent submitted or shown and we considered it was just and equitable to consider the claim.

**Merits of the claim**

**PCPs**

317. The PCPs relied upon with regard to this claim were the requirement to attend the office and the requirement to comply with the attaining competence policy. It was accepted by the respondent that these were applied to the claimant.

**Substantial disadvantage**

318. The first issue is whether or not the first PCP put the claimant at a substantial disadvantage compared to someone without a disability.

319. From the evidence before us (which was the same evidence before the respondent) we found that the PCP of requiring the claimant to attend the office did put her at a substantial disadvantage compared to those who were not disabled.

320. The substantial disadvantage was not being able to attend work and maintain attendance at an acceptable level, which in this case was 95%.

321. The claimant's evidence was that any movement aggravated her back. By having to go into the office, the claimant's health was adversely affected in that it increased her pain. The disadvantage she suffered was more than minor or trivial in comparison to someone who did not have a disability. We assessed the effect on an objective basis comparing the position of a person in the claimant's position without a disability. A worker without the claimant's disability would have no such difficulty in attending work and their health would be unaffected. Their absence levels would not be adversely affected.

322. We took into account that the claimant could attend work and did attend work and that she did not specifically ask for further adjustments (and that her attendance did improve in 2020) but that in our view did not alter the fact that her attending work (and being required to do so) put her at a substantial disadvantage compared to a person without the disability in question.

323. Similar issues arise with regard to the second PCP of requiring to complete 5 assessments before being able to work from home since the claimant's disability placed her at a substantial disadvantage by having to be in the office to complete her assessment. The claimant's agent set out the situations when the claimant clearly brought to the respondent's attention the difficulties she encountered, because of her disability, of attending work. That was not

disputed and we found that the claimant was in fact put at such a disadvantage as a result of both PCPs which were applied to her.

**Knowledge**

324. The next issue is whether or not the respondent knew or could reasonably be expected to know that the claimant was likely to be placed at the substantial disadvantage (it being accepted that the respondent knew about the claimant's disability).

325. We uphold the claimant's agent's submissions in this regard. We considered that there were a large number of occasions where the respondent was told that the claimant's health would be adversely affected by having to go to work, rather than working from home and that the respondent did know that insisting on working in the office (and not adjusting the competence policy) placed the claimant at a substantial disadvantage.

326. This was referred to at the meeting on 7 August 2020 and in her email to the respondent on 24 November 2020. The fact the claimant was able to attend work (and that her attendance improved) did not alter the fact that the respondent was told and knew or ought to have known that requiring to attend the office placed the claimant at a substantial disadvantage compared to someone who did not have her disability.

327. The same applies apply with regard to the second PCP. The respondent knew or must have known that requiring her to be at work to complete her assessment placed her at a substantial disadvantage. The respondent knew this because the claimant told them on a number of occasions as the claimant's agent set out in her submissions. Thus on 7 August 2020 the claimant noted getting to work was making her "sore". It was clear in the occupational health report of 24 August 2020. The claimant put the matter beyond doubt in her email of 24 November 2020 when she reminded the respondent that going to work caused her pain and home working would help.

328. The respondent knew from 7 August 2020 that home working would make it easier for her to work. We are satisfied from the evidence before us that the respondent knew of the substantial disadvantage to which the claimant was subject as a result of the imposition of both PCPs relied upon.

**Steps to remove the disadvantage**

329. We considered the issues arising in the Code in turn in assessing whether there were steps the respondent could take. The real issue in this case was taking the step of home working but we considered whether there were any other steps that should have been taken.

330. We firstly considered whether taking that or any other particular step would be effective in preventing the substantial disadvantage (as referred to at paragraph 6.28 of the Code). We assess this from the information before us. The authorities remind us that the step need not remove the disadvantage. From the facts in this case we considered that home working (and the other steps argued by the claimant) would not have altered the position, reasonably viewed, to reach an acceptable level of attendance at work. The issue was ultimately not where the claimant worked but the fact that it was likely, from the information reasonably available to the respondent at the time, that the claimant would remain unfit to work due to flare ups. The respondent had done all it reasonably could to assist the claimant but home working and the other steps suggested by the claimant would not, in our view, reasonably result in the claimant's absence reaching an acceptable and sustainable level.

