RESERVED DECISION

EMPLOYMENT TRIBUNALS

Claimant: **Ms Cathryn Hulme**

Respondent: **British Airways Plc**

Heard at: **Watford Hearing Centre (by cloud video platform)**

On: **22 to 26 November 2021**

Before: **Employment Judge G Tobin**
Mrs B Handley-Howorth
Mr D Wharton

Representation
Claimant: Ms L Whittington (counsel)
Respondent: Ms C Bell (counsel)

JUDGMENT

The unanimous Judgment of the Employment Tribunal is that: -

1 The claimant's claim under ss20 & 21 Equality Act 2010 that the respondent failed in its duty to make reasonable adjustments is dismissed upon withdrawal.

2 The claimant was not unfairly dismissed in breach of s94 Employment Rights Act 1996

3 At all material times, the claimant was a disabled person within the definition of s6 Equality Act 2010.

4 The claimant was not subjected to discrimination arising from her disability, in breach of s15 Equality Act 2010.

5 As the claimant has not succeeded with any of her claims, proceedings are hereby dismissed.

REASONS

The hearing

1 This has been a remote hearing which has been agreed to by the parties. The form of remote hearing was a video hearing through HMCTS Cloud Video Platform, and all the participants, save as to the Judge, were remote (i.e. not physically at the hearing centre). A face-to-face hearing was not held because it was not practicable in the light of the coronavirus pandemic and the Government's restrictions. The hearing was listed as a final hearing and all issues could be determined at this hearing.

The case and the issues to be determined

2 Proceedings were commenced on 11 October 2019 after the required ACAS early conciliation. The claimant was employed by the respondent from 17 April 2000 until her employment was terminated on 5 July 2019. The claimant was a member of the respondent's cabin crew and her employment transferred from British Midland International Airways on 1 November 2012 to the respondent pursuant to the Transfer of Employment (Protection of Employment) Regulations 2006, which preserved her continuity and her pre-existing terms of employment. The claimant averred that she had fibromyalgia, and that this amounted to a disability under section 6 of the Equality Act 2010 ("EqA"). The claimant complained of: unfair dismissal, in breach of section 94 Employment Rights Act 1996 ("ERA"); discrimination arising from her disability, in breach of s15 EqA; failure to make reasonable adjustments, pursuant to ss20 & 21 EqA and victimisation, in breach of s27 EqA. A Response was presented on 14 November 2019 in which the respondent denied all of the claims. The respondent acknowledged that the claimant had fibromyalgia and that this amounted to a disability. The respondent asserted that the claimant was dismissed for an incapability reason following substantial sickness absence.

3 The claimant withdrew her complaint of victimisation and on 13 May 2020, Employment Judge Bedeau recorded the agreed issues which require determination by this Tribunal to be as follows:

Unfair dismissal

1. Did the respondent dismiss the claimant for a potentially fair reason pursuant to s98 ERA?
   The respondent contends that the claimant was dismissed for the potentially fair reason of capability.

2. If so, pursuant to s98(4) ERA, did the respondent act reasonably or unreasonably in treating it as sufficient reason for dismissing the employee?
   The claimant contends that the dismissal was unfair for the following reasons:

   i. The absence management policy, EG300, paragraph 3.3, was not properly followed.

   ii. The claimant was not allowed an opportunity to demonstrate she could sustain attendance going forward before being dismissed.

   iii. The respondent did not have sufficient evidence on which to conclude the claimant would not be able to sustain attendance going forward.

3. In particular, was the decision to dismiss the claimant within the band of reasonable responses and did the respondent follow a fair procedure?

4. If the decision is found to be unfair, should any *Polkey* reduction be made? If so, how much.

5. If the dismissal is found to be unfair, did the claimant's conduct contribute to the dismissal?
   The conduct on which the respondent relies is the claimant's failure to engage with the Career Transition Service to explore whether any alternative roles where available.

Disability discrimination

6. Was the claimant disabled at all material times in accordance with s6 and schedule 1 EqA?
   The claimant relies on Complex Regional Pain Syndrome developing into fibromyalgia – see paragraph 41 Details of Complaint. The respondent accepts that the claimant was disabled by virtue of fibromyalgia at all material times.

Discrimination arising from disability – s39(2)(c) and s15 EqA

7. Was the claimant treated unfavourably by the respondent?
   The claimant contends that the unfavourable treatment was dismissal (see page 19 of the Details of Complaint) due to the claimant's absences.

