



# EMPLOYMENT TRIBUNALS

**Claimant:** G C

**Respondent:** A T

**Heard at:** Reading **On: 17, 18, 19 and (in chambers)  
20 August 2021**

**Before:** Employment Judge Gumbiti-Zimuto  
Members: Mrs A Brown and Mr J Appleton

**Appearances**  
**For the Claimant:** The claimant's husband  
**For the Respondent:** Mr J Perry, counsel

## JUDGMENT

1. The claimant's complaints of unfair dismissal and discrimination arising from disability are well founded and succeed.
2. The claimant's complaint about accrued holiday entitlement outstanding on her return to work following maternity leave which she was unable to take when off sick is well founded and succeeds.
3. The claimant's complaints of breach of duty to make reasonable adjustments and about re-instatement of sick pay are not well founded and are dismissed.
4. A remedy hearing has been listed to take place on the **27 January 2022** at the Reading Employment Tribunal, 30-31 Friar Street (Entrance in Merchants Place), Reading RG1 1DX.

## REASONS

1. In a claim form presented on the 4 December 2018 the claimant made complaints about unfair dismissal, disability discrimination, holiday pay and sick pay. The respondent defended the claim. The issues to be decided in the case were set out in the record of preliminary hearing and case management made following a hearing on the 28 November 2019.

Application pursuant to rule 50 of the Employment Tribunals Rules of Procedure.

2. The Tribunal heard an application from the claimant seeking an order that her name be anonymised in the judgment and any reasons. The respondent reminded the Tribunal of the importance of open justice but made no objection to the application and maintained a neutral position. The conclusion of the Tribunal is that it is in the interests of justice that the claimant's identity, that of her representative and that of the respondent should be anonymised with the claimant being known as G C and the respondent A T.
3. The claimant gave evidence in support of her own case, the respondent relied on the evidence of Penny Lamb, Alison Dean and Vicky Hughes. All the witnesses made statements which were presented as their evidence in chief. The Tribunal was also provided with a trial bundle containing 561 pages of documents. We made the following findings of fact.

#### Findings of Fact

4. The claimant began employment with OLDT on the 1 March 2007, this organisation merged, changed names and TUPE transfers occurred during the claimant's employment so that at the end of the claimant's employment her employer was A T. The claimant's employment terminated 26 June 2018. The claimant was a Senior Lifestyle Support Worker. Her role required her to support adults with learning disabilities.
5. While the claimant was on maternity leave in March 2015 she had a meeting with Daisy Fowler, house manager, during which she stated that she would not be comfortable to move to work in a house where service users had paedophilic tendencies and explained her reasons why this was the case.
6. The claimant was subsequently informed by the area manager that the location where she had worked was closing, the claimant was asked if she would return to work at Didcot House following her maternity leave. The claimant enquired whether any of the residents had paedophilic tendencies and was informed that there were not any service users at Didcot House with these tendencies. The claimant agreed to the move to Didcot House on her return from maternity leave.
7. Didcot House was a supported living home for up to 4 supported persons. Didcot House was staffed 24/7 to include working night shift which was staffed by one person and with two staff on each of the early, middle and late day shifts. The home had a Service Manager and Team leader.
8. In April 2016 shortly before she was due to return to work the claimant was informed during a call with the manager for Didcot House that there were 4 service users, 2 of whom the claimant supported previously. The claimant was informed about the physical needs of the service users and told that one of the new service users had challenging behaviour. The claimant asked the manager to confirm if any of the new or old service users had any paedophilic tendencies and was told that to the extent of the manager's knowledge they did not. The claimant made it clear in this conversation that she could not work with paedophiles. On this

occasion the claimant did not explain why. The claimant now believes that the house manager was well aware that one of the residents "D" was a paedophile.

