EMPLOYMENT TRIBUNALS

Claimant:	**Ms C Bage**
Respondent:	**Valuation Office Agency**
Heard at:	via CVP at Newcastle Employment Tribunal
On:	1, 2, 3 and 4 November 2021 – evidence and submissions
	23 December 2021 – in chambers
Before:	Employment Judge Jeram, Mr Baines and Mr Carter
Representatives:	
Claimant	in person
Respondent	Mr P Smith of Counsel

RESERVED JUDGMENT

The Judgment of the Employment Tribunal is as follows:

1. The claimant's claims of disability discrimination are not well founded and are dismissed.

REASONS

1. By a claim presented on 24 April 2020 the claimant complains of disability discrimination.

2. At a Preliminary Hearing held on 25 June 2021, EJ Beever determined that all material times, the claimant was disabled person within the meaning of section 6 Equality Act 2010 by virtue of: *'pain, fatigue, exhaustion and anxiety'.*

3. The issues were refined at the outset of this hearing and are broadly as follows:

Knowledge

a. Did the respondent know or could it reasonably have been expected to know that the claimant had the disability? The respondent accepts it acquired knowledge of the disability on 20 November 2019.

Reasonable Adjustments

b. Did the respondent have a PCP in that it required employees to take annual leave or be treated as having taken unauthorised leave in order to attend GP appointments in person during office hours?
c. Did that PCP put the claimant at a substantial disadvantage compared to persons who are not disabled, in the following ways:

i. She had to take annual leave to attend appointments with her GP (not having been offered the DAL) and attempt to make and answer telephone GP appointments during breaks or, inappropriately, in public areas; she also missed telephone appointments from her GP due to being on a call at work?
ii. She was unable to see her GP face to face for fear of losing her job; thus her diagnosis and treatment were delayed?
iii. Being thus unable to obtain diagnoses and a pain management plan meant that she was not provided with reasonable support by the respondent in respect of a severe impairment?
iv. The effect of this took a huge toll on her mental health therefore making her fatigue, pain and exhaustion worse?
v. She became subject to the respondent's sickness absence procedure as contained in its Probation Policy?
vi. She was dismissed in accordance with that Policy as she had failed to maintain an acceptable level of attendance?

d. Did the respondent know or could it reasonably have been expected to know that the claimant was likely to be placed at the disadvantage?
e. Did a physical feature, namely the workstation provided by the respondent for the claimant (i.e. desk, chair, footrest), put the claimant at a substantial disadvantage compared to persons who are not disabled, in that it did not address the discomfort

that she suffered as a consequence of her impairments. In the alternative, but for the provision of the auxiliary aids of a chair, desk and footrest, would a requirement of the respondent have put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled?

f. The substantial disadvantage in either case is: discomfort.

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

h. What steps would be reasonable to avoid the disadvantage? The claimant suggests as follows:

    i. In relation to the PCP – allowing the claimant to attend her GP for disability related matters during her office hours and without being required to make up missed working time

    ii. In relation to the physical feature / auxiliary aid – replace the end desk, foot rest and chair and not be required to hot desk.

Discrimination Arising in Consequence of Disability

i. Was the claimant's dismissal, which the respondent accepts amounts to unfavourable treatment, because of the claimant's sickness absences, and if so do those absences arise in consequence of her disability?

j. Was the respondent's aim, i.e. ensuring staff maintain an acceptable level of attendance to ensure the business can provide a satisfactory standard of service to its customers, legitimate? If so was dismissal a proportionate means of achieving that aim?

Time Limits

k. Were the complaints made within the time limit set by s.123 Equality Act 2010?

Evidence

4. We heard from the claimant, and for the respondent, Lynn Johnson (line manager, since retired), Sarah Carson (dismissing officer and lead for the Local Gateway Authority) and we read the statement of Jade Markwell (appeal officer, Team Manager).

5. We had regard to a file of documents consisting of 475 pages.

6. Insofar as it is relevant to our findings, we did not find the claimant to be a reliable witness of fact; her answers were inconsistent often framed as counter arguments with answers given after careful study of the documents. We agree with the submission of Mr Smith that the basis of her case shifted significantly throughout the litigation and during the hearing.

Findings of Fact

7. The claimant was employed as an administrative officer from 15 July 2019 until her dismissal on 4 February 2020, at the respondent's Customer Service Centre in Durham. During this time, the claimant's employment was subject to a probationary period of eight months duration, which was due to expire on 15 March 2020. The role involved taking calls from customers and assisting with their enquiries.

