EMPLOYMENT TRIBUNALS

Claimant: **E Glasby**

Respondent: **Edge Hill University**

HEARD AT: Manchester (by video platform) **On:** 23-27 September 2024

BEFORE: Employment Judge Batten
S Howarth
A Ramsden

REPRESENTATION:
For the Claimant: In person
For the Respondent: K Barry, Counsel

JUDGMENT having been sent to the parties on 1 October 2024 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

1. In April and May 2021, this case was heard by Employment Judge Warren sitting with non-legal members, A Jarvis and S Anslow. By a majority decision (Employment Judge Warren dissenting) the claimant succeeded on certain aspects of her claims. The successful matters were the subject of an appeal to the Employment Appeal Tribunal ("EAT") which overturned all the successful points by a judgment handed down on 6 December 2023.

2. Those matters overturned by the EAT, were remitted to be heard afresh by a different Tribunal. Hence this hearing was listed. The remit of this Tribunal is specifically defined as being not to interfere with the findings of fact of the original Tribunal but instead to review and re-hear, where appropriate, evidence on the conclusions reached by the Warren Tribunal only in respect of those successful points which were overturned on appeal.

Evidence

3. In order to conduct this hearing, the Tribunal was provided with copies of the original Tribunal bundle, relevant case management documents, the statement of agreed facts and the agreed list of remitted issues. In addition, the Tribunal were provided with copies of all the original witness statements of the parties. For this hearing, the claimant tendered a supplemental witness statement dealing with the remitted points in further detail.

4. This Tribunal heard oral evidence from the claimant and from each of the respondent's witnesses as follows:

   - Philippa Dunning, one of the claimant's line managers;
   - Philip Jones, the other of the claimant's line managers (the claimant did two jobs at the time);
   - Faye Sherrington, Director of Student Services;
   - Mark Allinson, who signed off the claimant's dismissal;
   - Steve Igoe, who dealt with the appeal.

5. All witnesses gave oral evidence from written witness statements and were each subject to cross examination.

List of Issues

6. On 20 February 2024, there was a case management preliminary hearing before Regional Employment Judge Franey, at which the remitted issues were clarified, and a list of those remitted issues was agreed with the parties. The agreed list of issues appears in the bundle starting at page 43gg but, for ease of reference, the agreed list of issues is set out below.

Complaints and Issues for Remitted Final Hearing

Breach of duty to make reasonable adjustments – sections 20 and 21 Equality Act 2010 ("EqA")

1. Did the respondent have the following physical features of premises and/or provisions, criteria or practices?

a. The doors to the Student Services Building known as the Catalyst building were closed unless opened by someone using them;

b. Not allowing employees to use additional annual leave which they have purchased to cover short-term periods of sickness absence; and

c. Not disregarding periods of disability-related sickness absence when applying the sickness absence policy.

2. If so, did those matters place the claimant at the following substantial disadvantages?

a. The claimant was able to open the doors to the Catalyst building only after a struggle which caused her pain, particularly at her mastectomy site, meaning that she was unable to wear her prosthesis;

b. The claimant was more likely to have sickness absence and therefore to hit trigger points for formal action under the respondent's policies if disability-related absence was not discounted;

c. The claimant was more likely to have sickness absence and therefore to hit trigger points for formal action under the respondent's policies if she was not allowed to use annual leave instead of sick leave.

3. If so, can the respondent show that it did not know and could not reasonably have been expected to have known of the substantial disadvantage? In relation to (a) the claimant relies on a conversation she had with Mrs Sherrington in May 2018 before the move to the Catalyst building.

4. If not, did the respondent fail in its duty to make such adjustments as it would have been reasonable to have made to remove the disadvantage? The adjustments for which the claimant contends are as follows:

a. Fitting a pad or some other electronic means of opening these doors;

b. Discounting disability-related sickness absence for absence management purposes;

c. Allowing her to take purchased annual leave instead of taking sick leave.

Discrimination arising in consequence of disability – section 15 EqA

5. The respondent accepts that by dismissing the claimant it subjected her to unfavourable treatment because of something which arose in consequence of her disability. It accepts that it knew that the claimant was a disabled person. The only issue to be determined is whether the respondent can justify dismissal as a proportionate means of achieving one or more of the following legitimate aims:

a. Ensuring the appropriate service of and, where necessary, cover for the information desk;

b. Ensuring the desk assistant's post could carry out additional responsibilities, such as providing support to the Executive Officer in health and safety measures;

c. Ensuring Student Services, particular the Money Advice Service, had the staffing resource required to provide support services to students of the university;

d. To monitor, encourage and maintain acceptable levels of attendance for employees across the university to ensure that high service levels are provided across the academic and business functions of the respondent;

e. To support employees by ensuring records of sickness absence are accurate and transparent;

f. To ensure that all of the respondent's employees are not placed under additional burdens in terms of workload as far as possible.

Time Limits – section 123 EqA

6. In relation to all matters above save in relation to the decision to dismiss the claimant, can the claimant show that:

a. any contravention of the Equality Act formed part of an act extending over a period ending less than three months before presentation of her claim, allowing for the effect of early conciliation; or

b. that it would be just and equitable to allow a longer period for presenting the claim?

Remedy

7. Insofar as any of the above matters are well-founded and found to be within time, what is the appropriate remedy in terms of:

a. compensation for injury to feelings;

b. financial losses;

c. interest?

Agreed facts

7. There was a statement of agreed facts which was arrived at after discussion with Regional Employment Judge Franey and further negotiation between the parties. The statement of agreed facts appears in the bundle at page 43www onwards and is reproduced as an Annex to this Judgment. The parties have agreed that the statement of agreed facts is binding on this Tribunal.

Applicable law

8. The applicable law is set out in the original Tribunal judgment and also in the judgment of the Employment Appeal Tribunal and is therefore not repeated here.

Conclusions

9. This Tribunal has applied the agreed statement of facts and the applicable law to determine the remitted issues in the following way.

The reasonable adjustments complaint

10. The Tribunal first looked at the complaint about breaches of the respondent's duty to make reasonable adjustments. The claimant here contended for three aspects of her employment terms and conditions where this had arisen:

    (1) The doors to the Student Services building;

    (2) The issue of whether the claimant should be allowed to purchase additional leave in order to cover short-term periods of sickness absence; and

    (3) Whether periods of disability-related sickness absence should be disregarded.

