EMPLOYMENT TRIBUNALS

Claimant: **Miss R Jasat**

Respondent: **The Council of the Borough of Kirklees**

Heard at: **Leeds** **On:** **6, 7 & 8 March 2017**

Before: **Employment Judge Burton**

Members: **Mr D Dorman-Smith**

Mr W G Appleyard

Representation

Claimant: Mr B Frew, Counsel

Respondent: Miss C Widdett, Counsel

JUDGMENT

1. The complaints of disability discrimination pursuant to s15 and s21 Equality Act are successful.
2. The Claimant was unfairly dismissed.

REASONS

1. These are claims brought by Miss Rashida Jasat against Kirklees Council whereby she complains of unfair dismissal and of disability discrimination. The Claimant has been represented by Mr Frew of counsel, the Respondents by Miss Widdett of counsel.

The Issues

2. The issues that we have to determine were defined at an early Preliminary Hearing but it is fair to say that by the time of this hearing the issues had been very much narrowed down to the simple issues of firstly did the Respondents fail to make reasonable adjustments in relation to the way in which they applied their sickness absence procedures designed to encourage more regular attendance at work. Secondly, it being accepted that the Claimant was subjected to unfavourable treatment by being dismissed and that that unfavourable treatment related to sickness absences attributable to the Claimant's admitted disabilities, can the Respondent show that her dismissal was a proportionate means of achieving a legitimate aim. The Claimant concedes that the Respondents had a legitimate aim in encouraging regular attendance at work so as to maximise their ability to provide services to the community.

3. In relation to the unfair dismissal claim the issues really are firstly whether the Respondents pursued appropriate investigations in relation to the Claimant's state of health before dismissing her for health related capability issues and secondly whether the dismissal was, at any event, within the band of reasonable responses.

The Facts

4. The Claimant has been employed by the Respondents, ultimately as a Community Assessment Support Officer, from 24 March 1986 and so by the time she was dismissed on 15 December 2015 she had completed very nearly 30 years of service with the Respondents. She works within the adult services department assessing and providing appropriate services for vulnerable adults. There is no doubt that this is valuable and important work and as is so often now the case a service that is under considerable pressure where the resources available do not always correspond with the demand placed upon the service.

5. The Claimant has had a number of significant health issues and it is fair to say that throughout significant parts of her career with the Respondents she has had on occasions a very poor sickness absence record.

6. The Respondents have procedures in relation to the way in which they manage sickness absence. There is an overall attendance management policy. As an introduction to that policy the Respondents state that having to dismiss employees for an unacceptable level of attendance is something that they want to avoid wherever possible.

7. They operate a process where trigger points will bring the policy into play. As far as these proceedings are concerned there are two relevant trigger points that is eight days absence in a rolling twelve month period or four occasions of absence in that rolling twelve month period. If a trigger point is hit the employee goes on to Stage 1 of the procedure that involves conducting a meeting with their manager discussing the reasons for the absence, any underlying medical personal or work related issues, whether the absence is due to a disability and what support or adjustments could be considered including a referral to the Respondent's occupational health advisors called Employee Healthcare. It is then anticipated that the manager will put in place a review period and will set an improvement target.

8. Where an employee fails to meet that improvement target they then move on to a second stage formal meeting. The same matters are to be discussed as at the first stage, for example whether the absences were due to a disability and whether support or adjustments should be considered and at the conclusion of that second stage formal meeting once again a manager may put in place a review period and set an improvement target.

9. Quite unusually, in our experience, the procedure then goes on to say that if at the end of the second formal review period the employee has met the targets set rather than going back, as we normally would have anticipated, to the first stage of the process they remain at that second stage. If within a two year period, and in this case there is a debate as to whether that begins at the start or the end of the trial period, they once again hit trigger points then the employee automatically proceeds

to the third stage unless there are extenuating circumstances. Once at the third stage rather than necessarily setting further targets the employee's dismissal may be considered.

10. As a consequence of that procedure even if, within the trial period, an employee meets fully the targets set he/she will continue to be at risk of dismissal for an additional two year period. That effectively creates a review period of (on the Respondents interpretation of the policy) two and a half years. That seems to us to be a draconian procedure. We accept, of course, that Respondents are entitled to create procedures in whatever way they see fit but for the purpose of determining whether any subsequent dismissal is fair or a proportionate response the more draconian the procedure may be the greater care the employer must take in ensuring that all proper steps have been taken and all necessary considerations have been taken into account before determining that an employee should be dismissed.