8. The claimant was employed on a full-time basis of 7.5 hours per day totalling 37 hours per week. She was able to select between two shift times. She could elect to work the early shift (which commenced at 8am but in fact allowed the claimant to begin at any point until 9am) or the late shift which commenced at 9am. Shifts could be swapped as between peers; where that was not possible an employee with a legitimate reason was able to discuss this with the Line Manager. At the end of a week, an employee working full shifts would have worked 30 minutes in excess of their contracted 37 hours; that additional time could be taken as an early finish.

9. The claimant was based at a customer service centre, which responds to customer enquiries via telephone, letter or email. The respondent is required to meet targets within which to reply to customers, as provided for in its service level agreement so as to ensure a quality service to customers. Staffing is planned to meet the demands of projected peaks in workload in certain teams. Employees are arranged in teams, which include teams working on telephones, letters and emails. Absence from one team requires reallocation of an employee from one team to another at short notice. That requires an assessment of a person's skills knowledge and experience to step into the gap created by a sudden absence, and the ability of their team to tolerate their own shortage taking into account such matters as planned absences in that team, and the impact that their shortage will have on their ability to meet their own teams service level targets.

10. The respondent's policy applicable to the claimant on attending medical appointments is as follows:

> *"where possible, employees should attend al medical appointments in their own time. If they are unable to do so they should try to minimise any disruption tot the business, for example by attending appointments at the beginning or end of the day. The employee should give their requires employees, to attend medical appointments in their own time, where possible".*

11. Non-routine medical appointments, such as hospital appointments, are treated differently, in recognition of the fact that the need to attend an appointment may be more urgent and appointments less amenable to flexibility.

12. The respondent has a policy for the provision of adjusted leave in respect of disability. Its aim is to allow people with a disability to take reasonable absences during work time the medical treatment, assessment of the medical condition and assessment of any adjustments required. The policy permits disability adjusted leave ('DAL') in circumstances were the employee requires *"treatment/training to help manage the effects of the disabling condition (for example medical appointments, short-term hospital treatment, training to user guide dog), which cannot be arranged outside normal working hours".* (emphasis applied)

13. The attendance policy applicable to the claimant was the "Probation and unsatisfactory attendance-short-term absences" policy. It provides that there shall be a review point for an individual who works full-time at six days or three spells during an eight-month probationary period. In the event that either trigger point is met or exceeded, and after discussion about the causes of or mitigation for an employee's attendance, at Stage 1, a manager may give a written warning requiring improved attendance comprising of two days absence during an improvement period of two months. Reaching or exceeding that review point will require a manager to consider whether to refer the matter to Stage 2 of the formal process. At a Stage 2 meeting, the manager reviews and discusses with the employee the reasons for their attendance; dismissal will be the normal course of action. The policy specifically reminds managers to consider making reasonable adjustments to the policy for disabled employees; the workplace adjustment policy reminds managers that the duty applies to any formal or informal policy or practice.

14. On commencement, the claimant's line manager was Kim Percival ('KP'). On 16 July 2019, the claimant undertook an Occupational Health ('OH') assessment which certified her fit to work but continued:

> *'this lady has given her consent for me to disclose that she has underlying medical conditions that are likely to be covered by the Equality Act 2010. I would recommend a DSE assessment is completed but currently no further adjustments are required. Once you have completed an in-house DSE, and if there is persisting doubt as to whether the job role has been made as comfortable as possible (mindful that she will experience discomfort to some degree irrespective of the workstation setup), then I would advise that she is referred to an external workstation assessment using the relevant referral form'.*

15. On the same day, DSE (Display Screen Equipment) took place. In the assessment, the claimant confirmed that the chair provided was comfortable, whilst her feet did not rest on the floor, she had been provided with a footrest and the desk caused her no other problems.

16. The claimant was recorded to have stated *"I have hypermobility connectivity disorder so my lower back can get a bit stiff. However now I'm sat at my chair it feels okay. I think the most important one is getting a footrest. I have Raynaud's and poor circulation to my legs (for whatever reason!) So feel better with my feet elevated wherever possible".*

17. The claimant told Lynn Johnson ('LJ') that she suffered from hypermobility in that her back could get a bit stiff and that the main thing she required was a footrest due to her Reynaud's disease. LJ arranged for a work area assessment.

