EMPLOYMENT TRIBUNALS

Claimant: Mrs D Gallagher

Respondent: Marks and Spencer plc

HELD AT: Manchester **ON:** 7 - 9 July 2021 and (deliberations) 6 October 2021

BEFORE: Employment Judge B Hodgson
Mr A G Barker
Ms P Owen

REPRESENTATION

Claimant: Mr N Ginniff, Counsel
Respondent: Ms S Firth, Counsel

RESERVED JUDGMENT ON LIABILITY

The unanimous judgment of the Tribunal is that:

1. The claim of direct discrimination is not upheld and is dismissed
2. The claim of victimisation is not upheld and is dismissed
3. The claim of unfair dismissal is not well-founded and is dismissed
4. The claim of discrimination arising from disability is upheld

REASONS

Background

5. By an ET1 Claim Form presented on 29 May 2020, the claimant indicated that she was raising the following complaints:

   5.1. Unfair dismissal

   5.2. Direct discrimination (by reference to her mother's disability)

   5.3. Discrimination arising as a consequence of her own disability

   5.4. Indirect discrimination (by reference to her mother's disability)

   5.5. Indirect discrimination (by reference to her sex)

   5.6. Failure to make reasonable adjustments

   5.7. Victimisation

6. The matter came before the Employment Tribunal at a Preliminary Hearing ("the first PH") held on 7 October 2020 at which the complaints and issues arising were fully discussed, both parties being legally represented. The matter was listed for a three day Final Hearing to determine liability only and Case Management Orders made. The respondent did not concede that the claimant was at the relevant time a disabled person as defined and this issue was listed to be determined at a further Preliminary Hearing ("the second PH") on 11 January 2021

7. At the first PH, the claim of failure to make reasonable adjustments was withdrawn and that claim was dismissed. Subsequent to the first PH, the claimant withdrew her two claims of indirect discrimination and these claims were dismissed at the second PH

8. The judgment of the Tribunal at the second PH with regard to the disability issue was that: "The claimant was disabled in accordance with section 6 of the Equality Act 2010 with a mental impairment of depression, anxiety and low self-esteem in the relevant period 18 July 2018 to 27 January 2020"

9. The respondent has conceded that the claimant's mother was at all relevant times a disabled person, as defined, by reason of physical impairment

Issues

10. The issues falling to be determined in this claim were discussed at the first PH but, as indicated, not all the original claims were pursued . A document setting out the remaining draft issues was agreed between the parties for the purposes

of this hearing. This was discussed at the outset of this hearing and the following issues to be determined were identified (albeit re-ordered) between the Tribunal and the parties:

Disability – section 6 Equality Act 2010

10.1. These elements of the issues are set out for completeness only

10.2. As indicated, it has been found that the claimant was at all relevant times (namely between 18 July 2018 and 27 January 2020) a disabled person, as defined, by reference to the conditions of depression, anxiety, and low self-esteem

10.3. As further indicated, it is conceded that the claimant's mother was at all relevant times a disabled person, as defined, by reason of physical impairment

10.4. It is further conceded by the respondent that it knew or ought to have known of the disabilities of both the claimant and her mother

Time

10.5. In respect of the Equality Act claims, the respondent raises the following time issue:

10.5.1. any conduct relied on which took place prior to 15 January 2020 is, on its face, out of time

10.5.2. does any such conduct form part of a continuing act with conduct which, on its face, is in time?

10.5.3. if not, is it just and equitable to extend time so as to bring any out of time conduct within the Tribunal's jurisdiction?

Direct discrimination – Section 13 Equality Act 2010

10.6. Did the respondent impose, on 4 June 2019, a shift pattern that required the claimant to work three out of four weekends and change her hours of work during the week?

10.7. Was that imposition because of her mother's disability?

Victimisation

10.8. Did the claimant's grievance of 25 July 2019 amount to a protected act?

10.9. The claimant relies upon the following conduct of the respondent:

10.9.1. commencing an absence management procedure on 12 August 2019

10.9.2. failing to pay SSP in November 2019

10.9.3. dismissing the claimant on 27 January 2020

10.10. Did the above conduct or any of it amount to a detriment?

10.11. Was the reason for such conduct because of the claimant's grievance of 25 July 2019?

Unfair dismissal

10.12. What was the reason or principal reason for dismissal and was it a potentially fair reason in accordance with sections 98(1) and (2) of the Employment Rights Act 1996 ("ERA")? The respondent asserts that it was a reason relating to the claimant's capability

10.13. Was the dismissal fair or unfair in accordance with the provisions of section 98 (4) of the ERA?

Discrimination arising from disability – Section 15 Equality Act 2010

10.14. Was the claimant's long-term absence:

10.14.1. the reason for her dismissal on 27 January 2020?

10.14.2. something arising in consequence of her disability?