11. The Respondents understandably issue guidance to their managers as to the way in which those procedures should be operated. They are told that when attendance triggers are hit "*as part of your duty of care you should consider reasonable adjustments for any employee with a medical condition whether it is likely to be classed as a disability or not*". The guidance goes on to say *"an Employment Tribunal would expect a manager to consider an employee's medical condition, consider reasonable adjustments and make allowances where reasonable when making decisions such as moving to formal procedures, setting improvement targets and review periods and considering dismissal."*

12. When conducting review meetings the guidance makes a number of suggestions. Before a manager considers dismissal they need to make sure that they have firstly considered advice from HR, fit for work scheme, if relevant, and employee health care and ensure that advice is still current. Secondly they should consider the Equality Act and any reasonable adjustments that may be required. Thirdly they should consider any new information or evidence that could affect the decision. Fourthly they should take into account the employee's length of service – " *Employment Tribunals expect us to demonstrate an even more caring approach for employees who have been with the council a long time*" and finally it is suggested that a manager should think about and evidence the impact of the absence on the team and the service. All that seems to be very good advice.

13. They have another policy document entitled "*Supporting Disabled Employees in the Workplace*". Under the heading "*What to consider when making reasonable adjustments*" it says as follows: "*The Equality Act says that you should make adjustments that are reasonable depending on your situation. You should think about and involve the disabled employee and consider advice from Employee Health Care*".

14. The Respondents concede that the Claimant has disabilities as defined within the Equality Act. Of relevance to these proceedings we need to consider three of those conditions, the first being osteoarthritis which in particular has had an effect upon Miss Jasat's knees. The second is a longstanding asthmatic condition and the third is a condition known as

dystonia which we understand to be a disorder of the nervous system which has the effect on Ms Jasat of causing tremor in both hands.

15. Looking at Ms Jasat's history in relation to medical absences it seems to us that the starting point should be February of 2012. By that time she had escalated to the second formal interview stage having failed to meet the target that had been set in August of 2011. Subsequent absences attributable in the large part to her asthma led her to progress to that second formal stage and on 27 February 2012 an improvement target was set that she should have no more than four days absence in a period of three months. Happily she was able to successfully meet that target.

16. Unfortunately the two year monitoring period caught her out. She had 6 days absence in October 2012 in relation to her asthma, 5 days absence in November 2012 in relation to muscular pain and a lengthy period of absence between November 2012 and February 2013 by reason of anaemia.

17. Having once again hit a trigger point a further stage two meeting was conducted on the 1st July 2013. On that date a further target was set involving no more than 4 days absence in the period 1st July to 31st December 2013.

18. For the second time she met that target. She had no absences at all during that period. Although her records show that she had no further sickness absence until January 2015 it is suggested that there may have been two days unrecorded absence during 2014. As, however, we have no evidence of such absences and as they were not taken into account by Ms green who subsequently decided to dismiss the Claimant we work on the basis that the Claimant was without any sickness absences between February 2013 and January 2015.

19. Unfortunately her asthmatic condition recurred and she had four days off sick between 6 and 9 January 2015. She developed a chest infection which was attributable to her asthma which led her to have another four day absence between 7 and 10 April 2015. In the summer of 2015 her GP endeavoured to control the dystonia by prescribing medication to her. That medication had a significant adverse effect upon her which led her to have two further periods of absence between 9 and 12 June and 29 and 31 July. That therefore hit a further trigger point being eight days absence or four periods of absence and a decision was then made, in accordance with the Respondent's procedures, to move her on to the third stage of the process.

20. An occupational health report was obtained in September of 2015 relating specifically to the Claimant's condition of dystonia. The relevant part of that report reads as follows: "*Rashida has chronic health problems which are not likely to resolve in the future. However she could expect a period of stability over the next few years, that does not preclude her from sustaining a satisfactory level of attendance. There will be times when it flares up and her symptoms are troublesome but I think with adjustments she could continue to work effectively in her current role"*. Thus the occupational health doctor, Dr Dan, was expressing optimism that dystonia was no longer going to

impact upon the Claimant's ability to provide effective service in the foreseeable future.

21. Unhappily for Miss Jasat she had another medical issue which needed to be resolved. She suffered from a degenerative bone condition in her jaw and it was known that at some stage she would be admitted for surgery to be performed to remedy that problem. As soon as Miss Jasat was given a date for that operation she notified her employer and she then went off sick again on the 9th October 2015 in order that the operation could be carried out. Unfortunately there were post operation complications and so a further sick note was issued to her on 20 November 2015 which would have expired on 22 December 2015 at which point Miss Jasat would be able to return to work.

