



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4100005/2023

Held in Glasgow on 1 to 3 August and in chambers on 18 August 2023

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**Employment Judge J Shepherd
Tribunal Member P O'Hagan
Tribunal Member D Frew**

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**Claimant
Represented by:
Mr B McLaughlin –
Solicitor**

Barchester Healthcare Limited

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**Respondent
Represented by:
Ms Z Kerr –
Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous judgment of the Tribunal is:

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1. The claimant's claim of unfair dismissal is dismissed.
2. The claimant's claim of direct disability discrimination is dismissed.
3. The claimant's claim of discrimination arising from disability is dismissed.

REASONS

Introduction

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1. The claimant ('A') presented their claim to the Tribunal on 3 January 2023 in respect of unfair dismissal and disability discrimination.
2. The respondent conceded that the claimant is a disabled person within the meaning of s.6 Equality Act 2010. The claimant has long term depression.
3. The parties lodged a joint bundle of productions running to 173 pages.

4. The claimant was represented by Mr McLaughlin and the claimant gave evidence on their own behalf. The claimant's mother, 'B', also gave evidence on behalf of the claimant.
5. The respondent was represented by Ms Kerr. Ms Alison Dickson, General Manager, gave evidence for the respondent.
6. The final hearing had been due to commence on 1 August 2023 but due to a misunderstanding by Mr McLaughlin with regard to the notice of final hearing neither he nor the claimant attended Tribunal on that day and the parties therefore agreed the case should be put back to commence on 2 August 2023. The final hearing was immediately preceded by a closed preliminary hearing at which the claimant's application for restricted reporting orders and anonymity orders were considered. Those orders are set out separately in a record of that hearing.
7. The Tribunal was able to conclude the evidence and parties' submissions on 3 August 2023 but did not have time to conclude their deliberations and therefore met again in chambers on 18 August 2023.

Issues

8. The issues to be determined were set out in an agreed list of issues at pages 47 – 48 of the bundle and are as follows:
- 20 *Unfair Dismissal*
9. What was the reason for the claimant's dismissal?
10. If that reason is capability, was it reasonable, having regard to s.98(4) ERA 1996, for the respondent to have dismissed the claimant?
11. If that reason is conduct, was it reasonable, having regard to s.98(4) ERA 1996, for the respondent to have dismissed the claimant?
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Direct disability discrimination – s.13 Equality Act 2010

12. Was the claimant treated less favourably than another employee in the same or not materially different circumstances as the claimant by dismissing the claimant on 19 August 2022?

5 13. Was that less favourable treatment because of the claimant's disability?

Discrimination arising from disability – s.15 Equality Act 2010

14. The unfavourable treatment relied upon is the claimant's dismissal.

15. Was the claimant's failure to be able to return to work/long-term absence arising as a consequence of his disability? And/or;

10 16. Were the claimant's intrusive thoughts arising as a consequence of the claimant's disability?

17. Did the respondent treat the claimant unfavourably:

a. Because of something arising in consequence of the claimant's disability?

15 b. Did the respondent dismiss the claimant because of his absence and/or intrusive thoughts?

18. What was the aim relied upon by the respondent and was that a legitimate aim?

20 a. The respondent asserts that they were required to protect their residents and assure staffing levels at all times within the home.

19. If so, was the respondent's treatment of the claimant a proportionate means to achieve a legitimate aim?

25 a. The respondent asserts that the claimant was absent for over nine months and the respondent sought medical advice which deemed that he would not be fit for work in the foreseeable future.

Remedy for unfair dismissal/ detriments

20. What recoverable financial losses has the claimant suffered as a result of any unlawful conduct?
21. Has the claimant mitigated their losses?
- 5 22. If not, should a reduction be applied?
23. If the Tribunal finds that the claimant's dismissal was procedurally unfair, should *Polkey* be applied to reduce any award?
24. Is the claimant entitled to receive compensation in respect of injury to feelings, if so, how much?

