EMPLOYMENT TRIBUNALS

Claimant: Mrs J Potter

Respondent: St Helens and Knowsley Teaching Hospital NHS Trust

Heard at: Liverpool

On: 30 and 31 May
1 and 2 June
5, and 6 June 2023

Before: Employment Judge Benson
Mrs D Price
Mr J Murdey

REPRESENTATION:

Claimant: Mr N Gildea, Claimant's partner
Respondent: Mr J Boyd, Counsel

JUDGMENT having been sent to the parties on 13 June 2023 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Claims and Issues

1. By a complaint form received on 29 July 2021 the claimant brings complaints of:

   1.1. unfair dismissal under Section 94 of the Employment Rights Act 1996,

   1.2. automatic unfair dismissal under Section 103A,

   1.3. disability discrimination under Section 15 and Sections 20 to 21 of the Equality Act 2010, and

   1.4. a claim of detriment pursuant to Section 47B of the Employment Rights Act 1996 (Whistleblowing).

2. At a Case Management hearing before Employment Judge Shotter on 5 October 2021, the claimant, assisted by Mr Gildea, clarified the complaints which she was bringing, and Employment Judge Shotter set out what she understood the complaints to be in her order. The parties were asked to confirm that position, and subject to an additional complaint of a failure to make reasonable adjustments, that document sets out the basis upon which the claimant brings her claims. Subsequently, an agreed list of issues was prepared, and the Tribunal have had the benefit of that list which appears at page 108 to 112 of the bundle which was provided to us. At the outset of the hearing, we confirmed that the list was agreed, and subject to one amendment, being an alleged act of detriment under Section 48 (D1) which was subject to an amendment application, that list was agreed. We set out that list of issues below but have excluded the issues for remedy for the purposes of these reasons.

Unfair dismissal

Automatic unfair dismissal

(1) Was the reason or principal reason for dismissal that the claimant made a protected disclosure? If so, the claimant will be regarded as unfairly dismissed.

Section 98 cases – general

(2) Was the reason for dismissal capability (ill health) or Some Other Substantial Reason?

(3) Applying the test of fairness in section 98(4), did the respondent act reasonably in all the circumstances in treating that reason as sufficient reason to dismiss the claimant?

(4) If the reason was capability, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant? The Tribunal will usually decide, in particular, whether:

(a) The respondent adequately warned the claimant and gave the claimant a chance to improve;

(b) The respondent genuinely believed the claimant was no longer capable of achieving acceptable attendance?

(c) The respondent adequately consulted the claimant;

(d) The respondent carried out a reasonable investigation, including finding out about the up-to-date medical position;

(e) The respondent could reasonably be expected to wait longer before dismissing the claimant;

(f) Dismissal was within the range of reasonable responses.

Protected Disclosures

(5) Did the claimant make one or more qualifying disclosures as defined in section 43B of the Employment Rights Act 1996? The Tribunal will decide:

(a) What did the claimant say or write? When? To whom? The claimant says s/he made disclosures on these occasions:

PD1: At her disciplinary investigation meeting with Mr Tony Mannion on 12 March 2021 the claimant raised issues about a lack of effective and/or supportive management within the phlebotomy team including whether the claimant had raised an issue about a broken chair.

(b) Did she disclose information?

(c) Did she believe the disclosure of information was made in the public interest?

(d) Was that belief reasonable?

(e) Did she believe it tended to show that the health or safety of any individual had been, was being or was likely to be endangered?

(f) Was that belief reasonable?

(6) If the claimant made a qualifying disclosure, it was a protected disclosure because it was made to the claimant's employer.

Detriment (Employment Rights Act 1996 section 48)

(7) What are the facts in relation to the following alleged acts or deliberate failures to act by the respondent?

D1 The *respondent* [as amended during the hearing] deciding to proceed to Stage 4 of the Bridgewater Absence management procedure.

D2 Mike Roscoe dismissing the Claimant at her stage 4 Absence management meeting on 4 May 2021.

(8) Were those acts or deliberate failures done on the ground that she made a protected disclosure?

Discrimination arising from disability (Equality Act 2010 section 15)

(9) Did the respondent treat the claimant unfavourably in any of the following alleged respects:

(a) May 2021 – Mike Roscoe dismissing the claimant for her poor attendance record?

(10) Did the following things arise in consequence of the claimant's disability:

(a) The Claimant's sickness absences from the date of the stage 3 warning on 23 August 2019?

(11) Has the claimant proven facts from which the Tribunal could conclude that the unfavourable treatment was because of any of those things? Did the respondent dismiss the claimant because of that sickness absence?

(12) If so, can the respondent show that the treatment a proportionate means of achieving a legitimate aim? The respondent says that its aims were:

(a) Striving for adequate attendance and safe staffing levels including to enable it to safeguard the safety and wellbeing of its other staff and patients?

(13) The Tribunal will decide in particular:

(a) was the treatment an appropriate and reasonably necessary way to achieve those aims;

(b) could something less discriminatory have been done instead;

(c) how should the needs of the claimant and the respondent be balanced?

<u>Reasonable Adjustments (Equality Act 2010 sections 20 & 21)</u>

(14) A "PCP" is a provision, criterion or practice. Did the respondent have the following PCPs:

(a) Providing a hard copy of the Bridgewater Attendance Management Policy/policies;

(b) Not redeploying the claimant into an administrative role where she was not required to stand on her feet;

(c) Being required to achieve acceptable levels of attendance and/or comply with the Bridgewater Attendance Management Policy/policy requirements.

(15) Did the PCPs put the claimant at a substantial disadvantage compared to someone without the claimant's disability, in that:

(a) She could not use her Dragon software to read the policy;

(b) She was unable to work in her role due to the need to stand on her feet;

(c) Her absence levels were unacceptable, and she was unable to comply with the policy requirements?

(16) Did the respondent know, or could it reasonably have been expected to know, that the claimant was likely to be placed at the disadvantage?

(17) Did the respondent fail in its duty to take such steps as it would have been reasonable to have taken to avoid the disadvantage? The claimant says that the following adjustments to the PCP would have been reasonable:

(a) Providing an electronic copy that could be replayed on Dragon;

(b) Redeploying her into an administrative role where the claimant was not required to stand;

(c) Discounting all absences relating to the claimant's umbilical infection disability?

(18) By what date should the respondent reasonably have taken those steps?