22. By reason of the earlier four periods of absence the Claimant was invited to attend a stage three review meeting. She knew that such a meeting could have lead to her dismissal. The date of that meeting was fixed for the 15th December 2015.

23. Ms Diane Green was, at that stage, the Head of the Service for Early Intervention and Prevention within Adult Services (she has since retired). She was asked to carry out this review. It could have been thought that the Claimant could not have been in safer hands. As Ms Green has told us she has a masters degree in disability related issues. She has a detailed knowledge of the Respondent's sickness management procedures. Indeed she teaches other managers how to apply those procedures.

24. There could be no question but that she had a detailed understanding of the responsibilities that these employers would have towards the Claimant as a disabled person and a detailed understanding of the guidance that the Respondents provided to their managers when dealing with sickness absence in relation to their employees, particularly when they were disabled within the meaning of the Equality Act and particularly when they had provided many years of service to the Respondents.

25. The one part of the guidance that Ms Green clearly had in her mind was the impact that these absences had upon the service that the Respondents were able to provide to the elderly and vulnerable people who they were to provide assistance to.

26. In advance of the review meeting Ms Green had commissioned a report from the managers in that department as to the impact that the Claimant's absence had upon the services being provided by that department. She received a written report upon which she relied which suggested that some 20 referrals had been received which the Respondents had not been able to process because of the Claimant's absence. Surprisingly that report was not shared with the Claimant at any time and indeed equally surprisingly was not disclosed to her representatives during the course of this litigation. What became clear however, when we heard the evidence of Ms Green, was that that report was wholly misleading in the terms of the decision that Ms Green had to make.

27. Ms Green was explicit in her evidence that when considering this matter she wholly ignored the absence attributable to the operation on

the Claimants jaw. She did that on the basis that the decision to advance Miss Jasat to stage three was taken before it was known that she was going to go off work on the date that she did. In her view, therefore, she should only consider those absences that were used to create the relevant trigger point.

28. What, apparently, that report made clear was that those alleged failed referrals were attributable primarily to the Claimants most recent absence for that operation and also to the fact that they had a number of unfilled vacancies. That impact, if such there was, therefore had nothing to do with the four absences that Ms Green was considering. Nonetheless it was clear that that was a report that significantly influenced Ms Green in her considerations.

29. At the outset of the meeting on 15 December Ms Green enquired as to the Claimant's current state of health . Miss Jasat was able to confirm that she was on the mend and she hoped to be able to return to work very quickly.

30. She was then asked about the dystonia. Miss Jasat explained that there had been problems with the medication that she had been prescribed, that she was now no longer on that medication, that she was using a device known as a TENS machine which she described as "*brilliant, it helps with the pain and tremors*". She went on to talk about the problems that that condition caused her at work and how she anticipated that those problems were capable of being resolved, in particular by accepting the recommendations that occupational health had made in relation to equipment that could be provided.

31. Ms Green dwelt at length upon the Claimant's past history of ill health, she asked the Claimant what was going to change. Ms Jasat acknowledged that the future was always uncertain but that she felt much improved. She confirmed that she would be coming back to work on the 22nd December. Having adjourned for a period Ms Green decided that the Claimant was not going to be given that opportunity. She was dismissed for unsatisfactory attendance. The Claimant subsequently appealed against that decision.

32. That appeal was heard on 18 March 2016. We heard the evidence of Deborah Ladlow who was part of the appeal panel and who was a human resources manager. That was clearly a much longer hearing predominantly involving Ms Green explaining the rationale behind her decision. When, however, Miss Jasat was asked to present her case she was able to give a summarise her present medical position. She said "*I have very good support from the asthma nurse. I am on better medication which doesn't cause me side effects*". She said "*with regards my knee complaint it is something that I have adjusted to and coped with on a day to day basis*". She talks about having to work round obstacles and avoid problems. In relation to the operation on her jaw she talked about having made improvement, that the pain that she had suffered was gone, that she felt that she had made a very good improvement and that she was ready to return to work. Her appeal was however rejected.

33. Mr Frew submits that the most blatant failure on the part of Ms Green and then Ms Ladlow was their failure to have obtained an up to date

report from their occupational health advisors. As he points out the more recent reports obtained from them related to specific medical conditions such as that one relating to dystonia. He submits, and we agree with him, that the Respondents own procedures demanded that a more general report needed to be obtained looking at the Claimants general medical condition, looking at what treatment was being given to her and, crucially, coming to an informed view as to what the future may hold in store in relation to the Claimants future reliability in her attendance at work.

