EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4107444/2017

Final Hearing Held at Glasgow on 14, 15, 16 and 17 October 2019

Employment Judge A Kemp
Tribunal Member I MacFarlane
Tribunal Member A McMillan

Ms V Boum — **Claimant**
In person

HMRC — **Respondent**
Represented by:
Dr A Gibson
Solicitor

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous decision of the Tribunal is that the Claim does not succeed and is dismissed.

REASONS

Introduction

1. This was a Final Hearing on the claims made by the claimant. She represented herself. The respondent was represented by Dr Gibson.

2. At the commencement of the hearing the claimant confirmed that she wished to make claims of unfair dismissal under section 94 of the Employment Rights Act 1996 ("the 1996 Act"), and under sections 13, 15, 19, 20 and 21, and 26 of the Equality Act 2010 ("the 2010 Act"), for the protected characteristic of disability. Dr Gibson stated that he had not anticipated claims under sections 13 and 26, and referred to the amended paper apart that was produced previously when the claimant was represented by Strathclyde University Law Clinic. After a discussion with the claimant, including whether she wished to make an amendment in relation to a section 13 claim, she confirmed that she did not wish to do so, and that she was not to pursue the claims under either of sections 13 and 26. She also confirmed that she had no further claim she wished to make, although in cross examination Dr Gibson raised with her an issue of holiday pay, which she said she did wish to raise, and that is addressed below.

3. Dr Gibson confirmed that the respondent accepted that the claimant was a disabled person, but that it had knowledge of that only from 14 July 2017. The claimant asserted that the respondent ought to have known that from at least 22 June 2017, a matter addressed below. The claimant confirmed that she was not making any claim based on race as a protected characteristic, and was not now seeking re-engagement, but only a financial award. She had produced a schedule of loss.

4. It was also confirmed that the parties had agreed that the claimant would give her evidence first.

Issues

5. The Tribunal identified the following issues for its determination:

(i) What was the reason for dismissal?

(ii) Was the dismissal fair?

(iii) Ought the respondent reasonably to have known of the claimant being a disabled person prior to 14 July 2017 and if so on what date?

(iv) Was the claimant dismissed unlawfully for a reason arising out of her disability under section 15 of the 2010 Act?

(v) Did the claimant suffer unlawful indirect discrimination under section 19 of the 2010 Act?

(vi) Did the respondent fail to make reasonable adjustments for the claimant under sections 20 and 21 of the 2010 Act, and if so what, and when?

(vii) Was any sum due to the claimant for accrued annual leave she did not take?

(viii) If any claim is successful, what remedy is appropriate to give to the claimant?

Evidence

6. Evidence was given by the claimant, and by David Mourning and Mark Fulton for the respondent. Dr Gibson explained that the person who had decided on dismissal, Paul O'Donnell, had been absent from work for a material period, and was seriously unwell such that it was not likely that he would be able to give evidence. One final hearing had earlier been discharged in light of that, but in the circumstances the present hearing would proceed in the absence of his evidence. The matter is referred to further below.

7. The parties had prepared a bundle of documents, most but not all of which were spoken to in evidence. It was also added to on the morning of the hearing, and during the course of the evidence, by agreement.

Facts

8. The Tribunal found the following facts to have been established:

9. The claimant is Ms Veronique Boum.

10. The respondent is Her Majesty's Revenue and Customs.

11. The claimant was employed by the respondent with effect from 8 June 2015. She was initially employed on a fixed term contract for a year, but that was made permanent on 19 November 2015.

12. When she commenced work, she did so as a Customer Service Consultant/ Administration Officer, working at the East Kilbride Contact Centre. She received a terms of employment document setting out the terms and conditions of employment. It had provision for sick pay that included three months' full pay and three months' half pay during her third year of service. There was a probationary period of 12 months that could be extended.

13. Clause 15 stated

> "2. Maintaining an acceptable standard of performance and attendance is a requirement for your continued employment....
> 3. If, despite best efforts at support and encouragement, you are unable to meet required standard of performance and/or attendance, your manager will take action under HMRC's procedures for managing poor performance/ and or managing poor attendance which may result in downgrading or dismissal.
> 4. The managing poor performance and attendance procedures apply to everyone in HMRC except probationers who are subject to separate procedures."

14. There was an equal opportunities clause, clause 17.

15. The work the claimant performed was primarily at a call centre, responding to telephone calls in relation to tax credits. It involved a commute to work of about two hours each way, by bus, from her home.

16. The claimant had a period of probation that was initially one year. It was extended twice, on each occasion for three months, on account of concerns over the claimant's attendance and performance. The probation period was successfully passed in November 2016.

17. Whilst working at East Kilbride the claimant had periods of absence initially as follows:

(i) 24 August 2015 for one day, on account of migraine caused by an earlier injury
(ii) 18 September 2015 for one day, on account of laryngitis
(iii) 30 October 2015 for one day, on account of migraine
(iv) 12 January 2016 for one day on account of migraine and neck pain

18. On 9 December 2015 the claimant was referred to occupational health advisers by the respondent for recurrent short term absence. A report was prepared and sent to the respondent on 25 January 2016 which stated that the claimant had several underlying medical issues being migraine, a gynaecological condition for which she had medication, iron deficiency anaemia, hypertension and sciatica or back pain. Of those, absence from work had only been triggered by migraine at that point. The advice was that the claimant was not likely to be considered a disabled person under the Equality Act 2010, and that the claimant was fit for work.

19. On 20 February 2016 the claimant had a further one day absence from work on account of back pain

20. On 2 June 2016 the claimant had a further one day absence from work on account of toothache.

21. On 7 June 2016 the claimant was required by letter to attend a meeting to discuss her attendance record. That was held under the respondent's policy in relation to Probation: Dealing with Poor Attendance. Under the policy then in force if there were more than five individual absences such a meeting was held to consider the absences and how to address them.

22. The meeting was rearranged and took place on 13 July 2016. The claimant was accompanied by her union representative.

23. Following that meeting the manager who held it, Myra Proctor, noted that the claimant had taken five days of absence on five separate days, she having discounted the absence on 2 June 2016 which the claimant had sought to take under flexi-time provisions. She held that the attendance of the claimant was not at the required standard and issued a first written warning. Her attendance was to be reviewed over a three month period.

24. The claimant signed the letter intimating the decision. She had a right of appeal but did not exercise that.

25. On 3 November 2016 Ms Proctor met the claimant to review her attendance in the review period of 15 July 2016 to 15 October 2016. There were no absences during that review period. The claimant was advised that her absences would continue to be closely monitored in the period 16 October 2016 to 16 October 2017, referred to as a Sustained Improvement Period, and explained the Attendance Management guidelines that would apply to her.

26. The respondent had an "Attendance Management: Procedure" document that they utilised. It applied to the claimant after her probation was successfully passed in November 2016. It provided that attendance would not be regarded

as satisfactory if it exceeded a Trigger Point of eight working days, or four separate absences, in a rolling 12 month period. The circumstances would then be considered by the manager, who could give a final written warning and, if there were further absences, dismissal. Dismissal was considered if the attendance management procedure had been followed and attendance had not improved to a satisfactory level following a final Written Improvement Warning. The decision manager required

"to dismiss the job holder if all of the following apply:

- The business can no longer support the job holder's level of sickness absence
- Downgrading is not appropriate or the job holder rejects this option
- Where appropriate there are no further reasonable adjustments which can be made which will help the job holder return to satisfactory attendance
- Occupational health advice has been received within the last three months....
- An application for ill health retirement is not appropriate or has been refused."

27. There was provision for a right of appeal. There were three grounds to do so:

"• A procedural error has occurred
- The decision was not supported by the information or evidence
- New information or evidence had come to light."

