EMPLOYMENT TRIBUNALS

Claimant: Miss K Edwards

Respondent: Automobile Association Developments Ltd

Heard at: Manchester Employment Tribunal (by CVP)

On: 11, 12, 13 and 14 October 2021

Before: Employment Judge Mark Butler
Mrs M Plimley
Mr WK Partington

Representation
Claimant: Ms J Whiteley (Solicitor)
Respondent: Mr C McDevitt (Counsel)

This has been a remote hearing which has not been objected to by the parties. The form of remote hearing was CVP. A face to face hearing was not held because of the ongoing pandemic and all issues could be determined in a remote hearing.

JUDGMENT

1. The claimant's claim for disability discrimination, namely that the respondent failed in its duty to make reasonable adjustments, does not succeed and is dismissed.

Oral reasons were handed down at the hearing, However, these are the written reasons following a request for such by the respondent.

REASONS

INTRODUCTION

2. The claim in this case arises following the presentation of a claim form, which followed on from ACAS Early Conciliation, which was concluded on 29 February 2020.

3. There have been a total of 3 preliminary hearings in this case, in advance of this final merits hearing. The final one being an Open Preliminary Hearing ('OPH) before Employment Judge Doyle on 30 June 2021, at which any acts before 16

July 2019 were struck out for being out of time, and claims insofar as they were brought as direct disability discrimination and discrimination arising from disability were struck out for having no reasonable prospects of success. The only outstanding claims at this stage concerned a failure by the respondent in its duty to make reasonable adjustments, which only concerned matters that post-dated 16 July 2019, and a victimisation complaint. Both of these claims were made the subject of a deposit order.

4. By email dated 29 July 2021, the claimant withdrew her victimisation claim. This meant that the only outstanding claim in this case was that there was a failure by the respondent in its duty to make reasonable adjustments from 16 July 2019. The specifics of this claim is detailed below.

5. The claimant brought her disability discrimination claim on the basis of a number of impairments. Namely the medical conditions of Chronic Obstructive Pulmonary Disease (COPD), Asthma, Bipolar Disorder, Post-Traumatic Stress Disorder (PTSD) and anxiety. It was recorded in the Preliminary Hearing before EJ Ross on 14 September 2020 that the respondent accepted that the claimant was a disabled person within the meaning of section 6 of the Equality Act 2010 by reason of those conditions.

6. The tribunal was provided with a bundle that ran to 518 pages (although there was 519 pages if one includes the cover sheet). A second short bundle was also provided to the tribunal; however, this was not considered during this hearing as this contained evidence that was said to be relevant to a Provision, Criterion or Practices ('PCP') that were withdrawn by the claimant on the afternoon of the first day of this hearing.

7. The claimant gave evidence. And we heard evidence from Mr Adi McDermott, who acted as the claimant's Trade Union representative during the period in question.

8. The following individuals were called by the respondent to give evidence on its behalf:

    a. Mr Scott Elson, who was the claimant's line manager at the relevant times and who imposed a Step 1 process on the claimant;

    b. Mr Martin McDermott, who heard the appeal by the claimant from Mr Elson's decision;

    c. Ms Jacqui Holt, who determined the claimant's grievance, and;

    d. Ms Charlotte Manson, who determined the claimant's appeal against Ms Holt's decision.

9. The tribunal was provided with a witness statement of Mr Keith Watkins. However, he was not called to give evidence given that matters on which he could give evidence were withdrawn by the claimant on the first day of the hearing. Mr McDevitt informed the tribunal on the morning of day 2 that, having reviewed the matter overnight, Mr Watkins would not be called to give evidence. Mr Watkins was consequently stood down as a witness.

10. The tribunal considers it appropriate to thank both representatives who appeared in this tribunal, for the way that they approached and presented their respective cases. We are aware that it is not always easy to present a case over CVP, especially when one concerns a claim of disability discrimination, which can be complex and involved sensitive factual matters. The manner in which the case

proceeded assisted the tribunal in following the evidence that was presented.

11. Further, being mindful of the disabilities that were live in this case and the needs of the parties, and being aware of the principles contained within the Equal Treatment Bench Book when managing the process, the tribunal tried to ensure that there were sufficient breaks throughout the hearing in an attempt to ensure all were able to fully engage and participate. Furthermore, the tribunal tried to signpost where necessary, to ensure all involved in the hearing understood the process and could follow what was happening. The tribunal takes its duty to ensure that all individuals can participate and engage in the process seriously, and we were satisfied that that was achieved in this hearing.

