EMPLOYMENT TRIBUNALS

Claimant: Ms S Barnes

Respondent: Central London Community Healthcare NHS Trust

HEARD AT: London Central Employment Tribunal

ON: 15 - 22 May 2023 (23 May in Chambers)

BEFORE: Employment Judge Akhtar

Members: Mr A Scott
Mr J Carroll

Attendances:

For Claimant: Mr C Jolley, lay representative/partner

For Respondent: Mr A Shellum, of Counsel

RESERVED JUDGMENT ON LIABILITY

The unanimous Judgment of the Tribunal is that:

1. The complaint of unfair dismissal is not well-founded. This means the Respondent fairly dismissed the Claimant.

2. The Respondent has not contravened s15 Equality Act 2010 in relation to the Claimant's dismissal.

3. The Tribunal has no jurisdiction to consider the Claimant's claims of direct disability discrimination, disability related harassment and failure to make reasonable adjustments, having regard to the statutory provisions relating to time limits.

CLAIMS AND ISSUES

1. The Claimant brings claims of unfair dismissal, discrimination arising from disability, direct disability discrimination, disability related to harassment and a failure to make reasonable adjustments. The issues were identified at a preliminary hearing on 3 August 2022, before Employment Judge Heath and are set out below.

2. The issues were further clarified and confirmed at the start of this hearing. The Respondent conceded that the Claimant was a disabled person by reason of depression at all material times relating to these claims.

3. The Respondent contended that it did not know and could not reasonably have been expected to know that the Claimant was a disabled person by reason of depression before 12 January 2021.

4. Regarding the s.15 Equality Act 2010 discrimination arising from disability claim, the "something arising in consequence of disability" relied on by the Claimant was her sickness absence.

5. The Respondent is an NHS trust providing community health services to patients across several London Boroughs and Hertfordshire.

6. The Falls Prevention Service is a community based service aimed at assisting vulnerable residents who are at greater risk of falling.

LIST OF ISSUES

TIME LIMITS

7. Are the claims relating to acts or omissions relied upon by the Claimant that occurred wholly before 21 October 2021 out of time for consideration by the Tribunal?

8. If so, is there any just and equitable basis upon which the Tribunal may exercise its discretion to extend the time limit for presentation of claims which occurred wholly before 21 October 2021?

9. If not, should these claims be struck out on the basis that the Tribunal does not have jurisdiction to hear these claims?

DISABILITY

10. At the commencement of this hearing, the Respondent admitted that the Claimant was disabled by way of depression within the meaning of the Equality Act 2010 ("EqA 2010") at all material times, and that it had knowledge of this, from 12 January 2021. Therefore the only remaining issue in dispute in respect of disability was the Respondent's date of knowledge.

11. In relation to any allegations of discrimination occurring before 12 January 2021:

    a. Did the Respondent know, or could it reasonably have been expected to know, that the Claimant was disabled by way of depression within the meaning of the Equality Act 2010 ("EqA 2010") at the time of the alleged discrimination, as alleged or at all?

SUBSTANTIVE CLAIMS

UNFAIR DISMISSAL

12. Was the Claimant dismissed for a potentially fair reason in accordance with sections 98(1) and (2) ERA 1996? The Respondent relies on the Claimant's capability due to ill-health.

13. Did the Respondent have a genuine belief that the Claimant was incapable of performing her role due to ill-health and, if so, did it have reasonable grounds for that belief?

14. At the time it held that belief, had the Respondent carried out a reasonable assessment as to the Claimant's capability?

15. Did the Respondent act within the band of reasonable responses in treating the Claimant's incapability due to ill-health as a sufficient reason to dismiss?

16. Was the Claimant's dismissal fair or unfair taking into account all the circumstances, including the size and administrative resources of the Respondent, and equity and the substantial merits of the case?

17. If the dismissal was procedurally unfair, would the Claimant have been dismissed in any event?

DISCRIMINATION ARISING FROM DISABILITY

18. Did the Respondent treat the Claimant unfavourably by dismissing her?

19. Did the Claimant's sickness absence arise in consequence of her disability?

20. Did the Respondent dismiss the Claimant because of her disability related sickness absence?

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

    a. Ensuring the operational effectiveness of the service;
    b. Balancing the workloads of the service fairly; and
    c. Ensuring the effectiveness, efficiency and reliance of the service at a proportionate cost.

22. 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 Respondent be balanced?

DIRECT DISABILITY DISCRIMINATION

23. Did the Respondent directly discriminate against the Claimant contrary to section 13 Equality Act 2010? In particular, it is alleged that the Claimant was subject the Claimant to the following treatment:

a. Jo Davis (CBU Manager) refusing the Claimant's request for unpaid leave on 5 January 2021;
b. Natalie Stewart (Clinical Lead Manager) refusing the Claimant's request the take annual leave on 5 January 2021;
c. Natalie Stewart refusing the Claimant's request to work from home on 5 January 2021; and
d. Philippa Johnson informing the Claimant on 1 September 2021 that she should take a 6-month unpaid career break, and if she refused this, would be subjected to a final sickness review meeting.

24. If the treatment occurred as alleged, was it less favourable treatment because of the Claimant's disability; more specifically:

a. Who is the relevant comparator? The Claimant relies on a hypothetical comparator with a physical condition in the same material circumstances.
b. Are there facts from which, in the absence of an explanation, a finding of discrimination could be made?
c. If so, has the Respondent established an explanation for the treatment which is nothing to do with the Claimant's disability?

FAILURE TO MAKE REASONABLE ADJUSTMENTS

25. Was the Respondent obliged to make reasonable adjustments to accommodate the Claimant's alleged disability pursuant to section 20 Equality Act 2010? The specific alleged reasonable adjustments are as follows:

a. Allowing the Claimant to keep in contact with Natalie Stewart via email whilst on sick leave from June 2019;
b. Allowing the Claimant to take annual leave on 5 January 2021; and
c. Allowing the Claimant to work from home in January 2021.

26. Were such steps reasonable and, if so, when did it become reasonable to take any such step?

27. Did the Respondent fail to take any such reasonable step at the appropriate time?

28. Did the Respondent apply a provision, criterion or practice ("PCP") which had the effect of putting the Claimant at a substantial disadvantage in comparison with someone without the Claimant's alleged disability in the same circumstances?

29. The PCPs the Claimant relies upon are:

    a. PCP 1: the requirement to keep in contact with Natalie Stewart via telephone calls whilst on sick leave from June 2019 for approximately five weeks; and
    b. PCP 2: Respondent's refusal to allow the Claimant to take leave (annual or unpaid) on 5 January 2021; and
    c. PCP 3: the requirement for the Claimant to remain working at the Respondent's site in January 2021.

30. If so, did any of the alleged PCPs put the Claimant at a substantial disadvantage in comparison to persons who are not disabled? In particular, the substantial disadvantage alleged for each alleged PCP is that it exacerbated the Claimant's depression and anxiety.

31. At the time that each of the alleged PCPs were applied, did the Respondent know, or could it be reasonably expected to know that the Claimant was likely to be placed at a substantial disadvantage by each alleged PCP?

32. Did the Respondent fail to make any adjustment(s) that it was reasonable to make that would have had the effect or removing or mitigating any disadvantage experienced by the Claimant as a result of her alleged disability?

HARASSMENT

33. Did the Respondent harass the Claimant by reason of her disability contrary to section 26 Equality Act 2010; namely Natalie Stewart referring the Claimant to Employee Health ("EH") twice in a period of two weeks in June 2019?

34. If so, was this alleged conduct unwanted?

35. If so, was this alleged conduct related to the Claimant's disability, contrary to section 26 Equality Act 2010?

36. If so, did the alleged conduct have the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

PROCEDURE, DOCUMENTS AND EVIDENCE HEARD

37. The Tribunal heard evidence from the Claimant and the evidence of the following witnesses on behalf of the Respondent:

Ms Natalie Stewart, Clinical Lead for Falls Service & Claimant's Line Manager
Ms Joanne Davis, Clinical Business Unit Manager
Ms Phillipa Johnson, Divisional Director of Operations, Chair of 4 final sickness meetings
Ms Elizabeth Hale, Director of Improvement, Appeal hearing chair
Ms Cathy Walker, Divisional Director of Operations, Dismissing officer.

38. There was a tribunal bundle of approximately 745 pages. Various additional documents were handed up during the course of the hearing. These pages were numbered and added to the bundle. The Tribunal informed the parties that unless we were taken to a document in the bundle we would not read it. Both parties provided written closing submission as well as making oral submissions.

39. The Tribunal noted the Claimant's request for regular breaks related to her depression and during the course of the hearing a similar request from Mr Jolley due to issues related to his back and difficulties with prolonged periods of sitting. The Tribunal agreed to adjustments and only sat for hourly intervals before stopping for a break. On a number of occasions, the Tribunal also agreed to intermittent requests for breaks from the Claimant and Mr Jolley.

FINDINGS OF FACT

40. Having considered all the evidence, both oral and documentary, The Tribunal made the following findings of fact. These findings are not intended to cover every point of evidence given but are a summary of the principal findings that the Tribunal made from which it drew its conclusions. The majority of the findings of facts were not in dispute.

41. On 1 November 1993, the Claimant commenced employment as a Rehabilitation Assistant within the Respondent's Falls Prevention Service.

42. It was not in dispute that the Claimant was disabled by way of depression within the meaning of the Equality Act 2010 ("EqA 2010") at all material times. The Respondent's knowledge of disability was in dispute prior to 12 January 2021.

