THE EMPLOYMENT TRIBUNALS

Claimant: William Drysdale-Wood

Respondent: Shared Lives South West

Heard at: By CVP

On: 24 - 25 February 2025

Before: Employment Judge Beever sitting alone

Representation:

Claimant: Mr L Jukes, Counsel

Respondent: Miss S Sheerin, Counsel

RESERVED JUDGMENT AND REASONS

1. The claimant's complaint of unfair dismissal is well founded, which means it is successful. Any submissions regarding Polkey or other reductions, if relevant, can be made by the parties at the remedy hearing.

2. The claimant's complaint of discrimination arising from disability is well founded, which means it is successful.

3. The claimant's complaint of discrimination arising from the respondent's failure to make reasonable adjustments is also well founded in respect of PCP1 (discounting sickness absence) and PCP4 (reduced workload) but in other respects is not well founded and is dismissed.

4. The case will now be listed for a remedy hearing with a hearing length of 1 day. The parties shall prepare for the remedy hearing taking into account the further case management orders provided in the conclusion of this judgment

REASONS

1. By an ET1 presented on 19 December 2023, the claimant brought claims for disability discrimination which were identified by EJ Roper on 10 July 2024 [39] as claims of unfair dismissal and discrimination arising from disability (section 15), failure to make a reasonable adjustment (section 20 and 21)

2. The Claimant is a disabled person within the meaning of section 6 of the Equality Act 2010. At a Preliminary Hearing on 28 October 2024 [68], EJ Self found that the Claimant was a disabled person at all material times on account of Crohn's Disease. Further, the Claimant was a disabled person on account of Long Covid from 1 February 2023.

3. The Final Hearing (and these Reasons) dealt with liability only.

The Issues

4. Both parties confirmed at the outset of the Final Hearing that the list of issues as identified by EJ Roper was agreed and helpfully the parties confirmed that the List of Issues at [499] was an agreed list and reflected the issues that the Tribunal was required to determine. This list is also attached as Annex A to these Reasons.

5. At the outset of the hearing a number of the issues were clarified by the representatives. The "legitimate aim" relied on by the respondent in respect of the section 15 claim was as set out in the Amended Grounds of Resistance [56], that of "requiring an acceptable level of attendance" in order to fulfil the duties of the job. The respondent accepted that PCP3 was applied to the claimant. The respondent conceded that it had knowledge of disability at all material times and that the issue of knowledge was not in dispute.

The Evidence

6. The evidence and submissions were heard over 2 days by CVP. The claimant requested reasonable adjustments for the purposes of the Final Hearing which were accommodated by the Tribunal. These included the provision of breaks.

7. Both counsel were diligent in assisting the Tribunal to manage this Hearing in accordance with a hearing timetable and in relation to the requested reasonable adjustments so that the Hearing could be concluded within the allotted time. In the event, there was insufficient time to deliver an oral decision with reasons and it was necessary to reserve judgment. These are the written reasons of the Tribunal's deliberations.

8. The Tribunal heard oral evidence from the claimant. The Tribunal also heard oral evidence from the respondent's witnesses: Miss Laura Maker, People and Culture Leader, Mr Edward Bunce-Philips, Team Leader, and Mr Dominic Spayne, Chief Executive Officer. All witnesses were cross examined. Both representatives provided helpful oral closing submissions which the Tribunal has taken account of. There was an electronic bundle of documents numbered to 504 pages which was placed before the tribunal. There was an agreed chronology document.

9. Both the bundle and the parties' respective witness statements exceeded the size directed by the Tribunal in its case management order. The purpose of such orders is the effective management of allocated time for the Final Hearing. Documentation which exceeds the directed size results in the Tribunal needing extra reading time which then limits the parties' time in front of the Tribunal and puts at risk the determination of the claim within the allotted time. In this case, the Tribunal permitted the parties to proceed; however, adherence to directed page and word count limits is an important feature of fair allocation of resources among all those seeking access to the Tribunal.

10. The tribunal made its findings of fact having regard to all of the evidence and did so on a balance of probabilities.

11. In assessing evidence relating to this claim, we have borne in mind the guidance given in Gestmin SGPS v Credit Suisse (UK) Ltd [2013] EWHC 3560; that research shows that human memories are fallible and memories are not always a perfectly accurate record of what happened, no matter how strongly somebody may think they remember something clearly. Most of us are not aware of the extent to which our own and other people's memories are unreliable and believe our memories to be more faithful than they are. The process of going through tribunal proceedings can create biases in memories. The judge in Gestmin said, "above all it is important to avoid the fallacy of supposing that because a witness has confidence in her or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth".

The Facts

Background

12. The claimant was employed by the respondent from 1 September 2015 as a Shared Lives Coordinator, which is a role that involves the recruitment, training and daily management of carers who support people with eligible needs to live with them in their own homes. A job description at [485] brings to life the nature of the role which includes supporting carers through telephone contact and home visits, dealing with any issues arising and undertaking assessment visits to the carers' homes and the people they support. The job entailed working in the community as it was important for carers and service users that assessment visits were in person.

