Case No: 2301458/2017 &
2303560/2021

EMPLOYMENT TRIBUNALS

Claimant:	**Mrs Dawn Brightman**
Respondent:	**TIAA Limited**
On:	**18-20 January 2022 and 21 January 2022 in chambers**
Before:	**Employment Judge Martin** **Ms R Shaw** **Mr JC Saunders**
Representation	
Claimant:	**Mr B Jones - Counsel**
Respondent:	**Ms K Anderson - Counsel**

RESERVED JUDGMENT

The judgment of the Tribunal is that:

1. The Claimant was unfairly dismissed
2. The Claimant's claim for discrimination arising from disability succeeds
3. The Claimant's claim for reasonable adjustments is dismissed
4. The Claimant's claim for direct disability discrimination is dismissed

RESERVED REASONS

1. This case has a long history. The Claimant brought proceedings on 8 June 2017. The case was heard, and judgment given on 29 May 2019. Following an appeal to the Employment Appeal Tribunal (judgment given on 2 July 2022 it was remitted to a different Tribunal for a re-hearing.

2. The evidence and submissions were heard over three days with one day for the Tribunal to deliberate in chambers.

3. The Tribunal had before it an agreed bundle of documents comprising, witness statements from the Claimant, Ms Deborah Croad (Head of HR), Mr Simon Muir, (Director and the Claimant's line manager) and Mr Andrew Townsend (Managing Director). We also had the witness statements provided for the first hearing as there had been a few amendments made to the statements for this hearing.

Findings of fact

4. The Tribunal has come to the following findings of fact on the balance of

probabilities having considered the evidence both written and oral presented by the parties. All evidence was heard and considered; however, these reasons are limited to those matters that are relevant to the issues and necessary to explain the decision reached.

5. The Respondent is a firm of auditors with clients such as NHS trusts. The Claimant was originally employed by South Downs NHS Trust as an auditor. On 1 January 2014 the audit function was transferred to the Respondent under the provisions of TUPE. There were no issues with the quality of the Claimant's work at any time during her employment either before or after the TUPE transfer. Her work was described as good. The issues that arose were to do with her levels of sickness absence.

6. The Respondent accepts that the Claimant is a disabled person. The Claimant has brittle asthma and other medical conditions including a blood clotting problem and diabetes. The Claimant needs oxygen throughout the day and carries an oxygen cylinder. She has had to use crutches since April 2013 following a fall and a slipped disc. She has a central venous line to administer the medication she needs for her various conditions.

7. During her employment, including before the TUPE transfer, adjustments were made. These included adjustments to her hours (her hours were originally reduced to from 37 hours per week to 34 hours per week and then 30 hours per week on an annualised basis so she could manage her medical appointments and medical issues more easily. These were her hours when her employment was terminated. She normally worked a four-day week, not working on a Friday.

8. Other adjustments included ensuring there was parking available for her, having her workstation on the ground floor as she found using the stairs very difficult and later, when moving offices, considering her needs and the need to have the whole team on the ground floor (before the move the Claimant was separated from the team who sat on the first floor which she found isolating). Adjustments such as having a spare oxygen cylinder on site were also made.

9. The Respondent has two policies dealing with absence. One was for long term absence and the other was for short term absences. Ms Croad told the Tribunal that the Respondent did not follow either policy. The reason put forward by the Respondent was that it considered that neither policy was applicable to the Claimant's situation. In relation to the short-term absences policy, it was felt that the Bradford Factor as a method of calculating absences was not appropriate given the Claimant's disability. Using this would have meant that the procedure was started much earlier. However, rather than just adjusting that part of the policy and following the remainder, the Respondent chose not to follow it at all. This inevitably put the Claimant at a disadvantage as she did not know what policy or procedure was being applied as the Respondent did not tell her. The Claimant asked about this but did not receive a reply.

10. The Claimant had high levels of absence:

    20-21 May 2014

25-26 June 2014
1-4 July 2014
19-22 August 2014
25-29 August 2014
1-5 September 2014
28 October 2014
30 October 2014
2-11 February 2015.
26-31 May 2015
8-28 June 2015
12 October – 16 November 2015

29 February – 11 April 2016

11. There was no suggestion that the Claimant was not genuinely ill, and it was accepted that she could not control her absences. The reasons broadly fall into two categories, respiratory issues arising from her asthma, and issues relating to her central venous line which was necessary to administer the medication she needed for her asthma and other conditions.

12. Some of the work the Respondent undertook was very time sensitive and the Respondent had to pick and choose what work to give the Claimant as they could not predict when the Claimant's absences would occur. This had happened for several years. This was backed up by the Claimant's evidence when she says that she was not fully utilised and that she was passed over for work. Because of these arrangements the Claimant's work was generally still there when she returned from a period of sick leave. It was not, save for the odd occasion, passed to another employee to deal with in her absence.

