EMPLOYMENT TRIBUNALS

Claimant: Ms K Rockell

Respondent: Maximus UK Services Limited

Heard at: Cardiff Employment Tribunal (in person)
On: 16 – 19 December 2024

Before: Employment Judge E Macdonald
Mrs G Rees
Mrs J Kiely

Appearances
For the Claimant: Ms Rockell (litigant in person)
For the Respondent: Ms Duane of Counsel

REASONS

Background

1. The decision in this matter was given orally to the parties on 19 December 2024. The Tribunal found that the complaint of discrimination because of something arising in consequence of disability contrary to s 15 Equality Act 2010 succeeded. The matter was listed for a remedy hearing to take place by video-link on 2 April 2025. On 22 January 2025 the Respondent requested written reasons.

2. The Issues in the case had been identified by EJ S Jenkins in his Case Management Order dated 15 July 2024. The sole substantive issue was whether the Respondent had discriminated against the Claimant because of something arising in consequence of disability, contrary to s 15 Equality Act 2010.

3. This is the unanimous decision of the Tribunal.

The hearing

4. We heard evidence from the Claimant herself; she attested to the truth of her statement and was carefully cross-examined by Ms Duane. We heard from Mr Andrew Davies, who was responsible for hearing the Claimant's grievance; and from Ms Rhodes, who was responsible for hearing the Claimant's appeal against her dismissal. The Claimant also provided a statement of one Mr Philip Davies but he was not present to confirm the truth of his statement or be cross-examined and although we read the statement we placed very little weight on its contents.

5. The decision-maker, Ms Price, was not called by the Respondent to give evidence. We

were told that Ms Price had been dismissed by the Respondent for reasons related to conduct. We drew no adverse inference from Ms Price's absence.

6. We had a hearing bundle of 275 pages which was later supplemented by a copy of the Claimant's contract of employment and a probation policy (supplied on the morning of 16 December) and further by a copy of the sickness absence management policy and a further probation policy. The second probation policy was the probation policy in force at the material time. The Respondent also disclosed an email (during 17 December) which on its face was an email from the Claimant to the Respondent attaching signed copies of the notes of the grievance meeting.

7. At the outset of the hearing we discussed the issues. The legitimate aim relied upon by the Respondent was clarified as consisting solely of:

> Ensuring employees meet the required number of job starts . . . so that the necessary performance requirements of the role are met in order to meet the Respondent's contractual obligations to the Department for Work and Pensions

8. We reminded ourselves that our task was to focus on the case, helpfully distilled by the List of Issues, but bearing in mind that the pleadings were the primary documents. Our task was not to reach general views as to the Respondent's management of the Claimant, and we took care not to let the issues in the case become clouded by irrelevant factors.

9. We received written closing submissions from the Claimant and from Ms Duane of Counsel for the Respondent, which submissions were developed orally. We were particularly grateful to Ms Duane for her detailed assistance in relation to the question of causation, the correct test for which was explored in some detail during oral submissions.

10. We made the following findings of fact on the balance of probabilities, having regard to the evidence in the round.

<u>Facts</u>

11. The Claimant began work for the Respondent as an Employment Advisor on 10 November 2022. Her line manager was Ms Leanne Price. Her employment was stated to be subject to an initial probationary period of 6 months, which the contract of employment stated could be terminated or extended in the event of underperformance, poor sickness or conduct. The contract referred to the probationary policy. The contractual notice period was two weeks during the probationary period.

12. The Contract also referred to the Sickness Absence Management Policy and said at Paragraph 11.4 as follows:

> 11.4. You understand and agree that we may terminate your employment for excessive absence as defined in the relevant Sickness Absence Management Policy

13. The Sickness Absence Management Policy explains at Paragraph 4.6 ("Returning to Work") that

> [s]hould the employee's absence levels reach or exceeded (sic) the triggers (sic) points outlined in the Absence Triggers section of this policy, the employee will be required to undertake an Attendance Review Meeting (ARM) to review their absence history in further detail. This can be done as part of the return-to-work

meeting.

14. The “trigger points” are set out in Paragraph 4.9.2. During the probationary period, the trigger points are shorter than would otherwise be the case. The policy provides:

> For employees within their probation period, the triggers are as follows:
> • 2 periods of absence, or
> • 5 or more working days (pro-rated for part-time employees), or
> • Any absence pattern which gives cause for concern.
>
> Refer to the Employees in probation period section of this policy for details on the process once an employee in their probation period has reached a trigger.
>
> In some circumstances, for example if the individual has absences related to a disability which is potentially covered by the Equality Act 2010, the trigger points may be increased for absences relating to the specific condition/disability. The triggers for absences that are not related to the specific condition/disability will remain as outlined above.
>
> Should an employee return to work after being absent and then become absent within 2 working days due to the same illness / issue then this may be considered a linked absence. In this case, if the second absence is covered by a medical certificate (i.e. Fit Note) then it may be considered as 1 occurance rather than 2 separate occurences. (*sic*)
>
> Once an employee’s absence has reached the trigger points, the line manager will hold a ARM as part of their return to work meeting to discuss their absences in the previous 12 month period in more detail.