10 **Findings in fact**

25. The claimant had been continuously employed by the respondent as a carer at the care home known as Balclutha Court from 30 March 2020. The respondent is a care provider that operates 240 care homes throughout the UK. The respondent has approximately 17,000 staff across those care homes and provides services that range from dementia care to assisted living. Balclutha Court care home has around 79 residents and 100 staff with 6 Heads of Units reporting into the General Manager.
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26. Alison Dickson is the General Manager of Balclutha Court. She has been employed at the care home for 32 years and has been the General Manager for 22 years. Her duties include ensuring the smooth running of the home and ensuring that high standards of care are delivered to the residents.
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27. The claimant was an employee who was highly regarded by the management and staff at Balclutha Court and was considered to be an asset to their team. The claimant was well known to Ms Dickson as the claimant had worked at Balclutha Court on and off in various roles since around 2013.
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28. On 4 November 2021 the claimant commenced a period of sickness absence due to depression. During that period of absence the claimant attempted suicide and was admitted as an inpatient to hospital on 7 November 2021 and

remained in hospital for around 6 weeks. After being discharged the claimant remained absent from work and continued to receive treatment and be supported by their GP, the Community Mental Health Team, and other medical professionals. The claimant made another suicide attempt on 22 May 5 2022 and was again admitted to hospital as an inpatient for a period of time.

29. The claimant's mental health difficulties include Obsessive Compulsive Disorder ('OCD'). As part of the OCD presentation the claimant experiences regular intrusive worries and thoughts about harming others. These thoughts are simply manifestations of intrusive obsessive anxieties and the claimant's 10 treating doctors consider there is no evidence to believe that the claimant would ever act on these thoughts in reality, or that they have ever done so. The claimant has received Cognitive Behavioural Therapy to overcome these thoughts and help the claimant realise they will not act on them.

30. During the claimant's absence from work the claimant remained in regular 15 contact with Ms Dickson or other employees of the respondent.

31. After the claimant had been off sick for around four months Ms Dickson contacted Human Resources ('HR') to inform them about the situation. HR referred Ms Dickson to the respondent's Long Term Sickness Procedure.

32. Having considered that procedure, Ms Dickson wrote to the claimant on 14 20 March 2022 to ask for consent to contact their GP for a medical report to have a better understanding of the situation with regard to the claimant's health and to see if there were any ways to get the claimant back to work.

33. The claimant provided consent and the claimant's GP provided a letter dated 25 2 June 2022 in which they explained that the claimant had been diagnosed as suffering from a depressive disorder and that this was a significant condition. The letter set out the medication the claimant had been prescribed and explained that the claimant continued to be under supervision of both the GP practice and the Mental Health Team. The letter stated that the GP did 30 not believe that the claimant would be able to carry out any normal day to day activities related to their employment without medication and that they had been experiencing problems for longer than the last 12 months. At times these

problems were significant and had required one spell of in-patient treatment from 7 November 2021 until 15 December 2021. The GP was not able to offer a date when it was likely that the claimant would be fit to resume work. The only adjustments the GP considered relevant would be for the claimant to be allowed to resume work, were they able to, in a gradual phased manner, and in settings where they were not exposed to any particularly stressful situations. The GP stated that the claimant was physically able to attend a meeting regarding work however the claimant's mental state did continue to be of some concern, having recently prompted the claimant to take an overdose on 22 May 2022. With this in mind the GP felt the claimant should be allowed a period of time for their mental state to stabilise before any such meeting be considered.

34. Ms Dickson waited a month following the GP report and then wrote to the claimant by letter dated 5 July 2022 inviting the claimant to a meeting. The letter stated that the claimant's prolonged absence had created a number of operational difficulties and the Company had to seriously consider the future viability of the claimant's employment. The agenda for the meeting was said to be '1. Your medical condition and the prognosis for the future. 2. Consideration of job adjustments to rectify the issue. 3. Consideration of alternative employment/ job roles. 4. The way forward/ ongoing review.' The meeting was arranged for 8 July 2022.

35. The claimant attended the meeting on 8 July 2022. Ms Dickson enquired as to how the claimant was feeling and the claimant stated, "I've not been good". The claimant recounted that they had tried to commit suicide twice last November and again in May of this year. They explained that they had been told that they had a psychotic breakdown in November and had also been drinking very heavily. The claimant went on to explain that they had not had a drink since February 2022 and had now been discharged from the Wellpark Centre (Alcohol Support Unit) and were also undergoing CBT. During the course of the meeting the claimant was sweating and shaky.