ISSUES

12. It was not entirely clear what the issues were in this case when it came before the tribunal on the morning of the first day of this hearing. And what was presented as an agreed list of issues fell somewhat short of what the tribunal expected to be included in such a document.

13. However, it was clear that following an OPH before EJ Doyle on 30 June 2021, and following the withdrawal of the victimisation complaint the only outstanding claim in this case was that of a failure by the respondent in its duty to make reasonable adjustments, and that this only related to matters that were from 16 July 2019.

14. However, Ms Whiteley produced a word document, which was handed to the tribunal, and which attempted to explain the basis on which the complaint was brought. This document initially included 3 separate PCPs. However, the second and third PCP were withdrawn by Ms Whiteley on behalf of the claimant in advance of evidence being heard. The outstanding issue was as follows:

    a. PCP of the Respondent's Absence Management Procedure

    b. Substantial disadvantage of the Claimant needing more time off work as a result of her disabilities, putting her in breach of the Respondent's attendance requirements and exposing the Claimant to disciplinary action for poor attendance, causing her to suffer increased stress and anxiety and increased pressure to attend work when unwell which causes exacerbation of her illnesses which in turn causes her to require more time off work.

    c. Adjustment of modifying the absence targets. Not counting absence due to disability towards attendance requirements, if absence becomes excessive adjustment of trigger point to 40% as initially suggested by Scott Elson.

    d. Date of knowledge 19.02.18

    e. Date adjustment should have been implemented 19.02.18

15. On further discussion with Ms Whiteley and Mr McDevitt, the substantial disadvantage on which the claim was being brought was taken to include the claimant being exposed to the risk of disciplinary action for poor attendance.

16. The tribunal refined the PCP (with agreement of the parties) on which the claimant brought her claim. This was reworded to be a PCP of requiring employees to maintain absence levels below the respondent's trigger point of 5% to avoid the absence management procedure. This was to ensure that the PCP was in

accordance with the guidance in **Griffiths**.

17. Following this discussion, the legal issue in dispute between the parties was clear and settled. This ensured that both parties and the tribunal knew specifically what was being addressed during this hearing.

CLOSING SUBMISSIONS

18. The tribunal was assisted by closing submissions made on behalf of both the respondent and the claimant. We do not repeat those submissions here, but will make reference to such submissions if we consider them relevant and necessary. For the avoidance of any doubt they have been considered and taken into account when reaching this decision.

LAW

19. The claim before the tribunal is one of a failure by the respondent in its duty to make reasonable adjustments. This duty is provided for at section 20 of the Equality Act 2010, with a claim for a failure in the duty provided for at section 21 of the Equality Act 2010:

> **20. Duty to make adjustments**
>
> (1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.
>
> (2) The duty comprises the following three requirements.
>
> (3)The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage. ...
>
> **21. Failure to comply with duty**
>
> (1)A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.
>
> (2)A discriminates against a disabled person if A fails to comply with that duty in relation to that person.

20. In closing submissions, Ms Whitely took the tribunal to the following decisions:

    a. **Griffiths v Secretary of State for Work and Pensions** (2017) ICR 160 CA;

    b. **Northumberland and Tyne & Wear NHS Foundation Trust** (2019) UKEAT/0249/18/DA and UKEAT/0013/19/DA, and;

    c. **Newham Sixth Form v Ashton** UKEAT/0610/12/SM

21. Whist Mr McDevitt cited the cases of **Bray v London Borough of Camden** EAT/1162/01, **Robertson v Quarriers** (an Employment Tribunal decision, which we note has no precedential value), and the **Griffiths** case (noted above).

22. Each of these decisions were relevant and considered in reaching this decision.

FINDINGS OF FACT

We make the following findings of fact based on the balance of probability from the evidence we have read, seen, and heard. Where there is reference to certain aspects of the evidence that have assisted us in making our findings of fact this is not indicative that no other evidence has been considered. Our findings were based on all of the evidence and these are merely indicators of some of the evidence considered in order to try to assist the parties understand why we made the findings that we did.

We do not make findings in relation to all matters in dispute but only on matters that we consider relevant to deciding on the issues currently before us.