18. The assessor carried out a workstation evaluation out on 24 July 2019. He recommended a footrest of extra height, together with an inflatable lumbar support. Both were provided to the claimant. Frequent breaks from the screen were advised, to encourage muscle movement.

19. On 19 and 20 August 2019, the claimant was absent from work for two days due to sickness and diarrhoea. The claimant declined the offer made by KP of a referral to OH.

20. On 23, 24, 25, on 26 September 2019 the claimant was out of work for five days due to a closed throat, flulike symptoms, vomiting and severe PMS (premenstrual

syndrome). The claimant told KP that she had discussed her PMS with her GP and that she would be making a further appointment. She agreed to a referral to OH.

21. KP wrote to the claimant, to invite her to a review meeting, after her appointment with OH. In the letter, the claimant was told that she had exceeded her review point of six days over three instances and was provided with a link to the Internet at which she could access the respondent's attendance management procedure. The claimant was informed by KP that she was 'not on track' to successfully complete her probation.

22. The appointment with OH did not proceed on 7 October as planned; the explanation the claimant gave was variously that the electrics in her house had stopped functioning or that she had a sore throat and was too unwell to talk. The appointment was rearranged.

23. In the meantime, the claimant off work for 4 days between 31 October and 4 November due to pain and fatigue associated with hypermobility. By now, due to the absence of KP, line management responsibility of the claimant had passed to LJ. LJ erroneously recorded the absence as being 6 days, rather than 4. The error was not identified and corrected until identified by Sarah Carson at the formal Stage 2 hearing; it is immaterial our findings.

24. On 5 November 2019 the claimant was to attend her OH appointment. It was not until 6 November 2019, when LJ called the claimant back about a message that the claimant needed to take emergency (or special) leave on that same day, that the claimant told her that she had not completed her appointment with OH on 5 November 2019 due to her phone running out of battery charge.

25. On 7 November 2019, at her return to work interview, the claimant told LJ that she had been taking annual leave when she had been poorly or in pain, during which time she *'self-medicated with her prescribed medication'*. LJ asked the claimant whether she had been to see her GP. The claimant replied that her GP *had 'been on leave and it was normally a two-week wait for appointments unless you phoned up on the day and were lucky enough to get one'*. She was, as was regularly the case, encouraged to see her GP. The claimant knew that she had hit the absence review trigger points. When asked what could be done to assist her to achieve an acceptable level of attendance, the claimant said she did not think there was anything. The claimant was

informed of the effect that taking last minute special leave in cases that did not appear to be an emergency had on the respondent's ability to manage in her absence.

26. About now, and for the first time, the claimant said she was using her annual leave *'on a few occasions now'* instead of taking sick leave. LJ told her that she should not do this as it would have the effect of masking the true extent of her sickness absences. For the avoidance of doubt and addressing some aspects of the claimant's allegations made during the hearing, we find that at no stage did the claimant tell LJ that she was having difficulty obtaining an appointment to see her GP because of the respondent's policy requiring employees to see their GP outside of office hours where possible; on numerous occasions she told her that she either had seen or was due to see her GP. LJ had been advising the claimant in accordance with the policy on attending medical appointments. She did not tell LJ that she was taking annual leave so as to enable her to see her GP, or that she believed that the respondent's policy was such that it gave her no option but to take annual leave. Her case that she could not plan to see her GP, but instead call in the morning in the hope of obtaining an appointment at any point in the day is undermined by what she told LJ about a *'two week wait'* on 7 November 2019 and which accords with the claimant's own evidence that she preferred to see her own GP who worked only one day (a Monday) per fortnight. It is further undermined by the evidence that she sought permission to take annual leave in advance of the day in question and the fact that her surgery enables patients to book their appointments by telephone, online or in person. Her GP's surgery is part of a group of surgeries offering evening and weekend appointments. The claimant had only taken two Mondays off on annual leave (as individual days) before November 2019. LJ did not at any stage refuse to allow the claimant to attend her GP's surgery for an appointment and she had no conversation with the claimant in which she disallowed her to attend an appointment via telephone during office hours. We are not satisfied that the claimant ever faced any significant difficulty obtaining or attending a GP appointment, other than that caused by her desire to see her own GP.

27. LJ arranged for a third OH appointment. As before, a private room was arranged for the claimant's use, and on this occasion LJ ensured that the room had a landline from which the claimant could call the OH assessor. The next day the claimant asked LJ to ask OH to provide them with copies of the initial fitness to work assessment. This was the first that LJ knew of that assessment.