9. The claimant would not have been made aware of D's personal history because the respondent promoted a policy of encouraging those working with him to get to know him for the person he was rather than by being influenced by his personal history. Where a Support Worker was going to support him in public or if they were going to work closely with him the detail of his history was shared with them. The claimant would not have been informed of D's history earlier because she had not supported him during the day and had instead worked waking night shifts which in the respondent's view did not involve close working with D. The claimant disagreed with this view.
10. The claimant believes that the staff shortages at Didcot House meant the respondent would go so far as to lie to her to get her to work at this house. This has caused the claimant to be set "*back hugely discovering that again I had put trust and confidence in my management team only to have been blatantly lied to for their gain*".
11. The claimant commenced work at Didcot House, her work included providing support for D which involved "*having a chat with him for around 30 minutes each waking night ... We would talk about what we had been doing since I was last in and he would tell me about how he had spoken to his girlfriend and where he had been out. He would ask what I had been doing, with being a mum of three this always involved my children ... He would always ask how my children were and what they had been doing, I perceived this as normal conversations.*" These conversations and other incidents or encounters with D which at the time were of no effect on the claimant she now views differently causing her an "*enormous amount of distress and mental torment*".
12. On Saturday 25 June 2016 the claimant was told that there was nobody available to support D, 1 to 1 on the following day. The claimant stated that she was happy to support him. The claimant was asked if she had been "*read in*" when the claimant stated that she had not been "*read in*" she was told that she needed to be "*read in*" and that "*after being 'read in' she might be able to help with cover*". The claimant was unaware what it was she was to be "*read in*" about.
13. Later that day the claimant received a call from Karen Beard, support manager. The claimant was told that D has restrictions that only staff over a certain age can support him due to his behaviour and as a legal obligation from restrictions placed on him as part of his release from prison for sexual assault on a minor.
14. On being told this the claimant became very upset and stated that she came to work at Didcot House "*so I didn't have to work with those who have paedophilic tendencies*" and that she had checked there was no one with paedophilic tendencies. The claimant explained that as a result of her own experiences she did not want to be put in a position where she was supporting a paedophile.
15. Although the claimant stated that she did not think she could do it she was eventually persuaded by Karen Beard to work a shift: "*I agreed to go in and push*

*through for that one shift for the service users sake and Karen who also was clearly under pressure as well."*

16. The claimant worked the shift but found it very difficult. The claimant was affected by the experience and she describes how: *"My numbness and complete fogginess got worse as the week progressed even though my next shift wasn't until the following weekend."*
17. The claimant worked her shift on Friday 1 July 2016. The claimant describes keeping her contact with D to an absolute minimum. The claimant asked that she be given cover for her next shift. After her shift the claimant describes how: *"I couldn't concentrate and I ended up with my car going up on a high verge and nearly crashed into another car when correcting it, then nearly pulled out at the junction into traffic. I pulled over and cried."* Nobody had been found to cover for the claimant so had *"no choice but to go in again that night"*. The claimant managed to complete the shift but describes a frantic night caused by how she felt.
18. The claimant informed Karen Beard that she would not be going back and booked an appointment to see her GP. The claimant was signed off sick from 8 July 2016 and never returned to work before her employment was terminated on 26 June 2018.
19. There was very little contact between the respondent and the claimant, other than the claimant submitting sick notes, from the time that the claimant went off sick until the claimant was invited for a Stage 1 meeting under the respondent's sickness procedure.
20. The respondent effectively ignored the claimant for a number of months and did not take the action that was expected by the respondent's Managing Sickness Absence Policy. The respondent failed to: Agree a plan of regular (e.g. weekly) telephone contact with the claimant whilst she was on sick leave; Employ a principle of actively planning, with the claimant, for her return work from the start of any absence and keep this under review; Involve the Occupational Health services; Actively signpost the EAP service; refer to Trust's Managing Stress and Enhancing Wellbeing Policy and Procedure.
21. The claimant was invited to a stage 1 review meeting in a letter wrongly dated 26 July 2016 and informed that a referral was being made to OH on or about the 6 October 2016. The Tribunal accept that the date on that letter was an error and this error is of no significance. The claimant met with Alison Dean, at the time employed as support manager, on 21 November 2016. Alison Dean apologised to the claimant *"for the oversight of not doing a Stage one meeting earlier ... and all sorts of issues which led [the claimant] to be "forgotten about"*.
22. The claimant made it clear that she wished to be communicate with by email or text during her sickness absence. It was agreed that a referral to occupational health would be made.

