Case No: 1305229/2020

EMPLOYMENT TRIBUNALS

Claimant: Ms V Apuusi

Respondent: Birmingham and Solihull Mental Health NHS Foundation Trust

Heard at: Midlands West

On: 9, 10, 11, 12 and 13 May 2022

Before: Employment Judge Faulkner
Mrs J Whitehill
Mr P Tsouvallaris

Representation: **Claimant** - in person
Respondent - Ms T Vittorio (Principal Associate)

JUDGMENT

1. The Respondent did not contravene section 39 of the Equality Act 2010 by failing to comply with the duty to make reasonable adjustments in the application of its Management of Attendance Policy to the Claimant. The Claimant's complaint of failure to make reasonable adjustments is therefore dismissed.

2. The Respondent did not contravene section 39 of the Equality Act 2010 by discriminating against the Claimant because of something arising in consequence of her disabilities in terminating her employment. The Claimant's complaint in this respect is therefore dismissed.

3. The Claimant was not unfairly dismissed. Accordingly, her complaint of unfair dismissal is not well-founded.

4. The Respondent's application for costs was withdrawn.

REASONS

1. Judgment and reasons were given orally on the last day of the Hearing of this Claim. The written judgment was signed on 16 May 2022. These reasons are provided in response to a written request from the Claimant dated 16 May 2022. The parties were advised that there would be a delay in their being provided because Employment Judge Faulkner was on leave.

Complaints

2. The Claimant's complaints were of failure to make reasonable adjustments, discrimination arising from disability and unfair dismissal.

Issues

3. This Claim concerned the Claimant's dismissal by the Respondent because of sickness absence. The issues to be determined by the Tribunal on the question of liability were agreed on day 1 of the Hearing to be as set out below.

Disability

4. The first question was whether the Claimant was a disabled person at the relevant times within the meaning of section 6 of the Equality Act 2010 ("the Act"). At Case Management Hearings, the Claimant told Employment Judge Hughes that she relied on fibromyalgia, ADHD, work-related stress and back and elbow injuries, and Employment Judge Richardson that she did not rely on the injuries but on fibromyalgia, ADHD, work-related stress/depression and a liver condition. She confirmed to us, after consideration during a long adjournment on day 1 whilst we carried out our reading, that she relied on ADHD, fibromyalgia, depression and a liver condition. She did not rely on work-related stress, though she indicated that matters said to have caused work-related stress remained relevant background.

5. The Respondent accepted that the Claimant was at the relevant times a disabled person by reason of ADHD and fibromyalgia only. Accordingly, in relation to the other alleged impairments the Tribunal had to decide whether the Claimant had a physical or mental impairment, which had a substantial adverse effect on her ability to carry out normal day to day activities and whether those effects were long-term.

Failure to make reasonable adjustments

6. It was accepted that the Respondent had a provision, criterion or practice ("PCP") of applying the timescales and trigger points (for action up to and including dismissal) in its absence management policy. The Tribunal therefore had to decide:

6.1. Did the PCP put the Claimant at a substantial disadvantage compared to persons who were not disabled because she was liable to be dismissed?

6.2. If so, were there steps the Respondent could have taken to avoid the substantial disadvantage? The Claimant says it could have changed the timescales and trigger points beyond the changes it actually made.

6.3. Would it have been reasonable to take those further steps?

6.4. Did the Respondent know or could it reasonably have been expected to know that the Claimant was at the relevant times a disabled person? The Respondent accepted that it had this knowledge only in relation to ADHD.

6.5. Did the Respondent know or could it reasonably have been expected to know that the Claimant would be put to the substantial disadvantage referred to above?

Discrimination arising from disability

7. The Respondent accepted that the Claimant's dismissal was unfavourable treatment and that this was because of her sickness absence. The questions for the Tribunal to decide were therefore:

7.1. Did the Claimant's sickness absence arise in consequence of her disabilities? The Respondent's case was that the medical information suggested she was absent because of personal stressors.

7.2. If so, was dismissal a proportionate means of achieving one or more legitimate aims? The originally pleaded legitimate aims were the proper management of absence and the need to ensure acceptable and sustained attendance.

7.3. Did the Respondent know or could it reasonably have been expected to know that the Claimant was at the relevant times a disabled person? The Respondent accepted that it had this knowledge only in relation to ADHD.

Unfair dismissal

8. The first issue was whether the Respondent had shown the reason for dismissal.

9. If so, the second issue was whether this was a fair reason under section 98 of the Employment Rights Act 1996 ("ERA").

10. If so, the final question was whether dismissal for that reason was fair within the meaning of section 98(4) ERA, entailing consideration of the following:

10.1. whether the Respondent had up to date medical evidence at the time of dismissal;

10.2. whether it consulted with the Claimant about the dismissal;

10.3. whether it considered alternatives to dismissal;

10.4. whether it could be expected to put up with her absence any longer; and

10.5. whether dismissal was within the range of reasonable responses to the circumstances.

The Claimant's case was that the Respondent did not allow her sufficient time to recover, did not take account of advice from occupational health ("OH"), did not consider redeployment and did not take account of her representations regarding returning to work nor take medical advice on the same.

11. There were no time limit issues. The Claimant confirmed that the termination of her bank role with the Respondent was not part of her Claim but that again it could be relevant background. As it turned out, this was barely referred to at all in the evidence.

Hearing

12. Before coming to our findings of fact, it is necessary to record a number of points regarding the conduct of the case, which arose during the course of the Hearing.

13. First, the Respondent did not pursue a strike out application made in writing shortly before the Hearing, in view of the fact that it had subsequently received the Claimant's witness statement.

14. Secondly, the Claimant did not pursue an application for the disclosure of a forensic report in relation to her email account with the Respondent, nor an application for any Order in relation to emails she says were deleted from that account.

15. Thirdly, the Claimant's amendment application made during closing submissions so that her complaint of discrimination arising from disability included consideration of the outcome of her appeal against dismissal was granted by consent.

16. Finally, in relation to the same complaint and also during closing submissions, the Respondent sought to add a new legitimate aim to those pleaded in its Response as set out above, namely the aim of properly structuring staffing levels to alleviate pressures on its IT department. This was opposed by the Claimant.

17. Miss Vittorio accepted that there was no satisfactory explanation as to why the amendment was sought so late in the proceedings. In fact, the application emerged from the Tribunal's questions of the Respondent's witnesses. She submitted that there was nevertheless no prejudice to the Claimant as evidence had been given in relation to this aim, in relation to which she had had the opportunity to question the Respondent's witnesses, and indeed had done so, for example suggesting to Mr Woodbine that her absence could have been covered with bank staff. Miss Vittorio submitted that conversely the Respondent would be prejudiced if the amendment were not allowed because it would not be able to rely on a stronger defence than that which had been pleaded.

18. The Claimant objected, effectively on basis that there was evidence she may have put forward had she known the Respondent's case in full in advance. When asked what that evidence was, she referred to bank cover and secondment cover. Both of those matters were rehearsed in the evidence, including through her questions of Mr Woodbine, as noted above.

19. We considered the application at the start of our deliberations on the case generally. The timing and nature of the amendment being sought are two important factors in deciding such applications, though case law makes clear that the key issue is the balance of prejudice between the parties, specifically prejudice in the conduct of the proceedings. Although made unusually late in the

proceedings, we decided to grant the Respondent's application for the following reasons:

19.1. As already indicated, the Claimant was able to ask questions of the Respondent's witnesses relating to the factual matters on which the legitimate aim was based.

19.2. She was not disadvantaged by being caught unawares about something she would otherwise have prepared to address in closing submissions, as she made clear that she did not wish to make any submissions in any event.

19.3. There was thus no discernible prejudice to the Claimant in allowing the amendment. By contrast, the Respondent would have been deprived of relying on a matter that was properly rehearsed in the evidence.

19.4. As part of considering the complaint of unfair dismissal, assuming the Respondent could establish the reason for dismissal, we were required to determine whether dismissal was within the range of reasonable responses and whether it could tolerate the Claimant's absence any longer, which was almost bound to entail considering the impact of the absence on the Claimant's team, such that the issue on which the new aim relied was within the four corners of the overall case anyway.

19.5. Moreover, on reflection during deliberations, it seemed to us that the management of absence (the first aim, which was already pleaded) necessarily incorporated something broader than just implementing the Respondent's attendance policy in relation to the Claimant as an individual; it also related to the impact of the absence on the organisation, in this case the Claimant's team. It is well known that this is what absence management means and entails. Accordingly, our view on further reflection was that the amendment really only made explicit what was already pleaded.

Facts

20. We read statements and heard oral evidence from the Claimant and, for the Respondent, from Mr R Woodbine (ICT Team Leader and the Claimant's supervisor), Ms M Jinks (Head of Programmes, Strategy, People and Partnerships) and Mr D Tomlinson (Executive Director of Finance). Mr Tomlinson gave evidence remotely because he had contracted Covid-19. By agreement and at the Claimant's request, the Tribunal put its questions to Mr Woodbine and Ms Jinks first, to assist her in the presentation of her case, with her questions then following.

21. As to documents, the parties had agreed an extensive bundle. We made clear that we would only have regard to those documents we were expressly taken to. As would ordinarily be the case, that generally included those documents referenced in the witness statements, but some of those references were very large (one referred to around 350 pages). We made clear that we would not read all of those sections – pages 364 to 603, 669 to 731 and 632 to 668 – as the time allocated for the Hearing simply did not allow us to do so, save to the extent that we were taken to specific pages within those parts of the bundle. The Claimant handed up additional documents on days 2 and 3. There was no objection to their inclusion, though in the end they were not referred to.

22. Our findings of fact now follow, made on the balance of probabilities, on the evidence we heard and were taken to as summarised above. We focused on those matters relevant to the issues to be decided, not everything the parties raised. Page references below are of course references to the bundle, with those prefixed with "M" being references to medical documents. Alphanumeric references are references to the statements, for example VA3 would be paragraph 3 of the Claimant's statement and RW5 would be paragraph 5 of Mr Woodbine's statement.

23. The Claimant was employed by the Respondent as an ICT Service Desk Technician from 2 May 2017 to 6 December 2019, working 15 hours per week. She worked part-time at another NHS Trust as well.

24. As noted above, the Claimant relied on having had a number of disabilities. There follow some initial general observations on those which remained contested, either as to disability itself or as to knowledge of the disability, though more relevant observations follow later in our chronological account of the main events.

Disability

Fibromyalgia

25. Before the start of her employment, on 10 April 2017 the Respondent obtained an OH report in relation to the Claimant (page 152). It said that she had a health condition thought to affect her joints. It was noted that physiotherapy was helpful, that the Claimant did stretching exercises, that she took daily medication and that she was monitored every 6 months, but that she did not want OH to divulge the condition. She was said to be fit for work, though OH concluded she was likely to be a disabled person under the Act as a result of the condition.

26. Mr Woodbine saw the April 2017 report later on in the Claimant's employment. He told us that the further steps the Respondent took as a result were the additional OH referrals we describe below. Fibromyalgia was diagnosed in August 2019. The Claimant did not tell the Respondent of the diagnosis at that point. The name of the Claimant's condition – fibromyalgia – was first flagged to the Respondent two weeks before her dismissal in an OH report of 22 November 2019 (pages 431d to 431e).

Depression

27. An OH report dated 23 October 2017 (page 156) described the Claimant as having moderate to high symptoms of concern, apparently based on the standard simple diagnostic tool whereby the Claimant answered a series of questions about her recent thoughts and feelings. A further report on 21 January 2019 (page 426) advised that the Claimant had attended six sessions of CBT to address symptoms of anxiety and depression and had a moderate level of depression.

