EMPLOYMENT TRIBUNALS

Claimant: **Miss D. Lakin**

Respondent: **Torrent Trackside Ltd**

Heard at: **Birmingham** **On:** **9 & 10 January 2023 & 7 February 2023 (latter being in Chambers)**

Before: **Employment Judge Broughton**
Sitting with Mrs B. Hicks
Mr A. Moosa

Representation

Claimant: Mr Dracass, Counsel
Respondent: Mr Prophett, Counsel

JUDGMENT

1. The Claimant's claim of unfair dismissal and for discrimination arising from her disability succeed.

2. Her claims for a failure to make reasonable adjustments fail and are dismissed.

3. The Respondent, however, could and would have dismissed her fairly 6 weeks after her effective date of termination.

4. The parties have 14 days to resolve remedy, failing which they should request a Remedy Hearing, identifying the outstanding areas of disagreement, which will be arranged as soon as possible to be heard by the full panel via CVP.

REASONS

The Facts

1. The Claimant was initially offered a role by the Respondent in November 2018. However, she said she was unable to accept the role at the time as a result of back pain she was experiencing because of degenerative disc disease.

2. There was a dispute about the level of detail that the Claimant provided to the Respondent at that stage, both in relation to her reasons and the nature of her condition. That said, it was common ground that the Claimant was due to have an injection and anticipated that she may be able to take up a position at a later date and she informed the Respondent of the same.

3. Whatever the Claimant may have said then, we accept that the Respondent understood the Claimant's difficulty to be a temporary one.

4. That was confirmed as, in May 2019, the Respondent approached the Claimant about a position that had become available. The Claimant had received her injection and the procedure had been successful. As a result, her back was not causing her significant difficulties and so she accepted the new position as a Hire Controller.

5. The Respondent rents equipment used in railway maintenance.

6. Following receipt of a formal job offer, the Claimant completed an Employment Declaration stating that she did not have any medical condition that the Respondent should be aware of. Her explanation for not declaring any back condition was that she was not exhibiting any significant symptoms and so she felt that there was nothing to declare.

7. It seems to us, therefore, that it was reasonable for the Respondents to conclude that the Claimant was not disabled on commencement of her employment.

8. The Claimant's employment started on 19 June 2019, and all went well, including when everyone was working from home during the initial Covid lockdown. We heard that, at that time, the Respondent transferred all office equipment to employees' homes to enable them to continue working.

9. When employees were starting to return to the office, the Claimant requested flexible working and, specifically, to reduce her hours to 4 days per week. The reason given was that she wanted to spend more time with her grandchildren.

10. In October 2020, the Respondent largely moved to a 2 weeks in the office and 2 weeks working from home rota system.

11. They thought, however, that the Claimant had returned to working solely in the office, but the evidence suggested otherwise. That said, on 24 November 2020, the Claimant was offered the opportunity to work permanently from the office but chose to stay on the 2 weeks in and 2 weeks working from home rota.

12. That appeared surprising, given that the Claimant said before us, that working from home on her kitchen table 8 hours a day without an additional screen and ergonomic chair, caused her back pain.

13. The Claimant said that, when working from home, she was unable to take breaks. That also seemed surprising as, ordinarily, one would expect greater flexibility when working from home than when in the office.

14. When challenged on this, the Claimant said that this was due to a large new contract which had been dropped on her in January 2021. This was her final 2 week period of working from home prior to her sickness absence.

15. She had been working the first 2 weeks of the month at home and the last 2 weeks in the office since the start of November 2020. Her last day of work in the office had been 24 December 2020 and, following the Christmas break, she was working from home.

16. However, we do not accept that she was unable to take breaks. We prefer the Respondent's evidence that, in fact, the new contract to which the Claimant referred had been won in April 2020 such that the Claimant's workload when at home or in the office was similar.

17. The Claimant said she had neck pain in January 2021 and her GP had advised her that her computer needed to be in the correct position. She said she tried putting books under her computer, but this was ineffective.

18. That was not accurate as the GP records showed that the Claimant did not speak to her doctor until around a week after she went off sick.

19. The Claimant had said that, as a result of her GP advice, she had asked for 2 big screens when working from home. She claimed she had been told that there were none available.