13. As one would expect, the Respondent spoke to the Clamant at various times during her employment about her absences and about reasonable adjustments. None of those conversations were part of any formal procedure which did not start until November 2016.

14. The Respondent refers to a meeting Mr Muir and Ms Croad had with the Claimant on 25 April 2016. This is referred to in the letter inviting the Claimant to a meeting in November 2016 (see below). This meeting led to the Claimant being referred to Occupational Health (OH). There are no minutes of this meeting or any other document relating to it directly. It was accepted by Ms Croad and Mr Muir that this was an informal meeting and not part of any formal sickness absence policy although Mr Townsend thought it was part of the formal policy or procedure.

15. The following medical evidence was obtained and considered at the time the Claimant's employment was terminated:

<u>The Claimant's GP</u>

16. On 21 October 2015 Ms Croad wrote to the Claimant's GP. The letter started with this preamble. "*We have recently undertaken a risk assessment for Dawn which was prompted by a move to a new office location".* This is the context in which the request was made. The various

adjustments made to date were listed. The letter then went on as follows:

"To ensure we have made reasonable adjustments, I should be grateful if you would supply me with a medical report on Dawn giving details of her current condition and future prognosis. In particular, I should also be grateful if you would give an indication as to whether, in your opinion, Dawn is fit to perform her duties as Senior Auditor. Her normal duties involve working at our offices in Kings Hill and at various client sites throughout the South East, carrying out internal audits. It would be helpful if you could advise whether there are any additional adjustments or measures that we could put in place that would assist Dawn in carrying out her role?"

17. She also asked for Dr Newman's opinion whether any medication which had been or was currently being prescribed to the Claimant could affect her professional judgment and affect the professional standards the Respondent operates under.

18. Dr Newman replied on 14 December 2015:

> *"I have now signed Dawn as fit to return to normal duties over a two-week phased return having been working at home for a number of weeks following an exacerbation of her chronic respiratory condition, which did take longer than others to settle. I did not feel I could complete an assessment until we had got through that phase of illness.*
>
> *I have noted each of your points and have discussed most of them at times with Dawn as she is aware of all that you have done to support her. The move so that she has a commute in the morning is obviously an increase in pressure on her, but not one to substantially affect her ability to do the job at the current time.*
>
> *In my opinion Dawn is fit to work as a Senior Auditor. She has good insight into her condition and is aware of the need to be safe with regard to her health. In addition to her chronic respiratory condition, she has chronic low back pain and sciatica, which began in April 2013 and for which she was admitted for a few weeks to Maidstone Hospital. She has since been reliant on crutches, which she finds helps support her back when walking.*
>
> *She has a central venous line in order to provide access to taking blood (she has very difficult peripheral veins to access) and for giving intravenous drugs during her acute exacerbations. In August 2013 an infection of the central line going into the superior vena cava led to thrombus, which has blocked both her superior vena cava, so she is only able to have a central line in her right femoral vein. She has a past medical history of recurrent deep vein thrombosis in her left femoral vein associated with known Factor V Leiden deficiency, which means that she is more prone to get blood clots. As a result, she is on daily subcutaneous heparinoid, and this is reviewed usually once or twice annually at Guy's and St Thomas' Hospital Haematology Department.*

Dawn has been on her current level of analgesia for her back for some years and is aware of potential drowsy effects should this ever require to be significantly increased.

It has always been evident to me that she is very well motivated to do her job. She enjoys her job and I understand that she is good at it. However, it is evident that her respiratory condition is deteriorating, and this is likely to result in longer exacerbations as we have just witnessed and thus longer periods of sick leave, but in between such exacerbations I cannot see why she should not be able to manage her work as she has for many years."

19. There does not seem to have been any follow up after this report was given.

Occupational Health (OH)

20. Before the TUPE transfer the Claimant was referred to OH. The reason for this referral was not clear but appears to have been for the purposes of reasonable adjustments rather than any absence management process.

21. The Claimant had a long period of absence due to respiratory issues related to asthma. This was between 29 February and 11 April 2016. On 25 April 2016 Ms Croad and Mr Muir had a meeting with the Claimant. The Claimant agreed to be referred to OH provided that the referral was made to a suitably qualified medical doctor and that he had additional information from her which she later provided to Ms Croad so it could be passed on to the OH practitioner.

22. A referral was made to an OH consultancy. As the Claimant was unable to travel far, arrangements were made for her to be seen locally by Dr Valanejad. The Claimant saw him on 5 July 2016 and he then reported back to the consultancy. The OH report was made by Dr Mackay. The Claimant complained that Dr Valanejad was not suitably qualified as he was a Senior Speciality Trainee in occupational medicine and that his background was in trauma and orthopaedics. She sent an email to Ms Croad asking for confirmation that all information had been sent. She did not receive any substantive reply to this and assumed that it had been sent and attended the appointment. Dr Valanejad did not have the additional information she had supplied before him, all he had was the referral form.