28. The Claimant took 50mg of sertraline from October/November 2019. On 25 October 2019 (page M42) she was referred to the community mental health team. She had four counselling sessions. Her impact statement (page M5) refers to a number of effects of depression. The Claimant told us these were the effects from 2017 onwards. In summary, she says that depression meant she was unable to sleep (almost every night), felt negative around others, was suspicious when at work, re-read things several times before being able to register what was being communicated (she says this was the case on most days) and sometimes lost the

sense of what she was supposed to say or do when she was upset or overwhelmed. She also told us that her depression meant she did little socialising, because she feared people would say something negative to her.

29. We were shown no medical evidence as to the effects of the impairment on the Claimant without medication, whether at the relevant times or at all. The Claimant's view in oral evidence was that she would "not [have been] at ease" and would not have felt confident and positive. She said that her medication helped her calm down and take things step by step.

Liver condition

30. The Claimant confirmed to us that the condition in question was hepatitis B, and that she has taken medication to reduce its effects, since 2013. She accepted that the Respondent did not know she had hepatitis B, but said that it knew she had a chronic liver condition because it is referred to in OH reports.

31. Her impact statement (page M5) says that the condition caused fatigue and overall weakness, especially if she missed her medication. She told us that without medication, i.e., when she forgot to take it, preparing food would become difficult, she could not walk for ten minutes to the nearest shop (though she could drive safely), she was too tired to read, and her older daughter had to help her dress. This had been the case since 2013. She was warned by medical professionals not to miss her medication.

Attendance management policy

32. The Respondent's Attendance Management Policy was at pages 691 and following. The main points to note are as follows:

32.1. Its purpose is to support health and wellbeing and to maintain regular attendance to support its service users.

32.2. If attendance does not improve, the expectation is that the Respondent will progress through the stages of the procedure. There is some discretion in this respect in certain circumstances, for example if a condition is life-limiting, and at all times managers are to act reasonably, consistently and fairly, with an emphasis on support for the absent employee.

32.3. There are three stages to the procedure for managing absence – a Notice of Concern ("NOC"), a Final Notice of Concern ("FNOC"), and a Final Review Meeting ("FRM"). Managers are to meet with an employee after two weeks of absence, and again after eight and twelve weeks, with the FRM to follow after sixteen weeks.

32.4. Dismissal follows the FRM if there is no short- or medium-term prospect of a return to work (assuming early retirement is not an option). Ms Jinks explained that the initial stages are about regular consideration of the position and communication with the employee, with regular OH referrals, before the FRM is arranged at the sixteen-week point.

32.5. There is a section on disability, which says that reasonable adjustments will always be considered to support a return to work. At page 717 there is reference to disability leave, but this is expressly stated not to be appropriate to cover

sickness absence. Rather, it is leave for treatment, rehabilitation or assessment related to disability.

The Claimant's sickness absences

33. From September 2017 to the date of her dismissal, the Claimant had three absences. We recount the first two briefly. It is the third that is most relevant.

34. The first was from 29 September to 2 December 2017. The Claimant's fit notes stated that the absence was because of stress at work causing high levels of anxiety, poor concentration, headache and very emotional and low mood (pages 376 to 377). The OH report at pages 156 to 157 (on 23 October 2017) focused on ADHD and also mentioned neck and back symptoms. It said that the Claimant had requested physiotherapy and needed regular breaks to stretch her back and neck. As noted already, it described moderate to high symptoms of concern relating to anxiety and depression. A further OH document of the same date (pages 160 to 161) referred to stress at work, and confirmed that the Claimant was not taking medication for the same. It said that it was not anticipated this condition would reoccur with support in place.

35. A further OH report was produced on 3 November 2017 (pages 164 to 165). It described the Claimant as having chronic pain and said that she had an acute stress reaction in relation to her work and personal stressors, reporting that this was likely to be a disability. A further document of the same date from page 167 onwards referred to a chronic liver condition for which the Claimant was taking medication. The report stated that the Claimant had undertaken six counselling sessions and recommended she utilise the Respondent's Employee Assistance Programme. She was said to have moderately severe depression (page 178).

36. Mr Woodbine saw the report. He instigated a DSE assessment, as a result of which the Claimant's office chair was replaced and she was given the opportunity to do stretching exercises at work and to take regular breaks. Mr Woodbine said that further enquiries following this report were made via the further OH referrals.

37. The Claimant's second absence was from 7 June to 1 August 2018. Her fit notes recorded stress at work and issues in her employment with the other Trust, causing stress and anxiety. An OH report on 13 July 2018 (page 419) said that the Claimant was suffering from stress reaction due to perceived work issues with her other employer, though the Claimant had also mentioned a noisy environment in her employment with the Respondent. The report described moderate depressive symptoms. A Wellbeing Assessment Report dated 3 August 2018 recommended CBT. The Claimant was given a phased return to work.

38. The Claimant was discharged from counselling on 21 January 2019. The OH report at pages 426 to 428 described a moderate level of depression but said that she had made good progress in therapy. It advised that she was fit to remain in work, though may warrant further therapeutic input.

39. The Claimant suffered a road traffic accident on 25 January 2019. The Respondent says she nevertheless attended a meeting at work on 1 February 2019 with her union representative. Mr Woodbine recounted at RW5 that the Claimant said at this meeting that the work stressors she was encountering were being assigned multiple tasks, conflict with staff and a noisy environment. Regarding conflict with staff, he says that there was no evidence to substantiate it

and it was agreed that the Claimant would not take any formal action in this regard. As to the environment, he says it had been agreed the Claimant could use her mobile phone or a CD player because she had said music would help with her ADHD. His evidence was that the Claimant said there was no need to discuss this further. He also said an OH referral was suggested, but that the Claimant said she was seeing her own GP. Mr Woodbine said at RW6 that a basic work action plan was agreed and sent to the Claimant as at pages 469 to 470. The document referred to regular one-to-one meetings, suggested a plan for her workload and that her tasks should be written up (a list was then given), and that she should have six respite breaks per day.

40. The Claimant agreed in her oral evidence that she "could have" said the things recounted by Mr Woodbine at RW5, but said that she did not attend any meeting on 1 February 2019 as she was off sick. Her evidence was that the plan was written months before, asserting that the HR colleague mentioned in the document at pages 469 to 470 had left the Respondent by the date of the alleged meeting. Mr Woodbine was adamant that the meeting took place, recalling the Claimant being in some discomfort after her accident. The document recording the meeting is not signed by either party, but the fact of the document and Mr Woodbine's specific recollection, for example of the Claimant's discomfort, on balance leads us to conclude that the meeting took place as Mr Woodbine says, including the Claimant saying that there was no need to discuss the music issue further and that she was seeing her GP.

41. The Claimant's third absence was from late January or 7 February 2019. The GP notes said that the reasons for her absence were the road traffic accident and stress at work – pages 380 to 387a. The Claimant accepted in evidence that she was not absent due to the effects of ADHD nor fibromyalgia, but said that the work-related stress and the accident exacerbated her pre-existing conditions, including her liver condition because her stress meant she sometimes forgot to take her medication.

42. A further OH report was produced on 30 April 2019 (page 428). It recorded that the Claimant had a fit note for two more months. It said that she felt unwell and stressed over the accident, as well as unresolved issues at work such as an odour issue with a colleague. It also recorded her as saying that there were too many demands on her time. It said that it appeared there was an action plan regarding the issues the Claimant had raised (this reference is a further indication that the 1 February 2019 meeting took place as the Respondent says) but the Claimant was unsure whether it had been actioned. The report also stated that the accident had exacerbated the issues with the Claimant's emotional wellbeing. She was said to be unfit for work. To achieve a return to work in eight to ten weeks, particular attention needed to be paid to how her work was structured.

43. The Respondent met with the Claimant under the auspices of its Attendance Management Policy, on 7 May 2019. Workplace stress issues were raised. Mr Woodbine says at RW8 that he said to the Claimant that these were in hand following the meeting on 1 February and that the Respondent was awaiting the Claimant's return to work so that the plan could be actioned. The letter sent to the Claimant following the meeting (page 472) recorded her as saying that her recovery would last another two months. It confirms Mr Woodbine's oral evidence in that it referred to the 1 February meeting and said that the agreed action plan would be circulated once the Claimant returned to work. Ms Jinks told us that it is usual practice at the FNOC meeting, which is what this was, to explain to an

employee the risk of dismissal if absence continues. Mr Woodbine conceded in his evidence that this was not done in this case.

44. The Claimant suffered a further road traffic accidence on either 2 June or 2 July 2019. At VA3 the Claimant says that the accident exacerbated her work-related stress, disabilities and "other chronic health issues". She also had issues with the house she was living in with her daughters. She says that this "altogether had a negative impact", adding that the effects of the second accident were "only psychological which regressed [her] pre-existing pains, anxiety and depression". At VA5 she says that "pre-existing work-related stress and depression of poor working condition and dignity at work issues … had a negative impact on [her] psychologically". Mr Woodbine says at RW11 that in conversations with the Claimant during this period she emphasised the two accidents and stress related to her personal life as being the reasons for her absence, not just work.

45. Two attempts were made to arrange another long-term absence meeting, in June and August 2019, but the Claimant did not attend either of them. She was unwell for the first and mistook the second for an OH appointment. On 5 August 2019 Mr Woodbine sent the Claimant a stress risk assessment to complete (page 439). She did not complete it, giving the reason that she was not at work.

46. An OH report dated 21 August 2019 (pages 430 to 431) said that given the severity of the Claimant's symptoms and the level of distress she was experiencing from difficulties in her personal life and the workplace, it was unlikely she would function adequately in her job or any work. It went on to say that there were "too many unpredictable variables" to suggest when she might return to her role and that there were no workplace actions or adjustments that would enable her to fulfil the demands of her job. The report mentioned the Claimant's liver condition and said it was long-term and that the Claimant took medication for it, but that it was under control and did not affect her ability to work. It described the Claimant as "overwhelmed by workplace difficulties".

47. It was this report which led to the decision to hold an FRM. This was arranged for 22 October 2019 (by a letter dated 8 October 2019 at page 318) but due to medical advice (pages 480 to 481), the Claimant could not attend. It was rearranged to 6 December 2019 by a letter dated 12 November 2019 (pages 358 to 359).

48. A further OH report on 21 October 2019 (page 431a) said that since the Claimant's accidents, her GP thought that non-work issues may have prolonged her recovery. The Claimant accepted before us that there was no medical evidence that her underlying health conditions meant she took longer to recover, though she told us it is common sense that this would be the case. The OH report recounted the Claimant as saying that her mental health symptoms had worsened over the preceding few months and that she had been diagnosed with depression and anxiety by her GP eight years before. It said she used coping mechanisms, such as mindfulness and that the main triggers for a decline in her mental health were non-work-related issues plus the Respondent getting in touch while she was off work. Due to the severity of her symptoms, OH strongly advised the Claimant to see her GP. The report said that the diagnosis of depression was likely to fall under the Act. A return to work was difficult to predict but neither a return nor any face-to-face meetings with the Respondent could be anticipated as being possible in the following four weeks. The Respondent made no further enquiries about the

Claimant's health at this point, Mr Woodbine says because they were getting to the point of the FRM.