28. The sickness absence review meeting on 19 November 2019 proceeded in the absence of a report from OH. At this stage, LJ genuinely but erroneously believed the claimant had taken 13 days of sick leave. In fact, the claimant had been absent on sick leave on 11 days over a period of 3.5 months as against the attendance policy which allows for 8 days absence across 8 months.

29. The claimant attended with her trade union representative. The claimant confirmed that she had made a doctor's appointment though she was *'not 100% sure when this is'*. She confirmed that she was always in some sort of fluctuating pain and did not feel that much could be done. She said she still had the back support and footrest assessed for her in July and that they helped her. She did not want to use an electric rise and fall desk, which had been made available for her use since early October. She could not think of any other measure that would assist her level of attendance or make it easier to work; she said that she did not think that extra breaks i.e. in addition to those hourly breaks that she was already afforded - would help and that nothing work related at that moment was affecting her being in work. She said that she felt worried about taking time off for hospital and doctor appointments and said she wanted to change her doctor because she felt that the service provided was inadequate.

30. In a report dated 10 November 2019, OH stated that the claimant had symptoms of premenstrual syndrome It stated that symptoms of PMS different between persons and from month to month, before listing typical symptoms which included mood swings, feeling used, anxious or irritable, tiredness or trouble sleeping, bloating or tummy pain, feeling tenderness, headache and skin and hair complaints.

31. The report stated the claimant had been diagnosed *'earlier this year'* with hypermobility syndrome, having suffered for symptoms for many years. It stated that the claimant suffered fatigue, anxiety and generalised pain. She felt low and had problems with concentration, at times feeling both physically and mentally exhausted. The report said that the claimant experienced pain all the time with her joints and muscles. It stated that the claimant was able to sit at her desk for around an hour but needs to change position and posture frequently and that she is able to walk distances but has constant pain especially in her hip and back. The report stated that the claimant *'says she does not know what would help with work – when her symptoms are bad she finds it difficult to leave the house and has exhaustion, blurred vision significant pain and needs to sleep'.*

32. In relation to the future, the report stated: *'the condition may trigger absences in the event of acute flare ups, attending medical appointments or if establishing on [sic] suitable treatment'.*

33. The report confirmed that the claimant was fit to work, subject to adjustments that were described as follows: that she should be able to adjust her posture every 30 minutes and have periodic breaks for 5-10 minutes per hour doing alternative duties; that the claimant be allowed to work flexible hours and that a workstation assessment be undertaken to ensure that it is correctly set up and to assess the need for specialist equipment; job stress should be reduced, and a stress assessment / reduction plan should be implemented.

34. LJ met with the claimant on 22 November to complete a 'Workplace Adjustment Passport'. The claimant was, like all colleagues, required to take a break for 5 minutes every hour and her job did not require her to remain at her desk; she was able to move away from her desk whenever she needed to do so to stretch and ease pain. In light of the contents of the OH report, however, LJ further encouraged the claimant to take breaks by moving away from her desk. LJ did not, at this or any stage, as the claimant subsequently suggested at her appeal hearing, inform the claimant that any breaks she took would be unpaid. LJ did not offer the claimant flexible working hours on the basis that her job already carried with it a choice of shift pattern and an early finish. LJ recorded the fact that a DSE and work area assessment was carried out in July and that the lumbar support and footrest helped the claimant as well as her own suggestion that the claimant uses an electric rise and fall desk to give her additional postural support. The claimant declined a stress risk assessment; LJ reiterated previous advice that the claimant could access the respondent's Employee Assistance Programme. The exchange was documented in a Workplace Passport which was signed by both LJ and the claimant.

35. On 22 November 2019 LJ issued the claimant with a written warning that she must improve her attendance levels. The policy allowed for 2 days or two spells of absence in 2 months; LJ increased that to 3 days of absence or two spells in the period 22 November 2019 to 23 January 2020. In cross examination, the claimant in evidence accepted that a 50% adjustment in order to account for absenteeism related to her disability was *'about right'*. For the second time since she started, the claimant was told that her probation was 'not on track'. The claimant did not exercise her right to appeal.