28. Ms Proctor confirmed the position in a letter to the claimant dated 4 November 2016.

29. The respondent further had a policy in relation to the Trigger Points, which was not produced to the tribunal but provided that in the event that the job holder was a disabled person under the Equality Act 2010 the Trigger Points could, at manager discretion, be increased up to 100%, or beyond that if a

decision to do so was taken by a manager at grade 7 level or above. Guidance indicated that normally an increase of 25 - 50% would usually be expected.

30. In January 2017 the claimant, on her application to do so, transferred to a Contact Centre at Glasgow. That was much closer to her home address and significantly reduced her commuting time by at least a half. The claimant spent an initial period of about six weeks undergoing training. The role she was to perform was in the area of VAT.

31. On 16 March 2017 the claimant joined the team of Mark Fulton. He managed a team of Administrative Officers such as the claimant. There were about 10 such officers in his team. Between 90 and 95% of the role of the team was the provision of telephone advice on VAT issues to businesses, members of the public, or their professional advisers. The queries ranged from straightforward ones involving small sums, to complex ones with sums of hundreds of thousands of pounds, or millions of pounds, potentially involved.

32. The team led by Mr Fulton was required to provide an efficient service. As part of the respondent organisation, it was funded by government, and subject to accounting oversight including by the Public Accounts Committee. There was a requirement to operate in a cost effective manner.

33. Very shortly after the claimant started to work for Mr Fulton's team he formed the opinion that she struggled substantially with the task. He listened to some of her calls. Team members sat in close proximity to each other, and he regularly did so as part of his managerial role. He also listened to the recordings of some of her calls. All calls made to the team were recorded. He held a private discussion with the claimant, who indicated that she was suffering from stress in performing her role.

34. As an informal step, not part of a formal performance process, he discussed with her a performance improvement plan (PIP) with the view to improving

her performance in the role, which was a new one for her involving VAT issues. That PIP was agreed between them on 22 March 2017.

35. The claimant was referred by Mr Fulton to occupational health advisers, who reported to him on 27 March 2017 that the claimant had high blood pressure and anaemia for which she took prescribed treatment. There was a recommendation that a stress risk assessment be undertaken. The advice was that the claimant was unlikely to be considered a disabled person under the 2010 Act. During the discussion that led to that report the occupational health adviser had given the claimant the telephone number for an organisation providing employees with advice and assistance called Workplace Wellness.

36. On 28 March 2017 Mr Fulton asked the claimant to listen to calls she had made. The claimant stated that she was too tired, and not mentally fit, to do so. Mr Fulton did not consider that she could take calls in such a situation, and gave her time in a private room. He printed out a document in relation to stress reduction, and suggested that she complete that. The claimant said that she would see her GP, and she was allowed to leave work slightly early.

37. The claimant attended her GP on 29 March 2017 who provided a fit note that day which stated that she was not fit for work, and would be so until 10 April 2017.

38. Mr Fulton called her as part of the respondent's process for keeping in touch with those off work. The claimant reported her GP's advice, including that she "requires proper rest and to take her mind off work in order to recover". Mr Fulton agreed that rather than the normal daily contact he would telephone her on 5 April 2017, to which the claimant agreed.

39. Mr Fulton did call the claimant on 5 April 2017. The claimant had not called Workplace Wellness nor completed the stress reduction document, but said

that she would consider both. She said that she did not know if she would return to work at the end of the current fit note on 11 April 2017.

40. In fact the claimant did so, and conducted a return to work interview with Mr Fulton, recorded by him and signed by the claimant on 13 April 2017. The claimant stated that she did not feel well suited to the job and that it was detrimental to her health. Mr Fulton said that he would do everything he could to help and support her. He said that it would be helpful to have her input into other jobs that would cause her less stress. He referred to her having exceeded a Trigger Point but would not address that until a stress reduction plan had been addressed.

41. The claimant prepared her written responses regarding stress on a document titled "stress discussion - notes for jobholders". It allowed the job holder to explain issues in relation to stress from their perception under a variety of headings. On 12 April 2017 the claimant and Mr Fulton discussed those responses and having a stress reduction plan. A written stress reduction plan was prepared, dated 11 April 2017 and to be reviewed on 11 May 2017. The written note of that prepared by Mr Fulton is a reasonably accurate record. He explained that the bulk of the work those at the claimant's level did was telephony. He said that he required to rule out at that stage her working on webchats, VAT Web Enquiries Team VWET) or written enquiries from an online service called VAT KANA. He explained that he required to do so to protect the department's reputation. He was able to have her working in another area called VOL KANA and VOL Letters as they involved use of stock responses, and she would be monitored by others. VOL refers to VAT online. The claimant indicated that she wished to consider part time working, and Mr Fulton explained that that required a formal application, the guidance for which he would send her.

42. The meeting noted that the claimant was to participate in the PIP, take regular breaks and read guidance for requesting alternative working patterns. Mr Fulton was to support the claimant in the PIP, afford her regular breaks,

send her the link to the guidance regarding alternative working patterns, delay consideration of her key performance indicators during the PIP, and consider providing a greater variety of work. There was also a discussion in relation to the claimant seeking other, external work, and Mr Fulton agreed to support her in doing so, including time to attend interviews.

43. On 13 April 2017 the claimant sustained back pain following a fall at home, and had a day of absence. She attended hospital, who advised her that there had been no fracture but she was in substantial pain. There was a one half day of absence on that date. It was discussed at a return to work meeting on the same date.

44. On 2 May 2017 Mr Fulton's colleague Mary Kelly invited the claimant to a meeting as she had been absent for 9.5 days during the sustained improvement period. Mr Fulton had passed the matter to her as he was on a period of three weeks' annual leave.

45. Ms Kelly met the claimant on 10 May 2017. A minute of that meeting was kept and is a reasonable record of it. Following it Ms Kelly consulted the HR department of the respondent and Alan Flannigan with whom the claimant had been working during Mr Fulton's annual leave. The former recommended a final warning but the latter advised against that.

46. She then decided that it was appropriate to give the claimant a Final Written Improvement Warning, and confirmed that by letter dated 16 May 2017. She confirmed that the claimant had a right of appeal.

47. The claimant exercised her right to appeal by letter dated 23 May 2017.

48. On 2 June 2017 the claimant and Mr Fulton had a review meeting in relation to the stress reduction plan. The record of that meeting is reasonably accurate. By then the claimant had made an initial application for alternative working, but that was not completed properly, as Mr Fulton informed her. She

had not completed that application properly since then. Mr Fulton at the meeting explained what was required to do so adequately and in compliance with the policy for that. Mr Fulton also reiterated his commitment to support the claimant with any applications she wished to make for transfers or for interviews. The claimant did not later submit an amended and compliant application for part-time working.

49. A meeting with the appeal manager Margaret Thomson-Moyes held on 14 June 2017 is a reasonably accurate record of it. The claimant outlined her health conditions as she saw them and alleged that she was 'lacing discrimination in the workplace". She was asked about the two occupational health reports which had an opinion that she was not likely to be considered a disabled person, and stated her opinion that her conditions were likely to be covered by the 2010 Act. The claimant was asked if there were any adjustments that might be made to enable her to achieve a satisfactory level of attendance and she said no, but that she had additional breaks.

50. Ms Thomson-Moyes wrote to the respondent on 22 June 2017 to reject her appeal. In a written note of the reasons she stated that she "believed the decision to be consistent with HMRC policies [and was] fair and reasonable in the circumstances". At that point the claimant had had two absences totalling 9.5 days in a 12 month period, where the trigger point was of 8 days.