11. The Tribunal were mindful of the particular wording of the agreed List of Issues and what it was the claimant specifically contended for.

Doors to the Student Services building

12. This Tribunal heard a great deal of evidence about the doors – probably more than it heard on anything else.

13. The provision, criterion or practice which the claimant says was in place at the respondent was that the doors to her office, in the new Catalyst Building, were closed and had to be manually open. The respondent accepts that, when the Catalyst building was built and started to be used, and when the claimant returned to work, that was indeed the case.

14. The claimant says the substantial disadvantage to which she and other disabled people would be put to was that it was a struggle to open the doors. The respondent accepts that it would have been a struggle for the claimant to open the doors in question.

15. The claimant also said that it caused her pain, particularly in her mastectomy site. The Tribunal only had the claimant's word for this effect. There was no medical evidence to support that contention. Instead, in the bundle at pages 174-175, is a report from Dr Shah (the respondent's Occupational Health physician) who says that it is not possible to say whether there is any causative link. The Tribunal took note of that medical opinion, which was not challenged by the claimant.

16. The claimant said that a reasonable adjustment to alleviate her pain would have been to fit a push-pad or some other electronic means of opening the doors. The claimant was very specific and careful in describing the adjustment contended for. The respondent's response was that fitting such a device was not a reasonable adjustment, firstly because it would cost £11,000 if it could be done and secondly it was not a reasonable adjustment because it was later discovered that it could not in fact be done due to the structure of the new building. The Tribunal considered this to be a surprising thing to hear given the expectation that those constructing a building would have in mind the issue of accessibility to all areas. However, there was no evidence from the claimant to rebut the respondent's contentions as to the reasonableness

or otherwise of the expense and the inability to make such an adjustment in any event.

17. The Tribunal considered that it was not a reasonable adjustment to expect the respondent to fit a pad or some other electronic means of opening the doors where it simply was not possible so to do, and in that regard, the Tribunal were bound by paragraph 61 of the agreed facts.

18. The Tribunal also took account of the respondent's evidence that they would have looked into, and did look into redeployment of the claimant. In addition, the respondent considered moving the claimant's workstation, as alternatives. However, these were not contended for as reasonable adjustments and were not looked into in detail because the claimant was off sick and eventually her employment was terminated. In light of the claimant's absence, other alternative reasonable adjustments simply could not be progressed.

19. In concluding that the installation of a push-pad or some other electronic means of opening the doors was not a reasonable adjustment, the Tribunal also take into account surrounding facts. The claimant returned to work in the Catalyst Building on 3 September 2018. She did not, at that time, raise the doors as an issue and did not raise them in any manner until after she went off sick, on 20 September 2018.

20. It is important to note that, previously, the claimant had been involved in discussing and planning a number of adaptations to improve accessibility at the Catalyst Building. She attended a meeting on 3 September 2018, which was her first day back at work, but she did not raise the doors then even though the claimant must have used the doors shortly before that meeting and quite possibly more than once because she came into work and the meeting took place at work. Nevertheless, the claimant did not raise any issue with the doors in question nor did she mention them as being a problem.

21. On 17 September 2018, the respondent conducted formal return-to-work meeting with the claimant, at which she did not raise the doors and, indeed, on 14 December 2018, there was a further meeting with the claimant at which she declared that the doors issue had been "resolved". The Tribunal accepted that the doors issue had been resolved by December 2018 and the respondent had discharged its duty to make reasonable adjustments in that regard because, once the claimant raised the doors on 20 September 2018, the respondent immediately adopted a practice of wedging the doors open for those periods when the claimant was working and/or for her hours of work. The Tribunal found this to be a reasonable adjustment (albeit a temporary one) in the circumstances. On a balance of probabilities, the claimant must have agreed with that adjustment because she declared the matter to be resolved and she did not dispute that wedging the doors open for her was one way of fixing the problem, albeit temporarily.

22. Thereafter, the claimant did not complain at any time, even when the respondent's managers forgot to wedge the doors open on one occasion.

That omission was raised by the claimant only subsequently, in the course of these proceedings.

23. The simple fact was that a more permanent solution to the issue of the doors could not be found, partly because of the design and construction of the Catalyst building itself and, in addition, because the claimant was off sick and then her employment was terminated so that she was not around or available to consult on the matter or progress it.

24. The Tribunal further noted, when considering the background to this issue, and the lack of complaint by the claimant at the material time, that it was the claimant's evidence that she used the doors on a minimum of four occasions per day – twice (to go in and out of work) and then twice each time she went to the toilet and back (which was outside of the doors in question). The claimant's evidence was that she would need to go to the toilet more than once in her 2-hour shift and possibly up to 3 times. If she went to the toilet 3 times per shift, she would need to use the doors 8 times, one way or another in a 2-hour shift. The claimant worked at least 12 of those 2-hour shifts before she raised a problem with the doors, which means that the claimant had used the doors around 96 times without mentioning a problem with them to anybody at all.

Using annual leave for sickness

25. The Tribunal found that, in the past, several managers had allowed the claimant to use her annual leave to cover certain sickness absences. However, the Tribunal considered that the respondent has a provision criterion or practice of not allowing employees to use additional annual leave which they have purchased to cover short-term periods of sickness absence, and that to allow such, as the claimant contended for, would not be a reasonable adjustment. It was not an adjustment that could be said to facilitate a return to work, nor would it make it easier for the claimant to do her job. Rather, the Tribunal considered that the use of annual leave to cover sickness absence meant that the claimant's absence figures were not accurate in terms of the reason for absences and thereby masked the true extent of the claimant's sickness. The claimant has recorded 1,187 days of sickness absence which is a large number. If, in past years, the claimant has been using annual leave to cover some of her sickness then the figure of 1,187 must likely be understated.

26. The Tribunal considered that an employer is entitled to obtain true and accurate absence records especially in the case of sickness, so that it can identify any issues, manage sickness absence, apply its absence policies consistently as appropriate and thereby support an individual employee. Allowing the use of annual leave to cover sickness is therefore not a reasonable adjustment.