36. On 5 December and the morning of 6 December, the claimant was off work sick with severe cough and exhaustion and PMS. She attended work on the afternoon of 6 December and was able to attend her works Christmas event that evening. At her return to work meeting on 9 December 2019 the claimant argued that 6 December ought not to be counted, since she attended the Accident and Emergency department on that day and that her absence was therefore was akin to being absent due to having to attend a hospital appointment. LJ disagreed and warned her that one further absence before 23 January 2020 would trigger the next stage of the absence management procedure.

37. Soon thereafter, LJ became aware that the claimant was emailing another manager about the prospect of taking time off in February 2020 to undergo a 'tummy tuck' cosmetic surgical procedure in Poland and in respect of which the recovery time was up to 6 weeks. LJ called her to a meeting on 10 December; the claimant gave her a very different account about her GP's knowledge of her plans to that which she written to the other manager. She claimed to be unaware of the fact that she had been marked as *'not on track'* and that she was concerned for her job, so LJ agreed with her that she should speak to her GP and be referred to OH before any cosmetic surgery was booked so as to not jeopardise her probationary period further.

38. On Thursday 2 and Friday 3 January the claimant was off work. She said she had childcare problems. LJ was concerned by coincidence of the claimant's absence on these days, given that she had asked, and been declined annual leave on these dates, in circumstances where the claimant said she had already booked a hotel.

39. The following week, on Monday 6, the morning of Tuesday 7, and on Wednesday 8 January 2020, the claimant was off work. She attended work on the afternoon of Tuesday 7 January. The claimant said she had been unable to obtain a GP appointment and so had attended hospital instead about her back pain. The claimant's messages to LJ throughout this period, as to the cause of absence was inconsistent and unclear.

40. On 9 January 2020, LJ conducted a return to work meeting. On identifying that the claimant's absence earlier in the week was due to back pain, LJ marked them as being sickness absences.

41. On 16 January 20, LJ wrote to the claimant to her that because the claimant had exceeded the trigger point of three days, the case would be reviewed at Stage II of the probation absence procedure by Sarah Carson ('SC').

42. SC invited the claimant to a formal meeting in accordance with the respondent's Probation and Unsatisfactory Attendance Policy. She was informed the meeting would take place on 30 January 2020 and that dismissal was a possible outcome of the meeting.

43. The claimant produced a supporting statement at the meeting. In it, the claimant said that she had the following conditions: anxiety and depression; hypermobility connectivity disorder; Raynaud's disease (which she said did not impact on her employment); PMS. She said she had chronic pain fatigue had numerous hospital visits over the years due to her joint pain and was being assessed for fibromyalgia. She said she was suffering severe financial difficulties which was the source of a considerable cause of stress and consequent pain. The financial issues had now resolved, she said. The claimant said that her leave had been *'greatly influenced'* by the lack of medical help, diagnosis, pain relief or long-term plan, notwithstanding that she had been actively and assertive in *'pushing for this'* for a number of years. She described her GP as unreliable, practice and only one GP, that she had been *'very assertive'* her their attempts to obtain an MRI scan and that she had advised her GP that could not tolerate continued inaction.

44. At the meeting, the claimant was accompanied by her trade union representative. She told SC that she thought that her absences were *"all connected"* and that her back pain was one of the main symptoms. SC reiterated that the claimant could take breaks every 30 minutes in addition to her allocated five minutes per hour. The claimant told SC that she was struggling to get an appointment with her GP or hospital to escalate matters; she was waiting for a diagnosis or a referral for an MRI scan, or a referral to a pain clinic, that she had not seen a physiologist and that her GP had told her that there was nothing that could be done about her condition and she would just have undertake exercises at home. She said she been for a few weeks taking gabapentin, a drug which was making her feel much better but had not been prescribed by her GP but that she was taking nonetheless because her GP was not providing her with the correct pain relief.

45. The claimant told SC that she had been taking annual leave when she was too ill to attend work. She did not suggest that that was because of the impact of the respondent's policy on her ability to attend appointments with her GP.

46. The claimant told SC that the previous day she had sat in Stephen's chair. It had been assessed for him so that it was adjusted for his back; she said she thought seemed to help her and therefore she said she thought a new chair would be beneficial. SC thought that mention of Stephen's chair was a late attempt to secure a reprieve. We are inclined to agree; we are not persuaded of the truth of that account and in any event, we are not persuaded that a chair adjusted for another was likely to bring any medium or long term benefits to the claimant as opposed to being, at best, be neutral.

47. She said she didn't need a stress reduction plan arranging.

48. In response to a direct question, the claimant said that there was nothing else that she felt could be done to support her and that there were no other matters to take into account.