Application to Amend

3. On day three of the hearing, it was apparent that the case was proceeding more quickly than had originally been envisaged. One of the claimant's witnesses, Ms Ryan had not anticipated that she would be required to give evidence until the 8 June and was on holiday. Waiting for her to return would have resulted in Tribunal and the parties' time being wasted and as such, discussions took place with Mr Gildea and Mr Boyd as to how this could be resolved. Mr Boyd proposed on behalf of the respondent that in view of certain admissions by the claimant during her evidence, Ms Ryan's evidence would be limited, and that if the claimant wished to make an application to amend the detriment D1 to widen it such that the allegation was that the *respondent* decided to proceed to stage four of the Bridgewater absence management procedure, rather than the decision being that of Ms Ryan's alone, the respondent would not object to that application. Further, if that was the position, then Ms Ryan's evidence would not be required, and the respondent would not propose calling her. Mr Boyd confirmed that in any event his client would not now seek to call Ms Ryan. Having given Mr Gildea and Ms Potter a break in order to discuss how they wished to proceed, and having explained the position to them, Mr Gildea confirmed that the claimant wished to make that application for an amendment and had no wish to bring Ms Ryan to the hearing either during her holiday or having only just returned. In those circumstances the application was duly made, the respondent did not object to it, and the Tribunal granted the amendment.

Evidence and Submissions

4. The claimant gave evidence on her own behalf, and we also heard evidence from Mrs C Dingley, a colleague of the claimant, and from Mr Gildea. On behalf of the respondent, we heard evidence from Ms L N Brockley, the claimant's line manager, Mr N Roscoe the Assistant Director of Operations at

the time, who was the Dismissing Officer, Mrs J Pickstock, who was an HR Business Partner who supported the Dismissing Officer, and Mr R Cooper, the Director of Operations at the time, who was the Appeal Officer.

5. We had the statement of Ms S Ryan the Community Nursing Operational Manager at the time, but as indicated, she did not give evidence and was not available to be cross examined. As such we applied limited weight to her evidence. Further we had regard to the documentary evidence within the bundle (which consisted of 649 pages), particularly the contemporaneous documents to which we were referred.

6. Mr Gildea and Mr Boyd provided written and oral submissions for which we were grateful. We made our decision in this case having received evidence in chief from each of the witnesses and having heard their oral evidence. In this case there has not been a great deal of dispute as to the facts. Most of the interactions between the parties have been recorded in writing and concessions had been made by the claimant in cross examination. Where there was a factual dispute, we made our decision based upon the balance of probabilities, that is what is more likely than not to have happened. We generally found all of the witnesses gave evidence to the best of their recollections, and we have had access to the documents to assist us in the conclusions we've reached.

Findings of Fact

7. The claimant was employed as a Community Phlebotomist from 23 January 2012 to 5 May 202. Initially she was employed by Bridgewater Community Healthcare NHS Trust ("Bridgewater"). On 1 April 2017 her employment was transferred under TUPE to the Northwest Boroughs NHS Foundation Trust ("Northwest Boroughs") and on 1 April 2020 to the respondent.

8. The respondent conceded that at all material times the claimant was a disabled person by reason of the Equality Act 2010 by reason of umbilical infections. Further that it had knowledge of the claimant's disability. The Occupational Health report dated 9 January 2020 confirmed that this was the position. The claimant also had Dyslexia. The respondent was aware of this and accepts that the claimant was a disabled person at all material times for the purpose of these proceedings.

9. The claimant had been provided with Dragon software which assisted her with reading and writing documents in work. She had this installed on her work PC.

<u>Absence Management (Bridgewater)</u>

10. The claimant had a history of ill health throughout her employment. This had been for a variety of reasons, and she had substantial periods of absence through sickness. This resulted in her being taken through the Bridgewater Absence Management Policy such that on or around 22 June 2016, whilst still with Bridgewater, she was issued with a stage three final letter of concern in respect of her sickness absence.

11. The Bridgewater policy was viewed by the respondent and its predecessors as a contractual policy and as such she continued to be subject to that policy throughout her employment. The respondent had taken the decision that anyone who was at any stage of that policy upon the transfer to the respondent continued to be subject to it. Although the claimant seeks to say there was confusion as which policy applied to her, we find that there was no confusion in the claimant's mind. Although some initial advice given by the respondent's HR department to the claimant's managers was that it was the respondent's policy which applied, that was corrected having been challenged by Ms Brockley and the claimant's manager and we were satisfied that the claimant, and her managers who were taking her through that process, knew that the Bridgewater policy applied to her.

12. The claimant had a paper version of the policy and at various times when asked by the respondent if she needed a copy, she said she had one. The policy was available electronically, but the claimant never asked for a copy in that format. Prior to her stage four meeting, the policy was read to her by Mr Gildea and she was aware of its contents.

13. The policy has four stages, the first being an attendance agreement whereby if a target is set, an employee is made aware that their next absence may trigger the formal absence process, a stage two interview whereby a first letter of concern could be issued and a stage three interview whereby a final letter of concern could be issued. Within that process the policy sets out information as to what the letter should contain, including consideration given to adjustments to the job and alternative employment, attendance targets set, review periods, and confirmation of the impact of not achieving the attendance target. It includes a statement that where a final letter of concern has been issued it is essential that reference be made in it that dismissal could be an option if the absence level does not improve, and a copy of the minutes of the meeting whereby the employee would be required to sign the minutes as statement of understanding and acceptance of the information contained within it and return a copy. Provision is made within the policy for references to occupational health. The policy sets out the trigger levels, which are essentially not having met the agreed attendance target at a previous stage.

14. It would appear, for a reason which is not explained and of which the respondent is unaware, that the claimant was not required to attend a stage four meeting following receipt of the stage three final letter of concern by Bridgewater in or around 22 June 2016, despite her having a further period of absence. Her employment was not therefore terminated at that time. The claimant's stage three attendance target with Bridgewater expired on 23 May 2017. She therefore returned to stage one in respect of absences since that date.

<u>Absence Management (North-West Boroughs and Respondent)</u>

15. During her period of employment with North-West Boroughs and the respondent, she was absent on the following dates for the following reasons:

6 June 2017 to 13 June 2017	8 days absence Diarrhoea/Vomiting
12 July 2017 to 15 November 2017	127 days absence stress related hypertension
29 December 2017 to 8 January 2018	11 days Diarrhoea/Vomiting
12 February 2018 to 11 January 2019	333 days Gall Bladder – Operation September 2018
17 April 2019 to 17 April 2019	1 day – Migraine
13 August 2019 to 20 August 2019	8 days – Sinusitis

16. In September 2018 the claimant had an operation to remove a gallstone which in resulted in the umbilical infection. This was very debilitating to the claimant. For a considerable period, the claimant underwent investigations and the claimant's doctors were unable to ascertain the cause of the problem. During this period, she was subject to numerous courses of antibiotics. It was decided in late 2020 that an exploratory operation would be the only route forward, but that operation could not take place, in part because of the Covid pandemic until July 2022. It was cancelled twice. During the stages of the absence management process, the claimant did not know when that operation could take place or that the outcome would be successful.