43. Between 9 March 2015 and the Claimant's dismissal on 14 December 2021, the Claimant had 19 episodes of sickness. In total these sickness periods amounted to approximately 1,122 calendar days of sickness and an average of 163 days sickness absence annually. The Tribunal noted that the total sickness days are calendar days and not working days, as this figure included weekends and bank holidays. This calculation of sickness absence is in line with paragraph 5.5 of the Respondent's Sickness Absence Management policy, which states *"In calculating a sickness absence, Saturdays, Sundays, public holidays and rest days will all count towards a continuous period of absence irrespective of whether an individual is scheduled to work".*

Events surrounding June/July 2019 absence.

44. In January 2019, Natalie Stewart commenced employment as Clinical Lead for the Respondent's Falls Prevention Service and became the Claimant's line manager.

45. The Claimant's first significant period of sickness absence under Ms Stewart's line management was between 10 June 2019 and 14 July 2019, this period of absence included pre-planned annual leave from 21 June 2019 to 30 June 2019. In respect of this period of absence, the Claimant contacted Ms Stewart advising her of the sudden passing of her dog and requested a period of leave.

46. The Claimant emailed Ms Stewart on 13 June 2019 notifying her that *"……at this time I'm not in a good place and feel emotionally unfit…….I need to let you know that I'm not fit to come I (sic) to work next week the days are going fast."* Ms Stewart responded by email on the same day asking the Claimant whether she wanted to have a chat. The Claimant sent an email in response the next day stating that she was too upset to talk on the phone and asked whether they could stay in contact by email for now. In response, on the same day, Ms Stewart emailed the Claimant seeking her approval to make a referral to Employee Health 'EH', expressing concern for the Claimant's well-being and the potential for the absence to become extended if adequate support was not provided. The Claimant responded on the same day advising that she was happy for the referral to be made to EH.

47. On 14 June 2019, Ms Stewart sent a referral to EH. Ms Stewart set out the reasons for referral as *"Previous history of long term sickness absence. New episode of absence due to death of dog causing increased stress and anxiety. Risk of long term absence if not supported". Ms Stewart* asked EH to advise on a likely return to work date and what additional measures needed to be in place to support the Claimant.

48. Ms Sharon Thompson, Occupational Health Advisor, EH, held a telephone consultation with the Claimant on 20 June 2019. On the same day she sent her report to Ms Stewart advising *"I note your concerns that Saira's absence could become long-term, I discussed this with Saira and based on this discussion, there is no evidence to suggest that this will be the case…….I cannot accurately predict a return to work timescale but I see no reason why this will not be in the foreseeable future".* Ms Thompson also advised that the Claimant was aware of the counselling and psychology service at Employee Health and of how to self-refer.

49. The Claimant sent Ms Stewart an update email on 27 June 2019, stating, *"After speaking to Sharon at occupational health last Thursday and reading her report I still feel quite tearful at present and am struggling to control my emotions……I am struggling over the phone so ask to keep contact by email just for now".* The Claimant advised that she would update Ms Stewart on Monday following her appointment with the GP. At this stage, the Claimant gave no indication of when she intended to return to work.

50. Ms Stewart responded on the same day advising the Claimant that *"It is important that you have the appropriate support and I would like to request Sharon organises another consult with you to discuss where you are currently. It is also important that we still keep communication over the phone, even for a brief conversation. I will give you a call tomorrow because we need to be realistic and plan for your absence if you feel you are still not able to return to work as planned on Monday".*

51. The Claimant next sent an email to Ms Stewart on 2 July 2019 advising that her GP had signed her off for another 2 weeks due to her emotional state. She also agreed to the further EH referral stating *"If Sharon from occupational health needs to speak to me again that's fine. I found her understanding and helpful from a mental health point of view".* The Claimant also suggested a catch up with Ms Stewart, the middle of the following week. Ms Stewart responded by email on the same day advising the Claimant that it is important they speak on the phone. The Claimant responded

agreeing to speak on the phone and a telephone informal health and well-being review was held on the phone later that day.

52. In her evidence to the Tribunal, Ms Stewart advised there were two reasons why she felt telephone contact was important. Firstly as part of her duties she was responsible for the staffing rota and she did not consider it reasonable to communicate via email back and forth as it did not allow her to discuss, consider and plan various options or measures of support that could be offered to the Claimant. Secondly, Ms Stewart referred to clause 5.4 of the Respondent's Sickness and Absence Policy, which set out that "*In all cases of sickness or injury which result in a member of staff being absent from work, they must keep in regular contact with his/her line manager".* Ms Stewart interpreted the word contact to mean telephone contact. The Claimant submitted that Ms Stewart misinterpreted the policy and ignored her request to keep contact by email. The Tribunal agree with the Claimant that there is nothing in the policy specifically stating that contact must be by phone. That said, the Tribunal also find Ms Stewart's understanding of the policy and her reasons for suggesting telephone contact was due to a genuinely held belief that this was the best way to discuss supportive options with the Claimant. The Claimant did not challenge Ms Stewart's position at the time and infact agreed to speak on the phone on 2 July at the informal health and wellbeing review meeting. The Claimant also accepted under cross-examination that it was appropriate to conduct an informal health and wellbeing over the phone rather than back and forth on emails.

53. The Tribunal also find that the informal health and wellbeing held on 2 July 2019 was the only occasion that the Claimant spoke to Ms Stewart on the phone over a period of 5 weeks.

54. On 2 July Ms Stewart sent a further email to EH advising C had been signed off for another 2 weeks and that she felt the Claimant required further support to help her at this time and to be able to get back to work as soon as possible. Ms Thompson responded on the same day advising normally a new referral is required with new questions, however, she would carry out a telephone consultation if Ms Stewart was requesting a further review regarding the Claimant's fitness to return to work. Ms Stewart responded confirming that she was requesting EH contact the Claimant as the Claimant had stated that the recent contact was of benefit. Ms Stewart stated that she was mainly seeking assistance from EH as it went beyond the scope of her as manager to provide emotional support.

55. Ms Thompson held a further telephone consultation with the Claimant on 10 July 2019. On or around the same date she sent her report to Ms Stewart advising *"it remains the case however, that there are no medical reasons to conclude that this will become an extended absence and Saira informed me that she intends to return to work on Monday of next week".*

56. A medical fit note was subsequently provided by the Claimant's GP covering the periods 10 June 2019 to 20 June 2019 and 1 July 2019 to 15 July 2019, stating the reason for absence as bereavement.

57. A further GP's fit note was received dated 15 July 2019, covering the annual period 20 June 2019 to 1 July 2019, stating that the Claimant was not fit for work due to low mood. This fit note was provided to ensure that the Claimant had her annual leave returned for this period.

58. The Claimant returned to work on 16 July 2019 and a return to work meeting was conducted by Ms Stewart. At this meeting, the reason for absence was noted as *"bereavement resulting in low mood and poor concentration".* It was recorded as a *"once off, however exacerbated by previous family loss".* At this meeting, the Claimant was placed on a 12 week absence monitoring plan with a 6 week review. She was also advised to consider self-referral to the EH counselling service.

Further sickness absences in 2020

59. The Claimant's next prolonged period of sickness absence was between 4 March and 21 June 2020 for reasons related to migraine, back, neck and shoulder pain as a result of a road traffic accident.

60. In March 2020, when the COVID-19 pandemic commenced, the Trust changed the way it was working with some roles being performed from home. However, this did not apply to the Claimants' role as she was patient-facing and in-person services were still essential and being provided in the NHS. The Service was temporarily closed down and those employed in the same role as the Claimant were required to be redeployed or made available to assist other services across the Trust that needed essential support. The Claimant was off sick during the majority of this period, therefore she was not considered for redeployment at this time.

61. Over the course of this sickness absence, Ms Stewart held a number of sickness review meetings with the Claimant, namely on 31 March 2020, 6 April 2020 and 30 April 2020, the outcomes of which resulted in a further referral being made to occupational health.

62. An EH report was provided on 14 May 2020, within which Dr James Preston, Consultant Occupation Physician stated that, *"I cannot provide you with a return to work date as this will depend upon progress with Ms Barnes musculoskeletal symptoms".*

63. A formal health and wellbeing review meeting was held on 16 June 2020 at which a return to work date was agreed of 6 July with a phased return pending receipt of further EH report. On 18 June 2020 a further EH report was provided which suggested a phased return to work for the Claimant.

64. The Claimant returned to work on 6 July on a 4 week phased return plan, at which point a return to work meeting was held with her. No additional support measures were requested by the Claimant and a 6 month monitoring period was agreed.

65. The Claimant's final prolonged period of absence commenced on 5 January 2021, this continued until her employment was terminated on 14 December 2021.

66. Following the sickness review meeting on 30 April 2020, Ms Stewart informed the Claimant that she could continue to keep in contact with her via email as opposed to telephone call. In her evidence Ms Stewart informed the Tribunal that she had become more experienced in her role as a manager and was happy to deviate more from her interpretation of the Trust's policy to accommodate the Claimant's request for email contact as she was finding contact via telephone call upsetting and distressing. Ms Stewart advised that in the previous communications relating to telephone contact in 2019, the Claimant has simply stated that she was struggling rather than finding such contact upsetting and distressing.