23. There was then a delay from the report being written to it being sent to the Respondent. This was because the Claimant did not initially agree to the report being released as it contained errors such as her date of birth and address. It took some time for this to be sorted out and eventually on 26 October 2016 the Claimant agreed for the report to be released even though she was not totally happy with it or the suitability of Dr Valanejad. On 26 October 2016 the Claimant emailed the OH Consultancy) stating that although she was not happy with the reports, and she did not feel that the additional information was fully taken into account, she had had enough of the stress that this had caused her, so she was giving permission for them to be released.

24. The OH report written by Dr Mackay said that the Claimant was not

expecting to receive any new investigations or interventions at that time and:

''Based on the information available to me and the assessment performed on 5th July 2016, Dawn appears to be currently fit for work. Her underlying medical conditions are longstanding and unlikely to improve for the foreseeable future but are currently symptomatically under control with regular medications. It is likely that her asthma problems will continue to present with exacerbations in the future requiring periods of sickness absence. No specific adjustments appear to be relevant that would help her with her attendance in the workplace as any exacerbations of asthma are not particularly work-related…..

In answer to your specific questions please see my responses below;

1. *What is the employee's current fitness for work?*
   In my opinion. Dawn appears currently fit for work.

2. *Is there evidence of an underlying medical condition that may have contributed to this sickness absence?*
   I understand previous absences are due to exacerbations of asthma and underlying medical conditions requiring attendance at A&E or hospitalisation for medical procedures or intensive care.

3. *Does their condition come under the current disability legislation as described in the Equality Act 2010?*
   Yes, In my opinion a number of her conditions will be eligible for cover under the Act at this time. As a result reasonable adjustments are required to be considered to accommodate her.

4. *What effect will this condition have on the person's ability to undertake their current duties? '*
   When her symptoms are under control she is expected to be fit for all aspects other contractual duties and hours. However during an exacerbation. it is likely that she will require to be off sick from work completely to receive appropriate medical attention.

5. *What to the likelihood of a recurrence of the condition?*
   As her condition is longstanding, it Is likely that she will continue to Have exacerbation of her symptoms on an intermittent basis. The nature and pattern of these will be unpredictable.

6. *Is this level of absence likely to continue?*
   Previous twelve months of absence pattern are likely to be the best predictor of her attendance going forward it is therefore likely she will continue to have further absences in the future of this magnitude

7. *Are there any recommendations we should consider that would improve attendance? For example would permanently reduced hours help?*
   In my opinion, a reduction at hours will not necessarily change her sickness absence episodes in the future. From a medical perspective and there is no identifiable work-related entity causing

an exacerbation of her symptoms. In my opinion. the only change would be a reduction in impact to the business with an absence lor fewer hours should she be off sick.

8. *We are committed to supporting employees with disabilities and would welcome any input you can provide regarding potential adjustments that would allow Dawn to give regular and sustained service.*
   Please see the detail in my report. However, further flexibility for tolerating sickness absence thresholds for Dawn in the context of her medical conditions would be the only adjustment I could recommend at title time.

9. *Do you believe that in the context of Dawn's health condition that regular and sustained service is achievable?*
   As aforementioned it is expected that she will have a high period of sickness absence in the future due to her underlying problem. It is clearly then a management decision as to the ability to accommodate this with the requirements and limitations of the service".

25. In the period between the Claimant seeing OH and the report being sent to the Respondent, the Claimant had further absences from work between 20 September to 12 October and 17 October to 23 October 2016 for the insertion of a new line. These absences were to do with problems with the line and were not for asthma.

26. This led to the Respondent inviting the Claimant to a meeting in November 2016. The invitation was initially sent by text on the Friday 17 November 2016. The purpose of the meeting was not explained in this text message. The Claimant did not normally work on a Friday. An email was sent later that same day which the Claimant did not read until the Monday when she was next working. The email said:

"Sickness Absence
As you are aware. you have had a significant number of absences from work since 1st April 2015 resulting in approximately 34% absence for 2015/16 and currently 35% for 2016/17.

On April 25th we held a meeting with you to discuss your continuing absence, your health and the need for the Company to obtain a medical report on your health. Following this meeting you consented to the Company referring you to an occupational health practitioner.

Having now received the occupational health practitioner's reports I would now like to invite you to a further meeting to discuss your situation, whether there are any further reasonable adjustments we can make to facilitate improved attendance levels at work and to discuss if there are any other options. The meeting will take place on Tuesday 22nd November at 11.30 am in the West Malling Office. Simon Muir will conduct the meeting and I will be in attendance to take notes, if this time or location is not convenient for you, please contact me to make alternative arrangements.