36. When asked how they were feeling right now the claimant stated "Not good. I have intrusive thoughts and compulsion. I've been told I have OCD and

PTSD. I am on high doses of Quetiapine and this leaves me flat.” The claimant then went on to state the following “I remember that before I went off sick, there was a resident who had died and I felt that because he refused his breakfast that day from me, that it was my fault he died and if I had managed to give him his breakfast he would not have died. It worries me that I have these thoughts at work. I also had a dream some time ago that I smothered a resident.” The claimant was asked how they felt about coming back to work and the claimant is recorded as stating “Not good at the present time and I can’t see this happening any time soon. I have a date in my head that I’m aiming for – September 30th”.

37. On 27 July 2022 Ms Dickson wrote to the claimant to invite them to attend a Formal Case Review. The letter stated that a possible outcome of this review may be the termination of the claimant’s employment.
38. By this time the claimant had been absent from work for 8 months. Ms Dickson was experiencing operational difficulties in covering the claimant’s shifts. The respondent did not have sufficient permanent or bank staff to cover the shifts which necessitated using agency staff. The agency staff coming in were frequently different people who did not know the residents and it was therefore difficult to provide continuity of care. It was also costly to the respondent.
39. The meeting took place on 17 August 2022. The claimant was aware that an outcome of the meeting was likely to be the termination of their employment. The claimant was not particularly worried about this as they believed they would be able to take some time to get better and then reapply for the same job. The claimant was asked by Ms Dickson how they were feeling. The claimant stated that they were not much better; detailed some medication they had been prescribed; and stated that they had been feeling very low this week and were not sure what the medication was for. Ms Dickson looked up the medication and advised the claimant it was prescribed for anxiety. Ms Dickson asked the claimant what they were thinking about for the future. The claimant replied they did not know; that they would like to get back to work; and asked Ms Dickson what she thought. Ms Dickson stated that she did not feel that the claimant was well enough to return to work and asked the claimant if they

were still having the intrusive thoughts where they were harming residents. The claimant nodded in response. When asked if the claimant thought they were well enough to return to work the claimant stated that they did not think so.

5 40. Ms Dickson explained to the claimant that there was a possibility that the respondent may have to end the claimant's employment on the grounds of capability due to ill health. Ms Dickson told the claimant that they must concentrate on their health and getting better. The claimant agreed but stated that they didn't want this to happen. Ms Dickson said that she understood but
10 once the claimant was better the claimant was welcome to reapply. Ms Dickson explained that as a business they have a duty of care to the claimant, the residents, and staff. The claimant enquired what would happen next. Ms Dickson reiterated there was a likelihood that the claimant's employment may end and that she would review and write to the claimant and that they may be
15 invited for a further meeting. Ms Dickson again reminded the claimant that they could always reapply once they were better.

41. Following this meeting Ms Dickson decided to terminate the claimant's employment and she wrote to the claimant on 19 August 2022. The letter stated "...We discussed the fact that you have been prescribed further
20 medication for anxiety and that you are not feeling any better and agreed that you are not well enough to return to work. We also discussed the fact that you are still having intrusive thoughts where you are harming the residents. Unfortunately there is no alternative positions or any adjustments we could make to your current role to allow your return to work. After taking all of these
25 factors into consideration, regretfully, the Company could see no alternative but to terminate your employment with effect from today, 19th August 2022 on the grounds of capability, namely your continued absence through ill health. You are entitled to 4 week's salary in lieu of notice..." The letter detailed the claimant's right of appeal and then went on to state "I must also
30 make you aware that due to some of the comments made during the meeting in relation to your feelings towards the residents, specifically that you are still having intrusive thoughts where you are harming the residents, that we have

a duty of care to refer this to SSSC, the company will notify you when this has been done.”

42. The claimant was very distressed upon reading that they were being referred to the Scottish Social Services Council ('SSSC'). The claimant felt that this letter indicated that the respondent had dismissed them because there was a risk that they may harm the residents of the care home. The claimant was very hurt by this and it caused a further deterioration in the claimant's mental health.
43. The respondent did subsequently make a referral to the SSSC stating that the claimant was on sick leave due to depression and that during review meetings the claimant disclosed that they were having intrusive thoughts where they were harming the residents. The referral stated that the claimant's employment had been terminated on the grounds of capability due to ill-health.
44. The claimant did not appeal his dismissal.