15. The ARM is a review meeting, the purposes of which include, in particular, understanding if there is a root cause of the absence issue, providing support, and identifying ways to prevent future absences. If there is unsatisfactory attendance and no reason why further action should not be taken, then the employee may be invited to a formal absence capability meeting.

16. There is then, as is conventional, an escalating set of stages for absence management.

17. For employees in their probationary period, where the outcome of the ARM is to continue to a formal meeting, this will be managed under the Probation Policy: paragraph 4.10 of the Sickness Absence Management Policy.

18. The Probation Policy says at Paragraph 4.4

> Throughout the probation period the line manager will continually discuss the employee’s performance against the criteria above and ensure the expectations and progress is clear and communicated. Where the employee is falling short of achieving the required standards, these will be clearly and appropriately feedback and where necessary, actions agreed to support the employee to reach the required standards.

19. At Paragraph 4.6 under the heading “Addressing concerns” the Policy provides

> Occasionally an employee may experience problems at the start of their employment. [. . .]
>
> Any concerns should be promptly managed in order to resolve these at an early stage and enable the employee to become effective in their new role. Discussions

> regarding any employee's concerns within their probation period must be documented including actions, next steps and a review period timeframe for expected improvement. The notes and actions should be shared with the employee in order to ensure they are aware of what standards are expected of them.
>
> Where standards are not met within the review period, or where there is some improvement but the required standard is still not reached, the line manager may extend the employee's probation period or terminate their employment for reasons due to a failed probation.

20. There is an expectation that records and notes of regular reviews should be made and shared with the employee: Paragraph 4.7 of the Policy.

21. There is also an expectation that notes of any probation review meeting should be made and shared with the employee: *ibid.*

22. The probation period can be extended, but the extension "is only applied in exceptional circumstances", which include "reasons relating to a concern raised with the employee such as absence." Again, the line manager must document the reasons discussed as well as the agreed actions and/or solutions to address the concerns and share these with the employee (p 7 of the Policy). Following the meeting, a letter will be sent to the employee confirming the extension to the probation period and reasons for this. Throughout the extension period, regular weekly meetings are supposed to continue.

23. The Policy then says as follows:

> Termination following probation
>
> If an employee is not meeting expectations at any point within their probation period, termination of probation is a possible outcome.
>
> [. . .]
>
> The employee will be invited to a probation review meeting with their line manager to discuss the employee's performance and the reasons why their probation period is subject to concern including the areas or standards which have not been met.
>
> The employee will have the opportunity to put forward their case and any evidence for the line manager to take into consideration which they believe is relevant to the concerns or issues.
>
> Where the line manager, having taken everything into consideration, decides that the employee has not met or demonstrated the standards and/or criteria required despite regular reviews and support, then the employee will be advised that their probation period is unsuccessful, and their contract of employment will be terminated.

24. Paragraph 4.10 explains that whilst an employee is in their probation period, "following an ARM, any unacceptable level of sickness absence could result in the extension of the employee's probation period or termination of contract of employment . . ."

25. Prior to 28 April 2023, there were no concerns raised with the Claimant about her levels of performance.

26. The Claimant was absent – it was agreed – on 12 & 13 January; 20 February; and 21 April 2023.

27. The Claimant accepted in evidence that she had had a cold on 12 & 13 January but explained that her absence was not due to a cold, but due to Crohn's. She remembered that her birthday was 8 January, and that she had been very unwell with a cold on that day. She was sure, and we accepted, that 5 days later she had substantially recovered. There was, as Ms Duane for the Respondent pointed out, no record in the Bundle that the Claimant had challenged the reason for the absence having been recorded as "cough and sore throat", and that is correct, although the Claimant said – and we accepted – that she had challenged this with Ms Price.

28. As to the remainder of the absences, it was accepted by the Respondent that the absence on 20 February 2023 was due to COVID (albeit at the Respondent's insistence); and that the absence on 21 April was due to a Crohn's flare-up. The Claimant referred to her condition as having become "active" following COVID infection in February 2023. That does not mean that it was not there beforehand, nor does it mean – as Ms Duane submitted – that her condition *only* became active shortly after a COVID-19 infection. The Claimant's statement that it became "active" following a COVID infection in February 2023 was not (contrary to the Respondent's submission) a 'seismic shift'. It is consistent with the Claimant's condition having been persistent.