23. The respondent provides a service to its customers that works on a duty roster that covers every day each year, between the hours of 06.00 and 00.00 (see p.179).

24. The claimant has been employed as a Customer Advisor (Retention) since 27 May 2014.

25. The year for the purposes of sick pay entitlement runs from 6 April to 5 April. Due to the claimant's length of service with the respondent, she was entitled to a maximum sick pay of 140 working days in each year.

26. The claimant initially worked for 27 hours per week; however, this was reduced to 20 hours per week from the 18 September 2017 (p.185).

27. The respondent maintains and works to a document entitled 'Absence Policy and Procedure' when managing absences. The respondent treats absences that are at least four weeks, or are forecast to be four weeks or more, as being a long term absence (pp.186 and 190).

28. The claimant is entitled to, and does, manage the absences of its workforce, and this is through applying the Absence Policy and Procedures document. It is an inevitable consequence of a person not being able to work that it has an impact on that business.

29. The respondent determines its staff rota through forecasting need based on call volume. Where a person calls in ill then there is disruption to the business in needing to find an alternative worker to provide cover as well as financial costs. This is the same in every business. Whenever the claimant was absent with illness there was therefore a consequence for the business in terms of workplace planning and cost.

30. The absence policy works on the basis of a number of identified principles. This is with a view to managing absences through monitoring levels of absences, investigating the cause of absences, being aware of disabilities, putting in place appropriate support mechanisms where needed and to impose targets for improvement where considered appropriate.

31. In adhering to the principles of the absence policy, the respondent considers whether an absence needs to be formally monitored (this is the case where the period of absence is giving cause for concern and it is identified that improvement is required), and if the line manager decides that it does, then the absence will be formally monitored through a series of 3 steps.

32. Step 1 of this process is defined on p.188 of the bundle as follows:

Step 1

If absence is to be formally monitored, then a review meeting will be held with you to:

- Discuss your absence record;
- Set targets for improvement; and

Clarify what further action may be taken if improvement targets are not met. Generally, this would be a formal first warning. The outcomes that may be agreed include:

- You may be required to submit a medical certificate from your doctor for every instance of sickness absence, at your own expense. This would only be required in particular circumstances.
- You may be required to attend an appointment with an Occupational Health practitioner.
- Other support mechanisms may be identified and implemented.
- Reasonable adjustments, such as changes to your workload, work practices or work pattern, may be made.
- A further meeting may be arranged to review progress.

Your line manager will record the outcome of the review meeting, confirming the points discussed and actions agreed. The letter will outline the consequences of a failure to reach set targets. A copy of this will be given to you and another placed on your file.

Arrangements may be made at any time for an independent medical report to be sought from an appropriate advisor to establish whether or not you have an underlying health problem and whether your absences are likely to remain at the same level. Your verbal consent will be obtained. The medical report will seek to establish only the medical facts.

33. Step 1 of the process is a supportive and investigative process, and not a disciplinary process. Although, it may lead to disciplinary action if targets for improvement are not met. Step 1 Is to enable the respondent to identify the reasons behind the absences and then to put in place actions, support mechanisms or adjustments to try to assist in resolving any identified issues. We as a tribunal did consider this very carefully, given that this is a central fact in this case, and as there are references to sanctions in the appeal documents. However, we found on balance, having considered the wording in the document, the witness evidence, and the approach adopted in the Step 1 meeting, that this was part of a supportive and investigative process.

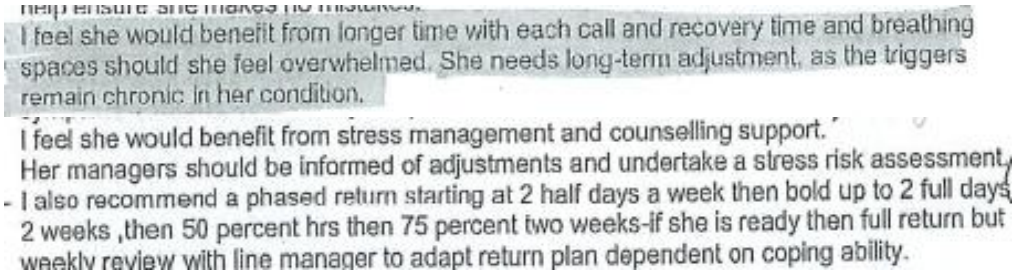
34. During 2017, the claimant had a period absent from work. In line with an Occupational Health report, the claimant was provided with a 6 week period of rest.