49. A final OH report was obtained on 22 November 2019 (pages 431d to 431e). It said that some of the Claimant's non-work issues had resolved (the Claimant indicated to us this was her moving house) and her GP had started some mental health treatments. The work-related triggers for stress were listed by the Claimant to OH as her having no structure to her workload, not being allowed enough time to complete tasks and being asked to carry certain items which could be a bit heavy. The report said there had been some improvement in her mental health, but given the severity of her symptoms she was not fit to return to work. It said that her depression and fibromyalgia were likely to fall under the Act.

50. The report then described fibromyalgia generally. It said that a deterioration of the symptoms of depression and anxiety could recur, but this was difficult to predict, going on to say that unless the Claimant's mental health was well-managed, a return to work was going to be difficult. No return to work could be anticipated within four weeks. Mr Woodbine told us that having received this report he believed the Claimant to be disabled because of depression and fibromyalgia at that point.

51. The Claimant summarised to us the reasons for her long absence in 2019 as being pre-existing work-related stress, especially the odour issue and issues with the structure of her work, the January accident, the housing issues and the later accident.

52. The Claimant referred frequently during her evidence to the odour issue. As to her willingness to go back to work into that situation, she said she was hoping it would be resolved by management looking into it properly, even though on her own evidence it had not done so effectively for some time. Mr Woodbine told us that the colleague's odour arose from a medical condition. The Respondent's action plan included checking the impact on the team and asking him to freshen up, change or go home; there was also a shower room. The Respondent could not permit the Claimant to work in side rooms as these were regularly in use for meetings. Mr Woodbine also told us that the Claimant did not make him aware that the colleague's odour was causing her stress or to vomit; at no point was any concern raised other than in informal discussions. In the absence of any formal complaint from the Claimant, we accepted that evidence.

53. Mr Woodbine described the impact of the Claimant's absence. We accept his account, which was effectively unchallenged. There were five employees in the team (though less than four FTE), of which the Claimant was one. The team's responsibilities included accounts, requests for IT changes, purchasing and control. The Claimant was responsible for updating database records, labelling apparatus and preparing it for dispatch. Other staff had to carry her workload and reported that they could not get all of the work done as a result, putting the team in breach of requirements under a service level agreement. Someone from another team was brought in for the last couple of months of the Claimant's absence to help with the backlog, on a temporary secondment, and the Claimant's job-share also did some extra hours. There could be no permanent replacement however whilst the Claimant remained employed. Mr Woodbine said he explained the impact to Ms Jinks in his report for the FRM. Ms Jinks' evidence was that she did not recall that explanation being given at the FRM, though there was discussion of temporary support being in place because work was not being completed. We

were content that Ms Jinks was made aware of the situation in broad terms, in Mr Woodbine's report even if not at the FRM itself.

Dismissal

54. The FRM on 6 December 2019 was chaired by Ms Jinks. The letter convening it (and its October predecessor) referred to above, both indicated that the potential outcome included dismissal and said that the Respondent would take into account any information the Claimant provided and any information from her GP and OH. It enclosed the management case paperwork. The letter also gave opportunity to the Claimant to submit a statement. The Claimant had not been formally warned before these letters that she could be dismissed if she did not return to work, but she did not argue before us that she was unaware that could be the case. Indeed, page 643 (the notes of the FRM) record her confirming she was aware of it. She was accompanied to the FRM by her union representative.

55. The management case was presented by Mr Woodbine. Ms Jinks told us that the salient points were that the Claimant's absence was extensive, that the Claimant had said there were work stressors but these had not been established as the Claimant was unwilling to complete a stress risk assessment whilst absent, there was no imminent return date, the Claimant's latest sick note was to the end of January 2020 (page 345), and support had been provided such as allowing the Claimant to listen to music at work and taking her off tasks that would impact her back pain. Mr Woodbine told Ms Jinks that all reasonable adjustments had been implemented for the Claimant's known conditions. Ms Jinks regarded those conditions as ADHD and fibromyalgia (though the latter without diagnosis). She was also aware of the road traffic accidents and that the Claimant was saying she had work-related stress, which Ms Jinks saw (according to MJ33), from the fit notes and from what the Claimant and her representative said at the meeting, as the primary reasons for her absence. Ms Jinks says that neither the Claimant nor her representative said that depression was a reason for her absence. At page 649 it can be seen that Ms Jinks asked the specific cause of her absence and that the Claimant replied, "RTA and work related but I didn't stop attending with the work-related stress". Ms Jinks checked whether Mr Woodbine had met the managerial responsibilities place on him by the Respondent's Policy, in particular the requirements for OH referrals and to keep the Claimant up to date. She was satisfied he had.

56. Ms Jinks summarised the case which the Claimant presented to her as follows (MJ13 and following):

56.1. She had previously raised concerns about her workload.

56.2. She confirmed that she had met with Mr Woodbine on 7 May 2019.

56.3. She had difficulties with work being done on her house and with her child being bullied.

56.4. The personal hygiene of a colleague had been making her unwell. Ms Jinks was not prepared to discuss this point, as the meeting was about the Claimant's absences. In any event, she did not see it as relevant given that an action plan was in place, briefly referred to by Mr Woodbine during the meeting. Ms Jinks says that the Claimant did not say to her that it was a barrier to her returning to work. Although at page 645 the Claimant's representative commented that this issue contributed to the Claimant's work-related stress and at page 646 the

Claimant said she went to OH as it was making her vomit, what Ms Jinks says seems to be supported by the notes.

56.5. She had not been able to use certain websites to listen to therapeutic music as OH had advised. Mr Woodbine told Ms Jinks he had advised the Claimant to use her phone. The Claimant felt she would be penalised for doing so.

56.6. A request for an increase in her hours had been denied.

56.7. She also raised having to remove packaging and rubbish when working with laptops and tablets, though she confirmed that there had been no formal diagnosis of fibromyalgia.

57. Ms Jinks' evidence (MJ21) is that the Claimant confirmed at the meeting that all of the workplace concerns summarised above – the personal hygiene issue and the carrying of items in particular – had been dealt with and closed. At page 650, Ms Jinks' HR colleague is recorded as saying "all agree" that other issues "have been dealt with and closed off". The Claimant agreed during cross-examination that she said that and told us when asked about the relevance of these matters to her case that they were background information in that they affected her psychologically. In questioning Ms Jinks however, the Claimant insisted that she did not agree the matters were closed, specifically the odour/hygiene issue. On balance, whatever the Claimant thought, given her admission in cross-examination, we conclude that she did say to Ms Jinks (directly or through her representative) that she regarded the issues as closed, that is addressed or in hand before she went off sick.

58. The Claimant told Ms Jinks she was aiming to return to work in six to eight weeks provided she could get an occupational therapy assessment from the local authority and was referred for an MRI scan, but there was no medical evidence to support that assertion and an MRI scan had not been recommended by her GP. Ms Jinks' evidence (MJ30) is that her conclusions were as follows:

58.1. The primary reason for the Claimant's absence was the road traffic accidents, together with work stressors.

58.2. The Claimant could not complete a stress risk assessment until she returned to work to know what the workplace stressors were.

58.3. It was acknowledged by all present at the meeting that the workplace stressors the Claimant mentioned to Ms Jinks had been dealt with.

58.4. OH could not predict a return to work date.

58.5. The Claimant's assertion regarding when she would return to work was not based on medical advice.

58.6. The Claimant was not undergoing any current medical treatment.

58.7. The Claimant had "extraordinary personal stressors" and was proactively seeking support with those.

59. Based on this information and given the length of the absence, there being no predicted return date and no current treatment, Ms Jinks decided to dismiss the Claimant and informed her accordingly. Ms Jinks told us there was nothing to say

that the latest sick note would not be extended and that the Claimant did not explain why she felt she would be able to return within the timescale she had given.

60. Ms Jinks did not consider alternatives to dismissal, given that there was no confirmed return to work date and given that she understood the support for the team to be temporary. She told us it was necessary to have people in their roles to support the Respondent's work, and that by the end of the six to eight-week period referred to by the Claimant she would have been absent for a year. Her evidence was that the Claimant did not tell her what would be required to enable her to return to work, nor did she say she should be referred to OH. We accept that evidence, as there is no such reference in the meeting notes. At page 646, the Claimant is recorded as saying she was trying to get her house sorted, awaiting an MRI, was into her second month on sertraline and was getting counselling. She is also noted as saying, "I don't want to answer calls and OH agreed to minimise contact" and (page 647), "I'm happy to return when everything is dealt with". At pages 648 to 649, Ms Jinks asked her, "In terms of you stating that you feel able to return within 6-8 weeks, where is this from … what will change?" The Claimant replied, "No there's no timeframe but I'm hoping". Ms Jinks repeated the question and the Claimant replied, "Focus on health, have the MRI and put lots in place". Ms Jinks' letter to the Claimant of 10 December 2019 (pages 604 to 608) rehearsed all of the above reasoning process and gave an account of the meeting.

61. The Claimant's evidence before us was that she hoped to return to work by the end of January 2020 as she was applying medical advice in relation to exercise, CBT books, mindfulness and her medication. She told us she anticipated that she would be settled into her new home by then. This is the burden of her case, namely that she should have been given more time to recover, and is what she meant by saying that the Respondent did not consider OH advice. She also said to us that the Respondent did not properly take into account her history of work-related stress and her personal stressors, because it did not put other options to her such as returning to work without pay. She did not suggest this as an option to the Respondent at the time.

62. The Claimant was not given the opportunity to be accompanied to the FRM by a "cultural ambassador", who we understand to be an employee of the Respondent who could attend internal meetings to report on their impact on equality issues. She could not tell us what more such a person could have done that her union representative did not.

63. The Claimant's employment with the other Trust terminated on 8 January 2020, also because of absence.

Appeal

64. The Claimant appealed against her dismissal on 19 December 2019 (pages 611 to 612). In summary she said:

64.1. She had experienced severe anxiety due to the road traffic accidents and severe housing issues (she moved house on 4 November 2019).

64.2. She had been diagnosed with fibromyalgia and ADHD.

64.3. She did not feel those matters had been taken into account by Ms Jinks.

64.4. She believed that following completion of a risk assessment and reasonable adjustments to her work environment, she would be able to return to work.

64.5. OH recommended that she have structured work, frequent breaks and a work review, but these recommendations had been largely ignored.

64.5. Mr Woodbine had said the colleague's odour issue was a personal health matter and had advised her of an action plan in December 2018.

64.6. She was concerned about her workload and having to move boxes, which was affecting her back.

65. The Claimant said in evidence (at VA8) that she had requested access to work emails to help with her appeal and that this had been denied, Mr Woodbine telling her that the Respondent could not trace any emails. When the Claimant started a new NHS role subsequently, she found that a number of emails had been deleted, including some she had sent to team leaders and managers. She was not able to say however how this affected her appeal. She says she tried at the appeal hearing to give a verbal account of the workplace issues which the emails had addressed.

66. The appeal was heard by Mr Tomlinson on 13 March 2020. The Claimant was accompanied by a trade union Regional Official. Ms Jinks presented the management case. Mr Tomlinson made clear it was not a re-hearing, but a chance for the Claimant to say why the decision was unfair and for management to explain it.

67. Mr Tomlinson told us (DT8), and the Claimant confirmed, that her representative explained at the appeal that the Claimant believed her ADHD and fibromyalgia diagnoses had not been taken into account by Ms Jinks. The Claimant produced confirmation of a diagnosis of fibromyalgia before the hearing (page M10). It was dated 16 February 2020 and said that she had been diagnosed in August 2019. Mr Tomlinson says he took the document into account by testing whether it would have made any difference to Ms Jinks' decision – see below.