29. Under the policies which we have seen, the appropriate response to the absences – which, by 23 April, had met the adjusted trigger points – would have been to hold an ARM. We find as a fact that having 2 absences or even 3 is not an "exceptional" circumstance. The policy does not, in our view, mandate probation to be extended in those circumstances.

30. On 28 April 2023 the Claimant had a probation review meeting with Ms Price. She was told that her probation was being extended for a period of 3 months due to absence. Up to that point her performance had been good, but she was told that Ms Price had no choice but to extend her probation by 3 months. The Claimant thought that this was unfair, but did not feel able to challenge the position.

31. The Claimant's evidence was in the following terms:

> I had my probation meeting In April 2023. My performance during this period was good, however I was told that my absence had triggered HR and that Leanne had no choice but to extend my probation by 3 months. I thought that this was unfair, however I could not argue as I had taken this time off. Straight away after my probation things changed between me, Leanne and Jess, the changes at first seemed passive aggressive, I wasn't sure if i was being overly sensitive as i wasn't well, soon enough it became clear. Leanne made it really clear that if I took any time off in the next 3 months she would have no choice but to let me go.

32. The Respondent contended that it would have been able to terminate the Claimant's employment at that point due to the failure to attend satisfactory absence, and relying on the "trigger" points identified in the policy. That in our view misunderstands the policy. The "trigger" points are not triggers for dismissal: they are triggers for the holding of an ARM, for the reasons stated above. By a similar token the "triggers" do not result in an entitlement "to activate the extended probation period / dismiss the Claimant under the Respondent's policies and procedures". That is not their role.

33. On 12 May 2023 Ms Price sent the Claimant a "support plan" by email, ostensibly following a meeting of the same date. The Claimant accepted the plan; she was on her probation period and arguing too much would, she thought, have seen her employment ended. She felt that she needed to keep herself in work. She did not, in her words, want to "rock the boat". She had childcare responsibilities and household bills to pay. We find that position entirely understandable. We reject the Respondent's submission that

her claims are "not credible". The fact that she was prepared to continue working in a hostile environment but took no steps to mitigate her position was compatible with her being unhappy with the Respondent's approach.

34. The elements in the support plan, and in particular the relevant performance metrics, appeared in the Bundle. Although the Claimant was in due course cross-examined about "job starts" (we return to this later), she was not challenged about her performance against these metrics. Nor could Ms Rhodes (who gave evidence for the Respondent) explain how the Claimant was said to have fallen behind as compared against these metrics. The metrics were, said Ms Rhodes, "measures designed to help her improve her performance." Ms Rhodes said that there was evidence that "these weren't being completed, they weren't necessarily happening." There was no corroborating documentary evidence before the Tribunal; we were not satisfied, on balance, that the Claimant was falling short as against these metrics (as opposed to "job starts").

35. On 23 June 2023 there was then a "Monthly Check-In & Metrics Review". All of the elements on that document were marked "Achieved" with the exception of "good quality file checks – minimum of 95% average file check score over rolling 3 months", with one "achievement" being marked as "DTP – 66% . . .".

36. The Key Performance Indicators ("KPIs") were all marked as N/A. We note that the KPIs related to "75% of first placements achieve earnings outcome payment" and "80% of participants falling out of work are back in employment within 60 days." Those, we find, were the KPIs.

37. The "Line Manager commentary" section of that document provided a breakdown of "Performance YTD" which states "YTD 1st – 10" and "% actual v target 63%" and for Y6 outcomes "actual v target 100%"

38. That document contradicts the document which appeared in the Bundle p 252 which purported to give further measures of performance, and which stated "Yr 6 Outcomes 20%" ("YTD JO's 1" as against a target of 5"). "YTD" here is an abbreviation for "year to date".

39. It is tolerably clear that the "YTD" entry refers to the quarter, rather than to the year.

40. In relation to June 2023, therefore, the document at p 252 of the Bundle did not flag failures to meet KPIs as such.

41. Despite the requirements – and good working practice – that review meetings be documented, the documents to which the Respondent were able to point were limited. They comprised the Caseload Breakdown Audit (pp 254 – 256), which was not a record of a discussion; and the "monthly check-in and metrics review" (pp 86 – 91), appearing to have been held on 21 July 2023, in addition to the documents at pp 84 – 85. Miss Duane also pointed us to the document at p 252, which was a table showing that the Claimant was not achieving the required level of job starts for the period May – July 2023.