49. SC contacted OH for clarity about aspects of its report in particular relating to future absences. She was told that the report could not be revisited and that a further referral was pointless unless there had been a change in circumstances, such as a new diagnosis, further treatment or other change in condition.

50. SC decided to dismiss the claimant. The historic absences were significantly high. She concluded that it was unlikely that the claimant would find out more about her disability, for example, by obtaining a diagnosis within a reasonable period and that she was therefore not satisfied that there would be any change in circumstances in the foreseeable future that would lead to an improvement in attendance within a satisfactory timeframe. The claimant's use of unprescribed medication was a cause of concern; either the claimant had not been seeing her GP, or she had, and was ignoring advice.

51. SC wrote to the claimant confirming her decision to dismiss on 4 February 2020.

52. The claimant appealed her dismissal. The letter contained a detailed analysis of where and how she disagreed with the respondent's notes of her meeting with SC. She severely criticised her GP for what she described as long-standing 'incompetency'.

53. The appeal hearing took place on 21 February 2020. It was chaired by Jade Markwell ('JM'). The claimant was accompanied by her trade union representative.

54. In that hearing, the claimant said that she was taking codeine and herbal tablets which was helping with her PMS and allowing her to sleep better, that she had *'pushed and pushed'* her GP who she described as *'useless'.* She said a further DSE assessment or external assessment would have helped her and that a different chair and longer breaks – albeit later she said she was afforded no breaks at all – would assist. She said she could not predict her pain, but that she wished to *'move forward with little adjustments to her chair'.*

55. JM rejected the claimant's appeal that a DSE assessment should have been carried out: she found that on 19 November 2020, the claimant informed LJ that her work equipment was helping her; that there had been no point at which the claimant had raised an issue about her work equipment; that she had been encouraged to take breaks; that a number of her absences appeared to be unrelated to her workstation, e.g. cough, flu, closed throat, vomiting and diarrhoea, PMS.

56. JM rejected the claimant's appeal that a stress risk assessment had not been completed: she found that the claimant was inconsistent about whether stress played a role in the pain she experienced; she had declined the opportunity to carry out an assessment which suggested that she did not think it would be beneficial to her.

57. JM rejected the claimant's appeal on the ground that she had not been allowed to take extra breaks, on the basis that there was documentary evidence in the form of the Workplace Adjustment Passport that the claimant had signed containing encouragement from LJ.

58. She told the claimant that she would consider whether DAL should have been made available to her when the claimant said that LJ had refused to allow her to attend her GP during office hours. She subsequently noted that OH had not made any such recommendation, that the notes of the meeting on 19 November suggested that LJ had given the claimant an accurate account of the respondent's policy and that the LJ had encouraged the claimant to attend her GP. There was evidence to suggest that the claimant had told LJ she was attending her GP and no evidence that the claimant had taken annual leave to attend. That ground, too, was rejected.

59. JM noted that the claimant had no evidence of the claimant *'finally'* having an MRI scan, but she did invite the claimant to let her know when her pain clinic appointment was. The claimant later informed JM that it was not for another 4 weeks.

60. As did SC, JM observed that the claimant's absences were well in excess of the level of sickness that was acceptable under the respondent's policy.

61. In a letter dated 25 February 2020, JM confirmed that she was satisfied that the original decision was sound and that her appeal was dismissed.

The Law

Knowledge of Disability

62. The Tribunal is required to take into account the **EHRC Code of Practice** on Employment where it appears relevant. Paragraphs 5.14 and 5.15 provide that an employer must show that they could not reasonably have been expected to know about disability and that they must do all they can reasonably be expected to do to find out if an employee of the disability; what is reasonable in the circumstances.

63. What is required is knowledge (actual or constructive) of the facts constituting the disability; knowledge of the diagnosis is not necessary. Where the Tribunal finds that the respondent could reasonably have been expected to take further steps to find out if the claimant had a disability, it must then consider whether as a result, it could then have reasonable have been expected to know of the disability: **A Ltd v Z** [2020] ICR 1999.

Discrimination Arising in Consequence of Disability

64. Section 15(1) of the Equality Act provides that a person discriminates against another where that person treats the other unfavourably because *of something arising in consequence of B's disability, and they cannot show that the treatment is a proportionate means of achieving a legitimate aim.*

65. A respondent may objectively justify unfavourable treatment if it can establish that the treatment was a proportionate means of achieving a legitimate aim. To be proportionate, the treatment must be an appropriate means of achieving a legitimate aim and also reasonably necessary in order to do so: **Homer v Chief Constable of West Yorkshire** [2012] UKSC 15 at [20-25].