68. Listening to music as an adjustment was discussed and the Claimant said that access to certain websites had been blocked and that she had been asked to sign a mobile phone policy which she thought was unfair (page 668). Mr Tomlinson's evidence at DT33/34 is that the Claimant told him she had to sign the policy in order to receive calls from and make calls to her children and that it also covered listening to music (which it did not). Mr Woodbine told us that the policy was raised with the Claimant because she was using her phone too much at work, as a record of their discussion, which we accept as unchallenged evidence. This was in December 2018, as the document in question shows, before the Claimant made the request to listen to music.

69. The Claimant told Mr Tomlinson that she was only allowed to listen to music for one week after the OH recommendation to that effect. Mr Woodbine told us that the arrangement did not change; in fact, the Claimant was given a headset. Ms Jinks indicated to Mr Tomlinson at the appeal hearing that the Claimant had been encouraged to use her own CDs (DT35). Mr Tomlinson was satisfied that the Claimant had been allowed to listen to music as an adjustment and that she was not treated any differently to anyone else in terms of access to websites.

70. The Claimant also said to Mr Tomlinson that the 2017 OH report had said she would benefit from structured work but she believed management did not understand this and said she had not been allowed to complete a particular task. Mr Tomlinson concluded (DT38) that there were no adjustments in place regarding the Claimant's workload, but all OH recommendations had been acted upon. Ms Jinks told him that the Claimant had not raised the question of moving boxes with her manager.

71. The Claimant also raised the issue of the colleague's personal hygiene (DT18), reporting that there had been some improvement but that it was still making her unwell (of course she had been out of the workplace for over a year by this point). Mr Tomlinson told us he could not recall the Claimant saying that she could not return to work because of this issue. We accept that on balance; his contemporaneous written decision was a comprehensive account of the hearing and did not refer to this point. He was satisfied as a result of his discussion with Ms Jinks at the hearing that managers had taken action, noted the Claimant said had been some improvement and, in any event, did not understand the relevance of the issue to the Claimant's appeal.

72. Mr Tomlinson asked Ms Jinks (DT23) whether, if she had been shown a formal diagnosis of fibromyalgia, that would have made a difference to her decision. Ms Jinks replied that she may not have made a decision immediately but would have possibly sought further OH guidance. She added that the key issue however was the absence of any clear return to work date.

73. Mr Tomlinson noted (DT27) that the Claimant was still not signed fit to return to work by her GP at the date of the appeal hearing. Although she told him she felt well enough to do so, Mr Tomlinson told us that there was no indication of any medical support for that assertion, whether from the Claimant's GP or anyone else, and the Claimant did not say that she could or would provide anything of that nature.

74. The panel asked questions of Ms Jinks, including about the flexing of the Respondent's Policy. Ms Jinks' HR companion said that it had in fact been flexed beyond the usual sixteen weeks for holding an FRM, as this had not been held until the Claimant had been absent for nine (it was actually ten) months. The Respondent had also changed the arrangements for contact with the Claimant from weekly to monthly calls, at her request.

75. The union representative said in summary (DT53) that the Claimant was disabled by reason of ADHD and fibromyalgia, referred to her road traffic accidents and major housing difficulties and said all of this impacted on the Claimant's ability to engage with the sickness absence process.

76. Mr Tomlinson accepted (DT56 and following) the Claimant's diagnosis of fibromyalgia, but concluded that neither at the FRM nor at the appeal, had the Claimant produced any independent evidence supporting a likely return to work date or adjustments that would enable her to return. The Claimant told us that she did not realise a fit note was required to back up what she was saying, though as noted above she did send a GP letter regarding her fibromyalgia before the hearing. Mr Tomlinson did not feel that the Claimant's assurance regarding returning to work was based on anything concrete and was not a considered submission on her part. He would have expected any fit note to have been provided prior to the hearing.

77. For him, the additional matters the Claimant had raised did not make any difference. His understanding, from what was said, was that the Claimant remained off sick because of ADHD and fibromyalgia. He was satisfied that the adjustments identified by OH had been implemented and the Claimant did not suggest to him any adjustments that would facilitate her return beyond what had already been done. He does not recall her saying she could be referred to OH for a further assessment, which again on balance we accept as again his detailed account of the hearing does not record it. He did not test the impact of the Claimant's absence on her team; nothing was presented to him about it and so he did not regard it as relevant to his decision.

78. Accordingly, the Claimant's appeal was not upheld. She was informed of the outcome at the hearing. A letter was sent to her subsequently confirming the content of the hearing in writing (pages 726 to 731) – see below.

79. At page M26 there is a GP note dated 18 March 2020 saying that the Claimant had requested a fit note for returning to work. The Claimant told us she was looking for work by the end of January, chasing bank work from both of her former employers but being told she needed fit notes in order to be offered any shifts.

80. On 20 March 2020, she sent the Respondent a fit note dated 18 March 2020. She asked Mr Tomlinson and Ms M Dalton of HR to consider her request to return to work, preferably in a different IT department. Ms Dalton replied on 2 March 2020, with Mr Tomlinson's approval and attaching his decision letter, saying that the decision had been made on 13 March, was given to the Claimant verbally on the day, and "our decision does not change". She apologised for the delay in sending the written decision.

Law

Disability

81. Section 6 of the Act provides (so far as relevant) that:

(1) A person (P) has a disability if -

(a) P has a physical or mental impairment, and

(b) *the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.*

82. Schedule 1 to the Act provides at paragraph 2 that "*The effect of an impairment is long-term if – (a) it has lasted for at least 12 months, (b) it is likely to last for at least 12 months, or (c) it is likely to last for the rest of the life of the person affected*". Paragraph 2 goes on to say that "*If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur*".

83. Schedule 1 also provides at paragraph 5 that "*(1) An impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities if – (a) measures are being taken to treat or*

correct it, and (b) but for that, it would be likely to have that effect. (2) Measures includes in particular medical treatment …".

84. Section 212 of the Act provides that "*substantial*" means "*more than minor or trivial*".

85. In **Kapadia v London Borough of Lambeth [2000] EWCA Civ**, the Court of Appeal accepted a submission that it was for the Claimant to prove that the impairment had a substantial adverse effect on his/her ability to carry out normal day-to-day activities or to prove that the impairment would have had such an effect but for the fact that measures were being taken to treat or correct the condition. Having in mind that burden, the Tribunal's task is to look at the evidence presented to it and decide the question on the balance of probabilities.

86. **Goodwin v Patent Office [1999] ICR 302** is well-established and well-regarded Employment Appeal Tribunal ("EAT") authority for the questions to be asked by Tribunals in determining disability, encouraging Tribunals to take an inquisitorial approach to the issue. The EAT stated that the legislation requires a tribunal to look at the evidence by reference to four different conditions. Taking account of amendments to the legislation since the decision, the questions are stated by the EAT as follows: "*(1) The impairment condition. Does the applicant have an impairment which is either mental or physical? (2) The adverse effect condition. Does the impairment affect the applicant's ability to carry out normal day-to-day activities ... and does it have an adverse effect? (3) The substantial condition. Is the adverse effect (upon the applicant's ability) substantial? (4) The long-term condition. Is the adverse effect (upon the applicant's ability) long-term?*". The EAT stated that it would be useful for tribunals to consider these questions in sequence, though it remains necessary to make an overall assessment and not "*take one's eye off the whole picture*". The EAT went on to give guidance in respect of each question. In respect of the adverse effect condition, it stated that "*the focus of attention ... is on the things that the applicant cannot do or can only do with difficulty, rather than on the things that the person can do*". As to the substantial condition, the EAT confirmed that the word "substantial" means "*more than minor or trivial*", wording which is now enshrined in section 212 of the Act.

87. As indicated above, Schedule 1 paragraph 5 of the Act requires consideration of how an impairment would affect day to day activities if medical treatment ceased. According to the House of Lords decision in **SCA Packaging v Boyle [2009] ICR 1056**, what must be asked is what the effect of the impairment would be if treatment stopped. Whether it is likely that the impairment would have the required effect in that situation means it "could well happen" – see also paragraph C3 of the Guidance on matters to be taken into account in determining questions relating to the definition of disability ("the Guidance"). The EAT in **Fathers v Pets At Home Ltd and another [2013] UKEAT/0424/13** said that "relatively little evidence may in fact be required to raise this issue", in other words to require a tribunal to consider and address the point of the effects in the absence of medical treatment. Of course, what a tribunal makes of the evidence before it on this issue very much depends on the individual case.

88. As to whether the required effects of an impairment were long term, again the **SCA Packaging** judgment makes clear that where a tribunal is required to assess whether those effects are "likely" to last for at least 12 months, this means that it "could well happen". As paragraph 2 of Schedule 1 to the Act says, and paragraph C7 of the Guidance confirms, it is not necessary for the effect to be the same

throughout the period being considered. What has to be considered is whether the effects were "likely" to recur, that word again meaning "could well happen".

89. The long-term question has to be assessed as at the time of the alleged discriminatory treatment. The Court of Appeal said in **McDougall v Richmond Adult Community College [2008] ICR 431** that in assessing likelihood in both respects, tribunals should only consider the evidence available at the time of the discriminatory acts. The assessment thus requires a prophecy of future events at those points, rather than recourse to actual evidence of subsequent events. This is reflected in paragraph C4 of the Guidance. In similar vein, on the question of whether the required effect had lasted 12 months, the EAT in **Tesco Stores Limited v Tennant [2019] UKEAT/0167/19**, held that it is the date of the alleged discriminatory act(s) at which this must be assessed, with the question being whether at that point there has been "12 months of effect".

90. In **Royal Bank of Scotland PLC v Morris [2012] UKEAT/0436/10**, the EAT upheld an appeal against the tribunal's decision that the Claimant was a disabled person. On the question of the effect of medication (what is sometimes known as "deduced effects"), the EAT found there was no explicit evidence and stated, "This is just the kind of question on which a tribunal is very unlikely to be able to make safe findings without the benefit of medical evidence". Similarly, "it would be difficult for the Tribunal to assess the likelihood of [the risk of recurrence of the required effects under paragraph 2(2) of Schedule 1] or the severity of the effect if it eventuated, without expert evidence". The EAT concluded, "The fact is that while in the case of other kinds of impairment the contemporary medical notes or reports may, even if they are not explicitly addressed to the issues arising under the Act, give a tribunal a sufficient evidential basis to make common sense findings, in cases where the disability alleged takes the form of depression or a cognate mental impairment, the issues will often be too subtle to allow it to make proper findings without expert assistance. It may be a pity that that is so, but it is inescapable given the real difficulties of assessing in the case of mental impairment issues such as likely duration, deduced effect and risk of recurrence which arise directly from the way the statute is drafted".

Burden of proof

91. Section 136 of the Act provides as follows:

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

(2) If there are facts from which the court [which includes employment tribunals] *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".

92. Direct evidence of discrimination is rare and tribunals frequently have to consider whether it is possible to infer unlawful conduct from all the material facts. This has led to the adoption of a two-stage test, the workings of which were described in the annex to the Court of Appeal's judgment in **Wong v Igen Ltd [2005] ICR 931**, updating and modifying the guidance that had been given by the EAT in **Barton v Investec Henderson Crosthwaite Securities Ltd [2003] ICR**

1205. The Claimant bears the initial burden of proof. The Court of Appeal held in **Ayodele v Citylink Limited and anor [2017] EWCA Civ. 1913** that "there is nothing unfair about requiring that a claimant should bear the burden of proof at the first stage. If he or she can discharge that burden (which is one only of showing that there is a prima facie case that the reason for the respondent's act was a discriminatory one) then the claim will succeed unless the respondent can discharge the burden placed on it at the second stage".