42. Around that time there was contact between Ms Price and one Rosie Buchanan, whose role we understood to be in Human Resources. The guidance which is provided by Ms Buchanan included the following (on 21 July 2023):

> "Is there any reason as to why her performance has dropped"
> "Consider how Katie has performed over the past six months."
> "If there are performance concerns, it is crucial that you understand why Katie is not performing to the required level."

"Assess whether there were any other factors to consider, for example, absences"

43. On 25 July 2023 there was contact between Ms Price and HR which included the following:

> I have sent the invitation out for her 9 month probation review on Friday 28th July 2023 at 15:00.
>
> There was no mention from Katie with regards to health as being a factor in why she is not hitting her performance targets and we went through all support to date and I gave her pointers/guidelines for working intensively with her customers.

44. That note purported to attach "121" notes, but we were not provided with them.

45. By this point, the Claimant had fallen quite far behind targets. There had been a precipitous drop from over-achievement of targets prior to April 2023, to under-achievement in respect of "job starts", with the Claimant achieving 1 job start over a 3-month reference period (May – July 2023) as against a target of 12.

46. The Claimant's evidence, which we accepted, is that this was a function of having been given the most complex individuals by Ms Hale Summers, who had taken over the referrals in May 2023, and the individuals who were the furthest away from the job market. This was the only plausible explanation which had been tendered by either party as to why the Claimant's performance should suddenly have dropped so precipitously. That is relevant background to understanding the Claimant's candid admission that she was underperforming at the time. We considered Ms Rhodes' suggestion about gradual "ramping up" – in effect, that workload was expected to increase over time – but rejected this explanation, as it did not explain the sharp drop in performance, nor did it cover the relevant timeframe.

47. On 27 July 2023 there was communication between the Claimant and Ms Price in which the Claimant asked "Have I got a job to come back to lol x" and the response was "all discussions will take place in the 9 month probation review that's the purpose of it."

48. The invitation to a probation review was dated 28 July 2023; it was signed by Ms Price. It said insofar as is material:

> Further to the 6-month probation review held on Friday 28th April 2023 and the weekly/monthly meetings to review your probation progress against your probation plan,
> I am writing to invite you to attend a final probation review meeting. The purpose of the probation review meeting will be to discuss your progress in the following areas:
> • ATTENDANCE
> • QUALITY & COMPLIANCE
> • PERFORMANCE
> [. . .]
> In addition to the Probation Review forms and weekly/monthly notes, the following documents enclosed with this letter, will also be discussed within the meeting:
> • EVIDENCE OF QUALITY & COMPLIANCE/PERFORMANCE CONCERNS DISCUSSED
> • ANY SUPPORTING DOCUMENTS - PROBATION ACTION PLANS / ABSENCE REVIEW MEETINGS NOTES / TRAINING AND OUTCOMES
> • OUTCOME LETTER OF SIX-MONTH PROBATION REVIEW MEETING (where probation extended)

49. The references to "attendance" indicated that attendance was a material factor in Ms Price's mind at the time.

50. The letter warned that dismissal is a potential outcome but said:

> . . . no decision will be made until you have had a full opportunity to put forward everything that you wish to raise, and this has been considered.

51. That, we found for reasons which we set out below, was not true.

52. On 1 August 2023 the final probation review meeting took place between the claimant and Ms Price. It started at 11am and lasted for 8 minutes. The notes appeared in the bundle at pp 134 & seq. albeit they were not signed by the Claimant. The material section of the notes reads as follows:

> L.P. As discussed in last months 121, your current overall Job start performance is at 61% which is lower that what is expected for the agreed extension period (being May, June and July). You have achieved 1 job start and the expectation was 12.
> L.P I also need to explain that your current absence levels, due to the 3 periods, which amounts to 5 days, has resulted in Absence Triggers.
> L.P Due to this, we are unable to extend your probation any further and unfortunately will not be able to pass your probation, which will now result in having to end your contract with us.

53. The dismissal letter was in similar language but omits reference to absences, saying insofar as is material:

> Following your probationary review meeting held on 01/08/2023 with myself. I am writing to formally confirm that you have not been able to reach the minimum standards required during your probationary period and as such I cannot confirm the completion of your probation period.
>
> During our meeting, we discussed your performance fully and that unfortunately you did not achieve your required performance KPI's. As a result, I have decided to bring your employment to an end due to your unsatisfactory performance in probation period

54. In due course the Claimant appealed and the appeal was heard by Ms Rhodes, from whom we heard evidence. Ms Rhodes' view was that if absence was "OK" and performance was "OK", and if there had been a sudden decline in her meeting her targets, what would normally happen is that the employee would be put on to a performance management plan, which would involve looking at her performance; providing support where required; regular reviews with her manager, and key metrics, and performance measures being put in place. She thought that someone who had had their probationary period extended would get the same treatment: it should be the same for anybody.