8. Was the claimant subjected to any such unfavourable treatment because of something arising in consequence of her disability?
   The "something" relied upon by the claimant in respect of the unfavourable treatment above was her inability to do full contractual duties including Eurofleet Flights

9. Did the "something" arise from the claimant's disability?

10. If so, did the "something" cause the unfavourable treatment relied upon?
    The respondent contends that the most recent absence which triggered the decision to terminate the claimant's employment was the result of stress/depression and it was not connected to her disability – see paragraph 23 of the Grounds of Resistance.

11. Can the respondent show that the treatment was a proportionate means of achieving a legitimate aim?
    The respondent contends that the legitimate aims are those set out in paragraph 23 of the Grounds of Resistance

12. Did the claimant bring her claim within the time limit set out in s123 EqA? If not, did the claimant bring the claimant within such period as was just and equitable?

~~Failure to make reasonable adjustments: s 39(5) and s21 EqA~~[1]

~~13. What are the [provisions, criterions or practices] PCPs relied on?~~
~~The claimant relies on 4 PCPs which are stated at pages 19 and 20 of the Details of Complaint.~~

~~14. Did the PCPs placed the claimant a substantial disadvantage in comparison with those who are not disabled?~~
~~The substantial disadvantage relied upon by the claimant in respect of the 4 PCPs is dismissal.~~

~~15. Did the respondent know (or could it reasonably have been expected to know) that the claimant was likely to be placed at the disadvantage?~~

~~16. Was there a failure on the respondent's part to take such steps as were reasonable to avoid the disadvantage?~~

~~Discrimination claims – time limits~~

~~17. Did the claimant bring her claims within the time limit set out in s123 EQA? If not, the claimant bring the claimant within such period as was just and equitable?~~

Remedy

18. If the claimant's claims succeed, what, if any conversation she entitled to? In particular what financial losses claimant suffered and what, if any, award for injury to feeling would be appropriate? Has the claimant mitigated her loss?

[1] Withdrawn, see paragraph 4.

4. In her written submission received on 25 November 2021, Ms Whittington withdrew the claimant's complaint of failure to make reasonable adjustments. We (i.e. the Tribunal) agreed to dismiss this element of the claimant's claim.

The law

Unfair Dismissal

5. The claimant claims that she was unfairly dismissed in contravention of s94 ERA. S98 ERA sets out how the Tribunal should approach the question of whether a dismissal is fair. First, the employer must show the reason for the dismissal and that this reason was one of the potentially fair reasons set out in s98(1) and s98(2) ERA.

6. The respondent said that it dismissed the claimant for a reason relating to her capability to do the work of the kind which she was employed to do, pursuant to s98(2)(a) ERA.

7. If the employer is successful at that first stage, the Tribunal must then determine whether the dismissal was fair under s98(4):

> Where the employer has fulfilled the requirements of subsection (1), the determination of the question of 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.

8. The s98(4) test can be broken down to two key questions:
   1. Did the employer utilise a fair procedure?
   2. Did the employer's decision to dismiss fall within the range of reasonable responses open to a reasonable employer?

9. Accordingly, so far as the unfair dismissal issue was concerned, the emphasis of the case at the hearing was whether the Tribunal could be satisfied that, in all the circumstances, the respondent was justified in dismissing the claimant for the reasons given, i.e. her capability to do the job she was employed to do.

10. In *West Midlands Cooperative Society Limited v Tipton [1986] ICR 192* the House of Lords determined that the appeal procedure was an integral part of deciding the question of a fair process. Indeed, a properly conducted appeal can reinstate an unfairly dismissed employee or remedy some procedural deficiencies in the original hearing.

11. In judging the reasonableness of the employer's decision to dismiss, an Employment Tribunal must be careful to avoid substituting its decision as to what was the right course of action for the employer to adopt for that which the employer did, in fact, chose. Consequently, the question for the Tribunal to determine is whether the respondent's decision to dismiss the claimant fell within the band or range of reasonable responses open to a reasonable employer: see *Foley v Post Office; HSBC Bank plc v Madden 2000 ICR 1283*. The range of reasonable responses test applies not only to the decision to dismiss but also to the procedure by which that decision is reached: *J Sainsbury plc v Hitt 2003 ICR 111 CA* and *Whitbread plc (t/a Whitbread Medway Inns) v Hall 2001 ICR 669 CA.*

Disability

12. S4 EqA identifies "disability" as a protected characteristic. S6(1) defines disability:

> A person (P) has a disability if—
> (a) P has a physical or mental impairment, and
> (b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.