93. At the first stage, the tribunal does not have to reach a definitive determination that there are facts which would lead it to the conclusion that there was an unlawful act. Instead, it is looking at the primary facts to see what inferences of secondary fact could be drawn from them. As was held in **Madarassy v Nomura International plc [2007] IRLR 246**, "could conclude" refers to what a reasonable tribunal could properly conclude from all of the evidence before it, including evidence as to whether the acts complained of occurred at all. In considering what inferences or conclusions can thus be drawn, the tribunal must assume that there is no adequate explanation for those facts.

94. If the burden of proof moves to the Respondent, it is then for it to prove that it did not commit, or as the case may be, is not to be treated as having committed, the allegedly discriminatory act. To discharge that burden it is necessary for the Respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the prohibited grounds. That would require that the explanation is adequate to discharge the burden of proof on the balance of probabilities, for which a tribunal would normally expect cogent evidence.

Discrimination arising from disability

95. Unfavourable treatment and the reason for it is accepted in this case and so nothing further need be said about that.

96. Whether the reason for the treatment was "something arising in consequence of the Claimant's disability" could describe a range of causal links and is an objective question, not requiring an examination of the alleged discriminator's thought processes. The approach to complaints of discrimination arising from disability was considered in detail by the EAT in **Pnaiser v NHS England [2016] IRLR 170**. As far as relevant to this case, it said

> *(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. Having regard to the legislative history of s.15 of the Act … the statutory purpose which appears from the wording of s.15, namely to provide protection in cases where the consequence or effects of a disability lead to unfavourable treatment, and the availability of a justification defence, the causal link between the something that causes unfavourable treatment and the disability may include more than one link. In other words, more than one relevant consequence of the disability may require consideration, and it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability.*
>
> *…*

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

…

(i) As Langstaff P held in Weerasinghe, 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."

97. We draw the following principles from the relevant case law concerned with whether the unfavourable treatment can be said to be a proportionate means of achieving a legitimate aim (justification for short):

97.1. The burden of establishing this defence is on the Respondent.

97.2. The Tribunal must undertake a fair and detailed assessment of the Respondent's business needs and working practices, making clear findings on why the aims relied upon were legitimate, and whether the steps taken to achieve those aims were appropriate and necessary.

97.3. What the Respondent does must be an appropriate means of achieving the legitimate aims and a reasonably necessary means of doing so. In **Homer v Chief Constable of West Yorkshire Police [2012] UKSC 15** it was said, approving Mummery LJ in **R (Elias) v Secretary of State for Defence [2006] EWCA Civ 1293**, that what is required is: first, a real need on the part of the Respondent; secondly, that what it did was appropriate – that is rationally connected – to achieving its objectives; and thirdly, that it was no more than was necessary to that end.

97.4. In **Hardy & Hansons plc v Lax [2005] ICR 1565** it was said that part of the assessment of justification entails a comparison of the impact upon the affected person as against the importance of the aim to the employer. It is not enough that a reasonable employer might think the treatment justified. The Tribunal itself has to weigh the real needs of the Respondent, against the discriminatory effects of the aim. A measure may be appropriate to achieving the aim but go further than is (reasonably) necessary in order to do so and thus be disproportionate.

97.5. It is also appropriate to ask whether a lesser measure could have achieved the employer's aim – **Naeem v Secretary of State for Justice [2017] ICR 640**.

97.6. In summary, the Respondent's aims must reflect a real business need; the Respondent's actions must contribute to achieving it; and this must be assessed objectively, regardless of what the Respondent considered at the time. Proportionality is about considering not whether the Respondent had no alternative course of action, but whether what it did was reasonably necessary to achieving the aim.

Reasonable adjustments

98. Section 20 of the Act provides:

"*(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 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".

99. Section 21 provides:

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

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

100. "Substantial" in this context means "more than minor or trivial" – section 212(1) of the Act. The Tribunal's task is to set out the nature, effects and extent of the alleged substantial disadvantage and assess it objectively. In other words, it must consider what it is about the PCP that puts the Claimant at the alleged disadvantage. As can be seen from section 20(3), a comparative exercise is required, namely consideration of whether the PCP disadvantaged the Claimant more than trivially in comparison with others. As indicated in **Griffiths v Secretary of State for Work and Pensions [2016] IRLR 216** the comparator is merely someone who was not disabled. They need not be in a like for like situation, but should be identified by reference to the PCP, so as to test whether the PCP puts the Claimant at the substantial disadvantage. This would be the case when an employee's disability led to disability-related sickness absences that would not be suffered by the non-disabled.

101. The next question is whether there were any reasonable steps which the Respondent could have taken to avoid the disadvantage which were not taken. It is well known that assessing whether a particular step would have been reasonable entails considering whether there was a chance it would have helped overcome the substantial disadvantage, whether it was practicable to take it, the cost of taking it, the employer's resources and the resources and support available to it. The question is how might the adjustment have had the effect of preventing the PCP putting the Claimant at a substantial disadvantage compared with others. This is an objective test, and the Tribunal can substitute its own view for that of the Respondent.

102. In **Environment Agency v Rowan [2008] IRLR 20,** the EAT restated guidance that tribunals 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."

103. In **Bank of Scotland v Ashton [2011] ICR 632**, Langstaff J emphasised the importance in all cases of the tribunal focusing on the words of the statute and considering the matter objectively. He held:

> "*The Act demands an intense focus by an Employment Tribunal on the words of the statute. The focus is on what those words require. What must be avoided by a tribunal is a general discourse as to the way in which an employer has treated an employee generally or (save except in certain specific circumstances) as to the thought processes which that employer has gone through*."

Knowledge

104. Paragraph 20 of Schedule 8 to the Act provides, in wording akin to section 15(2):

"*(1) A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know—*

(b) [in any case referred to in Part 2 of this Schedule], that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement".

105. The burden is on the Respondent to show that it did not have knowledge – certainly that is clear enough in relation to section 15 given the express wording of section 15(2). The EAT held in **Wilcox v Birmingham CAB Services Ltd UKEAT/0293/10** that what this provision requires is that the employer know (or could reasonably be expected to know) that an employee was suffering from an impairment, the adverse effects of which on their ability to carry out day-to-day activities were substantial and long-term, that is the various constituent elements of the definition of disability in section 6 of the Act – though as made clear in **Gallop v Newport CC 2013 EWCA Civ 1583** it is knowledge of the facts of the Claimant's disability that is required, not an understanding by the Respondent that those facts meet the statutory definition.

106. If the employer did not know and could not reasonably be expected to know the Claimant was disabled, knowledge of disadvantage does not arise.

107. What is reasonable for the Respondent to have known is for the Tribunal to determine and will depend on all the circumstances of the case. The question is what the Respondent would have found out if it had made reasonable enquiries – in other words there should be an assessment of what the Respondent should reasonably have done, but also of what it would reasonably have found out as a result (**A Ltd v Z EAT 0273/18** reflecting paragraph 5.15 of the EHRC Code on Employment (2011)).

Unfair dismissal

108. Section 98 ERA says so far as relevant to this case:

"*(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 … a reason falling within subsection (2) …

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

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

(3) In subsection 2(a) –

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

(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".

109. As Section 98(1) ERA puts it, it is for the employer to show the reason, or if more than one, the principal reason for the dismissal. The question to be considered is what reason the Respondent relied upon. The case of **Abernethy v Mott, Hay and Anderson [1974] IRLR 2013** is long-established authority to the effect that the reason for dismissal is "a set of facts known to the employer or as it may be of beliefs held by him, which cause him to dismiss the employee". That case also made clear that the reason given by an employer does not necessarily constitute the real reason for dismissal. The reason or principal reason is to be determined by assessing the facts and beliefs which operated on the minds of the decision-makers, leading them to act as they did in effecting the Claimant's dismissal. If and when the employer shows the reason for dismissal as above, it must then establish that it falls within one of the fair categories of dismissal set out by section 98(2) ERA (here the Respondent relies only on capability).

110. If the Respondent shows the reason and establishes that it was a reason falling within section 98, the Tribunal must then go on to consider section 98(4) ERA in order to determine whether the dismissal was fair. The burden is no longer on the Respondent at this point. Rather, having regard to the reason or principal reason for dismissal, whether the dismissal is fair or unfair requires an overall assessment by the Tribunal, and depends on whether in the circumstances, including the size and administrative resources of the organisation, the Respondent acted reasonably or unreasonably in treating the

reason as a sufficient reason for dismissing the Claimant, determined in accordance with equity and the substantial merits of the case. This overall assessment is in part concerned with the steps taken by the Respondent to effect dismissal and certainly requires an assessment of the reasonableness of the decision to dismiss. In all respects, the Tribunal must not substitute its opinion for that of the employer; rather, the question is whether what the employer did was within the band of reasonable responses of a reasonable employer.

111. The decision of the EAT in **East Lindsay District Council v Daubney 1977 ICR 566**, established the importance to fairness of an employer establishing the true medical position and consulting with an employee before dismissing them. It said, "*While employers cannot be expected to be, nor is it desirable they should set themselves up as, medical experts, the decision to dismiss or not to dismiss is not a medical question, but a question to be answered by employers in the light of the available medical advice. It is important therefore that when seeking advice employers should do so in terms suitably adjusted to the circumstances … 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. We do not propose to lay down detailed principles to be applied in such cases, for what will be necessary in one case may not be appropriate in another. But if in every case employers take such steps as are sensible according to the circumstances to consult the employee and to discuss the matter with him, and to inform themselves upon the true medical position, it will be found in practice that all that is necessary has been done. Discussions and consultation will often bring to light facts and circumstances of which the employers were unaware, and which will throw new light on the problem. Or the employee may wish to seek medical advice on his own account, which, brought to the notice of the employers' medical advisers, will cause them to change their opinion*".

112. In **O'Brien v Bolton St Catherine's Academy 2017 EWCA Civ 145**, a case also dealing with section 15, the Court of Appeal summarised unfair dismissal case law in relation to sickness absence dismissals by quoting the EAT's decision in **Spencer v Paragon Wallpapers Ltd [1977] ICR 301**, to the effect, "*Every case depends on its own circumstances. The basic question which has to be determined in every case is whether, in all the circumstances, the employer can be expected to wait any longer and, if so, how much longer? Every case will be different, depending upon the circumstances*". The EAT in that case noted that the relevant circumstances include *"the nature of the illness, the likely length of the continuing absence, [and] the need of the employers to have done the work which the employee was engaged to do"*. The last of these points is another way of referring to the impact on the Respondent of the continuing absence, which was something the Court of Appeal in **O'Brien** dealt with at more length in the context of section 15.

113. Other matters relevant to whether a sickness absence dismissal is fair will include whether an employer has properly considered alternatives to dismissal and, although of course the ACAS Code on Disciplinary and Grievance Procedures does not apply in such cases, the procedure followed by an employer in effecting dismissal, including the appeal process which is a well-recognised part of a fair dismissal in most cases.

Analysis

114. We reached our conclusions based strictly on the findings of fact we have set out above.

Disabilities

115. Dealing first with the basis on which the Claimant was a disabled person within the meaning of the Act, there is no need to say anything about fibromyalgia or ADHD. It was agreed that the Claimant was at the relevant times a disabled person by reason of those impairments.

