EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Ms D Jonson	**v**	B&M Retail Ltd

Heard: In Nottingham (with counsel for the respondent joining via CVP)

On: 4 & 5 May 2022 and, in chambers, on 19 May 2022

Before: Employment Judge Ayre
Mr D Green
Mr G Edmonson

Representatives:

Claimant: In person.
Respondent: Mr J Platts-Mills, counsel

RESERVED JUDGMENT

The unanimous decision of the Tribunal is that:

1. The claimant was fairly dismissed by the respondent. The claim for unfair dismissal fails and is dismissed.

2. The claim for direct disability discrimination fails and is dismissed.

3. The claim for discrimination arising from disability fails and is dismissed.

REASONS

Background

1. On 12 July 2021 the claimant presented a claim to the Employment Tribunal, following a period of Early Conciliation that started on 24 May

2021 and ended on 5 July 2021. On the claim form the claimant ticked the boxes for unfair dismissal, holiday pay, arrears of pay and 'other payments'. She also referred to wanting to bring a personal injury claim and, in some detail, to her health. The respondent defended the claim.

2. The case was originally listed for a Final Hearing on 8 November 2021. That hearing was postponed due to one of the respondent's witnesses being admitted to hospital, and relisted for 4 January 2022.

3. In December 2021 Employment Judge Camp reviewed the Tribunal file and identified that the claimant appeared to be bringing a disability discrimination claim. This was discussed at the start of the hearing on 4 January 2022 before Employment Judge P Smith, which was used for case management purposes. The claimant applied to amend her claim to include complaints of direct discrimination (section 13 of the Equality Act 2020 ("**the EQA**") and discrimination arising from disability (section 15 of the EQA).

4. Employment Judge Smith allowed the claimant's application to amend her claim to include complaints that her dismissal was discriminatory under both section 13 and section 15 of the EQA. He refused her application to amend the claim to include complaints under the same sections that the respondent had failed to organise a works capability meeting and / or to refer the claimant to Occupational Health within the first couple of months of the start of her sickness absence in November 2017 ("**the 2017 allegations**").

5. On 19 January 2022 the claimant's claim for arrears of pay was struck out as the claimant had not complied with an Unless Order made by Employment Judge Smith.

6. A second Preliminary Hearing took place before Employment Judge Broughton on 18 February 2022. The claimant asked again to amend her claim to include the 2017 allegations. Employment Judge Broughton explained that that question had already been decided by Employment Judge Smith and that the claimant would have to apply for reconsideration of or appeal against his decision.

7. The claimant's complaint of holiday pay was dismissed on withdrawal at the second Preliminary Hearing.

8. The respondent applied for strike out of the claim on the ground that the claimant's conduct of the case was vexatious, scandalous and unreasonable, because she had accused the respondent of arranging for an imposter to attend the hearing on 4 January, pretending to be Mr Lax. Employment Judge Broughton could not determine the application for strike out at the Preliminary Hearing, because a public hearing is required for such applications. She expressed a provisional view that a fair trial was still possible. The respondent withdrew the application but wanted it recorded that it reserved its position on costs.

9. On 19 February 2022 the claimant applied for reconsideration of Employment Judge Smith's decision to refuse her application to

amend. This was considered by Employment Judge Smith as a fresh application to amend the claim and the respondent was given the opportunity to comment on it. On 12 April 2022 Employment Judge Smith refused the claimant's application to amend her claim.

10. The claimant also appealed Employment Judge Smith's decision not to allow her to amend her claim to the Employment Appeal Tribunal. It appears that her appeal was made out of time and we were told at the start of the hearing by the respondent's representative that the claimant still required permission from the EAT to extend time to pursue her appeal.

The Proceedings

11. There was an agreed bundle of documents running to 213 pages. An additional 5 pages of evidence were added to the bundle during the hearing. This evidence was relevant to the question of how long one of the respondent's witnesses, Mr Lax, had worked for the respondent, which had been called into question by the claimant.

12. We heard evidence from the claimant and, on behalf of the respondent, from Angie Smith, Store Manager, Carol Wood, Deputy Manager, and Thomas Lax, former Store Manager. Mr Lax gave evidence from Jersey. The respondent informed us that it had contacted the Taking of Evidence Unit at the Foreign and Commonwealth Development Office, and had received an email confirming that there was no objection to Mr Lax giving evidence from Jersey.

13. Mr Platts-Mills also produced a written skeleton argument, for which we are grateful.

14. At the start of the hearing we discussed the claimant's appeal to the EAT in relation to the 2017 allegations. The claimant indicated that she still wishes to pursue those allegations. We asked both parties to address us on the question. The respondent was keen to press ahead with the hearing. The claimant's application to amend had, Mr Platts-Mills reminded us, been considered and refused twice by Employment Judge Smith, and applications for extensions of time to appeal tend not to be successful. He suggested that the 2017 allegations could be considered separately at a later hearing, along with the question of remedy, if the claimant's appeal and this claim are successful.

15. The claimant was unclear as to whether she was seeking a postponement or not. She told us that she did not want a delay but had been tricked and misled and queried what would happen if her appeal was successful.