You are entitled to be accompanied by a work colleague or an accredited trade union representative at the meeting.

I am obliged to advise you that one possible outcome of this meeting is that unfortunately, your employment may be ended If we are unable to facilitate appropriate arrangements to secure improved attendance levels".

27. The meeting was on Tuesday 22 November 2016, the Claimant having read the letter only the day before.

28. The meeting started by Mr Muir stating the purpose of the meeting:

"Explained the purpose of the meeting was to have a discussion on the way forward due to high levels of sickness absence and after a recent medical report. He explained that the year to date it is % higher than last year but still significantly higher than needed".

29. The Claimant explained that she had dispensed with her medical team and now had a new team based at Hammersmith Hospital. She had a new type of '*pioneering*' line which she was confident would reduce the issues around infection and clots that the previous type of line had. Mr Muir said that "*whilst we understood her situation we cannot as a business continue to support such high levels of absence*". When the Claimant told Mr Muir about her new team and her new treatment, he twice asked during the meeting if the Claimant felt that the new team and new treatment would reduce her absence levels and both times the Claimant said that she did think this was the case. Mr Muir made no comment in response.

30. The meeting ended with Mr Muir and Ms Croad telling the Claimant that a further meeting would be arranged, and, in the meantime, they would be looking at "*the way forward"*. The minutes were emailed to the Claimant on 9 December 2016.

31. The Claimant was at work consistently between this meeting and the next meeting on 10 January 2017 with no recorded absences.

32. Again, on a Friday, when the Claimant did not normally work, the Respondent sent her an email to tell her that the resumed meeting would take place on 10 January 2017. Again, the Claimant had only one day's notice of the meeting. The letter reiterated her right to be accompanied but did not contain the warning that her employment might be terminated.

33. At the resumed meeting, Mr Muir asked the Claimant if she had any thoughts about the way forward since the last meeting. She replied, *"I can't see how you can help me not going not hospital"*. Her representative pointed out that she had had no absence from work since the previous meeting. The Claimant reiterated her concerns about the OH report including that it had been written by a different doctor to the one who examined her. The Claimant's representative suggested the Claimant could be referred back to OH, the Claimant said she did not want to see the same doctor again but did not say she would not see a different doctor.

34. There was a short adjournment after which the Claimant was told her

employment was terminated. The letter confirming the termination of her employment said:

"You attended an informal medical capability meeting on 22nd November 2016 and during the meeting you were accompanied by Mike Dark.

Prior to that meeting we wrote to you regarding your absence record, and you were advised that a possible outcome of the meeting was dismissal if we were unable to facilitate arrangements to secure improved attendance arising out of your asthma and associated conditions

The minutes of our meeting which were sent to you on 9 December 2018 are attached again for your information.

You said in the meeting that you thought that your attendance would Improve with a new medical turn in place. This opinion was not however supported in the OH and GP reports which we discussed. which talked of a deteriorating condition.

We discussed your attendance record and the adjustments that had already put in place including the change to your working hours. But this had not rectified the problem. We mentioned a period to reflect in order to consider any other change that could be made.

We reconvened the meeting yesterday, Tuesday 10th January 2017, and there were no further adjustments that you proposed or which we could identify as being likely to assist. The meeting was adjourned so that l could consider the way forward.

When the meeting reconvened, you were informed that l have regretfully come to the conclusion that your employment was being terminated on the around: of Ill health incapability. as you are unlikely to be able to undertake your role on a consistent basis in the foreseeable future. I the following into account when reaching this decision:

1) That you have been advised that your condition is unlikely to Improve

2) That there are no adjustments that can be made to enable you to provide more consistent attendance

3) Your attendance record for 2016 which we believe is unsustainable

4) The lack of any alternative role that we can provide you.

You are entitled to 12 weeks' notice which will be paid in lieu. Your termination date will therefore be the date of this letter.

35. The Claimant appealed on 16 January 2017 and Mr Townsend heard the appeal. The grounds of appeal were that:

    a. There had been insufficient consideration of the circumstances affecting her absence in 2016, in particular (a) her expectation that her condition would improve now that it was being treated by an

expert team at Hammersmith Hospital, (b) Mr Muir's acknowledgment that she was capable of performing her duties when she was at work, (c) Deborah Croad's statement that TIAA would do everything it could to support her, (d) acceptance that her recovery from the line infection would be delayed because of the change to her treatment regime at the time, (e) a time delay of 14 days in getting the minutes to her, particularly as Mr Muir had concluded the meeting by asking her to think over what had been discussed.

b. There had been a failure as she had told the Respondent that she was not satisfied with the OH assessment on the basis the doctor was not suitable qualified and did not have all the information when he examined her.

c. There had been a failure to comply with the procedures laid out in the Capability and Performance Management and Sickness Absence Management Procedure (Section 35 and 36 of the Employee Handbook respectively).

d. The Respondent had not considered that she had not been absent since 21 October 2016 after which she returned on a phased return and resumed her normal hours on 21 November 2016 which she said demonstrated the effect that better treatment was having on her condition.

