EMPLOYMENT TRIBUNALS

Claimant: Ms CC McKenzie

Respondent: University Hospitals of Leicester NHS Trust

On: 11 - 18 March 2022

Before: Employment Judge Ahmed

Members: Mrs JC Rawlins
Mr A Wood

At: Leicester (via CVP)

Representation
Claimant: Mrs Rachel Barrett of Counsel
Respondent: Ms Anisa Niaz-Dickinson of Counsel

JUDGMENT

The unanimous decision of the Tribunal is that:

1. The complaints of discrimination arising from disability and a failure to make reasonable adjustments both succeed.

2. The Claimant was unfairly dismissed.

3. The issue of remedy is adjourned.

REASONS

1. In these proceedings the Claimant brings complaints of disability discrimination, in particular discrimination arising from disability and a failure to comply with the duty to make reasonable adjustments, and a complaint of 'ordinary' unfair dismissal.

2. The effective date of termination is agreed as 14 August 2020, the Claimant having been dismissed by a letter dated 29 May 2020 and required to work out her notice. The reason relied on for dismissal is 'capability', which is conceded as having been established as a potentially fair reason. The ET1 Claim Form was presented to the Tribunal on 16 October 2020. The Claimant entered ACAS early conciliation on 20 August 2020 and received an early conciliation certificate on 20 September 2020.

3. The Claimant suffers from two conditions both of which are conceded as disabilities, namely migraines and anxiety/depression. The relevant knowledge of both disabilities is now also conceded.

4. In coming to our decision we have taken into consideration the evidence of all the witnesses, the documents in the agreed bundle, the contents of the witness statements and the submissions made by Counsel on both sides, to whom we are grateful. This decision represents the views of all three members of the Tribunal.

5. Oral evidence on behalf of the Claimant was given by herself only. Evidence for the Respondent was given by the following witnesses:

Ms Natalie Nelson (Ward Sister and the Claimant's line manager)

Ms Lisa Lane (Head of Nursing and the dismissing officer)

Ms Joanne Hollidge (Head of Nursing for Intensive Care at the relevant time and the Appeal officer).

THE FACTS

6. The facts of the case are not unless otherwise indicated in dispute. The Claimant began her employment with the Respondent in November 2010 as a Band 5 Staff Nurse. She was promoted to a Band 6 Deputy Sister role in December 2015. The Claimant's main duties involved the clinical care for patient's needs on her Ward. As a Deputy the Claimant assisted the Ward Sister in some of the management duties. The Claimant was one of several Nurses who were assigned as a 'bleep holder'.

7. From about August 2010 the Claimant lived with her grandmother who suffered from dementia. In 2011 the grandmother's dementia became more prominent and she was later diagnosed with Alzheimer's. Consequently, the Claimant's grandmother was unable to look after herself. Her more immediate family were either unwilling or unable to look after her. Given the close relationship the Claimant had enjoyed with her grandmother, and the fact that it was the grandmother's wish for the Claimant to live with her, Ms McKenzie became the de facto carer.

8. Over time the caring responsibilities began to take their toll on the Claimant's own health in particular on her stress and anxiety levels. An occupational health report of 18 October 2017 confirmed the Claimant's own view that providing care for her grandmother was the main cause of stress and was likely to be contributing to the increased frequency in the migraines that the Claimant already suffered from.

9. In or about 2018 the Claimant's grandmother was diagnosed with cancer which was considered inoperable. In the same year the Claimant's aunt moved in with the two of them but had to leave due to her own medical issues. The Claimant began taking antidepressant medication in or about November 2018. By that stage the Claimant's grandmother also began to suffer from severe lack of mobility. At a capability meeting in April 2019 Ms McKenzie explained to her employers the difficulties in trying to balance home and work life as well as manging her own mental health. It is acknowledged though that the Claimant received support from line manager, Miss Natalie Nelson, a Ward Sister of many years of experience.

10. By March 2020 the Claimant's aunt moved in and became the main carer for the grandmother. Unfortunately, she had to leave later in the year for her own personal medical treatment but gave assurances to the Claimant that she would return as and when she was able to do so.

11. During her employment the Claimant suffered regular episodes of migraine attacks which resulted in absence from work. These absences typically lasted one or two days. Miss Nelson was aware of the frequency of these attacks. The Claimant tried various medication including both prescription and non-prescription medication. Her medical records show she was prescribed migraine prophylactics such as Propranolol and Amitriptyline neither of which proved particularly effective. She was later prescribed Topiramate which she then took on a long- term basis. For acute attacks she was prescribed and used Sumatriptan which whilst effective unfortunately caused drowsiness. The Claimant decided that Sumatriptan could not be appropriately and safely used whilst at work given the side effects and so it was only used after work. She was also prescribed Sertraline for depression in August 2018.