51. On 30 June 2017 the claimant was absent from work for one day on account of migraine. That was discussed with Mr Fulton on return to work on 3 July 2017. The claimant stated that she found the shift on the day before the absence, Thursday 29 June 2017, difficult due to background noise in the office and the noise on the telephones. Mr Fulton noted that on the day before that the claimant had told him that she often is too tired to take calls.

52. On 5 July 2017 the claimant commenced a further period of absence. The absence was on account of hypertension and high blood pressure. Mr Fulton spoke to her on the first day of absence and was informed that she had visited

her GP who had given her a fit note for the period to 19 July 2017. He agreed to contact her on 12 and 19 July 2017. He duly did so, and on 12 July 2017 gave her the telephone number for Workplace Wellness. There was a discussion in relation to her missing an appointment arranged with an occupational health adviser.

53. The claimant had a telephone conversation with an occupational health adviser on 14 July 2017, and on the same day a report was sent to the respondent. The report noted migraines, high blood pressure, and stress together with an underlying psychological condition for which she was taking prescribed treatment. The report stated an opinion that the claimant was likely to be considered a disabled person under the 2010 Act, and that the claimant was not fit for work. No adjustments were identified. She was referred to an occupational health physician for further assessment.

54. On 19 July 2017 Mr Fulton telephoned the claimant. He referred to the occupational health report, and asked if the claimant had discussed returning to work with her doctor. The claimant said that she had not, nor had the doctor discussed a fit note with her. She said that she would return to work on the following day. She confirmed that she was aware of the opinion in the occupational health report that she was not fit to do so. She said that she did not know if she was fit for work but would try.

55. On 20 July 2017 the claimant returned to work. Mr Fulton met the claimant for a return to work discussion. The claimant expressed the view that she was fit for work if she did not take calls. There was a discussion about the arrangements for work that the claimant would perform, which would not involve telephone calls, but Mr Fulton stated that that was her core duty, and it was reasonable for him, he said, to expect her to take any reasonable steps there might be to improve her own health. The written note of the discussion is a reasonable record of it and was signed by Mr Fulton and the claimant on that day.

56. On 21 July 2017 Mr Fulton sought HR advice. He outlined the circumstances, and set out his opinion that due to the level of absences, which was 21.5 days on four occasions over 12 months, it would not be reasonable to increase the trigger points sufficiently to accommodate that without being unreasonable to the business. On 25 July 2017 he received advice to the effect that his analysis was thought to be correct.

57. On 24 July 2017 the claimant received a fit note from her GP stating that she may be fit for work taking account of the following advice "Blood pressure very high. Frequent migraine. Stress in workplace likely to be a factor. Noise worsens migraine. Could amended duties be considered to avoid taking telephone calls. Many thanks."

58. On 26 July 2017 Mr Fulton wrote to the claimant to call her to a meeting to discuss her absences during the Improvement Period that followed the final written warning. He enclosed a copy of the Attendance Management Policy and occupational health information.

59. He also met her that day for a review of the stress reduction plan. The note of that meeting is a reasonably accurate record of it. The PIP had not been completed satisfactorily and there had been a formal meeting with the claimant about poor performance. The claimant had been trained in VOL KANA work in June 2017 and had often been deployed to do that since then. Mr Fulton wished her to listen to others taking calls to remain familiar with that area, with a view to her returning to taking calls herself later. Mr Fulton further consulted two managers, Stewart McTaggart and Robert Seely, in relation to the request by the claimant that she undertake webchat and VAT KANA. Both considered that the risks involved were unduly high, and advised against the claimant doing so. Mr Fulton agreed with that view.

60. The meeting took place on 2 August 2017. The claimant was unaccompanied. The note of that meeting is a reasonably accurate record of it. They discussed her job search activity, both within the civil service and outside it. Mr Fulton

offered his help. The claimant had sought support from him to do voluntary work for the Prince's Trust, which he had not approved. He had considered that she required to focus on her attendance and performance, and that further time away from the business would be detrimental to it. He explained that the claimant was not able to apply for internal vacancies within the civil service in light of the current attendance management process, under the relevant rules that applied to the civil service, but that she could apply for external posts. There was a further discussion in relation to non-telephony work that the claimant sought to do. Mr Fulton explained the advice he had taken from others, and what they had stated. He had also he said spoken to his own manager, who had shared the view that the claimant should not undertake webchat or VWET KANA.

61. Following the meeting Mr Fulton considered whether to continue with the Improvement Period or to refer the case to a higher manager to decide whether or not to dismiss the claimant. He chose the latter. He set out the reasons for that which included the cost of pay when unproductive, the challenge of achieving business objectives with less staff, the increased workloads for colleagues, the cost and time of administering the attendance management process, and the impact of poor attendance on performance.

62. On 4 August 2017 Mr Fulton wrote to the claimant to state his decision.

63. He separately prepared a written summary of the situation as he saw it for the manager who would take the decision.

64. On 9 August 2017 a report on the claimant was received from Dr Mark Fenwick an occupational health physician. He outlined her health conditions. He gave an opinion that it was unlikely that she would be able to engage regularly and effectively with work related duties involving the use of a telephone headset for the foreseeable future. He was unable to identify any adjustments which may facilitate her capacity to engage with and carry out such duties, or any possible timeframe for her returning to such duties. He

expressed the opinion that it was likely she was a disabled person under the 2010 Act, noting that it was a matter for legal determination.

65. The manager appointed to consider the position of the claimant was Paul O'Donnell. He wrote to her on 11 August 2017 and invited her to a meeting on 25 August 2017. That meeting took place. The claimant was unaccompanied. The minute of it is a reasonably accurate record.

66. Mr O'Donnell has been absent from work for a lengthy period, and is substantially unwell such that he is not fit to give evidence and not likely to be so.

67. He prepared a memorandum setting out the matters he considered, and the reasons for the decision he came to. He concluded that the claimant was not able to provide regular and effective attendance. He decided to terminate the claimant's employment In doing so he found that Mr Fulton had provided a high and comprehensive level of support, had followed all procedures, had explored all health issues and considered reasonable adjustments. He had implemented a stress reduction plan, a performance improvement plan, provided large amounts of non-telephony work, committed to assist the claimant with a job search and provided support that included the telephone number for Workplace Wellness. He noted that there was a finite supply of non-telephony work and that there was little alternative work to offer the claimant. He agreed with the decision not to offer work in relation to webchat or online enquiries given performance concerns. He took into account the occupational health report from Dr Fenwick.

68. On 1 September 201 7 Mr O'Donnell wrote to the claimant to inform her of his decision that her employment be terminated. He gave four weeks' notice of the same, which expired on 29 September 2017.

69. The claimant continued to attend work during that notice period. The claimant had 72.6 hours of annual leave then outstanding. She was informed by

Mr Fulton that she should take annual leave accrued during the notice period, otherwise it would be lost. She had earlier applied for annual leave in the period 4 - 1 5 September 2017, which was granted on 1 September 2017. The claimant did not take annual leave during the notice period. Mr Fulton provided her with policy HR33019 which stated in effect that leave required to be taken during notice unless conditions applied, which did not apply to the claimant. The claimant emailed Mr Fulton on 13 September 2017 stating that she could not take the annual leave as she had to be at work and follow the appeal process. Mr Fulton did not agree.

70. The claimant appealed the decision to dismiss her by letter dated 12 September 2017. The appeal was heard by David Mourning. He met the claimant to hear her appeal on 26 September 2017. The minute of that meeting is a reasonably accurate record of it. Mr Mourning had the authority to allow the appeal and reverse the decision to dismiss her.