Discounting disability absence

27. The Tribunal considered that it is not a reasonable adjustment to ignore disability-related absence altogether when accounting for absences from

work. However, that is what the claimant contended for – discounting all her disability-related sickness absence for absence management purposes. The Tribunal considered that such an approach could not amount to a reasonable adjustment and indeed could cause difficulties for the management of absences. The effect of such an adjustment would be that an employee who was disabled could have a whole year of absence, for disability-related reasons, and a respondent could take no action under its absence policies if none of the absences were liable to be addressed. The effect would be that, although a disabled employee was off for the whole year, they could in effect have a 100% attendance record because the disability-related absence would be discounted, and that outcome would be nonsensical.

28. In evidence and submissions, the claimant pointed to the fact that, in 2018, she had an extended period of absence for breast cancer - 274 days. The Tribunal did not agree with what the claimant propounded – that this period should be entirely disregarded, as a one-off, or because it was an absence for cancer (which is a deemed disability). It was clear from the claimant's evidence that the absence in question was not a one-off and that her cancer-related absence would and did continue. In fact, the claimant made much of that possibility when attempting to persuade the Tribunal that all cancer-related absences should be discounted. The Tribunal saw evidence of further sickness absence relating to the claimant's prosthesis and mastectomy site which the claimant described as relating to her cancer. In addition, Dr Shah concluded that such absences would continue, and the claimant's evidence accorded with that.

29. Reviews of absence are reasonably required, and employers often put in place trigger points to provoke a review. Trigger points would not be met if disability-related sickness absence is discounted, and a respondent would have no control over the amount or degree of absence to be tolerated from disabled employees. In those circumstances, the Tribunal concluded that discounting all disability-related absence did not amount to a reasonable adjustment.

30. In light of the above conclusions, the reasonable adjustment complaint fails.

<u>Discrimination arising from disability - the claimant's dismissal</u>

31. The respondent has accepted that, by dismissing the claimant, it subjected her to unfavourable treatment because of something which arose in consequence of her disability, namely her sickness absence record. The respondent knew that the claimant was a disabled person at the material time. The issue to be determined is whether the respondent can justify the claimant's dismissal as a proportionate means of achieving a legitimate aim.

32. The respondent contended for 6 aims – see the list of issues above, points 5 (a) to (f). The Tribunal considered all 5 to be legitimate aims, noting that the claimant did not challenge any of them at this hearing. The claimant's dismissal arose in the context of the claimant's record of at least 1,187 days of absence over 49 instances. The respondent's figures showed that the figures

produced an average of 70 days' sickness per annum and that, in the 5 years leading to the claimant's dismissal, that average went up to an average of 99 sick days per annum.

33. The Tribunal took account of the agreed facts (paragraphs 45 and 46) and also noted the medical evidence on this aspect (pages 164-165 of the bundle). Dr Shah had concluded that it was entirely possible that the claimant could have a recurrence of her condition in the future and may require more time off. The level of absence was unsustainable and not likely to improve. The respondent contended that, given the claimant's absence record and history, there would be more sickness absences, and the claimant accepted on a balance of probability that that was a reasonable view to take.

34. The Tribunal considered that the impact on the respondent was significant. A backlog of work grew. Cover was required for the claimant's work, and not just for the lunch hours, although there was much focus on lunch hours in the evidence at this hearing. When the claimant was absent, the fact was that other members of staff had to do her work, and they were drafted in, thereby leading to backlogs of work elsewhere.

35. The Tribunal also took account of the fact that sickness absence occurs usually at short notice or no notice. It is not something that ordinarily can be planned for. An organisation's managers are necessarily distracted from whatever they are doing because they have to attend to the consequences of sickness absence immediately, to ensure cover or to notify those affected. Other employees' work is disrupted because those employees have to be moved at short notice to provide the cover required.

36. In light of the above considerations, and in the context of the claimant's lengthy sickness absence record, the Tribunal accepted the respondent's submission that the situation had become unsustainable. Dismissal of the claimant, in those circumstances, was justified for each and all of the 5 aims, which the Tribunal considered to be legitimate aims. Dismissal was a proportionate means of achieving the respondent's legitimate aims and in particular aims a), c) and f) so the claimant's dismissal was justified.

Time Points

37. Even though the reasonable adjustments complaints have failed, the Tribunal considered that the complaint about the respondent refusing to allow her to use annual leave or additional leave to cover sickness absence was approximately 22 months out of time. The claimant knew that this facility was refused in April 2017. In addition, the issue of disregarding disability-related absence was refused on 14 December 2018 at the latest, which makes that complaint at least 7 weeks out of time.

38. The Tribunal found that there was no reason to extend time on a just and equitable basis for these 2 complaints. The evidence was that the claimant had the benefit of advice from her trades union throughout this matter. The Tribunal considered it reasonable to assume that such advice would have included advice on limitation and the need to present a claim within the

statutory 3 months. This is evident from the fact that the claimant told this Tribunal that she had been advised to apply to ACAS for early conciliation, which itself suggests that somebody somewhere had thought about limitation and/or knew that time was running, and so advised the claimant that she needed to progress her complaints via ACAS early conciliation. The claimant gave the Tribunal no reason for why she had not done so earlier.

39. In respect of the complaint about the doors in the Catalyst building, the Tribunal considered this to be in time, albeit that the particular complaint has been dismissed for other reasons.

40. The respondent contended that time for presentation of a claim in relation to the doors started to run on 20 September 2018, when the claimant first notified them of an issue. The Tribunal did not agree with that analysis. In fact, the respondent took some time to investigate the matter and discovered the cost would be around about £11,000 (see bundle page 249), and that cost was discovered around 23 January 2019 when the respondent became aware of the likely cost. Thereafter, the respondent considered its position for some time. In the meantime, the claimant's employment terminated on 5 February 2019. The respondent's decision not to do anything to adapt the doors for the claimant came after her dismissal. In those circumstances, the Tribunal considered that it was arguable that time (for the doors complaint) started when the respondent decided not to take an action. However, this is academic because the compliant fails for not being a reasonable adjustment.

41. In conclusion, the Tribunal considered that the respondent had been very accommodating of the claimant and her circumstances. It had made a number of other reasonable adjustments, in this case, about which the Tribunal has not been concerned due to the limits of the remission. However, the Tribunal considered that it was important to highlight that the respondent made a reasonable adjustment to its sickness absence policies, to the claimant's benefit, including holding the claimant at Stage 3 of the absence process over a period of approximately 2 years. The effect of this adjustment was to delay the claimant's dismissal in circumstances whereby other employers would not have been so accommodating and would not have let matters go on for so long. The Tribunal considered, from its industrial experience, that this respondent had gone above and beyond to accommodate the claimant for a long time, and that it was reasonable to conclude that such a level of sickness absence could not continue indefinitely.