20. Given the inaccuracies in the Claimant's account regarding her visit to her GP, we prefer the Respondent's evidence that the Claimant did not ask for 2 big screens in January 2021 and, indeed, that they did have some available in a storeroom should any such request have been made.

21. The Claimant went off on sick leave on 13 January 2021 due to neck and back pain. We note that the Claimant had no previous absence related to her back during her employment with the Respondent.

22. We also note that it was the Claimant's evidence that the injection which she had received towards the end of 2019 was only likely to be effective for a year of so and she had already achieved 2 years without any material difficulties.

23. The Claimant had her first appointment with her GP in relation to this period of neck and back pain on 21 January 2021. Her sicknote at that stage merely referenced neck and back pain and not degenerative disc disease. The Respondent was not, therefore, on notice at this stage that the Claimant's condition necessarily amounted to a disability as defined by the Equality Act 2010.

24. That said, the Claimant stated that she notified her Team Leader, Julie Green, by telephone that this was a flare up of her degenerative disc disease, although the Respondent disputed this.

25. The Respondent denied that there had been any discussion of any specific back issues during the entirety of the Claimant's employment prior to her sickness absence. That said, they did acknowledge that there had been general discussions with various members of the team about aches and pains but nothing, on their case, that put them on notice of a possible disability.

26. We note that the Claimant's medical records suggest that, when she was already on sick leave, her GP did say that sitting at her computer at home may have made the Claimant's condition worse.

27. The Claimant told the Respondent's HR advisor, Lisa McMahon, in a welfare call, on 10 March 2021, that she had been referred to see a Specialist at the Royal Orthopedic Hospital. The Claimant said that she discussed her symptoms and the pain she was experiencing, stating that it was similar to the issue she had suffered 2½ years previously when she had initially refused the respondent's job offer when awaiting a steroid injection.

28. It seems that this was the first time that the Claimant had said to the Respondent that working at home may have caused an exacerbation of her symptoms. There

was still no mention of any adjustments that may have assisted her, nor any explanation regarding why the Claimant had not elected to work from the office when offered if her back was being adversely affected by working from home.

29. The Claimant said in that telephone call with HR and, indeed, in her statement before us, that she was taking strong opioid painkillers, Gabapentin and Pregabalin and they made no difference. We note, however, that she was not actually taking those painkillers at the time, and this was a reference to her previous flair up, 2½ years earlier.

30. In late April 2021, the Claimant had a fall from a step and hurt her left leg. She attended Accident & Emergency around a week later, on 4 May 2021, where it was identified that she had suffered a rupture of her Achilles tendon and she would have to be on crutches.

31. The Claimant had an appointment with the Respondent's Occupational Health provider on 5 May 2021. A report was produced on 10 May 2021, confirming that the Claimant was unfit for work and that her degenerative disc disease was a lifelong condition.

32. On 8 June 2021, the Claimant said she was advised by her doctor that her ankle could not bear any weight for at last 12 weeks and she would need to wear a compression boot and have intensive physiotherapy.

33. The Claimant was in fairly regular contact, via Facebook, with her Team Leader, Julie Green, with whom she had a good working relationship.

34. A meeting was arranged at the Claimant's home on 18 June 2021. The Claimant said that she thought this was simply her colleague looking in on her, but the Respondent considered it to be a welfare meeting.

35. Ms. Green was accompanied by Marie Shaw, Helpdesk Manager, although as mentioned, the Claimant was unaware of this until they both arrived at her door.

36. The Claimant had, on her own initiative, gathered all of her work possessions in a bag for them to be returned to the office. The Respondent said that this included a second screen. The Claimant denied this, saying that it was just her laptop headset and phone.

37. We prefer the Respondent's evidence on this point as it was unlikely that the Respondent would have been mistaken about whether they had collected such a screen. In addition, for the reasons previously given, we consider that, if the Claimant did not have a second screen at home, she would have been more likely to have raised a concern in writing prior to going off on sick leave. She would also have been more likely to request working from the office when that opportunity was available to her.

38. It seems more likely that it was only after commencing sick leave, and speaking to her GP, that the claimant linked the deterioration in her back condition, to working from home. She acknowledged that it would get worse over time in any event.

39. The "Welfare Meeting" progressed in a friendly and supportive manner with the Claimant providing an update of her condition.