13. The claimant is a disabled person within the meaning of section 6 of the Equality Act 2010. He has a lifelong condition of Crohn's disease which the respondent had been aware of since the outset of employment and which came with a likelihood of a degree of sickness absence. The absence record of the claimant is at [84] which corroborates the fact of absences during the course of the claimant's employment.

14. During Covid in 2020, the claimant shielded as he was on immunosuppressant medication. Unfortunately, the claimant had a significant reaction to the Covid vaccine which he took in April 2021 and again October 2021. He also contracted Covid in January 2022. In September 2022, the claimant was diagnosed with Long Covid and chronic fatigue and on medical advice he took an extended period of absence between 3 November 2022 10 January 2023. The claimant was a disabled person on account of Long Covid from 1 February 2023.

15. The respondent had put in place a number of reasonable adjustments as is evident at [124], which is a note of outcomes following discussion with the claimant in autumn 2022 and in respect of which there was a collaborative approach to adjustments to assist the claimant at periods of time when he was suffering from exacerbation of Crohn's disease. These included attending internal teams meetings virtually at least in the short term although the respondent's view was that in the long term attendance should be in person to facilitate peer support and development. Carers visits were also agreed as virtual at least in the short-term. The claimant was exempted from the need to deliver face-to-face training and to take on extra assessment work that arose from time to time. The claimant was also afforded flexible working hours in that he could rest during the day if needed.

<u>The claimant's return to work from January 2023</u>

16. Following the claimant's extended absence, he had a return to work meeting with manager, Mr Bunce-Philips, on 16 January 2023 [138], which included a phased return to work. The subsequent return to work meeting on 26 January 2023 [143) extended the claimant's phased return to 3 weeks as the claimant had had a setback. A further meeting on 30 January 2023 discussed an update on the claimant's health and also, "make use of the reasonable adjustment approach that we have used interchangeably between Crohn's flare-up and long Covid symptoms".

17. The respondent made a referral to occupational health [140]. The report [148] sets out the challenges of managing risk of exacerbation of symptoms. It was not possible to predict further absences but there was a reasonable chance the claimant could sustain regular work attendance. A reduction in his case load was likely to be helpful. At a post-Covid syndrome Service telephone appointment with Elizabeth Field, specialist occupational therapist, on 14 March 2023, further adjustments included extending where necessary the phased return to work beyond the standard two week period, the value of micro-breaks and tai chi and homeworking to minimise the risk of infection.

18. The respondent held a meeting with the claimant on 16 March 2023 to reflect on the occupational health information. Mr Bunce-Philips and Miss Maker attended with an intention to review the reasonable adjustment plan and set an approach for the future. An agreement on adjustments was reached and put in place and was to be reviewed on a six weekly basis [181]. This included flexibility on face-to-face events; adjustment of workload, including assessments where possible would be allocated to other coordinators. The claimant was not able to accept an offer of reduction in his working hours due to his financial situation. Subsequently, on 1 May 2023, the claimant was granted a homeworking contract [197].

19. The claimant had numerous supervision sessions with his manager, Mr Bunce-Philips. For example on 8 June 2023, in a supervision it was agreed that the claimant would attend the office on a monthly basis for a review meeting with his line manager. On 8 June 2023, the claimant felt that his workload was “all ok”. It is common ground that the claimant’s caseload could at least in part be measured by the number of “units of support” undertaken. The claimant’s caseload had remained at or about 42 units of support since 2022. The respondent regarded a full-time caseload as 55 units of support. On 8 June 2023, Mr Bunce-Philips explained to the claimant that his current caseload level could not be maintained due to the departure of another coordinator and an increase of the claimant’s workload was likely [208]. This was reaffirmed to the claimant in a subsequent catch up on 14 June 2023 and an email on 15 June 2023 [215]. There is some dispute arising here about whether the claimant had accepted that it was an appropriate time to begin to increase his workload. The picture painted by the correspondence though indicates that the claimant considered any increase to his workload would be detrimental. Mr Bunce-Philips reflected on this and as a result no increase in workload was implemented at that time. This has been described by the respondent as a further extension to the reasonable adjustments afforded to the claimant.

20. The claimant felt increasing stress and pressure and perceived that he needed to fight for his rights to work with reasonable adjustments in place. He had a period of absence from 28 June 2023 to 14 July 2023. The claimant attributes this absence to the respondent’s failure to implement reasonable adjustments and refers to his vulnerability to stress and aggravation of Crohn’s disease symptoms.

21. The respondent referred the claimant to occupational health. On 3 August 2023, the report identified that the claimant’s main health issues continued to relate to Crohn disease and symptoms associated with Long Covid. These were evidently symptoms that were fluctuating but of long-term in nature. The report did not identify any additional adjustments that were likely to be necessary. It was not possible to identify definitively whether the claimant was likely to be able to resume full duties. Exacerbation of symptoms might occur and could be aggravated by increased levels of physical or mental activity. Further sickness absence remains a distinct possibility but it is not possible to quantify the risk, and it is for management to decide on how much disability-related absence is acceptable.