35. When the claimant returned to work on 19 February 2018, Ms Hawley explained to the claimant that any absences relating to her bi-polar disorder would not be counted in normal absence targets unless they became unmanageable or excessive. This was not a blanket policy of not counting any disability-related absences. And although Ms Whiteley tried to present a case that this position related to all the claimant's disabilities, the claimant's own evidence was that this was limited to the condition of bi-polar disorder, which we accept as accurate (see para 8 of claimant's witness statement). And secondly, supporting our finding that this was not a blanket policy covering all disability-related absences is that it was limited in application by the phrase 'unmanageable and excessive'. A file note recording this conversation is at p.493.

36. Mr Elson became the claimant's line manager in or around February 2019. The claimant was absent from work at the time that the he became the claimant's line manager.

37. The claimant was absent from work with illness related to her bi-polar disorder from 02 February 2019 to 28 June 2019. This was a period of 72 working days (sickness record at p.494). Although not being aware of the file note, Mr Elson concluded that this period of absence was unmanageable for the respondent, and required investigation to understand whether the respondent could support the claimant in returning to work.

38. Mr Elson arranged for the claimant to have an Occupational Health ('OH') assessment on 15 March 2019. The claimant attended this assessment by telephone. The report that was produced as a result of this assessment described the claimant as having a long-term disorder. The following recommendations were made(see pp.204-206):


help ensure she makes no mistakes.
I feel she would benefit from longer time with each call and recovery time and breathing spaces should she feel overwhelmed. She needs long-term adjustment, as the triggers remain chronic in her condition.
I feel she would benefit from stress management and counselling support.
Her managers should be informed of adjustments and undertake a stress risk assessment.
- I also recommend a phased return starting at 2 half days a week then bold up to 2 full days 2 weeks ,then 50 percent hrs then 75 percent two weeks-if she is ready then full return but weekly review with line manager to adapt return plan dependent on coping ability.

39. Following a number of personal issues in the claimant's personal life, whilst still absent from work, Mr Elson arranged for a further OH appointment, in agreement with the claimant, to take place on 20 May 2019. This was with a view to identifying whether there was anything further that the respondent could do to help the claimant. The clamant did not attend this appointment.

40. The claimant returned to work on 01 June 2019. She returned to work on a 4-week phased return to work programme, which was in line with that recommended by Occupational Health in the latest OH report (that being March 2019).

41. As a result of the absence levels of the claimant, Mr Elson conducted a Step 1 Absence Review Meeting with the claimant on 16 July 2019.

42. At no point during the period in which the tribunal is interested did Mr Elson count time off for medical appointments, or dependency leave in the trigger points that were being applied to the claimant to manage absences.

43. The claimant's impairments are lifelong. And the claimant's COPD, in particular, is progressive, which is likely to require the claimant to use oxygen within the next 18 months. It is impossible to predict the levels of absences the claimant will have. These fluctuate throughout the year.

STEP ONE MEETING (16 July 2019)-

44. The step one meeting took place on 16 July 2019. The meeting was chaired by Mr Elson, and was supported by Mr Gray, who attended as note taker. The claimant attended with her trade union representative, Mr Adi McDermott, in support.

45. In this meeting (notes of which are at pp.209-211), the following was discussed:

    a. The absence record was discussed, with particular focus on the reasons behind the absence.
    b. An update on the medical interventions were sought
    c. An agreement was reached in relation to a further OH report, that would take place in person
    d. Adi McDermott suggested some adjustments, which included a stress risk assessment and a phased 4 week return
    e. Mr Adi McDermott raised Ms Hawley's file note of 19 February 2018. He explained that this adjustment made by Ms Hawley did not have any parameters, and that the absence for 27 April 2018 to 27 August 2018 had been discounted in line with this file note. He made the point that the current absence, being 72 days, was fewer days than that previous period of 80 days, and therefore questioned how It was now being viewed as excessive.

46. Mr Elson adjourned the meeting at 10.37, and reconvened at 10.55. This was to enable him to review the file note, which he had not seen in advance of this meeting.

