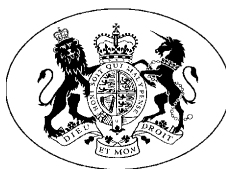

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Miss E Richardson	AND	EE Limited

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Plymouth **ON** 14, 15, 16 and 17 November 2023

EMPLOYMENT JUDGE N J Roper **MEMBERS** Ms H Scadding
Mr J Evans

Representation

For the Claimant: In person
For the Respondent: Miss A Rumble of Counsel

JUDGMENT

The unanimous judgment of the tribunal is that:
1. The claimant's claim for indirect disability discrimination is dismissed on withdrawal by the claimant; and
2. The claimant succeeds in her claims for discrimination arising from disability, and for failure to make adjustments; and
3. The claimant was unfairly dismissed.

RESERVED REASONS

1. In this case the claimant Miss Emma-Jayne Richardson, who was dismissed by reason of capability, claims that she has been unfairly dismissed, and that she was discriminated against because of a protected characteristic, namely disability. The claim is for discrimination arising from disability, and because of the respondent's failure to make reasonable adjustments. The respondent concedes that the claimant is disabled, but it contends that the reason for the dismissal was capability, that the dismissal was fair, and that there was no discrimination.

2. We have heard from the claimant, and from Mr Philip Hanson on her behalf. For the respondent we have heard from Mr Edward Hamilton, Mrs Helen Turner and Mr Paul Harrison. The respondent also adduced written statements from Mr John Garry and Mr Matthew Labib whose evidence was accepted by the claimant.
3. There was a degree of conflict on the evidence. We found the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after listening to the factual and legal submissions made by and on behalf of the respective parties.
4. <u>The Facts</u>
5. The respondent EE Limited is a communications company. It is a large national employer, and it is regulated by the Office of Communications, known as OfCom. This regulation includes its service levels relating to customer care. Not least for this reason the respondent has to ensure that it has a workforce which attends regularly and is capable of meeting service levels and customer demand. It has over 2,000 employees and agency workers nationwide. It has a Broadband Technical Support Team based in Plymouth with approximately 150 employees, and the same number in a similar Team in Darlington.
6. The claimant is Miss Emma-Jayne Richardson. She was born in 1981 and commenced employment with the respondent on 28 October 2019. Most recently she was employed in the Broadband Technical Support Team in Plymouth. She was a part-time worker and worked evening shifts. Her employment was terminated by reasons of capability (extended ill-health) on 6 July 2022.
7. The claimant has experienced mental health issues since about the age of 19, in other words for at least 20 years at the times relevant to this claim. This has more recently been diagnosed as panic disorder, and increased anxiety is a direct manifestation of this impairment. This condition gave rise to a substantial adverse effect on the claimant's normal day-to-day activities, including her mood, concentration, carrying out tasks, and taking part in social activities, in the sense that the effect was more than minor or trivial. The respondent was aware that the claimant suffered from this impairment throughout her employment.
8. The claimant signed a contract of employment which set out her duties as part of the Broadband Technical Support Team which provides customer support in that area. The respondent has an extensive number of policies in place, including a Sickness Absence Policy which is referred to in this judgment as the Policy. At all material times the claimant was aware of the existence of this Policy and the effect of its provisions. In addition, the claimant was a member of the CWU trade union, and she had access to support and assistance and representation from her union representatives.
9. The relevant provisions of the Policy include these. In the first place the introduction confirms that sickness absence has a major impact on the respondent's business and stresses the importance of having processes in place to monitor and manage absence. Employees are required to report sickness to their Line Manager, and to explain the reasons for absence. There will then be a Return-to-Work Interview upon the employee's return to work to discuss the reason for sickness and whether any recommendations or referral to Occupational Health might be necessary.
10. The Policy provides that: "If the amount of time you are taking off becomes unreasonable, then your manager may initiate the formal absence process to enable us to support you in improving your attendance record." The Policy suggests as a guide that the respondent would expect no more than three separate occasions of sickness absence in any rolling six months period, or 10 or more days of sickness absence over any rolling 12 months period, pro-rated for part-time workers. These are referred to as "Triggers" under the Policy, which means that exceeding these limits might trigger more formal action under the Policy. Once Stage One had been reached, the Stage Two triggers were then two instances of absence within six months, or seven days or more of absence within 12 months. Once this Stage Two had been reached, the remaining Stage Three triggers were then one further instance of absence within six months, or

three or more days of absence within 12 months The respondent reserved the right to vary these triggers depending upon levels of sickness in any particular department.