12. The Claimant's contract of employment incorporates the Respondent's Absence Management Policy ('AMP'). The AMP defines 'excessive absence' as a situation where an employee has had sickness absence as defined by the 'trigger' points. The "Trigger" is defined as 3 episodes or more than 10 days or more than 2 working weeks during any rolling 12-month period. Alternatively the Trust may set attendance targets outside of the triggers.

13. Clause 5.7.1 of the AMP is headed 'Reviewing excessive Absence' and states:

"Where an employee has breached Trust triggers, or their set targets:

a) A management referral to Occupational Health should be made, as appropriate, to obtain up to date health advice which should be discussed with the employee as appropriate.

b) Where a target is breached a hearing must be convened and could result in the issue of a formal sanction and target for improvement.

c) For absences due to a chronic underlying health condition, in accordance with the employer's obligations under the terms of the Equality Act 2010 managers must consider reasonable adjustments as outlined in Section 5.16.

d) Where the 3 episode trigger is being consistently hit annually over a period of time, but targets are met or where there is a pattern of sickness absence ……. managers may give consideration to discussing this formally with the employee at a Hearing."

14. Clause 5.8.1 of the AMP deals with setting of targets for review and states:

"While the ideal is for the employee to attain full attendance, the aim should at least be to ensure that the employee attains a level of attendance that brings them below the trigger points which the policy identifies as 3 episodes or more than 10 working days (or more than 75 working hours for employees working flexible working patterns) in a 12 month period …."

15. The Claimant's sickness record for present purposes began in 2010. Since then she has had a total of almost 300 days of absence. The vast majority of these absences have related to her disabilities. The Claimant's absences during the 12 months leading to the final (Stage 3) hearing totalled more than 85 working days. The Claimant's level of absence was 8 times higher than the AMP target.

16. In November 2013 the Claimant was issued with a first written warning for absence for 4 periods. Most of them related to migraine.

17. In September 2014 the Claimant was issued with a first formal written warning as she had breached her target of more than one episode of sickness. Fresh absence targets for attendance were set.

18. In 2015 it was found that the Claimant had met her absence targets and the warning therefore expired. From November 2015 the parties agreed to monitoring of the Claimants' absences in four monthly periods. She was allocated improvement targets which consisted of absence of no more than one episode of two days of each absence to continue until the Claimant was no longer triggering the process.

19. In March 2017 the Claimant recorded 4 absences totalling five days in the previous 12 months and so the targets set were breached. The factors that were identified as the causes of stress were the Claimant's circumstances at home. The Claimant was issued with a written warning.

20. Later in 2017 the Claimant was referred on to occupational health on various occasions. There were three occupational health reports in that year (none of which we need to refer to here) and in addition to the other absences the Claimants also had a lengthy absence for a fractured ankle which required surgery.

21. In 2018 the Claimant reduced her hours by agreement through a flexible working arrangement.

22. As a result of absences in the latter part of 2017 and early 2018 the Claimant had breached her targets and as a consequence she was required to attend a Level 2 hearing in March 2018. On that occasion instead of a final written warning being issued as would normally be the case the first written warning was re-issued.

23. In September 2018 the Claimant was absent on long term sickness absence due to anxiety and depression until 21 January 2019.

24. The Claimant attended a Level 2 absence meeting in April 2019 when she was issued with a final written warning which was to remain live on her record for 24 months. She was set the following target:

1st year: no more than 2 episodes of 3 days total in each 4 months

2nd year: no more than 1 episode of 2 days in each 4 months.

25. The Claimant was absent due to migraine on 10 June 2019, from 5 – 19 August for an ankle problem and for migraine on 23 September,13, 17 and 21 November 2019. She was absent for depression from 9 December 2019 to 11 March 2020. On her return she attended an occupational health appointment. We will deal with their recommendations below.

26. The Claimant had two further periods of absence on 25th March 2020 and 25th April 2020, the first apparently for sinusitis (we shall say more on that later) and for migraine.

27. The reason for the long-term depression absence from December 2019 to March 2020 was because the Claimant was having various medical issues and decided, without taking medical advice, to discontinue her anti-depressant

medication. She then began to suffer from severe withdrawal symptoms. Consequently, in December 2019 she suffered a setback with her mental health. She was off sick for 70 days in total. The Claimant resumed her medication and began Counselling session with AMICA in January 2020. She also made a self-referral for Cognitive Behavioural Therapy (CBT).

28. Ms McKenzie attended a Level 3 sickness absence hearing on 22 May 2020 following which she was dismissed. Her subsequent appeal against dismissal was dismissed.

29. We should say a little as to the absence on 25 and 26 March 2020 for sinusitis. The Claimant believes that at the time she could have contracted Covid-19 and thus in line with the practice at the time such absence should have been discounted. She had an antibody test at work in June 2020 which showed that she had the antibody for the virus. She gave a copy of the antibody result to the panel at the appeal hearing in July 2020 but the final decision was unaffected.