_____

Employment Judge Batten
Date: 19 November 2024

REASONS SENT TO THE PARTIES ON:

2 December 2024

FOR THE TRIBUNAL OFFICE

Public access to employment tribunal decisions
Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

Annex

Statement of Agreed Facts

1. On 1 July 2003 the claimant's employment commenced on a permanent basis as an Equal Opportunities Support Worker in Student Services. She had begun work for them originally on 1 February 2002 as a temporary employee. Initially she worked in an open plan office and access her working area through two automatic bifold doors. She had a manual height adjustable desk. She worked part time (10) hours per week 36 weeks term time.

2. On 1 July 2005 the claimant started to work under a separate contract for the Faculty of Education. This contract ran for 52 weeks of the year and 25 hours a week.

3. On 6 September 2005 at the behest of the respondent responsible for her administration assistance work, an ergonomic report was prepared (pages 70-76). This explained in detail the claimant's medical conditions. She had been involved in a road traffic accident in 1985 when her leg was hit by a passing car whilst she was on a motorbike. This had led to damage to her nerves and the blood supply which affected the left-hand side of her body. She had been diagnosed with reflex sympathetic dystrophy syndrome, and other conditions related to it. She experiences body cramps when she can become paralysed and less severe muscle cramps in her stomach when leaning over. She had circulation problems. She used a motorised chair on a permanent basis.

4. Six days later the respondent received funding through Access to Work totalling £800 to provide three desks for different parts of the building – in particular Access to Work believed that the claimant may have to work in the three administrative offices. It was clarified in a meeting on 16 September that she would not be required in the offices and that work would be brought to her at reception, which had been the same position as the previous postholder.

5. Later, radiant heaters were installed, and the claimant's desk in reception was raised. The claimant was supplied with a headset to use for answering the phones. The claimant became unwell and signed off from work on 7 November 2012.

6. On 26 March 2013, following a home visit on 12 March 2012, an Occupational Health physician report was concluded.

7. Between 19 March and 1 July 2014, the claimant was absent from work due to reflex sympathetic dystrophy syndrome. This was for 105 days. She was seen by the Occupational Health department on 3 September 2014. She was found to be fit for duties with a recommendation of a risk assessment to improve her working environment and enhanced disability access.

8. Between 1 October 2015 and 8 November 2015, the claimant was absent from work due to thrombosis for 39 days. This was unrelated to her disability.

9. Between 28 April and 29 April 2016, the claimant was absent from work due to a shoulder injury, unrelated to her disability.

10. Between 13 June and 17 June 2016, the claimant was absent from work due to a seizure, for five days.

11. Between 30 August and 4 September 2016, the claimant was absent from work with a urinary tract infection for six days.

12. On 15 September 2016 there was a sickness review meeting leading to a stage three absence review on 15 September 2016. (Outcome at pages 105-107).

13. The respondent had 2 sickness absence policies – one for short term and intermittent absences, and a second for long term absences. There is further detail later in these reasons.

14. The claimant was advised that absence from work between 1 October 2015 and 8 November 2015, which totalled more than 15 working days, involved stage one of the intermittent/short-term policy for sickness absence. The next absence, from 28 April 2016 to 29 April 2016, resulted in stage two being met. Her absence from 13 June 2016 to 17 June 2016 led to stage three being met. It was pointed out to the claimant that a subsequent absence from 30 August 2016 to 4 September 2016 should have invoked stage four of the intermittent/short-term procedure. It had been decided, however, that she would remain at stage three of the intermittent/short-term procedure for a rolling 12 months until 5 September 2017. The claimant was advised that any subsequent absence in the following 12 months would be reviewed under stage four of the intermittent/short-term procedure. This was described as a reasonable adjustment to ensure that a stage three formal meeting could take place, for her benefit.

15. The claimant had been to see Occupational Health services and was expecting a report shortly. She was advised there would be a review meeting with both of her managers (one for each contract) in December 2016. It was made clear that any further absence within 12 months from the last day of her most recent absence (i.e. 4 September 2016) would be reviewed in line with stage four of the intermittent/short-term absence procedure, and the potential implications of this were discussed with her, including the possibility of dismissal. It was also explained that the university would consider the full context of the absences that had led to this stage and any relevant supporting evidence.

16. Between 4 January and 22 January 2017, the claimant was absent from work with gastroenteritis for 19 days.

17. On 13 March 2017 a further Occupational Health report was prepared. The claimant had attended on 10 March 2017. At that point she was certified fit for work for full duties, and she advised the Occupational Health physician, Dr Shah, that she had adjustments at work including an adjustable desk, radiant heaters and had been provided with an electric wheelchair. She described her managers and colleagues as supportive and she did not require any new adjustments at work. It was pointed out that it was possible that she could have a flare up of her medical conditions and if they were severe enough, she might require time off work in the future. Her medical conditions were ongoing and unlikely to improve, in the doctor's opinion. Her four periods of sickness in the past 12 months were related to her ongoing medical conditions.

18. On 5 April 2017 there was a further sickness review meeting which led to a stage four absence review. This occurred with her manager, Mr Jones, and Ms Walker, an HR adviser as notetaker. The claimant was accompanied by her work colleague. Her history was mentioned again. It was noted that she was sick from 30 August 2016 to 4 September 2016, which should have led to a stage four review. However, the decision was made as a reasonable adjustment to hold her to stage three. Her sickness from 4 January 2017 to 22 January 2017 then invoked stage four again. At that stage they discussed her current health and wellbeing and asked if there were any additional reasonable adjustments the university could provide to support her. The claimant confirmed that she was happy with the level of support she was receiving, and would let them know if there was something more they could offer. It was pointed out that they had amended her work type and duties, made adjustments to her working environment and provided portable heating. She had been allowed to take flexitime/annual leave to cover from sickness, but this was unlikely to continue because it did not give a true picture of sickness absence. They discussed wellbeing support available to the claimant to help prevent and mitigate the effects of her condition and to help prevent further absences, and it was noted that the most recent Occupational Health report said she was fit for duty with full duties and did not require any new adjustments. It was suggested to her that her working time of 36 weeks could be spread in a different pattern across the year in order to give her shorter periods of working time to assist in managing her attendance. It was suggested that her normal work pattern of two hours a day over five days could be undertaken in more hours on fewer days, still totalling ten hours a week. The claimant was asked to consider that option.