Discrimination arising from disability

13. S15 EqA precludes discrimination arising from a disability:

> (1) A person (A) discriminates against a disabled person (B) if –
> (a) A treats B unfavourably because of something arising in consequence of B's disability, and
> (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.
> (2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had a disability.

14. S15 EqA is aimed at protecting against discrimination arising from or in consequence of the disability rather than the discrimination occurring *because of* the disability itself, which is covered under direct discrimination. The term *unfavourably* rather than the usual discrimination term of *less favourably* means that no comparator is required for this form of alleged discrimination. So, for example, where a disabled employee was viewed as a weak or unreliable employee because she had taken long periods of disability-related absence and this had caused her dismissal, the person may not suffer a detriment because they were disabled as such, but because of the effect of that disability.

15. In *Hall v Chief Constable of West Yorkshire Police UKEAT/0057/15* the Employment Appeals Tribunal ("EAT") emphasised that it was not necessary for the disability to be the cause of the unfavourable treatment. The burden on a claimant to establish causation in a claim for discrimination arising from disability is relatively low. It will be sufficient to show that there is some causal link, and that the unfavourable treatment has been caused by an outcome or consequence of the disability. The employer's motivation is irrelevant. The EAT in *Charlesworth v Dransfields Engineering Services Limited UKEAT/0197/16* said that s15 EqA requires unfavourable treatment to be *because of something* arising in consequence of the disabled person's disability. If the *something* is an effective cause – an influence or cause that operated on the mind of the alleged discriminator to a sufficient extent (whether consciously or unconsciously) – the causal test is satisfied. However, even if a claimant succeeds in establishing unfavourable treatment arising from disability, the employer can defend such a claim by showing either that the treatment was objectively justified, or that it did not know or could not reasonably have known that the employee was disabled.

The witnesses and documentary evidence

4 On behalf of the respondent, we heard evidence from Mr Daniel Ansell, who was the claimant's line manager, managed the claimant's absence and made the decision to dismiss the claimant. We then heard evidence from Mrs Venessa Drayton, who was a human resources manager and heard the claimant's appeal. Both Mr Ansell and Mrs Drayton initially provided the Tribunal with unsigned and undated statements. Signed and dated versions were sent to the Tribunal on the first morning and all witnesses confirmed the accuracy and truth of their statements before we commenced to hear evidence.

5 The claimant, Ms Cathryn Hulme, confirmed and relied upon a witness statement dated 12 November 2021. This statement attached 2 exhibits, which is very unusual in the Employment Tribunal process, and in her case the exhibits were not directly incorporated into the witness statement. The exhibits were purported to be "conversations with Daniel" and the respondent did not object to the admission of this evidence, notwithstanding these exhibits appear to have circumvented normal disclosure rules. Nevertheless, we also considered these documents in coming to our conclusions.

6 The claimant called Mr Peter Burgess, her former trade union representative, to give evidence. Mr Burgess provided a witness statement dated 11 November 2021, which also referred to an exhibit. Finally, the claimant called her daughter, Mrs Charlotte Prince. Mrs Prince confirmed her statement dated 10 November 2021, and which referred directly to an exhibit. Again, there was no objection from the respondent to the Tribunal considering the additional evidence contained in the exhibits

7 At the outset of the hearing the Judge referred to possible adjustment and discussed regular breaks. He asked that all participants make their requirements known so that these could be taken into account. All witnesses were crossed-examined by the opposing barristers and the Tribunal asked questions for clarification.

8 We were provided with a hearing bundle which ran to 1,071 pages. The parties referred us to some "core" or essential documents for preliminary reading and the witness statements referred to these and other documents. We read all of the documents to which we were referred. Rather depressingly (and particularly so for a case prepared by solicitors and barristers) the size of the hearing bundle was way out of proportion to the documents relied upon by each party and which we could see as relevant to the issues to be determined.