30. As to the migraine on 25 April 2020 the Claimant believes that the type of PPE wear that she was using affected the frequency of her headaches. Having to continuously wear a face mask over 12-hour shifts (as well as the type that was supplied) with very few opportunities to hydrate contributed she believes to the migraines. The Respondents say that there were adequate water facilities and reasonable opportunities to hydrate. We conclude that in the pressurised environment at the time the opportunities to hydrate were limited.

31. In the Claimant's occupational health report of 12 March 2020 Dr Kneale, Consultant Occupational Health Physician, said this of the Claimant:

"In my medical opinion Ms McKenzie is fit to return to work.

"I would recommend that she has a phased RTW plan starting at 50% of her hours and gradually increasing over a 4 week period to her normal role. It would be advisable to risk assess her duties at the start of the plan and gradually increase the demands placed upon her.

The aim is for Ms McKenzie to return to her full normal duties without restriction. I would recommend that she has a mentor and has regular review meetings.

We have had a long discussion about her mental health and the personal issues which have impacted negatively upon her psychological wellbeing. These involve deeply private issues which at the time, in my medical opinion, would have been difficult to express however Ms McKenzie is now taking professional steps to resolve these longstanding issues.

We have discussed her job role and some of the difficulties that arose before she was absent from work. Ms McKenzie is adamant that she wishes to return to the full role of deputy sister and I have urged her to speak further with her line manager about the difficulties she has experienced.

The aim is for Ms McKenzie to return to work as a Band 6 deputy sister through the phased plan as described above. I have discussed her mental health issues and that her main priority should be her health. *I have suggested that if she is not successful after 3 months then a temporary redeployment to a Band 5 role would be the best way forward while she resolves her ongoing psychological issues*. Perhaps this is an issue for her manager to discuss with Ms McKenzie." (emphasis added).

32. On 22 May the Claimant attended the Level 3 Sickness Absence meeting. It was chaired by Ms Lane. The Claimant was represented by her trade union representative. Unusually there are no notes of the meeting. The Respondent's

practice is to include the discussions in the outcome letter. The following passages from the outcome letter of 29 May 2020 set out the reasons for dismissal:

"The panel questioned your most recent absences which were due to Migraines and Sinusitis, you stated that you have suffered with migraines for years and regularly see your GP ……. The panel questioned whether you were under the care of a specialist given the severity of your migraines and you confirmed that you were not. You stated that your GP did not refer you to a specialist despite your request and instead changes your medication accordingly but this isn't working. You also stated that the PPE equipment you are required to wear at work exacerbates this and you could not guarantee that this would not cause you future absences. We discussed your aunt moving in to support you with your caring responsibilities, for your grandmother. Management questioned whether this was a permanent situation as your aunt has previously moved in to support you on a permanent basis but this did not work out. The panel also questioned how you would cope if your Aunt's support was no longer there. You stated that this time you were confident the move is permanent and that on this occasion your aunty would stay to support you. The panel noted that your last long-term absence was due to you having stopped taking your medication after you returned from being away on holiday. You stated that this was the case on that occasion but that moving forward you would not come off your medication again without first consulting with your GP. The panel then asked how you could reassure us that your absence levels would improve in the future and that you would not breach your targets. You stated that you feel that you are in a different place. You are able to get up on time now and can leave the house unaccompanied which is not something you were able to do before. You are attending sessions with AMICA and are awaiting your CBT counselling which you feel will help you further. You mentioned the difficulties you have with the PPE mask and that this was a concern for you breaching your targets. Management stated that the mask is there to protect you and that you needed to ensure you drank water regularly and had your breaks which would support you with this. Finally, management stated that they have supported you throughout your absences and on three occasions they have been in the same situation with your long-term absence, this leaves them sceptical that this occasion is different. You understood this and acknowledged the levels of support that management has given you. You stated that you wanted to continue to work at UHL and hoped that you could (sic)….

It is clear that you have been given the necessary support throughout your absences and that in some cases management have gone above and beyond to help you maintain your attendance at work. Despite this level of support your absences have consistently fallen below the Trusts targets and this is not sustainable moving forward. You could not provide the panel with reassurance that in the future your absence levels would improve, particularly the issue regarding the need for you to wear PPE and that you felt this could cause you to breach your targets. You did not acknowledge that there were measures that you could take yourself, to minimise the impact this PPE equipment has on you; this raised concerns to the panel in relation to your future attendance at work. Management confirmed that on 3 prior occasions they have supported you with your long-term absences and that this is not something that they are able to support moving forward. You have not performed the full duties of your band 6 role for some time and these duties are critical. We discussed the option of redeployment into a band 5 role but noted that this would still require you to work in other areas and wear the appropriate PPE equipment which, therefore would not mitigate any potential future absences. We recognise the positive steps you have taken to keep yourself well and at work over the last few weeks and hope that you continue with these steps moving forward. Having considered all the information presented, I concluded that your sickness absence levels continue to be unacceptable and are impacting the ward and your team causing difficulties for your area. I therefore advised you that the Trust was left with no alternative but to serve you notice to terminate your employment on the grounds of ill health capability."