<u>Capability Proceedings</u>

22. Miss Maker invited the claimant to a Capability meeting to take place on 6 September 2023 [240]. The letter identified that the respondent wished to look at managing the claimant's risk of infection, workload moving forward and thirdly considering future absence. The letter set out that the most appropriate policy to follow was the Capability (absence due to ill-health) Policy [235]. The letter alluded to possible outcomes, as set out in paragraph 5 of the policy, one of which was to consider termination of employment on grounds of ill-health.

23. There are minutes of the meeting at [242]. It was a meeting held "to discuss the next steps" in accordance with the Capability Policy. The claimant was asked what he considered to be a reasonable and realistic level of future absence [254]. Mr Bunce-Philips said that he was reluctant to set a threshold for future absences as it might encourage the claimant to work when the claimant was not well. Miss Maker discussed the need to increase the claimant's workload. The transcript at [263] records that the claimant said that he would "*do what's required within reason but… If we can try and spread the workload around a bit time being while I'm on this path of recovery".* The claimant challenged the suggestion that he was in a position to consider a full-time workload (55 units). Miss Maker acknowledged [264] that there was not an immediate need to increase workload "… *We believe we could agree an adjustment of 5% to units for the six months and not beyond. So that would be 52 and you are right it might not go straight up to that, because we don't have the carers flooding in, but there is potential that we could*".

24. The outcome of the meeting was that Miss Maker would consider the matter further, including the recent occupational health report and write further to the claimant

25. On 8 September 2023, the claimant was invited to a further capability meeting to take place on 14 September 2023 [273]. The letter referred to Miss Maker undertaking a further investigation "before making a final decision and concluding the capability process". The notes of the meeting of 14 September 2023 are at [308]. In that meeting, the notes record that the respondent could "*tolerate a small number of days in the next 3 months….a maximum of 2-3 days in the next 3 months*" [309].

26. On 15 September 2023, the claimant received notice by email of the termination of his employment on grounds of ill-health [318]. The letter is written by Miss Maker who had chaired the 14 September 2023 meeting. The letter refers to the respondent being unable to sustain continued high levels of absence and whilst having applied "increased tolerance" to disability related absence, the claimant's absence has had an unreasonable impact on other members of the team. Miss Maker referred to "a high probability of continued unsustainable levels of absence". In relation to workload moving forward, Miss Maker considered that the respondent could no longer support the claimant's current workload due to practicality, affordability and the impact on other members of staff. It could agree to a permanent reduction of up to 5% only, but to require the claimant to work at a level of 52 units would create a clear risk of a decline in his health. Thirdly, although the occupational health assessment recommended that the claimant should mostly work from home,

Miss Maker felt that the requirements of the role cannot be fulfilled whilst mostly working at home. She felt that there was an unavoidable and essential requirement to interact with people in the community, attend meetings and visit households of people supported.

27. The claimant was offered an appeal [320]. The claimant received a further letter from Miss Maker on 28 September 2023. In response the claimant raised a grievance on 28 September 2023 which was directed to Mr Spayne. In it the claimant said that he would not be appealing for his job back because he felt it was untenable. Mr Spayne responded to the claimant's grievance stating that he would be treating the grievance as an appeal. The claimant did not want a meeting and was content for the matter to be dealt with in writing. Mr Spayne undertook a grievance investigation, and a report dated 31 October 2023 is at [375]. The claimant received an outcome of his grievance/appeal on 14 November 2023 [432], which did not uphold any aspect of the claimant's grievance.

The Law

28. The claimant's claims, as identified in the agreed list of issues, arise in three ways: unfair dismissal, discrimination arising from disability and failure to make a reasonable adjustment.

Unfair Dismissal

29. Section 98 of the Employment Rights Act 1996 provides that it is for the employer to establish the reason for the dismissal and to show that it was a potentially fair reason. If the reason for dismissal relates to the capability of the employee to perform work of the kind that the employee was employed by the employer to do, then it is potentially fair.

30. Where the employer satisfies the Tribunal that there was a potentially fair reason for dismissal, then section 98(4) provides: "*The determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the m 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 reason for dismissing the employee, and (b) shall be determined in accordance with equity and the substantial merits of the case*".

31. In deciding the reasonableness of the decision to dismiss the starting point is always the words of section 98(4) themselves. The Tribunal has to consider the reasonableness of the employer's conduct but must not substitute its decision for that of the employer. The function of the Tribunal is to determine whether in the particular circumstances of the case and whether the decision to dismiss fell within a band of reasonable responses, which a reasonable employer might have adopted. See Iceland Frozen Foods Ltd v Jones [1982] IRLR 439.

32. Where dismissal is for a reason relating to ill health, guidance has been given in BS v Dundee City Council [2014] IRLR 131 and in Spencer v Paragon Wallpapers Ltd [1976] IRLR 373. Phillips J emphasised the importance of scrutinising all the relevant factors: 'Every case depends on its own circumstances. The basic question which has to be determined in every case is whether, in all the circumstances, the employer can be expected to wait any longer and, if so, how much longer?' Relevant circumstances include 'the nature of the illness, the likely length of the continuing absence, the need of the employers to have done the work which the employee was engaged to do'.