10.15. If yes, did the dismissal amount to unfavourable treatment?

10.16. If yes, was dismissal a proportionate means of achieving a legitimate aim? The respondent relies upon absence management as a legitimate aim

10.17. If the answer to issue 10.14.2 is yes, did the respondent's decision to invoke the absence management procedure on 12 August 2019 amount to unfavourable treatment?

10.18. If yes, was this decision a proportionate means of achieving a legitimate aim?

Facts

11. The Tribunal heard oral evidence from the claimant herself and also Ms Joan Dewsbury, a former work colleague and her Trade Union representative. The respondent called, to give oral evidence, a total of five witnesses: Ms Helen Yates, Section Manager; Ms Susan Waller, Section Manager; Ms Celia Roberts, Store Manager; Ms Carmen Tregartha, Deputy Store Manager; and Ms Amy Higham, Deputy Store Manager

12. The parties had agreed a final hearing bundle and reference to numbered documentation within this Judgment is by way of reference to pages as numbered within such bundle

13. The Tribunal came to its conclusions on the following facts - limited to matters relevant or material to the issues - on the balance of probabilities, having considered all of the evidence before it both oral and documentary

14. The respondent is a very well-known large national retailer with which the claimant initially commenced employment as a Customer Assistant in 1997

15. The respondent had an Attendance at Work Policy which was replaced, in or about December 2019, with a Sickness Absence Policy [see pages 72 - 85 and 86 -94]. There was no material or relevant change in terms of process

16. In or about June 2016 the claimant transferred from the respondent's Bootle store to its Queen's Drive (Liverpool) store

17. Subsequently, on 29 July 2016 the claimant agreed with the respondent a "Carer's Passport" [pages 114 - 115]. This arose from the claimant's caring responsibilities for her mother who was described as "wheelchair bound". The claimant had moved into her mother's house to support and care for her

18. As part of the preamble to the document, it is stated that: "This conversation and document will remain confidential between you and your line manager unless you want to share this more widely. This is your document and it's yours to share with a new line manager if you move or if your line manager changes. For our records we will also keep a copy on your p-file for future reference. You should work with your line manager to keep your passport as up to date as possible; remember, recording the agreements doesn't mean that they will never need to change to either reflect your own circumstances and the changing operational needs at work". (Within the claimant's contract – see page 103 – the respondent "reserves the right" to change hours and/days or work if the trading pattern and/or operational requirements of the store change)

19. The Passport confirmed that the claimant had agreed hours of working. Her contractual working hours included finishing at 9pm on a Wednesday evening and starting at 6am the following day, despite this appearing to be in breach of the Working Time Regulations

20. By a letter (undated but sent in or around May 2019) from her Store Manager [page 116], the claimant was advised that her "current contract may be required to be changed in order to fit the store operation and our customer demands". Attached was a "weekend working proposal" [page 136] which, it was said, "hopefully will give some context around the changes". The claimant was invited to a one to one meeting on 4 June 2019 "to discuss with your line manager the proposed changes to your contract". What was being proposed was an across the board revision of the work pattern of all employees at the Queen's Drive store with contractual hours of 20 or less per week

21. The claimant had worked varying hours and days during her employment with the respondent but at this point she was working 19.75 hours per week

22. The meeting proceeded as arranged on 4 June 2019 with the claimant's line manager Ms Helen Yates. The claimant was accompanied by her Trade Union representative Ms Joan Dewsbury. There are handwritten notes of the meeting at pages 117 – 120. The discussion centred around the claimant's caring responsibilities for her mother and what this meant in terms of the shifts she was able to work

23. By letter dated 29 June 2019 [page 121], the Store Manager wrote to the claimant confirming that the piece of work over the required level of staffing over the weekends had been completed "in line with our customer demand curve". A "new adjusted working pattern in line with our store's requirements" was enclosed [page 122] and it was stated that "the changes take effect from week commencing 4th August 2019 in line with Policy"

24. The shift pattern for the four weeks from 4 August 2019 provided for the claimant to work 3 out of 4 Saturdays, 2 out of 4 Sundays and 2 out of 4 Fridays

25. On 17 July 2019, the claimant had a follow up meeting with another line manager, Ms Susan Waller, in which she discussed the difficulties the proposed change gave rise to in light of her caring responsibilities for her mother. The claimant made it clear that she was unable to work the Friday shift due to her caring responsibilities and further discussion centred around moving this to a Thursday. However the system would not allow the claimant to be rota-ed for times that would put the respondent in breach of the Working Time Regulations and no final agreement was reached as to a position that satisfied both parties

26. The claimant attended her GP on 18 July 2019 and was signed off sick with "reactive depression" for two weeks [page 125]. (She did in fact then remain off work by reason of ill-health throughout the remainder of her employment with the respondent)

27. On 25 July 2019, the claimant lodged a "Formal Grievance Form" [pages 129 – 130], setting out in an accompanying letter the substance of her grievance [pages 131 – 132]. Her grievance concerned the change of hours proposed and the potential impact this would have upon her with particular regard to her caring responsibilities