11. If the formal absence process was engaged under the Policy, then this was likely to result in any one or more of three Formal Meeting Stages. The likely outcome for Stage One was that a first absence caution will be given, or alternatively no action taken. The suggested outcome for Stage Two is that the First Absence caution will be extended, a second caution will be given, or no action is taken. The suggested outcome for Stage Three is that the second absence caution is extended, no action is taken, or the employee is dismissed. The respondent reserved the right to vary this process in exceptional circumstances. In circumstances where the employee was said to have "a condition covered by the Equality Act" and/or considered to have a disability then the respondent will make any necessary referral to Occupational Health to consider adjustments, but the Policy provides that such absence will be recorded and managed in the same way as any other absence.
12. Mrs Helen Turner, from whom we have heard, is the respondent's Implementation and Improvement Manager. It was Mrs Turner who decided to dismiss the claimant following a Stage Three Meeting which took place with the claimant on 6 July 2022. The claimant was represented by Mr Phil Hanson, her CWU representative, from whom we have also heard. Mrs Turner summarised the various absences and actions taken by the respondent which had preceded that hearing. These are not disputed by the claimant, and they are as follows.
13. Initially the claimant's sickness absence and attendance were good, but this began to deteriorate. Following informal discussions, a Stage One meeting was held on 21 April 2021 in respect of the following three instances of absence: eight calendar days from 23 March 2021 to 31 March 2021 for cold flu and Covid symptoms; four calendar days from 20 July 2021 to 24 July 2021 for D&V; and 14 calendar days from 12 March 2021 to 26 March 2021 for ear and throat infection. The respondent did not pursue a rigid or inflexible application of the Policy at that stage. It disregarded the first Covid absence, and it agreed to treat the third absence as Covid related. No further action was taken at that Stage One meeting, and no sanction was applied.
14. There was a further Stage One meeting on 29 September 2021 in respect of the following two absences: one day on 6 May 2021 following a Covid jab (which was disregarded) but 15 days for stress and anxiety from 27 August 2021 to 16 September 2021, which resulted in a Stage One sanction for 12 months. The claimant did not appeal against the sanction.
15. Subsequently the claimant was absent following a panic attack and anxiety for 31 calendar days from 19 October 2021 until 19 November 2021. This resulted in a hearing under Stage Two. Again, the respondent did not pursue a rigid or inflexible application of the Policy at that stage. The respondent decided to take no further action under Stage Two, other than to extend the Stage One warning for a further 12 months. The claimant did not appeal against this decision.
16. Subsequently the claimant was again absent following a panic attack and anxiety for 67 calendar days between 27 December 2021 and 3 March 2022. This resulted in a Stage Two sanction for 12 months. The claimant did then appeal against this decision, but the appeal was rejected, and the decision was upheld on 17 March 2022 by Mr Hamilton, an Operations Manager for the respondent, from whom we have heard. However, again the respondent did not pursue a rigid or inflexible application of the Policy at that stage. Mr Hamilton decided to adjust the Stage Two sanction and to make it less onerous for the claimant, and to seek to remove any unnecessary stress. He increased the number of trigger points which would be required to progress further under the Policy by increasing the number of triggers to three or more instances in six months, or 10 or more days within the 12 months period, which was equivalent to Stage One figures. Mr Hamilton decided to do this to assist the claimant even though she was already at Stage Two of the process.

17. The claimant was then absent again with further anxiety with effect from 17 May 2022. She was signed off until 12 July 2022, and this triggered the Stage Three meeting with Mrs Turner on 6 July 2022, at which the claimant was dismissed.
18. Throughout this process there had been considerable consultation with the claimant about her medical position. Apart from informal meetings and quarterly review meetings, the more formal meetings set out above under the Policy had taken place with the claimant whilst she was accompanied by her CWU trade union representative. When the claimant had requested a postponement of any meeting this had been accommodated by the respondent. The claimant agrees that there had been a thorough process during which she had been able to state her case and explain her position before any decision was taken.
19. In addition, the respondent had obtained an Occupational Health report, and it had put in place a number of types of support and had made a number of adjustments to support the claimant. The Occupational Health report was dated 29 January 2022 and it recommended a number of adjustments. These were an update to the claimant's "health passport"; a stress risk assessment; flexible breaks; longer mealtime break schedules; a move to alternative shifts; and the possibility of a specialist referral to a consultant by her GP. With the exception of this last recommendation, all of these adjustments were put in place. The claimant acknowledges that the respondent had supported her in this way, and at the time of the Stage Three meeting with Mrs Turner, she did not think it was necessary for her to be referred to Occupational Health for an update.
20. We now turn to the Stage Three meeting with Mrs Turner on 6 July 2022 in detail. As noted above, the background was that the claimant was already at Stage Two in the process under the Policy, and she had triggered the Stage Three hearing. She was aware that it might result in her dismissal, and she was accompanied by Mr Hanson of the CWU. The claimant's cumulative disability related absences were 15 working days; 31 calendar days from 19 October 2021 until 19 November 2021; and 67 calendar days between 27 December 2021 and 3 March 2022. The claimant then triggered the Stage Three hearing by going absent again with effect from 17 May 2022.
21. We have seen detailed minutes of this meeting which are agreed by the parties as being accurate. Mrs Turner conducted a very thorough review of the claimant's sickness absence, and the various informal and formal procedural stages and meetings under the Policy. The claimant made it clear that her sickness absence certificate was about to expire, and that she could take three days of annual leave, but would then be fit to return to work within a week on 12 July 2022. The claimant confirmed that there was no need for any further risk assessment because the job was not causing any stress. The claimant confirmed that she had accepted all of the adjustments recommended by Occupational Health and that there were no adjustments needed "other than time, nothing else that can help with mental health".
22. Mrs Turner and the claimant then discussed the arrangements for the claimant's likely return to work within the week on 12 July 2022, including the likely duties, the furniture, and the need for new passwords because she would be returning to a new building. The claimant confirmed that the respondent had been supportive, but that she would need further support on her return to work after her absence whenever she was suffering from mental health. She said that she needed the "freedom to walk away, give myself time, ticking clock in head". The claimant had already confirmed earlier in the meeting that she was attending a new course of mental health treatment in Plymouth, which were some treatment sessions arranged locally by the NHS which had not been available previously during the Covid pandemic. The claimant stated at the hearing words to the effect: "Last month I went to hospital and was admitted. That's when I got the referral and they got me in, through them I had a referral to Options and I'm now seeing well-being practitioner, so second session yesterday. I do now have mental health support that I struggled to get for nine months." The claimant also made it clear that she was feeling positive and feeling healthier, and this was in keeping with her desire to return to work the following week, because the new treatment would

support that return. At that stage of the meeting the claimant felt encouraged because her return had been discussed in a positive light.