The facts

9 We made findings in respect of the following facts. We did not resolve all of the disputes between the claimant and respondent merely those matters which we regarded as appropriate to determining the issues of this case. In determining the following facts, we placed particular reliance upon contemporaneous or near contemporaneous correspondence, emails and documents. We approached the witness statements with some care because this evidence was prepared some months after the events in question and for the purposes of either advancing or defending the claims in question. Where we have made findings of fact, where this is appropriate, we have also set out the basis for making such findings.

10 The claimant commenced work for British Midland International ("BMI"), a predecessor of the respondent on 17 April 2000 [Hearing Bundle: page 40]. The claimant's employment and her contractual terms were transferred to the Euroflreet part of the respondent's business on 1 November 2012 [HB 50-53]. At all relevant times, the claimant's sickness absence was managed through EG300 Absence Management Policy [HB57-73] and the guidance made pursuant to this policy. The Absence Management Policy was contractually binding on both parties.

11 It is accepted by both parties that, when the claimant worked for BMI she sustained a shoulder injury at work, which over time developed into Chronic Regional Pain Syndrome and later to fibromyalgia. As stated above, it is common ground between the

parties that this condition amounted to a disability for the purposes of EqA.

12 The claimant experienced substantial sickness absence from 2013 and 2017 for her Chronic Regional Pain Syndrome and her fibromyalgia and for the majority of this time the claimant was managed under the Absence Management Policy (and specifically section 4). The claimant qualified for full basic pay during all of her sickness absences, and we accept Mr Ansell's evidence on this point, which was not disputed. During the claimant's absences, at various stages, she was referred to the respondent's occupational health service: British Airways Health Service ("BAHS").

13 The claimant said in evidence, and we accept, that she initially moved from BMI to British Airways on a 75% contract and reduced this to 50% in order for her to manage her fibromyalgia condition. From 1 April 2016 she moved to a 33% contract, which meant that she was supposed to work for one-third of the normal working time undertaken by a full-time equivalent.

14 The claimant's fibromyalgia improved sufficiently so that she exited section 4 of the Absence Management Policy on 31 January 2018 [HB323]. She was not absent from work due to fibromyalgia (i.e. her disability) again. Within weeks of the claimant's exit from section 4 of the Absence Management Policy, she commenced further long periods of absences for stress-related illness. This stress related absence began on 4 March 2018 and has never been contended to amount to a disability under s6 EqA.

15 The claimant re-entered the sickness absence management regime of EG300 on 21 May 2018 [HB300]. The claimant requested unpaid leave to care for her mother who was suffering from a terminal illness on 2 July 2018 [HB379] and Mr Ansell (In Flight Business Manager) granted this request on 15 August 2018 at a 6-month review meeting [HB397]. Mr Ansell said at that point that the claimant had been absent from work for 164 continuous days due to stress at home and that her attendance level could not be sustained. The claimant acknowledged that her employment could be terminated. Mr Ansell noted the disruption to the business and emphasised that unpaid leave was a discretionary measure which, in the circumstances, he agreed to. He emphasised:

> … It should be noted that this does not negate my overarching concerns over your ongoing ability to sustain your contractual flying duties. After this period of leave I am hopeful you will return to your full flying duties and provide effective service to the company. I will review this after your unpaid leave taking into consideration your latest position and return to work prognosis. You assured me you would use this time to put active steps in place to enable this.

16 The claimant returned to work on 17 March 2019. She was originally rostered to fly from 17 March to 19 March 2019 (landing on Tuesday at 1205). However, because of specific aircraft training requirements the claimant's roster was amended on 15 March 2019, although her flying days remained the same (i.e. 17 to 19 March 2019). On 18 March 2019, after reporting for duty, the claimant first informed one of her colleagues that she had scheduled a counselling session in Manchester for 19 March 2019. She therefore requested to be 'de-linked' from the final leg of her roster so she could attend the counselling session. This request was refused by various individuals from the flight scheduling team, the Cabin Crew Attendance Support Team with Mr Ansell's input [Mr Ansell's evidence and HB436]. The claimant then went sick for a month (i.e.19 March 2019 to 18 April 2019) for depression and work related stress [HB438, 451].

17 On 29 March 2019 Mr Ansell invited the claimant to an absence review meeting. He said that at the meeting the following would be discussed:

a. the claimant's return to her contractual role;
b. any reasonable adjustments that may assist this;
c. alternative employment if the claimant was unable to carry out her contractual role; and
d. termination of the claimant's employment, if the claimant return to work was not possible within a reasonable period [HB442].