40. It was common ground that, at that stage, the Claimant had no idea how or when she would be fit enough to return to work, although it appears that there was at least some mention of a possible 2 year recovery period.

41. Ms. Shaw confirmed this outcome in a letter on 21 June 2021, including the possibility of a 2-year recovery period, which was not challenged by the Claimant.

42. The Respondent considered that, in returning her work equipment, the Claimant was further indicating that she considered a return to work in the foreseeable future unlikely, albeit the Claimant said this was merely to avoid cluttering up her home.

43. The Claimant provided a further update on 23 June 2021, suggesting some slight improvement in relation to her ankle.

44. A second Occupational Health appointment was arranged for the Claimant on 8 September 2021.

45. The report arising from that appointment confirmed that the Claimant remained housebound and needed assistance with her day-to-day tasks. She was awaiting MRI scan results in relation to her back and neck and had been seen in the Pain Clinic.

46. Occupational Health considered that the Claimant's back condition classified her as disabled and further confirmed that she remained unfit for any work.

47. The report also said that the Claimant would be unfit for any work for another 10-12 weeks. Reading that comment in context, however, it was clear that the report meant that the Claimant would be unfit for any work for at least 10-12 weeks.

48. Two weeks later, on 23 September 2021, HR wrote to the Claimant to set up another meeting at her home with her Team Leader, Julie Green.

49. The letter stated that the purpose of the meeting was to discuss the Claimant's current condition, the likelihood of her return to work in the forceable future and what steps the Respondent could take to facilitate any such return and support her thereafter.

50. We note at this stage, however, that the Respondent's policy expressly provided that employees would be informed if their dismissal was being considered. Even had that not been the case, it would still be best practice to provide such advance warning. This would be a relevant factor in considering the fairness, or otherwise, of any subsequent dismissal.

51. We also saw, albeit only disclosed during the Hearing, a typed script for this meeting, apparently prepared by HR, which had then been completed in manuscript as the meeting progressed.

52. That script, prepared in advance, included the language to be used and the reasons to be given for dismissal, prior to any input from the Claimant.

53. We would acknowledge that it may well be that, depending on the responses from the Claimant, the Respondent might not have moved to dismissal in that meeting but, ultimately, that is what happened.

54. The Claimant had given the Respondent an update on her condition, stating that her foot was still in pain, but she could walk with crutches. She needed a splint at night and was still awaiting her MRI scan results which, it appeared, the Respondent had originally wanted before making a decision.

55. The Claimant largely agreed with the Occupational Health report, including that she wouldn't be fit enough for work for another 10-12 weeks.

56. As already mentioned, however, it seemed clear to us that the context of that comment in the report, was that the Claimant would not be fit for work for at least another 10-12 weeks and, indeed, it transpired that was, indeed, the case.

57. The various medical reports and the Claimant's evidence suggested varying time scales for potential recovery. That said, the general view appeared to be that it was likely to take up to a year, from the initial injury, for the Claimant's ankle to resolve and that, only then, could there be any meaningful attempts to start work on her back.

58. The Respondent did briefly ask the Claimant whether there were any other roles that she felt she could do and the Claimant couldn't identify any. This was unsurprising as it was clear that, at that stage, the Claimant was unfit for any work.

59. We would accept that the Claimant was completely taken aback when Ms. Green then moved the meeting on to discuss the Claimant's dismissal. There had been no indication prior to this point that such a decision might be contemplated at this stage.

60. The Respondent did, to some extent, explain the business case for the need to dismiss as they saw it.

61. The Claimant said that she believed that she was told she could only return to work if she could return at full capacity, but that seemed to us to be unlikely.

62. There was clear evidence that the Respondent would have considered a phased return and reduced duties if the Claimant's health had recovered to a level that would facilitate that.

63. In any event, the Respondent followed the prepared script and, having concluded that her return to work was not foreseeable at that stage, the Claimant was dismissed.

64. The Claimant appeared to accept this in the meeting.

65. The dismissal decision was confirmed in writing and the Claimant was offered a right of appeal, albeit to Marie Shaw, who had been involved in the previous Welfare Meeting.

66. That letter was sent on 7 October 2021. The Claimant was told she could appeal within 7 days, although the Claimant said that the letter was delayed in the post.