23. Mrs Turner then adjourned the meeting at 11:21 am. She took detailed advice from the respondent's HR department, and she reconvened just over an hour later at 12:42 pm. At this stage Mrs Turner decided to dismiss the claimant. She gave her reasons at the meeting which included: "I have considered that you feel able to return to work at the end of this fit note on 12 July 2022, however you have stated that you can't guarantee that there won't be further instances of absence relating to this instance" … "I also considered the occupational health report dated 29/01/2022 and that the details provided that you have been taking appropriate related medication to your ongoing mental health issues they suggested a change of shift and OH breaks as and when needed, I believe this has been implemented for you and there were no other recommendations" … and "I conclude that you have been offered every opportunity to return to work and adjustments to your personal and health situation have been made. Therefore, consequently it is my decision to dismiss you from employment with the Company under the final stage of the Company's sickness absence policy and procedure."
24. Mrs Turner confirmed her decision and her reasons in a detailed letter to the claimant dated 8 July 2022. The claimant was afforded the right of appeal, and she appealed by way of an undated letter which resulted in her appeal hearing with Mr Harrison, the respondent's Operations Manager from whom we have heard. This appeal hearing took place on 15 August 2022 and the claimant was again accompanied by Mr Hanson her CWU representative. The claimant had raised three grounds of appeal. The first was that there were procedural flaws because of inaccuracies in the outcome letters. These related to typographical errors in a variety of dates. The claimant has since confirmed that she knew that these mistakes had been made, and that she was not misled or prejudiced by them, and this is no longer pursued as an allegation of unfairness.
25. The other two grounds of appeal were: "lack of reasonable adjustments to the sickness absence process" and "decision to dismiss was discriminatory", and these were discussed between the parties. With regard to adjustments, Mr Harrison discussed and recorded the support which had been offered to the claimant. There had been an adjustment to her hours, and a bespoke shift created for her. There were frequent well-being meetings and Occupational Health had been involved. The claimant confirmed that there had been no recommendation by Occupational Health to extend or remove any of the sickness absence triggers. In addition, the respondent had already extended triggers during the various stages. Mr Harrison was satisfied that the claimant had received a substantial amount of support during the sickness absence management process and there been ample time between the various stages for the claimant to have shown improvement.
26. The third ground of appeal was to the effect that because the claimant could not guarantee that she would not have further absences, and that this was factored into the decision to dismiss, this was discriminatory. Mr Harrison was of the view that there had been no pattern to the absence or frequency of the claimant's medical treatment, and it was difficult to determine whether her attendance would improve. He decided that the claimant worked in a busy environment and that when she was absent her team was put under extra pressure and there was no indication that she might improve her attendance moving forwards. He did not think the decision to dismiss was discriminatory because of the high level of support which had been put in place to assist the claimant in trying to maintain an acceptable level of attendance. The claimant confirmed that when she had appealed, she initially wished to have her job back, but now she was not sure because the process had made her lose faith in the respondent. She was not confident that she would receive support from the respondent moving forwards. She argued that the decision to dismiss her was unfair.
27. Mr Harrison did not agree, and he decided to uphold Mrs Turner's decision and he rejected the claimant's appeal.