18 On 10 April 2019, following an appointment with the respondent's occupational health service on 27 March 2019, Ms Sue Persaud BAHS Occupational Health Consultant reported the following to Mr Ansell [HB454]:

> I am unable at present to advise on timescales for a possible return to her flying duties however her previous history maybe a guide to her future attendance

19 The claimant attended her sickness absence review meeting with her representative, Mr Burgess, on 12 April 2019 [HB462-466]. The claimant was off sick at this time and had been off sick for almost a month. The claimant declined to use the respondent's Career Transition Service to find an alternative suitable role within the business, she said that she wanted to continue cabin crew duties. Mr Ansell reviewed the claimant's absence with her, he discussed the claimant's health conditions and the medical position and BHMS referrals. Mr Ansell then proceed to give the claimant notice of dismissal with an effective date of terminate of 5 July 2019 [HB466, 482-489]. Mr Ansell sent the claimant a detailed letter confirming his decision to dismissed her [HB482-489]

20 Mr Ansell said at the termination meeting and in his confirmation of dismissal letter that he would review his decision to terminate the claimant's employment 6 weeks before her dismissal took effect. This did not accord with the EG300 policy. Mr Burgess said in evidence that such a review was "custom and practice". If Mr Burgess means that the claimant had formed a contractual or other entitlement to such a review, then we reject such an assertion. Such a review might have been commonplace with this employer (although we heard no further evidence on this) but in this instance we determine Mr Ansell set a review, at his discretion, so as to make a better (fuller and fairer) decision and not because he was under any obligation to do so.

21 The claimant appealed Mr Ansell's decision to dismiss her on 26 April 2019 [HB493].

22 The claimant returned to work from sick leave following an update from BAHS dated 2 May 2019. Ms Persaud referred to some ongoing treatment and medication and said that there was no medical barrier for the claimant to return to her contractual role, although with some further restrictions. Ms Persaud said that the claimant was fit for restricted flying duties with a maximum of 8 hours flying per day for 1 month [HB495-497]. Ms Persaud subsequently review her earlier indicator of the claimant's further attendance and said, on 2 May 2019, that her opinion on the claimant's likely future absences had not changed [HB502]. The claimant did not have any absences between her return to work and her effective date of termination. At the claimant's request [HB512], her termination review meeting and her appeal against dismissal meetings took place on the same day, which was 20 May 2019.

23 Mr Ansell conducted the claimant's review meeting. On 31 May 2019 Mr Ansell provided his decision after the review meeting and confirmed the claimant's termination of employment [HB566-571]. Mr Ansell letter is expansive; however, he reviewed again the

claimant's absence, some BAHS history and the Occupational Health Consultant's latest prognosis. He noted the impact the claimant's medical condition had had upon the claimant's return to work and the adjustment made and that the claimant had now returned to work. He proceeded:

I conclude that your health has prevented you from returning and sustaining your contractual role. It is unfortunate that each time you have reported fit, this has not been sustained and we have continued to see sustained levels of nonattendance at work.
Whilst I acknowledge that you have reported fit for duty and operated 5 there and backs, I have no confidence in your ability to return and sustain your contractual role. My concerns relate to your longstanding ability to sustain your contractual role and to achieve an acceptable level of attendance.

24 Mr Ansell proceeded to confirm the claimant's dismissal.

25 The claimant's appeal was heard by Mrs Drayton (HR Business Partner/Business Support & Attendance Manager). On 11 June 2019 Mrs Drayton provided her decision on the claimant's appeal [HB578-588]. Mrs Drayton went through all of the claimant's grounds of appeal and rejected these:

> I conclude that I believed Daniel followed the EG300 Section 4 process correctly. I recognise the fact that you have been cleared fit to return to work by BAHS and your GP however in deciding to set a termination date it is appropriate to consider an individual's history of attendance as this gives an indication of sustainability of work within the role. You have had 779 days off sick over a 6 year period. This is made up of duty days and continuous days absence once you triggered 21 days absence. There have been 20 occurrences of sickness over six years and a further 42 days off with additional support. EG300 states an acceptable level of attendance is within 4.5% of one's available working hours. For your current contract type of 33%, this equates to 4 days absence a year. Based on your history of sickness I do not have confidence that you would be able to sustain an acceptable level of attendance. I believe it was correct to set a termination date.