36. On 18 January 2017 the Respondent invited her to an appeal meeting on 30 January 2017, the letter said:

"With regards to the grounds for your appeal, please ensure that you bring any evidence that you will rely on to support your appeal. If you feel that there is any further information which you would like the organisation to consider, or if you would like to discuss your situation in any more detail, please do make use of this right of appeal and we will be happy to consider those points further and whether they alter the decision at all".

37. This was repeated in a letter on 25 January 2017 when alternative arrangement as to the location of the appeal meeting were given to the Claimant.

38. The Claimant had prepared a statement for the appeal, which she read to Mr Townsend. The first part of the statement referred to complaints she had about various matters during her employment. They are not relevant to this decision so are not set out. In relation to her appeal, she said the following:

a. She had had the new team at Hammersmith resulting in less issues with her line. She pointed out that most of her sickness in the previous year were to do with issues in relation to her line and not asthma.

b. That clients valued the expertise and professionalism she brought to her work.

c. That the Respondent had not assisted her when she had issues with OH even though Ms Croad had said she would do everything she could to help.

d. The new regime for the line had only been in place for a week and there was an appointment booked for February to review.

e. there was a 14-working day delay in the Respondent send her the minutes which had prejudiced her.

f. The policies had not been complied with.

g. Her dissatisfaction with the OH doctor, the assessment, and the fact that her documentation was not before the doctor during the examination and the lack of support from Ms Croad.

h. She allowed the OH report to be sent to the Respondent only she was stressed with going backwards and forwards in correspondence with them.

i. She said, *"I do not understand how the doctor can make a statement that my condition is likely to deteriorate when he does not know enough about my condition in the first place. I have been on oxygen for 14 years now and I would have thought he should have got additional advice from my Respiratory Consultant in London who is in a better place to know how my condition is likely to proceed in the long term. There have been new drugs that have come out in the middle of last year for severe asthmatics which have showed good results and I am hopeful that I will be able to get onto early trials of these*"

j. She referred to having absence from asthma up to April 2016 and no absences for this reason after this time. The other absences being due to problems with her line which had not been resolved with the new team and new line.

k. it was unreasonable to be told the day before the meeting that a formal meeting was due to take place, to then have the meeting reconvened 7 weeks later with no further correspondence between apart from the notes being sent out 14 working days later.

l. That a fair and reasonable procedure had not been followed. She did not have a return-to-work interview, she had not been told of her Bradford Factor score, that there had been no prior meetings under the procedure, and she had been supported by phased returns to work but there was no agreed or structured programme. She said she could not consider other options if she did not know what if anything was available.

m. She said that the OH and GP reports were not specialists in the field of severe asthma and so additional information should have been sought by the OH consultancy to make an informed prognosis of her condition.

n. That there are new drugs that are coming out which have showed good results in slowing down the progress of the disease and giving a better quality of life.

39. There was a discussion about the suitability of the OH doctor and other matters the Claimant had raised. Mr Townsend said he would contact OH. This he did in a letter dated 16 February 2017 written by Ms McFarlane (HR). This letter related to her concern about the suitability of the doctor she saw and whether he had the addional information she had provided at the time of assessment. Confirmation was sought as to whether these matters affected the final report. The letter made no reference to the Claimant's view that her new team and new treatment would reduce the absences relating to her line. Ms Caroline Roberts, Service Delivery & Quality Manager replied:

"I in fact dealt with Dawn's concerns last year. Dr McKay reviewed all the information and reports and we also paid for the doctor at the Maidstone clinic to review all the information. A subsequent report was sent to Dawn and Deborah Croad on 31.10.16 clarifying this. I am more than happy to resend the report if you do not have it."

40. There was no further meeting with the Claimant and her appeal was dismissed by letter dated 22 February 2017:

"In summary, the grounds of your appeal were that insufficient consideration was elven to the circumstances affecting your absence. that there was a failure to take account of your dissatisfaction with the Occupational Health report and an alleged failure to follow the Capability and Performance Management policies and Absence Management Procedures.

In our letter inviting you to the appeal hearing, I Informed you of your right to be accompanied, and you attended with Michael Dark.

I have attached the notes of our meeting to this letter which contain details of our discussion.

I am now writing to inform you of my decision.

<u>You state that insufficient consideration was given to the circumstances affecting your absence in 2016.</u>

You cite a number of different factors which you thought had not been sufficiently considered. These included your view that your condition would improve, an acknowledgement that you were capable of performing your duties when at work, a statement that TIAA would do anything to support you, an acceptance that recovery would be delayed and a time delay in getting the dismissal minutes to you.