116. What we were required to consider therefore was the Claimant's liver condition and depression. The burden was on her to establish that she was disabled by reason of those impairments. As already noted, the definition under section 6 requires a physical or mental impairment which had a substantial adverse effect on her ability to carry out normal day to day activities, which was also long-term. That impact was to be assessed at the time of her dismissal and the appeal hearing, that is between December 2019 and March 2020. That was the basis on which we asked questions of the Claimant during this part of her evidence, taking the inquisitorial approach referred to in the case law.

117. There was little by way of opinion from any medical professional, at least that we were taken to during the evidence, but we have accepted the Claimant's written and oral evidence as to the impact of the impairments. We will come shortly to whether it was sufficient to establish disability in either case, but make the point that it is perfectly common for tribunals to assess these matters based on what a claimant has said in evidence, without medical opinion, hence the standard request for an impact statement. We also make clear that it is a decision for a tribunal whether a claimant's particular impairment amounts to a disability. Whether an OH adviser or even an employee of a respondent believed that a claimant was disabled does not really take a tribunal forward in determining this issue. In the case of a claimant's colleague, this is because they usually do not have sufficient knowledge, medically or legally, to make the required assessment, although a colleague's belief that a claimant was disabled may well be relevant to the question of knowledge of disability if disability itself is established. In the case of OH, again they do not usually have the relevant legal expertise, and furthermore it is rarely clear that they have applied the section 6 test to their considerations.

118. With those general points in mind we then turned to consider the specific impairments in turn.

Liver condition

119. The liver impairment was hepatitis B. That is an impairment, and it was not disputed by the Respondent.

120. Did it have a substantial adverse effect on the Claimant's ability to carry out normal day-to-day activities? The Claimant's impact statement was unchallenged as to what she said in this regard, where she referred to fatigue and overall weakness. As already recorded, she stated in oral evidence what happened when she missed her medication. She could drive, but focusing on what she could not do or only do with difficulty, we note that she was unable to prepare food, unable to walk for ten minutes, was too tired to read, and needed help dressing. These

are all normal day-to-day activities, and plainly not being able to prepare food for oneself, dress oneself unaided, walk for ten minutes or read, all constituted at the relevant times – particularly when taken together – a more than minor or trivial impact on the Claimant's ability to carry out normal daily activities.

121. With that conclusion, it was not strictly speaking necessary for us to go on to consider deduced effects, but we did so for completeness. The Respondent submitted that the Claimant's medication was to prevent liver damage rather than treating her condition. It was not clear to us what the force of that submission was intended to be, as the medication seems clearly to have been necessary to keep the condition in question at bay. What we had to decide was what the position would have been without the use of any medication at all. In that regard, whilst we did not have any professional medical opinion, we noted the Claimant's own evidence that she had been warned about not taking it. Even without the evidence of a medical expert, we were satisfied, based on the Claimant's evidence of the impact upon her when missing her medication on an occasional basis, that the impact if she abandoned it altogether would have been significantly beyond minor or trivial in terms of her ability to carry out the daily activities described above, and no doubt others.

122. Whether assessed in the ordinary way or on the basis of deduced effects, we were satisfied therefore that the impairment had a substantial adverse effect on the Claimant's ability to carry out normal day-to-day activities. Was that effect long-term? The Claimant's case was that she had been impacted by the impairment in the ways summarised above since 2013. There was no challenge to that evidence. It seemed clear to us that the impact without medication would have been as described above from the same point. Paragraph (a) and in all likelihood paragraph (c) of Schedule 1, paragraph 2 of the Act was therefore satisfied in this case. The Claimant was thus a disabled person by reason of her chronic liver condition at the relevant times.

Depression

123. The impairment was again clear, namely the mental impairment described as depression.

124. We have noted in our findings of fact what was said in the various OH reports. In November 2017 it was said that the Claimant had "moderately severe depression", in July 2018 moderate depressive symptoms and in January 2019 a moderate level of depression. The reports in April and August 2019 contained no reference to depression (not directly at any rate). In October 2019 there was reference to a diagnosis of depression and OH was concerned enough to refer her back to her GP. Something similar, though with apparently less concern, was stated in the report of November 2019. We have also noted that the Claimant underwent counselling from 2017, CBT in 2018, and that in October 2019 she started to take medication.

125. Of course, it was necessary for us to take all of that into account, but it did not help us answer the statutory question, except to confirm that there was plainly the impairment which can be classified as depression. As set out above, just because OH said the Claimant was disabled by reason of depression, does not mean that she was, nor does Mr Woodbine's belief that she was in November 2019. What we had to determine is whether the impairment had a substantial adverse effect

on the Claimant's ability to carry out normal day-to-day activities and whether that effect was long-term.

126. The impact of the impairment was difficult to ascertain because the Claimant found it very upsetting to be asked questions about, and give evidence regarding, any of her medical conditions, particularly those connected to her mental health. This was evident at more than one point in the hearing, not just when she was being questioned about the alleged disabilities. That upset is entirely understandable, but its effect did limit the evidence given to the Tribunal, notwithstanding the fact that the Claimant was given opportunity for breaks and had a fair and proper opportunity to say what she wanted to say on this issue, even though it was difficult for her.

127. We had asked her about the impact on day-to-day activities of her liver condition first, so that she clearly knew the type of evidence being sought. Notwithstanding that, her evidence in relation to the effects of depression, it has to be said, was much less specific. We know that it was difficult for the Claimant to give this evidence and were conscious that she was a litigant in person, but we did make clear that specific, concrete evidence was needed. Of course, the Claimant had the opportunity to spell out the impact of depression not only in her oral evidence but in her impact statement, away from the pressure of a hearing, and should she have wished to do so in her witness statement as well, in addition to producing and taking us to relevant medical evidence amongst the documentation.

128. What the Claimant said to us, in the impact statement and in her oral evidence, the latter specifically by reference to 2019/20, was that:

128.1. She did little socialising because she felt people might say something negative.

128.2. Her sleep was affected most nights.

128.3. She often had to re-read things to register what was being communicated.

128.4. Her speech became slurred.

128.5. She lost the sense of what she was supposed to say or do when she was upset or overwhelmed.

129. We concluded that we had to ignore the last of those impacts as of itself it does not satisfactorily describe any impact on a normal day-to-day activity and the Claimant did not provide any example of what she was referring to or give further specifics. Moreover, what was said was that losing the sense of what to say or do was something which happened when the Claimant was upset or overwhelmed and it was not said that this was a normal day to day occurrence.

130. As to the impact on her sleep, again the Claimant did not provide any detail of what that entailed, specifically the extent of the impact of the impairment on her sleep such as how long her sleep was interrupted for, or how specifically that affected her. It might be said that the effects are obvious, but it was not for us to fill in the gaps in her case. We could only decide the case based on the evidence we heard.

131. As to socialising, we were content to conclude that this is a normal day-to-day activity in its broadest sense. Again however, we were given next to no detail on the impact of depression on the Claimant's social activities, for example how the activities she had previously been involved in were impaired or prevented. This was not a case where the Claimant was essentially prevented from going out at all – she referred in passing in her evidence for example to taking her children to sporting and music events.

132. The reference to her speech becoming slurred was included in her impact statement, but again we were given no evidence as to the frequency or severity of this particular impact. We should add that the Claimant did not seem to encounter any difficulties in giving oral evidence or in conducting her case in the Tribunal, though we acknowledge the question is what the position was in 2019/20 rather than in 2022. The point is we did not have anywhere near sufficient evidence on this particular impact to find that it met the statutory test.

133. The Claimant provided somewhat more specific detail about the impact on her reading, specifically having to re-read information, but again we were not given evidence as to what precisely the impact of that was, for example on her work or on dealing with administrative matters outside of work, to show that this was a more than minor or trivial impact on normal daily activities. For example, we were not told whether the re-reading arose in relation to every occasion she was required to read something or only some occasions, or how long it took her to assimilate the information by the re-reading process.

134. In summary therefore, on balance we were not satisfied – we emphasise on the evidence presented to us – that the Claimant had demonstrated that the impairment of depression had a substantial adverse effect on her ability to carry out normal day-to-day activities. As to assessing the position without medication or other medical and professional intervention, we noted that the Claimant was on anti-depressants from October 2019, was referred by her GP for counselling and also undertook CBT. The Claimant said that without those interventions she would not have felt at ease or confident and positive. That of itself was not sufficient in our judgment to establish a substantial adverse effect on her ability to carry out normal daily activities. More broadly, we were conscious of the warning and guidance given in **RBS v Morris**. These are not straightforward medical issues and, in this case, there was a complete absence of medical evidence on what the position would have been if the Claimant had not had the various interventions we have referred to, including medication. In short, we simply did not have sufficient evidence to determine that question.

135. For these reasons, we concluded that the Claimant had not established that she was a disabled person at the relevant times by reason of depression.

Knowledge of disability

136. We did not need to decide the knowledge question in relation to ADHD as this was accepted by the Respondent, nor did we need to decide it in relation to depression as we concluded that the Claimant was not, on the evidence presented to us, a disabled person by way of that impairment at the relevant times. This left fibromyalgia and the liver condition.

137. The burden was on the Respondent to show that it did not have actual or "constructive" knowledge. We noted that it was not necessary for the Respondent

to have actually been given a diagnosis of a named impairment from a medical professional in order to have actual knowledge. Otherwise, employers could say that they know that an employee has some impairment and that it has the requisite impact, but that they did not have knowledge of disability because they did not have a professional diagnosis of what the impairment was. That cannot be a proper basis on which to establish an absence of knowledge.

Fibromyalgia

138. We began with the Respondent's actual knowledge.

139. First, in relation to the impairment, as far back as the Claimant's pre-employment assessment (page 152) the Respondent was told by OH that it was likely she was a disabled person because of a joint condition for which she was taking medication. Then in November 2017 the Respondent was told that the Claimant was experiencing chronic pain (pages 164 to 165). Other OH reports thereafter also made reference to pain, though admittedly some of those were in the context of the impact of the road traffic accidents. In any event, by November 2019 (pages 431d to 431e), the Claimant had evidently told OH, who told the Respondent, that she had a diagnosis of fibromyalgia. What OH thus reported was sufficient to give the Respondent actual knowledge of the impairment for the reason we have given – a formal diagnosis by a medical professional is not a pre-requisite of actual knowledge of an impairment. Of course, that is precisely what the Respondent had by the time of the appeal.

140. Turning to actual knowledge of the impact of the impairment, Mr Woodbine at least knew that the Claimant could not unpack boxes without back pain and he also knew that from 2017 she needed a new chair and needed to do stretching exercises during working hours. He also introduced frequent breaks to her working hours from that point. We concluded that this was enough to establish actual knowledge of a more than minor or trivial impact on the Claimant's ability to carry out what were after all routine duties in terms of their physical demands – the Claimant was carrying out standard office work, which entailed normal day to day activities such as prolonged sitting, use of a computer and so on.

141. If there was any doubt about that conclusion regarding actual knowledge of a substantial adverse effect, perhaps as to whether the Respondent had actual knowledge that the impact just described was related to the joint condition – and we did not think that there was – then the most basic enquiries that could properly have been made of the Claimant following the OH reports identifying the condition would certainly have revealed that impact. Moreover, Mr Woodbine believed the Claimant to be a disabled person because of fibromyalgia from receipt of the final OH report in November 2019. That was in effect a concession of knowledge, especially as he was her direct line manager who had put the adjustments in place. It was also known to the Respondent by the time of the dismissal – known to Mr Woodbine in particular – that the more than minor or trivial impact on the Claimant was long-term, given that the measures that had to be put in place to assist her had been made more than two years previously.