17. During the application of the absence management process, the claimant attended appointments with the respondent's Occupational Health Practitioner ("OHP") and reports were issued on 9 January 2020, 17 March 2020, 27 October 2020, 1 December 2020, and 25 January 2021. Other appointments were arranged for her which she did not attend including 2 February 2021 and 23 February 2021. It is unclear whether the claimant did or didn't receive notices of these appointments. Her evidence was vague on the point, and we find that she didn't feel there was any point in attending as there was little the OHP could add to the views which her own consultant had given, that being that she needed an exploratory operation.

18. On 16 January 2019 the claimant was issued with a stage one informal letter of concern. On 26 April 2019 the claimant was issued with a stage two formal letter of concern. On 23 August 2019 the claimant was issued with a stage three final letter of concern. These were issued under the Bridgewater policy.

Stage 3 meeting

19. The letters to the claimant inviting her to a stage three meeting and the outcome letter itself were sent to a different address than letters had been sent to previously. These were the updated addresses on the claimant's file, but when they were sent out, the claimant no longer lived at the addresses. The claimant was however notified of the scheduled meeting by Ms Brockley

her line manager who had managed her from her Bridgewater days and with whom the claimant had a good and trusting relationship.

20. She attended the meeting with Ms Brockley and we accept Ms Brockley's evidence that the claimant was told that this was a formal meeting and that she was being issued with a stage three notice such that if she was absent again in the next 12 months period, she would proceed to stage four. The claimant told the Tribunal in evidence that she had not read the outcome letters that had been sent to her previously in any event and she had in the past relied upon Ms Brockley's explanations in the meetings she had with her. Although this meeting did not have an HR person present, we find that the claimant realised the seriousness of the meeting at the time it was held and understood its implications, but that she may have played this down in her own mind as time passed. In October 2019 the claimant confirmed to Ms Brockley during one of many regular welfare meetings that she knew she was subject to a stage three notice. Further, that she understood the implications of being on stage three and that further absences could result in dismissal. She had been in that situation previously.

Disciplinary Issue

21. On 8 January 2021 the claimant was overheard by a patient making derogatory comments, including using foul language about a colleague. The issue related to a situation where a midwife had interrupted an appointment the claimant's appointment by leaving another patient for the claimant to see and take blood. The claimant admitted she was frustrated and had made some comments but denied swearing.

22. As a result of that complaint, the issue was investigated, and an investigation meeting took place between the claimant and Mr Tony Manion on 12 March 2021. During that meeting the claimant raised the following issues which were minuted:

> "I just think what upset me on 4 January was that the service has always been busy. In ten years, it's been cost effective, and results are accurate. I just think senior managers don't see the importance of our service.
>
> "As things started to filter down, I do think our service is the forgotten service".
>
> "That there was a band 3 job going and there were three people applied for it out of this service and got to interview stage. That job disappeared never received an email as to why the job got pulled. I don't interpret that as me being a valued member of staff. Three people out of Phlebotomy didn't receive a courtesy email to say why the recruitment wasn't going ahead. I said to my senior Sharon Cross "where is the money to replace those staff". "I said I can ask where the budget is like and where money gets spent as an employee of the Phlebotomy service, I wanted to know why if we are not recruiting, the Ops Manager is not putting in a staffing structure in line with an Acute Trust kind of making decisions on the day without any backup."

"Team meetings are laughable, some don't even get minuted, Sharon the senior is not in a different union, I suggested this might be a good idea, I didn't get it minuted, I got back off Sharon Ryan that it was sad that I thought she should be in a different uniform out of respect I think it should be acknowledged".

"I was at Four Acre when I had my last PDR that was four years ago approximately" "As a Senior Phlebotomist she should be making sure stock is there not asking me to check what she needs to order. I told her the chair was broke the other day and she told me to use the other chair but there are issues with this, she says I need to ask people are they fainters she leaned over the desk and said where do you want me to get you a chair from".

"Staff morale is in its boots, no structure, no support. We have these fancy meetings, but nothing is ever done about it we have all asked senior managers to look at our banding, can we look at re-banding all we ever get is its in the pipeline".

23. The investigation resulted in a recommendation that disciplinary action in the form of a first written warning be issued together with some changes within the phlebotomy department. The claimant was provided with the outcome of that investigation but as it was after the claimant's employment with the respondent had ended no disciplinary process was taken forward.

24. There is no evidence that Mr Roscoe, Ms Pickstock or Mr Cooper knew about what the claimant had said in this meeting relating to the matters above and we accept their evidence that they did not.

Stage four meeting

25. From 1 April 2020 until October 2020 there was moratorium within the Trust on progressing employment processes, including absence management, because of the Covid pandemic.

26. The respondent's moratorium on the sickness absence process was lifted from October 2020 on staged basis. Sometime in February 2021 Ms Brockley produced a detailed report upon the claimant's absences to that date. She recommended that the matter proceed to stage four where the claimant's employment would be terminated on capability grounds. The respondent had, at that time, three former Bridgewater employees including the claimant whose absences had also triggered a stage four review.

27. The claimant's absences since her stage three warning were:

23 September 2019 to 4 October 2019	43 days – Umbilical Infection
11 November 2019 – 30 October 2020	355 days Umbilical Infection/investigation
19 February 2021 – 23 February 2021	5 days – Migraine/High Blood

	Pressure
6 March 2021 to 28 April 2021	Abdominal pain – Umbilical Discharge

28. Having considered the report, Mr Roscoe made the decision to invite the claimant (and separately the other employees) to stage four meetings. The letter inviting the claimant to attend the meeting was dated 20 April 2021. That warned the claimant that dismissal was a potential outcome. The meeting was rearranged at the claimant's request and took place on 4 May. The claimant was accompanied by her TU representative. We find that Mr Roscoe was not empathetic during that meeting and may have been abrupt to the claimant. Further although he says he checked all the dates of absences carefully, he did not pick up that there was an inaccuracy as to the start date of the absence in September 2019. He did however explore with the claimant the reasons for the her absences, the adjustments that had been put in place, the procedural points she made in relation to the stage three notice, the nature of her work and the impact her absence had upon her colleagues and the service itself, the engagement with OH, that she enjoyed her job and wasn't looking to be redeployed, but that wouldn't in any event impact upon her condition or provide any additional support which her current role didn't. That the latest absence was not the first that could have triggered a stage four meeting.

29. He adjourned for some 40 minutes and then advised the claimant that her employment was terminating with notice by reason of her absence record.

30. He concluded:

    30.1. The claimant's levels of absence were significant and lengthy. She had periods of absence in February 2018 of 333 days, July 2017 of 127 days and further shorter absences both before and after these dates; that this was an unacceptable pattern that the service could not sustain or support as this was impacting on patient safety.

    30.2. From August 2019 to April 2021, a period of 20 months, she was absent due to sickness for a total of 425 days.

    30.3. that the claimant failed to engage with occupational health on three occasions by not taking part in a telephone conference call with them when their purpose was to help and support employment from a health perspective. He reminded the claimant that this in itself could be treated as a disciplinary matter.