55. Ms Rhodes referred to a further document that showed that at the probation extension in April 2023 it had been made clear to the Claimant that it was very important that her performance stayed on track, and that she – the Claimant – had been very clear on what those performance expectations were. It was not clear to us to which document Ms Rhodes was referring.

56. The Respondent submitted in closing that Ms Rhodes went on to find that the dismissal

> was due to C's suboptimal performance in failing to meet the necessary objectives

and targets which were wholly unconnected to her disability and absences . . .

57. Those were not Ms Rhodes' words. On a plain reading of Ms Rhodes' letter, Ms Rhodes did not consider in that letter (and by inference during the investigation) whether the dismissal was "wholly unconnected" to the absences, but instead made a range of findings regarding support, targets, objectives, and the behaviour of Ms Price; and amongst those findings was the finding that

> [t]he decision to dismiss you was based on fact (*sic*), that you had not achieved the required job start performance for the rolling 3 months up to your dismissal . . .

58. Ms Rhodes was asked by the Tribunal about whether the absences might have played a part in the dismissal: she said, and we accepted, that at no point was she concerned that the Claimant had been dismissed "because of her Crohn's or anything related to that". She explained that the absences on the "people manager" (i.e. personnel) system were noted as "cough and cold."

59. Ms Rhodes suggested in her statement that "the idea that absence was a factor . . . was never something that had been brought up by Katie or Leanne in investigations, so I did not consider that this was a factor in Katie's dismissal." In terms, the idea had not – from Ms Rhodes' point of view – been mooted, so it was not considered.

60. We noted the Claimant's account as recorded during the appeal meeting: when asked by Ms Rhodes "In your final meeting what was discussed?" the answer given was "My absences were discussed but I didn't take any further, and flagged no Job starts in June and July . . ." The Claimant had indicated that her absences had been discussed in the final meeting: it would have been reasonable to go on to consider whether they had a significant influence on the dismissal.

61. The Claimant also submitted a grievance relating to the fact that Ms Price had, it appeared, on 31 July 2023, told others in the office that the Claimant was going to be dismissed in advance of the dismissal meeting. We do not need to go into significant detail on this point save to note that the grievance in due course was upheld; the decision-maker Mr Davies concluded that there had been a breach of confidentiality and that the Claimant had been ineffectively managed by Ms Price, and also that Ms Price had been ineffective in managing "Jess" [Hale-Summers], allowing Ms Hale-Summers to have a negative impact on the Claimant.

62. That is relevant insofar as it demonstrates that the decision to dismiss had been made in advance of the meeting on 1 August 2023.

63. As to the potential justification for the dismissal, the Respondent's pleaded case was that

> The Respondent has the legitimate aim of ensuring that its employees meet their required number of job starts so that the necessary performance requirements of their role is (*sic*) met and so as to fulfill the contractual targets set out by the DWP . . . [the Respondent] had previously extended the C's probation period and held regular reviews and check-ins with the Claimant . . . the Claimant's performance was not improving and so the decision was taken to terminate the C's employment . . .

64. Ms Rhodes explained in her evidence that the Respondent had an

> important contract with the DWP . . . [and] has contractual targets to meet with the DWP for an expected number of job starts. Each Employment Adviser is then given

> a target to meet so that the necessary performance targets can be met and the contractual targets with the DWP can be achieved. Katie had been given support with her performance which had not improved to the required standard. I felt that the dismissal was proportionate . . .

65. Despite a lack of detail as to what the contractual targets are, and as to what the consequences of failing to meet those targets might be, we accepted this aim as described by Ms Rhodes (and in effect as pleaded).

66. There was no express indication that this aim was in the mind of the decision-maker who took the decision to dismiss, i.e. Ms Price. The lack of an express reference balancing exercise makes it more difficult for the Respondent to demonstrate that the necessary balance was struck, but not impossible.

67. On 14 August 2023 Ms Rockell met with Ms Rhodes. The note of that meeting included the following:

> In your final meeting what was discussed? My absences were discussed but I didn't take it any further, and flagged no Job starts in June and July . . ."

68. On 29 September 2023 there is an advisory document from Katie Owen to Ms Rhodes which said insofar as is material

> There are both absence and performance concerns therefore the outcome decision could still stand but you should acknowledge and identify the faults of the business as learnings.