23. Alison Dean followed up on her promise of a referral to the EAP program and the claimant had some counselling sessions. Alison Dean took on the role of operations manager and had no further contact with the claimant until 2018.
24. The claimant attended her first occupational health appointment on the 13 July 2017, occupational health suggested that the claimant should have more appointments with the EAP counsellor while awaiting NHS treatment. On 15 August 2017 the respondent authorised for the claimant to have a course of at least 8 counselling sessions.
25. The claimant changed address and notified the respondent by email to Linda Barber. The claimant moved house again and once more informed the respondent of her new address. The respondent repeatedly sent correspondence to the wrong address including the response to the claimant's subject access request.
26. By October 2017 the claimant had commenced NHS treatment of psychotherapy with 20 sessions of Cognitive Behaviour Therapy (CBT).
27. The claimant was invited to a Stage 2 meeting by Victoria James-Priday (Operations Manager). The invitation letter was sent to the wrong address. The claimant spoke to Victoria James-Priday to discuss the set up of the meeting, confirmed that her husband would be in attendance and that the meeting would take place at the claimant's home address. The claimant provided Victoria James-Priday with the correct address, explained that the invitation letter had been sent to the wrong address and told her how sending letters to the incorrect address was causing her distress.
28. The Stage 2 meeting took place on the 23 November 2017. The claimant had now been off work for some 16 months. Initially Victoria James-Priday went to the wrong address from which she called the claimant stating she was outside but she was in fact outside the claimant's old house. The meeting eventually took place when Victoria James-Priday went to the correct address 30 minutes late by which time the claimant was in some distress. The claimant stated that her "*situation was extremely sensitive and confidentiality about my past and current health is a big concern of mine and that these mistakes causes a lot of anxiety.*"
29. Victoria James-Priday was accompanied by Natasha Ward (HR Business Partner), who asked when the claimant would be returning to work and stated that the respondent could not wait forever. It was suggested by Victoria James-Priday that a way forward was to book a second occupational health assessment after the claimant's CBT treatment had finished to assess the claimant's ability to return to work and to have a further Stage 2 meeting after that.
30. In an email to Penny Lamb, Natasha Ward stated "*Victoria and I both felt we were not at the end of the road in terms of the treatment/support we should give her under the circumstance of her case and being this was the first face to face meeting she has had with A T since she was transferred. We did forewarn her at this meeting that the absence cannot be sustained indefinitely.*"

31. Victoria James-Priday asked if she could ring the claimant once a week “*to check in that I’m OK and be there for me*”. The claimant expressed the wish that communication was done via email but agreed to welfare catch up being done verbally with all work matters to be by email. The letter sent to the claimant following this meeting was yet again sent to the wrong address.
32. Initially the phone calls with Victoria James-Priday consisted of asking how the claimant was and how her treatment by the NHS had gone that week. There was however an occasion when the claimant was out at the shops with her children and received a call from Victoria James-Priday asking her to send the respondent her GP notes for their next meeting. The claimant agreed to provide occupational health with signed consent form to access her medical records but stated that she was not going to give her medical records directly to the respondent.
33. A further Stage 2 meeting took place on the 13 April 2018. Victoria James-Priday had left the respondent by this time and Natasha Ward met with the claimant. It was agreed that Natasha Ward would arrange further counselling via the EAP for the claimant. This in fact never came to fruition despite it being agreed by the respondent and desired by the claimant.
34. On 8 May 2018 Natasha Ward gave the claimant contact details for the EAP program to get more counselling through the Trust. The respondent had first agreed to extra EAP counselling in July 2017, the expenditure was authorised by the Divisional Director, Penny Lamb, in August 2017 but it was not until about 10 months later that the claimant was given contact details. The claimant spoke to Natasha Ward and says that Natasha Ward “*made it very clear at our next meeting I was going to be dismissed, not that it was a possibility but that it was happening*”. There is a dispute between the claimant and respondent as to whether the claimant initially refused the further EAP counselling when it was first offered to her because she wished to complete the CBT treatment under the NHS. We accept the veracity of the claimant’s evidence on this issue, but recognise that there may well have been discussion about timing of the EAP counselling sessions and the claimant’s treatment by the NHS which has resulted in a difference of recollections.
35. On 25 May 2018 the claimant had her final occupational health appointment. It was concluded that the claimant was not fit to return for a further 6 months.
36. The claimant received three slightly different letters inviting her to a further stage 2 meeting. Following communication from the claimant, Natasha Ward sent the claimant a copy of Managing Sickness Absence Procedure. The claimant had already been given a copy of the Managing Sickness Absence Policy at the Stage 1 meeting in November 2016. The difference between the documents is that the former is a document giving guidance on how sickness absence is managed by the respondent, while the latter sets out the respondent’s standards and expectations on how managers and staff manage sickness. The latter document forms part of the staff terms and condition of service. On receiving the former document the claimant concluded that she should still have been being paid by the respondent and that she was entitled to take any annual leave while off sick.