331. We appreciate the claimant believed that home working could assist and would reduce, at least in part, her pain and in turn some of her absence but ultimately the absence would continue due to the nature of the flare ups. The medical evidence did not support the claimant's beliefs.

332. We took account of the practicality of the step. While home working was something the respondent could have facilitated, they wished to ensure the

claimant became competent. She had one further assessment to be carried out. Given the amount of absence and context of her training and being on site, we did not consider it reasonable for the respondent to have expedited the assessment. Being in work and around those who supported the claimant was an important part of the training and support network. We did not consider it reasonable to have facilitated home working at the time in question.

333. In principle there were no financial reasons nor any other reasons that could have prevented the step from being taken given the size and resources of the employer but we took a step back to consider whether any further steps were reasonable for the respondent to take on the facts.

334. The ultimate test is one of reasonableness and balancing all the factors given the nature of the claimant's work, her absences to date, the health issues she faced and the medical evidence that was available, we did not consider that there were any other reasonable steps that the respondent could take.

335. The same issues with regard to home working apply with regard to the second PCP, namely amending the attaining competence policy. The claimant had successfully completed 4 of the 5 calls and argued that adjusting the policy in some way to facilitate her 5th assessment was reasonable. The respondent wished to ensure the claimant was in the working environment and around those who supported her. She had not asked for the policy to be expedited and the respondent wished to await the completion of the assessment process. We were of the view that expediting the assessment or otherwise adjusting that policy would not have been a reasonable step since it was not likely on a reasonable basis to remove the disadvantage.

336. We did not consider, for the reasons we set out above, that the issue in this case was the place of work for the claimant. Even if the claimant were working from home (which is what adjusting the attaining competence would ultimately have allowed), we did not consider the claimant's absence would have materially altered. She would have remained, in all probability, unable to meet the reasonable standards of attendance the respondent sought. The

respondent had already made a number of adjustments and had worked with the claimant to support her with the challenges she faced. We did not consider adjusting the attaining competence policy or allowing her to work from home to have been reasonable steps in the circumstances. We did not consider those steps to have been reasonable at any stage in the claimant's employment.

337. In our assessment we took into account that the adjustment need not entirely remove the disadvantage and that it is sufficient if it *could* prevent the disadvantage in question. The key step relied upon by the claimant was working from home. It was argued that this was reasonable given the pandemic and the fact that 30% of the workforce had done so as indeed could the claimant if she had been deemed competent.

338. The disadvantage in question was being unable to reach a satisfactory level of attendance. For the reasons set out above we considered that even if the claimant was allowed to work from home, while she may have had fewer absences, she would still not have achieved a reasonable level of attendance.

339. The respondent took account of all the information before it, which was the information before us. They did take account of the fact the claimant had moved home and was closer to her support network. They did take account of the fact the claimant's absence at least in the first quarter of 2020 had improved and she was closer to her support network and did not unreasonably focus on a particular period of absence. But looking at the matter with all the facts, the respondent concluded that working from home would not have materially altered the fact that the claimant was likely to remain absent from work at a level below that which was acceptable. We concur and on the information before us the steps contended for were not reasonable.

340. The occupational health report recommended that working from home be considered. It did not state that working from home would result in absence improving to an acceptable level. Noone had a crystal ball and it was considered by the respondent as we have done. Ultimately the issue is

whether or not taking the step would have been reasonable. We concluded that it would not have been reasonable in all the circumstances.

341. The evidence did not support the assertion that absence would improve to an acceptable level even although the claimant believed it would. A number of adjustments had already been trialled. The claimant had accepted she had no control over when flare ups occurred and that when they did she would be unable to work, irrespective of the location. The nature of the respondent's business is that security and competence has to be carefully considered. The claimant had not yet reached the level of competence that would have given the respondent comfort that working from home should be trialled. This was only a factor in our consideration but it was not unreasonable for the respondent to wish to satisfy itself that the claimant was competent and that this be done over a reasonable period, given the number of absences from the office the claimant had.