66. The principle of proportionality requires an objective balance to be struck between the discriminatory effect of the measure and the needs of the undertaking. It is for the Tribunal to conduct that balancing exercise and make its own assessment of whether the latter outweighs the former; there is no range of reasonable responses test. The more serious the disparate adverse impact, the more cogent must be the justification for it*:* **Hardys and Hansons plc v Lax** [2005] EWCA Civ 846 Pill LJ at [19-34].

The Duty to Make Reasonable Adjustments

67. Section 20 of the EqA 2010 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.

(4) The second requirement is a requirement, where a physical feature 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.

(5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put 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 provide the auxiliary aid.

. . .

(10) A reference in this section, section 21 or 22 or an applicable Schedule (apart from paragraphs 2 to 4 of Schedule 4) to a physical feature is a reference to—

. . .

(c) a fixture or fitting, or furniture, furnishings, materials, equipment or other chattels, in or on premises, or

68. Schedule 8 Part 3 of the Act provides that an employer is not subject to the duty to make reasonable adjustments if it does not know and could not reasonably be expected to know that the employee has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement at s.20.

69. The provision of furniture, furnishings and equipment also amounts to an auxiliary aid: Equality Act 2010 (Disability) Regulations 2010 Part 3 paragraph 8.

70. We have had regard to the provisions of s.20 and 21 of the Equality Act 2010 as well as the correct approach to their interpretation as set out in **Environment Agency v Rowan** [2008] IRLR 20 EAT.

71. Consultation or assessment may be a precursor to the taking of a step under s.20, but it is not a step itself, for it does not remove a disadvantage: **Watkins v HSBC Bank plc** [2015] IRLR 1015, EAT at para 30.

Discussion and Conclusions

72. We have no reason to disbelieve LJ when she states that she did received until early November 2019 and that KP had not received at all, the original fitness assessment from OH in July 2019. But both the pre-employment assessment as well as references to hypermobility and Reynaud's disease, at the DSE assessment in July put the respondent on notice of the possibility of a disability. The respondent was under a duty to take reasonable steps to find out if the claimant had a disability, for example by asking the claimant for further details and/or referring her to OH for a specific assessment. Taking into account the claimant's evident reluctance to undergo medical scrutiny, and doing the best on the facts before us, we find that the respondent, had it taken further steps to find out if the claimant had a disability, would be expected to know of the disability by end September 2019.

<u>Reasonable Adjustments - PCP – requirement to take annual leave to attend GP appointment</u>

73. The respondent operates no such PCP. Its policy is to require employees to attend out of hours where possible, alternatively to seek appointments that would minimise

disruption to the business. There is no evidence that the respondent, or LJ, ever departed from the published policy.

74. Were the PCP to exist, the claimant was not put to any substantial disadvantage claimed. She did not take leave to attend her GP.

75. The respondent could not reasonably be expected to know that the claimant was being put to any of the substantial disadvantages claimed. LJ was being told by the claimant on a number of occasions that she was seeing her GP, or that she was soon to attend an appointment. Her position throughout her employment, put in increasingly vehement terms, was that she was seeing her GP and that her GP was giving her poor medical advice. The claimant regularly asked LJ for other types of leave (annual, special/emergency). LJ encouraged the claimant to visit her GP to get further information about her condition. The clamant did not tell LJ that she was having any difficulty seeing her GP at all.

Reasonable Adjustments - Physical Feature / Auxiliary Aid – provision of a workstation (i.e. desk, footrest, chair with lumbar support)

76. We are not satisfied that the workstation as adjusted to the claimant's requirements put the claimant to any substantial disadvantage or, in the alternative would, but for the provision of the workstation, put her to the same. The claimant's workstation was assessed and approved as being suitable for her in July 2019. The claimant's condition was such that she would always have some degree of discomfort. That is why she was encouraged to take breaks. At no stage did she complain that the workstation was no longer suitable and indeed, on 19 and 22 November – after she had spoken to OH – she confirmed to LJ and later to SC that the individual components of her workstation were helping her and that northing further could be done.

77. We are not satisfied that the physical feature (or lack of auxiliary aid) puts her at a substantial disadvantage when compared with persons who are not disabled. The provision of the workstation was to reduce the discomfort (and not eliminate it).