47. Mr Elson presented the calculation that during the period of 30 June 2018 to 30 June 2019, the claimant had been absent with sickness for 525 of 878 scheduled working hours, and that this equated to some 60% of her working year.

48. Following a second short adjournment, and taking into account the file note, Mr Elson explained to the claimant that the respondent could not sustain such an absence, and implemented a step 1 warning, which would remain on the claimant's file for 12 months. It was agreed that Mr Elson, the claimant and Adi McDermott would work together to decide on % targets that would form the basis of the improvement notice.

49. On 23 July 2019, Mr Elson completed the improvement notice that followed on from the Step 1 Absence meeting (see p.216). In agreement with the claimant and Mr Adi McDermott, the target for the 1st quarter (period 23 July 2019 to 22 October 2019) was to have no more that 40% of her scheduled hours absent with sickness. The business target is 5%. Mr Elson would monitor this target through 1-2-1's.

50. In addition to the % absence targets, the claimant would also be able to invoke two short notice shift swaps due to IBS.

51. It was explained in the improvement notice that if any of these targets were not met then the claimant would proceed to a step 2 absence meeting.

52. In line with that discussed at the step 1 meeting, Mr Elson arranged for the claimant to attend an OH assessment in person on 11 September 2019. The claimant was late to her appointment, meaning it did not take place and needed rescheduling.

STEP ONE APPEAL

53. The claimant appealed Mr Elson's decision that he reached in the step 1 meeting, by email on 19 July 2019 (see pp.213-214). The claimant appealed on the following ground:

> Please accept this letter as notice to appeal my step 1 hearing out come from the 16th July 2019. I believe the outcome to uphold the step one goes against absence adjustments that have been put in place to safe guard me from discrimination against my disabilities. Recommendations from Occupational Health to provide additional support to alleviate work-based stress have not been followed.

54. On 20 September 2019, the claimant attended an appeal hearing. This was chaired by Mr Martin McDermott, who was assisted by Mr Clare as note taker. Mr Adi Mcdermott again attended to support the claimant. Notes of this meeting are at pp.225-227.

55. Following an adjournment, with the meeting reconvened on 27 September 2019, Mr Martin McDermott reached the following conclusion:

- The sanction and targets agreed in the hearing will cease.
- As you highlighted in your appeal the file note in February 2018 does not include timescales or context for "excessive or unmanageable". This will be removed, and any support will follow the structure outlined in the "Absence Policy and Procedure" where it is usually agreed during formal meetings.
- There are some key areas in the "Absence Policy and procedure" that will assist in maintaining your attendance and supporting any underlying health conditions that may impact your ability to attend regularly.
    - Attend an appointment with an Occupational Health practitioner
    - Support mechanisms may be identified and implemented.
    - Reasonable adjustments, such as changes to your workload, work practices or work pattern, may be made.
- I recommend that you attend a meeting with an Occupational Health practitioner. The purpose of seeking professional medical advice will help with understanding the frequency and duration of absences relating to your underlying health conditions and providing medical advice whether steps can be taken to support you in maintaining a sustainable level of attendance.

56. It was made clear in this appeal meeting that with regards targets, this will be something that will be discussed between the claimant and Mr Elson, with adjustments being considered once in receipt of OH advice. But that from this date (and until such adjustments took place), the claimant was on business targets going forward.

57. The appeal outcome letter was sent to the claimant, dated 23 September 2019 (see pp.228-229). This follows to a large degree the findings explained to the

claimant at the hearing. However, within this letter, Mr Martin McDonald also records the following:

- A File Note 18 months ago indicated that absence relating to your disorder unless excessive or unmanageable would not be counted towards absence triggers.
- The levels of your absence are not sustainable, and I consider them to be excessive with 60% absence in the last rolling 12 months in comparison to the normal business targets and 72 days in 2019 at the date of the hearing.
- These absence levels may have a detrimental impact on our ability to resource, impact your colleagues and most importantly may affect our ability to answer customer calls within the accepted timeframes.
- You explained in your appeal the events that triggered your absence in 2018, these related to a work colleague, diagnosis of some additional health conditions and increased anxiety and stress at the time. The issuing of the supportive file note was deemed appropriate at this time.