69. The Respondent submitted that Ms Price had confirmed (during the grievance interview) that the Claimant's performance was the reason for the dismissal. That, we note, was a response to a leading question from Mr Davies – "[t]hen she was dismissed at the end of the three-month extension, for performance? Yes". We placed little weight on this. It did not go to the material question, which was whether the absences were an effective cause of the decision to dismiss.

Law

70. The starting point is the words of the statute. The Equality Act 2010 provides insofar as is material as follows:

> **15 Discrimination arising from disability**
> (1) A person (A) discriminates against a disabled person (B) if—
> (a) A treats B unfavourably because of something arising in consequence of B's disability, and
> (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.
> (2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.
>
> **39 Employees and applicants**
> [. . .]
> (2) An employer (A) must not discriminate against an employee of A's (B)—
> [. . .]
> (c) by dismissing B
>
> **109 Liability of employers and principals**
> (1) Anything done by a person (A) in the course of A's employment must be treated as also done by the employer.

[. . .]

136 Burden of proof
(1) This section applies to any proceedings relating to a contravention of this Act.
(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

71. The case of **Igen v Wong Ltd [2005] EWCA Civ 142** sets out a two-stage process. The first stage requires the complainant to prove facts from which the tribunal could, apart from the section, conclude in the absence of an adequate explanation that the respondent had committed the unlawful act of discrimination. If those facts are proved, the second stage requires the respondent to prove that he did not commit that act.

72. The only matter to be excluded at the first stage is the employer's explanation given for the treatment complained of: **Royal Mail Group Ltd v Efobi [2021] UKSC 33.**

73. The 'something' that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it: **Pnaiser v NHS England [2015] 12 WLUK 178**

74. The inquiry is not into motive: **Pnaiser** again.

75. The words "significant influence" are used synonymously to mean in both cases an influence or cause that does in fact operate on the mind of a putative discriminator whether consciously or subconsciously to a significant extent and so amounts to an effective cause: **Hall v Chief Constable of West Yorkshire [2015] 7 WLUK 193**

76. There is a distinction between cases where absence is the cause of a conclusion that the employer is able to manage without an employee, in which cases it is likely to be an effective cause of a decision to dismiss; and cases where absence is merely part of the context and not an effective cause. Every case will depend on its own particular facts. **Charlesworth v Dransfields Engineering Services Ltd [2017] 1 WLUK 78**

77. Similarly, the Tribunal must be careful to distinguish between the context within which the events occur, on the one hand, from those matters which are causative: **Basildon & Thurrock NHS Foundation Trust v Weerasinghe UKEAT/0397/14/RN**

78. When considering whether an employer treated an employee unfavourably because of an identified "something arising", the Tribunal must examine the putative discriminator's state of mind to determine what consciously or unconsciously was the reason for any unfavourable treatment found. If the "something" was a more than trivial part of the reason for unfavourable treatment then the answer is "yes": **Sheikholeslami v The University of Edinburgh UKEAT/0014/17/JW**

79. Although ordinarily one would expect a decision- maker whose treatment is impugned in unlawful discrimination proceedings to give evidence about the reason for such treatment, there is no inflexible principle or rule that requires this to be done. The failure to call a particular decision-maker to give evidence does not prevent a tribunal from making findings of fact about the reasons for a particular decision where other evidence available enables it to do so: **Sheikholeslami**

80. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A's motive in acting as he or she did is simply irrelevant: see **Nagarajan v London**

Regional Transport **[1999] IRLR 572** . A discriminatory motive is emphatically not (and never has been) a core consideration before any prima facie case of discrimination arises: **Sheikholeslami**

81. As to the defence under s 15 – whether the employer can show the treatment to be a proportionate means of achieving a legitimate aim – we reminded ourselves that o be proportionate, the unfavourable treatment has to be both an appropriate means of achieving the legitimate aim and a reasonably necessary means of doing so (**Homer v Chief Constable of West Yorkshire** **[2012] UKSC 15**

82. It is for the tribunal to balance the reasonable needs of the business against the discriminatory effect of the employer's actions on the employee (**Land Registry v Houghton and others** **UKEAT/0149/14** above). This is an objective exercise.

Issues & conclusions

83. We can now state our conclusions fairly shortly. We adopt the numbering from the List of Issues provided by the Respondent (but with the deletion of Paragraph 1.4.1 in the Respondent’s draft, on the basis that that paragraph sought to set out a legitimate aim not pleaded).

84. In reaching our conclusions, we bore carefully in mind the distinction between the context within which the dismissal occurred, on the one hand, and the matters which were causative of the dismissal – i.e. those which formed a more than trivial part of the reason for the dismissal – on the other.