28. The covering letter includes the statement that: "I am sure I don't need to remind you that if you are looking after someone who is older or has a disability, you are protected against discrimination or harassment because of your caring responsibilities under the Equality Act 2010"

29. The claimant was advised that her pay would be withheld during her absence and, in addition to raising this issue in her grievance letter, she further raised a separate specific complaint over the respondent's failure to pay Company Sick Pay ("CSP") by letter dated only July 2019 [page 128]

30. By letter dated 26 July 2019, the Store Manager set out the reasons why CSP had been withheld [page 138]. This letter advised that the respondent retained the right not to pay CSP, for example, "if there is evidence to show that a colleague is absent as a result of a company decision or they are unhappy with the outcome of a grievance or appeal" and that, for various reasons set out, "we have evidence to believe that your absence is work-related"

31. By letter dated 1 August 2019, the claimant was invited to attend a formal meeting to discuss her grievance. This meeting went ahead as scheduled on 6 August. Notes of the meeting are at pages 141 – 152. It was conducted by Ms Celia Roberts, a Store Manager, who sought further details from the claimant as to the content of her grievance

32. The outcome of the grievance meeting was set out by Ms Roberts in a letter dated 9 August 2019 [pages 154 – 156]. The grievance was effectively rejected but Ms Roberts stated that: "Having reviewed the four weeks of the demand curve, I do believe that there could be a compromise to ensure that you can care for your Mother and that the store demand curve would be met." The stated understanding of Ms Roberts was that the claimant would be prepared to compromise with her hours

33. On 9 August 2019, the claimant was issued with a further GP note signing her off sick for a period of one month [page 153]

34. The claimant appealed against the grievance outcome by letter dated 12 August 2019 [page 157]. She was asked to expand upon the basis upon which she was appealing [page 158] which she did [pages 159 -160]

35. By letter of the same date, 12 August 2019, the claimant was invited to attend a meeting with Ms Susan Waller to discuss her sickness absence [page 167] in accordance with the respondent's Attendance at Work Policy

36. This meeting proceeded on 15 August 2019 and the handwritten notes are at pages 169 – 172. The content of the meeting was summarised by Ms Waller in her letter of the same date [page 173]

37. Ms Waller confirmed that the respondent would endeavour to help the claimant back to work and consider any reasonable support but also that continued absence may ultimately lead to her dismissal

38. On 18 August 2019 the claimant was issued with a further GP note for a period of two weeks [page 125]

39. On 29 August 2019 Ms Waller held a telephone catch up with the claimant [notes at page 174]. The claimant indicated that she did not have a date to come back to work

40. There was a further telephone catch up on 4 September 2019 but with no progress indicated [page 175]

41. By letter dated 6 September 2019 [page 176], Ms Waller invited the claimant to a follow up meeting to discuss her sickness absence on 12 September but this did not proceed [page 178]

42. Ms Waller rearranged the long term ill-health meeting for 17 September 2019 [pages 180 – 182]. She confirmed the outcome by letter dated the same day [page 183]. The outcome remained unchanged from the previous meeting

43. On 26 September and 3 October 2019, there were further telephone catch ups with the claimant [pages 184 and 187]. The outcome was again summarised by Ms Waller by letter dated 3 October 2019 with again very similar wording as followed the earlier meetings [page 188]

44. By letter dated 3 October 2019 [pages 164 – 166], Ms Tregartha set out the outcome of the grievance appeal which she had heard on 11 September 2019. The appeal was not upheld in respect of both of the issues raised namely, the refusal to pay CSP and the co-relation between the claimant's health and well-being and her caring commitments. In respect of the former, Ms Tregartha was satisfied that the claimant's ill-health absence was as a result of the "conversation" over her working hours. In respect of the latter, Ms Tregartha believed the claimant had been given support but that her working hours needed to be reviewed

45. On 7 October 2019, the claimant was issued with a further GP note for a period of two weeks [page 189]

46. On 9 October 2019, a third long term ill-health meeting was cancelled due to the claimant being unwell [page 190]

47. On 18 October 2019, the claimant was issued with a further GP note for a period of two weeks [page 196]

48. On 29 October 2019, the rearranged third ill-health meeting between the claimant and Ms Waller took place [pages 198 - 200]. It was agreed that an Occupational Health Report would be obtained

49. On 1 November 2019, the claimant was issued with a further GP note for a period of one month [page 202]

50. By email of 22 November 2019, the claimant's husband set out on her behalf a complaint that she had not been paid the Statutory Sick Pay ("SSP") to which she believed she was entitled [pages 203 - 204]

51. On 26 November 2019, the respondent notified the claimant that her not receiving SSP had been an administrative error and, having apologised and summarised their discussion, confirmed that SSP would be paid and back dated [pages 207 - 208]

52. On 29 November 2019, the claimant was issued with a further GP note for a period of two months [page 216]

53. An Occupational Health Report concerning the claimant was sent, as agreed and requested, to the respondent by letter dated 2 December 2019 [pages 217 - 219]