33. In the case of ill health dismissals, as well as the general requirement to adopt a fair and proper procedure, there are additional matters which go to the issue of fairness: it is essential to consider the question of whether or not the employer can be expected to wait longer for the employee's return to a sustainable attendance at work; there is a need to consult with the employee and take his or her views into account; there is a need to take steps to find out about the employee's medical condition and his or her likely prognosis. This may require obtaining proper medical advice. The importance of consultation has been stressed in various cases. What is required, as stated in Spencer v Paragon Wallpapers, is 'a discussion so that the situation can be weighed up, bearing in mind the employer's need for the work to be done and the employee's need for time in which to recover his health'.

Discrimination arising from disability

34. By section 15 (1) EqA 2010, which states:

> *"A person (A) discriminates against a disabled person (B) if-*
> *(a) A treats B unfavourably because of something arising in consequence of B's disability, and*
> *(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim*."

35. The Supreme Court in Williams v Trustees of Swansea University Pension and Assurance Scheme [2018] UKSC 65, at para [12], sums up the first element of the section succinctly as follows, "*…section 15 appears to raise two simple questions of fact: what was the relevant treatment and was it unfavourable to the claimant?"*.

36. In Williams, at para [27], it was said that unfavourable treatment did not require a hypothetical or actual comparator but measured against an "*objective sense of that which is adverse and that which is beneficial*". The Tribunal also had regard to T-System Ltd v Lewis, EAT, 22nd May 2015 which referred to the disabled person being placed, "*at a disadvantage*".

37. In Pnaiser v NHS England [2016] IRLR 170 at para 31 Mrs Justice Simler DBE identifies the proper approach to be taken in cases involving consideration of s15 EqA.
"(d) … The causal link between the something that causes unfavourable treatment and the disability may include more than one link. In other words, more than one relevant consequence of the disability may require consideration, and it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability.
(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.
(f) This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator."

38. It is for the tribunal to reach its own judgment when fairly assessing proportionality based upon a detailed analysis of the working practices and business considerations involved having regard to the business needs of the employer: Monmouthshire County Council v Harris UKEAT/001/15 at para 44 which applied Hensman v Ministry of Defence UKEAT/0067/14.

Failure to make reasonable adjustments

39. Section 20 EqA 2010 provides that there is a requirement where a provision criterion or practice ('PCP') of A puts a disabled person at a substantial disadvantage in relation to the relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

40. Section 21(1) EqA 2010 provides that a failure to comply with the requirement is a failure to comply with the duty to make reasonable adjustments. It is necessary for a tribunal to identify the PCP applied by or on behalf of the employer, the identity of the non-disabled comparators and the nature and extent of the substantial disadvantage suffered by the claimant: Environment Agency v Rowan [2008] ICR 218.

41. In considering the reasonableness of the proposed adjustment the question of whether the adjustment would work in practice is relevant. Having identified whether an adjustment is reasonable the burden of proof shifts to the respondent to show that an apparently reasonable adjustment that has a prospect of success was not a reasonable adjustment: Leeds Teaching Hospital NHS Trust v Foster UKEAT/0552/10.

Time Limits

42. EJ Roper identified [45] that the claims for unfair dismissal and under section 15 were issued in time, but an issue arises in respect of the claim for reasonable adjustments. EJ Roper identified the legal framework at para 37 [45]

43. As to time limits, the provisions on time limits under the EqA are set out at section 123 EqA:

> ***123 Time limits***
> (1) *… proceedings on a complaint within section 120 may not be brought after the end of—*
> (a) *the period of 3 months starting with the date of the act to which the complaint relates, or*
> (b) *such other period as the employment tribunal thinks just and equitable.*
> *…*
> (3) *For the purposes of this section—*
> (a) *conduct extending over a period is to be treated as done at the end of the period;*
>
> (b) *failure to do something is to be treated as occurring when the person in question decided on it.*
>
> (4) *In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—*
>
> (a) *when P does an act inconsistent with doing it, or*
>
> (b) *if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.*

44. Guidance for the test for a "continuing act" is set out in Hendricks v Metropolitan Police Commissioner [2002] EWCA Civ 1686. Recent case law regarding the exercise of discretion for the purposes of the just and equitable provisions includes Adedeji v University Hospitals Birmingham NHS Foundation [2021] EWCA Civ 23.

45. As to reasonable adjustments, the Tribunal had regard to Matuszowicz v Kingston Upon Hull City Council [2009] IRLR 288 and also Adedeji noting that the date on which an employer first breaches its duty to make reasonable adjustments is not the same as the date on which time starts to run. An employer's liability begins as soon as it can take steps which it is reasonable for it to have to take to avoid the relevant disadvantage to the employee: this period should be assessed from the employee's point of view, having regard to the facts known, or which ought reasonably to have been known, by the employee at the relevant time. See Fernandes v Department for Work and Pensions EAT [2023] 114, to the effect that the Tribunal should consider when the reasonable employee, based on the facts known to them, would have concluded that the duty would not be complied with.

Discussion and Conclusions

46. We turn now to apply the law to the findings of fact and the allegations.

Unfair Dismissal

What was the potentially fair reason for dismissal?