16. Having considered carefully the representations of both parties, it was the unanimous decision of the Tribunal that the hearing should go ahead for the following reasons:

    a. Neither party was seeking a postponement;

b. Both parties were present and ready to proceed with the hearing;
c. If the claimant's appeal is successful a further hearing can be arranged to consider the 2017 allegations, which are discrete from those that the Tribunal has to consider at this hearing;
d. There is no prejudice to either party in proceeding in this manner and it is in line with the overriding objective to do so.

17. On the first day of the hearing we heard evidence from the claimant and from Mr Lax. Following the first day of the hearing, the claimant sent an email to the Tribunal suggesting that she had been put under pressure to cross examine Mr Lax on the first day of the hearing, and to agree to have her claim dealt with from March 2019 only. She also objected to additional documents relating to Mr Lax' length of service with the respondent.

18. Having considered what both parties had to say, it was the unanimous decision of the Tribunal that the additional documents should be admitted into evidence. It was explained to the claimant that she had not agreed to drop the 2017 allegations, and the claimant was given more time to cross examine Mr Lax.

The Issues

19. The respondent admits that the claimant was disabled at the relevant time by reason of Facioscapulohumeral Muscular Dystrophy ("**FMD**"). The issues that fell to be determined at the final hearing were as follows:

Unfair dismissal (section 98 of the Employment Rights Act 1996)

a. What was the reason or principal reason for dismissal? The respondent says the reason was capability, namely the long-term absence of the claimant.

b. If the reason was capability, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant? In particular:

i. Did the respondent genuinely believe the claimant was no longer capable of performing her duties;
ii. Did the respondent adequately consult the claimant;
iii. Did the respondent carry out a reasonable investigation, including finding out about the up-to-date medical position;
iv. Could the respondent reasonably be expected to wait longer before dismissing the claimant; and
v. Was dismissal within the range of reasonable responses.

Direct disability discrimination (section 13 Equality Act 2010)

c. Did the respondent treat the claimant less favourably because of disability when it dismissed her? The claimant relies upon a hypothetical comparator.

Discrimination arising from disability (section 15 Equality Act 2010)

d. Did the respondent treat the claimant unfavourably by dismissing her?

e. Did the claimant's sickness absence of three years five months arise in consequence of the claimant's disability?

f. Was the treatment a proportionate means of achieving a legitimate aim? The respondent says that its aims were:

   i. Ensuring that its employees are medically fit to undertake their duties; and

   ii. Managing long term capability absence so as to save cost and management time and to allow the respondent to plan its workforce and operational needs with certainty.

g. The Tribunal will decide in particular:

   i. was the treatment an appropriate and reasonably necessary way to achieve those aims;

   ii. could something less discriminatory have been done instead; and

   iii. how should the needs of the claimant and the respondent be balanced?

Findings of Fact

20. We make the following findings of fact unanimously.

21. The respondent is a large variety retailer with approximately 680 stores in the UK and more than 36,000 employees.

22. The claimant was employed by the respondent from 19th August 2015 until 27 April 2021 when she was dismissed because of her long-term sickness absence.

23. The claimant worked for the respondent as a Customer Service Assistant at the respondent's Netherfield branch. Her contract of employment contained a notice period of one week for each completed year of service up to a maximum of 12 weeks.

24. The contract also stated that the respondent did not provide any contractual sickness or injury payments other than Statutory Sick Pay. There was a capability procedure that was referred to in the contract, along with an appeal procedure. The contact stated that:

"*…the procedures that will apply when dealing with capability or disciplinary issues are shown under the headings "Capability*

Procedures" and "Disciplinary Procedures" in the Employee Handbook to which you should refer."

25. The claimant was provided with a job description and an employee handbook, called the "Colleague Handbook". The job description set out the duties and skills required for the claimant's role and included the following in the list of duties:

"*Assist in floor moves, merchandising, display maintenance, and housekeeping…*
Any other tasks as assigned from time to time by any manager…"

26. Included in the list of 'skills' required for the role were the following:

"*Ability to work in a fast paced environment*
Flexibility an absolute…"

27. When the claimant began work for the respondent, she was assigned to the Netherfield store which was one of the respondent's new stores. As a result, during the first few weeks of the claimant's employment she and others had to help with getting the shop ready to open. This involved some shop fitting duties. The claimant suggested that she should not have been asked to carry out these duties and that doing so contributed to a decline in her health.

28. There was no medical evidence before us to suggest that was the case however, and we find that the respondent was entitled to ask her to help with these duties given the flexibility set out in the job description. There was nothing untoward in this.

29. Once the store had opened the claimant carried out the duties of a general assistant which included working on the tills. The claimant told us that she found till work difficult and that she believes that the till work also contributed to a decline in her health. Again, there was no medical evidence before us to suggest that was the case, and no evidence that she complained about till work at the time.

30. In May 2016 the claimant's working hours were reduced, at her request, from 30 hours a week to 24 hours a week. The claimant also asked to be moved to another store which was closer to her home, as she had a long journey to work. There was no evidence before us of any action being taken in response to this request.

31. On 26th November 2017 the claimant began a period of sickness absence from which she did not return at any point prior to the termination of her employment. During her absence the claimant submitted Fit Notes certifying her as unfit to work.