34. This failure was not because Ms Green and then Ms Ladlow just overlooked the possibility of obtaining such a report. They both made the positive decision not to obtain a report. Their reasoning for doing so was rather surprising. They both contended that, in the past, reports had been obtained from Occupational Health in relation to Ms Jasat that had proved to be unduly optimistic and so they decided to use their own judgement as to these matters despite the obvious fact that neither of them had any qualifications to enable them to make what are, essentially, medically based judgements. We have little doubt that, in reality, they did not want the possibility that the contents of any such report may make it more difficult to achieve their objective which was to dismiss the Claimant.

35. The Respondent's procedures encourage Ms Green to consider making appropriate adjustments. Ms Green's expertise in disability related issues would lead her to have a very good understanding of what that should involve. Again Ms Green tells us she considered whether adjustments should be made and made the positive decision not to. The basis of that decision was that many adjustments had been made in the past both in relation to the Claimants working arrangements and in relation to the equipment that had been provided to her.

36. That gives the impression that Ms Green worked on the basis that there was a limit on the number of adjustments that any employee could expect. Despite her expertise in disability related issues she wholly failed to understand that the need to make such adjustments may well be a dynamic process as the employees needs change or as the provisions, criteria or practices applied by the employer may vary. She just thought that Miss Jasat had received sufficient accommodation in the past. She gave no thought to the real question which was whether in the situation in which Miss Jasat found herself namely facing dismissal in relation to disability related absences adjustments needed to be made in relation to the Respondent's procedures.

The Law

37. In terms of any failure to make reasonable adjustments we refer to section 20 of the Equality Act which sets out that duty. Subsection 3 reads as follows:

"The first requirement is a requirement where a provision criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled to take such steps as it is reasonable to have to take to avoid the disadvantage"

Section 21 tells us that:

"(1) *A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments. (2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person".*

Section 15 of the Equality Act reads as follows:

"(1) *A person (A) discriminates against a 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".

38. The Respondents concede that by dismissing the Claimant they treated her unfavourably. They also concede that that unfavourable treatment related to her disability, namely sickness absences attributable to her disability. The Claimant conceded that they had a legitimate aim in so doing, namely to reduce sickness absence so as to enhance their ability to provide a service to those vulnerable adults who rely upon them. That, therefore leaves us only to consider whether the treatment was a proportionate means of achieving that aim.

39. Mr Frew refers us to the well known decision of **Homer v Chief Constable of West Yorkshire Police [2012]** UKSC 15 which tells us that to be proportionate a measure has to be both an appropriate means of achieving a legitimate aim and also be reasonably necessary in order to do so although we do not go so far as to require the Respondents to show that no other means were available to meet that aim (**Hardy's and Hanson's v Lax** [2005]IRLR 726.)

40. We have been referred to the relevant **Code of Practice** which, at para 4.30 says as follows

"*Even if the aim is a legitimate one, the means of achieving it must be proportionate. Deciding whether the means used to achieve the legitimate aim are proportionate involves a balancing exercise. An Employment Tribunal may wish to conduct a proper evaluation of the discriminatory effect of the provision, criterion or practise as against the employers reasons for applying it, taking into account all the relevant facts.*

At para 4.31 it says

"*Although not defined by the Act, the term "proportionate" is taken from the EU Directive and its meaning has been clarified by the decisions of the CJEU (formerly the ECJ), EU law views treatment as being proportionate if it is an "appropriate and necessary" means of achieving a legitimate aim.*

But necessary does not mean that the provision criterion or practise is the only possible way of achieving the legitimate aim; it is sufficient that the same aim could not be achieved by less discriminatory means".

Findings

41. We turn to our findings in relation to the disability discrimination claim. We found the approach of Ms Green in determining whether to dismiss the Claimant for her disability related absences to be a difficult to understand. She placed great emphasis upon an impact report which she had obtained which in effect said nothing at all about the impact to this service in relation to the four periods of absence in 2015 that she was considering. They related to a period of absence that Ms Green specifically was not considering. It related to other difficulties within this service. Although this point was not put to the Respondents witnesses, and so it is not a matter upon which we place undue reliance in arriving at our decision, it is a puzzle to us how it could be that if the service provided by these Respondents is adversely affected because they have unfilled vacancies they are assisted by adding to those vacancies by dismissing the Claimant.