28. There are also detailed contemporaneous minutes of the appeal hearing. In her letter of appeal the claimant stated: "For me the hardest thing about this dismissal coming when it has is that I am finally now getting the mental health support that I need. The company is aware that I have tried to access mental health support and have been unable to do so … I finally received a referral to the mental health team and have just started seeing a therapist on a fortnightly basis, something the company was also aware of prior to the meeting." The claimant also set out her concerns to the effect that the details of her return to work had been discussed at the dismissal meeting and that the reason for her dismissal appeared then to be based solely on the amount of absence which she had incurred.
29. The point about the claimant's new access to treatment does not appear to have been discussed at the appeal hearing. The appeal hearing was a rehearing rather than a simple review, and Mr Harrison seems to have missed the opportunity to make further enquiries and/or to establish whether and if so to what extent the claimant had improved or recovered. However, he does mention in his letter which confirmed his reasons for dismissing the appeal that he was pleased that the claimant was now receiving treatment. As for the second point, on behalf of the claimant Mr Hanson did raise his concerns at the appeal hearing to the effect that there had been an unnecessary and unfair discussion of the claimant's return to work, which was imminent, and by which the claimant was encouraged, only to find shortly thereafter that she had been dismissed.
30. The claimant subsequently initiated the Early Conciliation process with ACAS on 9 September 2022 (Day A), and the Early Conciliation Certificate was issued on 10 October 2022 (Day B). The claimant then presented these proceedings of 31 October 2022.
31. Having established the above facts, we now apply the law.
32. The Law
33. The reason for the dismissal was capability which is a potentially fair reason for dismissal under section 98(2)(a) of the Employment Rights Act 1996 ("the Act").
34. We have section 98 (4) of the Act which provides "…. the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) – (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and – (b) shall be determined in accordance with equity and the substantial merits of the case".
35. This is also a claim alleging discrimination because of the claimant's disability under the provisions of the Equality Act 2010 ("the EqA"). The claimant complains that the respondent has contravened a provision of part 5 (work) of the EqA. The claimant alleges discrimination arising from disability, and failure by the respondent to comply with its duty to make adjustments.
36. The protected characteristic relied upon is disability, as set out in section 6 and schedule 1 of the EqA. A person P has a disability if he has a physical or mental impairment that has a substantial and long-term adverse effect on P's ability to carry out normal day to day activities. A substantial adverse effect is one that is more than minor or trivial, and a long-term effect is one that has lasted or is likely to last for at least 12 months, or is likely to last the rest of the life of the person.
37. As for the claim for discrimination arising from disability, under section 15 (1) of the EqA a person (A) discriminates against a disabled person (B) if A treats B unfavourably because of something arising in consequence of B's disability, and A cannot show that the treatment is a proportionate means of achieving a legitimate aim. Under section 15(2), this 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.
38. The provisions relating to the duty to make reasonable adjustments are to be found in sections 20 and 21 of the EqA. The duty comprises of three requirements, of which the first is relevant in this case, namely that 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, there is a requirement to take such steps as it is reasonable to have to take to avoid that disadvantage. A failure to comply with this requirement is a failure to comply with a duty to make reasonable adjustments. A discriminates against a disabled person if A fails to comply with that duty in relation to that person. However, under paragraph 20(1)(b) of Schedule 8 of the EqA A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know – (a) in the case of an applicant or potential applicant, that an interested disabled person is or may be an applicant for the work in question; (b) … that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement.

39. The provisions relating to the burden of proof are to be found in section 136 of the EqA, which provides in section 136(2) that 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. However, by virtue of section 136(3) this does not apply if A shows that A did not contravene the provision. A reference to the court includes a reference to an employment tribunal.
40. We have considered the cases of: Pnaiser v NHS England [2016] IRLR 170 EAT; Basildon & Thurrock NHS Foundation Trust v Weerasinghe UKEAT/0397/14; Environment Agency v Rowan [2008] IRLR 20 EAT; Newham Sixth Form College v Sanders EWCA Civ 7 May 2014; Archibald v Fife Council [2004] IRLR 651 HL; Griffiths v Secretary of State for Work and Pensions [2015] EWCA Civ 1265; General Dynamics Information Technology Ltd v Carranza [2015] ICR 169 EAT; McCullough v ICI Plc [2008] IRLR 846; O'Brien v Ministry of Defence [2013] IRLR 315 SC; Kapenova v Department of Health [2014] ICR 884; Homer v West Yorkshire Police [2012] IRLR 601 SC; R (Elias) v Secretary of State for Defence [2006] EWCA Civ 1293; Cross v British Airways plc [2005] IRLR 423 EAT; Redcar and Cleveland Borough Council v Bainbridge [2007] IRLR 91; Hardy & Hansons plc v Lax [2005] IRLR 726 CA; O'Brien v Bolton St Catherine's Academy [2017] EWCA Civ 145; Spencer v Paragon Wallpapers Ltd [1976] IRLR 373 EAT; GE Daubney v East Lindsey District Council [1977] IRLR 181 EAT; BS v Dundee City Council [2013] IRLR 131 CS; and Polkey v A E Dayton Services Ltd [1988] ICR 142 HL. We take these cases as guidance, and not in substitution for the provisions of the relevant statutes.
41. We have also considered section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992, and in particular section 207A(2), (referred to as "s. 207A(2)") and the ACAS Code of Practice 1 on Disciplinary and Grievance Procedures (2015) ("the ACAS Code"). We note that it is arguable the ACAS Code may well not apply to long-term absence for ill health, (rather than repeated short-term absences akin to conduct).
42. Decision
43. The claimant's claims to be determined by this Tribunal were agreed at a case management preliminary hearing and set out in the Case Management Order of Employment Judge Hastie dated 21 June 2023 ("the Order"). The claimant's claims are for disability discrimination, (being discrimination arising from disability, and an alleged failure to make adjustments) and for unfair dismissal. The claimant had also pursued a claim for indirect disability discrimination under s19 EqA, but that claim was withdrawn at this hearing, and it is hereby dismissed on withdrawal by the claimant. We deal with each of the remaining claims in turn
44. The Claimant's Disability:
45. The disability relied upon by the claimant is panic disorder. For the reasons explained in findings of fact above, we find that at all material times the claimant experienced a mental impairment which had a substantial and long-term adverse effect on the claimant's ability to carry out normal day to day activities, in particular mood and concentration. There was a substantial adverse effect because it was more than minor or trivial, and there was a long-term effect because it lasted for at least 12 months.