32. Initially the Fit Notes that she sent in referred to 'right shoulder pain' as being the cause of her absence. From 29 March 2018 onwards however the Fit Notes referred to FMD as being the cause of her absence.

33. The claimant was diagnosed with FMD in January 2018. FMD is a genetic condition which the claimant's mother and a cousin also had. It is a chronic musculo-skeletal condition which is degenerative and for which there is currently no cure.

34. The claimant suggested that her condition was caused or triggered by her work at the respondent, as she had not experienced any symptoms previously. There was no medical evidence however to support this suggestion. When she was diagnosed in January 2018 the consultant neurologist who saw her referred to the FMD as "maternal inheritance" and to the claimant's maternal cousin also having the condition.

35. As there is no cure for FMD treatment is focused on alleviating the symptoms. The main impact of the condition on the claimant is muscle weakness and watery eyes. On 27th April 2021 the claimant had surgery on her tear ducts which has improved her eyes somewhat – she said by 70%.

36. There was very little if any contact with the claimant during the first months of her absence. She was contacted on 18 June 2018 by the then store manager Lucy Holden who carried out a telephone welfare meeting with her. The notes of that meeting record that the claimant was waiting for a physio appointment and for treatment on her eyes, that the condition affected the claimant's ability to lift and stack shelves, and that the claimant was unable to give a return to work date. The claimant was asked if there were any reasonable adjustments that could be made to help her return and commented 'not working on the till as that how injury has occurred'. She also said that she could not work on the shop floor.

37. There was no further contact whatsoever with the claimant until January 2020, by which time the claimant had been off work for more than two years, and understandably felt that her employer had forgotten about her.

38. In December 2018 Angie Smith moved to the Netherfield store as Store Manager. Carol Wood was the Deputy Manager of the store and had been since October 2017, shortly before the claimant's sickness absence began.

39. Neither Mrs Wood nor Mrs Smith made any attempt to contact the claimant until February 2020, approximately 13 months after Mrs Smith became manager of the store. Mrs Smith's evidence was that she did not contact the claimant sooner because she had to focus on what she described as 'critical store issues' and did not have capacity to deal with employees on long term sick leave, including the claimant.

40. During 2020 Mrs Wood and Mrs Smith contacted the claimant on a number of occasions. Welfare calls were carried out with her on 24 January 2020, 14 February 2020, 16 June 20020, 27 July 2020, 14 September 2020 and 18 January 2021.

41. They also attempted to contact her by telephoning her, without giving her any prior warning that they were going to call, on 25 March 2020,

29 May 2020, 5 August 2020 and 12 December 2020. On the occasions that the respondent tried to call the claimant but could not reach her no attempt was made to call back.

42. There was no evidence before us as to what was discussed during the call on 24 January 2020. On the other calls when the respondent was able to speak to the claimant, a pro forma 'Telephone Welfare meeting' form was used, which contained a number of questions to be discussed during the meeting. These included questions about the reason for absence, any treatment that the claimant was waiting for, limitations on a return to work, what reasonable adjustments could be made to help the claimant return, and whether the claimant could give a return to work date.

43. On 14th February 2020 during the welfare call the claimant said that she could not see well and was awaiting an operation to improve her blurred vision. She also said that no adjustments could be made to help her return to work and that there would not be an immediate return to work.

44. In May 2020 the claimant was issued by her GP with a six month fit note running through to 18 November 2020.

45. On 16th June during the welfare call the claimant said that there had been no change in her condition, that there were no adjustments that could be made to help her back to work, and that she could not give a return to work date. The claimant also said that there was a delay in getting the treatment for her eyes due to Covid.

46. On 27 July the claimant told the respondent during the welfare call that there had still been no change in her condition, that there were no adjustments that could be made to help her back to work, and that she could not give a return to work date. The claimant also referred again to a delay in getting treatment for her eyes due to Covid.

47. In the welfare call on 14 September the claimant said, for the first time, that she was not sure that she would be able to return to work due to weakness in her arms and problems with her vision. She could not give a return to work date.

48. On 18 January 2021 the claimant told Mrs Wood that she was still awaiting an operation on her eyes, which had been cancelled due to Covid. When asked what reasonable adjustments could be made to help her return, she replied that she could not return to work because she had no strength in her arms and due to her blurred vision as a result of her eye problems. She was unable to give a date for a potential return to work, but when asked whether she intended to return, she replied that she was not due to retire yet. In November 2020 the claimant's GP had issued her with a further fit note certifying that she was not fit for work for a further period of six months, which was due to expire on 17 May 2021.

49. The respondent has a centralised HR function which is based at its head office, and there is no HR function on site at Netherfield store.

Mrs Smith contacted HR in September 2020 and asked for what she called a 'medical welfare meeting' to be arranged with the claimant. There was some delay in arranging that meeting on the part of HR.

50. On 27 January 2021 Michelle Billing in HR sent an email to the claimant inviting her to a medical capability meeting on Monday 1 February 2021. She explained in the email that the purpose of the meeting was to discuss the claimant's absence from work, that the respondent had been unable to contact the claimant on "numerous occasions", the likelihood of her returning to work, reasonable adjustments and alternative employment.