Relevant law

Unfair Dismissal

45. The claim for unfair dismissal is made under section 94 of the Employment Rights Act 1996 ("the ERA"). It is for the respondent to show that there is a potentially fair reason under section 98(1)(a) ERA (which includes a reason relating to the capability of the employee for performing work of the kind which they were employed by the employer to do (s.98(2)(a)), or a reason relating to the conduct of the employee (s.98(2)(b)).
46. If the respondent establishes a potentially fair reason, the Tribunal must decide whether in the circumstances (including the size and administrative resources of the respondent) the respondent acted reasonably or unreasonably in treating that reason as sufficient reason for dismissal. That shall be determined in accordance with equity and the substantial merits of the case (s.98(4) ERA).

47. It is well established that there may be more than one reasonable response to the particular circumstances. One employer acting reasonably might dismiss while another might not. The Tribunal, in making the assessment under s.98(4), must consider whether the decision to dismiss falls outside that “range of reasonable responses.” It must not substitute its own view of what it would have done in the circumstances and conclude that if it would not have dismissed, then the dismissal is unfair. See *Iceland Frozen Foods Ltd v Jones* [1983] ICR 17.
48. In ill health capability cases it is important for the Tribunal to consider whether the employer could be expected to wait any longer for the employee to return to work. See *Spencer v Paragon Wallpapers Ltd* [1977] ICR 301. According to the Court of Session in *S v Dundee City Council* [2014] IRLR 131, the Tribunal must expressly address this question, balancing the relevant factors in all the circumstances of the individual case. Such factors include whether other staff are available to carry out the absent employee’s work, the nature of the employee’s illness, the likely length of his or her absence, the cost of continuing to employ the employee, the size of the employing organisation and, balanced against those considerations, the unsatisfactory situation of having an employee on very lengthy sick leave.
49. In *East Lindsey District Council v Daubney* [1977] ICR 566 Mr Justice Phillips stated: ‘Unless there are wholly exceptional circumstances, before an employee is dismissed on the ground of ill health it is necessary that he should be consulted and the matter discussed with him, and that in one way or another steps should be taken by the employer to discover the true medical position. We do not propose to lay down detailed principles to be applied in such cases, for what will be necessary in one case may not be appropriate in another. But if in every case employers take such steps as are sensible according to the circumstances to consult the employee and to discuss the matter with him, and to inform themselves upon the true medical position, it will be found in practice that all that is necessary has been done. Discussions and consultation will often bring to light facts and circumstances of which the employers were unaware, and which will throw new light on the problem. Or

the employee may wish to seek medical advice on his own account, which, brought to the notice of the employers' medical advisers, will cause them to change their opinion. There are many possibilities. Only one thing is certain, and that is that if the employee is not consulted, and given an opportunity to state his case, an injustice may be done.'

Direct disability discrimination

50. s.13(1) Equality Act 2010 ("EA") provides:

(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

51. In order to claim direct discrimination under s.13 the claimant must have been treated less favourably than a comparator who was in the same, or not materially different, circumstances as the claimant. The claimant does not necessarily need to point to an actual person who has been treated more favourably in comparable circumstances, it is possible to construct a purely hypothetical comparison. The one factor that must be left out of account is the protected characteristic itself. Therefore, the comparator in the context of a direct disability discrimination claim cannot be disabled themselves. This was made clear by Lord Scott in *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337 when he observed: '[T]he comparator required for the purpose of the statutory definition of discrimination must be a comparator in the same position in all material respects as the victim save only that he, or she, is not a member of the protected class.'

52. In *Igen Ltd (formerly Leeds Careers Guidance) and others v Wong and other cases* [2005] ICR 931, CA the Court of Appeal established that the correct approach for a Tribunal to take to the burden of proof entails a two-stage analysis. At the first stage the claimant has to prove facts from which the Tribunal could infer that discrimination has taken place. Only if such facts have been made out to the Tribunal's satisfaction (i.e., on the balance of probabilities) is the second stage engaged, whereby the burden shifts to the respondent to prove, again on the balance of probabilities, that the treatment

in question was 'in no sense whatsoever' on the protected ground. The Court of Appeal explicitly endorsed guidelines previously set down by the EAT in *Barton v Investec Henderson Crosthwaite Securities Ltd* [2003] ICR 1205, EAT.