46. The respondent has conceded that the claimant was a disabled person by reason of the impairment relied upon at all material times. We agree with that concession, and we so find.
47. General Observations – Applicable to All Claims:
48. Before we address each of the three claims individually, we make the following general observations with regard to what we see as two important failings by the respondent. In the first place we put on record that very much of what the respondent had done was extremely commendable. It has a detailed sickness and absence policy which it is entitled to apply in support of its clearly reasonable and legitimate aim to manage the effective attendance of its workforce and to maintain good customer service in a regulated industry. The respondent consulted fully with the claimant throughout, and it had put in place a number of adjustments to assist and to support the claimant. To her credit the claimant concedes that this was the case.
49. Our concerns nonetheless are twofold. In the first place, at the time of the dismissal, the respondent did not have to hand an accurate medical prognosis relating to the claimant's current condition and the likelihood of her maintaining good service. It is true that the respondent had to hand extracts from her medical records, the relevant diagnosis and past history, and details of the claimant's poor attendance record. However, at the time she was dismissed, the claimant had reported that she was attending a new course of treatment, and was feeling much better, and hoped that the new treatment would support her recovery. The second concern is linked to this, namely that the claimant had indicated that she was sufficiently well to return to work within a week and intended to do so. The practicalities of doing so by way of furniture, passwords and so on were even discussed and agreed. Despite the fact that the claimant had reported that her condition had improved, and that she was well enough to return to work, she was still dismissed. The decision appears to have been based on the claimant's past record, rather than what was the then current position. It may well have been the case that the respondent's concerns and suspicions that the claimant could not give continuing effective service may have been proven to be well founded. Be that as it may, a short delay of say two to four weeks would in all probability have clarified the position either way. In short, and in the vernacular, the respondent "jumped the gun".
50. We now deal with the three individual claims as follows.
51. Discrimination Arising from Disability s15 EqA:
52. The proper approach to section 15 claims was considered by Simler P in the case of Pnaiser v NHS England at paragraph 31: (a) Having identified the unfavourable treatment by A, the ET must determine what caused it, i.e. what the "something" was. The focus is on the reason in the mind of A; it involves an examination of the conscious or unconscious thought processes of A. It does not have to be the sole or main cause of the unfavourable treatment, but it must have a significant influence on it. (b) The ET must then consider whether it was something "arising in consequence of B's disability". The question is one of objective fact to be robustly assessed by the ET in each case. Furthermore: (c) It does not matter in precisely what order the two questions are addressed but, it is clear, each of the two questions must be addressed, (d) the expression "arising in consequence of" could describe a range of causal links … the causal link between the something that causes unfavourable treatment and the disability may include more than one link, and (e) the more links in the chain there are between the disability and the reason for the impugned treatment, the harder it is likely to be to establish the requisite connection as a matter of fact.
53. In Basildon & Thurrock NHS Foundation Trust v Weerasinghe the EAT held that the fact that unfavourable treatment might be loosely related to a person's disability, or the context in which the disability was manifested, is not the same as showing that the treatment was the result of something arising out of the person's disability.
54. As clarified in the Order, the claimant originally relied upon four allegations of less favourable treatment by the respondent. These are (by reference to the List of Issues in the Order): 5.1.1 - applying its sickness policy unfavourably and sanctioning the

claimant at every stage; 5.1.2 - being inflexible in the application of the sickness policy; 5.1.3 - applying the sickness policy in such a way that it exacerbated the claimant's panic and anxiety; and 5.1.4 - not removing absences due to mental health from the claimant's absence record. Paragraph 5.3 in the Order also refers to dismissal.

55. At this hearing the claimant confirmed that there may have been confusion as to the possible overlap between her allegations of unfairness and her claim for failure to make adjustments with the above allegations under s15 EqA. The claimant confirmed that the nub of her complaint under this section relates to her dismissal. We have therefore addressed the claimant's claim under section 15 EqA as relating to one allegation of less favourable treatment only, namely that of her dismissal. The respondent concedes that the claimant was dismissed and that she suffered less favourable treatment or detriment in this respect. We agree with that concession.
56. The next question to address therefore is whether the claimant's dismissal was because of something which arose in consequence of her disability. Again, the respondent concedes that the claimant's extended sickness absence was something which had arisen in consequence of her disability. We agree with that analysis.
57. The claimant will therefore succeed in her claim under section 15 EqA unless the respondent succeeds in the defence of justification to the effect that its actions were a proportionate means of achieving a legitimate aim.
58. The legitimate aim relied upon by respondent is set out in paragraph 6.6.1 of the Order (which related to the indirect disability discrimination claim which is now withdrawn). This same aim is also relied upon by the respondent under section 15 EqA, namely "having a workforce capable of attending regularly and doing the job". We accept that for a large employer in a regulated industry this is a legitimate aim. As we understand it this is not disputed by the claimant, and we so find.
59. As confirmed in paragraph 5.5 of the List of Issues in the Order we next consider whether the treatment was an appropriate and reasonably necessary way to achieve those aims; whether something less discriminatory could be done instead; and how the needs of the claimant and the respondent should be balanced.
60. <u>S 15 EqA Discrimination Arising from Disability- Justification</u>
61. In assessing the legitimate aim defence, the tribunal must consider fully whether (i) there is a legitimate aim which the respondent is acting in pursuance of, and (ii) whether the treatment in question amounts to a proportionate means of achieving that aim (<u>McCullough v ICI Plc</u>). As noted in <u>O'Brien v Bolton St Catherine's Academy</u> in cases involving capability dismissals, the aim will almost inevitably be legitimate. The central issue for the tribunal in the majority of cases, and particularly in this, is whether dismissal was a proportionate means of achieving that aim.
62. In <u>Hensman v Ministry of Defence</u> Singh J held that when assessing proportionality, while an ET must reach its own judgment, that must in turn be based upon a fair and detailed analysis of the working practices and business considerations involved, having particular regard to the business needs of the employer.
63. In addition, the defence of justification does not fail merely because there is a less discriminatory means of achieving the legitimate aim in question (<u>Kapenova v Department of Health)</u>. Budgetary considerations may justify discrimination if they are in combination with other reasons (<u>Cross v British Airways plc</u> and <u>Redcar and Cleveland Borough Council v Bainbridge)</u>. It is for the tribunal to weigh the reasonable needs of the undertaking against the discriminatory effect of the employer's measure and to make its own assessment of whether the former outweigh the latter (<u>Hardys & Hansons Plc v Lax</u>).
64. The test of proportionality is an objective one. A helpful summary of the proper approach is provided in <u>Bolton St Catherine's Academy v O'Brien</u> UKEAT/0051/15/LA: "[109] - A leading authority on issues of justification and proportionality is <u>Homer v Chief Constable of West Yorkshire Police</u> [2012] IRLR 601 in which Lady Hale quoted extensively from the decision of Mummery LJ in <u>R (Elias) v Secretary of State for Defence</u> [2006] 1WLR 3213. Lady Hale cited a passage in his judgment when Mummery LJ said: "151 … The objective of the measure in question 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. So it is necessary to weigh the need against the seriousness of the detriment to the disadvantaged group."