42. Ms Green relied upon the history preceding 2013 as demonstrating both a very poor attendance record and, she told us, a history of obtaining unduly optimistic occupational health reports, although no such reports have been put before us or examples provided. What she wholly failed to do was to focus on those four periods of absence with which she was concerned. If she had done and if she had obtained, as undoubtedly she should have done, an up to date occupational health report she would have discovered, as Miss Jasat has told us, and we accept her evidence entirely upon these matters, that the situation was clearly an improving one.

43. Proper enquiries would have revealed the problems that Miss Jasat had had in the past in controlling her asthma. She has described how, over the years, her various medical advisors had endeavoured to help her with that condition by various prescriptions the effectiveness of which was judged by means of trial and error. Time after time she discovered that the side effects of the treatment provided were as bad as the illness itself. By the summer of 2015 that problem had at last been resolved.

44. Although asthma is a notoriously unpredictable condition and, as Miss Jasat has explained to us, can be triggered by a wide variety of things, what matters to the sufferer is to have the appropriate medication, normally in the form of an inhaler, available which then rapidly brings the symptoms under control without having its own disabling effect. By the summer of 2015, at last, such medication was identified and prescribed. There was, thereafter, every hope that the condition of asthma would no longer have a significant impact upon her ability to maintain regular attendance at work.

45. In terms of the absences relating to dystonia they had nothing actually to do with that condition but to the medication which her doctors had provided in an effort to manage that condition. Once again knowing that that medication had caused significant side effects her doctor had ceased to prescribe them. Miss Jasat had found other means of controlling her condition, namely by use of a TENS machine. If Ms Green had made those enquiries she would have been bound to conclude that the four absences that she was considering had specific causes which were not likely to be recurring in the future.

46. What she should also have given far greater weight to was the fact that when Miss Jasat had her second formal review meeting in July of 2013 and when a target was set as to a limit of the number of absences within a specific period she met that target. The same had happened in the previous year. That was shown to be an effective management tool. Not only that but she had gone on to sustain a lengthy period without any sickness absence at all.

47. Ms Green just dismissed the significance of that by saying that it was only one such period when looking at the entire history of sickness absence. What that approach wholly fails to understand is that when it come to whether it is an appropriate step to take to dismiss an employee of such length of service that history, in reality, only serves to explain why the employee finds herself at risk of dismissal. What matters in determining whether such a step should be implemented depends upon an assessment of the future not of the past. Even if it were appropriate to proceed without the benefit of Occupational Health advice Ms Green was wholly wrong not to have understood that the recent absences were explicable in terms that would suggest that such absences would not be repeated, that the management tool of setting realistic absence targets was shown to have been effective and that by sustaining a lengthy absence free period of employment the signs were of an improving position generally.

48. Of course, when asked, Miss Jasat could not, in all honesty, provide any categoric assurances as to the future. Who, in reality, could do. Taking all those matters into account we have no difficulty in concluding that the Respondents have failed to show that the dismissal of the Claimant was a proportionate act. Alternative steps that could and should have been taken, once the appropriate advice had been obtained, was to consider what adjustments should have been made to the trigger points to take account of those absences that may be disability related and then to consider what future targets could be set which may balance the needs of this employer in encouraging regular attendance with the discriminatory effect which this draconian procedure had upon the Claimant as a disabled person. We therefore conclude that the complaint bought under s15 Equality Act is well founded.

49. In terms of the failure to make reasonable adjustments that is of course only the other side of the same coin. In so far as we conclude that the four absences should not have led Ms Green to conclude that dismissal was the only option so we conclude that adjustments should have been made to the way that these procedures were applied as explained above. In so far therefore as it makes any difference we find that complaint well founded also.

50. It follows that we must also conclude that the Claimant's dismissal was an unfair dismissal. The failure to obtain the necessary occupational advice was a failure to pursue those investigations that were necessary before it could be shown that dismissal was within the band of reasonable responses. In terms of **Polkey,** namely what were the chances that the outcome would have been the same had such enquiries been made, we have no doubt that the Claimants dismissal would have been avoided. A properly informed medical report would have, as we have already found, suggested that the position was an improving one with every likelihood of the Claimant being able to sustain acceptable attendance in the future. On that basis it would have been far outside the band of reasonable responses to have dismissed an employee with such a long period of dervice.

Employment Judge Burton
Date: 22 March 2017
Sent on: 24 March 2017