37. At the final meeting on 26 June 2018 the claimant was informed that her employment was to be terminated on medical grounds. The meeting was with Alison Dean, now employed as operations manager, and Natasha Ward. Alison Dean states: *“Given the fact there was no prospect of the Claimant’s return to work for at least another 6 months and we had no prognosis as to when a return to work might be feasible, we explained it was not sustainable to continue her employment.* “ Further the respondent was having to cover shifts with agency staff to cover for the claimant’s absence. The respondent did not raise the prospect of the claimant returning to work in another role because she was not fit to return to work for at least 6 months and while there was no search for administration roles Alison Dean does not believe that there were any such vacancies. The evidence of Vicky Hughes, Head of HR since 2019, shows that there were a limited number of administration roles at about the time the claimant’s employment came to an end.
38. The claimant queried the breakdown of her final pay. The claimant should have been able to take holiday throughout the 12 months she went without pay but did not do so because she was not provided with a version of the sickness policy to enable her to be aware to make claim for her annual leave while unpaid. The claimant received an offer back pay of sick pay in the sum of £2,980.42.
39. The claimant contends that her pay should have been reinstated to the date of her dismissal and that she should have been paid in respect of annual leave accrued during maternity leave and subsequently after maternity leave that she was unable to take during her sickness absence.

#### Law

40. The Claimant has the right not to be unfairly dismissed (section 94 Employment Rights Act 1996 (ERA). Section 98 ERA states that in determining whether the dismissal of an employee was fair or unfair, it shall be for the employer to show the reason (or, if there was more than one, the principal reason) for the dismissal that is a reason falling within subsection (2). Capability of the employee for performing work of the kind which he was employed by the employer to do is a reason within subsection (2). Capability, in relation to an employee, means her capacity assessed by reference to skill, aptitude, health or any other physical or mental quality. Where an employer has shown that capability is the reason for dismissal, the determination of the question whether the dismissal is fair or unfair (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.
41. The Tribunal must not substitute its views about the employee’s capacity for that of the employer.
42. Equality Act 2010 (EQA) provides at section 15 (discrimination arising from disability) that a person (A) discriminates against a disabled person (B) if A treats B unfavourably because of something arising in consequence of B’s disability, and A cannot show that the treatment is a proportionate means of achieving a

legitimate aim. This 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.

43. Where the EQA imposes a duty to make reasonable adjustments, the duty comprises three requirements. The relevant requirement in this case is a requirement, where a provision, criterion or practice of the employer's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage (section 20 EQA).
44. The claimant and respondent have both provided the Tribunal with written submissions which we have taken into account in arriving at our decisions in this matter. Our conclusions are as follows:
45. The claimant was and the respondent knew that that the claimant was a disabled person within the meaning of section 6 of the EQA from the time that the claimant was off sick until the point of her dismissal by reason of PTSD, depression and anxiety.
46. The parties agree that the claimant was dismissed. There is no real dispute between the parties that the reason for claimant's dismissal was the claimant's sickness absence. The respondent concluded that dismissal was appropriate as the claimant had no date for return to work, and at the point of dismissal was signed off sick for a further six months and which position was to be the subject of review at the end of that period. The Tribunal is satisfied that the claimant was dismissed for capability within the meaning of section 98 (2) ERA.