19. The decision was taken that the claimant was not going to be recommended for termination of contract and that she would be held at stage four again as a further reasonable adjustment. She was made aware that should there be any further absence within the following 12-month period from the last date of her most recent absence it would be reviewed in line with stage four of the intermittent short-term absence procedure, and the potential implications of that were explained to her, in particular the possibility of dismissal (pages 112-113).

20. On 7 November 2017 the claimant self-referred to Occupational Health. She said that this was due to work-related stress. he had described that she had the two part-time roles within the university and that she had no problem with her role in Student Services. She was due to have a new line manager in the Faculty of Education and that she had previously suffered work-related stress issues when she had worked for that manager in 2013. She explained that there were currently no significant non-work-related stressors. It was recommended that she have a workplace stress risk assessment. It was further recommended that the management put together an action plan to manage the issues that the claimant had highlighted. She felt that the new manager did not understand what adjustments are considered reasonable in relation to her chronic medical conditions. She was anxious to prevent possible absence from work with stress. She considered that her physical condition had deteriorated and was therefore referred to the Occupational Health physician for an assessment. The Occupational Health assessment took place on 12 December 2017 and the report was provided on 15 December 2017 (pages 125-126). The consultation was undertaken by telephone. She had been off work from 1 December 2017 after having found a lump in her breast. She had a seizure during the investigative process at the hospital and was admitted to hospital for observation. At that stage she did not have the results of the tests on the lump.

21. The same Occupational Health physician, Dr Shah, undertook a further telephone consultation with the claimant on 23 January 2018. She had by then been diagnosed with breast cancer and had been off work since 1 December 2017. She had surgery on 8 January 2018 and was having staff counselling. She was experiencing stress about her condition but did not mention any problems at work and she did not know if the planned changes in line management would go ahead of not. She was unfit for work until completion of her treatment for breast cancer.

22. There was evidence that in February and March 2018 there was great difficulty within the faculty arranging cover when the member of staff due to cover the desk normally undertaken by the claimant either took a lunch break or had other responsibilities that caused her to leave the information desk ‘unmanned’ (pages 129-139). These covered the period from April to June 2018.

23. On 4 July 2018 Mr Jones, the claimant's line manager in the Faculty of Education (the 25 hour a week contract), made a further referral to Occupational Health. The claimant planned to return to work on 10 July and he wanted to know what reasonable adjustments could be considered, whether there was an underlying health problem that could affect her attendance, and whether sickness absence was likely to continue, recur or affect future attendance.

24. On 7 August 2018 the claimant was seen by Dr Shah. The claimant had not then returned to work but hoped to do so within the following four weeks. It was considered that she would benefit from a phased return over two weeks if feasible. She wanted to use annual leave to prolong her phased return over a

four-week period, and the doctor noted that this would require a management decision. She would commence her post in Student Services in early September and had asked for a mini fan and a track ball because she could no longer use a mouse. It was noted that this equipment was going to be ordered for her. She did not at that stage require any further restrictions at work. The requests for cover to enable the current occupant of the claimant's position to have a lunch break, continued as evidenced in a series of emails.

25. The claimant returned to work on 1 September 2018. By then she had been away from work for nine months.

26. On 20 September 2018 the claimant emailed Phillipa Dunning to say she would not be able to come in due to being unable to wear her prosthesis (this was as a result of her mastectomy) because it was rubbing. She believed that it was the doors into Student Services which were causing the problem. She subsequently accepted that that was not the case – there was no evidence that the doors were causing the problem.

27. On 26 September 2018 Mr Jones wrote to the claimant to confirm the outcome of the sickness review meeting that had taken place with her on 14 August 2018. It was pointed out to the claimant that she had already had a stage four meeting for long-term absence (not short-term/intermittent) and so the meeting was being convened. It had been postponed from 10 July as she had still been unable to attend at that stage. They discussed the Occupational Health appointment that she had attended on 7 August 2018, and she confirmed that she had received counselling from the counselling service. He arranged to order the track ball mouse and a desk fan. He confirmed there would be a risk assessment carried out in relation to stationery related tasks (these being heavy). They agreed to reconvene. It was pointed out to the claimant that there was an impact of her absence on the business – the cover that had to be found for the team, the impact on colleagues; roles and the responsibilities of the health and safety role which she had been expected to take up. Work had been delayed in the Student Services role which caused an impact on the service. They discussed arrangements for her phased return and the incorporation of her annual leave that would be carried over, this would take place over six weeks, and they would finalise the detail on her return. She confirmed that she was increasing her physical activities, including playing badminton, and hoped to swim again soon. She asked if she could use annual leave to cover her sickness absences, and it was confirmed with her that as part of her phased return and ongoing employment they were prepared to implement a plan of flexibility which would include carrying over annual leave and a reduction in hours.

28. Mr Jones refused the claimant’s request that she be allowed to take annual leave when she was unwell. He said this because of her high level of sickness absence, currently and historically, and because it masked sickness and they wanted to be able to support her with Occupational Health. It was agreed that they would re-discuss the handling of the stationery requests and orders when she returned to work. The claimant confirmed she did not need

any additional support or further measures at that stage, and they talked about the next stage of the absence policy and continued absence which would have led to stage five of the long-term sickness policy, but as she had returned to work on 1 September 2018 this was not required. It was also confirmed, however, that Mr Jones would need to arrange to reconvene the stage four intermittent sickness policy formal meeting that she had been held at as a reasonable adjustment in April 2017. Because she had been off sick again from 19 September and she was on a phased return plan, he had not had the opportunity to do so. The claimant was reminded that it was part of his and Ms Dunning's role as line managers to consider the impact of any further absence on the students and university staff, and to consider her ability to maintain regular attendance at work, executing her duties in her roles. A review of her absence history would form part of that consideration. The potential implications of her absence could include the possibility of a recommendation by him for her employment to be terminated.

29. Two days later, on 28 September 2018, the claimant wrote to Ms Dunning asking for changes to her workplace arrangements. She had noted that her track ball and desk fan had been supplied in the Faculty of Education but not in Student Services. Fortunately, she had taken her own in from home and it had now been resolved. She asked that as a reasonable adjustment any previous or future absences relating to either of her disabilities be disregarded in relation to sickness monitoring and recording.