51. Ms Billing also warned the claimant in that email that "*if the meeting indicates that there is little likelihood of a return to work within a reasonable timescale and there are no reasonable adjustments that can be made or alternative employment available, then the outcome may be notice of the termination of your employment on the grounds of ill health."*

52. This was the first time in more than three years that the respondent had contacted the claimant in writing. It was incorrect and threatening to state in the email that the respondent had tried to contact the claimant on numerous occasions and that she had been uncontactable.

53. On 1 February 2021 the first medical capability meeting took place. During the meeting the claimant said that due to the time she'd had away from work, the pain in her arm had eased, such that there had been a 60% improvement in her shoulders although no significant improvement in the mobility of her shoulder area. She said that she thought she may be able to return to work eventually but was not sure what role she could do. She suggested maybe working on a department which did not have anything too heavy or too small due to problems with her grip.

54. She also said that the operation that she was waiting for on her eyes should improve them by approximately 70% but that she would not be able to lift heavy objects and certainly not above shoulder height. She thought that scanning at the till could aggravate her shoulder and arm pain.

55. When asked about reasonable adjustments, she said that lighter duties would help, that she was not sure if she could work on the checkouts due to the repetitive action of scanning goods, but that she would be able to do replenishment and possibly work 16 hours a week.

56. She estimated that it would be more than six months before she could consider a return to work and that she could only return after the eye operation which had not yet been scheduled due to Covid.

57. The minutes of the meeting were read out to the claimant at the end of the meeting but she refused to sign them as she had been advised to sign nothing.

58. The claimant was also referred to Occupational Health for the first time and a telephone consultation with Occupational Health took place on 7 April 2021. Occupational Health produced a report following the telephone call, which included the following:

"*Delia has MD, a chronic musculoskeletal condition affecting groups of muscles. There is no cure, and the impact will depend on which muscles are affected. It is also a condition which can progress over a period of time. There is no cure, but I do believe Delia has received appropriate treatment and support. She has been fully cooperative with advice in order to restrict the impact of her symptoms on her usual daily activities…*

It is not possible to predict a time frame for a possible return to work as this would depend on improvements in her physical strength and the outcome of eye surgery. However, based on the current length of absence, I doubt this will be in the foreseeable future.

I am not aware of any adjustments or restrictions which would facilitate a return to work at this stage…"

59. On 14th April 2021 the respondent wrote to the claimant inviting her to a second medical capability meeting on 20 April 2021. The letter explained that the purpose of the meeting was to discuss the claimant's absence from work, the likelihood of her returning in the near future, whether any reasonable adjustments could be made to facilitate a return to work, and whether any suitable alternative employment was available. It also warned the claimant that a possible outcome of the meeting was the termination of her employment on ill health grounds, and reminded her of her right to be accompanied at the meeting.

60. The meeting on 20 April took place by telephone and was conducted by Mrs Smith, with Mrs Wood also present. During the meeting the claimant told Mrs Smith that she now had a date for her eye operation – 27 April 2021. When asked what adjustments could help her to return to work, she said 'none really' and that she was not sure what the respondent could do to help her return. She also said that her GP had not said anything about her returning to work, and there was a discussion about roles that she could not do, namely checkout, shop floor, pricing and 'night face up'.

61. The claimant was asked if she wanted to return to work and said that it was possible that she might be able to return after her eye operation, however she was not sure and could not give any time estimate as to when she might be able to return. Both Carol Wood and Angie Smith formed the view, at the end of the meeting, that the claimant was not intending to return to work at all.

62. After the meeting the notes of the meeting were sent to HR for advice. On 27 April 2021 Carys Gainer in HR called the Netherfield store. Mrs Smith was not in the store that day and Carol Wood took the call. Carys Gainer and Carol Wood had a discussion over the telephone. During that call Mrs Wood recapped the actions and outcomes taken

so far by the respondent in relation to the claimant's sickness absence and asked if anything had been missed or they could offer the claimant anything else.

63. Ms Gainer advised Mrs Wood that the respondent had, in her view, exhausted all of the options, that the claimant had been offered all reasonable adjustments and that dismissal was the only reasonable option.

64. Between them Mrs Wood and Ms Gainer decided to dismiss the claimant. Ms Gainer wrote a letter in Angie Smith's name, without speaking to Mrs Smith, pp'd the letter and sent it to the claimant by email on the afternoon of 27 April when the claimant was recovering from surgery. Neither Mrs Wood nor Mrs Smith saw the letter of dismissal before it was sent.

65. The letter informed the claimant that she was being dismissed on the grounds of medical capability and advised her of the right of appeal.

66. The claimant appealed against the decision to dismiss her. Her letter of appeal contained the following grounds of appeal:

    a. That her ill-health was caused by working at the respondent;
    b. When she joined the respondent in August 2015 she was forced to do shop fitting, including carrying metal bars for four weeks;
    c. When working on the tills she was expected to work with customers queuing at the till whilst other tills remained closed, which she found physically exhausting and stressful;
    d. She had asked 'several times' to be moved to a store nearer home, but her requests were ignored and that she had to drop her hours because she was tired; and
    e. The respondent did not refer her to occupational health until April 2021 despite the fact that she had been off sick since November 2017.