31. In conclusion, he found that the claimant had been fully supported during all of her absence periods. Despite this, her levels of absence remained unacceptable. He noted that having considered all of the evidence and mitigating circumstances he came to the decision that there was no alternative but to terminate employment with notice under 'capability due to ill health' as detailed in the Bridgewater policy.

32. This decision and the decision to dismiss the claimant's colleague who was also on a stage three notice was against a background where the respondent's responsibility was to provide a safe service delivery to patients and that additional workload was being picked up by the claimant's colleagues during her absences.

33. The significant impact that hers and her colleague's absences had upon the service and her other colleagues was not disputed by the claimant. Between November 2019 and late April 2020 which included the height of the COVID pandemic, out of the 11 phlebotomists in the service, between two and five were off sick. This created additional pressure on the service. There were significant attendance issues within the central locality phlebotomy team which the respondent considered needed to be addressed. Mr Roscoe's evidence (in answer to a question from Mr Gildea), was that the service normally operated with a 20% uplift of staff to ensure cover for holidays, training and normal absences. The service could not however sustain long periods of absences without it impacting the service and safety of patients, in a climate where public funds were scarce.

Redeployment

34. The claimant never asked to be redeployed. Although that topic was mentioned in passing with Ms Brockley in one of her welfare meetings, we find that it was not a request and that the claimant did not want to leave the job she loved. The claimant's position was set out in Ms Brackley's report, and this was the view she expressed to the respondent. Although the Bridgewater policy listed that as an issue to be considered during the application of the stages, and particularly at Stage four, it is not something which the claimant herself wanted at the time.

Appeal

35. The claimant appealed against the decision to dismiss her. Initially she was advised, mistakenly, by Mr Roscoe and Miss Pickstock that there was no right of appeal. Mr Gildea challenged this and having checked the policy, the position was rectified and the claimant was given a right of appeal which she exercised.

36. Mr Gildea supported the claimant in her grounds of appeal which were set out in an e-mail dated the 13th of May 2021. Mr Cooper heard that appeal and he arranged for further inquiries to be made in relation to the matters raised in the appeal grounds. These included asking Mr Roscoe for a summary of the reasons for his decision which Mr Roscoe provided. His summary noted that the claimant's longer periods of absence relating to the disability were following surgery at the respondent hospital. Further, but not linked to the specific scenario, that the claimant was also subject to a disciplinary hearing linked to an accusation of 'appalling behaviour in a clinic in front of a patient which included swearing'.

37. The appeal hearing took place on 28th May 2021. The grounds of appeal included the reasons for the missed OHP appointments, that the correct policy was not provided, the policy not being followed correctly, the non-receipt of

the stage three letter, redeployment, the lack of a right of appeal, comments and actions of senior managers, and the claimant's request for minutes of the meeting. A management response was provided by Ms Pickstock in relation to the grounds of appeal and this appears at page 510. Mr Roscoe added his comments.

38. During the appeal meeting, the claimant had the assistance of her trade union representative. Following that meeting Mr. Cooper made further inquiries to follow up issues and provided his outcome by way of letter dated 14th June 2021. The claimant takes no issues with the appeal process but disagrees with the outcome.

39. Mr Cooper dealt with the grounds of appeal. He concluded that the correct policy had been provided. Although it was an updated version, that that would not have impacted upon the outcome or process of the meeting. In respect of the outcome letter from the stage three meeting, the claimant had never queried with her line manager why she had not received a letter, when she was aware they were normally sent as she had received them previously. The serious situation had been confirmed to the claimant by Ms Brockley during the meeting and on 15th of October 2019 the claimant had confirmed to Ms Brockley that she knew she had been issued with a stage three final letter of concern.

40. He considered the claimant's assertion that the final period of absence had been contributed to by being notified about the disciplinary matter, but that the process was as laid out under the disciplinary policy and additional considerations were put in place to ensure she was supported through that process. Adaptive equipment had been provided to the claimant to assist her in accessing documents; the claimant had a dyslexia coach and that in telephone welfare meetings, face to face meetings and meetings with occupational health during 2018 to 2021 and on several occasions the severity of the situation was explained to the claimant and then followed up in writing. Having looked through the documentation Mr Cooper could not find a formal request for redeployment from the claimant and that had not been recommended by OHP nor had any reason why alternative employment or redeployment would assist been provided. In respect of the claimant's surgery in September 2018 contributing to her overall levels of absence: the claimant was initially issued with an informal warning, the stage two first letter of concern was issued after an absence with a migraine, the stage three final letter of concern was issued after an absence with sinusitis, and the stage four dismissal only happened after she had been absent with a migraine. Whilst throughout the period the claimant had long periods of absence due to her umbilical infections, the Trust had chosen not to implement the triggers and stages in the Bridgewater policy.

41. He concluded that having taken into consideration all of the information provided that the original decision should stand.

The Law

Discrimination Arising from Disability

42. Section 15 of the EQA provides that:

> *(1) A person (A) discriminates against a disabled person (B) if —*
>
> *(a) A treats B unfavourably because of something arising in consequence of B's disability, and*
>
> *(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.*
>
> *(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.*

43. In **Secretary of State for Justice and anor v Dunn EAT 0234/16** the EAT identified the following four elements that must be made out in order for the claimant to succeed in a S.15 claim:

43.1. there must be unfavourable treatment

43.2. there must be something that arises in consequence of the claimant's disability

43.3. the unfavourable treatment must be because of (i.e. caused by) the something that arises in consequence of the disability, and

43.4. the alleged discriminator cannot show that the unfavourable treatment is a proportionate means of achieving a legitimate aim.

44. If the employer can establish that it was unaware and could not reasonably have been expected to know that the claimant was disabled, the claim cannot succeed.

Duty to make reasonable adjustments

45. By section 20 of Equality Act 2010 the duty to make adjustments comprises three requirements.

46. The first requirement, by section 20(3), incorporating the relevant provisions of Schedule 8, is a requirement, where a provision, criterion or practice of the employer's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

47. The second and third requirements are not relevant to this claim.

48. A disadvantage is substantial if it is more than minor or trivial: section 212(1) Equality Act 2010.

49. Paragraph 6.28 of the EHRC Code lists some of the factors which might be taken into account when deciding what is a reasonable step for an employer to have to take:

    (1) Whether taking any particular steps would be effective in preventing the substantial disadvantage;

    (2) The practicability of the step;

    (3) The financial and other costs of making the adjustment and the extent of any disruption caused;

    (3) The extent of the employer's financial and other resources;

    (5) The availability to the employer of financial or other assistance to help make an adjustment (such as advice through Access to Work); and

    (6) the type and size of employer.

50. Claimants bringing complaints of failure to make adjustments must prove sufficient facts from which the tribunal could infer not just that there was a duty to make adjustments, but also that the duty has been breached. By the time the case is heard before a tribunal, there must be some indication as to what adjustments it is alleged should have been made.