54. The Report summarised that the claimant "is suffering from reactive depression due to difficult circumstances that occurred in the workplace that impacted her domestic responsibilities"

55. In terms of when the claimant may be able to return to work, the Report states that: "Due to the severity of the symptoms [the claimant] is experiencing and also her presentation to me at the time of the consultation, I would expect her absence to continue for at least another six to eight weeks possibly longer". The Report goes on to say that, in view of the nature of the illness, " at this time, a likely return to work date cannot be predicted"

56. In terms of "adjustments or modifications that may assist", the Report advises that when the claimant is able to consider returning to the workplace, "I would recommend a management meeting to put in place a supportive package of working hours that takes into consideration her care duties. In my opinion, it is important that [the claimant] is fully aware of this before a return to work commences". A further recommendation is a phased return to work

57. In terms of possible re-occurrence, the Report concludes that there is "no reason to assume that with adequate work supportive measures in place [the claimant] should not be able to continue" her good attendance record

58. On 12 December 2019, Ms Waller held a further telephone catch up with the claimant [page 220]

59. On 18 December 2019, Ms Waller conducted a fourth ill-health meeting with the claimant by telephone [pages 228 - 230]. They discussed the likelihood of the claimant returning to work in the context of the Occupational Health Report. It was agreed that a further Occupational Health Report would be obtained

60. On 19 December 2019, the claimant raised a further Formal Grievance, this being in regard to the failure to pay SSP [pages 231 - 232]

61. A response to that grievance was given on 23 December 2019 [page 233]. It confirmed that the issue had been resolved by the previous admission that there had been an administrative error and that payment of SSP would be made. It further confirmed that any internal disciplinary action arising would remain confidential and that a financial settlement would not be part of any grievance outcome. By further email dated 24 December 2019 [page 234], the claimant confirmed that, having taken legal advice, she nevertheless wished to pursue her grievance formally

62. A second Occupational Health Report was issued on 3 January 2020 [pages 236 - 237]. This indicated that the claimant was fit for work undertaking her substantive role and contracted hours, but her "severe level of anxiety and depression" was preventing her return to work. She would require further treatment but "from today's appointment there is no foreseeable return to work date"

63. On 14 January 2020, the respondent conducted a fifth long term ill-health meeting with the claimant [pages 239 - 244]. Ms Waller confirmed the outcome by letter dated the same day [page 245]. The prospect of the claimant's return remained open-ended but details of the availability of counselling were to be provided

64. On 24 January 2020, the claimant was issued with a further GP note for a period of one month [page 249]

65. On 24 January 2020, there was a sixth, and what turned out to be a final, long term ill-health meeting conducted by Ms Waller with the claimant [pages 250 - 260]. The claimant had been called to this meeting by letter dated 20 January 2019 [page 247]. This letter had indicated this was a "final ill-health meeting" and that a potential outcome was dismissal. The claimant's position was that her situation was essentially unchanged. When asked if she could see herself returning to work in the next 4 – 6 weeks, the claimant replied that she didn't know and can't answer that. She was asked: "If I do a well-being plan with you and look at hours around care for Mum, would you come back to work?" Her reply was: "Yes but the way feeling at the moment can't say when" [page 259]

66. The meeting was adjourned for Ms Waller to take HR advice and reconvened on 27 January 2020 [pages 272 – 274] (confirmed by letter dated 24 January 2020 [pages 261 – 262]). In answer to the question "If I was to give you the hours you want would you return?", the claimant replied: "That's all I ever asked for. Can't say if I feel ok to come back". In answer to the follow up question "How soon could you come back?", the claimant replied: "Just been the GP and signed off for another month". At that point the meeting was adjourned for Ms Waller to speak to her HR department after which she advised the claimant: "I have considered all the points of the absence and looked at and offered the hours you want along with any other adjustments offered and the most recent OH referral and decided to ill-health dismiss you today as the level of your absence is no longer sustainable". The claimant was told she was being dismissed with pay in lieu of notice. When ultimately she was asked if there was anything she wanted to say, she replied: "Wouldn't be here if listened to in the first place" [page 272]

67. The outcome was confirmed in writing by Ms Waller by letter dated 28 January 2020 [pages 275 - 276]. The claimant was confirmed as having been dismissed

with pay in lieu of notice. The "considerations and reasons" for the decision were set out as follows:

- During your final ill-health meeting we discussed moving your contracted hours to whatever hours you wanted to enable you to return to work while also caring for your mum. Also completing a well being adjustment plan together to support you to manage your depression while in work along with any other reasonable adjustments you felt would help you. You still could not see yourself returning to work in the foreseeable future

- All adjustments offered were declined by yourself, and you were unable to provide any further adjustments that you felt would support a return to work

- You have followed your GP's advice throughout this absence including taking the prescribed medication and following self help suggestions however you have advised your medical condition has not improved since the original date of your absence

- The impact your continued absence is having on the operational requirements of the store and your colleagues