33. The Claimant appealed the decision to dismiss. Following an appeal hearing on 21 July 2020 chaired by Ms Jo Hollidge, Head of Nursing, the appeal was dismissed.

34. On 16 October 2020 the Claimant presented her Claim to the Tribunal.

THE ISSUES

Unfair dismissal

35. Did the decision to dismiss the Claimant fall within the Band of reasonable responses? (The Claimant accepts that the Respondent has established that the Claimant was dismissed for a potentially fair reason, namely capability)

Disability Discrimination - out of time issue

36. Whether the complaint was presented to the Tribunal before the end of the period of three months beginning when the act complained of was done as required by s123(1)(a) Equality Act 2010 ("EA 2010") and if not whether the Tribunal should consider the complaint on the ground that it is just and equitable in all the circumstances to do so pursuant to s123(1)(b) EA 2010.

The out of time issues relate only to paragraphs 42.2 and 42.4 only.

Discrimination arising from disability

37. Whether the Claimant has been treated unfavourably because of something arising in consequence of the Claimant's disability contrary to section 15 EA 2010

(The alleged unfavourable treatment complained of is dismissal only)

The “somethings” relied on by the Claimant are: not achieving her attendance target, her sickness record and uncertainty about her return to her substantive role

38. Was the above related to her disability-related sickness absence?

39. Whether the Respondent has shown that the treatment was a proportionate means of achieving a legitimate aim pursuant to s15(1)(b) EA 2010?

(The legitimate aim relied on is managing staff absences in order to maintain an appropriate level of service in respect of patient care)

Disability discrimination – failure to comply with the duty to make reasonable adjustments

40. Whether the Respondent applied a provision, criterion or practice (“PCP”) and, if so, whether the PCP(s) put the Claimant at a substantial disadvantage in comparison with persons who are not disabled?

41. The PCPs relied on by the Claimant are:

41.1 The requirement to perform her full duties as a Deputy Sister;

41.2 The requirement to comply with attendance targets generally;

41.3 The requirement to comply with the attendance target set in April 2019;

41.4 The requirement to maintain a certain level of attendance at work;

41.5 The requirement to wear PPE;

41.6 The expectation that an employee could guarantee that CBT would improve their attendance record.

[PCPs 41.2 – 41.5 inclusive are not in disputed on the facts as factually established PCPs]

42. The reasonable steps the Claimant alleges which ought to have been taken by the Respondent to avoid substantial disadvantage are:-

42.1 not dismissing the Claimant and extending the Claimant's employment until seeing whether attendance could improve based on further occupational health assessments;

42.2 discounting disability related absences;

42.3 disregarding the impact of having to wear PPE equipment on migraine and sickness absence in March 2020;

42.4 adjusting the attendance targets;

42.5 allowing the Claimant to undergo CBT counselling before considering termination;

42.6 temporary redeployment as recommended by the OH report;

42.7 revising expectation on medical treatments so that they were based on a prospect of improved attendance rather than "*guaranteeing*" improved attendance.

43. Whether the Respondent knew that the Claimant likely to be placed at a substantial disadvantage in comparison with persons who are not disabled.

THE LAW

44. The law in this case is not in dispute.

45. Section 15 EA 2010, so far as is relevant, states:

"(1) A person (A) discriminates against a disabled person (B) if—

(a) A treats B unfavourably because of something arising in consequence of B's disability, and

(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability."

46. Sections 20 EA 2010 deals with the duty to make adjustments and state (so far as is relevant)*:*

"(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."

47. Section 123 EA 2010 deals with time limits and states:

"(1) Proceedings on a complaint within section 120 may not be brought after the end of

(a) the period of 3 months starting with the date of the act to which the complaint relates, or

(b) such other period as the employment tribunal thinks just and equitable."

48. Section 136 EA 2010 deals with the so-called 'reversal of the burden of proof' and states:

"(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."

49. Section 98 of the Employment Rights Act 1996 ("ERA" 1996) deals with the relevant law on unfair dismissal and states:

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

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

(2) A reason falls within this subsection if it—

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

(3) In subsection (2)(a)—

(a) "capability", in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and

(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."

50. The leading case on the law concerning discrimination arising from disability under section 15 EA 2010 is the decision of the EAT in **Pnaiser v NHS England** [2016] IRLR 170**.** In that case Mrs Justice Simler P (as she then was) set out the relevant steps for the tribunal in determining such complaints. The relevant passages are as follows:

"(a) A Tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises.

(b) The Tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required... The 'something' that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.

(c) Motives are irrelevant...

(d) The Tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is "something arising in consequence of B's disability". That expression 'arising in consequence of' could describe a range of causal links... the causal link between the something that causes unfavourable treatment and the disability may include more than one link...