67. In any event, the Claimant elected not to appeal because, she said, she felt the decision to dismiss had been prejudged and Marie Shaw would not be independent.

68. The Claimant's MRI scan results came through shortly thereafter confirming only limited progress.

69. When the Claimant's 2 month sicknote expired in November 2021, her GP then issued a further 3 month sicknote. This suggested that, had the Respondent waited a few more weeks, there was still no realistic prospect of an imminent return.

70. It seemed to us that it was likely that there would have been further relevant medical information, but none had been disclosed.

71. We also heard that the Claimant had been granted the maximum personal independence payment until February 2024. We also note that the Job Centre, in

May 2022, suggested that, at that stage, there were still "multiple barriers to move closer to employment".

72. The claimant remained out of work as at the date of this hearing.

73. Those are the facts as we have found them.

The Issues and law

74. Unfair Dismissal

74.1 The parties agreed that the Claimant was dismissed.
74.2 There was also no dispute that the Claimant was dismissed for the potentially fair reason of capability.
74.3 We needed to determine whether the dismissal was fair or unfair in accordance with Section 98(4) Employment Rights Act 1996.

75. Disability / knowledge

75.1 There was no dispute that the Claimant was a disabled person in accordance with the Equality Act 2010 at all relevant times in relation to her degenerative disc disease. This was the only impairment relied on for the purposes of the Claimant's claims.
75.2 There was, however, a dispute about when the Respondent had knowledge of that disability. It was admitted from the 10 March 2021, but the Claimant asserted that the Respondent had knowledge from the start of her employment.

76. Section 15 Equality Act 2010

76.1 It was agreed that the Claimant's absence from work and her inability to do her role arose in consequence of her disability, at least in part, and that the Claimant's dismissal was capable of amounting to unfavourable treatment.
76.2 As a result, the issue under Section 15 Equality Act 2010 was whether the Respondent could justify that dismissal.
76.3 It was not in dispute that the Respondent had the following legitimate aims

- ensuring its employees are medically fit to undertake their duties.
- requiring its employees to attend their contractual role on a regular basis.
- managing long term capability so as to save cost of management time and to allow the Respondent to plan its workforce and operational needs with certainty.

76.4 Knowledge was not in dispute in relation to the Section 15 Claim.
76.5 The issue, therefore, was whether or not dismissal was a proportionate means of achieving the agreed legitimate aims.

77. Reasonable Adjustments

77.1 The issue of knowledge was potentially relevant to the following alleged provisions, criteria or practices (PCPS), said to have been applied by the Respondent and related to the period October 2020 to January 2021

- the requirement to work from home.
- the requirement to use personal equipment and furniture when home working.

77.2 If so, did any such provision, criterion or practice put the Claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled in that

- she would suffer pain as a result of prolonged sitting,
- she would not have sufficient time to recover from the pain before another day of full-time working,
- she would have increased lapses of concentration caused by pain and therefore it would take her longer to complete tasks and her daily output may be reduced.

77.3 We would then have to consider whether or not the Respondent knew, or could reasonably have been expected to know, that the Claimant was placed at any such disadvantage and

77.4 If so, would it have been reasonable for the Respondent to make any adjustments

77.5 The specific steps contended for, in relation to this period by the Claimant, were providing her, at home, with

77.2.1 screen monitors,
77.2.2 an adjustable desk,
77.2.3 an ergonomic chair.

78 The Claimant also made a number of reasonable adjustment claims in relation to her dismissal.

78.1 In this instance, the Claimant suggested the following PCPs were put in place by the Respondent

- the requirement to work full-time hours
- the requirement to maintain a certain level of attendance at work in order to not be at risk of dismissal
- the requirement to carry out certain work
- the practice of dismissing employees after long term sickness absence

78.2 The alleged substantial disadvantage in relation to the above was that the Claimant would have disability related absences and therefore be at greater risk of dismissal as a result.

78.3 In relation to the dismissal claims the Respondent did not argue that it was not aware of the Claimant's disability nor, indeed, of any claimed disadvantage.