#### Conclusions

47. The respondent consulted with occupational health before the claimant was dismissed and the claimant was warned that she might be dismissed if her absence continued.
48. The respondent contends that in the circumstances the dismissal was fair. The claimant contends that the dismissal was unfair.
49. The conclusion of the Tribunal is that the claimant was unfairly dismissed for the following reasons.
50. The respondent contends that in this case, the nature of the illness meant that the claimant was unable to work as a support worker in the foreseeable future. The respondent says that the claimant was likely to be unable to lone work or administer medicines in the foreseeable future, that the symptoms were so serious that the claimant appeared largely housebound and unable to even contemplate a return to work without creating her significant anxiety. We recognise this but note that at the time that this was assessed the claimant was still unwell and signed off work. The claimant could not return to work while ill. There was no prognosis that stated that the claimant would not be able to recover or would not be able to return to work. While a return to work was not possible for at least six months the position there after was not known. The claimant was undergoing treatment that



was having positive results and the claimant was showing some signs of improvement.

51. The respondent also contends that the likely length of the continuing absence was significant, the claimant had been absent for two years and no return to work was envisaged by HR for at least a further six months. We remind ourselves that we must not replace our views about the claimant's capacity for that of the employer. We recognise that the claimant had been off sick for a considerable period of time, but this should be considered in the light of two factors that the respondent does not appear to have considered. The first is that the respondent's actions were solely responsible for the situation that led to the claimant's absence from work, secondly the respondent had been lax in the way that it applied its procedures to the claimant, effectively ignoring her in breach of its own policy, and when it did engage with the claimant doing so in a manner that exacerbated her anxiety resulting in setbacks for the claimant in her recovery. Examples are the way that the respondent dealt with the correspondence with the claimant sending out her mail containing confidential information repeatedly to the wrong address, a matter which the respondent knew caused the claimant anxiety. We do not consider that the claimant exaggerates when she states that she was "forgotten about" before the stage 1 meeting.

52. The Respondent refers to the need to have done the work which the claimant was engaged to do and contends that it was legitimate to seek to end the claimant's employment having regard to this factor. The respondent relies on the concerns raised by Penny Lamb and Alison Dean by December 2016 about the number of shifts needed to be covered by fewer staff and the corresponding over-reliance on agency staff (and the associated increased costs) if permanent staff would not pick up shifts. The respondent however acknowledges that there were other vacancies and a general push to recruit regardless of the claimant's absence. A situation which we concluded must have persisted at the time that the claimant returned to work from maternity leave. This was a case where there were already strains on the service and the need to employ agency staff regardless of the claimant's absence. While the claimant's absence would have added to this it is unclear that the absence made it so that it was critical for the respondent to dismiss the claimant and recruit to replace her. Dismissal or retention of the claimant would not have made any difference to the situation that persisted so long as the claimant was absent through sick leave. There is an absence of evidence as to what extent, if any, her continued absence detrimentally affected the respondent's position.

53. The respondent relies on the submission that there was a policy covering sickness absence with three staged capability meetings. The respondent accepts that the strict timelines of this policy were not complied with initially and that thereafter there were deviations from the policy. In our view these are not minor matters. Their effect was to jettison the policy for the first few months and led directly to the delay in obtaining occupational health advice. The delay in providing initial EAP counselling sessions deprived the claimant of such aid these sessions would have had towards the claimant's recovery. The claimant benefitted from EAP counselling and ultimately it was agreed that she should be provided additional EAP counselling sessions which in fact never materialised, what impact this might have had on the claimant's ability to recover is unknown. This is a factor which the

respondent did not take into account at the time of dismissal that we consider a reasonable employer should have regard to at the time of making the decision to dismiss the claimant.