- Your PAM occupational health report states that they are unable to predict how long it will take for you to have a level of wellbeing consistent with a return to work and therefore they cannot see a return to work in the foreseeable future

- Your length of service has been considered, but with no imminent return to work a decision needed to be made around your continued employment

68. The claimant exercised her right of appeal by completing an Appeal Form dated 5 February 2020 [pages 277 - 278]

69. The appeal hearing proceeded on 3 March 2020 conducted by Ms Amy Higham [pages 291 - 299]. There was discussion surrounding the basis upon which the claimant could return to work. She was asked: "Do you want to be reinstated on your original hours?" Her reply was: "I don't think I could return to work as I don't trust m and s anymore." [see page 294] She asked her husband to speak on her behalf as to the outcome she was seeking. He stated that: "[The claimant] believes that there is a breakdown of trust between herself and m and s due to the ignorance of m and s. … The only outcome [the claimant] is looking for is a settlement and to go separate ways." [see page 295] The claimant was asked if she was happy with what her husband had said and she confirmed that she was [see page 298]

70. The outcome of the appeal was confirmed by letter (undated) [pages 300 – 303]. The appeal was rejected with specific reference to the fact that the

claimant did not want to be reinstated and was looking for financial compensation

Legal Framework

71. Section 98(1) of the Employment Rights Act 1996 ("ERA") states:

In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show:

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held

72. Relating to the "capability of the employee" is one of the reasons set out in subsection (2)

73. Section 98(4) of the ERA states:

Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason 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

74. It is for the employer to prove the reason for dismissal. The application of section 98(4) has a neutral burden of proof

75. The Tribunal must not substitute its own view for that of the employer unless the latter falls outside the band of reasonable responses (***Iceland Frozen Foods v Jones 1983 ICR 17***). This applies to procedural as well as substantive matters (***Sainsburys v Hitt 2003 ICR 111***).

76. Section 13 of the Equality Act 2010 ("EqA") states that:

(1) *A person (A) discriminates against another (B) if, because of a protected characteristic [in this case, disability], A treats B less favourably than A treats or would treat others*

77. Section 15 of the EqA states that:

(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

78. Section 27 of the EqA states that:

(1) *A person (A) victimises another person (B) if A subjects B to a detriment because-*

(a) B does a protected Act, or

(b) A believes that B has done, or may do, a protected act

(2) Each of the following is a protected act –

(a) bringing proceedings under this Act;

(b) giving evidence or information in connection with proceedings under this Act;

(c) doing any other thing for the purposes of or in connection with this Act;

(d) making an allegation (whether or not express) that A or another person has contravened this Act.

79. The burden of proof in discrimination claims rests initially with the claimant but section 136 EqA provides that if there are facts from which the Tribunal could decide, in the absence of any other explanation, that the respondent has acted in a way that is unlawful, the Tribunal must uphold the complaint unless the respondent shows that it did not so act

80. This requires a two-stage process. First, the complainant must prove facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an unlawful act of discrimination against the complainant. The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a Tribunal 'could conclude' (namely, that a reasonable Tribunal could properly conclude from all the evidence before it) that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination. The second stage, which only applies when the first is satisfied, requires the respondent to prove that it did not commit the unlawful act. However, it is not necessary for the burden of proof rules to be applied in an overly mechanistic or schematic way

Submissions

81. The representatives of both the respondent and the claimant prepared and spoke to written submissions, including reference to relevant case law, which, being on record, are not repeated in this Judgment but were fully considered by the Tribunal

Conclusions

Direct Discrimination

82. Although there is a time issue regarding this claim, the Tribunal considered the substantive merits within its overall deliberations

83. There is no question but that the respondent did or proposed to (in the sense that, as a consequence of her long-term sickness absence up to the date of her dismissal, the claimant did not actually return to work) impose a change in shift patterns for the claimant on 4 June 2019. That fact is not disputed by the respondent

84. Although this was an across the board exercise involving all employees working 20 hours per week or less, no actual comparator was identified and the parties were essentially in agreement as to the identification of the appropriate (hypothetical) comparator. This would be an employee employed for 20 hours or less per week without caring responsibility for a disabled relative

85. The question for the Tribunal to resolve is whether or not this action was less favourable treatment "because of" the disability of the claimant's mother, namely, by association

86. The Tribunal noted, as indicated, that the exercise carried out by the respondent in this respect was not solely in respect of the claimant but for all members of staff with a contractual working week of 20 hours or less of whom the claimant was one

87. There was no suggestion by the claimant in her evidence – and nothing in the evidence otherwise before the Tribunal – that the fact that the claimant had caring responsibilities for her mother caused any concern on the part of the respondent in regard to the claimant's ability to perform her work or otherwise. They had in fact previously accommodated this by agreement within the arrangements agreed within the claimant's Carer's Passport

88. Reliance is placed by the claimant's representative upon the particular impact of this proposed change upon the claimant but it is upon the treatment and the reason for it that the Tribunal must focus