In short. I have concluded that sufficient consideration was given to all of these factors.

Your view that your condition would improve was measured against the

medical and other evidence that indicated that this was unlikely.

The fact that when at work you were capable of performing our role, ignores the reason for your dismissal, namely your exceptionally high absence record.

The statement that TIAA would support you is borne out by by the adjustments that were made to your role.

The fact that recovery would be delayed had already been taken into account prior to the decision to dismiss you, and I do not see that you suffered any prejudice in the delay in getting the minutes of the dismissal meeting to you. given that you them prior to the appeal meeting.

The first ground of your Appeal is not upheld.

2. You raised concern with regard to the Occupational Health doctor not being suitably qualified in your condition or possessing the supplementary medical information.

I have been in communication with the Occupational Health Consultancy and their response is "the purpose of the Occupational Health assessment for Dawn was to assess her fitness for work and not for an opinion on her medical conditions. this was carried out by a qualified Occupational Health doctor.

With regards to the supplementary medical information being available to the Occupational Health doctor you saw, the response from the Occupational Health Consultancy Is that "Dr McKay reviewed all the information and reports and we also paid for the doctor at the Maidstone clinic to review all the information. A subsequent report was sent to Dawn and Deborah Croad on 31.10.16 clarifying this".

The Occupational Health report was unambiguous regarding your likely future attendance level. You were requested within the appeal confirmation letter to "ensure you bring any evidence that you rely on to support your appeal.....'. At the appeal you did not provide any further medical evidence and therefore the above Information leads me to conclude that your case was very much based upon your own view regarding your future attendance levels.

I had considered whether it was appropriate to seek a further report but in light of the responses from the Occupational Health Consultancy above and having taken appropriate advice. I do not consider that this would change the outcome.

41. *The fact that you did not agree with the conclusions attire Occupational Health Consultancy does not, in the absence of something demonstrating that it Is unreliable, make me consider that a another report should have been obtained.*

Your second ground is not upheld.

3. You refer to the procedures on Capability and absence management, and I have reviewed those procedures.

The reality is that your record is not one of sporadic absence (which would be reviewed by the Bradford Factor calculation and the Short Term Absence procedure), or that of permanent Incapacity to carry out your role, (renewable under long Term Absence procedure) but of an inability to carry out your role on anything like a consistent basis. The fact that the causes of your absence differ does not distract from the fact that their extent is disruptive to the business, and the procedures that were adopted have to be seen in this light.

Your third ground is not upheld.

4. You stated that there was a disregard that your last day of absence was 21 October 2016 after which you returned on a phase return to work, returning to your normal hours on the 21st November which demonstrates the affect that better treatment is having on your condition.

I accept that where has been an Improvement In your attendance more recently but that is against a background of a period of reduced hours prior to your return to work and is insufficient in my view, to call into question the reasonableness of the decision to terminate your employment on 11 January.

Your fourth ground Is not upheld.

I therefore reject your appeal. You have now exercised your right appeal. This decision is therefore final."

Submissions

42. Both parties gave submissions, given the extent of the Respondent's submissions they are not set out here. However, both parties' submissions were considered in detail along with the case law referred to.

Conclusions

43. Having found the factual matrix set out above the Tribunal have come to the following conclusions on the balance of probabilities. The relevant law is set out under the different causes of action. The case law has not been set out for reasons of proportionality, due to the number of cases cited in submissions. The case law was however considered by the Tribunal when reaching its conclusions.

Unfair dismissal

Law

Section 98 of the Employment Rights Act 1996, which provides:

"(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show -

(a) the reason (of, if more than one, the principal reason) for the dismissal, and
(b) that it is … a reason falling within subsection (2) ….
(2) A reason falls within this subsection if it -
(a) relates to the capability … of the employee for performing work of the kind which he was employed by the employer to do.

…

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

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case."

44. The reason given for dismissal was capability. The Tribunal looked carefully at the process adopted by the Respondent. As already found, the Respondent did not use either of the two policies available to it. The Tribunal can understand why the Respondent chose not to use the Bradford Factor which is part of the short-term absence policy as an adjustment given the Claimant's disability. What the Tribunal does not understand is why the Respondent did not use the rest of the policy with just this amendment to it. For example, the Respondent could have devised another method of assessing the Claimant's absence levels which would take into account her disability. It did not do this. The Respondent having decided not to use the policies did not write to the Claimant to explain this, or to explain what procedure had been put in in its place. The Claimant therefore did not know what was going to happen. This is something she raised at the appeal.

45. The short-term absence policy provides that once the Bradford Factor calculation reached 300 points and a failure to improve after informal meetings under the policy occurs, then the formal Capability and Performance Management procedure ("CAP") should be implemented. The policy also provides that where there is an underlying medical issue, then advice should be sought from a medical professional.