(e) ...However, the more links in the chain there are between the disability and the reason for the impugned treatment, the harder it is likely to be to establish the requisite connection as a matter of fact.

(f) This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.

(g) .. [the case of] **Weerasinghe** ... highlights the difference between the two stages — the 'because of' stage involving A's explanation for the treatment (and conscious or unconscious reasons for it) and the 'something arising in consequence' stage involving consideration of whether (as a matter of fact rather than belief) the 'something' was a consequence of the disability.

(h) Moreover, the statutory language of section 15(2) makes clear……that the knowledge required is of the disability only, and does not extend to a requirement of knowledge that the 'something' leading to the unfavourable treatment is a consequence of the disability.

(i) ... it does not matter precisely in which order these questions are addressed. Depending on the facts, a Tribunal might ask why A treated the Claimant in the unfavourable way alleged in order to answer the question whether it was because of "something arising in consequence of the Claimant's disability". Alternatively, it might ask whether the disability has a particular consequence for a Claimant that leads to 'something' that caused the unfavourable treatment."

51. In **Hensman v Ministry of Defence** [2015] UKEAT/0299/14 Singh J (as he then was) gave guidance as to the difference between the defence in section 15 of a proportionate means of achieving a legitimate aim and the band of reasonable responses test for unfair dismissal purposes. At paragraph 43 he said this:

"Accordingly it is clear, first that the role of the Employment Tribunal in assessing proportionality, in contexts such as the present, is not the same as its role when considering unfair dismissal. In particular, it is not confined to asking whether the decision was within the range of views reasonable in the particular circumstances. The exercise is one to be performed objectively by the Tribunal itself."

52. In relation to the complaints of a failure to make reasonable adjustments, the classic guidance was set out in **Environment Agency v Rowan** [2008] IRLR 20 where the EAT said this:

"… an employment tribunal … must identify: (a) the provision, criterion or practice applied by or on behalf of an employer, or (b) the physical feature of premises occupied by the employer, (c) the identity of non-disabled comparators (where appropriate) and (d) the nature and extent of the substantial disadvantage suffered by the Claimant."

53. The relevant comparative exercise must be conducted by reference to the disadvantage caused by the PCP, i.e. with the non-disabled person who is subject to

the PCP but not disadvantaged by the PCP (**see Smith v Churchills Stairlifts Plc** [2006] IRLR 41).

54. A substantial disadvantage is defined in the 2010 Act as one that is "more than minor or trivial".

55. Whether the disadvantage existed is a question of fact to be ascertained objectively: see paragraph 6.15 of the **Statutory Code of Practice**.

56. In **Griffiths v Secretary of State for Work and Pensions** [2017] ICR 160, the Court of Appeal held that a requirement to maintain a certain level of attendance at work in order not to be subject to the risk of disciplinary sanctions is capable of substantially disadvantaging a disabled employee whose disability results in more frequent absences. At paragraph 65 and 76 the Court of Appeal said this:

"Any modification of, or qualification to, the PCP in question which would or might remove the substantial disadvantage caused by the PCP is in principle capable of amounting to a relevant step. The only question is whether it is reasonable for it to be taken……..

An employer is entitled to say, after a pattern of illness absence, that he should not be expected to have to accommodate the employee's absences any longer, but "the fact that some of the absence is disability-related is still highly relevant to the question whether disciplinary action is appropriate".

57. In **Revenue and Customs Commissioners v Whiteley** (UKEAT/058112) the EAT (at paragraph 14) said this:

"There are, in principle, at least two possible approaches to making allowances for absences caused by a disability that interacts with other ordinary ailments. One is to look in detail and with care and, if necessary, with expert evidence at the periods of absence under review and to attempt to analyse with precision what was attributable to disability and what was not. The alternative approach, which we anticipate will be of greater attraction to an employer, is to ask and answer with proper information the question: what sort of periods of absence would someone suffering from the disability reasonably be expected to have over the course of an average year due to her disability?"

58. The onus is on the employer to make the reasonable adjustment, once aware of the substantial disadvantage, and not on the employee to request it: see paragraph 6.24 of the **Statutory Code of Practice**.

59. In applying section 98(4) ERA 1996 on the issues of the fairness of the dismissal we have borne in mind the guidance in **HSBC Bank plc v Madden** [2000] ICR 1283, where the Court of Appeal re-affirmed the guidance for tribunals originally set out in **Iceland Frozen Foods Limited v Jones** [1982] IRLR 439, namely that:-

"(1) The starting point should always be the words of section [98(4) ERA 1996] themselves.

(2) In applying the above section the Tribunal must consider the reasonableness of the employer's conduct, not simply whether the Tribunal would have done the same thing.

(3) The Tribunal must not substitute it's decision as to what was the right course to adopt.

(4) In many cases there is a Band of reasonable responses to the employee's conduct within which one employer might reasonably take one view another employer quite reasonably take another.