58. Following the claimant's successful appeal against Mr Elson's decision, the 23 July 2019 Improvement Notice was removed. This was replaced by an Improvement Notice dated 08 October 2019 (p.238). It is recorded on this improvement notice that the claimant was requesting to revert back to her previous absence targets of 40% absences being allowable, but that this was not being accepted as she was being placed on the respondent's standard absence policy as per the outcome of her appeal. But that adjustments would be considered and implemented having first received guidance from OH.

59. Mr Elson also recorded in the Improvement Notice that the claimant had been absent for 15 days from 19 August 2019, and that although this technically triggered the need for a Step 1 meeting, that he was using his discretion not to do so but to only apply the absence trigger process as from 08 October 2019.

60. The claimant attended an Occupational Health Assessment by telephone on 17 October 2019 (pp.243-246). In addition to recommending a Work Action Plan, within the report, the following were recommendations made to assist the claimant's return to work: Provide a shift pattern which will enable the claimant to have two consecutive rest days; enable flexibility to attend appointments and to allow flexibility with breaks. It was also identified that the claimant's conditions would have no permanent recovery.

GRIEVANCE

61. The claimant raised a grievance by email on 23 December 2019 (p.270), the contents of which were in an email attachment (pp.271-276).

62. A grievance hearing was held between Ms Holt, who was chairing the meeting, and the claimant on 13 January 2020. Mr Adi McDermott again attended to support the claimant. Ms Clark attended as note taker.

63. The claimant's grievance was partially upheld. The specific outcomes of the grievance hearing, which were confirmed to the claimant by letter dated 21 January 2020, were as follows:

a. The claimant's request to reduce her hours to 16 hours per week was accommodated.
b. The claimant's request to alter her working pattern that included 2 full days off together in line with that recommended by OH and to have hours starting after 9.30 and finishing before 2.30pm was accommodated.
c. The claimant's request to have Saturday removed from her working pattern was not accepted; however, the claimant was reduced from working 1 Saturday in 2, to 1 Saturday in 4.
d. The claimant's request to increase the absence target as it applied to her was refused, on the basis that the changes outlined above has removed the need to amend this target.

64. On 27 January 2020, the claimant exercised her right to appeal the grievance outcome (p.386). The claimant appealed the following:

I would like to appeal the decision to give no reasonable adjustments to my absence targets, I feel this is treating me less favourably due to my disabilities resulting in discrimination. Past absence indicates that I have been and will likely be unable to meet The AA's standard absence targets due to disability related absences.

…

I would also like to appeal the shift times offered as these don't enable me to attend medical appointments outside of working hours, as I have raised I have been informed that I am unable to attend medical appointments during work hours, again I believe this to result in disability discrimination.

The shifts I believe would be beneficial are Monday Tuesday Wednesday and Thursday 9am – 1pm weeks 1 – 3 followed by Monday Tuesday Wednesday and Saturday 9am – 1pm.

GRIEVANCE APPEAL

65. The claimant's grievance appeal hearing took place on 27 February 2020. Ms Manson chaired the meeting. The claimant attended with Adi McDermott in support. Ms Ladley acted as note taker.

66. Ms Manson wrote to the claimant by letter dated 04 March 2020 with the outcome of the appeal (pp.396-399). The claimant's appeal was not upheld.

a. The appeal as it related to adjustment to absence targets was rejected as Ms Manson considered that this would not help the claimant continue to work, nor was it sustainable for the business. And that the adjustments made relating to working hours and pattern would support this.
b. The respondent allowed the claimant to attend appointments at the asthma clinic and at the psychiatrist in work time, so long as notice was given of appointments. And gave the claimant a further option in terms of working patter, in line with that discussed at the appeal hearing.

67. The claimant through the period 03 January 2020 until 15 January 2021 was incapable of working due to sickness for 183 days. Discounting the 13 day overlap, for the calendar year 03 January 2020 until 02 January 2021, the claimant had at least 170 days where she was unable to work due to sickness. This is 46.58% of the year.

CONCLUSIONS

68. The PCP relied on in this case is clearly established. The respondent maintains an absence policy, which includes trigger points at which monitoring of absences takes place across the workforce.