46. CAP has a policy statement that the standards of performance should be understood by employees. The procedure starts with an informal management meeting. It was accepted that there was no informal process. Ms Croad rightly said in her evidence, that the meeting on 25 April 2016 was not part of the informal process under this policy (although Mr Townsend disagreed with this). The Respondent went straight to the formal management part.

47. The Tribunal looked at the letter inviting the Claimant to the meeting on 22 November 2016 which is set out above. From this letter it appears that at the time this letter was sent, Ms Croad did consider the 25 April meeting to be part of this process as it is referred to. The meeting was stated to be to

consider any further reasonable adjustment to facilitate improved attendance levels and any other options. The Claimant was entitled to be accompanied and there was a warning that dismissal may be a possible outcome.

48. During the meeting on 22 November 2016, it was said that the business could not continue to tolerate such high levels of absence. In this meeting the Claimant told the Respondent about her new medical team and the '*pioneering'* new line she had fitted which she believed would reduce the absences relating to the line going forward. There was no reaction to this information save for the Claimant begins twice asked if she felt it would improve things and her answering that she felt it would. There was no conversation about how the Respondent had '*been there before'* with the Claimant saying things would improve which did not happen. Mr Muir said he had the sense that the Claimant felt that with the new team in place her sickness levels would reduce which the Claimant agreed with. There were no questions about what the new line was, how it differed from the old line or anything like this. The meeting ended with Ms Croad saying that she would be "*speaking to Simon to agree the way forward*".

49. The Tribunal finds that what was said to the Claimant during the meeting was insufficient to put her on notice that she should provide medical information about the new line and the new team. It appeared that Mr Muir and Ms Croad simply accepted what she was saying. The Claimant would not have had time to get any other information prior to this meeting given the short time between the invite and the meeting.

50. On 6 January 2017 (on a Friday when the Claimant did not normally work), the Respondent sent an email to the Claimant to reconvene the meeting held in November. The letter said that it was "*to discuss any further thoughts and then for a decision on the way forward to be made*". This was only seen on the Monday 9 January 2017, the day before the meeting. This email again gave the right to be accompanied but this time did not say that dismissal might be a possibility.

51. The Tribunal finds that the procedures used by the Respondent were flawed to an extend that the dismissal is unfair. Not only did the Claimant not know what the procedure was that was being used, she not unreasonably believed that the words "*a decision on the way forward*" were positive given that her explanation about her new team and new line was not challenged in the November meeting.

52. The Tribunal is also troubled by the medical information the Respondent relied on. By the time of the November meeting, the Claimant had not had any absence from work for her asthma. The last absence for this condition was in April 2016. All other absences (taken from the dates listed in the bundle) from then to the November meeting were for issues relating to her line. The GP report relied on was over a year old and the Occupational Health report was six months old. The OH report did not consider issues relating to the line at all. The Tribunal accepts that there was a considerable delay in the OH report being sent to the Respondent. The Tribunal finds that by then the medical information was out of date and that the Respondent should have considered obtaining an updated report

considering what the Claimant was now saying.

53. It may well be that in the period after her dismissal the Claimant's optimism about the new line and her new medical team were misplaced and that she continued to have absences for this, however at the time of the dismissal and appeal this was unknown. The Tribunal limits itself to the medical report from the GP and OH as set out above.

54. In its evidence to the Tribunal the Respondent said that the issue with the Claimant's absence was the unpredictability. It said that this led to difficulties in allocating work. The Respondent had for some time, been giving the Claimant work which was not time sensitive. This is borne out by the Claimant's evidence that on returning from a period of absence the work was still there and her complaint that she was passed over for some types of work.

55. There was no documentary evidence of the difficulties the Claimant's absences caused although the Tribunal accepts that any absence will cause inconvenience for an employer. There appears not to have been a particular trigger or any analysis or report about the difficulties the Respondent had. In his evidence Mr Muir could only give one rather vague example of a client ringing up to find out where the report was which the Claimant was working on. The Claimant says this was because she was waiting for information from the client to compete the report. The Respondent did not discuss these issues with the Claimant, so she had no opportunity to rebut them. She provided the explanation that she was waiting for the client to provide information at the hearing, and this was not challenged. The Claimant should have been given the opportunity to challenge these matters and to have explained to her why, after so many years, things had changed and why the Respondent decided to initiate absence procedures.

56. The Tribunal finds the dismissal to be unfair because of the reasons set out above.

<u>Direct disability discrimination (s13 Equality Act 2010)</u>

Law

S.13(1) EqA provides:

(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

s136 Burden of proof

(1) This section applies to any proceedings relating to a contravention of this Act.

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3)But subsection (2) does not apply if A shows that A did not contravene the provision.