78.4 The reasonable adjustments contended for by the Claimant in relation to her dismissal were that the Respondent should have

- reduced or adjusted her workload,
- reduced her hours of work,
- implemented a phased return to work,
- increased trigger points in the sickness absence policy,
- disregarded some, or all, of her disability related absences,
- delayed the dismissal to allow the Claimant to finish her physiotherapy and/or awaiting her MRI scan results and, ultimately,
- not dismissed the Claimant

79 The law on unfair dismissal and long-term ill-health cases is well established and was not in material dispute between the parties. We set out below in our decision the factors that we considered relevant.

80 Those factors also, potentially, had an impact on the Claimant's Section 15 Equality Act 2010 claim where, as identified, the issue was one of proportionality. Having reached that stage of the statutory test, the burden is on the Respondent to show that their actions were justified.

81 The issues set out above in relation to the reasonable adjustments claims adequately set out the relevant elements of the statutory test which we needed to consider.

82 Ultimately, however, it is not necessary for the Claimant to set out all of the specific adjustments contended for. Rather, it is for us to consider whether or not the Claimant was at a substantial disadvantage by virtue of any provision criterion or practice applied and, if so, whether it would have been reasonable for the Respondent to make adjustments to remove or ameliorate such disadvantage.

Decision

83 The list of issues, as outlined above, was amended from the original list but, nonetheless, agreed by respective counsel.

84 It seems sensible, however, to approach the issues chronologically rather than as displayed.

Reasonable adjustments

85 The first relevant period which we needed to consider was that between October 2020 and January 2021.

86 The Claimant confirmed that she had no particular difficulties working from home during the initial covid-19 lockdown, as all necessary equipment (screens, chair etc) had been transported by the respondent from the office to employees' homes.

87 Similarly, she had no difficulties working from the office once her equipment was returned there after the initial lockdown.

88 However, during the second, less restrictive lockdown, towards the end of 2020, the Respondent was operating a 2 weeks in the office, 2 weeks from home rota, as part of their covid measures.

89 Whilst the respondent had initially believed otherwise, it appeared that, from the start of November 2020, the claimant worked the first 2 weeks from home, then

returned to the office. She then worked the first 2 weeks of December from home before returning to the office and working up to Christmas Eve.

90 She was then on leave until the start of January 2021 when she worked from home until going on sick leave on 13 January 2021.

91 In relation to this period, whilst disability was conceded, the respondent's knowledge of the claimant's disability was in dispute.

92 The claimant said that she had informed the respondent of her degenerative disc disease when declining their original job offer in late 2018. Her evidence on this was a little sketchy and we did not hear from either of the relevant individuals who it was said that she had informed. Those that we did hear from said that they were only aware that there had been some problem with the claimant's back but they believed that this had been resolved by treatment.

93 That view was seemingly confirmed by the fact that the claimant did not declare any disability or back problems on her pre-employment questionnaire.

94 In any event, personal information provided in a previous recruitment round would rarely be retained by employers for more than a few months, not least for data protection reasons.

95 We consider that, whatever information the claimant may have provided to the respondent when rejecting the initial job offer, it was reasonable for the respondent to conclude that, whatever the issue may have been, it had been resolved by the time that the claimant started working for them.

96 It was the claimant's own evidence that the injection she had received had been successful and, at the time of appointment, she was largely symptom free. As a result, she declared no medical or disability issues and it was reasonable for the respondent to accept that at face value.

97 Thereafter, we would acknowledge that there did appear to have been occasional conversations between colleagues, including the claimant, about aches and pains, including back pain. There also appear to have been discussions about pain relief including the use of heat patches.

98 It was far from clear, however, when, or whether, the claimant may have mentioned the disability relied on before us, or even the extent of the symptoms such that the respondent may have been put on notice of a potential disability.

99 There was no obvious reason why the claimant would have mentioned it, having not disclosed it on appointment and given her own evidence that the injection she had received had largely removed her symptoms for a year or more, Thereafter, of course, from March 2020, she was predominantly working from home due to covid.

100 There was also no evidence that she reported any further back problems to her GP until after she had gone on sick leave in January 2021.

101 We accept, therefore, that the respondent did not have actual or constructive knowledge of the claimant's disability until after she went on sick leave in January 2021.

102 In those circumstances, the claimant's claims of alleged failures to make reasonable adjustments in the period October 2020 to January 2021 must fail.

103 Nonetheless, for completeness, we also accept that the respondent did not have knowledge of the claimant's alleged substantial disadvantage during this period.