71. Mr Mourning decided to reject her appeal. He set out his reasons in a written note dated 29 September 2017. He concluded that the procedures had been followed correctly, and that HR advice to the effect that even if there were some modification to the trigger points on account of the claimant's status as a disabled person, that would not have been sufficient to lead to a different conclusion. He considered that the facts and evidence had been properly considered, that there had been no new evidence submitted, that the decision was consistent with other similar decisions, and was proportionate, fair and reasonable in the circumstances.

72. When employed by the respondent latterly the claimant's annual salary was £18,816 per annum. Her gross monthly salary was £1,568, and her net pay was £292.71 per week. There were employee pension contributions of £16.84 per week. The claimant was 48 years of age at the date of her dismissal.

73. The claimant applied for a number of positions following her dismissal. In January 2018 she was offered on a provisional basis a role with Barclays

Bank. That was not confirmed after enquiries were made in relation to the circumstances of the claimant's termination of employment with the respondent. The claimant would have been fit to commence that work at that time.

Submissions for claimant

74. The following is a basic summary of the claimant's submission. She argued that she had clearly been unfairly dismissed, and that there had been discrimination. She criticised the respondent for the way in which it had managed her, and suggested that the decision to dismiss her had been taken very early in the process. Her absences had been caused by illness, and had been certified by her GP. Her condition had been made worse by the way in which Mr Fulton had managed her. There was no consideration for her or her circumstances. She had done a good job, and the criticism of her performance was exaggerated.

75. The respondent ought to have taken account of her disability and increased the trigger points. If they had done so she would not have been dismissed, but they would have found her another position, including a part-time one or involving voluntary work so that she could return afterwards with new skills and be able to progress.

76. The claimant had lodged a document on the first morning of the hearing with arguments as to her claim, and a schedule of loss, which was taken both as evidence and as included within her submission.

Submissions for respondents

77. Dr Gibson had prepared a written submission which had been given to the claimant before she made her own submission. The following again is a basic summary of it.

78. He argued firstly that there was no unfair dismissal. The reason for it was either capability or some other substantial reason and was potentially fair. He referred to ***Wilson v Post Office [2000] IRLR 834*** and ***Ridge v HM Land Registry [2014] UKEAT/00485/12.*** It was actually fair. Advice had been taken from occupational health on four occasions. The standard was that of the reasonable employer - ***BS v Dundee City Council [2013] CSIH 91.*** There had been sufficient consultation. Sick pay was not a factor - ***Coulson v Felixstowe Docks and Railway Co [1975] IRLR 11.*** The absence had not been caused by the respondent. Length of service was limited. The final written warning had been given appropriately, and it was not now open to challenge. It was not manifestly improper - ***Davies v Sandwell Metropolitan Borough Council [2013] EWCA Civ 135, General Dynamics Information Technology Limited v Carranza UKEAT/0107/14.*** The alternatives to dismissal had been considered, but was not sustainable. The test was that of the reasonable employer - ***DB Schenker Rail UK Ltd v Doolan [2010] UKEAT/0053/09.*** The tribunal should guard against the substitution mindset.

79. On the discrimination claims he argued that the respondents had proved objective justification in relation to the section 15 and 19 claims. The aim was to have people at work doing the tasks they are employed to do. That was legitimate. It was also proportionate given all the circumstances. He did not accept that a POP about the claimant being available to take telephone calls on a daily basis was applied, given the evidence including that it did not create a particular disadvantage, nor in relation to calls made during absences. He also challenged a PCP of not having more than six absences in a 12 month period.

80. In relation to the claim under sections 20 and 21 he accepted that the PCP was application of the attendance management policy. He argued that they had proved that it was not reasonable for the respondent to have known of disability before 14 July 2017, that if there had been advice sought in June 2017 it was not clear that that would have led to a finding that the claimant was then disabled, and that in any event it was not reasonable to increase

the trigger points for the final written warning. He argued similarly that it was not reasonable to do so at the stage of dismissal, and commended to us the evidence of his witnesses. He argued that it was not reasonable to have taken the steps argued for in relation to alternative duties, alternative employment, or the keeping in touch calls. He also made submissions as to loss and remedy if we found against him.

Law

(i) Unfair dismissal

(a) The reason

81. It is for the respondent to prove the reason for a dismissal under section 98 of the Employment Rights Act 1996 ("ERA"). The burden is on the employer.

82. In ***Abernethy v Mott Hay and Anderson [1974] ICR 323,*** the following guidance was given by Lord Justice Cairns:

> "A reason for the dismissal of an employee is a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee."

83. These words were approved by the House of Lords in **W *Devis & Sons Ltd v Atkins [1977] AC 931.*** In ***Beatt v Croydon Health Services NHS Trust [2017] IRLR 748,*** Lord Justice Underhill observed that Lord Justice Cairns' precise wording was directed to the particular issue before that court, and it may not be perfectly apt in every case. However, he stated that the essential point is that the 'reason' for a dismissal connotes the factor or factors operating on the mind of the decision-maker which caused him or her to take that decision.

84. If the reason proved by the employer is not one that is potentially fair under section 98(2) of the Act, the dismissal is unfair in law. The reason relied on

by the respondent was capability or some other substantial reason and if proved is one that is potentially fair. Capability is defined as 'capability assessed by reference to skill, aptitude, health, or any other physical or mental quality'.

(b) *Fairness*

85. If the reason for dismissal is one that is potentially fair, the issue of whether it is fair or not is determined under section 98(4) of the Act and

> "depends on whether in the circumstances .....the employer acted reasonably or unreasonably in treating [that reason] as a sufficient reason for dismissing the employee, and shall be determined in accordance with equity and the substantial merits of the case."

86. There is no onus on either party to prove fairness or unfairness under the terms of section 98(4). The onus under that part of the section is neutral.

(ii) Discrimination

87. The law relating to discrimination is complex. It is found in statute and case law, and account is take of guidance in a statutory code.

(i) Statute

88. Section 4 of the Equality Act 2010 ("the Act") provides that disability is a protected characteristic. The Act re-enacts large parts of the predecessor statute, the Disability Discrimination Act 1995, but there are some changes.

89. Section 15 of the Act provides as follows:

> **"15 Discrimination arising from 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 the disability."

90. Section 19 of the Act provides as follows:

"19 Indirect discrimination

(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.

(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if —

(a) A applies, or would apply, it to persons with whom B does not share the characteristic,

(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,

(c) it puts, or would put, B at that disadvantage, and

(d) A cannot show it to be a proportionate means of achieving a legitimate aim.

(3) The relevant protected characteristics are —

.....

disability;...?

91. Section 20 of the Act provides as follows:

"20 Duty to make adjustments

(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.

(2) The duty comprises the following three requirements.

(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage ....."

92. Section 21 of the Act provides:

"21 Failure to comply with duty

(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.

(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person...."

93. Section 39 of the Act provides:

'39 Employees and applicants

.....

(2) An employer (A) must not discriminate against an employee of A's (B)-

(a) as to B's terms of employment;

(b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;

(c) by dismissing B;

(d) by subjecting B to any other detriment.

....."

94. Section 136 of the Act provides:

> **"136 Burden of proof**
>
> If there are facts from which the tribunal could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned the tribunal must hold that the contravention occurred. But this provision does not apply if A shows that A did not contravene the provision."

95. Section 212 of the Act states:

> **"212 General Interpretation**
>
> In this Act - .....
>
> 'substantial' means more than minor or trivial"

96. Schedule 8, at paragraph 20 states:

> **"Part 3**
>
> **Limitations on the Duty**
>
> **Lack of knowledge of disability, etc**
>
> **20**
>
> (1) A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know —
>
> (a) in the case of an applicant or potential applicant, that an interested disabled person is or may be an applicant for the work in question:
>
> (b) [in any case referred to in Part 2 of this Schedule], that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement."