78. For the reasons above, the respondent did not have actual or constructive knowledge of the substantial disadvantage.

Discrimination Arising in Consequence of Disability - Dismissal

79. The respondent accepts it had knowledge of the disability by the time of the claimant's dismissal and it accepts that its decision to dismiss amounted to unfavourable treatment because of something (absenteeism) arising in consequence of the disability. It is therefore the respondent who bears the burden of proving that its treatment was objectively justifiable.

80. We accept that requiring the maintenance of an acceptable level of attendance in order to ensure that the respondent can operate effectively to provide a satisfactory standard of customer services is a legitimate aim. The respondent plainly needs to be able to plan its staffing resources in a way that is not only efficient, but also effective to deliver its services within the targets agreed.

81. The dismissal would be capable of achieving the aim; we accept that the claimant's dismissal would enable to respondent to better plan and manage its staff resources in order to function as a customer services provider and meet its service level agreement.

82. We turn to the objective balancing exercise between, on the one hand, the reasonable needs of the respondent and on the other, the discriminatory effect of the dismissal.

83. Dismissal is self-evidently the step that causes the most severe impact on the claimant; the respondent must adduce cogent evidence of its justification.

84. The claimant absences were significant in number of absences over a short, probationary period. As against an acceptable level of 8 days' absence over a probation period of 8 months, the claimant had been absence for 15 days in 5.5 months i.e. just short of twice the acceptable level, unadjusted.

85. It is not possible to identify with precision what proportion of the absences were disability related; since the majority of them cite numerous symptoms. Plainly a significant number of absences were disability related, but many symptoms are not: there is no evidence that, e.g. sickness, diarrhoea, closed throat and flu like symptoms, were, or could be, disability related symptoms.

86. The disability related symptoms that the claimant suffered were varied in nature and severity and unpredictable. No diagnosis, or treatment plan or any other medical step was likely to take place in the foreseeable future, which might assist the parties to

better manage the claimant's absence and therefore the respondent's ability to manage its staffing resources.

87. To both LJ and SC at the Stage 2 hearing, the claimant said that there was nothing more that the respondent could do. The claimant told OH, and OH did not disagree, that nothing could be done to assist the claimant further. Even at the Preliminary Hearing in July 2021, the claimant had not obtained a diagnosis of her condition/s. We have no reason to believe that when the claimant told the respondent that there was nothing more that could be done, she did so from an informed position.

88. The adjustments (as opposed to assessments) recommended by OH had suggested, had all had been implemented from the outset of the claimant's employment. Of the recommendation that the respondent permit flexible working, we agree that the claimant already had a degree of flexibility in her start and finish times, that it is not obvious from the report why that adjustment might have any impact on the claimant health or ability to attend work, the respondent sought, but was denied any further clarity on the contents of the report, and the claimant in discussion did not seek it. We are not satisfied that any further flexibility than that which she already had would give rise to any change in the claimant's ability to attend work.

89. The DSE assessment had taken place less than 6 months before the decision to dismiss, there had been no material change in circumstances since. An unavoidable symptom was constant hip and back pain. There is no evidence before us to conclude that a further assessment would have elicited any different response than that in July 2019, given that the claimant had been suffering from symptoms for years.

90. A stress risk assessment was declined by the claimant and there is nothing to suggest any concrete adjustment that might have arisen from that, much less how or why that might improve the claimant's attendance: OH did not explain as much it the report and they declined to provide SC with any further detail.

91. The respondent did not adjust the claimant's leave pursuant to the DAL policy; on the evidence before them and on our own findings, the claimant had no difficulties attending her GP. Indeed, if taken at face value, her evidence tends to suggest that her true sick leave days were in excess of those identified by the respondent.

92. The claimant had access to the respondent's sickness absence policies and was reminded of their effect at regular intervals by LJ; she was warned at an early stage that she was *'not on track'* to pass her probationary period.

93. Balancing the severity of the decision to dismiss, against the lack of evidence before us that there are any other steps that could realistically be taken that would have the likely effect of improving the claimant's attendance record in the foreseeable future, we find that there no less discriminatory means by which the respondent could achieve the objective of maintaining staff attendance levels to enable the provision of a satisfactory standard of service; the dismissal was reasonably necessary to achieve the aim.

94. The defence succeeds and therefore the claim is not well founded.

Employment Judge Jeram

Date: 8 February 2022

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