51. In **Bray v London Borough of Camden EAT 1162/01** the EAT approved an employment tribunal's conclusion that, as a matter of principle, it is not a reasonable adjustment to ignore disability-related absences entirely when calculating sickness levels and the like. The EAT observed that, if the contrary were the case, the logical consequences would be that a disabled employee could be absent throughout the working year without the employer being able to take any action in relation to that absence.

52. We were also referred a number of authorities by Mr Boyd as set out in his written submissions which we have considered where relevant.

Burden of proof

53. Section 136 of Equality Act 2010 applies to any proceedings relating to a contravention of Equality Act. Section 136(2) and (3) provide that if there are facts from which the tribunal could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the tribunal must hold that the contravention occurred, unless A shows that A did not contravene the provision.

54. We are reminded by the Supreme Court in **Hewage v. Grampian Health Board [2012] UKSC 37** not to make too much of the burden of proof provisions. They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other.

Protected Disclosures

55. A protected disclosure is governed by Part IVA of the Employment Rights Act 1996 ("the Act") of which the relevant sections are as follows:-

"s43A: in this Act a "protected disclosure" means a qualifying disclosure (as defined by Section 43B which is made by a worker in accordance with any of Sections 43C to 43H.

s43B(1): in this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure is made in the public interest and tends to show one or more of the following:

(a) …….

(b) ….

(c) …

(d) that the health or safety of any individual has been, is being or is likely to be endangered…"

56. The Employment Appeal Tribunal ("EAT") (HHJ Eady QC) summarised the case law on section 43B(1) as follows in **Parsons v Airplus International Ltd UKEAT/0111/17**:

57. As to whether or not a disclosure is a protected disclosure, the following points can be made:

57.1. *This is a matter to be determined objectively; see paragraph 80,* **Beatt v Croydon Health Services NHS Trust [2017] IRLR 748 CA***.*

57.2. *More than one communication might need to be considered together to answer the question whether a protected disclosure has been made;* **Norbrook Laboratories (GB) Ltd v Shaw [2014] ICR 540 EAT.**

57.3. *The disclosure has to be of information, not simply the making of an accusation or statement of opinion;* **Cavendish Munro Professional Risks Management Ltd v Geduld [2010] IRLR 38** *EAT. That said, an accusation or statement of opinion may include or be made alongside a disclosure of information: the answer will be fact sensitive but the question for the ET is clear: has there been a disclosure of information?;* **Kilraine v London Borough of Wandsworth [2016] IRLR 422 EAT***."*

58. The decision of the EAT in **Kilraine** was subsequently upheld by the Court of Appeal at **[2018] EWCA Civ 1436**. The concept of "information" used in section 43B(1) is capable of covering statements which might also be characterised as allegations.

59. The worker need only have a reasonable belief that the information tends to show the matter required by Section 43B(1) and that the disclosure is made in the public interest. A subjective belief may be objectively reasonable even if it is wrong or formed for the wrong reasons. In **Chesterton Global Ltd and anor v Nurmohamed [2017] IRLR 837** the Court of Appeal approved a suggestion from counsel as to the factors normally relevant to the question of whether there was a reasonable belief that the disclosure was made in the public interest.

60. In **Chesterton** Underhill LJ addressed the question of the motivation for the disclosure in paragraph 30, saying that:

"… while the worker must have a genuine (and reasonable) belief that the disclosure is in the public interest, that does not have to be his or her predominant motive in making it: otherwise, as pointed out at paragraph 17 above, the new ss.49(6A) and 103(6A) would have no role. I am inclined to think that the belief does not in fact have to form any part of the worker's motivation - the phrase 'in the belief' is not the same as 'motivated by the belief'; but it is hard to see that the point will arise in practice, since where a worker believes that a disclosure is in the public interest it would be odd if that did not form at least some part of their motivation in making it."

61. Sections 43C – 43G address the identity of the person to whom the disclosure was made. In this case it was accepted that the alleged disclosures (if found to be disclosures) were made to the employer (section 43C).

Unfair Dismissal

62. Section 103A of the Act deals with protected disclosures and reads as follows:

"*an employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure".*

63. In **Abernethy v Mott, Hay and Anderson [1974] ICR 323**, Cairns LJ said, at p. 330 B-C.

"A reason for the dismissal of an employee is a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee."

64. In **Beatt** the Court of Appeal described the reason for dismissal as

"the factor or factors operating on the mind of the decision-maker which cause them to take the decision – or, as it is sometimes put, what 'motivates' them to do so…"

65. Where the claimant contends for a reason which would be automatically unfair, but the respondent contends for a fair reason, the proper approach is set out in paragraph 47 of the decision of the **EAT in Kuzel v Roche Products Limited [2007] ICR 945,** approved by the Court of Appeal at [2008] ICR 799.

66. In many cases where these provisions are relied on there will be a dispute between the employer and the employee as to the real reason for the dismissal.

67. In these circumstances, if the employee has sufficient qualifying service to bring an ordinary unfair dismissal claim (i.e. has at least two years' continuous service), the burden of proof is on the employer to prove the reason for the dismissal on the balance of probabilities. This was established by the Court of Appeal in **Maund v Penwith District Council 1984 ICR 143, CA**, in relation to a claim for automatically unfair dismissal on trade union grounds under S.152 TULR(C)A. The Court went on to hold that once the employer has shown a reason for dismissal, there is an evidential burden on the employee to produce some evidence to show that there is a real issue as to whether or not the reason given is true. Once this is done, the onus remains on the employer to prove the real reason for dismissal.

68. If the reason or principal reason is not a protected disclosure, the dismissal will still be unfair unless the employer can show that the reason or principal reason was a potentially fair reason within section 98. If that is shown, the general test of fairness in section 98(4) will apply. Section 98 (as relevant) reads as follows:

> *"(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –*
>
> *(a) the reason (or, if more than one, the principal reason) for the dismissal and*
>
> *(b) that it is either a reason falling within sub-section (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.*
>
> *(2) A reason falls within this sub-section if it … relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do …*
>
> *(3) In subsection (2)(a) – "capability" , in relation to an employee means his capability assessed by reference to skill, aptitude, health, or other physical or mental quality……*
>
> *(4) Where the employer has fulfilled the requirements of sub-section (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".*

69. There is no burden on either party to prove fairness or unfairness respectively.

70. The essential framework for considering whether a dismissal on account of ill-health absence falls within the band of reasonable responses open to an employer was set out by the EAT in **Monmouthshire County Council v Harris EAT 0332/14**. There, Her Honour Judge Eady observed:

"Given that this was an absence-related capability case, the employment tribunal's reasoning needed to demonstrate that it had considered whether the respondent could have been expected to wait longer, as well as the question of the adequacy of any consultation with the claimant and the obtaining of proper medical advice".