54. While the claimant's absence had underlying causes from historic trauma that predated the claimant's employment with the respondent, the claimant had expressly informed the respondent that she could not work with paedophiles and, on at least one occasion before the 2 July specifically set out the reasons why. Even if no one who transferred knew about the claimant's own personal history, the claimant gave sufficiently clear information about her restriction to cause a reasonable employer who was not going to consider whether to comply with her request not to work with paedophiles to enquire why that was the case and ascertain what if any risk this posed to the claimant or any service user. This employer accepted that no risk assessment was ever carried out. This was in our view a serious failure by the respondent.
55. The Tribunal was asked by the respondent to treat as exaggeration the claimant's evidence that she was pressured by Karen Beard to continue attending work. We found the claimant a compelling witness, we consider that there is some indication from the documents (see email correspondence between Alison Dean and Penny Lamb p85-p86) that there was pressure on the respondent to provide a service in circumstances where there was understaffing at Didcot House. We do not accept the respondent's contention that this was an instance of a mental health issue arising from an incident at work that was not caused by negligence or breach of trust and confidence of the respondent. The claimant was required to work in a location where she had been falsely told that she was not required to work with paedophiles. The evidence presented to the Tribunal strongly suggests that the claimant was knowingly told something that was not true which caused her to agree to work at Didcot House.
56. The fact that the respondent waited 2 years before taking the decision to dismiss in our view highlights the fact that the respondent considered that this was an exceptional case where waiting, according to the respondent's submission, at least twice the normal length of time was appropriate.
57. The respondent acknowledges that *"the misdirecting of mail was a major and persistent error and would undoubtedly have led to frustration, and possibly increased anxiety on the claimant's part."* We consider that the respondent understates this by suggesting that it was only *"possibly increased anxiety on the claimant's part"*. The evidence from the claimant was that it did cause such anxiety, it was further a matter about which the claimant complained of at the time.
58. The respondent states that there can be no sensible suggestion that further counselling via EAP was deliberately withheld from the claimant. It was approved in August 2017. There would be no sense to approve counselling but then withhold it out of spite. The obvious reason for this counselling not happening is that the claimant started NHS counselling the following month in September 2017, which continued until relatively shortly before her dismissal. Once the NHS counselling finished an offer of further counselling via EAP was made in April 2018 and details provided in May. However, there is no direct evidence to this effect and we are

asked to draw inferences contrary to the claimant's direct evidence. The claimant presented as person who was very distressed by her experience and illness but also a compelling and credible witness.

59. The respondent states that the characterisation of Natasha Ward's behaviour towards the claimant as aggressive, bullying or harassing is unjustified and exaggerated. We are satisfied that as described it represented the claimant's perception of her behaviour, it may well have been wrong but it was not in our view an exaggeration. This claimant would have been unaware until studying the bundle of documents that Natasha Ward stood up for the decision to postpone any decision on dismissal pending the completion of treatment in emails with Penny Lamb at this time.
60. The respondent states that the suggestion that Natasha Ward was somehow chasing the Claimant for GP notes is clearly wrong. But it is undoubtedly the case the claimant was being pressed to provide access to her GP notes for the occupational health report. The claimant may have misunderstood but she again clearly explains what she believed she was being asked, we did not hear from Natasha Ward on this or Victoria James-Friday who the claimant states made a similar request. Again while the claimant may have been wrong in fact we consider her evidence was a truthful statement of what she believed happened. The claimant's evidence on this issue was clear that she was being pressed to provide her medical records to the respondent not just to give occupational health her form of consent to access her medical records.
61. We accept that while it is a relevant factor the extent to which the respondent considered alternative employment, we note that in this case the claimant was not fit to work at the relevant time and that at no point did the claimant ask to return to another role. We note that there were limited administrative roles, and it is not clear that there was an available alternative role suitable for the claimant the time.
62. Taking all the matters into account we are of the view that the claimant's dismissal was in the circumstances unfair.
63. In respect of the claimant's complaint of discrimination arising from disability the respondent states that the key question is justification. The claimant was disabled, the respondent knew of the claimant's disability. The claimant was dismissed because of her continued absence which was something arising in consequence of the claimant's disability.
64. The respondent must show that the dismissal was a proportionate means of achieving a legitimate aim. In assessing proportionality, while we must reach our own judgment, that must be based on a fair and detailed analysis of the working practices and business considerations involved, having particular regard to the business needs of the employer. It is necessary to consider the direct and indirect costs that had to be borne by the respondent as a result of absenteeism, whether the measures went beyond what was necessary to achieve the aim pursued and the adverse effects it was liable to cause for the persons concerned. In assessing proportionality we must give a substantial degree of respect to the judgment of the employer as to what is reasonably necessary to achieve the legitimate aim.