30. On the third week of her phased return the claimant noted that when her department were moving into a brand-new building, known as The Catalyst, the doors into the Student Services were too heavy. She believed that having to pull them open had caused inflammation and pain around her operation site of the mastectomy. In her evidence she confirmed that none of the doctors supported her belief. She asked that the doors into the Student Services area in the new building be made to open using a touchpad, as had been done in the Faculty of Education, and she reminded Ms Dunning of her responsibilities under the Equality Act 2010.

31. Dr Shah had a further telephone conference with the claimant on 10 October 2018. She found herself unable to predict her prognosis: that she could have a recurrence of her condition in the future, and if it was severe enough, she may require time off work. She noted what the claimant had told her about the doors to The Catalyst building but did not comment on whether the link that she had made at that stage between the swelling and the doors was credible or even likely.

32. A further Occupational Health referral was made by Mr Jones on 28 September 2018 (pages 166-172). That recorded the fact that Mr Jones had agreed to align the claimant's working days in Student Services with his working days in his department. It further recorded the fact that the claimant had contacted him on 19 September 2018 to indicate she was unwell because of the side effects of medication and her prosthesis rubbing. On 20 September 2018 Mrs Dunning had been contacted by the claimant to say that she was finding the doors heavy and could not access her work area (this was

in the new building). Mrs Dunning immediately arranged for the doors to be propped open for her two hour shifts each day when she was going to be in the building until an automated control could be fitted. On one occasion the claimant arrived earlier than the start of her normal shift and was unable to gain entry until somebody let her in. The claimant informed Mr Jones that an Occupational Health referral was being made by the Faculty of Education. It was agreed that Mr Jones would liaise with her line manager there to ensure support needs were assessed for both areas of her work. A new desk had been provided and shelving in the filing cabinet checked to ensure it was accessible for the claimant. Mr Jones noted that the claimant had been seen playing badminton with another member of staff and was concerned to establish whether this had contributed to her pain or soreness. It was noted that she was at stage four of the intermittent absence stages, and at stage four of the long-term absence stages (pages 170-172).

33. The claimant was away from work on 19 and 20 September 2018. She contacted Mr Jones on 2 October 2018 asking to use her annual leave to cover 19 and 20 September. Mr Jones replied on 4 October 2018 confirming that annual leave could not be used because it masked sickness absence, and it is difficult then to provide the correct level of support. On this occasion, however, he was willing to approve the annual leave for her absence on 19 and 20 September, as part of her phased return and as a reasonable adjustment under the circumstances. The claimant thanked him in an email on 10 October 2018. Ms Dunning, however, then replied to the claimant indicating that the days had been entered as sickness on her personnel record with Ms Dunning. Because she worked term-time only in Student Services there was no option to cover with annual leave (her annual leave was taken out of term). On this occasion, however, Ms Dunning allowed the claimant to add the hours onto her term-time total hours contract and remove them from the sick record as part of her phased return and as a reasonable adjustment under the circumstances. The result of the request for a further Occupational Health physician report was supplied on 30 October 2018 by Dr Shah. The claimant had been off work since 19 September 2018 on sickness absence but had worked some days in between. She had been seen by her specialist in early October and had been advised that she has fat necrosis. She was now able to wear her prosthesis, but it still caused rubbing, but she said that she needed to get used to it, using a track ball instead of a mouse to avoid rubbing. She was planning to return to work on 1 November 2018 and did not require any new adjustments at work. Any flare-up of her condition, if severe enough, may require further time from work. She was having appropriate ongoing treatment and was in remission from her cancer. Dr Shah said it was not possible to say whether or how much of any specific activity had contributed to her symptoms and triggered her recent sickness absence. Generally, the advice would be that she used her arms as much as possible and within her limits so that she remained as fit and healthy as possible and regular exercise was recommended (page 175).

34. The claimant returned to work at the beginning of November 2018 and had a discussion with Ms Dunning in a return-to-work interview. It was noted that the last day of her absence had been 31 October, that she had been off

because of inflammation and swelling, that she had received feedback from Occupational Health, that Ms Dunning considered there should be an immediate work environment assessment and risk assessment, that the claimant was using flexitime/annual leave and a phased return to work with a light workload to be extended for the first weeks back. Her end of year review would be moved to May 2019, and she was going to take up swimming again. The only reasonable adjustment referred to therein was to consider the use of a shredder because the claimant had difficulty emptying it due to the position of the equipment, but it was noted that no other adjustments were needed.

35. On the same day Mr Jones undertook a return-to-work discussion in relation to her contract in his department. The reason for absence there was given as complications post-surgery. Again, Occupational Health were to be asked to undertake a risk assessment. There were adjustments put in place in terms of a phased return to work, and it was noted the claimant would use annual leave for her next doctor's appointment on 9 November 2018. It was also noted that Occupational Health had recommended exercise.

36. On 20 November 2018, 13 days later, the claimant was once again absent from work due to pain. The last date of absence was 30 November 2018. The reason for absence was given in the return-to-work discussion on 7 December with Mr Jones as being severe pain, and that the illness was not work related. It was noted that it could reoccur and that there was to be a further risk assessment undertaken. It was noted that there were not at that stage any adjustments to be added and that she should not over-exert herself.

37. The claimant was called to a formal stage four intermittent/short-term absence meeting on 14 December 2018. Both Ms Dunning and Mr Jones were present at the meeting along with an HR adviser, Nicola Walker. The claimant attended with her union representative, Sam Armstrong. It was noted that the claimant had been held at stage four in April 2017 as a reasonable adjustment. Each absence was reviewed and discussed. The claimant at that stage said that one of the absences had been caused by the injury sustained when using the heavy door. She conceded in cross examination that in fact that may not have been the case. It was noted the claimant had returned to work again on 3 December 2018 and she was feeling well. It was also noted that the most recent absence for severe pain was not due to work, the claimant simply woke up with it.

38. It was agreed that they would look at a workstation assessment for the claimant in the Faculty of Education. The claimant also noted that she had been able to work later if she had been late in in the morning, and that she had been able to take holidays to cover sickness. Ms Dunning noted that she had continued to do that in the last couple of years. Ms Dunning also said that working later was not feasible in the current climate and she would take those points away and review them. She felt the ad hoc arrangement was harder to manage.