97. The provisions of the Act are construed against the terms of the ***Equal Treatment Framework Directive 2000/78/EC.*** Its terms include Article 5 as

to the taking of "appropriate measures, where needed in a particular case", for a disabled person, "unless such measures would impose a disproportionate burden on the employer. This burden shall not be disproportionate when it is sufficiently remedied by measures existing within the framework of the disability policy of the Member State concerned."

(ii) Annual Leave

98. The entitlements to paid annual leave for workers are found in the Working Time Regulations 1998. The right to annual leave is to a total of 5.6 weeks per year, in Regulations 13 and 13A. The right to payment for that is found in Regulations 14 (where employment has ended) and 16 (for leave taken). The right to make a claim to a Tribunal is found in Regulation 30.

(Hi) Case law

Unfair dismissal

99. A basic summary of the test to apply in a case related to absences from work under section 98(4) of the 1996 Act, as it is now, is set out in the EAT decision in ***Spencer v Paragon Wallpapers Ltd [1976] IRLR 373*** as follows:

> "Every case depends on its own circumstances. The basic question which has to be determined in every case is whether, in all the circumstances, the employer can be expected to wait any longer and, if so, how much longer?"

100. The tribunal added that the relevant circumstances include 'the nature of the illness, the likely length of the continuing absence, the need of the employers to have done the work which the employee was engaged to do'.

101. In ***Lynock v Cereal Packaging Ltd [1988] IRLR 510,*** [1988] ICR 670, the EAT described the appropriate response of an employer faced with a series of intermittent absences as follows:

> "The approach of an employer in this situation is, in our view, one to be based on those three words which we used earlier in our judgment — sympathy, understanding and compassion. There is no principle that the mere fact that an employee is fit at the time of dismissal makes his dismissal unfair; one has to look at the whole history and the whole picture. Secondly, every case must depend upon its own fact, and provided that the approach is right, the factors which may prove important to an employer in reaching what must inevitably have been a difficult decision, include perhaps some of the following— the nature of the illness; the likelihood of recurring or some other illness arising; the length of the various absences and the spaces of good health between them; the need of the employer for the work done by the particular employee; the impact of the absences on others who work with the employee; the adoption and the exercise carrying out of the policy; the important emphasis on a personal assessment in the ultimate decision and of course, the extent to which the difficulty of the situation and the position of the employer has been made clear to the employee so that the employee realises that the point of no return, the moment when the decision was ultimately being made may be approaching. These, we emphasise, are not cases for disciplinary approaches; these are for approaches of understanding'.'

102. There is a conflict between the needs of the business and those of the employee, and the tribunal must consider whether or not the employer has sought to resolve that conflict in a manner which a reasonable employer might have adopted. That includes considering whether the respondent carried out an investigation which meant that it was sufficiently informed of the medical position.

Discrimination

(a) Discrimination arising from disability

103. The process applicable under a section 15 claim was explained by the EAT in ***Basildon & Thurrock NHS Foundation Trust v Weerasinghe [2016] ICR 305:***

> 'The current statute requires two steps. There are two links in the chain, both of which are causal, though the causative relationship is differently expressed in respect of each of them. The Tribunal has first to focus upon the words 'because of something', and therefore has to identify 'something' - and second upon the fact that that 'something' must be 'something arising in consequence of B's disability', which constitutes a second causative (consequential) link. These are two separate stages."

104. In ***City of York Council v Grosset [20 18] IRLR 746,*** Lord Justice Sales held that

> "it is not possible to spell out of section 15(1)(a) a ... requirement, that A must be shown to have been aware when choosing to subject B to the unfavourable treatment in question that the relevant 'something' arose in consequence of B's disability".

105. The EAT held in ***Sheikholeslami v University of Edinburgh [2018] IRLR 1090*** *that:*

> "the approach to s 15 Equality Act 2010 is now well established and not in dispute on this appeal. In short, this provision requires an investigation of two distinct causative issues: (i) did A treat B unfavourably because of an (identified) something? and (ii) did that something arise in consequence of B's disability? The first issue involves an examination of the putative discriminator's state of mind to determine what consciously

or unconsciously was the reason for any unfavourable treatment found. If the "something" was a more than trivial part of the reason for unfavourable treatment then stage (i) is satisfied. The second issue is a question of objective fact for an employment tribunal to decide in light of the evidence."

Unfavourable treatment

106. In ***Williams v Trustees of Swansea University Pension and Assurance Scheme [2017] IRLR 882*** the Court of Appeal did not disturb the EAT's analysis, in that case, that the word "unfavourable" was to be contrasted with less favourable, the former implying no comparison, the latter requiring it. The Equality and Human Right's Commission Code of Practice on Employment states at paragraph 5.7 that the phrase means that the disabled person "must have been put at a disadvantage."

107. That analysis was supported by the Supreme Court decision, reported at ***[2019] IRLR 306.***

Justification

108. There is a potential defence of objective justification under section 15(1)(b) of the Act. In ***Hardys & Hansons pic v Lax [2005] IRLR 726,*** heard in the Court of Appeal, it was held that the test of justification requires the employer to show that a provision, criterion or practice is justified objectively notwithstanding its discriminatory effect.

Indirect discrimination

109. Lady Hale in the Supreme Court gave the following guidance in ***R (On the application of E) v Governing Body of JFS [2010] IRLR 136***

> "The basic difference between direct and indirect discrimination is plain ……Indirect discrimination looks beyond formal equality towards a more substantive equality of results: criteria which appear neutral on their face may have a disproportionately adverse impact upon people of a particular colour, race, nationality or ethnic or national origins."

Reasonable adjustments

110. Guidance on a claim as to reasonable adjustments was provided by the EAT in ***Royal Bank of Scotland v Ashton [201 1] ICR 632*** and in ***Newham Sixth Form College v Sanders [2014] EWCA Civ 734,*** and ***Smith v Churchill s Stair Lifts pic [2005] EWCA Civ 1220*** both at the Court of Appeal. These cases were in relation to the predecessor provision in the Disability Act 1995. Their application to the 2010 Act was confirmed by the EAT in ***Muzi-Mabaso v HMRC UKEAT/0353/14.*** The guidance given in ***Environment Agency v Rowan [2008] IRLR 20*** remains valid, being that in order to make a finding of failure to make reasonable adjustments there must be identification of, relevant for the present case:

(a) the provision, criteria or practice applied by or on behalf of an employer; and
(b) the nature and extent of the substantial disadvantage suffered by the claimant.

111. Mr Justice Laws in ***Saunders*** added:

> "the nature and extent of the disadvantage, the employer's knowledge of it and the reasonableness of the proposed adjustment necessarily run together. An employer cannot … make an objective assessment of the reasonableness of proposed adjustments unless he appreciates the nature and extent of the substantial disadvantage imposed upon the employee by the PCP."

112. The nature of the duty under sections 20 and 21 was explained by the EAT in ***Carranza v General Dynamics Information Technology Ltd [2015] IRLR 43*** as follows:

> "The Equality Act 2010 now defines two forms of prohibited conduct which are unique to the protected characteristic of disability. The first is discrimination arising out of disability: section 15 of the Act. The second is the duty to make adjustments: sections 20-21 of the Act. The focus of these provisions is different ..... Sections 20-21 are focused on affirmative action: if it is reasonable for the employer to have to do so, it will be required to take a step or steps to avoid substantial disadvantage."