71. In addition, where the employer operates a detailed attendance policy, it will be expected to adhere to its provisions to ensure procedural fairness, although inconsequential departures from the policy will not necessarily be fatal — see **Sakharkar v Northern Foods Grocery Group Ltd (t/a Fox's Biscuits) EAT 0442/10.**

72. **In Kelly v Royal Mail Group Ltd EAT 0262/18** Mr Justice Choudhury (President of the EAT) made the important point that attendance policies usually apply to all absences (save for those that may be discounted for disability-related conditions), and that ill-health absence does not imply fault on the part of the employee. Indeed, it is likely that most absences dealt with under absence procedure will entail little or no fault, since employees do not choose to get ill or to have accidents. Nevertheless, an employer is entitled to look at an employee's overall attendance in order to consider whether there is a likelihood of satisfactory attendance in the future. So far as general fairness is concerned, the question is not whether other employers in similar circumstances might have allowed additional time to see whether the employee's attendance improved before dismissing but whether what the employer did fell within the band of reasonable responses.

73. The Tribunal must not substitute its own decision for that of the employer but instead ask whether the employer's actions and decisions fell within that band.

74. Any appeal is to be treated as part and parcel of the dismissal process: **Taylor v OCS Group Ltd [2006] IRLR 613.**

<u>Detriment in Employment</u>

75. If a protected disclosure has been made the right not to be subjected to a detriment appears in Section 47B(1) which reads as follows:

"A worker has the right not to be subjected to any detriment by any act or any deliberate failure to act by his employer done on the ground that the worker has made a protected disclosure."

76. The question of what will amount to a detriment was considered in the discrimination context by the House of Lords in **Shamoon v The Royal Ulster**

Constabulary [2003] ICR 337: the test is whether a reasonable employee would or might take the view that he had been disadvantaged in circumstances in which he had to work. An unjustified sense of grievance cannot amount to a detriment.

77. The right to go to a Tribunal appears in Section 48 and is subject to Section 48(2), which says this:

"On such a complaint it is for the employer to show the ground on which any act or deliberate failure to act was done".

78. In **International Petroleum Ltd and ors v Osipov and ors UKEAT/0058/17/DA** the EAT (Simler P) summarised the causation test as follows:

"...I agree that the proper approach to inference drawing and the burden of proof in a s.47B ERA 1996 case can be summarised as follows:

(a) the burden of proof lies on a claimant to show that a ground or reason (that is more than trivial) for detrimental treatment to which he or she is subjected is a protected disclosure he or she made.

(b) By virtue of s.48(2) ERA 1996, the employer (or other respondent) must be prepared to show why the detrimental treatment was done. If they do not do so inferences may be drawn against them: see **London Borough of Harrow v. Knight [2003] IRLR 140** *at paragraph 20.*

(c) However, as with inferences drawn in any discrimination case, inferences drawn by tribunals in protected disclosure cases must be justified by the facts as found."

Decision and Conclusions

79. We have immense sympathy with the claimant concerning the ill health that she suffered and continues to suffer. Dismissals for health capability reasons are difficult for all concerned and are often difficult for individuals to accept.

80. We are grateful for the way in which Mr Gildea on behalf of the claimant, and Mr Boyd have conducted the proceedings with respect for each other, the witnesses and the Tribunal.

81. As a tribunal we have been asked by the claimant to find that the reason or principal reason for her dismissal was that she had made protected disclosures during a meeting with Mr Mannion during her disciplinary investigation, and if not, alternatively, whether she was unfairly dismissed under the provisions of section 98 of the Employment Rights Act 1996. The respondent says the claimant was dismissed for capability reasons related to her health. She further claims that her dismissal and/or the reason for her being moved to a stage four was on the grounds that she had made such disclosures. She also alleges that she has been subjected to discrimination because of something arising from her disabilities and that the respondent

has failed in its duty to make adjustments to remove substantial disadvantages that she has suffered because of her disabilities.

82. We intend taking each of the issues in turn, but also in a slightly different order that set out in the List of Issues.

Protected Disclosures

83. The disclosures which the claimant relies upon are those which she says she made at her disciplinary investigation meeting with Mr Tony Mannion on 12 March 2021, being issues about a lack of effective and / or supportive management within the phlebotomy team including when the claimant had raised an issue about a broken chair. Minutes of that meeting were available to us.

84. The claimant found it difficult to identify the specific parts of those minutes which she says amounted to the disclosures. The comments made were general in nature and lacked detail. They were a general commentary about issues the claimant was dissatisfied with rather than specific information. They were statements of her opinion as to how the department was being run and how it was viewed.

85. In any event for a claim of PID detriment or dismissal to succeed, the individuals concerned must have known about the disclosures that were made. The claimant has put forward no evidence which allows us to come to that conclusion. Mr Roscoe, Ms Pickstock and Mr Cooper all deny knowing that the claimant raised these issues in that meeting. The disciplinary process was separate from the sickness absences process and although Ms Pickstock in HR and Mr Roscoe knew that the disciplinary process was ongoing, there is no reason that these issues would have come to their attention. We find that those making decisions about the claimant's dismissal and the absence process had no knowledge of the alleged disclosures.

Detriment (Employment Rights Act 1996 section 48)

86. Although the respondent accepts that deciding to proceed to Stage 4 of the Bridgewater Absence management procedure and the decision to dismiss the Claimant at her stage 4 Absence management meeting on 4 May 2021 amount to detriments, in view of our finding that Mr Cooper, Mr Roscoe and Ms Pickstock did not know about what was said by the claimant in the disciplinary meeting, they cannot have subjected the claimant to these detriments on the grounds alleged.

87. As such this claim fails.

Discrimination arising from disability (section 15 Equality Act 2010)

88. It is accepted that the claimant was at all relevant times disabled by reason of her umbilical infection. Further that her dismissal was in part because of disability related absences from the date of her stage 3 warning in August 2019, though she also had absences were not disability related.

89. It is therefore necessary for us to examine whether the respondent can show that their decision was a proportionate means of achieving their aim which was to strive for adequate attendance and safe staffing levels to enable it to safeguard the safety and wellbeing of its other staff and patients.

90. There is no doubt that this is a legitimate aim. The matters we should consider in deciding whether the respondent acted proportionately in dismissing the claimant to achieve that aim are set out in the list of issues:

    90.1. was the treatment an appropriate and reasonably necessary way to achieve those aims?

    90.2. could something less discriminatory have been done instead?

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

91. In looking at what else could have been done by the respondent, the claimant's case focusses on it being her longer absences which caused her to be taken through stages three and four. There is no doubt that the claimant's absences were genuine and necessary. The respondent has an aim, indeed a responsibility to provide a service to the public. It cannot do that if its staff are not in work. The claimant says in essence that the respondent should not have taken into account the absences caused by her disability or should at least have discounted those more than it did. The case which Mr Boyd refers to **Griffiths v Secretary of State, [2015] EWCA Civ 1265** which although a reasonable adjustments case, confirms that an employer is entitled to manage ill health and absence within the workplace and a disabled person cannot be expected to be removed entirely from the absence management policy. In this case, the claimant's absence record is significant and although the large proportion of it has been because of her umbilical infection, the respondent did give that consideration. It could have moved to stage four earlier, and it was only after other absences for other reasons that it moved to stage four in April 2021.