39. The claimant had been working hours to suit, to the concern of Mr Jones, and in particular the claimant pointed out that her husband did not have transport

so she would stay later (up to 7.30pm) and then go and pick her husband up. The claimant was attending later because she was bringing her daughter to the university (the claimant's daughter was a student). Ms Dunning believed that the reason for the reasonable adjustment to let the claimant start later was because of her disability, whereas in fact the claimant confirmed it was due to her daughter coming in and that is why she started at 10.00am.

40. The impact of the claimant's absences was discussed by Mr Jones because they had had to put in a rota for others to cover the claimant's work. Somebody else had been appointed but half of the role was to cover health and safety, and she had not managed to get that work done because she was covering the claimant's role in reception. Ms Dunning made the point that they carry forward a backlog of work, but they had really struggled this year, and she did not have anyone to pass it to. She had been unable to complete the audit. She did not feel it could be sustained. There was a backlog of filing and a backlog for auditing.

41. The claimant confirmed that she did not have any future doctor's appointments and there was nothing else stopping her from coming into work. It was noted that she had help from two members of staff dealing with the stationery, and she still felt able to do both of her roles. The claimant confirmed that she did not feel it necessary to go to see Dr Shah again and other wellbeing options were discussed. The claimant also confirmed that the issue with the doors had been resolved (page 184). The claimant was reminded that they may have to consider termination of her employment.

43. On 31 January 2019 a report was prepared by Ms Dunning and Mr Jones with a recommendation for termination due to absence. It was noted that between 11 February 2002 and 30 November 2018 the claimant had taken 1187 days of absence. The claimant had been held at intermittent policy stage three as a reasonable adjustment in September 2016, and at intermittent policy stage four as a reasonable adjustment in April 2017. She had been given special paid leave days. The support that had been offered to her was listed (page 190). It was noted that the claimant had requested two adjustments – the first being to continue to be allowed to use annual or flexi leave instead of recording absence as a period of sickness. Previously, the university had supported the claimant with allowing the use of such leave in place of recording as a period of sickness absence, however it was noted in the April 2017 stage four meeting that this would not be allowed going forward as it masked the absences and therefore made it difficult to provide the correct level of support. She also asked, in September 2018, that previous and future absences relating to either of her disabilities be disregarded in relation to sickness monitoring and recording.

44. It was confirmed with the claimant that any requests for reasonable adjustments would be discussed in the pending stage four absence meeting, but after consulting Human Resources it was agreed that this was not a reasonable adjustment because the university absence policy applied to all absences and was designed to support employees who were absent due to health problems regardless of the nature of the specific medical condition, and

this had been confirmed with the claimant in the stage four absence meeting. It was noted that the current position at the time of the recommendation being made that Occupational Health considered that the claimant could have a flare-up of her condition in the future and if it was severe enough may require time from work. The claimant did not require any new adjustments at work. The claimant had been offered the opportunity of adjusting her weekly working pattern and consolidating her hours in Student Services to enable her attendance, but she had indicated that would not be helpful in managing her attendance and had only been helpful when her daughter had been coming into the university at similar times. The claimant was told the option was still available to her. It was noted that the claimant had said no further support of adjustments were required.

45. The conclusions in the report were that the level of absence was unsustainable. There had been a substantial increase in pressure on both the Faculty of Education information desk and the Student Services as a result of the claimant's continued absence. Within the Faculty of Education, the absence of the claimant provided a strain on the other information desk colleagues and other professional support colleagues. The other two colleagues undertook additional responsibilities as part of their time on the information desk, for example health and safety and the processing of student travel expenses, and they had been unable to complete their tasks because of covering the desk in the sessions where the claimant would have been in attendance. Within Student Services a proportion of the work that should have been completed had been completed by two student information officers. This was over 100 hours of scanning, shredding and filing. The two officers who had picked this backlog were no longer available in the team and not a resource that could be drawn on in the future. A manager had had to carry out the additional checks on student support fund application forms, normally completed by the claimant, adding to the manager's workload. In order to catch up from 2017 to 2018 Student Services would have to recruit and train temporary staff to complete the work, and also to clear the backlog of work that had accrued in 2018 and 2019. The money advice service was unable to sustain further delays to compliance and audit checks. They were recruiting temporary staff to undertake those tasks. There continued to be an impact on the team.

46. The claimant had incurred 49 separate instances of absence totalling 1187 days (three years and three months). The absences had occurred every year except one (in 2011) of her 16 years 11 months' employment. It equated to a career average of approximately 70 sickness absence days per year and over the last five years the average number of sickness absence days per year had increased to 99 absence days per year on average. Such a persistent high level of absence over a significant period indicated that the claimant was unable to attain a satisfactory level of attendance despite the ongoing support, interventions and reasonable adjustments that had been implemented, and so a recommendation for termination of employment on the grounds of poor attendance was tabled for consideration.

47. On 5 February 2019 the claimant was advised that her employment would terminate with effect from 5 February 2019 on the grounds of attendance. She was to be given 12 weeks' pay in lieu of notice and payment for any outstanding holidays.

48. On 14 February 2019 the claimant appealed the decision to Mr Passey, Senior Human resource Adviser.

49. On the last day of work when the claimant received her dismissal letter, there was something of a minor upset when she was asked to leave the university. The claimant wrote to the university asking that she be allowed back on campus, and the response was that she could.

50. An appeal hearing was held on 14 March 2019 by Mr Igoe. The claimant was again supported by her union representative, Mrs L Welsh. Mr Igoe confirmed that he had looked at the recommendation for termination submitted by Mr Jones and Ms Dunning, he had looked at the Occupational Health reports from 2012 onwards, the letter of dismissal, her appeal letter, the university's absence policies and procedures and the representations that were made during the hearing, and additional documentation submitted to him after the hearing. This information was the formal absence review meeting invite letter dated 10 December 2018, the appointment letter to the pain clinic and an email confirming that the claimant was starting counselling in April.