67. On 6th May 2021 Carys Grainger wrote to the claimant acknowledging her appeal and inviting her to an appeal hearing on 11th May 2021 with Thomas Lax, manager of the Castle Store. Ms Grainger summarised the claimant's grounds of appeal as being that:

    a. Her ill health was due to working at B&M;
    b. Her ill health was brought on by the repetitiveness of working on the tills and the general nature of the work;
    c. She was diagnosed with FMD in February 2018 but not referred to Occupational health until April 2021; and
    d. She had eye surgery on 27 April 2021 which she believed would help with her vision problems.

68. It was Ms Grainger's summary of the claimant's grounds of appeal that was provided to Mr Lax, rather than the full appeal letter itself. Ms Grainger's summary did not refer to all of the claimant's grounds of appeal.

69. The claimant sent an email to Ms Grainger on 6 May in which she stated that she wanted all of the grounds of appeal to be discussed and not just the four 'selected' in Ms Grainger's letter. She specifically identified the additional issues that she also wanted to be considered.

70. A revised invite to the appeal hearing was sent on 7 May 2021. That letter referred to all of the grounds of appeal.

71. The appeal hearing took place on 11 May at the Netherfield store, chaired by Thomas Lax. At the start of the meeting Mr Lax was under the impression that there were only four grounds of appeal. The claimant told him that there were in fact eight and she gave him a copy of the letter she'd received from HR confirming this.

72. There was a discussion of the claimant's grounds of appeal. During the meeting Mr Lax commented that everything he had read suggested that the claimant was not capable of returning to work and he asked the claimant what it was that she wanted. The claimant replied that she wanted to have her say and that he should consider the facts. Mr Lax asked her when she would be able to come back to work and she replied "*I wouldn't be able to come back. I would be scared it would cause the pain again. I daren't come back as I would be in the same position again".*

73. Mr Lax then asked her whether there was any job she could do, and she replied '*no*'. He followed up with '*so what are you appealing against*' and she replied, '*being dismissed on medical capability as it is this place that caused it'*. The claimant then repeated that she could not come back to work, and felt that she had been unfairly treated.

74. Mr Lax wrote to the claimant after the meeting to inform her of his decision. Her appeal was not upheld. In his letter he dealt with each of the claimant's grounds of appeal and explained his conclusions on all of them.

75. He also referred to the store having contacted the claimant on 15 occasions to carry out telephone welfare chats. He accepted in his evidence to the Tribunal that this was a 'typo' and that the reference should have been to 5 occasions.

76. Mr Lax was employed by the respondent from 11 March 2019 until 22 October 2021 when he left to take up a role with another organisation. He was therefore only an employee of the respondent for 31 months, and not the 30 years suggested by the claimant. During the appeal hearing he told the claimant that he had worked in retail generally for 30 years. The claimant misinterpreted this as meaning that he had worked for the respondent for 30 years.

77. Whilst the claimant was off sick the respondent did not recruit a permanent replacement for her. Her work was covered by temporary staff who were in place for three months at a time, and by permanent colleagues working extra hours. Each temporary member of staff has to be fully inducted and trained, and then had a 'buddy up' arrangement with a permanent colleague for 4 weeks. Permanent

colleagues are required to train the new temporary members of staff. This takes them away from their normal duties and has a knock on effect on activity within the store, as well as a cost to the respondent.

78. The respondent was unable to recruit a permanent replacement or extend temporary cover until it knew whether the claimant would be returning to work or not.

79. The claimant's work was also covered by colleagues working extra hours, which the respondent said was not a long-term solution.

80. At the time of her dismissal the claimant was not receiving any payments from the respondent. She received statutory sick pay only and her entitlement to SSP had expired years before she was dismissed. There was no evidence before us that continuing to employ the claimant was costing the respondent anything.

The Law

Unfair dismissal

81. In an unfair dismissal case, such as this one, where the respondent admits that it dismissed the claimant, the respondent must establish that the reason for the dismissal was one of the potentially fair reasons set out in section 98(1) or (2) of the Employment Rights Act 1996 ("**the ERA**").

82. Section 98(1) provides that: "*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.*"

83. Under section 98(2)(a) of the ERA a reason for dismissal is a potentially fair reason if it "*relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do*". Section 98(3)(a) defines capability as "*in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality*".

84. The burden of proving a potentially fair reason for dismissal lies with the respondent. If it discharges that burden the Tribunal must then go on to consider whether a dismissal is fair under section 98(4) of the ERA which states as follows:

"*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.

85. The range of reasonable responses test applies in capability dismissals not just to the decision to dismiss but also to the procedure that the employer follows when reaching that decision (***Pinnington v City and Country of Swansea and anor EAT 0561/03***).

86. Where an employee has been off work on long term sickness absence, the Tribunal must consider whether the employer can be expected to wait any longer for the employee to return (***Spencer v Paragon Wallpapers Ltd [1977] ICR 301***). In ***S v Dundee City Council [2014] IRLR 131*** the Inner House of the Court of Session suggested that when deciding this question the Tribunal must balance relevant factors, including:

a. The likely length of the absence;
b. The nature of the illness causing the absence;
c. The size of the employer;
d. Whether other employees can cover for the absent employee' and
e. The cost of continuing to employ the employee.