104 Firstly, the claimant had been given the option to work entirely from the office and had elected not to. That would be surprising if, at that time, she was suffering as much as she now recalls when working from home.

105 The claimant said that she had been repeatedly raising her concerns, about adjustments when home working, with management and not receiving any satisfactory responses.

106 Had she done so, we imagine she would have chosen to work from the office or, at the very least, management would have suggested it. In addition, if the situation was as bad as claimed, and the claimant had repeatedly raised concerns, it was surprising that there was nothing in writing or any attempt to escalate matters.

107 Moreover, in her witness statement, the claimant had implied that she had spoken to her GP about the difficulties she was having prior to going off sick and that he had advised her about her work set up at home. That was inaccurate. The claimant only spoke to her GP about a week after the start of her sick leave and, it appears, it was then that she was advised that her home working arrangements may have been an aggravating factor.

108 For all those reasons, therefore, whilst it is possible that working from home may have caused the claimant a level of difficulty, we do not accept that the respondent was aware of any of the pleaded disadvantages at the time.

109 We also do not accept that the respondent had a provision, criteria or practice that required the claimant to work from home at the relevant time. She had the option to work from the office but chose not to exercise it.

110 The opportunity to work from the office would, in any event, have been a reasonable adjustment that removed the disadvantage.

111 We would acknowledge that the claimant may have had her reasons for choosing the 2 week rotating rota, which may have included concerns about covid. That said, the respondent appeared to have appropriate measures in place and the claimant had no objections to the weeks that she did spend in the office during the relevant period.

112 We accept that there was a provision, criteria or practice, in the period from October 2020 to January 2021, such that employees had to use some personal equipment and furniture when working from home.

113 However, we prefer the respondent's evidence that the claimant had, or at least had access to, an additional screen or screens.

114 The claimant's evidence was that working from the office was not a problem and there was little or no evidence that an adjustable desk was required in either location.

115 It may well be that the claimant would have benefited from an ergonomic chair when working from home but, for all the reasons already stated, her claim that one was required as a reasonable adjustment under the Equality Act 2010, must fail.

116 We then turn to the reasonable adjustment claims in relation to the dismissal which, to a degree, interrelate with the unfair dismissal and section 15 claims.

117 The respondent conceded that they were aware of the claimant's disability from March 2021, well before her dismissal in October of that year.

118 They also conceded that they applied a PCP of requiring employees to maintain a level of attendance to avoid the risk of dismissal.

119 We would also accept that the claimant's work was largely sedentary and that the respondent had a policy to consider dismissal after a period of long-term sickness absence, where there was no foreseeable return. Those PCPs, however, have been adjusted from those pleaded.

120 We do not accept, however, that the respondent had a policy of requiring employees to work full time hours or, in the claimant's case, her already adjusted 4 day week.

121 It is possible that the claimant may have misunderstood the respondent at the meeting in October 2021 in relation to the requirements for a return to work, but there was no dispute that she was unfit for any work at that stage.

122 Moreover, we accept the respondent's evidence that they had adjusted hours for other employees previously and they would have considered a phased return, or even a more permanent adjustment to the claimant's role and/or hours, if and when she was able to return to work.

123 The respondent accepted that the conceded PCPs put the claimant at a substantial disadvantage due to the likelihood that she would have disability related absences which, in turn, would increase the risk of dismissal.

124 The issue, therefore, was whether it would have been reasonable to make any adjustments to remove or reduce that disadvantage.

125 The claimant argued for adjustments such as reducing her hours and/or workload and implementing a phased return to work.

126 We have already indicated that we believe that the respondent would have been willing to consider such adjustments but, at the time of dismissal, the claimant was unfit for any work, adjusted or otherwise. As a result, those adjustments would have made no difference as she still would have been unable to return.

127 Those proposed adjustments would not have removed the disadvantage.

128 The claimant also argued for increasing the trigger points in the respondent's sickness absence policy and / or disregarding some, or all, of her disability related absence.

129 The respondent's policy suggested that dismissal could be considered after 3 months' absence. It is difficult to conceive of a situation where an employer of a disabled employee could never dismiss no matter how long they may have been absent.

130 In essence, these proposed adjustments were suggesting that the respondent should have given the claimant longer to potentially recover. That was a submission with some merit.