5 *Discrimination arising from disability*

53. s.15 EA provides:

(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

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

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

15 a. There must be unfavourable treatment

b. There must be something that arises in consequence of the claimant's disability

c. The unfavourable treatment must be because of (ie caused by) the something that arises in consequence of the disability, and

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

55. In considering the question of objective justification a critical evaluation of the evidence is required, entailing a weighing of the needs of the employer against the discriminatory impact on the employee. The Tribunal must carry out its own assessment on this matter, as opposed to simply asking what might fall within the band of reasonable responses of the reasonable employer. See *Hardy v Hansons plc v Lax* [2005] ICR 1565.

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56. In *O'Brien v Bolton St Catherine's Academy* [2017] ICR 737, CA Underhill LJ observed that, in the context of any s.15 claim where sickness absence is 'the something arising in consequence of' the claimant's disability, 'the impact on the employer of the continuing long term absence must be shown to be a significant element in the balance that determines the point at which [the] dismissal becomes justified.'

Respondent's submissions

57. Ms Kerr made detailed oral submissions on behalf of the respondent which the Tribunal have taken fully into account but which are not fully recounted here. In summary, Ms Kerr submitted that the reason for the claimant's dismissal was capability. The respondent genuinely believed that the claimant was no longer capable of performing their duties and there was no date for return. There had been a reasonable investigation including a medical report. The respondent waited a sufficient period before dismissal, but it was not reasonable to expect them to wait longer. The claimant had been absent for 9.5 months at the time of dismissal. The respondent held the claimant's job open but medical evidence was clear that there was no prospect of return in the foreseeable future. The claimant had themselves stated they were not getting better. Medication had been increased but was not helping. Therefore, it was not reasonable to expect the respondent to hold the role open indefinitely. There were two meetings with the claimant to discuss fitness to return to work. The sickness absence was placing the care home under pressure due to the minimum staffing levels required and that Ms Dickson struggled to find staff to cover the shifts. Agency staff were costly and seriously affected the quality of care as continuity of service was affected due to ever changing personnel.

58. Ms Kerr asserted it was within the range of reasonable responses open to the respondent to dismiss. They engaged with the claimant and carried out a reasonable investigation, including seeking an up to date medical position, but there was no date for a return to work.

59. Ms Kerr submitted that the claimant was not dismissed because of the intrusive thoughts and dream disclosed to Ms Dickson. The long term absence procedure had already been instigated prior to that disclosure. The claimant's case was that the respondent had pivoted from a capability to a disciplinary process but that was not plausible. The claimant was paid in full for their notice period and not summarily dismissed. Ms Dickson said the disclosures were a concern and reasonably so.
60. Ms Kerr submitted the reason for dismissal was not due to disability. The claimant had failed to establish a prima facie case of direct discrimination. No evidence was led to this effect. It was clear from the evidence that other employees with long term absence who were not disabled were treated in the same way. It was submitted that a hypothetical comparator with 9.5 months absence and no foreseeable return would have been dismissed.

Claimant's submissions

61. On behalf of the claimant Mr McLaughlin also made detailed oral submissions that have also been taken into account by the Tribunal but not fully recounted here. He submits that the principle reason for the claimant's dismissal was conduct. He relies upon the fact of the intrusive thoughts being referred to in the dismissal letter along with potential risk to residents and asserts that this was clearly a principle factor operating in the mind of the manager at the time of dismissal. Mr McLaughlin asserted that the referral to the SSSC was consistent with this as there would not be a referral for a dismissal purely for ill health absence. It may have started out as a procedure for dismissal by reason of capability but that changed with the claimant's disclosure on 8 July 2022.
62. Mr McLaughlin asserted that the claimant was unaware of the concerns about their intrusive thoughts until they saw the dismissal letter and that this renders the conduct dismissal substantively and procedurally unfair and referred the Tribunal to *Boyd v Renfrewshire Council* [2008] CSIH 36 and *Strouthos v London Underground Ltd* [2004] IRLR 636. Mr McLaughlin submitted that the

claimant did not know the case they were meeting and, had they done so, would have been able to adduce medical evidence in their favour.