87. In order for an employer to fairly dismiss an employee on long term sickness absence, the employer must also follow a fair procedure. In most cases this will involve obtaining medical evidence, consulting with the employee and considering alternatives to dismiss.

88. Consultation with an employee on long term sickness absence should be carried out with a view to finding out the medical position and prognosis. Warnings are often not appropriate in cases of long term absence (***Taylorplan Catering (Scotland) Ltd v McInally [1980] IRLR 53***). In **East Lindsey District Council v Daubney [1977] ICR 566** Mr Justice Phillips stated that "*Unless there are wholly exceptional circumstances, before an employee is dismissed on the ground of ill health it is necessary that he should be consulted and the matter discussed with him, and that in one way or another steps should be taken by the employer to discover the true medical position."*

89. Consultation with the employee should ideally start at the beginning of the employee's sickness absence and continue periodically throughout that absence.

Direct discrimination

90. Section 13 of the Equality Act provides that:

"*(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"*

91. Section 23 of the Equality Act deals with comparators and states that: "*there must be no material difference between the circumstances relating to each case."* ***Shamoon v chief Constable of the Royal Ulster Constabulary [2003] ICR*** is authority for the principle that it must be the relevant circumstances that must not be materially different between the claimant and the comparators.

92. When determining questions of direct discrimination there are, in essence, three questions that a Tribunal must consider:
    a. Was there less favourable treatment?
    b. The comparator question; and
    c. Was the treatment 'because of 'a protected characteristic?

Discrimination arising from disability

93. Section 15 of the Equality Act 2010 states that:

> "*(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.*

94. In a claim under section 15, no comparator is required, and the claimant is merely required to show that she has suffered unfavourable treatment and that the reason for that treatment was something arising because of her disability.

95. In ***Secretary of State for Justice and another v Dunn EAT 0234/16*** the then president of the EAT, Mrs Justice Simler, identified four elements that must be made out for a claimant to succeed in a complaint under section 15:

    a. There must be unfavourable treatment;
    b. There must be something that arises in consequence of the claimant's disability;
    c. The unfavourable treatment must be because of (ie caused by) the something that arises in consequence of the disability; and
    d. The respondent must be unable to show that the unfavourable treatment is a proportionate means of achieving a legitimate aim.

Submissions

96. We summarise below the oral submissions made by the parties during the hearing. We have also considered, in reaching our decision, the written submissions sent in by the respondent.

Respondent

97. Mr Platts-Mills submitted that there was no medical evidence that the respondent caused the claimant's illness. It was, he said coincidence that the claimant's condition onset whilst she was employed by the respondent.

98. The nature of her condition is that it is a progressive one, and not the sort of condition likely to be caused by work. There was no accident record sheet recording any incidents at work.

99. There was no real prospect of the claimant returning to work. FMD affected the claimant's upper body and eyes, the claimant suggested that there was the possibility of improvement in her eyes, but never suggested any improvement in her upper body symptoms. The Occupational Health report sets out the reality of her condition, in the respondent's submissions.

100. Mr Platts-Mills also submitted that the only positive evidence in the claimant's witness statement of adjustments that should have been made by the respondent but weren't considered by the respondent related to 2016 and a suggested move to another store closer to her home. When the claimant raised this her hours were reduced.

101. In contrast, he said, there was lots of evidence from 2020 that adjustments were readily discussed with and offered to the claimant, as set out in the notes of the welfare calls with the claimant.

102. The Occupational Health report is key in his submission. It contained no suggestion that any adjustment would facilitate a return to work. Carol Wood had tried to get to the bottom of the question of reasonable adjustments and to get the claimant back to work – it wasn't just a tick box exercise on the part of the respondent.

103. The question of the lack of welfare meetings and an Occupational Health referral until 2020 is, in Mr Platts-Mills submission, a red herring and has no bearing on the decision to dismiss. For a year from early 2020 there were consistent meetings and attempts to contact the claimant on a monthly basis, except in April 2020 when Covid hit.

104. The correct test, in Mr Platts-Mills view, is whether an employer can be expected to wait longer and, if so, how much longer. The Tribunal should look forwards not backwards when deciding this issue. It cannot be the law, he submits, that someone with the claimant's condition and no prospect of a return to work is unfairly dismissed because welfare calls were done monthly rather than every two weeks.

105. If steps in the welfare process had been taken sooner, that would have brought forward the claimant's dismissal and it is not part of her case that she should have been dismissed sooner.

106. In relation to the question of whether the respondent should have held welfare meetings by telephone or note, and pre-arranged the calls with the claimant, he referred us to the case of **Dundee City Council v Malcolm 2016 [2016] 2 WLUK 252** and in particular to paragraph 18 of the judgment. It is, he says, an essential principle that the Tribunal should not make a case for a litigant. The Tribunal should not 'descend into the arena' and find on issues not raised by the claimant and in respect of which the respondent has not adduced evidence. It would be wrong for the Tribunal to find that meetings should have been in person, because the claimant hasn't raised that as an issue.