89. In the Tribunal's view, the combination of the "across the board" nature of the proposal - with no evidence that any comparator was or would have been treated any differently - coupled with the absence of any indication of concern

over the claimant's caring responsibilities, leads to a conclusion that the proposal was in no way motivated by the claimant's caring responsibilities with regard to her mother and there was accordingly no less favourable treatment

90. As to the time point, the first consideration is whether or not this step on the part of the respondent amounts to a continuing act. In the Tribunal's view it is properly categorised as a one off decision that had continuing effect rather than a continuing act

91. In such circumstances, the claim is clearly brought out of time and the Tribunal then has to consider whether or not it is just and equitable to extend time (see section 123(1)(b) of the ERA)

92. The claimant was sufficiently concerned as to the proposed change to raise a formal grievance as early as July 2019. She subsequently advised the respondent in December 2019 [page 234] that she had sought "legal advice from an external source" with regard to the grievance process. Although the claimant has throughout the process been a disabled person by reference to mental impairment, there has been no suggestion by or on her behalf that this in any way baulked her from pursuing a claim should she have wished or chosen to do so

93. The Tribunal's conclusion therefore is that this claim is out of time and it is not just and equitable to extend that time with the consequence that the Tribunal does not have jurisdiction to hear the claim

94. Accordingly this claim fails by reason of lack of jurisdiction and would otherwise fail substantively

Victimisation

95. It is not conceded by the respondent that the grievance of 25 July 2019 amounts to a protected act as defined

96. The Tribunal notes that, having set out the claimant's concerns as to the actions of the respondent in terms of the proposed change to her hours, the grievance specifically contains reference to the Equality Act 2010. The claimant makes it clear in her grievance that she feels she has been wrongly or badly treated with reference to her caring responsibilities

97. Whilst accepting that the grievance does in essence set out an allegation that the Equality Act 2010 has been breached, it is argued on behalf of the respondent that this arises out of an erroneous interpretation of the provisions of the Act. The Tribunal does not accept the argument that this negates the fact that there is an allegation of a breach and (so far as it is relevant) that it is made in good faith. Without question, it appears to the Tribunal, it is clear – from the express reference itself - that the grievance is something done connected with the Equality Act

98. On any proper analysis of the grievance, this leads in the view of the Tribunal to a clear conclusion that the grievance is something done in connection with the Equality Act and/or alleges that the respondent has contravened the Act

99. The Tribunal is accordingly satisfied that the grievance does amount to a protected act as defined

100. The Tribunal considered in turn each allegation said to amount to a detriment, namely:

100.1. commencing an absence management procedure on 12 August 2019

100.2. failing to pay SSP in November 2019

100.3. dismissing the claimant on 27 January 2020

101. The failure to pay SSP is conceded as amounting to a detriment. The commencement of the absence management policy and the dismissal of the claimant are not conceded as amounting to detriments. The respondent's representative did not seek to pursue any argument beyond the bare failure to concede these latter points, other than what seemed to the Tribunal to be a somewhat novel point that, in the context of the facts of this claim, it would have been unfavourable treatment not to have dismissed the claimant

102. The Tribunal is satisfied without question that all of the above steps taken by the respondent amount to detriments, namely that they put the claimant to a disadvantage. The commencement of the absence management policy had the potential to, and did in fact, culminate in the dismissal of the claimant

103. Were all or any of the actions "because of " the protected act(s)?

104. Beyond the basic chronology – that is to say that the detriments relied upon post-date the claimant's grievance – there has been no evidence produced to the Tribunal which would suggest the actions relied upon were taken because of the fact that the claimant had raised her grievance

105. The commencement of the absence management procedure was in accordance with the claimant's written procedures both in terms of the steps taken and the timing, in the light of the claimant's sickness absence

106. The failure to pay sick pay was explained as an administrative error which was quickly corrected by the respondent. Although it is surprising that a company of the size and with the resources of the respondent should make such a basic and fundamental error, no evidence was produced to the Tribunal to suggest in any way that this error was connected to the raising by the claimant of her grievance. The Tribunal accepts the respondent's evidence in this regard that this was an error that should not have occurred but the fact that it did was in no way connected with the fact that the claimant had raised her grievance. It was an error that was corrected as soon as it was brought to light by the claimant

107. The dismissal of the claimant followed a prolonged exercise of the respondent's absence procedures which culminated a significant period of time after the grievance was raised. There is no evidence, in a general sense, that the respondent took exception to the fact of the claimant raising the grievance. It was a grievance raised formally in accordance with the respondent's procedures and dealt with accordingly. It must be assumed, given the size of the respondent, that it receives and deals with numerous formal grievances

108. The Tribunal is accordingly satisfied that there is no connection between the protected act and any of the detriments relied upon and accordingly this claim also fails

109. Again, there is also a jurisdictional point in this claim but relating solely to the failure to pay SSP. The commencement of the absence management procedures are regarded by the Tribunal (and conceded by the respondent) as clearly part of a continuing act up to and including the dismissal of the claimant and therefore the claim as based upon these detriments is in time