Burden of proof

113. There is a two-stage process in applying the burden of proof provisions in discrimination cases, which may be relevant to the issue of whether the respondents applied a PCP to the claimant, as explained in the authorities of ***Igen v Wong [2005] IRLR 258,*** and ***Madarassy v Nomura International Pic [2007] IRLR 246,*** both from the Court of Appeal. The claimant must first establish a first base or prima facie case by reference to the facts made out. If she does so, the burden of proof shifts to the respondents at the second stage. If the second stage is reached and the respondents' explanation is inadequate, it is necessary for the tribunal to conclude that the claimant's allegation in this regard is to be upheld. If the explanation is adequate, that conclusion is not reached.

114. The application of the burden of proof is not as clear as in a claim of direct discrimination. In ***Project Management Institute v Latif [2007] IRLR 579,*** Mr Justice Elias, as he then was, said this:

> "53
> ..... It seems to us that by the time the case is heard before a tribunal, there must be some indication as to what adjustments it is alleged should

> have been made. It would be an impossible burden to place on a respondent to prove a negative; that is what would be required if a respondent had to show that there is no adjustment that could reasonably be made. Mr Epstein is right to say that the respondent is in the best position to say whether any apparently reasonable adjustment is in fact reasonable given his own particular circumstances. That is why the burden is reversed once a potentially reasonable adjustment has been identified.
>
> 54
>
> In our opinion the paragraph in the code is correct. The key point identified therein is that the claimant must not only establish that the duty has arisen, but that there are facts from which it could reasonably be inferred, absent an explanation, that it has been breached. Demonstrating that there is an arrangement causing a substantial disadvantage engages the duty, but it provides no basis on which it could properly be inferred that there is a breach of that duty. There must be evidence of some apparently reasonable adjustment which could be made.
>
> 55
>
> We do not suggest that in every case the claimant would have had to provide the detailed adjustment that would need to be made before the burden would shift. However, we do think that it would be necessary for the respondent to understand the broad nature of the adjustment proposed and to be given sufficient detail to enable him to engage with the question of whether it could reasonably be achieved or not."

115. ***Jennings v Barts and the London NHS Trust UKEAT/0056/12*** held that ***Latif did*** not require the application of the concept of shifting burdens of proof, which 'in this context' added 'unnecessary complication in what is essentially a straightforward factual analysis of the evidence provided' as to whether the adjustment contended for would have been a reasonable one.

116. The EAT emphasised the importance of Tribunals confining themselves to findings about proposed adjustments which are identified as being in issue in the case before them in ***Newcastle City Council v Spires UKEAT/0034/10.*** The importance of identifying the step that the respondent is said not to have taken which amounts to the reasonable adjustment required in law of it was stressed in ***HM Prison Service v Johnson [2007] IRLR 951.*** Setting out what the step or steps that comprise the reasonable adjustments are, before the evidence is heard, was however referred to in ***Secretary of State v Prospers EAT 0412/14. General Dynamics Information Technology Ltd v Carranza [2015] IRLR 43*** highlighted the importance of identifying precisely what constituted the step which could remove the substantial disadvantage complained of.

117. The adjustment proposed can nevertheless be one contended for, for the first time, before the ET, as was the case in ***The Home Office (UK Visas and Immigration) v Kuranchie UKEAT/0202/16.*** Information of which the employer was unaware at the time of a decision might be taken into account by a tribunal, even if it also emerges for the first time at a hearing - ***HM Land Registry v Wakefield [2009] All ER (D) 205.***

118. The reasonableness of a step for these purposes is assessed objectively, as confirmed in ***Smith v Churchill [2006] ICR 524.*** The need to focus on the practical result of the step proposed was referred to in ***Royal Bank of Scotland pic v Ashton [201 1] ICR 632.***

Knowledge

119. Where an employer argues that it could not reasonably have been expected to know of the employee's disability, the onus falls on the employer to establish that, and the issue is one of fact and evaluation - ***Donelien v Liberate UK Ltd [2018] IRLR 535.*** The matter, in the context of a claim under section 15 of the Act, was also examined in ***A Ltd v Z UKEAT/0273/18where*** it was held that the assessment included what the employer might reasonably

have been expected to know after making having made appropriate enquiries.

(iv) EHRC Code

120. The Tribunal also considered the terms of the Equality and Human Rights Commission Code of Practice on Employment, the following provisions in particular:

> **Knowledge**
>
> 6.19
>
> For disabled workers already in employment, an employer only has a duty to make an adjustment if they know, or could reasonably be expected to know, that a worker has a disability and is, or is likely to be, placed at a substantial disadvantage. The employer must, however, do all they can reasonably be expected to do to find out whether this is the case. What is reasonable will depend on the circumstances. This is an objective assessment. When making enquiries about disability, employers should consider issues of dignity and privacy and ensure that personal information is dealt with confidentially.
>
> Example: A worker who deals with customers by phone at a call centre has depression which sometimes causes her to cry at work. She has difficulty dealing with customer enquiries when the symptoms of her depression are severe. It is likely to be reasonable for the employer to discuss with the worker whether her crying is connected to a disability and whether a reasonable adjustment could be made to her working arrangements.
>
> 6.20
>
> The Act does not prevent a disabled person keeping a disability confidential from an employer. But keeping a disability confidential is likely to mean that unless the employer could reasonably be expected to know about it anyway, the employer will not be under a duty to make a reasonable adjustment. If a disabled person expects an employer to

make a reasonable adjustment, they will need to provide the employer - or someone acting on their behalf - with sufficient information to carry out that adjustment.

Substantial disadvantage

6.15

The Act says that a substantial disadvantage is one which is more than minor or trivial. Whether such a disadvantage exists in a particular case is a question of fact, and is assessed on an objective basis.

Reasonable steps

6.28

The following are some of the factors which might be taken into account when deciding what is a reasonable step for an employer to have to take:

- whether taking any particular steps would be effective in preventing the substantial disadvantage;
- the practicability of the step;
- the financial and other costs of making the adjustment and the extent of any disruption caused;
- the extent of the employer's financial or other resources;
- the availability to the employer of financial or other assistance to help make an adjustment (such as advice through Access to Work); and
- the type and size of the employer.

6.29

Ultimately the test of the “reasonableness” of any step an employer may have to take is an objective one and will depend on the circumstances of the case.

6.33

[Provides a list of examples of steps it might be reasonable for an employer to take, such as the following]:

Transferring the disabled worker to fill an existing vacancy

Example: An employer should consider whether a suitable alternative post is available for a worker who becomes disabled (or whose disability worsens), where no reasonable adjustment would enable the worker to continue doing the current job. Such a post might also involve retraining or other reasonable adjustments such as equipment for the new post or transfer to a position on a higher grade.

Altering the disabled worker's hours of work or training

Example: An employer allows a disabled person to work flexible hours to enable him to have additional breaks to overcome fatigue arising from his disability. It could also include permitting part-time working or different working hours to avoid the need to travel in the rush hour if this creates a problem related to an impairment. A phased return to work with a gradual build-up of hours might also be appropriate in some circumstances.

Observations on the evidence

121. The Tribunal had sympathy for the claimant, who had had a number of health conditions which affected her at work. The Tribunal noted that the respondent accepted that she met the definition of a disabled person from 14 July 2017. The respondent was right to do so, and the issue of knowledge at an earlier date is addressed below.

122. The tribunal further accepted that the claimant had not wished to have time off work from illness, and that the absences were genuine ones. She had also returned to work in July 2017 when occupational health advice had been that she was not fit to do so. She did that as she was keen to work and did so despite occupational health advice that at that time she was not fit. The tribunal could understand why the claimant would feel that the dismissal was unfair, from her own perspective and that as a disabled person she was dismissed unlawfully.