107. Mr Platts-Mills also submitted that whilst an appeal can cure a defective dismissal, a defective appeal can't render a reasonable decision unreasonable. It was, therefore, a red herring to say there are problems with the appeal.

108. He invited the Tribunal to consider closely the claimant's evidence in relation to the questions about what should have happened. Her answer was not that she should not have been dismissed. The claimant's true concerns, in Mr Platts-Mills' submissions, do not relate to her dismissal but to matters outside the Employment Tribunal's jurisdiction, namely a potential personal injury claim.

109. The claimant's submissions make clear, he suggests, that she is not complaining about her dismissal, but rather about the working practices that brought on her condition. The claimant's claims should, therefore be dismissed.

Claimant

110. The claimant submitted that she had been badly treated by the respondent and by the agency that recruited her. There had been problems from the beginning. The job description was inaccurate and did not include shop fitting.

111. When she went off sick there was no occupational health referral or medical capability meeting.

112. Her illness was brought on by working at the respondent. Shopfitting was exhausting manual work, and even when tills were fitted, and she was working there she was overworked and exhausted. Her fatigue escalated and resulted in her going off sick.

113. The claimant also submitted that when she was off sick the respondent didn't follow the correct procedure in managing her sickness absence, and she suggested that this was deliberate, to drag matters out and deter or prevent her from bringing a personal injury claim.

114. The claimant also alleged again that at an earlier hearing in these proceedings an imposter pretending to be Thomas Lax had joined the CVP hearing. She suggested that there was no proof that Mr Lax was actually in Jersey during the course of the final hearing.

115. The claimant was insistent, in the face of constant and repeated denials by Mr Lax during his evidence, that he had been employed by the respondent for 30 years.

116. The respondent's witnesses had, the claimant suggested, lied and 'passed the buck' in relation to the decision to dismiss her. The respondent had gone to 'all this trouble' to deny her justice which was a sign she had a good case. She also alleged that some of the telephone welfare records were fabricated. She submitted that she had responded to all attempts to contact her by telephone or email, and that therefore the records purporting to show her as not being contactable were fabricated.

117. The claimant told us that she was not aware of and was denied knowledge of her employment rights, that she was 'conned out' of the original hearing date by the respondent's solicitors. She hadn't told any lies, but was telling the truth.

Conclusions

118. We reached the following conclusions on a unanimous basis, having considered carefully all of the evidence, the written and oral submissions of the parties and the legal principles set out above.

Unfair dismissal

119. We are satisfied that the reason for dismissal was capability. No alternative reason was suggested by the claimant and all of the evidence points to the claimant's long-term sickness absence as being the only reason that she was dismissed.

120. Capability is a potentially fair reason for dismissal and the respondent has therefore discharged the burden of proving a potentially fair reason for dismissal.

121. We accept that, at the time it decided to dismiss the claimant, the respondent genuinely believed that the claimant was no longer capable of performing her duties. It was clear from the Occupational Health report and from what the claimant said at the time that the claimant remained unfit for work. She had been off work constantly for 3 years and 5 months by the time she was dismissed.

122. There was no clear indication from her that she wanted to return to work or would be able to do so. In the capability meeting on 1 February 2021 she said she could not consider a return to work within the next 6 months. In the second meeting, on 20 April 2021, she could not give any estimate as to when she may be able to return to work.

She demonstrated no enthusiasm about a return to work – either on 20 April 2021 or at the appeal.

123. Turning now to the question of whether the respondent adequately consulted, we find on balance that they did. We are concerned about the lack of contact with the claimant during the first two years of her absence, the lack of support provided to her during that period and the lack of an Occupational Health referral. However, that alone does not in our view render the dismissal unfair. From January 2020 onwards the respondent did keep in contact with the claimant, did discuss relevant issues with her, such as a potential return to work, reasonable adjustments and alternative roles, and she was referred to Occupational Health.

124. It was in our view unreasonable of the respondent to refer in the letter inviting the claimant to the first capability hearing to the claimant not being available on occasion when the respondent had tried to contact her. The respondent gave no warning to the claimant as to when it was going to call her. When the claimant did not answer the telephone the respondent did not leave messages or try to call back. The claimant cannot be blamed for the fact that some of these calls did not take place. That was the respondent's fault. The respondent showed no concern for the claimant's wellbeing for many months and yet expected her to be available all the times on the telephone.

125. Despite our concerns about this letter, it does not render the dismissal unfair. The claimant was not dismissed for not being available when the respondent tried to contact her. She was dismissed because she had been off for three years and five months with a chronic and incurable health condition and there was no prospect of a return to work within a reasonable time period.

126. The respondent held two meetings with her before her dismissal, in February and in April 2021. She was told in advance of each meeting what the respondent wanted to discuss with her, warned that a potential consequence could be her dismissal and offered the right to be accompanied at the meetings.

127. In reaching our decision we have focussed on the period leading up to the claimant's dismissal which is the most important period. We find, on balance that the respondent did adequately consult with her.

128. We have then considered whether the respondent carried out a reasonable investigation with a view to establishing the correct and up to date medical position.