57. The comparator relied on by the Claimant is a hypothetical comparator. The Claimant refers to the capability policy, which states that an employee should not be dismissed at a first formal meeting absent exceptional circumstances, and that it was not applied to the Claimant whereas it would have been applied to a hypothetical comparator with no disability. It is Claimant's position that the hypothetical comparator would not have been dismissed at the January meeting but would have been placed on a review process pursuant to the short-term absence policy.

58. The respondent submitted that in the comparator's case, where there was no underlying health condition, the Respondent's short term absence procedure would have been applied, and the comparator would have been dismissed, long before 10 January 2017.

59. The Tribunal accepts the submission by the Respondent and the Claimant's claim of direct disability discrimination is dismissed.

Reasonable adjustments

Law

ss.20 – 21 EqA as relevant:

> S.20(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.
>
> S.21(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.
>
> S.21(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.

60. The Claimant relies on a PCP applied by the Respondent "that a certain percentage of absences from work world result in dismissal which placed the Claimant at a substantial disadvantage in comparison to her colleagues who were (and are) not disabled. The Claimant's disability meant that higher than normal absence levels are reasonably likely". (ET1 grounds of resistance). In the case management order this was recorded: "that a certain level of absences would result in dismissal".

61. Considering the PCP first, the Tribunal find that there was never a precise percentage or level of absence which would be tolerated by the Respondent. The Tribunal finds that the PCP is not made out.

62. If the Tribunal had found the PCP to be made out the following findings would have applied.

63. The Claimant relies on the following adjustments as being reasonable:

a. To delay deciding on dismissal to see if the improved medical care described by C led to a sustained reduction in absence.
    i. The Tribunal would have found this to be a reasonable adjustment.

b. To delay deciding on dismissal pending the obtaining of up-to-date medical evidence.

    i. The Tribunal would have found this to be a reasonable adjustment.

c. To delay making a decision on dismissal to permit C an opportunity to continue to work the remaining months of the year to reduce her level of absence (i.e., to let the annualized hours system run and assess whether she has missed the target at the end of a full year rather than just looking at a part year).

    i. Given the time to be made up and where it was in the year, the Tribunal does not find this to be a reasonable adjustment

d. To discount absence related to C's IV line issues. and/or

    i. Given that the issues regarding the IV line were related to her asthma (it provided the means for medication to be given) the Tribunal does not find this to be a reasonable adjustment.

e. To continue to tolerate C's level of absence going forwards.

    i. The Tribunal would have found this not to be a reasonable adjustment. However, the Tribunal does find it would have been reasonable to wait to see if the medical information from her new team corroborated the Claimant's optimism about her treatment and prognosis going forward.

Discrimination arising from disability

Law

S.15(1) EqA provides:

(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.

64. The Respondent accepts that the termination of the Claimant's employment was something arising from her disability. It sought to justify dismissal on the basis that dismissal was a proportionate means of achieving a legitimate aim. This is where the first difficulty for the Respondent arises. The case management order of EJ Sage (20 November 2017) in which the issues were set out does not define the legitimate aim. The grounds of resistance are sparse in its defence to the discrimination claims. There is no legitimate

aim set out. At the Tribunal the Respondent submitted that the legitimate aim: "*The Respondent aimed to run an efficient business and protect its employees from being required to take on additional work to cover for the absences of other employees"*. This is not pleaded. This was also not discussed with the Claimant. The Tribunal accepts the Claimant's submissions that there is no evidence to support this legitimate aim or that the means chosen namely dismissal were proportionate.

65. The comments made by Mr Muir about difficulties in allocating work are vague, generalised, and anecdotal. He could only give one example of a client chasing up a report. Given that time critical work was by and large not given to the Claimant, it was not a case that other staff were being asked to take on additional work to cover for the Claimant's absences. There was no evidence of any complaint or grievance from one of the Claimant's colleagues about this.

66. Although the Tribunal's primary position is that no legitimate aim has been pleaded which would render the Respondent's arguments otiose, the Tribunal went on to consider whether it would have been a proportional means of achieving a legitimate aim, had it been pleaded. The legitimate aim now relied on is *"The Respondent aimed to run an efficient business and protect its employees from being required to take on additional work to cover for the absences of other employees. That was a legitimate aim*" (paragraph 52 Respondent's closing submissions).

67. The Tribunal finds that on the evidence provided to it, that dismissal could not objectively be said to have been a proportionate means of justifying this legitimate aim because there was no evidence that other employees were required to take on extra work as the Respondent gave the Claimant work that was not time sensitive, and it was waiting for her when she returned from a period of absence. This part of the Claimant's claim succeeds.

68. A remedy hearing will be listed, and the parties will be notified in due course. The representatives indicate they would be providing the Tribunal with draft directions for the remedy hearing, and these should be provided within 21 days of this judgment being sent to the parties.

Employment Judge Martin
Date: 09 March 2022