5 63. With regard to the direct discrimination claim Mr Mclaughlin submitted that Ms Dickson had made stereotypical assumptions about the claimant and their disability. He submitted that a person who was not disabled who had made the same disclosure of an intrusive thought about the consequences of a resident not taking breakfast the morning before they passed away would not have been dismissed, and it was only because of the respondent's perception of the claimant and their medical condition that meant the respondent believed 10 the claimant posed a risk to residents. That would not have been the case for a person without a disability. The same would apply to someone disclosing a dream about harming a resident. A person with no underlying depressive disorder would not have faced dismissal if they had disclosed the same matters to their employer.

15 64. With regard to the s.15 claim Mr Mclaughlin referred the Tribunal to the EAT decision in the case of *City of York Council v Grosset* UKEAT/0015/16. He asserted that in this case the claimant's intrusive thoughts arose as a consequence of his disability and his dismissal was unfavourable treatment because of those intrusive thoughts.

20 **Observations on the evidence**

65. All the witnesses gave their evidence in a clear way and the Tribunal considered they were all giving an honest account of events as they remembered them.

Decision

25 *What was the reason for dismissal? Was it conduct or capability?*

66. The Tribunal find that the reason for the claimant's dismissal was capability, namely that the claimant had been absent on long term sickness absence for 9.5 months at the time of dismissal and that there was no clear date as to when the claimant may be fit to return to work.

67. The Tribunal were satisfied on the evidence that the claimant was not dismissed because they had disclosed to the respondent that they had experienced intrusive thoughts about a resident who had died and that they had felt that because the resident had refused breakfast from the claimant on the day he died that this may have been the claimant's fault. The Tribunal were also satisfied that the claimant was not dismissed because they had disclosed to Ms Dickson that they had experienced a dream where they had smothered a resident.
68. The Tribunal could understand why the claimant had felt, upon reading the dismissal letter dated 19 August 2022, that the dismissal was connected to their disclosure of intrusive thoughts as this had been referred to in the dismissal letter, and the dismissal letter had also outlined the fact that the respondent considered it had a duty of care to refer the matter to the SSSC.
69. However, the Tribunal was also satisfied, having heard the evidence of Ms Dickson, that whilst she was obviously concerned about the claimant's disclosure with regard to intrusive thoughts, that was not the reason she had decided to dismiss the claimant. The decision to dismiss was based entirely on the length of the claimant's sickness absence to date and the fact that there appeared to be no prospect of the claimant being fit to return to work in the near future. The Tribunal were satisfied that the respondent considered it had a duty to make a referral to the SSSC in respect of the claimant's disclosure of intrusive thoughts but that it did not follow that this was the respondent's reason for dismissal.
70. The Tribunal took into account that the respondent had stated in its ET3 that the "...respondent would be unable to allow the claimant to return to the workplace whilst having repeated thoughts which may result in the harm if its residents..." but the Tribunal finds that Ms Dickson, the decision maker in relation to the dismissal, had not drafted this document and that this did not reflect her reasons for dismissal.

Was the dismissal reasonable having regard to s.98(4) ERA?

71. The Tribunal have had regard to whether the respondent could be expected to wait any longer for the claimant to return to work. The Tribunal were mindful that the claimant's own account of his health situation at both of the meetings of 8 July 2022 and 9 August 2022 was not positive, and in particular that at the second meeting that they had stated that they had not been much better and that they had been feeling very low and that they did not feel well enough to return to work and the claimant did not venture a view as to when they would be sufficiently well to do so. This remained consistent with the medical advice that the respondent had obtained from the claimant's GP.
72. The Tribunal took account of the fact that it was clear from the respondent's evidence that there were insufficient permanent or bank staff available to carry out the claimant's work whilst he was absence and that this was consistent with the current difficulties in recruitment across the care sector. This meant that there was an ongoing cost to the care home of supplying agency staff to cover the claimant's shifts and, importantly, that this was affecting the quality of care being offered to the residents as a result of the agency staff not being consistent and therefore not being known to the residents.
73. The Tribunal took into account the nature of the claimant's illness. It was clear that the claimant had experienced very serious mental health difficulties over the course of their period of absence that inevitably required a lengthy period of recovery, and it was therefore very difficult to predict when they may be sufficiently fit to return to work.
74. The respondent obtained appropriate medical evidence with regard to the claimant's health and also consulted with the claimant prior to deciding to terminate the claimant's employment. As the claimant had been absent for 9.5 months at the time of dismissal with no prognosis as to when they may be fit to return the Tribunal have concluded that it was within the range of reasonable responses for the respondent to dismiss on the grounds of capability due to ill health absence.