Events surrounding December 2020/January 2021 absence

67. On 22 December 2020, email correspondence from Jo Davis, Clinical Unit Business Manager, was sent to staff regarding COVID precautions and service need. Within this email Ms Davis stressed that *"We want to keep all staff and patients safe and with increased winter/covid pressures we can (sic) afford for our staff to be off sick or isolating".*

68. On 24 December 2020 a staffing letter was circulated to all Managers within the NHS, this was subsequently cascaded to all staff. Ms Stewart circulated this to her team, including the Claimant on 3 January 2021. The letter was headed "call to action to all London NHS Staff" and set out the pressures being faced in London as Covid-19 infection rates rise in the capital. The letter requested staff, particularly those who do not normally work in emergency services to consider undertaking additional shifts over the Christmas and New Year period.

69. In Ms Stewart's absence on 31 December 2020 an email was circulated to the Claimant's team from Jonathan Zulueta, Team lead, Tri-Borough Falls Prevention Service. Mr Zulueta advised staff that due to the NHS crisis as a result of the pandemic, the Service would be closing and the expectation was that staff would be redeployed to help within bedded units as well as assisting in discharges from hospital.

70. In response to this email, the Claimant replied to Mr Zulueta on the same day indicating she did not feel able to work in a different role because of her "back and shoulder problems". The Claimant asked Mr Zulueta to liaise with Jo Davis and put forward a request for her to be given unpaid leave for 8 weeks. Mr Zulueta liaised with Ms Davis who stated *"Just asking Pete Couchman, HR business partner but I think we have to deny her the leave as she is needed. Its then up to her to go off sick and we should then see if we can take her further along the dismissal route. I will gt (sic) back to you with petes advice".*

71. On 31 December 2020, the Claimant contacted Ms Davis directly via email and stated *"I am reaching out to you myself as I am not good emotionally at all and Natalie is aware if (sic) this regarding my mum and my nephew. I am very concerned about my emotional well being and with today if (sic) all days being the anniversary of the death if my nephew Please would you consider 4 weeks unpaid leave It would really help me to get through".* Ms Davis responded the same day, denying the Claimant's request for unpaid leave, citing the pandemic and pressure on the NHS with high demand on staff as the reasons for doing so. Ms Davis further advised the Claimant that there were already 3 Rehabilitation Assistant vacancies in the service and her absence at this time would leave just two, which would not be *"acceptable or fair"* on the remaining staff. Ms Davis also noted the Claimant was now requesting leave due to her not being well emotionally rather than the back and shoulder pain she had put forward to Mr Zulueta.

72. The Claimant responded to Ms Davis on 3 January 2021 to advise that she did not add the state of her mental health to the unpaid leave request initially as she had made Ms Stewart aware of this several weeks ago. She stated this was the main reason for the unpaid leave request, besides her concerns regarding her back/shoulder injury. She further advised that she would be speaking to her GP for support to help with her low mood. Ms Davis responded the next day and advised the Claimant, that she was unable to authorise unpaid leave due to the pandemic crisis re-iterating the same reasons as set out in her earlier email. Ms Davis advised the Claimant to speak to her GP and informed her that she would speak to Ms Stewart so that a referral could be made to EH.

73. Upon her return from leave on 4 January 2021, Ms Stewart contacted the Claimant by phone, to discuss matters following the Claimant's communications with Ms Davis. Ms Stewart made contemporaneous notes of her telephone conversations with the Claimant, which stated that the Claimant felt that she was not coping, she was seeing her GP the next day and would self-certify for the moment. The Claimant also advised she was at that time residing in Manchester. The Claimant requested annual leave for the week and Ms Stewart advised that this could not be approved due to the capacity in the Trust as a result of the COVID-19 crisis, and in line with paragraph 5.12 of the Trust's Annual Leave Policy, which states *"Each short term request outside of the rostering period will be assessed against service need".*

74. The Claimant then followed up with an email to Ms Stewart on 5 January 2022 at 21:53 advising that her GP has said that *"it sounds like I have depression and she has prescribed me antidepressants".* The Claimant also advised that her GP advised her to have counselling and that she had notified her GP that her manager would arrange this with Occupational Health. In respect of her being unavailable for redeployment as she was temporarily residing in Manchester, the Claimant stated that staff had been advised to work from home where possible but made no specific request to work from home. On the advice of her GP, the Claimant then self-certified her sickness for 7 days.

75. Ms Stewart responded by email on 6 January confirming that the Claimant's sickness would be recorded as self-certified for 7 days and that she would make a referral to EH. Ms Stewart also reiterated to the Claimant that the Service was in crisis and things were rapidly changing, which included the closure of the Falls Service. Staff were to be redeployed, maybe into bedded units but assistance was also required in other areas. Ms Stewart went on to advise that although the Service has been offering

remote working options, this did not cover all the activities that the Service provide. Ms Stewart advised the Claimant that she was employed to work in a clinical team and as such the Claimant should not expect to work remotely in Manchester, without prior approval.

76. The Claimant responded to Ms Stewart on 10 January advising that she had registered with and spoken to a doctor in Manchester. She described feeling low, becoming tearful easily and not sleeping well. The Claimant advised the doctor would be signing her off unfit for work for 2 weeks and would be reviewing her again. She had also now commenced her anti-depressant medication.

77. The Claimant's period of self-certification was followed by a GP's statement of fitness for work on 12 January 2021, noting depression as the reason for her unfitness for work. This was the first reference to 'depression' in any GP's statement of fitness for work.

78. An EH report was provided on 25 January 2021, wherein, D Preston stated that no likely return to work date could be provided but also that it was more likely than not that the Claimant would be in receipt of a further certificate of absence.

79. On 11 February 2021, a formal health and wellbeing review meeting was held under the Respondent's Sickness and Absence Policy. The purpose of the meeting was to discuss the Claimant's prolonged sickness absence and the recent EH Assessment to determine what support was required to get the Claimant back to work. During the meeting the Claimant stated that based on how she was feeling at the moment, she did not feel able to return to work. At the end of the meeting, the Claimant was advised that the process may need to be escalated to a final sickness review meeting to determine next steps if appropriate support to facilitate a return to work could not be identified.

80. On 2 March 2021, the Claimant sent an email to Ms Stewart advising that she found having to email her each week *"very unhelpful regarding my wellbeing and mental health".*

81. On 20 April 2021, as a result of her continuing absence the Claimant was invited to a formal final sickness review meeting dated 14 May 2021.

82. A further EH report was obtained on 23 April 2021 wherein Dr Preston stated that he could not provide a specific return to work date and that in the absence of unpaid

leave, the Claimant would remain on sick leave, on health grounds, on an ongoing basis. Dr Preston also advised that it would be premature at this stage to discuss arrangements for a return to work plan and also that redeployment at this stage would not resolve matters in terms of aiding a return to work.

Final sickness review meetings

83. The First final sickness review meeting was held on 14 May 2021 and was chaired by Phillipa Johnson, Divisional Director of Operations.

84. At this meeting, Ms Stewart presented a Management Report and expressed concerns for the Service's ability to sustain the Claimant's level of sickness. At this point the Claimant had an average of 136 calendar days off sick over the previous 6 years.

85. The management report was prepared by Ms Stewart in or around May 2021. The report included a table setting out the Claimants recorded absence history since 2015. The table of absence includes a number of recorded references to depression from 2015 to 2021. The relevance and the accuracy of the table of absence is an area of dispute between the parties. The Claimant submits that the reference to depression within the table points to the Respondent having knowledge of her disability since 2015. The Respondent submits that the report was drafted after 12 January 2021 so it does not speak to the knowledge of Ms Stewart and Ms Davies at the time of the earlier allegations in respect of which knowledge is in dispute.

86. Ms Stewart in her evidence stated recording the reason of anxiety/stress/depression is a result of the limitations in the coding used by the Respondent's systems. In support of this, she referred to the corresponding fit notes for relevant periods of absence which simply referred to stress. By way of example, Ms Stewart pointed to inaccuracies in recording where a period of absence in 2016 for musculoskeletal injury was recorded as "anxiety/stress/depression". In terms of her own knowledge, Ms Stewart referred to the period of bereavement she was made aware of in 2019 following the death of the Claimant's dog. In her oral evidence she stated that *"bereavement is very different to depression, it's normal when someone passes away to have an emotional response to that part of a normal bereavement and grieving process, different to depression and long term condition of depression".* The Tribunal will set out its findings in relation to this issue in its conclusions below.

87. In response to the management case, the Claimant explained that she had made a breakthrough in treatment in counselling and that she anticipated returning to work on 1 July 2021. During the course of the meeting, the Claimant also disclosed that she had made disclosures to the police over a historical matter. As a result, Ms Johnson concluded that there were therefore outstanding issues which could impact on the case, and therefore organised a review meeting on 17 June 2021 to review progress and finalise a decision.

88. Following the meeting and due to the disclosures that were made, the Claimant was again referred to EH. On 14 June 2021, Dr Preston provided a report advising that whilst the Claimant's musculoskeletal symptoms had improved, it was her mental wellbeing in the context of a significant ongoing stressor which would require occupational health monitoring. Dr Preston did not specifically comment on whether the Claimant was fit to return to work, however, he advised that any return to work should be accompanied by a further EH review 3 weeks thereafter and should be on a phased basis.

89. The adjourned second final sickness review meeting was held on 17 June 2021, chaired by Ms Johnson. At this meeting, it was agreed that the Claimant's return to work originally scheduled for 1 July 2021 would be postponed, in light of the fact that police processes were ongoing into the personal matter previously disclosed and as referenced in the EH report of 14 June 2021. As a result, the sickness review meeting was again postponed and a further EH referral was agreed.