342. Looking at matters objectively we considered that working from home and adjusting the attaining competence policy would not have been reasonable steps on the facts.

343. With regard to the second PCP, amending the attaining competence policy, the issues that arose were essentially the same as above. Adjusting the policy was to allow the claimant to work from home. It was not reasonable.

344. We considered whether there were any other steps that reasonable should have been taken. We concluded the respondent had taken all reasonable steps prior to dismissing the claimant and that the steps suggested by the claimant were not reasonable steps on the facts. We did not consider the steps relied upon by the claimant would have been reasonable steps for the respondent to take. The point had arrived from the evidence before us that the claimant's attendance was not going to improve.

345. While we have considerable sympathy with the claimant, the respondent did all that was reasonable to seek to remove the substantial disadvantage she encountered. On the facts we found, her section 20 claim is ill founded.

**Unfair dismissal**

**The reason**

346. We find firstly that the reason for the claimant's dismissal (the set of facts or beliefs held by the respondent that caused them to dismiss the claimant) was due to "capability", a potentially fair reason.

347. The respondent did not believe the claimant's attendance would improve to an acceptable level and the reason for her dismissal related to her capability to perform work of a kind which she was employed to do. "Capability" is assessed by reference to any physical quality. In this case the claimant's health issues were the physical qualities that that caused the claimant to be unfit for work and to remain unfit.

348. We find that the claimant was dismissed for a potentially fair reason, namely capability.

**Procedure**

349. We then turned to consider whether the procedure that was undertaken and led to the claimant's dismissal was a fair procedure, a procedure that fell within the range of responses open to a reasonable employer. We find that a fair procedure was carried out.

350. The claimant had been given a number of opportunities to explain her attendance and absence. The respondent had repeatedly delayed determining the matter as it wished to ensure it had as much information as it could and that a reasonable period of time had been given for the claimant to

improve. The claimant had not criticised any aspect of the procedure during the process and had agreed that she had been given support in respect of her absence and attempts to return to work. She had repeatedly agreed that the respondent could not have supported her further. There were a large number of lengthy meetings carefully documenting what was happening and what steps could be taken to help the claimant, taking account of the medical position and, critically, what the claimant was telling the respondent.

351. The procedure that was followed in this case, applying the knowledge of the panel sitting in this case, was a procedure that a reasonable employer facing the circumstances the respondent faced could follow. That was assessed by reference to the size and resources of the respondent taking account of equity and the substantial merits in this case.

352. The procedure that led to the claimant's dismissal fell within the range of responses open to a reasonable employer.

**The decision to dismiss**

353. With regard to the decision to dismiss, we have concluded that the decision was a decision that a reasonable employer could have taken. It was a decision that fell within the range of responses open to a reasonable employer. While an equally reasonable employer might well have delayed dismissal, for example by trialling working from home, we concluded than an equally reasonable employer could have dismissed on the facts of this case having reasonably decided that working from home was unlikely to achieve a material difference in attendance. We considered the facts carefully and analysed the submissions made on the claimant's behalf in considering this issue. We did not uphold the claimant's agent's submissions.

354. The claimant had been given a large number of opportunities to improve her attendance. A large number of adjustments had been made to accommodate the claimant. Dismissal had been delayed to ensure a fair and reasonable time was afforded to the claimant to improve.

355. While her attendance had improved by the start of 2020, the respondent acted fairly and reasonably in concluding that her attendance was not likely to further improve such as to reach a satisfactory standard. The claimant, naturally, could not confirm that her attendance would improve. Occupational health could also not confirm that the position would improve. That was the case even taking into account the fact the claimant had moved home and was closer to her support network.