92. The claimant also suggests that at the final stage it should have considered redeployment for the claimant. This was not however something that the claimant sought. Although she suggests that it is, that is not what the evidence bears out. Mention of it in some of the meetings with Ms Brockley is very much along the lines that the claimant enjoyed her job and wasn't looking to move roles. It is not suggested by the OHP as an alternative and we consider is not something that the claimant herself suggested because it would not have assisted.

93. The claimant's absence record is, as stated by Mr Roscoe, significant. It was having a real impact upon the phlebotomy service, and by that its staff and patients. In part this was because the claimant was not the only member of staff who had poor attendance. There was no prospect of the claimant being able to provide a sustained attendance until she was able to resolve the umbilical infections and at the time the decision to dismiss was made, there was no guarantee when the operation would happen and when it did, that it would remedy the problems. In coming to that conclusion, we note that the

claimant was absent for many non-disability reasons. She clearly has several health problems. Prior to the onset of her umbilical infections, she had already progressed to a stage three and could have been dismissed earlier.

94. When carrying out the balancing exercise, we conclude that the approach which the respondent took in the dismissing the claimant through the absence procedure was proportionate.

95. This claim fails.

Reasonable Adjustments (Equality Act 2010 sections 20 & 21)

96. The claimant relies upon three PCPs which we deal with in turn:

Providing a hard copy of the Bridgewater Attendance Management Policy /policies

97. In respect of this complaint, the claimant relies upon her Dyslexia which the respondent concedes is a disability. The claimant says that as it did not provide her with an electronic version of the policy, she was placed at a substantial disadvantage compared with someone who was not dyslexic as she couldn't use her Dragon software to read it. The relevant time is from the Stage four invitation. The adjustment which she says should have been made is that she should have been provided with an electronic copy.

98. It was a practice of the respondent.

99. The claimant had a paper copy of the policy, and she had this in her possession from her Bridgewater days. At various times including when she was invited to the Stage four meeting, a hard copy was offered or provided. At no time did she tell the respondent that she needed an electronic copy or that she was having any difficulties accessing the paper version because of her dyslexia.

100. In the evidence she gave when being asked questions by Mr Boyd, she said she didn't ask for a copy because she was embarrassed because she couldn't read lengthy documents. Further she accepted that her partner Mr Gildea read them to her in time for the stage four meeting. Although the respondent has a duty to make adjustments, it can only do so if it has knowledge of the disadvantage and that it is substantial. Although therefore the claimant may have been at a substantial disadvantage, she has been unable to show that the respondent knew she was at a substantial disadvantage. Mr Gildea suggests that the respondent should have known, but there is some onus on the claimant, and she must at least alert the respondent to the particular problem for the duty to arise. This claim fails as the duty does not arise.

Not redeploying the claimant into an administrative role where she was not required to stand on her feet.

101. The second provision, criteria or practice relied upon is not redeploying the claimant into an administrative role where she was not required to stand on her feet, as she says that would put her at a substantial disadvantage

compared with people who did not have her disability of an umbilical infection as she was unable to work standing up. She says that the adjustment that should have been made was to redeploy her in an administrative role where she would not need to stand.

102. It is difficult to see how this alleged provision, criterion or practice could amount to a provision, criterion or practice in law. The authorities require there to be some element of repetition rather than just a one-off act. It would be sufficient to be able to show that although there had been no repetition such that it had been applied to others in the past, that it would be applied in the future. There is nothing which the claimant has put forward which supports that this might happen. This was not therefore a PCP of the respondent.

103. This claim fails.

104. In any event, the claimant would have a problem when it comes to showing facts from which we could conclude that such a provision, criteria or practice would put her at a substantial disadvantage compared with someone without her disability. The claimant has brought no evidence forward that standing on her feet caused her any problems at all. There is no medical evidence, it is not something that she has mentioned to her manager in any of the meetings or the OHP, and she asked to go back to carrying out home visits, which must involve standing more than in a clinic setting. If she felt this was causing her such a disadvantage, if she did not raise it with her employer (and she does not suggest that she did) then the claims would fail at that stage.

<u>Being required to achieve an acceptable level of attendance/and or comply with the Bridgewater Attendance Management Policy/policy requirements.</u>

105. The final provision, criterion or practice relied upon is being required to achieve an acceptable level of attendance/and or comply with the Bridgewater Attendance Management Policy/policy requirements. The claimant says that the substantial disadvantage she was put to, compared with someone who did not have her disability was that her absence levels were high, and she was unable to comply with the policy requirements. She says that the respondent should have discounted all absences relating to her umbilical infection.

106. It is accepted by the respondent that this is a provision, criterion or practice which is in place. Further that the respondent had knowledge of the substantial disadvantage which the claimant was subjected to by reason of it.

107. The duty is therefore engaged and as such the respondent is under a duty to make such adjustments as are reasonable.

108. Again, this comes down to what steps we as a Tribunal consider were reasonable for the respondent to take. We have to consider whether discounting all or some of the claimant's absences relating to the disability would strike a fair balance between the employer and employee. It is appropriate to take the needs of the employer and the employee into account.

109. **Bray v London Borough of Camden** (above) confirms that as a matter of principle, it is not a reasonable adjustment to ignore disability-related absences entirely when calculating sickness levels.

110. Would it therefore have been reasonable for the respondent to discount some of the absences? An adjustment should also be in some way effective to alleviate or go some way to alleviate the disadvantage. The disadvantage is that the claimant had hit the trigger points. In the claimant's case it is difficult to see what discounting some of the days of absence relating to the umbilical infection would achieve. The claimant had so many days absence and over long periods, and for such varied reasons that even if some of the disability related absences were discounted, she would still have hit the triggers.

111. Each of the stages she hit were triggered by non-disability related reasons and the respondent did not follow the stage four process at times when it could have done so under the policy, following the claimant's absences because of her umbilical infections.

112. In weighing up each of these issues we find that there was no adjustment which would have been reasonable for the respondent to take which would have alleviated the substantial disadvantage caused to the claimant by that policy.

113. This claim fails.

Automatic Unfair Dismissal

114. The claimant says that the reason or principal reason that she was dismissed was that she had made a protected disclosure or disclosures. For the reasons set out above, we find that Mr Roscoe, Ms Pickstock and Mr Cooper did not know what the claimant had said in her meeting with Mr Mannion and as such were unaware of the alleged disclosures. Further we find in any event that the disclosures made were not information which was specific enough to amount to a disclosure which has any prospect of being protected with the Employment Rights Act 1996. The respondent says that the reason was the claimant's capability. We find that the respondent has shown that to be the reason or principal reason for its decision to dismiss the claimant. In light of our findings the reason or principal reason for the claimant's dismissal cannot be the disclosures made to Mr Mannion.