65. Mrs Turner and Mr Harrison were the decision-makers in this case, and although their evidence helpfully sets out the rationale for their decisions, it does not specifically address proportionality under the justification defence. We are unanimously of the view that the dismissal of the claimant at the time that it occurred was not a proportionate way of achieving the respondent's legitimate aim. A short delay of say two to four weeks would have clarified whether the claimant was well enough to return to work and to continue to fulfil her duties, in furtherance of that legitimate aim. We accept that the claimant may subsequently have proven unable to return to work at all, or for an acceptable period, in which case dismissal at that stage would have been proportionate and in pursuance of the stated legitimate aim. However, at the time that the dismissal took effect, balancing the effect on the claimant as against the need for the respondent to act in pursuance of its legitimate aim, a more proportionate course of action would have been to have waited only a short period of time in order to ascertain the true picture. If the claimant then proved able to give good service, the legitimate aim would have been met without the need to dismiss her. If the claimant proved unable to give good service, even despite the new treatment and beginning to feel better, then the dismissal at that stage would have been proportionate.
66. The burden of proof is on the respondent to justify the less favourable treatment by way of dismissal, which in our judgment it has not done. The claimant therefore succeeds in her claim that she has suffered from discrimination arising from her disability.
67. Reasonable Adjustments
68. The constituent elements of claims in respect of an alleged failure to make reasonable adjustments are set out in Environment Agency v Rowan. Before considering whether any proposed adjustment is reasonable, the Tribunal must identify: (i) the provision, criterion or practice applied by or on behalf of the employer; (ii) the identity of the non-disabled comparators (where appropriate); and (iii) the nature and extent of the substantial disadvantage suffered by the claimant.
69. Environment Agency v Rowan has been specifically approved by the Court of Appeal in Newham Sixth Form College v Sanders - the authorities make it clear that to find a breach of the duty to make reasonable adjustments, an employment tribunal had first to be satisfied that there was a PCP which placed the disabled person at a substantial disadvantage in comparison with persons who were not disabled. The tribunal had then to consider the nature and extent of the disadvantage which the PCP created by comparison with those who were not disabled, the employer's knowledge of the disadvantage, and the reasonableness of proposed adjustments.
70. As per HHJ Richardson at para 37 of General Dynamics Information Technology Ltd v Carranza UKEAT/0107/14 KN: "The general approach to the duty to make adjustments under section 20(3) is now very well-known. The Employment Tribunal should identify (1) the employer's PCP at issue; (2) the identity of the persons who are not disabled with whom comparison is made; and (3) the nature and extent of the substantial disadvantage suffered by the employee. Without these findings the Employment Tribunal is in no position to find what, if any, step it is reasonable for the employer to have to take to avoid the disadvantage. It is then important to identify the "step". Without identifying the step it is impossible to assess whether it is one which it is reasonable for the employer to have to take".
71. The claimant's claim relating to reasonable adjustments was set out in paragraph 7 of the List of issues in Order. The PCP relied upon is succinctly put as: "Sickness Absence Policy". As confirmed in Griffiths per Elias LJ, the correct formulation of this PCP is the requirement on the employee to maintain a certain level of attendance at work in order to avoid the risk of disciplinary sanctions. We find there was a PCP to this effect in place. This is not disputed by the respondent.