47. The reason relied on by the respondent is capability. This was identified in the letter of dismissal written by Miss Maker on 15 September 2023 following on from the Capability meeting on 14 September 2023. The letter informs the clamant that the decision to terminate his employment is on the grounds of his ill health.

48. The Tribunal is satisfied that Miss Maker was the decision maker. She had chaired the capability meeting on 14 September. She describes in detail in her witness statement and in her oral evidence that she had made the decision. She did so on account of the claimant's health and its impact on the respondent's business. The Tribunal is satisfied that the decision related to Miss Maker's review of the claimant's sickness absence, the claimant's capability to undertake an appropriate workload and potential health issues arising from risk of infection. This was a capability issue, and it was a potentially fair reason to dismiss.

Was the dismissal fair or unfair in accordance with section 98(4)?

49. Having identified the reasons for dismissal and it being a potentially fair reason to dismiss the claimant, it is then necessary to consider whether the decision to dismiss by reason of capability was actually fair or not.

50. It was Miss Maker's evidence that dismissal was not solely related to absence and that there was not a single policy that fully addressed all the concerns that related to the claimant's situation. Miss Maker followed the Capability policy [235].

51. As far as absence was concerned, the Respondent had obtained an OH report dated 3 August 2023 which had concluded that further sickness absence was a "*distinct possibility*" but it was not possible to quantify the risk. The report had been based on a referral form that set out 60 days absence in the previous 12 months. Miss Maker had concerns that the respondent was not going to be able to manage that level of absence moving forward. She had identified to the claimant at the 14 September 2023 meeting that there was a small number of days of absence that could be tolerated in the next 3 months. In doing so, Miss Maker did not expressly take into account the respondent's well-being policy which at [231] stated that 10 periods of absence due to ill health in any 12-month period would trigger a capability process. Miss Maker did not expressly consider any adjustment that the respondent might apply to reflect the likely increase in absence caused by disability related factors. Instead, the respondent's position was that it would not set a "threshold" for future absences because it might cause the claimant to work when he was not well.

This did not reasonably provide the claimant with any opportunity to achieve a level of attendance that the respondent would be able to tolerate especially bearing in mind the claimant's own evidence that at that time he was, "*on a path to recovery",* and, in his witness statement, at para 65, he stated that at the time of his dismissal he had been working full time.

52. The timeline for the capability process was remarkably brief: the claimant was invited to a meeting on 6 September 2023 and he was subsequently dismissed immediately following a second meeting on 14 September 2023. The process did not permit the claimant to be able to show that his health was improving. The claimant was not given any opportunity within the format of the capability process to be able to show to the respondent that he could maintain reasonable attendance or otherwise to manage his work within the reasonable expectations of the respondent.

53. The respondent relied on "workload moving forward" as a second basis for its capability dismissal. It had enabled the claimant for a significant period to maintain a reduced workload of "units of support". What had changed was that the respondent had anticipated that during 2023 there would be a need for increasing the claimant's workload. Even so, the respondent accepted that, at the time of the claimant's dismissal, the need to increase had not yet arisen, and that it was a "*potential*" need [264]. The claimant had himself recognised that he might need to take on additional work and accepted that he would increase his workload if the need arose. The claimant was not given any opportunity within the format of the capability process to be able to show to the respondent that he could increase his workload. This is all in the context that there is no suggestion that the claimant's work was unsatisfactory in any respect.

54. The respondent relied on "risk of infection" as a third basis for its capability dismissal. The respondent relied on the OH recommendation that the claimant should work mostly from home to avoid the risk of infection. The respondent concluded that some requirements of the role cannot be fulfilled whilst mostly working from home. It is apparent from the termination letter that the respondent had taken into account a number of suggestions of the claimant that he had put forward as a means to minimise risk, such as virtual attendance at meetings.

55. The Tribunal has reminded itself of the relevant legal framework and in particular the caution against substituting its own views for that of the decision maker. In this case, it was not reasonable that the respondent failed to allow the claimant any opportunity within its capability process to show that he could meet, or at least meet in part, their reasonable expectations both in terms of attendance and their reasonable organisational needs (when they arose) in terms of workload. It was not reasonable to follow a timeline that resulted in the claimant's dismissal (on 15 September 2023) which was essentially over a 9-day period of time. It was not a decision within the range of a reasonable employer to sanction the claimant with dismissal at 15 September 2023.

56. The claimant's claim of unfair dismissal succeeds.

57. The Tribunal did not receive submissions on matters such as Polkey and/or whether and if so how the Tribunal should take into account the likelihood that the claimant's termination might have occurred in any event. It remains open to the parties to make submissions at the remedy hearing if they wish to do so on such matters.

Discrimination arising from disability (section 15)

58. The claimant relies on one act of unfavourable treatment which is his dismissal. The respondent has accepted that the claimant was dismissed. Self-evidently, it is unfavourable treatment.

59. The Tribunal finds that the claimant's sickness absence was substantially a consequence of his disability. The OH report in August 2023 [233] confirms this. It is the symptoms of the claimant's long covid and Crohn's disease that had flared up and had resulted in sickness absence.