51. Mr Igoe concluded that a fair process had been followed and that there had been an increase in the claimant's level of absence. He noted that the Occupational Health physician believed she may need more time off work in the future, and that the university did not have capacity to accommodate such high levels of absence in any area of the institution in the current economic climate. He was aware that a backlog had caused serious audit and compliance concerns and that the need to train new members of staff to cover the backlog had a major impact on the wider team and their ability to deliver good customer service. He was aware that the claimant's poor levels of attendance had placed considerable strain on the professional support team in the Faculty of Education which impacted on their ability to deliver a high quality and timely service for students and staff (page 207). He considered that the detrimental impact of the claimant's current levels of attendance made on both areas of the business was clearly not sustainable. He pointed out that there was no automatic right for disability related absences to be discounted for the purpose of a sickness absence policy as a reasonable adjustment. He noted that there had been a number of referrals to Occupational Health and a comprehensive list of adjustments made to help the claimant to improve her absence levels, including contributing towards the cost of a new wheelchair and arranging for her to have a height adjustable desk, and further including phased returns and flexible working. His conclusion was that the decision to terminate the claimant's employment was fair and reasonable and that no new evidence had been brought to light during the appeal which would have had a material impact on the original outcome. For the reasons that he set out, the claimant's appeal was unsuccessful.

The university policies on sickness absence

52. These were set out at page 68(a) to 68(o) of the bundle. In particular there were two sections – section 10 dealing with intermittent and short-term absence, and section 11 talking about long-term absence.

Short-term absence

53. There is a section dealing with reasonable adjustments which describes reasonable adjustments as including, for instance, a phased return to work, a permanent or temporary adjustment to working hours or pattern subject to business needs, new or modifications to existing equipment or tools and physical adaptions including ground floor office accommodation. It states that reasonable adjustments for employees who are disabled would be considered in accordance with the current equality legislation. The phased return to work is set out at paragraph 7 (page 68(f)). When a member of staff returns from a continuous period of eight weeks or more sick leave a phased return may be considered. It is usual that for the first two weeks of the phased return it will be paid at the employee's normal salary level. In the first week they will work two days and three days in the second week (pro rata for part-time employees). Should a phased return of more than two weeks be recommended annual leave may be used to accommodate the remainder of the phased return or unpaid leave may be taken if annual leave has been exhausted. On return from sick leave a line manager will meet with the individual informally to discuss their absence. At various stages there will be formal absence review meetings.

54. Paragraph 10 (page 68(g)) states that when a member of staff reaches a sickness absence trigger level (three occasions or 15 working days) the stage process will be invoked on their next absence. Any subsequent absence (irrelevant of length) within the next 12 months will lead to the next stage of the policy. Cases of individuals whose absence appear to form a pattern within any timescales and/or evidence of trigger avoidance and/or persistent high levels of absence will be subject to a wider absence review to fully consider attendance levels and further action may be taken where appropriate.

55. The stage process, intermittent and short-term absence, is set out at pages 68(h):

- Stage One – four occasions of absence or 16 working days in a 12-month period. The manager is then to organise a supportive Occupational Health referral if appropriate. On return from each absence the manager will meet informally with their member of staff to discuss the absence, any support that could be provided and any measures they are taking to improve attendance.

- Stage Two – any subsequent absence. The manager is then to organise a supportive Occupational Health referral, if appropriate (and

in fact should do so at both stage three and four). The same process is followed in the return-to-work discussion.

There then follows stages three and four, which are formal as opposed to informal:

- Stage Three – reached by any subsequent absence due to sickness, and the manager will convene a formal absence review meeting. The member of staff now has the right to be accompanied, and HR will be present.

- Stage Four – reached by any subsequent absence. For this the manager will convene a formal meeting with the employee, who has the right to be accompanied, and HR will attend to provide guidance.

56. Appendix 1 to the policy at paragraph 13 sets out the potential termination of employment on the grounds of attendance. This may be considered at stage four of the intermediate procedure and at stage six of the long-term procedure, or in other exceptional circumstances. It explains that the manager will follow a formal absence review meeting and review of the most recent report from Occupational Health, consider the support provided, mitigating personal circumstances, ongoing medical condition or treatment. In the case of long-term ill health, the prognosis and potential for future recovery, any adjustments that have been made; Occupational Health recommendations; the impact of the absence on the team students, customer and cost; the business and operational needs and the efforts made by the employee to improve their health and attendance, and may consider the progress of an application for ill health retirement and the pattern of attendance whilst employed at the university. The manager will then prepare a report for consideration by a Pro Vice Chancellor who will determine whether termination is appropriate, and the employee will then be advised in writing of the decision, the date of termination and the right of appeal.

Long-term absence

57. This is set out at page 68(l). This has six stages:

- Stage One – this is reached at a 28-day length of absence. Throughout the period the manager and member of staff maintain regular contact to discuss support and at four weeks the manager may make a referral to Occupational Health.

- Stage Two – this is triggered at six weeks of absence, when the manager will convene an informal meeting with the employee. At both of these the manager is to organise an Occupational Health referral.

- Stage Three (formal stage) – this is triggered at 13 weeks of absence, when the manager will convene a formal meeting with the employee, who has the right to be accompanied, and HR will attend.

- Stage Four – triggered at 26 weeks, when the manager will convene a formal meeting with the employee, who has the right to be accompanied, and HR will attend. There may be an Occupational Health referral dependent on the employee's progress.

- Stage Five – this is triggered at 39 weeks, when the same conditions apply as at stage four.

- Stage Six – this is triggered at 12 months. Again, there will be a formal meeting with the same terms as stages four and five, but if there is no improvement in health there may be a recommendation for termination.

58. The Tribunal did note that following the claimant's diagnosis and treatment for breast cancer she described herself as forgetful because of the treatment.

59. The Tribunal further noted that in the claimant's absence on sickness leave the respondent had built a new centre, The Catalyst. The claimant's department had moved into it but before it was built Ms Dunning, and the claimant had discussed the need for accessible toilets and a kitchen to facilitate her access to work. Nobody appears to have considered the access needs of a wheelchair user into the building, whether her or any other, to the extent that on her return to work she found herself unable to access her workstation as it was beyond heavy double doors (as was the toilet). The claimant did not however complain until 20 September, at which point it was immediately agreed that the doors would be held open.

60. The Tribunal further noted in the claimant's evidence that she did not disclose any of her mental health issues to the respondent in case they turned them against her and placed her at a further disadvantage.

61. The evidence from the respondent was that they had looked into putting automatic openers and closers on the new doors in The Catalyst building but had found eventually that the building was structurally unable to take them. Apparently, the entrance to the claimant's work area had a particularly high ceiling and the doors were very large.