72. The claimant compares herself with other employees of the respondent who are not disabled and accordingly are less likely to have extensive absences from work such as to engage the Policy and trigger sanctions. The substantial disadvantage suffered by the claimant is that she had extensive absence from work which engaged the Policy and triggered sanctions which ultimately led to her dismissal. The respondent denies that it had knowledge of any such substantial disadvantage to the claimant, but we reject that assertion. The respondent knew of the claimant's disability and clearly knew that her extended absence because of it had triggered the various sanctions under the Policy. We find that the respondent was on notice and did have knowledge that the claimant's disability put her at a substantial disadvantage as a result of the above PCP.
73. The respondent's statutory duty to make such adjustments as were reasonable was therefore engaged.
74. Although it is not necessary for the claimant to specify what adjustments should have been made, the two steps (adjustments) which should have been taken to avoid the disadvantage which are relied upon by the claimant in the Order are these: 7.5.1: - "Removing the claimant's mental health absences from the application of the Policy"; and 7.5.2: "Not sanctioning her at every stage of the application of the Policy".
75. With regard to the first of these adjustments, we accept that if the respondent had removed all of the claimant's mental health related absences from the application of the Policy then this would have removed the substantial disadvantage caused to the claimant by the PCP. Put simply she would not then have been subject to the triggers under the Policy as a result of her mental health absences.
76. However, we do not accept that this was an adjustment which it was reasonable for the respondent to have to make. As noted above, the respondent has a legitimate aim of "having a workforce capable of attending regularly and doing the job". The Policy is an essential tool for the respondent in seeking to achieve that aim. If in general terms all disability-related absence were to be disregarded in the application of the Policy, the respondent would not then be in a position to address and/or manage the sickness absence of any disabled person. Such an adjustment would significantly and adversely affect the respondent's ability to manage the long-term sickness of its employees. Equally, in the individual specific case of the claimant, in respect of whom the decision to dismiss was effectively based on disability-related absence, such an adjustment would preclude the respondent from addressing and managing the claimant's lengthy absences which were unacceptable to the respondent.
77. For these reasons we reject the claimant's first assertion that the respondent failed to make an adjustment which was reasonable when it failed to disregard the claimant's mental health absences from the application of the Policy.
78. With regard to the second of these adjustments, we have already made a finding that the respondent did not sanction the claimant at every stage of the application of the Policy, and that therefore this adjustment was already in place. The respondent has not therefore failed to make this adjustment.
79. However, where the statutory duty to make adjustments has been engaged, it is not appropriate for the Tribunal to limit its considerations to just those adjustments which have been suggested by the claimant. In general terms the respondent acted commendably by putting in place a number of adjustments to help and to support the claimant. The adjustments which were recommended by the Occupational Health adviser were all implemented. These included: well-being meetings, quarterly absence review meetings, adjustment passports, the creation of the bespoke shift, stress risk assessments, rehabilitation counselling, and extra paid breaks. Indeed, the claimant had confirmed that she thought that the respondent had been supportive, and other than disregarding her absences and allowing continued time off there was nothing else which could help her.
80. However, in this case we find that there is one adjustment which was reasonable and which the respondent should have made. That was to delay the implementation of the Policy and the decision to dismiss for a short period of time sufficient to analyse whether the claimant was well enough to return to work (as she had confirmed), and if

so for how long. Failure to make that adjustment put the claimant at a substantial disadvantage because she was dismissed at a time when she was confident that she was well enough to return to work within the coming week.

81. For these reasons we find that the respondent failed to make this reasonable adjustment, and the claimant also succeeds in this claim.
82. Unfair Dismissal s98(4) of the Act
83. Finally, we deal with the claimant's claim for unfair dismissal.
84. We have considered section 98 (4) of the Act which provides "…. the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) – (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and – (b) shall be determined in accordance with equity and the substantial merits of the case".
85. The starting point should always be the words of section 98(4) themselves. In applying the section, the tribunal must consider the reasonableness of the employer's conduct, not simply whether it considers the dismissal to be fair. In judging the reasonableness of the dismissal, the tribunal must not substitute its own decision as to what was the right course to adopt for that of the employer. In many (though not all) cases there is a band of reasonable responses to a set of factual circumstances within which one employer might take one view, and another might quite reasonably take another. The function of the tribunal is to determine in the particular circumstances of each case whether the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair.
86. In general terms there are two important aspects to a fair dismissal for long term illness or for injury involving long-term absence from work. In the first place, where an employee has been absent from work for some time, it is essential to consider whether the employer can be expected to wait longer for the employee to return (see Spencer v Paragon Wallpapers Ltd). In S v Dundee City Council the Court of Session held that the Tribunal must expressly address this question and balance the relevant factors in all the circumstances of the individual case. Such factors include whether other staff are available to carry out the absent employee's work; the nature of the employee's illness; the likely length of his or her absence; the cost of continuing to employ the employee; the size of the employing organisation; and, balanced against those considerations, the "unsatisfactory situation of having an employee on very lengthy sick leave".
87. The second important aspect is that a fair procedure is essential. This requires, in particular, consultation with the employee; a thorough medical investigation (to establish the nature of the illness or injury, and its prognosis); and consideration of other options, in particular alternative employment within the employer's business. An employee's entitlement (if any) to enhanced ill health benefits will also be highly relevant.
88. The importance of full consultation and discovering the true medical position was stressed by the EAT in East Lindsay District Council v Daubney. Mr Justice Phillips stated: "Unless there are wholly exceptional circumstances, before an employee is dismissed on the grounds of ill-health it is necessary that he should be consulted and the matter discussed with him, and that in one way or another steps should be taken by the employer to discover the true medical position. We do not propose to lay down detailed principles to be applied in such cases, for what will be necessary in one case may not be appropriate in another. But if in every case employers take such steps as are sensible according to the circumstances to consult the employee and to discuss the matter with him, and to inform themselves upon the true medical position, it will be found in practice that all that is necessary has been done … Only one thing is certain, that is that if the employee is not consulted, and given an opportunity to state his case, an injustice may be done".