90. On 22 July 2021, a further EH report was provided. Dr Preston was once again unable to specify a return to work date as he stated he could not predict the outcome of further counselling due to commence 2 August 2021 and suggested the best that could be offered was a further review after the Claimant had undertaken a number of sessions.

91. The third final sickness review meeting was held on 26 July 2021 and again was chaired by Ms Johnson. At this meeting it was agreed that the Claimant would ask her counsellors as to the anticipated length over time of appointments, and the Claimant was to inform Ms Stewart of the same. Ms Johnson also raised the possibility of a career break to allow the Claimant to engage in the counselling process and not be stressed by the prospect of a return to work. It was agreed that the meeting would reconvene when more information was available.

92. The fourth final sickness review meeting was held on 1 September 2021, and was chaired by Ms Johnson. The Claimant advised that she had not attended counselling due to an error regarding the appointment scheduled for 2 August 2021. The Claimant was therefore unable to update Ms Johnson on her progress. Ms Johnson expressed her concerns on how long the process was taking and the impact this was having on the service. Ms Johnson offered the Claimant a 6 month career break stating that *"this will give you enough time to concentrate on getting well and also enable the Service to make appropriate arrangement to cover your post for that period".* Ms Johnson advised the Claimant if the career break was not a preferred option then she would arrange the final sickness review and make a decision regarding her employment as her continued absence was not sustainable for the Trust and therefore impacting the Service.

93. The Claimant requested that she be allowed to use her accrued annual leave before commencing a career break. Ms Johnson agreed to the Claimant using her annual leave as requested. The Claimant did not make a decision as to how she wished to proceed at the meeting and it was agreed that she would take some time to consider matters before confirming her position.

94. The outcome letter from 1 September 2021 was sent to the Claimant on 13 September 2021, having originally been sent in error to her work email address rather her personal email address.

95. On 17 September 2021, the Claimant sent an email to Ms Stewart and Ms Johnson stating that her GP would be signing her fit for work after her current period of leave ended, indicating a return to work date of 27 September 2021. In response Ms Johnson sent a letter to the Claimant dated 23 September 2021 advising her that as a result of her anticipated return to work the sickness absence process was closed, but that if a sustained improvement in attendance was not achieved, then the process could continue and result in the termination of her employment. The career break did not therefore proceed.

96. Ms Stewart sent an email to the Claimant on 23 September 2021 setting out a phased return to work plan. She expressly clarified that the return to work plan was being progressed instead of the Claimant accepting the offer of a career break made by Ms Johnson. On the same day the Claimant sent an email in response to Ms Stewart stating that her GP had advised her not to return to work as planned and suggested she take a 1 month career break instead. The Claimant also said that she felt rushed

into making the decision as she only received the outcome letter on 13 September 2021. Ms Stewart replied to the Claimant on 24 September 2021 advising that she would pass on her email to Ms Johnson regarding the career break as she was the person responsible for any decision making in managing the Claimant's absence.

97. On 29 September Ms Stewart sent the Claimant another email clarifying that a medical note was required for the continuing period of absence. In respect of the career break she also clarified the position around a one month career break in that this had been discussed on a number of occasions but it was concluded that a shorter period was not appropriate as it did not allow Ms Stewart to effectively manage the service.

98. The Claimant provided two further GP's fit note covering the period from 27 September 2021 to 6 December 202. The fit notes certified the Claimant was unfit to work due to depression.

99. Ms Stewart made attempts to arrange a meeting with Ms Johnson to discuss how to proceed with Ms Barnes, however, Ms Johnson had unfortunately taken ill and was not available to conduct any further sickness absence review meetings.

100. On 9 October 2021, Ms Stewart made a further referral for the Claimant to EH and a report was provided by Dr Preston on or around 9 November 2021. Dr Preston set out that it was the Claimant's *"stated wish to return to work on 7th December 2021 or thereafter on a phased return to work".* He went on to say *"I am not in a position to predict how well Ms Barnes will settle into work or whether or not she will have a higher rate of sickness absence or not. The only way to ascertain would be for her to return and to see how she gets on".* It was within the content of this report that Dr Preston advised that in his opinion it was likely that an adjudicating legal authority would conclude the Equality Act applied to the Claimant's condition.

101. On 29 October 2021, the Claimant sent an email to Ms Stewart to inform her that she was still undergoing counselling and urology and that she planned to return to work after the sick note expired on 6 December.

102. The Claimant was sent a letter dated 22 November 2021 inviting her to a fifth final sickness review meeting scheduled to take place on 7 December 2021 chaired by Cathy Walker, Divisional Director of Operations, this was due to Ms Johnson being ill with COVID-19. The letter enclosed a copy of a management report prepared by Ms

Stewart and advised the Claimant that her employment may be terminated at the meeting on the grounds of capability due to ill-health.

103. The meeting scheduled for 7 December 2021 did not take place due to the Claimant turning up for work following the expiry of her fit note and not being able to join the meeting. The Claimant had made no contact with Ms Stewart to advise her of her attendance at the workplace. Other than the email of 29 October 2021, when the Claimant advised Ms Stewart that she was planning to return to work after her sick note expired on 6 December 2021, there was no communication between the Claimant and Ms Stewart regarding a return to work. No return to work arrangements had been put in place and no work was allocated to the Claimant.

104. The rescheduled final fitness review meetings took place on 10 and 14 December 2021. On 14 December 2021, Ms Walker informed the Claimant that the Respondent would be terminating her employment on the grounds of capability, with 3 months pay in lieu of her notice period. The effective date of termination was 7 March 2022. An outcome letter was sent to the Claimant dated 21 December 2021 which summarised Ms Walker's decision. The letter stated *"given your history of absence and no prospect of a sustained return to work, and that it is not possible for the Trust to accommodate your level of absence it was my decision to terminate your contract of employment".*

105. On 23 December 2021 the Claimant appealed the outcome of the fifth final sickness review meeting, on the following grounds:

Ground 1 – unfair and flawed disciplinary procedures relating to an email sent in 2021;
Ground 2 – incorrect paperwork sent in 2019 referring to a stage 3 meeting instead of stage 2;
Ground 3 – HR rep failing to turn up to Stage 2 meeting in 2019 and Trust failing to specify which stage the meeting was;
Ground 4 – long term depression not taken into account;
Ground 5 – reason given for termination was that it could not be guaranteed she would not need more time off, which was contrary to ACAS view.

106. An Appeal hearing was held on 4 March 2022, chaired by Ms Elizabeth Hale, Director of Improvement. In response to the Claimant's grounds of Appeal, Ms Hale concluded as follows:

Ground 1 – the delay in receipt of an email in early 2021 was unfortunate, but the error was identified and corrected within a few days.

Grounds 2 and 3 – these events were a substantial amount of time ago i.e. in 2019 and since then there have been multiple processes and meetings to support the Claimant's to return to work.

Grounds 4 & 5 – there was clear evidence of sustained support over a period of time, including an offer of a career break that the Claimant chose not to take up. There is evidence that the process has been fair and it has balanced the Claimant's needs with those of the service.

107. In light of the above conclusions, the appeal was not upheld and the Claimants employment with the Respondent was terminated on 7 March in line with Ms Walker's original decision.

Relevant Law

Unfair dismissal

108. Section 98(1) places the burden on the employer to show the reason or principal reason for the dismissal and that it is one of the potentially fair reasons identified within Section 98(2), or failing that some other substantial reason. 169. The potentially fair reasons in Section 98(2) include a reason which:- "relates to the capability or qualifications of the employee for performing work of a kind which he was employed by the employer to do".

109. Section 98(3) goes on to provide that "capability" means capability assessed by reference to skill, aptitude, health or any other physical or mental quality.

110. Where the Respondent shows that dismissal was for a potentially fair reason, the general test of fairness appears in section 98(4): "…the determination of the question whether the dismissal is fair or unfair (having regard to the reasons 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".

111. It has been clear ever since the decision of the Employment Appeal Tribunal in ***Iceland Frozen Foods Limited -v- Jones [1982] IRLR 439*** that the starting points should be always the wording of section 98(4) and that in judging the reasonableness of the employer's conduct a Tribunal must not substitute its decision as to what was the right course to adopt for that of the employer. In most cases there is a band of reasonable responses to the situation and a Tribunal must ask itself whether the employer's decision falls within or outwith that band. This approach was endorsed by the Court of Appeal in ***Post Office –v- Foley; HSBC Bank Plc –v- Madden [2000] IRLR 827.***

112. The application of this test in cases of dismissal due to ill health and absence was considered by the Employment Appeal Tribunal in ***Spencer –v- Paragon Case No. 2404551/19 25 Wallpapers Limited [1976] IRLR 373*** and in ***East Lindsey District Council –v- Daubney [1977] IRLR 181.*** The Spencer case establishes that the basic question to be determined when looking at the fairness of the dismissal is whether, in all the circumstances, the employer can be expected to wait any longer, and if so how much longer. Matters to be taken into account are the nature of the illness, the likely length of the continuing absence, and the overall circumstances of the case.

113. In Daubney, the Employment Appeal Tribunal made clear that unless there were wholly exceptional circumstances, it is necessary to consult the employee and to take steps to discover the true medical position before a decision on whether to dismiss can properly be taken. However, in general terms where an employer has taken steps to ascertain the true medical position and to consult the employee before a decision is taken, a dismissal is likely to be fair.