(5) The function of the Employment Tribunal as an industrial jury is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the Band of reasonable responses which a reasonable employer might have adopted. If the

dismissal falls within the Band, the dismissal is fair; if the dismissal falls outside the Band it is unfair."

60. The Court of Appeal in **London Ambulance Service NHS Trust v Small** [2009] EWCA Civ 220 reminded tribunals of the importance of not substituting their views for that of the employer. We have been conscious of the importance of not doing so.

61. It is now well-established that the band of reasonable responses test applies equally to the investigation as it does to the decision to dismiss (see **Sainsbury's Supermarket Ltd v Hitt** [2003] IRLR 23).

62. In **Lynock v Cereal Packaging Ltd** (1988) IRLR 510 the EAT made it clear that in capability dismissals the case should be decided by looking at the 'whole history' and the whole picture.

CONCLUSIONS

Out of time issue

63. This relates only to the failure to make reasonable adjustments claim and in particular to the reasonable steps contended of discounting disability-related absences and adjusting the attendance targets.

64. Miss Barrett argues that both of these were acts extending over a period up to the time when dismissal occurred on 22 May 2020. Alternatively, she suggests that time should be extended on 'just and equitable' grounds.

65. We agree with Ms Barrett's primary submission that the acts extended to dismissal because they continued to be applicable up to termination and to have an impact upon the decision to dismiss. If we are wrong on that point, and the allegations are out of time, we consider it is just and equitable to extend time under section 123 EA 2010 for the following reasons:

65.1 The delay in issuing proceedings is relatively short;

65.2 The Respondent has suffered no prejudice by reason of the delay. It has been able to marshal all its evidence and call the relevant witnesses;

65.2 There is no suggestion that the cogency of the evidence has been affected.

65.3 The Claimant would suffer significant hardship if the allegations were not permitted to proceed for a technicality.

Discrimination arising from disability

66. There is only one act of unfavourable treatment relied upon, namely the act of dismissal.

67. The Claimant says that the 'somethings' for the purposes of section 15 are not achieving her attendance target, her sickness record and uncertainty about her return to her substantive role.

68. The principal argument against these 'somethings' not being disability-related is that they arose from the Claimant's (irrational, and in the Claimant's GP's words

'stupid') decision to withdraw from taking all of her medication in October 2019 without the benefit of medical advice. This led to further long-term absence with consequences.

69. It is quite clear when one looks at the Respondent's management of the Claimant's sickness absence that the warnings and breaches of targets were principally because of disability-related absences. At the time of dismissal the Claimant had been issued with a target for improvement and under a 24 month final written warning. The Claimant did not achieve her target because she was absent for stress, anxiety and depression from December 2019 to March 2020.

70. The Claimant's sickness record was also something arising from her disabilities. In the Respondent's Occupational Health report of 15 November 2013, the main reasons for the Claimant's level of sickness absence related to "the underlying health problem of migraines".

71. The Respondent's table of the Claimant's absences shows that the majority of the Claimant's absences over 10 years was down to stress/anxiety/depression or migraines. In other words, all disability-related.

72. Furthermore, the dismissal letter says the following:

"Despite the level of support your absences have consistently fallen below the Trusts targets and this is not sustainable moving forward."

"Having considered all the information presented, I concluded that your sickness absence levels continue to be unacceptable and are impacting the ward and your team and causing difficulties for your area."

73. These passages demonstrate that the dismissal was, if not wholly then at least partly, due to the Claimant not achieving attendance targets and/or because of her sickness record. We are therefore satisfied that the reason for the Claimant's dismissal was for 'something arising' from her disabilities. Put in simple terms, the Claimant had disabilities which caused her to absent from work and for which she was ultimately dismissed. That is a breach of section 15(1) EA 2010 unless it can be justified.

74. The real issue in relation to this particular aspect of the case is therefore whether dismissal was justified, or in the language of the statue whether it was 'a proportionate means of achieving a legitimate aim'. The legitimate aim relied on is managing staff absences in order to maintain an appropriate level of service in respect of patient care. It is conceded that this is a legitimate aim. Proportionality is not conceded.

75. The Claimant's absences are indeed lengthy and frequent. The Claimant realistically accepts that there was a direct impact on the level of service on her Ward in that colleagues had to cover her absence. The Claimant also had some limited management responsibilities which could not be undertaken when not on Ward.

76. In all of the circumstances, we are satisfied that dismissal was not a proportionate response for the following reasons:

76.1 By the time of dismissal the Claimant's mental health condition was optimistic given the domestic changes. The prognosis was positive and absences for stress/anxiety/depression were much more likely to be reduced. The single long-term absence for the adverse effects of coming off medication was unlikely to be repeated.

76.2 By the time the Claimant was given notice of dismissal on 22 May 2020 she had successfully completed a phased return to work fulfilling her contractual hours.