142. For the reasons set out above, the Respondent knew or should reasonably have known that the Claimant was a disabled person because of fibromyalgia at the relevant times.

Liver condition

143. We concluded that the Respondent had actual knowledge of this impairment also. The OH report of 23 October 2017 (page 161) referred to the Claimant having had hepatitis B over ten years previously, for which she had been taking medication since 2013.

144. As to its impact however, there was no actual evidence that we were made aware of that was given to the Respondent at any time showing that it had knowledge of any impact at all. None of the fit notes nor any of the OH reports talked about any such impact, except the report in November 2017 (page 168) which referred to a chronic liver condition and described multiple aches. That plainly did not give the Respondent actual knowledge of any impact on normal day-to-day activities. The August 2019 report mentioned the condition (page 430), but said nothing about its impact at all, stating that it did not affect the Claimant's work.

145. We did not think that anything in the OH reports could reasonably be said to have called for more enquiries on the Respondent's part, specifically because no impact was reported and the August 2019 report expressly said that the condition had no effect on the Claimant's work. As a result, the Respondent at no point had any reason to make any further enquiry about the impairment. We considered whether knowing that the Claimant had hepatitis B, the Respondent should have reasonably drawn the conclusion that without medication there would be the required substantial adverse effect. The fact is however that the Respondent did not know what the medication was doing, because neither the Claimant nor OH had told it, and it had no reason to ask because as we have noted it was expressly told that the condition was having no workplace impact.

146. We therefore concluded that the Respondent did not fail to take reasonable steps to ascertain the implications of the Claimant's reported condition, nor should it reasonably have known that she was a disabled person (i.e., that there was or would be a substantial adverse effect on her ability to carry out normal day-to-day activities) by reason of this impairment.

147. As a result, by this point in our deliberations we had concluded that the Claimant was disabled by reason of three impairments – ADHD, fibromyalgia and a liver condition – and that the Respondent had actual or constructive knowledge of two of those, namely ADHD and fibromyalgia. Given that both discrimination arising from disability and failures to make reasonable adjustments require knowledge of disability, the liver condition fell out of the picture at this point.

Discrimination arising from disability

148. Unfavourable treatment was accepted, namely the dismissal. It was also accepted that the dismissal was because of the Claimant's absence in 2019. That answered the first two questions in the required sequence. We thus moved on to the third.

Did the Claimant's 2019 absence arise in consequence of one or more of her disabilities?

149. The question was whether the absence arose in consequence of ADHD and/or fibromyalgia only.

150. The burden was on the Claimant to show that it did. There only had to be a loose link between the absence and one of the disabilities and it did not need to be a direct link. Answering this question required an objective assessment, and so was not a question of what was in anyone's mind or what anyone thought or understood, whether the Claimant, her union representative, Ms Jinks, Mr Tomlinson or anyone else. We had to look at the evidence presented to us and see whether the necessary link was made out, whether immediately or more remotely.

151. The relevant evidence can be summarised as follows:

151.1. In her oral evidence, the Claimant summarised the reasons for her long absence in 2019 (which led to her dismissal) as being pre-existing work-related stress (especially the odour issue and issues with structured work), the January accident, the housing issues and the later accident.

151.2. The fit notes from page 380 onwards all said that the Claimant was absent because of the accidents and work-related stress, except one which also referred to PTSD – that was not relied on in this case as a disability.

151.3. The Claimant's union representative told Ms Jinks at the FRM that the accidents and work-related stress were the reasons for the Claimant's absences. He also mentioned ADHD and fibromyalgia as disabilities, but did not say that they were the reasons she was off work. He simply seems to have been making the point that she was a disabled person.

151.4. The April 2019 OH report (page 428) said that the Claimant was off work because she was stressed, related to the first accident and work issues.

151.5. At the meeting on 7 May 2019, the Claimant raised work-related stress. The letter following up the meeting (page 472) referred to her describing pain arising from her accident, without making any connection to fibromyalgia.

151.6. The OH report in August 2019 (page 430) described a level of personal distress as the reason keeping the Claimant off work; there was no mention of ADHD or fibromyalgia.

151.7. The OH report in October 2019 (page 431a) referred to the accidents and other non-work issues as the reasons for the continuing absence. It focused on depression, and strongly advised the Claimant to see her GP, but did not refer to fibromyalgia or ADHD.

151.8. The November OH report (page 431d) set out some general detail, in what appears to be standard text, regarding the effects of fibromyalgia and how that could impact on the Claimant once she returned to the workplace, but this was not identified as something keeping her from returning to work. The burden of the report in terms of what needed to happen to enable her return was an improvement in her mental health, specifically the resolution of workplace stressors. There was no mention of ADHD.

151.9. At the FRM (page 649), the Claimant was asked what was the specific cause of this episode of absence and she replied with reference to her accidents and work-related stress, stating that the latter did not stop her attending work (very

much suggesting, though it was not put it to her in evidence, that the work-related stress was not of itself sufficient to keep her off work).

151.10. In her appeal, (pages 611 to 612), the Claimant gave severe anxiety due to her accidents and severe housing issues as the reasons for her absence.

151.11. Her representative at the appeal hearing emphasised ADHD and fibromyalgia, but not as an explanation for the Claimant remaining off work, simply to say that she was disabled.

152. All of that evidence strongly indicated a lack of any connection, immediate or otherwise, between the Claimant's absence and the established disabilities. As we have noted, she said in evidence that work-related stress and the accidents exacerbated her conditions (including her disabilities) and that this was a matter of common sense, but we were not taken to any evidence that could take us beyond her assertion to this effect. We appreciate it is difficult for a litigant in person to know what evidence may be required – medical or otherwise – in the complexities of a discrimination complaint, but whether at the case management stage or a final hearing, whilst ample assistance was offered to the Claimant in this case, it is plainly not a tribunal's role to make her case by plugging gaps in the evidence on her behalf. We certainly did not think that we could take judicial notice of the connection the Claimant was required to establish.

153. We concluded in the light of the above that the absence, which was the reason for the unfavourable treatment (the dismissal), did not arise in consequence of the Claimant's disabilities. Even had we found that the Respondent had knowledge of the liver condition, the same conclusion would have followed. There was no evidence that the Claimant was off work because of her liver complaint. Occasionally forgetting to take medication was plainly not enough to establish that link.

154. The complaint of discrimination arising from disability failed on that basis, but we thought it appropriate to consider the final question relevant to that complaint for completeness.

Was dismissal a proportionate means of achieving one or more legitimate aims?

155. The aims on which the Respondent relied were:

155.1. Properly managing absence.

155.2. Ensuring an acceptable and sustained level of attendance.

155.3. Having properly structured staffing levels to alleviate pressure on the IT department.

156. It can hardly be disputed that these were legitimate aims, that would be shared by many or most employers in our experience, and we did not feel the need to say anything further about that.

157. The key question was whether dismissal was a proportionate means of achieving one or more of those aims. It would have been for the Respondent to establish this defence and it must be said that it was largely in oral evidence and

largely from questions asked by the Tribunal, that the basis on which the Respondent said the defence was made out emerged. As already indicated however, we nevertheless accepted that oral evidence, given by Mr Woodbine. Whether dismissal was a proportionate means of achieving one or more of the aims was for us to decide. We considered the following.

158. First, was there a real need on the Respondent's part? We did not have evidence from the Respondent about its management of absence generally, whether in the Trust as a whole or even within the team where the Claimant was employed, that is by reference to the absence levels of other employees. We were satisfied however that there was a real need to manage absence in the Claimant's team, and to ensure that it had proper staffing levels, because the team was clearly providing a crucial service to doubtless most if not all of the Respondent's 6,000 employees.

159. Secondly, having dismissal as the ultimate sanction within an absence management policy is obviously a necessary and rational way of ensuring acceptable attendance and in particular proper staffing levels as it seemed clear from the evidence that we heard that there would be no green light to recruit a permanent replacement while an absent employee was still employed. The real question was whether dismissal of the Claimant specifically was a rational means of achieving one or more of the aims. We are satisfied that it was a rational means of achieving proper staffing levels and alleviating pressure on the IT department and thus of managing absence, for the reason just given, namely that otherwise the Respondent could not secure a reliable full staffing complement within the team.

160. Thirdly, was dismissal no more than was necessary to achieve the aims? This question might also address whether a lesser measure could have done so, balancing the impact of dismissal on the Claimant, which of course was severe, and the importance of one or more of the aims to the Respondent. In dealing with these matters, we took account of the following:

160.1. As set out in our findings of fact, there is an expectation of progression through the Respondent's policy to dismissal if an absence continued. It was not suggested that those stages were not followed in the case of the Claimant, even though we only heard explicit evidence about the FNOC and not the NOC stage. In other words, the Respondent did not proceed immediately to dismissal after a short period of absence. It should also be noted that there was a significant extension of the sixteen weeks laid down in the policy for proceeding to the FRM.

160.2. There was an Impact on the Claimant's team, one which was providing a key service, an impact that needed addressing for the reasons set out above, because as we have said, it appears clear that the Respondent could not replace the Claimant permanently whilst she was still employed, which is frankly unsurprising.

160.3. The Claimant's was a long absence and there was no medically supported imminent return date.

160.4. There was no current medical intervention at the point of dismissal.

160.5. At the FRM, the Claimant's comments about returning to work can best be described as hopeful.

160.6. The Respondent does not appear to have considered alternatives to dismissal, at least not expressly, but we were required to do so:

160.6.1. Ill-health retirement was not raised at all in this Hearing and so is not something we were in a position to assess.

160.6.2. A further NOC was effectively what the Claimant contended for, namely giving her more time. We noted the bleak OH assessment in October 2019 as to her mental health generally (there had been some improvement by November but her symptoms were still said to be severe); the fact that she could not cope even with a telephone call from the Respondent; the fact that there was no logic to or medical support for her assertion of a return to work within six to eight weeks; and the fact that there was no continuing medical intervention. In that context, a further NOC and giving the Claimant more time would not have helped achieve the Respondent's legitimate aims.

160.6.3. Suspension on nil pay would not have enabled the recruitment of a replacement.

160.6.4. We heard no evidence of any posts to which the Claimant could have been redeployed.

160.6.5. Similarly, there were no adjustments suggested by OH, or indeed by the Claimant herself, that it was said would facilitate her return to work and for whatever reason the Claimant had failed to complete a stress risk assessment, though it was not clear to us that this of itself would have facilitated a return.

161. Balancing all of those factors, we concluded that dismissal was a proportionate means of achieving the Respondent's legitimate aims at the point of Ms Jinks' decision.

162. We concluded that the position was no different at the appeal stage:

162.1. The GP letter had arrived confirming a diagnosis of fibromyalgia, but it did not say the Claimant was ready to return to work.

162.2. The Claimant believed she could return once a risk assessment and reasonable adjustments had been implemented, but this was not supported by medical evidence.

162.3. She had not done what she said she was going to do at the FRM on 6 December 2019, namely getting advice from occupational therapy and an MRI scan, or at least she did not tell the Respondent she had done either of those things.

162.4. No medical evidence was said to be forthcoming indicating a timescale for a return to work.

162.5. There had been a further three months since the FRM and the Claimant was still not back at work in any capacity elsewhere.