114. The Employment Appeal Tribunal considered this area of law in ***DB Shenker Rail (UK) Limited –v- Doolan [UKEATS/0053/09/BI)***. In that case the Employment Appeal Tribunal indicated that the three-stage analysis appropriate in cases of misconduct dismissals (which is derived from ***British Home Stores Limited –v- Burchell [1978] IRLR 379***) is applicable in these cases. The Court of Session in decided ***BS v Dundee City Council [2014] IRLR 131*** in which at dismissal the employee had been off sick for about 12 months (after 35 years' service) with a sick note for a further four weeks. The Court reviewed the earlier authorities and said (at paragraph 27): "Three important themes emerge from the decisions in Spencer and Daubney. First, in a case where an employee has been absent from work for some time owing to sickness, it is essential to consider the question of whether the employer can be expected to wait longer. Secondly, there is a need to consult the employee and take his views into account. We would

emphasize, however, that this is a factor that can operate both for and against dismissal. If the employee states that he is anxious to return to work as soon as he can and hopes that he will be able to do so in the near future, that operates in his favour; if, on the other hand he states that he is no better and does not know when he can return to work, that is a significant factor operating against him. Thirdly, there is a need to take steps to discover the employee's medical condition and his likely prognosis, but this merely requires the obtaining of proper medical advice; it does not require the employer to pursue detailed medical examination; all that the employer requires to do is to ensure that the correct question is asked and answered."

Discrimination arising from disability

115. *Section 15 of the Equality Act 2010 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 (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.

116. In ***Gallop v Newport City Council [2013] EWCA Civ 1583***, the Court of Appeal highlighted that it is vital for a reasonable employer to consider whether an employee is disabled, and form their own judgment on this issue.

117. The burden of proof in terms of knowledge is on the employer to prove that it was unreasonable for them to have the required knowledge. This is a question of fact for the Tribunal. The burden is on the employer to show it was unreasonable to have the required knowledge.

118. The EHRC Employment Code provides that employers must do all they can reasonably be expected to do to find out whether a worker has a disability. What is reasonable will depend on the circumstances. This is an objective assessment. When making enquiries about disability, employers should consider issues of dignity and privacy and ensure that personal information is dealt with confidentially.

119. S15 (2) provides that the discrimination will not arise if A shows they did not know and could not reasonably be expected to know that B had a disability.

120. In order for the Claimant to succeed in her claims under section 15, the following must be made out: 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 (i.e. caused by) the something that arises in consequence of the disability; d. the alleged discriminator cannot show that the unfavourable treatment is a proportionate means of achieving a legitimate aim.

121. Useful guidance on the proper approach was provided by Mrs Justice Simler in the case of ***Pnaiser v NHS England [2016] IRLR, EAT***: *"A Tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises. The Tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a s.15 case. The "something" that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it."*

122. Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and the Respondent's motive in acting as he or she did is simply irrelevant.

123. The Supreme Court considered this claim in ***Williams v Trustees of Swansea University Pension and Assurance Scheme [2018] IRLR 306*** and confirmed that this claim raises two simple questions of fact: what was the relevant treatment and was it unfavourable to the Claimant?' 'Unfavourable' must be given its normal meaning; it does not require comparison, it is not the same as 'detriment'. A Claimant cannot succeed by arguing that treatment that is in fact favourable might have been even more favourable. The court confirmed that demonstrating unfavourable treatment is a relatively low hurdle.

124. The Supreme Court said that in dealing with a section 15 claim, the first requirement was to identify the treatment relied upon. In that case it was the award of a pension. There was nothing intrinsically unfavourable or disadvantageous about the pension on the facts of this case. On the facts the pension was only available to disabled employees (since the entitlement only arise upon permanent incapacity). While that could be less favourable than someone with a different disability, who may have worked more hours upon cessation of employment, no comparison was needed for the purposes of section 15. The claim failed. The Court emphasised that unfavourable treatment meant what it says and was not a high hurdle to surmount.

125. The Equality and Human Rights Commission Code of Practice contains some provisions of relevance to the question of justification. Paragraph 5.2.1 of the Code suggests that if a Respondent has failed to make a reasonable adjustment it will be very difficult for it to show that its unfavourable treatment of the Claimant is justified. As to justification, in paragraph 4.27 the code considers the phrase *"a proportionate means of achieving a legitimate aim" (albeit it in the context of justification of indirect discrimination) and suggested that the question should be approached in two stages:- * is the aim legal and non discriminatory, and one that represents a real, objective consideration? * if so, is the means of achieving it proportionate – that is, appropriate and necessary in all the circumstances.*

126. As to that second question, the code goes on in paragraphs 4.30 – 4.32 to explain that this involves a balancing exercise between the discriminatory effect of the decision as against the reasons for applying it, taking into account all relevant facts. It goes on to say the following at paragraph 4.31:- *"although not defined by the Act, the term "proportionate" is taken from EU directives and its meaning has been clarified by decisions of the CJEU (formerly the ECJ). EU law views treatment as proportionate if it is an "appropriate and necessary" means of achieving a legitimate aim. But "necessary" does not mean that the [unfavourable treatment] is the only possible way of achieving a legitimate aim; it is sufficient that the same aim could not be achieved by less discriminatory means."*

127. In ***Chief Constable v Homer 2012 ICR 704*** Baroness Hale stated that to be proportionate a measure has to be both an appropriate means of achieving the legitimate aim and reasonably necessary in order to do so. She approved earlier authorities which emphasised the objective must correspond to a real need and the means used must be appropriate with a view to achieving the objective and be

necessary to that end. It is necessary to weigh the need against the seriousness of the detriment.

128. In ***O'Brien v Bolton St Catherine's Academy [2017] IRLR 547*** a case relating to a dismissal because of long-term sickness absence the Court of Appeal held that, when considering whether dismissal was justified the following should be considered: 1. the decision to dismiss should be assessed as at the date of any internal appeal decision (so that any new evidence that has come to light since the original decision to dismiss should be taken into account) 2. the impact of the absence on the employer will be a significant factor in whether dismissal is a proportionate response 3. if the impact of the absence on the employer is obviously very severe then a general statement to that effect may be all that is required. If it is not, then more detailed evidence should be produced 4. ultimately employers are entitled to some finality. That is all the more so where the employee has not been as co-operative as the employer is entitled to expect about providing an up-to-date prognosis and where the evidence relied on is produced late in the day and is not entirely satisfactory.

129. The question is whether the action is, objectively assessed, a proportionate means to achieve a legitimate end. The employer has to show (and the onus is on the employer to show) that the treatment is a proportionate means of achieving a legitimate aim. The Tribunal can take account of the reasonable needs of the Respondent's business but the Tribunal must make its own judgment as to whether the measure is reasonably necessary. There is no room for the range of reasonable response test.

<u>Duty to make adjustments</u>

130. Sections 20 & 21 of the Equality Act 2010 provides;

<u>Section 20 – Duty to make adjustments</u>

(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.

(2) The duty comprises the following three requirements.

(3) The first requirement is a requirement, where a provision, criterion or practice of A'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.

(4) The second requirement is a requirement, where a physical feature 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.

(5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put 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 provide the auxiliary aid.

Section 21 Failure to comply with duty

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

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

131. It is not necessary to prove that the potential adjustment will remove the disadvantage; if there is a “real prospect” that it will, the adjustment may be reasonable. In ***Romec v Rudham*** **[2007] All ER (D) 206 (Jul), EAT**: HHJ Peter Clark said that it was unnecessary to be able to give a definitive answer to the question of the extent to which the adjustment would remove the disadvantage. If there was a 'real prospect' of removing the disadvantage it 'may be reasonable'.

132. In ***Cumbria Probation Board v Collingwood*** **[2008] All ER (D) 04 (Sep), EAT**: HHJ McMullen said that 'it is not a requirement in a reasonable adjustment case that the claimant prove that the suggestion made will remove the substantial disadvantage'.

133. In ***Leeds Teaching Hospital NHS Trust v Foster*** **UKEAT/0552/10, [2011] EqLR 1075**, the EAT said that, when considering whether an adjustment is

reasonable, it is sufficient for a tribunal to find that there would be 'a prospect' of the adjustment removing the disadvantage.

134. In respect of reasonable adjustment claims, an additional element of knowledge is required. The first element is the same test as in S15 namely that A shows they do not know or could be reasonably be expected to know that the [interested] disabled person has a disability. Schedule 8 EQA 2010 pt. 3 para 20 states that A is not subject to the duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know that a disabled person has a disability and is likely to be placed at a disadvantage. Accordingly, the additional element on knowledge for S20/21 claims is that A must also be reasonably expected to know the disabled person is likely to be placed at the disadvantage.

Direct discrimination

135. Section 13 of the Equality Act 2010 provides as follows;

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".

Burden of Proof

136. Section 136 of the Equality Act 2010 provides**;**

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred. (3) But subsection (2) does not apply if A shows that A did not contravene the provision.

137. In ***Islington Borough Council v Ladele [2009] ICR 387*** Mr Justice Elias explained the essence of direct discrimination as follows: *"The concept of direct discrimination is fundamentally a simple one. The claimant suffers some form of detriment (using that term very broadly) and the reason for that detriment or treatment is the prohibited ground. There is implicit in that analysis the fact that someone in a similar position to whom that ground did not apply (the comparator) would not have suffered the detriment. By establishing that the reason for the detrimental treatment is the prohibited reason,*

the claimant necessarily establishes at one and the same time that he or she is less favourably treated than the comparator who did not share the prohibited characteristic."