131 Similarly, the claimant argued that the respondent should have delayed any dismissal decision until she had finished physiotherapy and / or had received her MRI results.

132 Of course, all of those proposed adjustments would only be reasonable if they would have removed the disadvantage. That is, if the respondent had delayed their dismissal decision, would the claimant have been able to return to work within a reasonable timeframe.

133 Ultimately, the claimant said that it would have been a reasonable adjustment not to dismiss her which, again, must have meant at the time of her dismissal rather than indefinitely. That, too, therefore, was an argument for delay which would only be reasonable if it were likely to remove the disadvantage. That is a point we will return to below.

134 When looking at the dismissal we need to consider not only the potential reasonable adjustments argued for but also the ordinary principles of fairness in capability dismissals and the proportionality of the respondent pursuing their legitimate aims.

135 We acknowledge that the respondent's aims were legitimate and, in any long-term ill health scenario, there will often be a time at which it would be legitimate for an employer to consider dismissal if there is no foreseeable return, whatever the reason for the absence.

136 In this case:

136.1 the claimant had been absent for almost 10 months
136.2 the respondent had carried out a previous welfare visit, albeit the claimant was unaware it was such in advance
136.3 they had obtained 2 Occupational Health reports
136.4 the claimant had also provided regular updates
136.5 the claimant was unfit for any work as at the date of dismissal

137 However, it was also the case that:

137.1 the respondent had originally arranged what became the dismissal meeting at a time when the claimant was expected to have her MRI scan results but, when these were delayed by a few days, they did not wait for the outcome
137.2 the second occupational health report suggested a further review in 8 – 10 weeks
137.3 the claimant had no idea that there was any prospect that the second welfare meeting could result in her dismissal

137.4 that was a breach of the respondent's own policy

137.5 the dismissing manager acknowledged her lack of experience in such matters and certain failings as a result. For example, she accepted that she should, perhaps, have waited for the MRI results or a further OH review

137.6 it certainly appeared that there was a hint of prejudgment. The script, prepared in advance, effectively moved from the absence of any alternative roles straight to dismissal

137.7 in practice, this appeared to happen without even consulting the claimant about that possibility

137.8 the offer of an appeal was to Marie Shaw who had been involved in the process and, seemingly, stepped away from the dismissal as she was to be the appeal officer

138 Given the size and resources of the respondent, a couple of those failings may have been sufficient on their own to take the respondent's actions outside the band of reasonable responses.

139 We considered that the failure to inform the claimant that her dismissal was even being considered (in breach of the respondent's own policy) was a serious one. This may have impacted the claimant's preparation and, potentially, her responses.

140 It certainly appeared that some confusion arose in the discussion about the possibility of returning to her "full role" and whether that related to the time of dismissal or some future time and, if the latter, was there a possibility of a phased return or other adjustments.

141 That said, those matters were, inevitably, largely hypothetical.

142 The letter inviting the claimant to that meeting transposed bullet points from the respondent's policy about what would be discussed yet omitted the one about dismissal. We do not know whether that was a conscious choice, but it did not sit comfortably with a script prepared in advance that, at the very least, anticipated such an outcome.

143 For all those reasons, therefore, we find that the dismissal, at that time and in those circumstances, fell outside the band of reasonable responses available to the respondent in this case and was not a proportionate means of achieving the respondent's legitimate aims.

144 We then have to consider what would have happened but for the unfairness and discrimination arising from the claimant's disability.

145 It seems to us that, had the respondent waited for the MRI results and arranged a further OH report, as suggested, in November 2021, there would still have been no foreseeable return to work date.

146 This is evidenced by the fact that the claimant was actually signed off for longer on expiry of her previous sicknote, was in receipt of full personal independence payments for an extended period (until 2024) and she was clearly still a very long way off being able to consider returning to the workplace when reviewed by the DWP in May 2022.

147 In those circumstances, and with appropriate warning and consultation and rectifying the other defects identified above, we consider that the claimant could have been fairly dismissed by the end of November 2021. That would have been a proportionate response at that stage on the part of the respondent who needed to be able to recruit to replace to ease the pressures on the rest of the team.

148 The remaining proposed adjustments, however, would not have been reasonable, as they still would not have removed the disadvantage.

Employment Judge Broughton

17 March 2023