115. That claim also fails and is dismissed.

Unfair Dismissal

116. Finally, we turn to the claim of ordinary unfair dismissal.

117. The respondent has the burden of showing a potentially fair reason for the claimant's dismissal. It says it was because of her poor attendance record which amounts to capability within section 98 of the Employment Rights Act 1996, and/or some other substantial reason.

118. Within these proceedings, the claimant has also in addition to her protected disclosure argument, suggested that the reason she was taken down the stage four dismissal route was because she had a disciplinary incident, and she uses Mr Roscoe's reference to it in his report to Mr Cooper as evidence.

119. Although as we have said, it was unfortunate that Mr Roscoe made that comment when it had nothing to do with the absences, it does not dilute the clear evidence from the respondent that the claimant's poor attendance was the reason for the decision to dismiss her. That is a potentially fair reason.

120. We must then go on to consider the fairness of the decision and more generally whether such a decision was within a band of reasonable responses open to an employer.

121. The claimant raised a number of issues at her stage four hearing and at her appeal hearing which she repeats in these proceedings. These were considered by Mr Roscoe and Mr Cooper and were taken into account by them in coming to their decisions. It is not for us to substitute our own view as to whether we would have dismissed the claimant, but rather looking at what they knew, was the respondent's decision reasonable.

122. We do this by reference to the matters set out in the list of issues:

123. Our findings of fact are that the claimant did know about the stage three warning and the implications of being at that stage in the Bridgewater process. Ms Brockley had made it clear to her during welfare meetings and in the stage three meeting itself. She also made clear the triggers to activate stage four and that there was a right of appeal, and but the claimant chose not to exercise it. Although the claimant may not have received the outcome letter, she said that she didn't read any of the previous outcome letters and relied upon what Ms Brockley said to her as she trusted her to explain it. Although the trigger to stage four may have been strict, in fact it was not progressed at an earlier stage and the respondent considered it had allowed the claimant leeway and it was only when a non-disability related absence occurred that it progressed to the next stage.

124. The respondent also found that claimant was aware that the Bridgewater policy applied to her. Although there was some understandable confusion between the HR team and managers, it was quickly resolved. The Bridgewater policy was in any event more advantageous to the claimant as it had a four stage rather than three stage process.

125. The claimant's attendance record throughout her employment was poor but there is no suggestion that her ill health was anything but genuine.

126. Mr Roscoe's calculations showed historical periods of absence in February 2018 of 333 days, July 2017 of 127 days and further shorter absences both before and after these dates. Even taking away the month between 23 August 2019 and 23 September 2019 which the respondent mistakenly added to the claimant's record, between 23 September 2019 and the claimant's dismissal on 11 May 2021, she was absent due to sickness for a total of 395 calendar days. This was out of 596 days.

127. Both Mr Roscoe and Mr Cooper had substantial concerns that the claimant would not be able to achieve acceptable attendance. This was not just based upon her past history, but that her umbilication infection was continuing to remain unresolved. She was being treated by her own specialists and although an exploratory operation was the next step, there was no evidence that this would allow the claimant to recover such that she was free from pain and continued infections. This operation had been postponed twice because of COVID and there was in May 2021, and at the appeal stage, no confirmation when it would happen.

128. The respondent had obtained a medical view from its own OHP. The claimant had a number of consultations with them. She did not see the point in these as at the time as she was waiting for an exploratory operation to find out why she was having recurrent infections. She felt there was little else that could be said. She didn't attend those arranged in February 2021. This was something that was taken into account by Mr Roscoe, but no clear conclusion was reached as to why the claimant hadn't attended.

129. This, the respondent considered, was not a situation which could continue. It had a responsibility to its patients and other staff.

130. The claimant says that no enquires were made of her own treating doctors. A letter from the claimant's consultant dated 29 September 2022 provided the Tribunal with details about the outcome of a scan in February 2022 and the exploratory operation which the claimant eventually had in July 2022. Mr Gildea suggests that the respondent should have made those enquiries itself at the stage four meetings. This was not however suggested by the claimant at the time. That information was not available to the respondent at the dismissal stage or appeal stage. The claimant has made a good recovery since that operation but that was not something which the respondent or indeed anyone would have known in May 2021 and at that time the claimant herself could not provide any confidence that she would be able to maintain regular attendance going forward. The investigation which the respondent should carry out should be within a band of reasonableness. We find that it was.

131. The respondent had a duty to its patients and other staff. It was unfortunate for the claimant that at the time of her absences, there were other absences within the department which brought matters to a head. The claimant accepted that the phlebotomy department was under a great deal of pressure because of lack of staff. We found the explanation provided by Mr Roscoe persuasive concerning the workforce planning and the strains upon budgets of having long term absences that were outside the average. It was against this background that upon the ending of the Covid moratorium in October 2020, the respondent considered that the absence issues needed to be addressed. The claimant's colleagues were also dismissed.

132. At the meetings, other matters which were considered by Mr Roscoe and/or Mr Cooper were adjustments which had been made for the claimant, that she had felt fully supported during her sickness absence process, and the implications of her dyslexia on her ability to understand the respondent's policies.

133. Taking into account out findings above we accept that the respondent genuinely believed that the claimant would not be able to maintain acceptable service going forward. Further that she was aware of the significance of the stage three warning and that if she was absent again, she would move to stage four which could result in her dismissal; that the claimant had been fully consulted and supported at all stages of the absence process; that the medical position had been investigated so far as it could be at that time and was within a band of a reasonable investigation. The claimant herself felt that she had to await the exploratory operation before more would be known. The respondent did not know when that operation might take place and that in view of the pressures on the phlebotomy department decisions had to be made.

134. The respondent also took into account other issues which we find added to the reasonableness of its decision. It gave consideration to the fact that the operations had been delayed because of COVID, again through no fault of the claimant, and that the operation which had caused the claimant's disability had been conducted at the respondent's hospital. Although these were relevant issues it did not in their mind outweigh the needs of the service and other staff. Further it did not dismiss earlier when it could have done so.

135. Finally, Mr Roscoe's manner in the stage four hearing, and his failure to spot the wrong start date of the claimant's sickness in September 2019, does not impact upon the reasonableness of the decision.

136. We find that these issues and the matters set out above were such that the respondent's decision to dismiss the claimant was reasonable in all the circumstances and that such decision was within a band of responses open to a reasonable employer.

137. This claim fails.

Employment Judge Benson
Date: 25 September 2023

JUDGMENT AND REASONS SENT TO THE PARTIES ON
29 September 2023

FOR THE TRIBUNAL OFFICE