85. We note, for completeness, that disability was – quite rightly – conceded by the Respondent.

Discrimination arising from disability (Equality Act 2010 section 15)

Did the Respondent treat the Claimant unfavourably by dismissing her?

86. Yes. Dismissal is a paradigm instance of unfavourable treatment.

Did the Claimant’s sickness absence arise in consequence of her disability?

87. Yes, as follows. Albeit that the Claimant’s sickness absence on 12 & 13 January 2023 is listed as “cough – sore throat”, we accepted that the Claimant’s absences on those dates were in fact due to the Claimant’s disability, namely Crohn’s disease. We arrived at this conclusion primarily because the Claimant herself testified that her birthday was on 8 January and she remembers being very unwell, or having a “serious cold” that weekend; she was clearly back in work from 9 – 11 January (Monday – Wednesday); hence, her cold was not stopping her from working. We also bore in mind the Claimant’s unchallenged testimony that infections can trigger her Crohn’s disease. One day of sickness absence (February 2023) was agreed to be by reason of COVID, rather than Crohn’s disease. The parties agreed that there had been one day of sickness absence in April 2023 which was due to Crohn’s disease.

88. We rejected the submission advanced on behalf of the Respondent that the Claimant has “quite cynically, sought to engineer an alternative chronology . . . wherein a second absence could be linked to her Crohn’s disease . . . [which is] clearly a falsehood . . .”. By a similar token, and for completeness, we rejected the suggestion that the claim advanced by the Claimant was solely motivated by financial recompense, or that the claimant lacked a genuine sense of injustice.

Was the unfavourable treatment because of that thing? Did the Respondent dismiss the Claimant because of that sickness absence?

89. The Claimant advanced two arguments on this point. First, she said that her sickness absence caused her probationary period to be extended, and that it was as a result of the extension to her probationary period that her under-performance resulted in dismissal. Second, she said that her sickness absence was a significant factor in the decision to dismiss her – i.e., it was something that Ms Price had in mind when taking the decision to dismiss.

90. As regards the first argument, we reminded ourselves of the guidance given by Simler J (as she then was) in **Sheikholeslami:** answering the question requires an examination of the putative discriminator's state of mind to determine what unconsciously or consciously was the reason for any unfavourable treatment found. In our view, the extension to the probation period was part of the context within which the dismissal occurred, rather than being (whether consciously or unconsciously) the reason – or, more strictly, a "more than trivial part of the reason" for the unfavourable treatment.

91. As regards the second argument, we considered that the Claimant's position had more force. The guidance provided by HR on 21 July 2023 invited Ms Price to assess whether there were other factors to consider, "e.g. absences". The letter inviting the Claimant to a final probation review meeting referred to absences. Absences were mentioned as one of two issues in the dismissal meeting, after which the notes record that "due to this" the Claimant would be dismissed. The Claimant confirmed in her interview with Ms Rhodes that absences were discussed. The Claimant in her witness evidence (cited above) stated that after the first probation meeting Ms Price's attitude towards her changed (with the trigger for that meeting, of course, being the Claimant's absences). Those are all facts from which the Tribunal could conclude, in the absence of a non-discriminatory explanation, that the absences had a significant influence on the decision to dismiss.

92. We then considered whether the Respondent had proved, on the balance of probabilities, that the (disability-related) absences did not have a "significant influence" – or, to use a synonymous phrase, were not an "effective cause" of the dismissal. We found that the Respondent had not discharged this burden. We considered that the language used in the lead-up to, and during, the final probation meeting is clear and unequivocal. We did not accept Ms Duane's suggestion that the reference to absences was "merely context". Nor did we think that the evidence of Ms Rhodes establishes that the absences were not a significant influence (or an "effective cause"). The inquiry with which Ms Rhodes was tasked was not directed at this question. Ms Rhodes did not explore with Ms Price whether the reference to "absences" in the final probation meeting was merely provided as context, or whether it was cited as one factor, even if a subordinate factor.

93. We reflected on Ms Rhodes' assertion that the dismissal was "purely" due to performance (stated in her oral evidence, tendered in re-examination). That may well have been Ms Rhodes' view as at the date of the hearing, but we approached it with considerable reservation given the observations made above.

94. Ms Rhodes' investigation (rather than her oral evidence following re-examination) is entirely consistent with performance being the primary reason for dismissal, but with absences nonetheless exerting a significant influence on the decision. In the language of **Hall,** we considered that the absences were ". . . a significant influence on the unfavourable treatment, or a cause which is not the main or the sole cause, but is nonetheless an effective cause of the unfavourable treatment . . ."