123. The tribunal did however require to assess the evidence as a whole, including the written records and the evidence of the respondent's witnesses. It concluded that not all of the claimant's evidence could be considered reliable. There were some aspects of it that appeared to the Tribunal not likely to be correct. For example the claimant alleged that she suffered from severe post traumatic stress disorder, but no medical evidence of that was produced, it was not an impression supported either by the occupational health reports or GP fit notes produced, not supported by the manner in which she gave evidence or conducted the case, and not consistent with her evidence of seeking other roles, attending interviews, and stating that she was fit to commence work at a major bank in early 2018.

124. The claimant further did not appear to respond well to constructive criticism. She did not accept that it was valid, but appeared to consider that her performance at work was of a consistently high quality. The Tribunal considered that there was clear evidence of valid performance concerns when the claimant was at the Glasgow Call Centre, and some concerns from before then. They were outlined in a performance improvement plan, which was an informal step taken by Mr Fulton, which was not completed successfully. Mr Fulton's manager had agreed with his concerns, and from other written records.

125. The claimant did on occasion seek to blame others for matters which were at least partly a result of her own action or inaction. Two examples are firstly in relation to part-time working, and secondly in relation to telephony work. For the first, the claimant discussed matters with her manager. He gave her details of how to apply for part time working. She partly completed the document required, but not fully. He set out what was missing. She did not follow up on that, believing that the application was complete. It was not. His evidence is supported by the written record.

126. The second follows an occupational health physician report which noted her as being unfit for work, and unable to suggest any adjustments to allow her

to return to telephony work such that she was unfit for that for the foreseeable future. The claimant did then attend for work. She said that she could not do telephone work, and submitted a fit note from her GP with a request for that. When discussing matters with her manager however she did not engage in any way with questions as to how that matter might be managed, and what she could do herself, in consultation with her GP, to make that work. She sought in effect to dictate what job she would do so as not to include telephony. In a location where 90-95% of the work is telephone based, and given the claimant's role which was an operational one, that was not realistic.

127. The claimant sought to blame the respondent, and Mr Fulton in particular, for what happened. The tribunal did not regard that as correct. There was a fundamental difficulty, which the claimant herself recognised, that she was struggling with the demands of the role in relation to the use of the telephone. But that role was essentially a telephone advice service. Her performance raised genuine concerns on the part of her manager. His attempts to manage that successfully failed. He did however have a role that required him to manage it, and it was that which the tribunal considered caused the conflict that the claimant perceived.

128. The two witnesses for the respondents gave evidence clearly and candidly. They displayed no antipathy towards the claimant, in fact there was clear evidence of them having a material level of sympathy for her. Mr Mourning who gave evidence first gave clear and consistent evidence as to how he had conducted his appeal. When asked about the issue of what ought to have been known in relation to the claimant, at or about the time of the conduct of the appeal against the final written warning, he gave obviously truthful and careful evidence which was to the effect that there might not have been such a warning given. It is addressed in more detail below.

129. Mr Fulton gave evidence in an equally clear and convincing manner. His evidence was also supported by the written records, some of which the claimant had herself signed. He came across to the Tribunal as someone who

was trying to carry out his managerial duties in a professional and considerate manner. He sought to assist the claimant in a number of respects, both to seek to improve her performance at work, and to assist her in overcoming obstacles to full attendance at work. He also offered to assist her in other respects, including with alternatives within the respondent, and applying for posts outwith it. The claimant's portrayal of him as an overbearing manager who exacerbated her stress levels by the manner in which he managed her was not an allegation that the Tribunal considered to be correct. It was not consistent with the evidence as a whole.

Discussion

130. The Tribunal applied the law set out above to the facts that it had found, as follows in relation to each of the issues identified:

ft) Reason

131. The Tribunal concluded that the respondent had proved that the reason for dismissal was capability or some other substantial reason. That was clear from the documentation with regard to the decision. Whilst Mr O'Donnell was not available to give evidence, a full memorandum was prepared by him which set out his reasoning. The claimant was being managed under the Attendance Management policy, and it was the application of that policy which led to dismissal. Whether that is given the legal label of capability or some other substantial reason, it is potentially fair.

(ii) Fairness

132. Whether the dismissal is fair or unfair depends on an assessment of all the evidence, against the statutory test set out in section 98(4) of the 1996 Act. The Tribunal was satisfied that it was a fair dismissal. Whilst the claimant argued that absences latterly were certificated by her GP and that it was not fair to dismiss someone for being ill, particularly where that illness was exacerbated by the manner in which she was being managed by the respondent, the tribunal did not accept that. Firstly, it is potentially fair to

dismiss an employee if there is absence through illness, including as here intermittently and for a variety of reasons. It depends on the circumstances, as explained in case law which is outlined above. It does not involve a finding of fault on the part of the person who has been ill.

133. Secondly, the respondent did follow a fair procedure, with a series of warnings. Thirdly in the context of fairness, there was sufficient evidence for the final written warning, and the issue in relation to it arises under discrimination law as noted below, not unfair dismissal law. Fourthly, the claimant's absences were not caused by the respondent in the sense that that is normally understood. The cause was not the management of the claimant by Mr Fulton. He managed her sympathetically and appropriately, and at least as a reasonable manager could have done. The difficulty was that the role involved telephony work to a material extent, over 90%, and the claimant was not able to undertake it as required, but also her absences caused operational difficulty for the respondent, put additional burdens on colleagues, affected the service to customers, and that was not likely to change for the foreseeable future. There was consideration of alternatives, indeed that had been addressed throughout the review of the stress reduction plan. There was no realistic alternative.

134. Having regard to the case law and the issues that arise the tribunal concluded that the decision to dismiss was one that a reasonable employer could have taken. There was further an appeal which Mr Mourning conducted fairly and reasonably, such that in the event that there was any defect in procedure or decision making by Mr O'Donnell, and the tribunal did not find evidence of that, the appeal cured that.

135. In light of that the claim of unfair dismissal does not succeed and is dismissed.

(Hi) Section 15

136. The tribunal was satisfied that the claimant had established that she did suffer unfavourable treatment in the application of the Attendance Management

policy to her, and that that arose out of her disability. That is unlawful unless the respondent can prove that it was a proportionate means of achieving a legitimate aim. The respondent had as its aim the effective management of the work it required to undertake. It did so as a public body, with oversight from, amongst other bodies, the Public Accounts Committee. In all the circumstance, efficiency is a legitimate aim.

137. The issue of proportionality then fell to be considered. The tribunal concluded that the respondent had discharged the onus upon it. It had developed an Attendance Management Policy. That has a series of Trigger Points. Those points do not mean that an outcome inevitably follows. It is not a purely mechanical exercise. It involves the exercise of management judgment. The claimant had been through a lengthy process. She had received a first written warning, her attendance improved, there was a sustained improvement period set out, the attendance was less than required, there was a final written warning, upheld on appeal, there were further absences, and occupational health advice taken that did not set out a pathway for the future, as referred to in more detail below. The claimant herself did not put forward a reasonable pathway for the future. She sought to require the respondent to place her on non-telephony duties where these were not the predominant majority of the role, were limited in scope and insufficient for full utilisation, and involved an adverse impact on the team of which she was a part. In all the circumstances the tribunal concluded that the respondent had proved that the dismissal was proportionate.

138. As a result, there was no breach of section 15 of the 2010 Act.

(iv) Section 19

139. The tribunal accepted that the attendance management policy impacted disabled persons adversely in a manner that those not disabled did not experience, and again required to assess the issue of objective justification. For the same reasons as set out above, the tribunal considered that that had been proved by the respondent. The tribunal did not consider that it had been

proved that there were PCPs applied in the other aspects that the claimant had referred to, in respect of daily telephone calls and having six absences in 12 months, and accepted the submissions made by the respondent in that regard.