76.3 The Occupational health report had recommended a 3-month period of return followed by redeployment if not successful. In dismissing the Claimant the Respondent acted contrary to the recommendation of the Occupational Health report;

76.4 There was no medical basis for concluding further long-term absence due to mental health issues. With appropriate adjustments the Claimant could continue working despite the (relatively few) migraine episodes.

77. The complaint of discrimination arising from disability therefore succeeds

Failure to make reasonable adjustments

78. There was a dispute as to whether the Respondent applied as PCPs (1) the requirement to perform her full duties as a Deputy Sister and (2) an expectation that an employee could guarantee that CBT Treatment would improve her attendance record.

79. In relation to the former we accept that a PCP was applied but not in relation to the latter. A PCP has to have a degree of regularity. We are conscious that a one-off act can as a matter of law in certain circumstances amount to a PCP but this is relatively rare. The words 'provision, criterion or practice' carry the connotation of a state of affairs indicating how similar cases are generally treated, or how a similar case would be treated if it occurred again. This was not the case with the particular PCP alleged.

80. There was some discussion and evidence as the Claimant being expected to 'guarantee' an improvement in attendance but in that respect we accept the Respondent's evidence that it was more a case of seeking an assurance rather than a cast-iron guarantee. The appeal decision letter speaks of there being "no guarantee or assurance". The reality is the Respondent did not consider that there was any real assurance that CBT would improve attendance and there was never any expectation of a guarantee which never be given.

81. We will now deal with the steps the Claimant suggests were reasonable for the Respondent to take instead of dismissal.

Not dismissing the Claimant and extending the Claimants employment

82. This would have been a reasonable step for the reasons set out in relation to the complaint of discrimination arising from disability.

Discounting disability-related absences

83. The Equality and Human Rights Commission Code of Practice (at paragraph 17.20) states:

" Employers are not automatically obliged to disregard all disability-related sickness absences, but they must disregard some or all of the absences by way of an adjustment if this is reasonable."

84. The Respondent argues that attendance targets were in fact adjusted in accordance with paragraph 5.8.7 of the AMP and confirmed by the evidence of the Respondent's witnesses. Miss Niaz-Dickinson submits that the Trust could not extend attendance targets beyond what was reasonable in order for it to provide an adequate service to its patients.

85. Discounting some or all the disability related absence is a potential reasonable step (see **Griffiths v Secretary of State for Pensions** [2017] ICR 160**]**

86. The Respondent's policy allows this step to be taken and therefore on the face of it is potentially a reasonable step.

87. In coming to our decision we have looked at the frequency of the Claimant's migraines. On average she had 3 episodes of migraine attacks per year. In the last year of her employment she had 5 days of absence for migraine.

88. It cannot reasonably be said that to discount disability related absences of 3 -4 days per year or thereabouts would significantly impact upon the service provided by the Respondent to its patients. Of course, all absences affect a service to some extent so even if an employee is off sick for one day that has some impact. The issue is therefore not one of zero impact but of *reasonable* impact.

89. In our judgement it would have been reasonable in the circumstances to discount the Claimant's migraine-related absences in their entirety given that they were relatively few in number and of fairly short length in terms of absence. If it would not have been reasonable to discount them all of them then certainly greater allowance should have been made.

90. The failure to adjust targets and/ or triggers meant that the Claimant had no allowance for any other legitimate absences. The purpose of reasonable adjustments is to ensure a level playing field but that cannot be achieved if all of the absences allowed are taken up with disability-related matters leaving no room for any other legitimate absence. In this case given the targets and triggers the Claimant could not afford to be ill for any other legitimate reason.

Disregarding the impact of having to wear PPE equipment on migraine and sickness absence in March 2020.

91. The Claimant had two short periods of absence in March 2020 which counted against her in the decision to dismiss. The Claimant believed that these absences were related to the impact of wearing PPE on her migraines. It arose because the Claimant was unable to carry a water bottle around for Covid-19 reasons and as it was difficult to have a break and obtain water in a very busy and pressurised environment, the Claimant suffered from dehydration which then caused her to be

more vulnerable to migraines. The Claimant also had an issue with the type of PPE supplied.

92. It is not clear what type of Covid-19 testing was in place in March 2020 but it is agreed that the Trust undertook antibody tests to ascertain whether staff had Covid-19. The Claimant's antibody tests were positive and thus there is a reasonable inference to be drawn that she had the Covid virus. It was the Trust policy at the time to discount all COVID related absences. In the Claimant's case those absences were not discounted.

93. We are satisfied that the Respondent failed to make proper allowance for the fact that on that occasion the Claimant was more likely than not to have had Covid in view of the positive antibodies test. Her absences related to this should therefore have discounted.

Adjusting the attendance targets

94. We repeat that given the relatively few days that the Claimant was likely to be absent for migraine it would have been a reasonable step to take to adjust the attendance targets/triggers.