60. The Tribunal also notes that the claimant's reduced workload and his inability to sustain a full workload, materially in terms of units of support, arose in consequence of his disability. The OH report in February 2023 [147] reinforces the position. The claimant's symptoms are exacerbated by stress. The report had highlighted that a reduction in caseload was likely to be helpful and useful in optimising attendance at work. Similarly, the Tribunal also notes that the claimant had additional health issues that were created by Covid infections. This again is reinforced in the OH report in August 2023, at [233]. The Tribunal finds that the claimant's need for a reduced or adjusted workload and the risk of infection resulting in additional medical issues were both things that arose in consequence of the claimant's disability.

61. Was the unfavourable treatment because of any of these things which are said to have arisen from the claimant's disability? The claimant was dismissed on three grounds which, when taken together by the respondent, were dealt with as a capability matter. Those three grounds are amply described in the termination letter, namely, the claimant's sickness absence and future absence, secondly the claimant's future workload, and thirdly managing the claimant's risk of infection. The claimant's sickness absence was plainly one of those three factors.

62. Was the treatment a proportionate means of achieving a legitimate aim? This is the defence of justification. The burden is on the respondent to establish justification. The respondent was permitted to amend its Grounds of Resistance and in doing so to set out its defence in full [40]. The respondent puts forward the legitimate aim of requiring an acceptable level of attendance on order for the claimant to fulfil the duties of his job role and so that the respondent's business could provide the required standard of service to service users and operate effectively [56].

63. The Tribunal accepts that it is a legitimate aim to require employees to be able to attend work as this is plainly in the interests of the service that the respondent

provides and in the interests of the care of service users. It is also material to the present case as the claimant's absence is a relevant feature.

64. The principle of proportionality requires an objective balance to be struck between the discriminatory effect of the measure (dismissal) and the reasonable needs of the employer. The Tribunal is required to weigh the reasonable needs of the employer against the discriminatory effect of the employer's measure and to make its own assessment of whether the former outweigh the latter. There is no room to introduce into the test of objective justification the 'range of reasonable responses' which is available to an employer in cases of unfair dismissal. Hardys & Hansons plc v Lax [2005] IRLR 726.

65. The respondent had several policies that interacted with absence management. The respondent considered that the present case did not fit neatly within a single policy. It elected to follow its capability policy. The reason why it did not fit neatly within a single policy was because the respondent made its decision on three separate but interrelated grounds. The evidence was that the claimant was dismissed in part because of his sickness absence and therefore the prospect of future absence and also because the claimant was not able to undertake a full workload and also because of the claimant's need for remote working.

66. The claimant and the respondent had collaborated successfully for a number of years in accommodating the claimant's absences arising from his disabilities. The future envisaged by the OH report did not suggest that the situation would deteriorate rather that it might not be possible to predict. What appears to have changed the landscape was an emerging position in June 2023 when a decision was taken to increase the claimant's workload albeit that Mr Bunce-Philips subsequently reversed the decision at that time. This was because of a prediction of an increase in workload. Equally, at the time of the claimant's dismissal, carer numbers remained low and the respondent did not establish at Tribunal that there was any immediate need for the claimant's workload to increase. The claimant provided some numerical information about colleagues' comparative units of support workload. The information was of limited assistance as the respondent emphasised that there are a number of other tasks undertaken by the claimant's co-workers. The respondent did not adduce specific or identifiable evidence about the capacity of co-workers to be able to undertake work that the claimant did not.

67. The respondent no doubt needed to manage attendance. However, the respondent has not sufficiently evidenced how if at all, as part of its decision making, the respondent had factored in the potential to make adjustments for the claimant's disability and likely requirement for some level of absence. The respondent could have achieved its legitimate aim by less discriminatory means namely to allow the claimant some periods of absence going forward – even to the small degree intimated in the capability meeting when Miss Maker proposed that the respondent could tolerate 2-3 days in the following 3 months – as opposed to the harshest sanction of dismissal.

68. The respondent has an additional difficulty. Its legitimate aim of requiring an acceptable level of attendance does not assist the respondent's defence given that the operative reason for dismissal also related to the claimant's capacity to undertake a full workload. The claimant had stated that he would undertake more workload if the business needed it. It is common ground that at the time of dismissal it was not immediately needed rather that it was potentially needed. There was evidence that co-workers were not themselves undertaking full (units of support) workloads. The evidence that they had been undertaking other tasks was vague and not specific to coworkers. The Tribunal was in no position to be able to reach any sound conclusion that this business could not continue to accommodate the claimant at a reduced workload. The respondent itself accepted that a 5% reduction would be feasible but there was no further elaboration. The respondent rejected the claimant's suggestion that he might be able to take on more workload (units of support) if the business required it. There was no meaningful consideration of the claimant's suggestion.