138. ***Burrett v West Birmingham Health Authority 1994 IRLR 7, EAT*** is an example of the proposition that it is for the tribunal to decide as a matter of fact what is less favourable treatment and the test posed by the legislation is an objective one. The fact that a Claimant believes that he or she has been treated less favourably does not of itself establish that there has been less favourable treatment, although the Claimant's perception of the effect of treatment is likely to be relevant as to whether, objectively, that treatment was less favourable.

139. In order for a disadvantage to qualify as a "detriment", it must arise in the employment field, in that ET must find that by reason of the act or acts complained of a reasonable worker would or might take the view that he had thereby been disadvantaged in the circumstances in which he had thereafter to work. An unjustified sense of grievance cannot amount to "detriment". However, to establish a detriment, it is not necessary to demonstrate some physical or economic consequence, ***Shamoon v Chief Constable of RUC [2003] UKHL 11***.

140. ***Igen v Wong and Others [2005] IRLR 258*** *and* ***Madarassy v Nomura International PLC [2007] IRLR 246***. The employment tribunal should go through a two-stage process, the first stage of which requires the Claimant to prove facts which could establish that the Respondent has committed an act of discrimination, after which, and only if the Claimant has proved such facts, the Respondent is required to establish on the balance of probabilities that it did not commit the unlawful act of discrimination. In concluding as to whether the Claimant had established a prima facie case, the tribunal is to examine all the evidence provided by the Respondent and the Claimant.

141. ***Madarrassy v Nomura International Ltd 2007 ICR 867*** - the bare facts of the difference in protected characteristic and less favourable treatment is not "without more, sufficient material from which a tribunal could conclude, on balance of probabilities that the Respondent" committed an act of unlawful discrimination". There must be "something more".

142. ***Nagarajan v London Regional Transport [1999] IRLR 572, HL***,-"The crucial question in every case was, 'why the complainant received less favourable treatment … Was it

on grounds of race? Or was it for some other reason, for instance, because the complainant was not so well qualified for the job?'"

143. ***Chief Constable of West Yorkshire Police v Khan [2001] UKHL 48, [2001] IRLR 830, [2001] ICR 1065, HL,*** - The test is what was the reason why the alleged discriminator acted as they did? What, consciously or unconsciously was their reason? Looked at as a question of causation ('but for …'), it was an objective test. The anti-discrimination legislation required something different; the test should be subjective: 'Causation is a legal conclusion. The reason why a person acted as he did is a question of fact.'

Harassment

144. **Section 26 of the Equality Act 2010 provides;**

(1) A person (A) harasses another (B) if— (a)A engages in unwanted conduct related to a relevant protected characteristic, and (b)the conduct has the purpose or effect of— (i)violating B's dignity, or (ii)creating an intimidating, hostile, degrading, humiliating or offensive environment for B. (4)In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account— (a)the perception of B; (b)the other circumstances of the case; (c)whether it is reasonable for the conduct to have that effect."

145. ***Richmond Pharmacology V Miss A Dhaliwal [2009] ICR 724.*** There are two alternative bases of liability in the harassment provisions, that of purpose and effect, which means that the Respondent may be held liable on the basis that the effect of his conduct has been to produce the prescribed consequences even if that was not a purpose, and conversely that he may be liable if he acted for the purposes of producing the prescribed consequences but did not, in fact, do so.

146. ***Grant v HM Land Registry & EHRC [2011] IRLR 748 CA*** emphasised the importance of giving full weight to the words of the section when deciding whether the Claimant's dignity was violated or whether a hostile, degrading, humiliating or offensive environment was created: "Tribunals must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment."

147. ***Pemberton v Inwood [2018] EWCA Civ 564*.** Underhill J "In order to decide whether any conduct falling within sub-paragraph (1)(a) of section 26 EqA has either of the proscribed effects under sub-paragraph (1)(b), a tribunal must consider both (by reason of sub-section 4(a)) whether the putative victim perceives themselves to have suffered the effect in question (the subjective question) and (by reason of sub-section 4(c)) whether it was reasonable for the conduct to be regarded as having that effect (the objective question). It must also take into account all the other circumstances (subsection 4(b)).

Time limits

148. Section 123 of the Equality Act 2010 provides as follows;

(1) [Subject to [sections 140A and 140B],] proceedings on a complaint within section 120 may not be brought after the end of— (a) the period of 3 months starting with the date of the act to which the complaint relates, or (b) such other period as the employment tribunal thinks just and equitable. (3) For the purposes of this section— (a) conduct extending over a period is to be treated as done at the end of the period; (b) failure to do something is to be treated as occurring when the person in question decided on it.

149. ***British Coal Corporation v Keeble [1997] IRLR 336***, it was held that the Tribunal's power to extend time was similarly as broad under the 'just and equitable' formula. However, it is unnecessary for a tribunal to go through the above list in every case, 'provided of course that no significant factor has been left out of account by the employment tribunal in exercising its discretion'

150. ***(Southwark London Borough v Afolabi [2003] IRLR 220). Robertson and Bexley Community Centre (trading as Leisure Link) 2003 IRLR 434CA*** - there is no presumption that time should be extended to validate an out of time claim unless the Claimant can justify the failure to issue the claim in time. The Tribunal cannot hear a claim unless the Claimant convinces the Tribunal that it is just and equitable to extend time so the exercise of the discretion is the exception rather than the rule.

151. ***Abertawe Bro Morgannwg University v Morgan [2018] EWCA Civ 640*** - the "such other period as the employment tribunal thinks just and equitable" extension indicates that Parliament chose to give the tribunal the widest possible discretion. Although there

is no prescribed list of factors for the tribunal to consider, "factors which are almost always relevant to consider are: (a) the length of, and reasons for, the delay and (b) whether the delay has prejudiced the Respondent".

152. The Court of Appeal made it clear in **Hendricks v Metropolitan Police Commissioner [2002] EWCA Civ 1686**, that in cases involving a number of allegations of discriminatory acts or omissions, it is not necessary for an applicant to establish the existence of some 'policy, rule, scheme, regime or practice, in accordance with which decisions affecting the treatment of workers are taken'. Rather, what she has to prove, in order to establish 'an act extending over a period', is that (a) the incidents are linked to each other, and (b) that they are evidence of a 'continuing discriminatory state of affairs'. The focus of the enquiry should be on whether there was an "ongoing situation or continuing state of affairs" as oppose to "a succession of unconnected or isolated specific acts". It will be a relevant, but not conclusive, factor whether the same or different individuals were involved in the alleged incidents of discrimination over the period. An employer may be responsible for a state of affairs that involves a number of different individuals.

DISCUSSION & CONCLUSIONS

Time Limits

153. Save for the unfair dismissal and discrimination arising from disability claim, which relates only to dismissal, every other claim is out of time. The claims are significantly out of time, almost all pre-date 5 January 2021, save for a single claim of direct disability discrimination relating to the offer of a 6 month unpaid career break on 1 September 2021. The Tribunal considered the overriding objective and fairness by weighing up the prejudice to the parties. The prejudice to the Respondent is essentially limited to the need to defend those allegations. However, the prejudice to the Claimant is also limited: she is left with other significant parts of her claim which are in time.

154. The Tribunal reminded itself that the discretion to extend time should only be exercised in exceptional circumstances The burden is on the Claimant to persuade the Tribunal that it is just and equitable to extend time. The Tribunal find that the Claimant has not discharged this burden and has provided no reason or explanation for the delay. The Tribunal note that she did not raise any grievance or issues pertaining to these claims at the time. The Tribunal find the claims are not part of a continuing act and have no bearing on the decision to dismiss, which was the last act in time and involved different decision makers.

155. However, having heard all of the evidence and for the sake of completeness, we set out below what our conclusions would have been if we had found it just and equitable to extend time in relation to the out of time claims of harassment, failure to make reasonable adjustments and direct disability discrimination.

Knowledge of disability

156. At the start of this hearing, the Respondent conceded that the Claimant was a disabled person at all relevant times. The Respondent did not concede that it had knowledge of the Claimants disability (depression) until 12 January 2021 upon receipt of a fit note stating depression. There is no dispute that the note provided on 12 January 2021 was the first fit note which referred to depression. The Claimant submits that the Respondent had knowledge of disability since around 2015, when the first mention of depression was recorded in the Respondents absence records. The Claimant relied principally on the management report which was prepared by Ms Stewart. The Tribunal noted the various references to depression within the table included in the management report.

157. Whilst the Tribunal found the table of absence unhelpful and the coding system inaccurate in its recording of absence reasons, it accepted the evidence of Ms Stewart in terms of her knowledge of the Claimant's disability prior to 12 January 2021. The Tribunal found Ms Stewart to be clear and detailed in her explanation, and it was apparent that she understood bereavement and depression to be very different things. Whilst she was aware of the Claimant's absences, which she related to bereavement she was unaware of the Claimant's depression. This position is supported by the Claimant's own use of language in an email to Ms Stewart on 5 January 2021, where she states *"that my GP has said that it sounds like I have depression and she has prescribed me anti-depressants".* The Claimant herself appears to be raising this as a new concern at that time.