26 The claimant's appeal having been rejected her employment ended on 5 July 2019.

27 The respondent proffered a number of figures in the contemporaneous documents and correspondence about the claimant's absence, all of which indicated a very high absence level. The claimant questioned some of these figures at the hearing but not to any great extent during the sickness absence process. For the purpose of this Tribunal hearing, the respondent compiled a list of the claimant's planned or scheduled working days and the actual days worked. This was at page 1071 of the hearing bundle and was not disputed by the claimant when it was put to her in cross-examination by Ms Bell. For the avoidance of doubt, none of the respondent absence record double-counts any period of the claimant's unpaid special leave. The claimant's planned working days largely comprise of actual trip days, standby days/ring-in days and training. We have calculated the claimant's percentage absence in the table below at column 3 so that we can measure her absence rate against her allocated work, which took into account all of the reasonable adjustments made. So, the respondent's expectation of a sickness absence rate of below 4.5% for scheduled attendance is measured against an absence rate of over 20% at best (for 2014) and over 80% at worst (for 2018). However, the most important figure was for the claimant's last year of work. Although there was not a great deal of work scheduled for the claimant, she was absent – again on full basic pay – for over 60% of the time compared against the normal tolerance of 4½%.

Year	Total days planned to work	Actual days worked	Absence rate from allocated work
2013	103	47	54.37%
2014	18	14	22.22%
2015	121	81	33.06%
2016	83	35	57.83%
2017	70	41	41.43%
2018	34	6	82.35%
2019	13	5	61.54%

Our determination

Unfair dismissal

28 The respondent must establish the reason for dismissal and that this was a permissible reason under s98 ERA. The respondent's position was that the claimant was dismissed for capability, pursuant to s98(2)(a) ERA. The claimant did not argue that this was not a capability-related dismissal, rather she contended that it was not reasonable to dismiss her for the reason given, i.e. her capability.

29 The claimant had a chronic and re-occurring disability in fibromyalgia. She also had been absent for stress-related conditions, which did not amount to a disability, but the respondent regarded as a condition that could (and was likely to) reoccur.

30 The claimant had a level of sickness absence which on any analysis was truly astonishing. The figures quoted in the final column at paragraph 27 were after various and periodic adjustment were made and should be compared with the respondent's target rate of 4.5%. The figures at column 2 represent work scheduled for the claimant so the claimant's actual attendance at column 3 accurately highlights the potential disruption to the respondent's business, which we accept was substantial. Mr Ansell described the claimant's absence as something the respondent's business could not sustain (although on slightly different figures) and this represents an accurate assessment.

31 The claimant contends that, at the time of her dismissal, as she was managed through section 4 of the Absence Management Policy, her employment could only be terminated when she was absent on grounds of medical incapacity. This is not convincing argument because the policy applies all absences, irrespective of cause. Mr Ansell was entitled, indeed we expected of him, to look at the overall pattern of absence to determine whether there was likely to be satisfactory attendance from the claimant for the future. That assessment could only be based on past experience, evidence and medical advice and that is what Mr Ansell – and Mrs Drayton – relied upon in coming to their decision.

32 We reject Ms Whittington's submission about the failure to follow the Absence Management Policy. There is nothing in the wording of section 4 that states that probable future absences cannot be taken into account. The general principles applicable to all absences contained in the section Absence Management Process are not stated to be limited to section 3 only. The claimant's argument about the rigid application of her version of the Policy does not take into account the wider wording of section 4 itself and the policy generally. There is nothing that we read in section 4.7 that strictly limits or precludes the employer from dismissing the claimant to when she is absent from work and/or incapable

of doing her contractual duties at the point of dismissal. That is a restrictive reading of the contractual policy which would enable easy frustration of potentially fair dismissals. It would allow an employee to hobble back to work every time a decision to dismiss has been made in order to effectively reset the process and that cannot be correct.