140. As a result, there was no breach of section 15 of the 2010 Act.

(v) Sections 20 and 21

141. The Tribunal considered that the claim under these provisions was at the heart of the claimant's case. It raised a number of complex issues. The tribunal considered them against the background of all of the evidence. The first was whether the respondent should have known of the claimant being a disabled person, if that be the case, as at 22 June 2017 on which date an appeal against the final written warning was refused, as if so potentially one reasonable step was to increase the trigger points so that no final written warning would be given.

(a) When could the respondents reasonably be expected to know that the claimant was a disabled person, having regard to paragraph 20 to Schedule 8 to the Equality Act 2010?

142. This was a particularly difficult issue. There was evidence both ways. On the one hand the claimant had expressed to the appeal officer at the appeal meeting that she believed that she was covered by the 2010 Act, giving an outline of her health conditions, and that the contrary findings from the two earlier occupational health reports were wrong; in addition, she had had a continuous period of absence of nine days since the report of 27 March 2017. On the other hand, that previous report was not particularly aged at that point, it had referred to the possibility of future absences, there had been one, and the claimant had after it returned to work. The claimant had been rather general in commenting on her health conditions, and had not been specific as to why she felt that she was a disabled person, nor had she referred to factors such as the treatment she was receiving.

143. By 14 July 2017 an occupational health adviser had expressed an opinion that the claimant was likely to be a disabled person, and that was also the opinion of the occupational health physician in a later report. That later report however was based on two pieces of evidence not available to Ms Thomson-Moyes, firstly that the claimant was off for a reasonably lengthy period for a second occasion, commencing on 5 July 2017, and secondly had disclosed to him more details of her condition and the treatment received for it.

144. Whilst the issue was difficult, the tribunal concluded that there was not sufficient to lead to a finding that the respondent ought reasonably to have known of the claimant being a disabled person prior to 14 July 2017. In that regard, it noted the requirement that there be both something to indicate that the claimant might be a disabled person, and that there be a substantial disadvantage at that time. In all the circumstances, the tribunal considered that that was not the case in the period prior to 5 July 2017 at the earliest.

145. In any event, even if the tribunal had concluded that there was sufficient to put the respondent on notice that the claimant might be a disabled person, there was still the issue of whether or not, at that point, she was. The tribunal concluded from all the evidence that had there been a referral to occupational health in mid June 2017, the likelihood is that the advice would have been still that the claimant was not a disabled person. The tribunal considered that it was likely that the combination of a second period of continuous absence which commenced on 5 July 2017, and the further enquiries that that led to information given to the physician that led properly to the conclusion that the claimant was a disabled person at that stage. By then, there was a sufficiently significant effect on normal day to day activities, with the commencement of a second more significant period of continuous absence, so as to meet the definition in the 2010 Act.

146. Separately, the tribunal noted that there was an absence of clear pleading in relation to the issue of a reasonable adjustment to allow the appeal against

the final written warning, that had not been identified at any earlier stage, and as a result the respondent had not been on clear notice that that was an issue.

147. In light of those findings the tribunal concluded that the final written warning was not given unlawfully, and that it was not a reasonable step under the statutory provisions to have required the respondent not to have given that final written warning.

Did the claimant suffer a substantial disadvantage from the application of such a PCP, with the term "substantial" meaning not minor or trivial having regard to section 212 of the Equality Act 2010?

148. The tribunal was satisfied that the application of the attendance management policy is a provision, criterion or practice and that the claimant did suffer a substantial disadvantage by its application to her. That was not disputed by the respondent.

If so, did the respondents fail to take any step that it was reasonable to have to take to avoid the disadvantage?

149. The tribunal again considered this issue in detail. The argument for the claimant was essentially that it was reasonable to increase the level of trigger points for her because she was a disabled person, such that she not be dismissed. There were other issues raised which are referred to below, but that matter is the heart of the claim made.

150. The tribunal considered that increasing her trigger points such that she not be dismissed was not a reasonable step to require of the respondent. The claimant had had material absences, there was occupational health advice that that would not change for the foreseeable future, there were not adjustments that the occupational health physician felt able to recommend, the claimant herself had not engaged with the process nor involved her GP in assessing what could be done to move towards a return to telephone work,

and that work made up about 90% of the overall workload. The respondent properly concluded that it could not continue to support the claimant with non-telephony work when the volume of such work was not sufficient to occupy her adequately. It was not efficient to do so. There was an adverse effect on other team members, who required to attend to telephone work not done by the claimant, together with other adverse effects on the respondent as Mr Fulton referred to in evidence, as stated above. The advice from two managers was to the effect that involvement in telephone work was important to allow other roles involving web chat, or other correspondence, to be performed well and without monitoring and supervision which was being carried out for the claimant.

151. The tribunal also considered it relevant that what the claimant was in effect seeking was an entirely different role to that she had been employed to do, whether at East Kilbride or Glasgow. The adjustment proposed as to increased trigger points did not itself solve matters. The claimant still was not prepared to undertake telephone work, but there was insufficient non-telephony work that she was able to undertake. The extent of it varied. Her doing only that work placed burdens on her other colleagues. In addition, she had been working on duties that had very little telephone work and had still had the absence in July 2017. Against that background the tribunal did not consider that an adjustment would be reasonable which did not resolve the unreliability of attendance.

152. The claimant argued that the manner in which Mr Fulton had kept in touch with her during absences was unlawful in that a reasonable step would have been to have done so far less frequently. When the documentation was considered however it was clear that he had taken account of her comments, and had agreed with her that he would not contact her daily, but after a week, during the first continuous period of absence. She had agreed with that at the time. That fact alone demonstrates a manager prepared to exercise discretion, listening to the individual concerned and modifying the normal practice so as not to increase stress unduly, whilst at the same time

performing his duties as manager. The argument in this regard made by the claimant is not accepted.

153. The claimant also complains as to his not supporting her in seeking part-time employment, or carrying out voluntary work for the Prince's Trust. As to the former, the evidence was clear that this application required additional information from the claimant to take forward, and she did not provide that. As to the latter, Mr Fulton explained that his judgment had been that in light of the attendance and performance issues it was not appropriate to grant the claimant further time off, and he thought that concentration should be on improving them not least as that may have reduced the level of stress and therefore absence. The tribunal accepted that evidence, and did not consider that the steps proposed by the claimant were reasonable ones to require of the respondent.

Holiday pay

154. For completeness the tribunal did not consider that the claimant's claim in relation to holiday pay could succeed. It was not clearly pled, and not referred to in any detail in evidence, but in any event it was clear from a note of Mr Fulton's discussions that the claimant was given the instruction to take accrued annual leave during notice, to which he spoke in evidence. The employer is entitled under Regulation 15 of the Working Time Regulations 1998 to give such an instruction. It was not unreasonable in the circumstances, and on that basis the claimant does not have any claim either under the regulations, contract or by way of unlawful deduction from earnings.

Conclusion

155. In light of the findings made above, the Tribunal must dismiss the Claim.

156. Whilst that is the decision, which the tribunal accepts will come as a substantial disappointment to the claimant at the very least, the tribunal would

wish to record that the claimant argued her claim and conducted examination of the respondent's witnesses in a most responsible manner, and she clearly has had the misfortune to suffer from a number of health conditions. The tribunal expresses the hope that she will shortly find a new position.

Employment Judge: A Kemp
Date of Judgment: 11 November 2019
Entered in register: 15 November 2019
and copied to parties