69. Further, the respondent's legitimate aim does not address the third strand of the respondent's reason to dismiss the claimant, namely the claimant's need to undertake remote working. It is common ground that elements of the claimant's role were community based. However, the respondent was prepared "in the short term" to permit the claimant sufficient adjustments as to make his job feasible from his perspective. The respondent's evidence was that it sought to review its reasonable adjustments on a regular basis, for example, every six weeks. The respondent failed to establish sufficient evidence for the Tribunal to conclude that the respondent was objectively justified in dismissing the claimant – at least at the point that it did so, rather than later - in part because of it being unable to continue to implement adjustments that it substantially had in place for the claimant.

70. The Tribunal finds that the claimant was treated unfavourably, and the respondent cannot show that the treatment is a proportionate means of achieving a legitimate aim. The respondent's justification defence therefore fails.

<u>Failure to Make Reasonable Adjustments (section 20 and 21)</u>

71. It is not in dispute that the respondent knew that the claimant was a disabled person. At the hearing, the Respondent confirmed that it did not dispute that it knew or could reasonably have been expected to know that the claimant was likely to be placed at the disadvantage claimed.

72. Turning to the question of PCPs, the Tribunal has been asked to consider a number of different provisions, criterions and/or practices.

    <u>PCP 1: (Long Covid and Crohn's Disease) from 2015 onwards the application of the respondent's Sickness Absence Policy without discounting disability related absences.</u>

73. The Tribunal has found that the respondent had a number of policies that related to absence and sickness management. One such policy was its wellbeing policy which provided for a certain number of absences within a period to trigger the operation of the respondent's formal capability policy. The evidence was that the respondent did fully allow for the claimant's ongoing absences over a significant period and encompassed in that is the conclusion that the respondent did make significant adjustment for the claimant's absences.

74. However, that changed in August 2023 when the claimant was invited to a meeting as part of the capability process. The invitation to the meeting was because the respondent intended to apply its capability process. The claimant's absences were substantially if not entirely disability related. It follows that at the point in time that the respondent did not discount disability related absence. This was a provision criterion or practice operated by the respondent.

    PCP 2: (Long Covid Only) from January 2023 onwards a policy of restricting any phased return to work to a limited period of two weeks

75. The Tribunal heard evidence from Mr Bunce-Philips that he would be flexible with regards to the claimant's return to work from absence and that flexibility included extending periods of phased return to work. There was not a provision criterion or practice operated by the respondent. This aspect of the claim fails.

    PCP 3: (Long Covid Only) from March 2023 a requirement to work in the community

76. It was accepted by the respondent that it applied this provision criterion or practice to the claimant. It was an appropriate concession to make given that aspects of the claimant's role were community based and that the respondent did require the claimant to undertake some work in the community. In practical terms, no issue in fact arose until the respondent implemented its capability process in August 2023.

    PCP 4: (Long Covid Only) from June 2023 failing to revisit and amend where necessary arrangements relating to reasonable adjustments which were already in place

77. The Tribunal heard evidence that the respondent worked collaboratively with the claimant in respect of his reasonable adjustments. In June 2023, the respondent requested that the claimant should increase his workload but this was reversed when the claimant expressed that he would not be able to do so. The claimant held supervision meetings with his line manager, Mr Bunce-Philips, in June 2023. The Tribunal does not find that the respondent had failed or refused to collaborate with the claimant and review any of his adjustments at that stage. Later, in August 2023, when the claimant was invited to a capability meeting, the question of his capability came under greater focus.

78. This was not a provision criterion or practice operated by the respondent in June 2023. However, it was a provision criterion or practice operated by the respondent subsequently but only to the extent that it was reflected in the respondent's decision to dismiss the claimant in September 2023.

79. Did the PCPs put the claimant at a substantial disadvantage compared to some without the claimant's disability? The Tribunal finds as follows: as to PCP1, the claimant was substantially more at risk of sanction and dismissal on account of his susceptibility to absence arising from his disability. As to PCP 3, working in the community compromised the claimant's health because of its diminished immune system; and as to PCP 4, the claimant found it substantially more difficult to undertake his role at the same level (units of support) than his co-workers and also that his health was put at substantially more risk when working in the community. In respect of that latter element, it adds little to PCP3 in any event.

80. Did the respondent know or could it reasonably have been expected to know that the claimant was likely to be placed at the disadvantage? This is not in dispute.

81. What steps could have been taken to avoid the disadvantage?

82. As to PCP 1, the claimant suggests not including the claimant's disability related absences at all for the purposes of the Sickness Absence Policy. The Tribunal does not find that in itself to be a reasonable step. The respondent cannot reasonably be expected to ignore any disability related absence regardless of its impact on the business or the frequency of it occurring nor reasonably be expected to apply future discount of all disability related absence. That said, it would have been reasonable for the respondent within the formal capability process to identify what tolerance it would apply or alternatively what discount on trigger points it would apply moving forwards so as at least to afford the claimant the opportunity to meet those expectations. A tolerance or discount applied by the respondent would have had a reasonable prospect of success given that the claimant was at that stage at a point in his health where he was, in his words, "in the right direction, and coming out of the woods". The respondent should have given the claimant more time and afforded him further opportunity within the formal process.

83. The claimant's reasonable adjustment claim in respect of discount of disability related absence succeeds.

84. As to PCP 3, the claimant contends that the respondent should have allowed the claimant to work from home and or agreed that he need not attend large-scale public meetings when remote attendance could have been arranged for these. The Tribunal does not find that the Respondent failed to make a reasonable adjustment.