110. The Tribunal's clear view is that the failure to pay SSP is a stand alone action and not part of a continuing act. The claim based upon that detriment is accordingly out of time and the Tribunal's analysis on the question of the potential for a just and equitable extension is as set out above

111. The element of the claim arising from the failure to pay SSP therefore would fail by reason of lack of jurisdiction. In terms of substantive issues, however, all elements of the claim fall

Unfair dismissal

112. The Tribunal reminded itself throughout its deliberations that it is not to substitute its own view for that of the respondent but rather to apply the test of reasonableness to the entirety of the process

113. There is no dispute between the parties that the reason for dismissal is capability, namely the long-term sickness absence of the claimant. It is further not in dispute between the parties that the respondent followed its internal procedures in terms of meeting with the claimant and including the obtaining of Occupational Health Reports. There is accordingly no allegation of procedural unfairness

114. The essential issue between the parties is whether or not, given the overall circumstances, it was fair or unfair on the part of the respondent to dismiss the claimant when it did in the circumstances pertaining at the time. This would include whether or not the respondent could reasonably be expected to wait any longer, the claimant's views and her medical condition. The Tribunal, in answering this question, is to take into account the size and administrative resources of the respondent's undertaking

115. The respondent chose to separate out the "ill health" issue from the "shift pattern" issue when it would be apparent to any employer acting reasonably that the two issues were inextricably linked. Even if it could be said that the interlinking of the two matters was not reasonably apparent, the correlation was emphasised by the Occupational Health Report obtained by the respondent in December 2019

116. Although therefore the respondent on the face of matters followed its long-term ill-health process, it did so completely divorced from the very issue that was causing the absence. This view is reinforced by the respondent's own reliance upon the claimant's illness being occasioned by work conditions as the reason not to pay CSP

117. The failure to combine the issues – or at the very least to see each in the context of the other - led the respondent to a position where it took the decision to dismiss essentially based on an impasse. The respondent was saying that it needed the claimant to return to work and then the issue of shifts could be further discussed whereas the claimant sought to have certainty as to her working pattern before returning. The first Occupational Health Report of December 2019 expressly supported the claimant's view in this regard but this was not followed by the respondent

118. At the dismissal meeting, resumed on 27 January 2020, the claimant was asked whether she would return if given the hours she wanted. The response of the claimant was to point out that a further sick note had been issued for a period of one month. Essentially what the claimant was asking for was a period of up to one month to consider her position.

119. The conclusion of the respondent was not to grant that but to proceed to an immediate decision to dismiss**.** Was that a reasonable step to take in all the circumstances?

120. The Tribunal notes that the claimant's ill health was caused, or at the very least materially contributed to or exacerbated, by the respondent's attempt to change the claimant's shifts. As indicated, this was the basis upon which the respondent declined to pay CSP to the claimant. The case of ***Royal Bank of Scotland v McAdie [2008] ICR 1087*** makes it clear that it is not automatically unfair to dismiss under such circumstances but the employer should be prepared to "go the extra mile" including the possibility of extending the period prior to dismissal. The obvious "extra mile" in this case is to defer the decision whether or not to dismiss by a period of up to one month. The Tribunal does not accept that not to defer for this period is a reasonable stance for a reasonable employer to take. The respondent is a very large well-resourced organisation. Although general reference was made by the respondent's witnesses that any staff absence can have a detrimental impact on a store and potentially its customers, no evidence whatsoever was produced to the Tribunal to indicate that, specifically, the claimant's ongoing absence for a further month would put the respondent to any material difficulty, or in fact any difficulty at all, in terms of serving its

customer base or by placing an unacceptable burden upon her colleagues or generally by impact upon the respondent's finances. The suggestion was made in the respondent's witness evidence that each individual store needs to be considered as a stand-alone entity. No explanation was proffered as to why, when there is one common owner of all of the stores, this should be the case. No evidence was produced that this was in practice the position. No reason was put forward, for example, as to why staff could or would not be swapped between stores to meet demand or necessity. The further suggestion was made that "retail" is a very low profit margin business and that the Tribunal should take judicial note both of this contention and that any absence has an impact on operating profits. The Tribunal does not agree that such propositions are so obvious, particularly for an operator the size of the respondent and concerning an employee at the level of the claimant, that judicial notice should be taken and no economic-based evidence to back up these contentions was produced to the Tribunal

121. Had the matter rested there, the Tribunal's conclusion in all the circumstances therefore would have been that the dismissal of the claimant was unfair***.*** However the matter did not rest there

122. It is trite law (see for example ***Taylor v OCS Group Limited [2006] EWCA Civ 702***) that the whole process, including investigation up to a disciplinary hearing and any appeal following a decision to dismiss, must be taken into account and the facts considered in the round when determining whether a dismissal is fair or unfair