Temporary redeployment as recommended by OH report

95. The Respondent says that this had previously been discussed but that the Claimant was adamant that she wished to remain at Band 6 and did not wish to be redeployed. They go on to say she did not raise this as a ground of appeal and therefore implicitly accepted that this was not something she was challenging. It is also argued by the Respondent that a temporary redeployment would not have solved the problem of the Claimant's poor attendance as she would have to move back into the Band 6 role at some point.

96. The Respondent's occupational health report of 12 March clearly envisages the Claimant remaining at Band 6 and for her to return to that role through a phased plan starting at 50% of hours and gradually increasing over a four-week period to her normal role. The occupational health report did not envisage, nor recommend, the Claimant moving down to a Band 5 post other than on a temporary basis and this was only to be undertaken if a three-month phased return was not successful.

97. In our judgment the Claimant was not being unreasonable in asking for the occupational health recommendations to be followed. Accordingly, this would have been a reasonable step for the Respondent to take.

98. For those reasons the complaint of a failure to make reasonable adjustments also succeeds.

Unfair dismissal

99. We find that the decision to dismiss fell outside the band are reasonable responses open to a reasonable employer for the following reasons:

99.1 The Respondent chose to ignore, or any rate not to substantially follow, the recommendations of the most up to date occupational health report in relation to the Claimant. No valid reason has been given. Employers are of course not bound by

the recommendations of an occupational health report but a reasonable employer is obliged to provide some justification for departing from its recommendations. No justification has been put forward in this case. In departing from those recommendations, and in the absence of an explanation, we find the Respondent acted unreasonably.

99.2 Although an employer is entitled to look at the overall picture, including the history of the matter and past absences, the Respondent was in this case focusing excessively to the past rather than looking at the future. The prospects for future attendance were positive.

99.3 As to the Claimant's likely absences for stress/anxiety/depression, she had explained that she now had a family member who was going to take over many of the responsibilities she previously had for her grandmother and thus the stress and anxiety triggers which caused absences were removed. The Respondent's concern was that the family member may not stay having left once before but the reason for the family member leaving was because of her own medical emergency rather than a lack of reliability.

99.4 The overall prognosis of the Claimant's mental health was positive. The Claimant's managers had confirmed that since she had returned to work the Claimant was in their words 'doing OK'. The Claimant would be able to provide a reasonably good level of consistent service if migraine absences were adjusted for.

100. There was an issue as to the Claimant not being able to hold the bleep if she was not at work. The importance of this seems to have been somewhat overstated. It does not appear to have been a matter of primary concern at the Stage Three Hearing nor was it a barrier to the Claimant returning to work. The Claimant did have bleep responsibilities but an average absence of 3- 4 days a year was not likely to cause undue demands on others.

101. The Claimant was criticised for not seeing a Consultant as to her migraine given that the Respondent's evidence was they have a specialist unit. As we do not have the full set of notes of the Stage 3 hearing, and the dismissal letter on this point is silent, it is difficult to be certain if this issue was discussed. We find on a balance or probabilities that if asked the Claimant is likely to have told the dismissing panel what she told this Tribunal, namely that the Claimant had asked her GP to be referred but this had been refused by her GP and the Claimant was left with the treatment she was already on.

102. In all of the circumstances we conclude that the decision to dismiss by reason of capability fell outside the band of reasonable responses open to a reasonable employer and was unfair for the purposes of section 98(4) ERA 1996.

Contribution

103. There is no factual basis for concluding that the Claimant caused or contributed to her dismissal.

Polkey

104. There is no procedural defect rendering the dismissal unfair and thus the **Polkey** principle (that is a reduction in compensation to reflect the percentage

chance that the Claimant would have been dismissed fairly in any event – see **Polkey v AE Dayton Services Ltd** [1987] IRLR 50]) is not strictly relevant. The Respondent suggests that according to the medical records disclosed the Claimant suffered from sinusitis after dismissal and the likely absence from work would have resulted in a fair dismissal shortly afterwards even if it was not fair to dismiss in May 2020.

105. The Claimant did suffer from Sinusitis post dismissal but she had suffered from it previously and had not taken any time off work other than the one day on 25 March 2020 which the Claimant now reasonably believes was a Covid19-related absence. It cannot be said with any confidence that the Claimant would have taken any significant time off work for sinusitis if she had not been dismissed.

106. The Claimant is said to have applied for a Band 5 role with her present employer thus suggesting, the Respondent argues, that she personally did not regard herself as being up to a Band 6 role. The Claimant did indeed apply for a Band 5 role but there were good reasons for this. The new role involved a considerable amount of travelling and the Claimant was not keen on assuming the same level of responsibility with the additional travel time to and from work.

107 In all of the circumstances we do not consider it appropriate to make any **Polkey** reduction.

Remedy

108. The issue of remedy is adjourned. Case management orders in respect of the remedy hearing are given separately.

Employment Judge Ahmed

Date: 12 May 2022