89. In this case there was a detailed, fair and reasonable procedure during which the claimant was fully consulted. There were a number of discussions including quarterly review meetings, before the more formal meetings under Stages I, 2 and 3 of the Policy. In each of these meetings the claimant had the opportunity to state her case in the presence of her chosen Trade Union representative. In particular, this applied at the Stage 3 hearing before Mrs Turner following which she was dismissed, and for her subsequent appeal. The appeal was held by Mr Harrison who was a senior manager who was independent of the first decision, and it was effectively a rehearing of the matter at a new hearing, rather than a simple paper review of the earlier decision.
90. This leads two remaining key questions to be addressed: first, whether the respondent had sufficient medical information before it, particularly with regard to the claimant's prognosis, and secondly whether the respondent could have been expected to have waited longer before making the decision to dismiss.
91. We have considered at some length the first concern as to whether the respondent had sufficient information as to the claimant's prognosis. At the time of her dismissal the claimant reported that she recently been referred to the Plymouth Mental Health Team and intended to start a new course of between six and ten episodes of treatment. She confirmed that she was well enough to return to work within a week and she hoped that this course of treatment would continue to have a positive impact on her health and enable her to recover. Although the claimant agreed that she did not feel that another referral to Occupational Health was necessary, nonetheless the respondent did not have to hand at the time of the claimant's dismissal sufficient information to know whether the claimant was well enough to come back to work (as she asserted), if so for how long, and whether and to what extent the new course of treatment which she had accessed would assist and maintain her recovery.
92. Secondly, we have considered the extent to which the respondent should have been expected to have waited longer before making the decision to dismiss the claimant. Again, we accept Mrs Turner's evidence to the effect that the claimant's absence rate was 59% in the previous financial year and 57% at the time of the decision. The claimant agreed that all reasonable adjustments had been made and put in place to support her. It may well have been the case that the claimant's assertion that she was well enough to return to work was overly optimistic, particularly given her past record. Nonetheless she was not given the opportunity, and despite being certified as fit to return to work within a week, she was still dismissed. The decision seems to have been based on her previous poor attendance record, rather than her capability at the time of the decision.
93. Mrs Turner discussed the practicalities of the claimant returning to work, and then took advice from the HR Department during the adjournment. On resuming the hearing after that adjournment, she confirmed her decision was to the effect that the claimant should be dismissed. This was on the basis that the respondent could not sustain the claimant's current absence level which was putting increased pressure on the claimant's team and having a negative effect on the respondent's customer service and service levels in a regulated area. The difficulty with this argument is that if the claimant had returned within a week, then she would have been back in the team assisting with that customer service. In these circumstances we are of the view that the respondent could and should have waited even a relatively short period of time before deciding whether the decision to dismiss was still appropriate.
94. We are conscious that the tribunal must not substitute its own decision as to what was the right course to adopt for that of the employer, and we are careful not to have done so. The function of the tribunal is to determine in the particular circumstances of each case whether the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair.
95. In this case we find that dismissal was not within the band of responses which were reasonably open to the respondent then faced with these facts. In short this is because (i) at the time of the claimant's dismissal she was confident that she well enough to

return to work within a week (which was consistent with the expiry of her GP's fitness to work certificate), and (ii) the respondent did not have to hand sufficient information as to the claimant's likelihood of maintaining acceptable attendance; and (iii) it was clear from the claimant's previous record that she had been able to return to work following previous periods of absence, and give effective service, before she had access to treatment and support, which were now available. In addition, we have found that the respondent's actions were discriminatory for the reasons set out above in relation to the other two claims.

96. We therefore find that bearing in mind the size and administrative resources of this employer, the respondent's decision to dismiss the claimant by reason of capability was not fair and reasonable in all the circumstances of the case.
97. Accordingly, we find that the claimant was unfairly dismissed, and she also succeeds in that claim.
98. Remedy and Resolution:
99. This hearing was listed to determine liability only. Directions will now be made as to the listing of a hearing to determine the appropriate remedy. The parties are encouraged to seek to resolve their differences between them, and to agree a resolution. To that end we encourage the parties to be realistic, and we remind the parties that we will consider the application of Polkey and Chagger v Abbey National Plc & Anor [2009] EWCA Civ 1202 in the calculation of potential compensation.
100. For the purposes of Rule 62(5) of the Employment Tribunals Rules of Procedure 2013, the issues which the tribunal determined are at paragraph 1; the findings of fact made in relation to those issues are at paragraphs 4 to 30; a concise identification of the relevant law is at paragraphs 32 to 41; and how that law has been applied to those findings in order to decide the issues is at paragraphs 43 to 97.

Employment Judge N J Roper
Date: 17 November 2023

Judgment sent to Parties: 8 December 2023

For the Tribunal Office