356. Sadly the issue with regard to the claimant's back had become inoperable and the medical position was such that the flare ups and pain was unlikely to change. While medication could control the impact to an extent, it was clear that the claimant would, sadly, continue to suffer pain on a daily basis for the foreseeable future. It was also likely that whether she worked from home or at the office (or did both) the claimant would continue to suffer health issues that would prevent her having an acceptable level of attendance.

357. It did not matter what role the claimant would have done or where she would have worked from since on the information before the respondent, up to and including the appeal meeting, the claimant was not likely to be able to return to work to an acceptable level of attendance.

358. We did not accept the claimant's agent's submissions that the respondent had focussed too much on the fact that the claimant was unable to say her fitness would return or that they unreasonably focused on the fact that the claimant would be unfit for periods of time. This was a key issue facing the respondent and they reasonably assessed the situation facing them, taking account of their knowledge of the claimant, the background, the medical information and what the claimant was telling them. That had to be considered in context, taking account of the positive developments but also reasonably and realistically assessing what was likely to happen in the future.

359. While some reasonable employers may have been prepared to delay a final resolution of the claimant's employment further, an equally reasonable

employer on the facts of this case could decide that sufficient time had been given to improve and the outlook was not good. While from the information before the respondent at the time the position was likely to improve, there was no basis to find (as the claimant believed) that her attendance would improve to an acceptable standard. The claimant clearly did believe it but the information before the respondent did not realistically support that belief. There comes a point when a reasonable employer is entitled to decide that dismissal is a fair outcome. We considered that to have been reached in this case applying the legal test in this area.

360. The respondent had waited a reasonable period of time and obtained sufficient information (from the claimant and medically) to allow a decision to be taken as to whether it was reasonable to wait any longer. Adjustments had been made to the working environment and reasonable steps had been taken to give the claimant a reasonable chance of improving her attendance. The respondent did not unreasonably focus on one period of absence but fairly considered the context and picture as a whole. The respondent acted fairly and reasonably in dismissing the claimant from the information within their possession, having made all reasonable adjustments.

361. The decision not to allow the claimant to work from home while, for some, may be regarded as harsh, particularly as she had completed 4 of the 5 assessed calls, was a decision that a reasonable employer could make. Working from home was not reasonably likely to have made any material difference to the claimant's future attendance levels. We were satisfied the respondent had implemented all reasonable adjustments and no other adjustments would have been reasonable on the facts before us.

362. Taking a step back and looking at the information the respondent had, we conclude that the respondent acted fairly and reasonably in dismissing the claimant by reason of capability. We considered the size and resources of the respondent. That had allowed the claimant to have been given the time she was to improve her attendance and led to the substantial adjustments that were made to her working environment and conditions. The time had been

reached where an employer of the size and with the resources the respondent had could reasonably decide to dismiss on the facts.

363. We also took account of equity and the substantial merits of this case. We balanced the effect of dismissal upon the claimant and the context with the needs of the respondent. The respondent in our view acted fairly and reasonably in dismissing taking account of equity and the substantial merits of this case.

364. The dismissal was accordingly fair.

**Authorities**

365. In this Judgment reference has been made to authorities not addressed by the parties in their submissions. The Tribunal considers it in accordance with the overriding objective to issue the Judgment notwithstanding that, and if either party considers that they have been unfairly prejudiced by that they may apply for a reconsideration of the Judgment under Rule 71, making submissions by reference to the authorities not addressed in their respective submissions.

**Observations**

366. We reiterate the points we made above that we had considerable sympathy for the claimant and the issues she faced which were not of her doing. The respondent was supportive of the claimant and had sought to work with her to facilitate a return to work. We appreciated that the claimant believed that the circumstances were such that her attendance would improve but from the information available to the respondent at the time, that was not something that the respondent could have known. We took account of the impact the claimant's dismissal had upon her and how she felt about the treatment she received. We balanced that with the impact upon the respondent.

367. Finally we wanted to reiterate our thanks to both agents who assisted the Tribunal to comply with the overriding objective. We thank both agents for their professionalism.

Employment Judge: David Hoey
Date of Judgment: 15 October 2021
Entered in register: 18 October 2021
and copied to parties