129. The respondent obtained an Occupational Health report in April 2021. The contents of that report are clear. The respondent also repeatedly asked the claimant for updates on her condition. It discussed reasonable adjustments and alternative roles. It is difficult to see what more they could have done to investigate the medical position in 2020 and the claimant did not suggest any further investigations. We therefore find that the investigation carried out by the respondent into the medical position was reasonable.

130. Could the respondent reasonably be expected to wait longer before dismissing the claimant? It waited 3 years and five months. We have considered whether it should have waited until the outcome of the eye operation was known, given that that was due to take place on 27 April, and the respondent knew that when it made the decision to dismiss. We find that given the medical evidence and that the claimant herself had said on 20 April that she was unable to give any indication as to whether she might be able to return, and on 1 February had said she could not consider a return for at least 6 months – it was not unreasonable for the employer to dismiss when it did.

131. Whilst, by the time she was dismissed, the claimant was not being paid, the respondent could not recruit a replacement for her. Her condition was a long term and chronic one for which there was no cure. Her work was being covered by colleagues and temporary members of staff. There was no prospect of an imminent return to work, or any evidence that the claimant would have been able to return at any point in the future. In these circumstances it is our view that the respondent could not reasonably have been expected to wait any longer for the claimant to return to work.

132. Turning now to the question of the procedure followed by the respondent when dismissing the claimant, we find on balance that it was fair. There were two capability meetings, an investigation of the medical position, consideration of alternatives to dismissal and of reasonable adjustments and the claimant was consulted. The claimant was offered the right to be accompanied at the meetings, and there was an appeal heard by an independent manager.

133. It is unfortunate that the letter dismissing the claimant was sent on the day of the claimant's eye operation, but we accept that this was by accident rather than by design. It is also regrettable that the claimant was informed of her dismissal by letter sent by email after almost six years of employment.

134. It was not entirely clear who made the decision to dismiss – the letter was drafted by HR and not seen by either Angie Smith or Carol Wood. Mrs Wood was however clear in her evidence that she had been involved in the decision to dismiss and stood by that decision.

135. On balance therefore we find that the dismissal was procedurally fair.

136. We also find that dismissal within the range of reasonable responses. At the time of her dismissal the claimant had been off work continuously for 3 years and 5 months. There was no prospect of a return to work. There had been discussion of alternative work and a referral to Occupational Health who had been unable to identify any return to work date or adjustments.

137. We therefore find that the dismissal was fair. The claim for unfair dismissal fails and is dismissed.

Direct disability discrimination

138. To succeed in a complaint of direct discrimination the claimant has to show that she was dismissed because of disability. We find that she was not dismissed because of disability but rather, for the reasons set out above, we find that she was dismissed because of her lack of capability to perform the role due to her long term sickness absence.

139. The claim for direct discrimination fails and is dismissed.

Discrimination arising from disability

140. It is clear from the evidence before us that the respondent knew, or ought reasonably to have known at the relevant time that the claimant was disabled. The Fit Notes from March 2018 onwards all referred to FMD as the reason for the absence, and the length of the absence and the nature of FMD as a condition should have put the respondent on notice that the claimant is disabled.

141. We find that the claimant's sickness absence between 26 November 2017 and 27 April 2021 did arise in consequence of her disability. Although she wasn't diagnosed until January 2018 with FMD the reasons for her absence before then were consistent with FMD, namely shoulder pain, which then led to the formal diagnosis.

142. We also find that the respondent treated the claimant unfavourably by dismissing her. Dismissal clearly is unfavourable treatment. It was unwanted by the claimant and resulted in the loss of her employment.

143. We have then considered whether the respondent dismissed the claimant because of her sickness absence, and, in light of our findings above in relation to the unfair dismissal claim and the reason for dismissal, we have no hesitation in finding that it did.

144. The claimant was therefore dismissed because of something arising in consequence of her disability, namely her sickness absence.

145. Having reached this conclusion, we have gone on to ask ourselves whether the respondent has shown that dismissing the claimant was a proportionate means of achieving a legitimate aim?

146. The legitimate aims set out in the Response are:

a. Ensuring that employees are medically fit to carry out their duties; and

b. Managing long term capability absence so as to save cost and management time and allow the respondent to plan its workforce and operational needs with certainty.

147. We accept the evidence of Angie Smith about the business needs of the respondent. We acknowledge that it is a legitimate aim of the respondent, and indeed of any employer to ensure that employees

are medically fit to carry out their duties and to manage long term absence. No employee should be permitted to work if they are too unwell to do so. The respondent is entitled to manage long term absence so that it can plan its staffing levels and recruitment accordingly. We also accept that it was in pursuit of these aims that the claimant was dismissed.

148. We have also considered whether the respondent's dismissal of the claimant was a proportionate means of achieving the legitimate aims. We find as follows:

a. The dismissal was an appropriate and reasonably necessary way to achieve those aims given the length of time the claimant had been off and the lack of a potential return date;

b. There was no less discriminatory way of achieving the legitimate aims. The respondent had explored repeatedly with the claimant the possibility of reasonable adjustments and alternative roles, but to no avail; and

c. Balancing the needs of the claimant and the respondent, dismissal was a proportionate means in the circumstances.

149. The claim for discrimination arising from disability therefore fails and is dismissed.

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Employment Judge Ayre

13 June 2022

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