85. The respondent had given careful consideration to the nature of the role undertaken by the claimant. It had given the claimant a home working contract in May 2023. It is not simply that the respondent had shown that it had put in place a number of reasonable adjustments. That of course is not of itself a sufficient answer. The Tribunal also accepted the respondent's explanations in respect of the limited extent of the claimant's role that was required to be achieved in person that it was necessary for business needs to do so. The respondent properly placed considerable weight on the benefits of employee collaboration and development when meetings were held in person.

86. The respondent properly took account of the interests of service users for example in assessments taking place in the carers home

87. The claimant's reasonable adjustment claim in respect of working from home or attending remotely is not well founded and does not succeed.

88. As to PCP 4, the claimant suggested that the respondent should have continued and extended existing reasonable adjustments. As above, this was not an entirely helpful description as it did not specifically identify what the respondent could or should have done. Further, in one respect it adds nothing to PCP3 in any event. However, it was plain that one operative reason for dismissal was in respect of the claimant's workload and both parties addressed the issue of whether the respondent could have been expected to accommodate the claimant's requirement for a reduced workload. There was a reasonable prospect that a reduced workload would have been successful given that this was the view of the OH in February 2023. The respondent was prepared to accommodate a 5% reduction. However, the fact that a number of other workers were not working to a full caseload brought into focus the lack of evidence that might amount to justification for such a limited reduction.

89. In the event, the respondent did not satisfactorily explain why a 5% reduction was a reasonable limit to apply; specifically why it could not sustain a larger reduction given in particular that (i) it had done so for a significant period of time, (ii) there was no immediate need to require a full caseload from the claimant (as opposed to a predicted future need) and (iii) the claimant had expressed a willingness to undertake higher caseload on the basis of organisational need which could reasonably have been trialled when the need arose.

90. The claimant's reasonable adjustment claim in respect of a reduced workload succeeds.

<u>Time Limits</u>

91. The claim form was presented on 19 December 2023. The claimant commenced the Early Conciliation process with ACAS on 16 September 2023 (Day A). The Early Conciliation Certificate was issued on 18 December 2023 (Day B). Accordingly, any act or omission which took place before 17 August 2023 (which allows for any extension under the Early Conciliation provisions) is potentially out of time so that the Tribunal may not have jurisdiction to hear that complaint.

92. The claims for unfair dismissal and under section 15 were presented in time, but an issue arises in respect of the claim for reasonable adjustments.

93. An employer's liability begins as soon as it can take steps which it is reasonable for it to have to take to avoid the relevant disadvantage to the employee: this period should be assessed from the employee's point of view, having regard to the facts known, or which ought reasonably to have been known, by the employee at the relevant time. See Fernandes v Department for Work and Pensions EAT [2023] 114, to the effect that the Tribunal should consider when the reasonable employee, based on the facts known to them, would have concluded that the duty would not be complied with

94. The respondent's liability arose in within the context of the capability process. The claimant was first invited on 25 August 2023 to attend a capability meeting. For the purposes of his reasonable adjustments claim, liability therefore occurs after 17 August 2023. His reasonable adjustments claims are accordingly in time and Tribunal can hear the complaints.

Conclusion

95. The claimant's complaint of unfair dismissal is well founded, which means it is successful. Any submissions regarding Polkey or other reductions if relevant, can be made by the parties at the remedy hearing.

96. The claimant's complaint of discrimination arising from a disability is well founded, which means it is successful.

97. The claimant's complaint of a discrimination arising from the respondent's failure to make reasonable adjustments is also well founded in respect of PCP1 (discounting sickness absence) and PCP4 (reduced workload) but in other respects is not well founded and is dismissed.

98. The case will now be listed for a remedy hearing with a hearing length of 1 day. The parties should prepare for a remedy hearing in accordance with the following:

    98.1. Parties are requested to provide details of dates to avoid for the purpose of listing this case for the remedy hearing during 2025 **within 7 days** of the date in which the judgment is sent to them by the Tribunal

98.2. The hearing will be listed as CVP hearing, with a hearing length of 1 day

98.3. The claimant shall provide the respondent with an updated schedule of loss **by 30 April 2025**

98.4. The parties shall exchange documents relating to the determination of remedy by **14 May 2025**

98.5. The parties shall by **4 June 2025** agree an index for the remedy hearing bundle and by **11 June 2025** the respondent shall (unless otherwise agreed with the claimant) provide the claimant with a hard and pdf copy of the bundle for use at the hearing.

98.6. The parties shall exchange witness evidence relating to the determination of remedy by **25 June 2025**.

98.7. The respondent shall ensure that **14 days** before the remedy hearing, a pdf copy of the bundle together with a pdf copy of the parties' witness evidence provided to the Tribunal.

_____

EMPLOYMENT JUDGE BEEVER

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON: 27 March 2025

.....

JUDGMENT SENT TO THE PARTIES ON

03 April 2025 By Mr J McCormick

FOR THE TRIBUNAL