123. At her appeal hearing, the claimant was given the option of returning to work under her previous shift pattern which would therefore, on the face of matters, address her concerns. (The respondent's witnesses were unable to address how this may have worked given the apparent position that the claimant's prior working hours were, upon cursory analysis, in breach of the Working Time Regulations. This however was the specific offer made.) The claimant did not need further time to consider this proposal at this stage but was clear in her expressed view (and specifically in approving the position outlined by her husband on her behalf) that she could not return to work for the respondent under any circumstances. What she was seeking was some form of financial recompense for the fact that she had been dismissed and placed in this position

124. The Tribunal is satisfied on the evidence that this was not a spur of the moment decision by the claimant but rather a position she had come to between the dismissal hearing and the appeal

125. The respondent was accordingly, at that stage, left in the position of having an employee who was clearly and unambiguously stating that she was either unable or unwilling to return to work - not for a limited period but at all - notwithstanding being offered the basis of return that she had been seeking

126. In such circumstances, the respondent, acting reasonably, was entitled to take the decision that it did, namely to terminate the claimant's employment. Under

those circumstances, this effectively overrides the position at the original dismissal hearing and, when viewed in the totality of the process, renders the decision to dismiss fair

Discrimination arising from disability

127. The Tribunal must analyse all of the statutory elements upon which this claim is based

128. The primary unfavourable treatment relied upon is the claimant's dismissal. The respondent's position and the Tribunal's findings in this regard are set out above in the context of the victimisation claim (albeit more specifically on the question of "detriment"). The Tribunal is satisfied that the claimant's dismissal amounts to unfavourable treatment. The Tribunal is further satisfied that the same analysis applies as regards the respondent's decision to start the absence management procedure in August 2019 which is the commencement of a continuing act through to the decision to dismiss

129. What is the "something arising"? This by agreement is the claimant's long-term sickness absence

130. It is found that at the relevant time the claimant was a disabled person, as defined. Did the sickness absence arise as a consequence of the claimant's disability? The respondent says no, it arose as a consequence of the respondent's attempt to change the claimant's shifts. The Tribunal rejects this argument. The reason for the claimant's absence was her ill health, found to be by reason of disability. It is correct to say that it was the attempt to change the claimant's shifts which caused or contributed to (as emphasised by the respondent's own position with regard to CSP) the claimant's sickness but the reason for her absence was her mental impairment, as confirmed by her various sick notes

131. The final element is whether or not the unfavourable treatment was "because of" the claimant's long term sickness absence. The Tribunal is clear that the unfavourable treatment relied upon (namely, commencing the absence management procedure and ultimately dismissing by reason of capability) arose, effectively by definition, precisely as a consequence of the claimant's sickness absence

132. In the above circumstances, the Tribunal's conclusion is that this claim is to that point upheld. The respondent however seeks to rely upon the defence that the treatment was a proportionate means of achieving a legitimate aim

133. The legitimate aim relied upon is to provide an excellent service to its customers and meet operational demands. There is no dispute that this is a legitimate aim of an organisation such as the respondent. Was the commencement of the absence management procedure culminating in the dismissal of the claimant a proportionate means of achieving that aim?

134. The Tribunal accepts that the respondent acted proportionately in commencing its procedure in the context of long-term sickness absence. It is entitled to manage long-term sickness absence of its employees. However, for the reasons set out in the Tribunal's analysis regarding the claim of unfair dismissal and the reasonableness of the respondent's decision (at the point of the original decision to dismiss) at paragraph 120 above, the Tribunal finds that the dismissal of the claimant was not a proportionate means of achieving that legitimate aim

135. The Tribunal is mindful of the guidance in the case of ***O'Brien v Bolton St Catherine's Academy [2017] EWCA Civ 145*** which states that effectively there is no real distinction between the reasonable test for unfair dismissal and the proportionality test. Whilst at face value, the Tribunal has come to a different overall conclusion, in fact the two decisions are entirely consistent. The Tribunal's analysis in regard to the claim of discrimination arising from disability must stop at the time of the initial decision to dismiss without taking account of the subsequent decision on appeal

136. This claim is accordingly upheld

137. The matter will now go to a Remedy Hearing and a Preliminary Hearing to discuss with the parties what steps may be appropriate to ensure the Remedy Hearing can proceed in good order will be listed as soon as possible

138. In terms of remedy, the Tribunal would add the following. The parties were given the opportunity to make submissions on the ***Polkey*** principle. Given the Tribunal's decision on the unfair dismissal claim, there is no question of the potential applicability of ***Polkey***

139. The Tribunal will however need to give consideration to the potential impact of the appeal process on any award of compensation. Although this may produce similar arguments to those pursued under the ***Polkey*** principle, they are not necessarily identical and the Tribunal accordingly considers it appropriate that this remain an issue to be considered, and opportunity be given for submissions to be made on behalf of both parties, at the Remedy Hearing to be arranged

Employment Judge B Hodgson

Date: 9 December 2021

RESERVED JUDGMENT

Case No: 2406039/2020

JUDGMENT SENT TO THE PARTIES ON

14 December 2021

FOR THE TRIBUNAL OFFICE

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