65. The legitimate aim relied upon is the efficient running of the respondent's business. We accept that this is a legitimate aim.
66. As to proportionality, the respondent relies on the evidence of Alison Dean that agency costs were 17% higher than normal staff costs and that management time was being required to manage the claimant's absence. There was the possibility of further medical costs and even possibly further sick pay costs. The respondent submits that in those circumstances, having waited two years already and with no end in sight, and giving due regard to the judgment of the employer as to what is reasonably necessary to achieve the legitimate aim it was proportionate to dismiss.
67. We do not consider that it was proportionate to dismiss. The reason we come to this conclusion is because we do not consider that the respondent has given any regard to the fact that the respondent's actions caused the claimant's decline and sickness absence. Bearing in mind that the respondent's actions (correspondence sent to wrong address) and failures (delay in applying the sickness absence policy) in dealing with the claimant during her sickness had a detrimental effect on the claimant, the dismissal of the claimant at the time that the respondent was still to complete all the treatment (additional EAP counselling sessions) that the parties had anticipated she would have as part of treatment to aid her recovery leads us to conclude that the dismissal of the claimant was not proportionate at that time.
68. To succeed in her claim for failing to make reasonable adjustments, the claimant must establish that there was a provision, criterion or practice of the employer's that puts her, a disabled person, at a substantial disadvantage in comparison with persons who are not disabled, and that the respondent has failed to take such steps as it is reasonable to have to take to avoid the disadvantage.
69. The claimant says that the respondent applied a PCP, namely that the claimant could only return to her old work (working directly with service users). The respondent does not accept that it applied a PCP of requiring staff to only return from sickness to previous roles. We agree with the respondent that in this case this was clearly not the case from the evidence which showed that the respondent asked occupational health about a return to alternative roles and also the respondent had given consideration to the claimant returning to a different location. The consideration of the role that the claimant would return to never arose in the claimant's case as at all times the medical evidence was that the claimant was unfit to return to work. The claimant's complaint of failing to make reasonable adjustments is not well founded and is dismissed.
70. The claimant's complaint about re-instatement of sick pay is not well founded. The claimant's contractual entitlement to sick pay is set out in section 10.3 of the Managing Sickness Absence Procedure. This provides that that pay should only be reinstated if the delay to the final meeting is due to the employer's fault. The delay was by agreement with the claimant, it was not because of the respondent's fault.

71. The respondent points out that the ECJ's decision in Max-Planck-Gesellschaft zur Forderung der Wissenschaften eV v Shimizu Case C-684/16, ECJ in which the ECJ held that it would not be compliant with Art 7 WTD if a worker automatically lost the right to be paid for backdated untaken holiday pay if that worker had not had the effective opportunity to take that annual leave. This case requires an employer to show it provided the worker with sufficient information to be able to allow the worker to exercise their right to leave including giving the worker the opportunity to take annual leave; encouraging the worker to do so; and informing the worker, in good time, that if they do not take holiday, they will lose it at the end of the relevant period.
72. The claimant was unaware of the right to take annual leave during sick leave until shortly before the termination of her employment. We take into account the evidence of Vicky Hughes. In our view the respondent has not shown that the claimant was provided with sufficient information to be able to exercise that right. The claimant's case is that she had untaken leave accrued during her maternity leave that she was unable to take during her sickness absence.
73. We conclude that the claimant is therefore entitled to holiday pay in respect of the 20 days. To this extent the claimant's claim in respect of holiday pay is well founded and succeeds

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Employment Judge Gumbiti-Zimuto

Date: 18 October 2021

Sent to the parties on:  
03 November 2021

For the Tribunals Office

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