95. We therefore concluded that the unfavourable treatment was “because of” the “something arising”, namely the absences. We would have reached that conclusion even absent the shifting burden of proof provided for by s 136 Equality Act 2010: in our view, the contemporaneous references to “absences” leading up to, and during, the probation review meeting are sufficient to establish that, more likely than not, the absences had a significant influence on the decision to dismiss.

Was the treatment a proportionate means of achieving a legitimate aim? The Respondent says that its aims were . . . ensuring employees meet the required number of job starts [. . .] so that the necessary performance requirements of the role are met in order to meet the Respondent’s contractual obligations to the Department for Work and Pensions.

96. We accepted this as a legitimate aim, despite the reservations expressed above. In our view it is in the very nature of the Respondent’s business that there will be targets to meet, based on objectives and/or contractual targets set by the DWP. Contrary to the submission made on behalf of the Respondent in closing, we have no evidence that if the Respondent does not satisfy the targets set by its contract then there would be consequences including fines; nor did we have any evidence as to the likely impact of C’s failure to meet targets on the overall performance as against the contract.

was the treatment an appropriate and reasonably necessary way to achieve those aims?

97. The treatment was not an appropriate or reasonably necessary way to achieve that aim. It was open to the Respondent to act as Ms Rhodes indicated they might reasonably have been expected to act, i.e. to have provided training; to have put the Claimant on a performance plan; or to have extended the probationary period further. We say that notwithstanding Ms Rhodes’ qualification about any extension being referable to someone who had good performance and good attendance and whose performance then dropped sharply. We make that last point notwithstanding the express limitation in the probationary policy that only one extension (of up to 3 months) is permitted. It is the Respondent’s own policy and they were able to disapply it, should they have so chosen, for the Claimant’s benefit. Moreover, the Respondent had failed – for reasons set out above – to comply with its own policy; we would not, therefore, accept that the Respondent was strictly constrained to act in accordance with the letter of the policy. We bore in mind that the Claimant’s probation could well have been confirmed in April; there was nothing exceptional about the circumstances such as to have warranted extension at that point.

98. As Ms Rhodes explained, both for non-probationary and probationary staff one would expect, in these circumstances, a performance management plan, which would entail e.g. regular reviews, targets, support, and key measures, with regular reviews at the 3-month stage.

99. We bore in mind the Claimant’s concession that she had feedback approximately every six to eight weeks, but we noted that in 3 a month reference period this would have provided for at most a few meetings.

100. Dismissal is a logical consequence at the end of a capability management process, but would need to be seen in that context. A capability management process is the primary means of helping employees to achieve targets, and would have constituted a less discriminatory means of achieving the legitimate aim in question.

Could something less discriminatory have been done instead?

101. The answer is a simple “yes”. As outlined above, the options open to the Respondent would have included extending probation or confirming employment (whether retrospectively or otherwise). The Respondent could have disapplied its own policy in

favour of the Claimant given the circumstances.

How should the needs of the Claimant and the Respondent be balanced?

102. We considered that the balance struck by the Respondent in this case was disproportionate. There was not, in our view, a proper balancing exercise undertaken, and the result was that the outcome was not did not strike a proper balance between the legitimate aim, on the one hand, and the discriminatory impact on the Claimant, on the other, given that no genuine efforts had been made to identify the reason for the sudden drop in performance; given that the Claimant had not had performance issues prior to the review period; and given that the Respondent had no reasonable basis, in our view, for concluding that the problem was incapable of remedy.

103. In the language of the probation policy (p 327) cited above, we did not accept that the line manager could have reasonably concluded that the employee “had not met or demonstrated the standards and/or criteria despite regular reviews and support”.

Did the Respondent know or could it reasonably have been expected to know that the Claimant had the disability? From what date?

104. We find that the Respondent was aware at all material times that the Claimant had the disability. The Claimant had disclosed the same to Occupational Health prior to her start date. She was not challenged on this point. Ms Price recorded that the Claimant was “celiac”: we do not understand this but clearly Ms Price was aware of sufficient facts (certainly as of 21 July 2023) to fix her with constructive knowledge, i.e. she could reasonably have been expected to know, in any event, that the Claimant had the disability.

105. For the reasons set out above, the claim of unlawful discrimination contrary to s 15 Equality Act 2010 succeeds. A remedy hearing has been listed for 2 April 2025 (by video-link) and Case Management Directions have been given.

Employment Judge **E Macdonald**

Date: **24 February 2025**

JUDGMENT SENT TO THE PARTIES ON

5 March 2025

Kacey O’Brien
FOR THE TRIBUNAL OFFICE

Notes
Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

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