158. The Tribunal conclude that the Respondent had knowledge of the Claimant's depression from 6 January 2021. Following receipt of the Claimant's email of 5 January 2021, which was received by Ms Stewart on 6 January 2021, the Tribunal concluded that Ms Stewart should have reasonably become aware of the Claimant's disability at that time. In the email of 5 January 2021, the Claimant set out that her GP thought she had depression. Whilst we accept the Claimant's reference to depression was uncertain, this was the first occasion that the word depression was mentioned in the context of her continuing

absence and the Tribunal find in light of the Claimants lengthy absence history relating to bereavement and emotional wellbeing that Ms Stewart ought to have become aware of the Claimant's disability at this time.

159. In light of these findings, the Tribunal conclude that in respect of all claims predating 5 January 2021, Ms Stewart and Ms Davies did not have relevant knowledge at that time. This includes the harassment allegations in June 2019, the direct disability discrimination claims relating to 5 January 2021 and all of the claims relating to the failure to make reasonable adjustments. The only direct disability discrimination claim not affected by the date of knowledge findings is that relating to the career break and Ms Johnson on 1 September 2021 although as per the Tribunal's conclusions above, this claim is out of time.

160. For these reasons the claims of disability-related harassment, direct disability discrimination and failure to make reasonable adjustments must fail as the Respondent and alleged individual discriminators did not have knowledge of the Claimant's disability nor of the substantial disadvantage in respect of the failure to make reasonable adjustments claim. However, even if there had been knowledge we consider the claims would not have succeeded in any event. We consider it appropriate, for the sake of completeness to set out our reasons as follows in this judgment.

Harassment – June 2019 referral to EH twice in period of 2 weeks

161. The allegation is that Ms Stewart harassed the Claimant by referring her to EH twice in a period of two weeks in June 2019. We note, the Claimant failed to put these allegations to Ms Stewart in cross-examination. The Claimant agreed to be referred to EH on the second occasion, in light of this, we agree with the submissions of the Respondent that this therefore cannot be characterised as unwanted conduct. Additionally, the Claimant in her evidence was explicit that she found Ms Thompson to be understanding and helpful from a mental health point of view. The Claimant welcomed the referrals and did not complain about them at the time. The referrals were not related to her disability and we accept that they were made to ensure that she was able to get back to work and that she had the necessary support that she required.

162. Had the Tribunal not concluded that the claims were out of time and that Ms Stewart did not have knowledge of disability at this time, it would have dismissed this claim for these reasons.

Failure to make reasonable adjustments

Keeping in touch over the phone – June 2019

163. The allegation is that the Respondent failed in its duty to make reasonable adjustments for the Claimant's disability by requiring her to keep in contact with Ms Stewart via telephone calls whilst on sick leave from June 2019 for approximately 5 weeks.

164. The Tribunal find the Respondent did not apply the PCP of requiring the Claimant to keep in contact via telephone calls over a period of five weeks. The Claimant and Ms Stewart only spoke once over the phone on 2 July 2019 to conduct the informal health and well-being review meeting as required by the Respondent's absence management policy. In cross-examination the Claimant conceded that it was appropriate to conduct the informal health and well-being review meeting on 2 July 2019 over the phone as per para 5.14.1 of the Respondent's absence management policy. The Tribunal conclude that this is acceptance of the fact that it would not have been reasonable to conduct an informal health and well-being review over the course of a series of emails going back and forth.

165. The Claimant has failed to demonstrate that any such requirement placed her at a substantial disadvantage, in terms of exacerbating her depression. The Claimant told Ms Stewart that she was emotional and preferred to stay in touch via email. The Tribunal conclude that these words alone were insufficient to give rise to knowledge of a substantial disadvantage, particularly in light of our conclusions relating to Ms Stewart's knowledge of the Claimants disability at that time.

166. Had the Tribunal not concluded that the claims were out of time and that Ms Stewart did not have knowledge of disability at this time, it would have dismissed this claim for these reasons.

Annual leave – 5 January 2021

167. The allegation is that the Respondent failed in its duty to make reasonable adjustments for the Claimant's disability by refusing her request for leave (unpaid or annual) on 5 January 2021. The substantial disadvantage relied upon by the Claimant is that her depression was exacerbated. The Tribunal conclude that the reason for the request for a period of leave at that time was due to the Claimant's concerns about her back and

working in a bedded unit. That was the reason she gave to Mr Zulueta in the first instance.

168. The Tribunal also conclude that it would not have been reasonable adjustment to grant the Claimant a period of leave at the time. The Tribunal base this on the evidence from Ms Stewart and Ms Davies who set out in detail that the service was in "crisis mode" at the time due to London moving into Tier 4 lockdown restrictions at that time. The Respondent had previously granted the Claimant a period of unpaid leave in January 2020 following the passing of her nephew, when service need was not as great. It is clear from this that that the Respondent did not simply apply a blanket policy.

169. Had the Tribunal not concluded that the claims were out of time and that Ms Stewart did not have knowledge of disability at this time, it would have dismissed this claim for these reasons.

Working from home – 5 January 2021

170. The allegation is that the Respondent failed in its duty to make reasonable adjustments for the Claimant's disability by refusing her request to work from home in January 2021.

171. The Tribunal conclude that the Claimant did not in fact request to work from home in January 2021. The Claimant was unable to point to any such request in the documentary evidence and as such the Tribunal agree with the Respondent's assertion that there can be no failure to make reasonable adjustments in respect of a request which was never made.

172. The Tribunal also took into account that the Claimant was not employed in a role which could reasonably be undertaken from home. The Claimant relied on a comparator who she stated was allowed to work from home; this comparator was a band 6 physiotherapist who the Claimant agreed in oral evidence was qualified to triage referrals remotely, conduct telephone assessments remotely and was someone who had a respiratory condition making them more susceptible to the effects of COVID-19. The Tribunal concluded that this was not a suitable comparator as this was someone who was not in materially the same circumstances as the Claimant.

173. Had the Tribunal not concluded that the claims were out of time and that Ms Stewart did not have knowledge of disability at this time, it would have dismissed this claim for these reasons.

Direct disability discrimination

174. The first three allegations where the Claimant alleges direct disability discrimination are a repeat of the failure to make reasonable adjustment claims namely Ms Davies and Ms Stewart's refusal to grant the Claimant leave on 5 January 2021 and Ms Stewart's refusal to allow the Claimant to work from home on 5 January 2021. The Tribunal address these three claims together as there is commonality in our reasons as to why it would have dismissed these claims. The Tribunal agree with the Respondent submissions that these claims are misconceived and in reality the Claimant's case is that these decisions were taken in spite of her disability not because of it.

175. The reasons for refusing leave were because of the pressing service need at the time and not because of the Claimant's disability, the Claimant accepted the same in cross-examination. Additionally, in respect of the working from home allegation the Claimant did not make such a request. The Tribunal therefore conclude that the Claimant has not proven facts from which a tribunal can conclude that discrimination has occurred.

176. Had the Tribunal not concluded that the claims were out of time and that Ms Stewart and Ms Davies did not have knowledge of disability at this time, it would have dismissed these claim for these reasons.

Ms Johnson informing the Claimant on 1 September 2021 that she should take and unpaid career break and if she refused, she would be subject to a final sickness review meeting

177. The documentary and witness evidence is clear that Ms Johnson did not say that the Claimant should take a six month unpaid career break, it was offered as a choice. The Claimant had previously indicated that she wished to take her career break, the fact that she was now being offered a career break cannot amount to a 'Shamoon' detriment, especially where the Claimant herself suggested that she take the first portion of the break as annual leave, something which the Respondent was amenable to. In actual fact, this had the favourable consequence of enhancing the Claimant's sick pay entitlement and resetting the clock from a sick pay entitlement perspective.

178. In respect of less favourable treatment the Claimant conceded under cross-examination that she had no reason to doubt Ms Johnson when she stated that she would have given the option to anyone with the same sickness concerns whether they were disabled or

not. The Claimant also accepted Ms Johnson's rationale that a career break would give her enough time to concentrate on getting well and enable the service to make appropriate arrangements to cover her post.

179. Had the Tribunal not concluded that the claim was out of time, it would have dismissed this claim for these reasons.

Unfair dismissal - The principal reason

180. The reason for the dismissal was the set of facts or beliefs held by the Respondent that led to the dismissal of the Claimant. In this case the set of facts or beliefs that led to dismissal was the Claimant's capability assessed by reference to the Claimant's health. This was summarised in the dismissal letter, which stated that *"given your history of absence and no prospect of a sustained return to work, and that it is not possible for the Trust to accommodate your level of absence it was my decision to terminate your contract of employment".* The Claimant did not put forward any alternative reason for her dismissal. The Tribunal concluded that the Claimant was dismissed by reason of capability, which was a potentially fair reason for dismissal. The Tribunal then went on to consider whether the Respondent dismissed the Claimant fairly for that reason in all the circumstances.

181. The Tribunal considered the evidence from the dismissing and appeal officers carefully. They did not think there was any prospect of a sustained return to work by reason of the Claimant's health. The Tribunal concluded that it was reasonable for them to take into account the history of the Claimant's absence over the preceding years and the Claimant's tendency to be over optimistic about her recovery and the prospect of a sustained return to work. The latest EH report, dated 11 November 2021, obtained shortly before dismissal did not state that the Claimant was fit to return to work rather, Dr Preston simply advised that it was the Claimant's *"stated wish to return to work on 7 December 2021 or thereafter on a phased return to work".* The Tribunal agree with the Respondent's submissions that this was not the same as concluding that someone was fit to return to work and that essentially Dr Preston was uncertain as to how the Claimant would settle into work and was advocating a "wait and see" approach. We are satisfied the Respondent genuinely believed the Claimant was incapable and had reasonable grounds for its belief.