33 In any event, we accept that the respondent was relying upon section 4 of the Absence Management Policy in dismissing the claimant. There is no doubt that both Mr Ansell and Ms Drayton concluded that the claimant was unable to undertake a job to the standard reasonably required by the respondent due to her medical incapacity and this was within the terms of clause 4.1. Throughout the respondent's long engagement with the claimant's sickness absence reasonable adjustments had been made at various stages to enable the claimant to fulfil her contractual role and this was in accordance with clause 4.4. Following the dismissal decision, when the claimant was in fact on sick leave, she returned to work with further restrictions. However, even at the final review meeting she said her roster was unmanageable, referring to not been able to do 7-day weeks and needing to avoid there-and-back allocations. We note that the claimant did not want to undertake alternative roles in accordance with clause 4.6.

34 Even if we were wrong (which we do not think we are) and the respondent had dismissed the claimant in breach of contract, in the circumstances of this case, we do not consider, that this dismissal was unfair: see *British Labour Pump Co Ltd v Byrne [1979] ICR 347*. It was understandable, indeed wholly appropriate, for Mr Ansell and Mrs Drayton to take into account past absence and likely future absence in dismissing the claimant. Any reasonable employer would have done so.

35 The claimant had been granted a substantial period of unpaid discretionary leave from August 2018 to March 2019. It was reasonable for Mr Ansell to expect that the claimant would return to work and demonstrate a sustainable level of absence. On her return to work in March 2019, the claimant undertook 1 flight and then went sick when she was told she could not de-link her return flight. The claimant had scheduled a counselling session sometime previously. She said that this counselling session was important to her, yet she did not inform her employer of this appointment, nor did she check her amended roster when this was sent to her. In questions from the Tribunal the claimant accepted that her appointment was "fluid" and that she could have rescheduled it if she wanted to as she was prepared for disruption caused by a delayed flight. The claimant said that she could not cope with her line manager's refusal to make changes to re-structure her roster to accommodate her late notice of unavailability. In fact, the decision not to de-link the claimant's roster was made mainly by the scheduling team in conjunction with Mr Ansell, so his input was limited. The respondent could not (nor should it reasonably be expected to) accommodate the claimant going on protracted sick leave when its officers refused late changes to her roster.

36 Although the claimant regarded the 5 scheduled flights as showing that she could now perform her contractual role, Mr Ansell and Mrs Drayton effectively regarded this as being too little and too late to demonstrate a sustained ability to do to job that she was paid to do and such assessment was wholly reasonable in the circumstances. The claimant's attendance history the previous 6 years was crucial and determinative for both the occupational health advisor and these managers. Significantly, the claimant in evidence referred to 2014 as being a "good" year. The Tribunal regarded the claimant's best year of attendance as being unacceptable. We regarded the claimant as displaying a worrying lack of insight in respect of both the level of her absence and in the impact that

this had on colleagues, customers and her employer's business.

37 We do not believe the claimant's account of purported bullying from Mr Ansell. We examined the contemporaneous documents closely and there was nothing to indicate that Mr Ansell adopted a high-handed, oppressive or bullying approach. The claimant was represented by 2 experienced trade union officials. Ms Christine Edwards and Mr Burgess and both appeared robust in correspondence and accounts of meetings. We do not accept that either or both would put up with their member being badly treated or bullied. Indeed, we heard Mr Burgess in person and formed the view that he was a committed employee representative dedicated to advancing his members' interest. In evidence Mr Ansell appeared both keen to understand the claimant's complaints and measured in his response attributing the claimant's after-the-event criticism of him to the claimant's stress and her various difficult circumstances. The claimant was prone to exaggeration in her evidence and where her evidence did not coincide with the contemporaneous correspondence and Mr Ansell's evidence, we rejected her account. Mrs Price's story did not make sense when compared with the correspondence sent at the time between the claimant and Mr Ansell, and, notwithstanding her desire to support her mother's claim, we also do not believe her version of events. We resoundingly reject the allegation that Mr Ansell bullied the claimant, and that this inappropriately influenced his decision to dismiss the claimant. If Mr Ansell was frustrated with the claimant's absence he never let this show. He was not unwilling to manage the claimant because he seemed to address difficult issues in a courteous manner. It is misleading to contend that he was a bully and this diminished the claimant's credibility.

38 In summary, the claimant's absence had reach a threshold that this business – indeed that no similar business – could be expected to sustain. The claimant had demonstrated that she was unable or unwilling to cope with the pressure and demands of her job over a significant period of time. This is evidenced through the various occupational health reports and the assessments that said to predict the future one should consider the claimant's past absences as a likely indicator. The respondent determined that the claimant was incapable of performing work of the kind that she was employed to do. This determination was well within the rage of reasonable responses of a similar employer. The respondent utilised a substantially fair procedure in coming to this determination. So both the decision to dismiss and the process adopted fell within the range of reasonable responses open to this employer.