163. For all of the above reasons, the complaint of discrimination arising in consequence of disability would have failed on the alternative basis that the Respondent had established the justification defence.

Reasonable adjustments

164. This complaint concerned only the Claimant's dismissal and not her appeal, logically so, given that the extension of the period triggering dismissal could only properly apply at the dismissal stage.

165. The Respondent accepted it had a PCP of, put at its most specific, moving to dismissal after sixteen weeks of absence. The next question was whether the PCP put the Claimant to a substantial disadvantage compared to persons who are not disabled.

166. As we understood Miss Vittorio to submit, to establish substantial disadvantage in a case such as this, the absence has to be disability-related. That appears to be the import of **Griffiths**, which says that the comparator is someone who was not disabled, that they need not be in a like for like situation, but should be identified by reference to the PCP, so as to test whether the PCP puts the Claimant at the substantial disadvantage. This would be the case, it was said, when an employee's disability led to disability-related sickness absences that would not be suffered by the non-disabled (our emphasis). In other words, the substantial disadvantage cannot be in relation to disability generally; in a case such as this, it must be related to the application of the absence management process to disability-related absence. For example, an employee whose disability never kept them off work but who was off sick for the requisite time under an absence policy for reasons other than disability, could not say that they had been put to a substantial disadvantage by the PCP of applying the absence policy which therefore required adjusting, because they would be in the same position as the non-disabled.

167. The Claimant was effectively in that position because of our conclusions as to the absence of any connection between her disabilities and her 2019 absence. Accordingly, she could not establish the required comparative substantial disadvantage. Her complaint failed on that basis, although we briefly considered the additional questions that would otherwise have arisen.

168. The first additional question would have been whether there were steps the Respondent could have taken to avoid the substantial disadvantage. The step the Claimant contended for was an extended timescale before the FRM was held and her dismissal effected, beyond the ten-month period that was actually applied. The Respondent could of course have taken that step, but the second additional question would have been whether that would have been reasonable.

169. As to that, the Claimant did not say what the extension should have been, except implicitly to 31 January 2020. What would have been reasonable can only be assessed based on what the Respondent knew at the time. We concluded as follows:

169.1. Whilst the Respondent could have taken the step, it would not have been practicable if the team was to function on a more acceptable basis, namely with a permanent employee in the Claimant's role.

169.2. There would have been no or very little direct cost to the Respondent of extending the period before dismissal, but whilst a large public sector body, its resources are not infinite and that it would not have replaced the Claimant whilst she remained employed.

169.3. The Respondent was entitled to conclude that there was next to no chance of any further extension of the absence review period giving rise to the Claimant returning to work, that is of the adjustment being effective. Even with hindsight, it seems clear that an extension to late January 2020 would not have achieved that result. The Claimant had not started new work when her appeal was heard in March.

170. Accordingly, with a long absence, no clearly supported imminent return date, no current medical intervention and no established failures to make other reasonable adjustments, for example relating to the various workplace issues, we concluded that it would not have been a reasonable step to extend the ten-month period further, which as we have said several times was well beyond what the Respondent's policy required and in our experience beyond what many employers would have tolerated. The complaint of failure to make reasonable adjustments would have failed on this basis also.

Knowledge of disadvantage

171. The question of knowledge of disadvantage did not arise.

Unfair dismissal

Reason

172. The burden was on the Respondent to show the reason for dismissal. In this case it was obvious. There was no suggestion of a hidden reason. The Respondent keeping the Claimant employed beyond the sixteen-week review period set out in its policy is supportive of that; if there had been another reason, the sixteen-week point could have been used as an excuse to dismiss her. All the documentation showed clearly what the Respondent was concerned about and seeking to address, namely the Claimant's absence. That was a reason falling within the capability category under section 98(2) ERA.

173. The crucial question was therefore whether dismissing the Claimant for that reason was fair within the meaning of section 98(4) ERA. We addressed that by considering the questions set out in the list of issues above.

Medical evidence

174. The Respondent obtained regular OH reports, right up to two weeks before the Claimant's dismissal. There is no need to rehearse their content again, except to note that the Respondent had shown itself willing to act on OH advice by making adjustments in response to earlier reports.

175. The last two OH reports did not provide an encouraging assessment of the Claimant's situation, specifically the likelihood of her returning to work. There remained no indication of a date for her to do so. Of course, OH saying in the November report that it did not anticipate a return within four weeks was clearly not a statement that she would return after four weeks; it was simply a standard

comment anticipating a further review within that period if the Claimant had not been dismissed.

Consultation

176. The Respondent met with the Claimant on 1 February 2019 in an endeavour to address her concerns about workplace issues. It met with her again on 7 May 2019 as we have described above. Between meetings, the Respondent wanted to keep in touch with the Claimant on a weekly basis; at her request, this became two-weekly contact (RW8); she also asked for contact to be by email not phone and the Respondent acceded to that as well.

177. The Claimant was told (twice) in the invitations to the FRM, as early as October 2019, that she might be dismissed. She was clearly given an opportunity to have her say before the FRM and during it, whether via her representative or directly.

Alternatives to dismissal

178. It is regrettable that Ms Jinks did not directly and proactively consider alternatives to dismissal, but none were suggested to her by the Claimant, other than implicitly the extension of the time for her to return to work, which (again implicitly) Ms Jinks considered and rejected, and nothing other than that alternative was explored before us. Disability leave was plainly not relevant and the Claimant led no evidence whatsoever about any alternative role to which she could have been redeployed, nor did the evidence suggest that she could have returned to another role in any event.

Could the Respondent be expected to put up with the absence any longer?

179. This was a long absence which was clearly having some detrimental impact on the Claimant's team. On 7 May 2019, the Claimant said that her recovery would take two more months, which did not prove to be case – though of course she had the second road traffic accident within that two-month period. In August, there was no return-to-work date and in October and November, it was said that she would not return within the next four weeks, which as we have noted was the standard review period.

180. Particularly given that context, it was not unreasonable for Ms Jinks to conclude that the Claimant was not able to explain to her satisfaction the basis on which she would return in a six- to eight-week period, not least given that there was no then current medical intervention. Some employers would have waited longer, but in our view as the industrial jury, not many would have waited even as long as the Respondent had by this point. We could not say that it was outside the range of reasonable responses for the Respondent to conclude that it could not put up with the absence any longer.

Was dismissal otherwise within the range of reasonable responses?

181. The Respondent's policy was clear. The normal expectation was that it would progress through its various stages if absence continued to or beyond the sixteen-week period if there was no short- or medium-term prospect of a return to work. Its clear purpose was to be supportive to employees but also to help the Respondent provide a satisfactory service to its service users.

182. The Claimant had the earlier meetings we have referred to, on 1 February and 7 May 2019. The Respondent did not expressly warn her at those meetings that she could be dismissed if her absence continued. It should consider making that a clearer requirement for managers within its policies, but this is not something the Claimant raised before us as a ground on which she argued her dismissal was unfair, and as again already noted, she was explicitly warned of the possibility of dismissal when the FRM was first convened, which ended up being two months before the dismissal was actually communicated.

183. We considered whether Respondent had before then done what was reasonable (in a general sense rather than in the sense of "reasonable adjustments") to address what the Claimant said were her workplace stressors that might have mitigated against a successful return to work. It is clear that the Respondent considered these issues in its decision-making process. It is also clear that it did not just discuss the issues but took relevant practical steps to assist the Claimant. Specifically, it allowed her to listen to music, provided her with headphones, arranged for her to have a new chair and put in place structured breaks. The question of the colleague's body odour exercised the Claimant in this Hearing, but as we have already made clear, what she communicated to the Respondent in that respect did not make clear that this was a barrier to her return, nor was her position in this regard consistent in her evidence before us.

184. We also note that Ms Jinks was clearly not unsympathetic to the Claimant's circumstances outside work, referring in the dismissal letter to her "extraordinary personal stressors". This too shows an approach which was careful, at least reasonably so, to balance all relevant factors in the decision-making process.

185. The question was not whether we would have dismissed the Claimant. That is irrelevant. Taking into account all of the matters just summarised, we were satisfied that Ms Jinks' decision was within the range of reasonable responses of a reasonable employer.

Other procedural matters

186. We were also satisfied that in relation to other procedural matters (prior to the appeal, which we turn to separately) the Respondent acted within the range of reasonable responses:

186.1. The Claimant was invited to the FRM well in advance.

186.2. She was given the management case.

186.3. She was also given the opportunity to provide any written evidence to Ms Jinks prior to the FRM, including medical evidence.

186.4. She had the right to be accompanied, and exercised it.

186.5. She was clearly given the right to have her say before Ms Jinks made her decision, either directly or through her representative.

186.6. She was not afforded the attendance of a cultural ambassador at the FRM, but there was no right to that, either contractually or statutorily, as it appears to

have been no more than a trial by the Respondent of a new initiative, and there was no discernible disadvantage to the Claimant in any event.

Appeal

187. The conduct of an appeal is important to consider in the overall assessment of fairness. An unfair appeal can render a dismissal unfair.

188. We have referred to the Claimant not being granted access, prior to the appeal hearing, to emails rehearsing communications with managers about workplace stressors. The Claimant was not able to tell us how that hampered her appeal however, and it does not appear to have been raised by her very senior trade union representative at the appeal hearing.

189. The appeal was not a re-hearing, but it is clear that it did not have to be in order to be fair.

190. Mr Tomlinson could have been more searching in his enquiries, specifically by testing the impact of the Claimant's absence on her team, but:

190.1. He reached a reasonable conclusion as to whether the Claimant had been permitted to listen to music during working time.

190.2. He reasonably concluded that what OH had explicitly recommended, the Respondent had done or was prepared to do. We were not taken to any evidence suggesting otherwise.

190.3. The Claimant did not say to him that the colleague's body odour issue prevented her returning to work – that is consistent with the evidence presented to us overall.

190.4. Both the Claimant and her representative said that ADHD and fibromyalgia had not been taken into account by Ms Jinks, but did not say in what way, although Mr Tomlinson concluded that the Claimant remained off sick for those reasons (we have to say we are not sure on what basis).

190.5. Of course, that of itself did not mandate that the only reasonable conclusion was to overturn the decision. It was reasonable for Mr Tomlinson to conclude that the absence of a clearly supported and logically explained return-to-work date was key to Ms Jinks' decision, and reasonable to conclude that there was still no such clarity about when the Claimant might in fact return.

190.6. There was no indication that the Claimant would or wished to provide any medical support for her contention that she was now ready to return.

190.7. We could not say that the appeal outcome was unfair because of something that came in after Mr Tomlinson's decision had been made and communicated. As Miss Vittorio submitted, the Respondent's procedure had been exhausted by that point and all that remained was to provide written confirmation of a decision that had already been communicated in full. The Claimant said to us that she did not realise a fit note was required, but she did have the advice of a senior trade union official and did send the Respondent a GP diagnosis of fibromyalgia before the appeal hearing took place.

191. The appeal process and outcome were thus within the range of reasonable responses. For the reasons we have given, the Claimant was not unfairly dismissed. Accordingly, the complaint of unfair dismissal was not well-founded.

192. In summary, all of the Claimant's complaints failed and were dismissed. Whilst the Respondent had made a written application for a costs order whilst the Tribunal was deliberating, the application was subsequently withdrawn.

Employment Judge Faulkner
28 June 2022

Note

All judgments and written reasons for the judgments (if provided) are published, in full, online at www.gov.uk/employment-Tribunal-decisions shortly after a copy has been sent to the parties in a case.