69. However, considering our findings, already explained, this tribunal concludes that the PCP did not put the claimant at a substantial disadvantage compared to someone without the claimant's disability in this case, in that the additional absences that were related to the claimant's disability did not put her in breach of the respondent's attendance requirements and thus exposing her to disciplinary action, nor was there any of such that this tribunal considers to reach the level of being a substantial disadvantage. There were simply no disciplinary consequences for reaching the trigger points in question. Once a trigger point was reached then it became a management decision as to how to then manage the absence. But what became clear, especially in the specific approach taken in relation to the claimant, is that Mr Elson approached the claimant's absences with a view of first identifying the reason behind the absences before assessing whether the respondent could put in place anything that could assist the claimant to return and continue working. This is evident in the discussions that he had with the claimant and his approach to gathering guidance from those that would have a better grasp than him as to what actions may help, in particular through involving Occupational Health.

70. Insofar as reaching a trigger point is concerned, it is not in dispute that once triggered then the respondent did need to take some action but this was with a view to understanding the absences, putting in place support where it was needed and balancing the needs of the employee with that of the business. The respondent needs a point at which such actions happen, and this was merely that point with respect the respondent. It was even open to a line manager to decide not to take any action, despite a trigger point being reached, where they considered that to be the appropriate action. And this was the precise position taken by Mr Elson with respect the claimant in August 2019.

71. There is no disciplinary action taken during the period in question, nor is there a threat of disciplinary action, but a series of supportive mechanisms put in place following a long-term absence, in the form of discussions, OH referrals and investigations into adjustments that could be considered. The targets that were recorded on the Improvement Notice was part of that support. In these circumstances, this tribunal concludes that the claimant has not established the substantial disadvantage aspect of her claim.

72. However, even if we are wrong on that, and had we found that there was substantial disadvantage in this case, the claim would still not have succeeded.

73. Turning first to whether ignoring all disability related absences when considering a trigger point, which was the position at the time under the file note of Ms Hawley, would have been a reasonable adjustment. The **Bray** case supports our conclusion that such an adjustment would not be reasonable, as to find otherwise could lead to a position where an employee could be absent for an entire year without the employer being able to take any action. But more so, it would make it difficult for an employer to take any steps to discuss absences with any worker with

a view to making adjustments to try to help remove any substantial disadvantages that is present. In many ways, such an adjustment would be counter-productive.

74. And secondly, turning to whether having a figure set at 40% absence as the trigger point would have been a reasonable adjustment. We again find that this would not have been a reasonable adjustment. The claimant's conditions were ongoing. They were not going to improve, but were going to get increasingly worse, especially with the claimant's progressive condition of COPD. On balance, the claimant going forward, beyond the relevant dates in this case (16 July 2019 to 04 March 2020) was more than likely to have similar levels of absence or absence levels that would increase. And although we have no clear medical evidence on this point, this is certainly supported by the claimant's own oral evidence on this matter. Absence levels were and are unpredictable with the claimant- both parties accepted this. Further, the increase in absences and unpredictability of absence levels was then borne out with the claimant's absences across the year 2020. There is no evidence to support that introducing an arbitrary figure of 40% absences as the trigger point would in some way alleviate any disadvantage. And it certainly would not have removed the contended disadvantage at the rate of absence the claimant had during 2020, as she would have still hit the trigger point had a 40% figure been in place. The tribunal is not satisfied that changing the absence trigger rate from the standard 5% would have alleviated the disadvantage that the claimant says she suffered, nor have we been provided with a logical and principled approach to establish the level at which this would be achieved, and we certainly have not been taken to anything that would support a trigger point set at 40% absences.

75. To the contrary, the evidence that was presented to the tribunal, especially in the form of OH reports, identified recommended adjustments that were appropriate to help manage the claimant's absences. These were implemented by the respondent, and yet adjustments to trigger points were not part of that suite of adjustments recommended. In these circumstances the adjustments contended for by the claimant would not have been considered reasonable, so even had we found that there was substantial disadvantage in this case, at least insofar as the adjustments to trigger points pleaded, we would have concluded that there was no failure in the duty to make reasonable adjustments in not applying such adjustment.

76. The adjustments that did appear to be suitable to be applied to the claimant were made throughout this period. These included changes to working hours and working patterns, and were made from an informed position.

77. In these circumstances, the claimant's claim for disability discrimination does not succeed and is dismissed.

Employment Judge **Mark Butler**
Date: 07 December 2021

JUDGMENT SENT TO THE PARTIES ON

9 December 2021

FOR THE TRIBUNAL OFFICE

Notes
Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

Public access to employment tribunal decisions
Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.