<u>Discrimination arising from disability (the s15 EqA claim)</u>

39 The *unfavourable treatment* alleged was the claimant's dismissal. Obviously, the respondent does not contend that dismissal cannot amount to unfavourable treatment. Dismissal clearly amounts to unfavourable treatment, and this is recognised by s39(2)(c) EqA.

40 The next element of the test is to assess whether the claimant was dismissed because of *something arising* in consequence of the claimant's disability. The claimant's disability was fibromyalgia and the something arising relied upon by the claimant in respect of her dismissal was her inability to do her contractual duties, including Eurofleet Flights. The respondent's case is that the claimant was not dismissed in connection with something arising from her disability because following her exit from the absence management process in January 2018 she was not absent again due to fibromyalgia nor was there any further adjustments made in respect of her disability (i.e. fibromyalgia).

41 Whilst it appears at first glance to be logical to contend that fibromyalgia had nothing to do the claimant's dismissal around 15 to 18 months later, Mr Ansell said that he considered the whole of the claimant's absence when he decided to dismiss the claimant and, we find, Mrs Drayton also took into account the whole of the claimant sickness absence, including the pre-2018 period. So even if the disability-related absence was not a dominant feature – and we accept that it was not a principal issue because of the effluxion of time and the absence of the claimant's fibromyalgia from being a problem or difficulty in April 2019 and June 2019 – the respondent's managers considered her fibromyalgia and the absence attributed to this in the overall context of their dismissal. Ms Bell is wrong to contend that this element of the analysis fails. The claimant's pre-2018 disability-related absence was taken into account, so the *Charlesworth* test is satisfied.

42 The legitimate aim relied upon the respondent is the need for staff to maintain and sustain regular attendance. Although not binding, the Equality and Human Rights Commission Employment Code of Practice says that we can take into account any or all of the claimant's absences due to disability in our assessment of proportionality. Indeed, it is common-sense to do so.

43 The claimant's level of attendance was unsustainable from the transfer of her employment to the respondent despite the number of reasonable adjustments put in place in respect of her fibromyalgia. Nevertheless, notwithstanding, the adjustments put in place for the fibromyalgia, the claimant still had an ongoing unacceptable level of attendance despite subsequent extensive adjustments being made to accommodate her stress-related conditions – which did not amount to a disability.

44 Causally the claimant is in great difficulties in respect of this claim of discrimination because the claimant's disability-related absence occurred so long in the past and the claimant's absence record – for non-disability related condition or conditions – was subsequently so very poor.

45 We accept the force Ms Bell's submission made at paragraph 62; however, irrespective of that justification – and these points are all compelling – points (b) to (q) relate to the claimant's non-disability-related illness and do not relate to the s15 assessment.

46 We are persuaded that the claimant was dismissed largely because of her stress-related absence and within the overall decision it was proportionate to take into account the claimant's absence for fibromyalgia in assessing the overall picture. Fibromyalgia and stress/depression were both chronic and re-occurring conditions. In assessing the claimant's likely future ability to perform her contractual duties it was proportionate to assess all of the claimant's underlying, possibly episodic, and certainly re-occurring medical conditions. This was clearly relevant, and it was proportionate to take this into account in the decision to dismiss.

47 Finally in respect of time limits, so far as the claim of unfair dismissal is concerned, the time limit runs from the effective date of dismissal (and not from when notice was given). There is no contention that this claim is out of time. The discrimination claim time limit runs from the date of the discriminatory decision(s) and these could amount to conduct extending over a period of time, for the purposes of s123(3)(a) EqA, from the decision to dismiss, the review decision and the appeal outcome. Irrespective of

whether or not we might have exercised our discretion under S123(1)(b) EqA, the claimant did not succeed in her claim of discrimination, so it is not necessary to decide the time-limit point.

48 As we reject the claimant's claims of unfair dismissal and disability discrimination, proceedings are now dismissed.

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Employment Judge Tobin

Date: 14 December 2021

JUDGMENT & REASONS SENT TO THE PARTIES ON

11 January 2022

FOR THE TRIBUNAL OFFICE