75. The Tribunal therefore conclude that the claimant's dismissal was fair in all the circumstances and the claim for unfair dismissal is dismissed.

Was the claimant treated less favourably because of his disability in being dismissed by the respondent on 19 August 2022?

5 76. The Tribunal have concluded that the claimant was not treated less favourably than a comparator who was in the same, or not materially different, circumstances as the claimant but who was not disabled.

77. The Tribunal is satisfied that the respondent would have dismissed a non-disabled employee who had the same length of sickness absence where it
10 was similarly unclear as to when they may be fit to return.

78. The Tribunal had regard to the evidence in the bundle that showed that other non-disabled employees had been dismissed in circumstances where they had been absent for 10 months, 12 months and 1 year and 3 months.

79. The Tribunal did not accept Mr McLaughlin's submission that Ms Dickson had
15 decided to dismiss the claimant because of the claimant's intrusive thoughts and because of a stereotypical assumption about the claimant and their disability. As set out above, the Tribunal are satisfied that the reason for the claimant's dismissal was not because of the intrusive thoughts, but instead because of the lengthy sickness absence. The claimant was not dismissed
20 because of their disability.

80. The claim for direct disability discrimination therefore fails and is dismissed.

Was the claimant's long term sickness absence and his intrusive thoughts something arising as a consequence of his disability?

81. The Tribunal is satisfied on the evidence that the claimant's long term
25 sickness absence, and the intrusive thoughts the claimant experienced, were something arising as a consequence of the claimant's disability.

Was the claimant's dismissal unfavourable treatment as a consequence of his long term sickness absence?

82. The Tribunal is also satisfied that the claimant was dismissed because of their long term sickness absence, and that the absence was something arising in consequence of the claimant's disability. The claimant's dismissal was therefore unfavourable treatment because of something arising in consequence of the claimant's disability, namely long term sickness absence.

Was the claimant's dismissal unfavourable treatment as a consequence of his intrusive thoughts?

83. For the reasons set out above in respect of the unfair dismissal claim, the Tribunal finds that the claimant was not dismissed as a consequence of experiencing intrusive thoughts. The Tribunal therefore concludes that the claimant's dismissal was not unfavourable treatment because of something arising in consequence of the claimant's disability, namely their intrusive thoughts.

Was the respondent's treatment of the claimant a proportionate means to achieve a legitimate aim?

84. Having concluded that the claimant's dismissal was unfavourable treatment because of something arising in consequence of the claimant's disability, namely the long term sickness absence, the Tribunal have gone on to consider whether the respondent's treatment of the claimant was a proportionate means to achieve a legitimate aim.

85. The Tribunal is satisfied that the quality of care and service being provided to the residents of the care home was clearly compromised as a consequence of the fact that the claimant's sickness absence had to be covered by agency staff.

86. The respondent had a duty and legitimate aim to provide the best possible service to its vulnerable residents by ensuring that it had sufficient permanent staff to provide care rather than covering shifts with inconsistent and costly agency staff. The Tribunal is satisfied that the decision to terminate the

claimant's employment was a proportionate means of achieving that legitimate aim.

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

5 **Conclusion**

88. It was clear to the Tribunal that the claimant is passionate about, and committed to, their career in the care sector, and that the claimant has much to contribute to this important area of work. The Tribunal were impressed by the claimant's candour and clear regard for the residents in their care. The
10 Tribunal hopes that the claimant's health continues to improve so that they can return to their college studies and eventually to a successful career in this sector.

15 **Employment Judge: J Shepard**
Date of Judgment: 31 August 2023
Entered in register: 11 September 2023
and copied to parties

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