182. The Tribunal then went on to consider whether the investigation was reasonable. The Tribunal reminded itself that it must avoid deciding what it would do and instead consider whether what the Respondent did in the circumstances was reasonable, taking account of its size, resources, equity and the merits.

183. At the time of the Claimant's dismissal, she had accrued over 1100 days of sickness absence across 19 episodes since 2015. On average over that same period the Claimant had been absent for 163 days annually. By the time of dismissal, the Respondent had held five formal sickness meetings. On each occasion a formal sickness meeting was postponed it was to allow for a new development in the Claimant's treatment and recovery. The Respondent sought the advice of occupational health throughout the lengthy investigation process. Alternative options to dismissal were properly considered including redeployment, and the formal offer of a career break. In light of all these factors, we concluded that the Respondent had carried out a lengthy, thorough and reasonable investigation.

Substantive fairness – band of reasonable responses

184. In O'Brien the Court of Appeal stated that a time comes when an employer is entitled to some finality. In the present case, the Respondent submitted that by 14 December 2021 the time had come when it was entitled to some finality.

185. Regarding the issue of the Claimant's physical attendance at the workplace on 7 December 2021 the Respondent's position is that such attendance did not constitute a return to work. The Respondent accepted that the Claimant had given notice of her intention to return to work some five weeks prior to seven December 2021. However, since that point the Claimant had made no attempt to communicate with Ms Stewart or the Respondent to organise a return to work. The Claimant was not expected at work, was not assigned any duties and none of her managers were aware of her attendance on site. The Claimant's position is that she was well enough to return to work on 7 December 2021 and that her dismissal was unfair as a result.

186. The Tribunal agree with the Respondents submission that the Claimant was not sufficiently well, to attend the workplace on 7 December 2021 but did so because she was worried that she would be dismissed at the final sickness review meeting.

187. The Tribunal conclude that the Respondent was entitled to look at the Claimant's overall attendance to consider the likelihood of satisfactory attendance in the future due to ill health. The Tribunal find that there was ample evidence before the Respondent that the Claimant was unlikely to be able to maintain attendance in the future, not only because of the medical evidence but because of the significant history of absences over the preceding years.

188. The Tribunal conclude that the Respondent made significant efforts to explore relevant alternatives to dismissal, this included the prospect of redeployment but the Claimant's position and that of Dr Preston was that redeployment would not assist. The Tribunal find that the Claimant was offered a six month career break but she declined indicating she would instead return to work. This was yet another occasion when the Claimant indicated that she was fit to return to work but did not ultimately do so.

189. The Tribunal considered the impact on the Respondent's Falls service and in particular noted the dismissal officer's comments in this regard, which were taken from Ms Stewart's Management Report. The Claimant worked as part of a relatively small team, which meant it was difficult to arrange absence cover for her work. Additional work was also created for management to plan for her absence. The Tribunal accept that there was increased pressure on the team for an extended period of time with no indication as to when this would be relieved and that this was unsustainable both for the Respondent and the Claimant's colleagues for the situation to continue as it was.

190. Both the dismissing and appeal officers knew of the facts upon which the Claimant relies and of the Claimant's position. They knew about her mental impairment. They took this information into account. On the evidence before the Tribunal, it concludes that both the dismissing and appeal officers did not act unreasonably and they reached a conclusion open to a reasonable employer in all the circumstances with regard to this issue.

191. Whilst a reasonable employer may well have adopted a 'wait and see' approach, given the Claimant's indication that she was fit to return to work, an equally reasonable employer in our view could choose not to given the facts before them. In the present instance, there was no suggestion that anything the Respondent could do would secure a return to work. The information before the Respondent suggested an uncertain future. Given the time that had passed and the prevailing circumstances we concluded that the Respondent acted fairly and reasonably in dismissing the Claimant.

192. Applying the authorities and reasoning set out above, the Tribunal concluded that the Respondent's decision to dismiss fell within the range of responses open to a reasonable employer given the facts of this case. It was not reasonable for the Respondent to wait any longer in all the circumstances. The Claimant was accordingly fairly dismissed.

Procedural unfairness

193. The Claimant complains of procedural unfairness in relation to her dismissal. The Claimant takes issue with the letter of 13 September 2021, arising out of a final review meeting on 1 September 2021. The Tribunal find that the Claimant was present at the meeting and thus fully aware of the options that had been presented to her. The Tribunal also conclude that this had no impact on the decision to dismiss taken months later on 14 December 2021.

194. The Claimant objects to the wording of a letter which invited her to a stage two meeting in December 2019 as the letter referred to her job being potentially at risk. The Claimant also complains about the fact the HR did not attend the December 2019 meeting. The Tribunal conclude that there is no doubt the reference to the Claimant's job being at risk would have caused her distress, however her dismissal took place almost two years later, following a further 11 sickness meetings. The Tribunal also conclude that this also had no impact on the decision to dismiss on 14 December 2021. The Tribunal find there was no requirement under the Respondent's absence management policy for HR to attend a stage two meeting .

195. The Tribunal do not find any procedural irregularities in relation to the dismissal process and find that these matters which the Claimant raises had no impact in relation to the Claimant's dismissal.

Discrimination arising out of disability – Section 15

196. Was the treatment i.e. the dismissal by reason of something arising in consequence of disability. The Respondent submits that a number of the Claimant's absences do not relate to disability, however, it accepts the absence from January 2021 onwards as being because of the Claimant's disability. The Claimant was dismissed because of her absence (which included specifically her absence from January onwards) and because there was no indication that her attendance had or would improve within an acceptable

period of time. That reason was in the Tribunal's view, sufficiently connected to her disability such that the treatment, her dismissal, was by reason of her disability.

Was there unfavourable treatment

197. There was no dispute between the parties that the dismissal was unfavourable treatment.

Justification – Legitimate aim

198. The final issue is whether the Respondent has shown that the unfavourable treatment was a proportionate means of achieving a legitimate aim, namely, to ensure the operational effectiveness of the service, balancing the workloads of the service fairly and ensuring the effectiveness efficiency and reliance of the service at a proportionate cost.

199. Firstly, the Tribunal considered whether the aims relied upon were legitimate and it concluded that they were. The aims relied upon are legal and not discriminatory in themselves. They represent a real and objective consideration pertaining to the Respondent. The aims were rationally connected to the dismissal. In other words, dismissal was potentially capable of achieving those aims.

200. The next question is whether the aims were proportionately achieved by dismissal. The Tribunal considered each of the aims and carried out the requisite balancing exercise. The Tribunal took account of the discriminatory effect of the treatment (the loss of the Claimant's job and career with the Respondent) as against the Respondent's reasons for applying the aims, taking into account all the relevant facts.

201. The Tribunal then considered whether the aims could be achieved by less discriminatory means. The Claimant had been absent for a lengthy period of time. By the point of dismissal there had been 11 formal sickness review meetings, 5 of these were final sickness review meetings. The Claimant knew that she was at risk of dismissal. The Claimant was aware of the Respondent's policies and trigger points.

202. The Tribunal balanced the effect of the aim (the Claimant's dismissal) with the Respondent's need to ensure the operational effectiveness of the service and concluded that dismissal of the Claimant was a proportionate means of achieving the aims relied upon.

203. The Claimant's absence impacted upon the Respondent in terms of managing the absence. The Respondent delayed taking action on a significant number of occasions and sought to encourage attendance and work with the Claimant to support her return to work.

204. The Respondent waited a reasonable period of time and noted the medical prognosis, which was unclear, something which was accepted by the Claimant. The Respondent carefully considered less discriminatory measures. Firstly, the Claimant had previously declined a formal offer of a six-month unpaid career break. Furthermore, granting the Claimant's request for a shorter-term career break would not align with the Respondent's objectives since there would be inadequate time to hire for a temporary fixed-term contract. Secondly, redeployment as a less discriminatory measure was not an appropriate option for the Claimant. Finally, adopting a "wait and see" approach regarding the Claimant's absences would not have served the Respondent's legitimate objectives. Such an approach would not have alleviated the strain on the Respondent's service. This is because the unpredictable and often short-term nature of the Claimant's absence patterns rendered effective planning unfeasible.

205. The Tribunal was acutely aware of the impact dismissal had upon the Claimant and it balanced that as against the impact upon the Respondent

206. The Tribunal considered matters objectively bearing in mind that the onus is on the Respondent to show that the dismissal was a proportionate means of achieving a legitimate aim. The Tribunal reached its own judgment as to whether the measure was reasonably necessary in light of the aims relied upon.

207. In the Tribunal's judgment, the Claimant was dismissed because of her absence and in the absence of a foreseeable return to work. It is clearly envisaged within the Respondent's policies that where circumstances arise in which an employee is unable to provide such service, the Respondent may, by following a defined process, reach the point where dismissal may be the outcome. The Respondent sought to apply their policies and procedures in a manner which was consistent with the way in which they treated others. There is no evidence that the Claimant was treated inconsistently. The Respondent had considered steps short of dismissal and given the Claimant a reasonable opportunity to improve her attendance.

208. Accordingly, it is our judgment that the Claimant's dismissal was a proportionate means of achieving a legitimate aim, and the claim under section 15 is accordingly dismissed.

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Employment Judge Akhtar

1 August 2023

Sent to the parties on:

25/10/2023

For the Tribunal Office: