EMPLOYMENT TRIBUNALS

Claimant: Miss C Amess

Respondent: Doncaster & Bassetlaw Hospitals NHS Foundation Trust

Held at: Sheffield **On:** 21, 22 and 23 August 2019 and 23 September 2019

Before: Employment Judge Little
Members: Mrs D Ennals
Mr D W Fields

REPRESENTATION:

Claimant: Miss A Hashmi of counsel

Respondent: Miss L Gould of counsel

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is that all the complaints within this claim fail and accordingly the claim is dismissed.

REASONS

1. **The complaints**

   At a preliminary hearing for case management conducted by Employment Judge Rostant on 12 September 2018 it was confirmed that the following complaints were being pursued:-

   - Unfair dismissal.
   - Disability discrimination – failure to make reasonable adjustments.
   - Discrimination arising from disability.

   At that hearing it was also noted that there appeared to be a direct discrimination complaint (disability). However when further case management orders were made in February 2019 by the same Judge it was noted that direct disability discrimination was no longer being pursued.

   We should add that the context for the February 2019 hearing was on the occasion of it being necessary to adjourn what otherwise would have been a five day hearing to determine the merits of this claim and if appropriate remedy. On the basis that the Tribunal constituted for that hearing had not heard any evidence, the matter was not reserved to them. It was directed that the claim would now be heard over three days but that hearing would be restricted to liability.

2. **The issues**

   These had been defined at the preliminary hearing in September 2018. However in the meantime the claimant was permitted to make two amendments to her claim and one of those amendments was in respect of the reasonable adjustments complaint which was recast in terms of the policy criterion or practice relied upon and also as to how the duty had been breached.

   In these circumstances we think it is helpful if we set out below a definitive list of issues taking into account these amendments.

   The respondent accepts that at all material times the claimant was a person with a disability by reason of the physical impairment of postural orthostatic tachycardia syndrome (POTS). They also concede that they had been aware that the claimant was disabled since June 2016.

   <u>Reasonable adjustments</u>

   2.1. Did the respondent have a provision criterion or practice of requiring the claimant to attend work and to maintain a certain level of attendance to avoid being put at risk of disciplinary sanctions? (- in fact this is not disputed).

2.2. Did that PCP put the claimant at a substantial disadvantage in relation to the employment in comparison with persons who are not disabled? The claimant contends that she found it harder than other non-disabled employees to meet attendance targets because of her disability.

2.3. Did the respondent know or could it have reasonably have been expected to know that the claimant was likely to be placed at any such disadvantage?

2.4. If so, were there steps that were not taken but which could have been taken by the respondent to avoid any such disadvantage?

The reasonable adjustment which the claimant contends for was an increase in the non-attendance trigger points by more than the 1% which was provided and taking into account and discounting the claimant's disability related absences.

2.5. Would it have been reasonable for the respondent to have to take those steps?

Discrimination arising from disability

2.6. Was the claimant's absence from work (or part of it) something which arose in consequence of her disability?

2.7. It has been agreed that subjecting the claimant to the absence procedure and ultimately dismissing her was unfavourable treatment and further it is agreed that that was at least in part because of sickness absences related to the disability.

2.8. In those circumstances can the respondent show that applying the absence procedure and ultimately dismissing the claimant was a proportionate means of achieving a legitimate aim? The respondent contends that the legitimate aim was ensuring that there were sufficient health care assistants on a given shift to ensure that the appropriate level of patient care was provided and that those health care assistants present on shift were not subjected to a higher workload than would be reasonable or anticipated.

Unfair dismissal

2.9. Can the respondent show the potentially fair reason for dismissal of capability?

2.10. If so was that reason actually fair having regard to the provisions of the Employment Rights Act 1996 section 98(4) and in particular:-

- Because the respondent unreasonably failed (at the stage 3 meeting) to return the claimant to stage 2 of the absence procedure.
- Because the respondent failed to adequately consider re-deployment options.
- Because the respondent failed to take any or any proper account of the claimant's improved attendance.

- By not increasing the permitted percentage non-attendance for her to the same levels as had been permitted for other employees?

As always, the Tribunal needs to consider whether the decision to dismiss the claimant was within the reasonable band of decisions which an employer of the size and with the administrative resources of this respondent could reach. The Tribunal must not substitute its own decision for that of the reasonable employer.

3. **Declaration of potential conflict**

Shortly after the hearing commenced Mrs Ennals indicated that she believed she had met the claimant before in her capacity as a member of the Social Security Tribunal when hearing an appeal about a Personal Independence Payment matter. The claimant indicated that whilst she had made such an appeal she had never attended a live hearing. It would later that day transpire that the parties were now concerned that Mrs Ennals might have been a member of a Social Security Tribunal which had determined the claimant's PIP appeal on paper. The Tribunal retired so that Mrs Ennals, who could not remember doing so, made enquiries of the administration of the other Tribunal. The result of that enquiry was that the claimant's PIP appeal had been heard on paper by a Tribunal of which Mrs Ennals was not a member. In these circumstances all parties were happy for Mrs Ennals to continue to be part of this Tribunal.

4. **Evidence**

The claimant has given evidence. Evidence on her behalf has also been given by Mary Potter an officer of the Royal College of Nursing.

The respondent's evidence has been given by Sister Elaine Yates, formerly the claimant's line manager and the person who conducted the stage 1 absence meeting; Sister Lorna Fox, latterly the claimant's line manager; Matron Andrea Bliss, who conducted the stage 2 meeting; Ms Christine (Chris) Beattie formerly head of paediatric nursing and quality and the dismissing officer and Ms Karen Barnard director of people and organisational development and the appeal officer.

5. **Documents**

The Tribunal have had before them an agreed bundle of documents running to 507 pages.

6. **Overview**

This case is about the claimant's sickness absences over a two year period culminating in her dismissal in March 2018. During that period and because of frequent, but usually relatively brief absences, the respondent applied its sickness absence policy whilst making some adjustments to it. The adjustments were essentially that from time to time the claimant's sickness absence record would be 'zeroed' and, from May 2017 by increasing the standard or trigger point for formal action from no more than 3.5% sickness absence in a rolling twelve month period to no more than 4.5%. The respondent

had also made various adjustments to the requirements for the claimant in her role as a health care assistant.

Ultimately the respondent reached the conclusion that despite those adjustments the claimant's inability to carry out her work by regularly attending was having a deleterious effect on the Trust's ability to provide the appropriate level of service to patients and so as to ensure that the claimant's colleagues were not overburdened by having to cover for the claimant when absent. The respondent's view was that those interests ultimately outweighed their obligations to the claimant as an employee with a disability.

The claimant contends that the adjustments made were insufficient and that at the material time her attendance was improving and so the respondent should have given her a further chance.

7. **Facts**

7.1. We start by recordind that at the beginning of the hearing we were told by Ms Gould that there was very little in dispute factually between the parties. Ms Hashmi did not disagree with that assessment. In retrospect these assurances now appear rather optimistic. It is unfortunate that, as Ms Gould accepted, the absence history records for the claimant which we have at pages 493 to 498 are not necessarily accurate in all regards. Ms Hashmi had prepared a sickness absence table document which seeks to analyse the claimant's absence through various key phases of her employment. However ultimately Ms Gould contended that this was not a document which we could rely upon wholly because, unwittingly, Ms Hashmi had imported into it errors from the respondent's own absence history documentation. In these circumstances Ms Gould urged us to rely upon the management report prepared by Sister Fox for the stage 3 meeting, a document which is in the bundle at pages 215 to 224 (followed by various appendices). In the context of the earlier assurance that little was in dispute and having had the benefit of hearing evidence from Sister Fox, we are prepared to accept that her report is thorough and is to be treated as the definitive statement of the claimant's absences.

7.2. The claimant's employment, as a health care assistant, with the respondent, began on 7 December 2015. The claimant worked in the children's observation unit at Doncaster Royal Infirmary.

7.3. In the first three months of 2016 the claimant had nine days absence. Those were intermittent absences.

7.4. On 30 March 2016 Sister Yates, who at that time was the claimant's line manager, conducted a sickness review meeting with the claimant. Following that meeting Sister Yates wrote to the claimant on 31 March 2016 to confirm what had been discussed and agreed. A copy of that letter is at pages 83 to 87. The letter explains that the purpose of the meeting had been to informally review the claimant's sickness record and to discuss the Trust's position and expectations of staff in relation to attendance. It was noted that the claimant's sickness percentage currently stood at 4.82% and so was above the Trust's target of 3.5%. It was pointed out to the claimant that sickness absence had implications

on the level and quality of service which the Trust provided and that it placed an additional burden on colleagues because work of an absent member of staff had to be undertaken by others. Sister Yates explained that she would be monitoring the claimant's sickness as part of an ongoing performance management process and by using the Trust's sickness absence policy. The claimant's sickness absence record was to be re-set at zero, but the letter indicated that there were targets now set for the claimant which would apply from the week commencing 4 April 2016. Those were, no more than 3.5% sickness absence in the following six months and no more than three episodes of sickness in the following six months. The letter reiterated that it had been made clear to the claimant in the meeting that if those targets were breached it would be necessary for Sister Yates to take action under a formal process within the sickness absence policy. The claimant was given a copy of that policy.

7.5. The respondent's Sickness Absence Policy is at pages 37 to 45 and an annexe to that policy "Managing Absence" is at page 46. There is also a document entitled "Manager's guidance on managing attendance" which is at pages 46A to 46H. The managing absence annexe (page 46) refers to formal measures which may need to be put in place to address the level and/or nature of absences and the effect (they have) upon the respondent's services. That document goes on:

"*We have a range of standards or "trigger points" which provide a prompt for you (*the manager*) to take action:*

- *No more than 3.5% sickness absence in a rolling 12 month period.*
- *No more than three episodes of sickness absence in a rolling six month period.*
- *An identifiable pattern of absence.*
- *A Bradford factor score of 80 or above over a 12 month period.*
- *Long term absence of four weeks or more"*

The guidance explains that the first step would be an informal meeting but if absences continue there would be a second meeting and it would be likely that a series of formal warnings would be issued.

The guidance also explains that in certain circumstances, including where the employee has an underlying health condition, the line manager can make a referral to the occupational health service.

The guidance goes on to provide that if one of the triggers in the policy is breached the manager will need to put in place specific and targeted measures to address the level and/or nature of the absence and the effect upon the Trust's services. That could include setting targets for the employee during a target period. If the employee indicates that more time off work will be required in the proposed review period because of an underlying health condition which might come under the Equality Act, then the manager may take that into consideration when agreeing the

review period and/or determining when to trigger the next stage of the process.

7.6. The policy/guidance then sets out the three stage process for sickness management meetings. One of the factors to be taken into account by a manager conducting a stage 1 sickness management meeting is reasonable adjustments, if there was an underlying health problem which could include a reduction in hours (page 46E). The guidance indicates that if the employee fails to meet the target that has been set within the stage 1 period they should be required to attend a stage 2 meeting. If the employee goes on to fail to achieve a target set in any subsequent target period there will be a stage 3 sickness management meeting. Before such a meeting being conducted consideration must be given to the question of obtaining further occupational health advice. If there is an underlying medical condition, reasonable adjustments should be considered.

The guidance goes on to explain that the purpose of a stage 3 meeting is to review the employee's overall attendance record and all the information and mitigation presented, in order to reach a decision which may include, but is not limited to, a request for more information or evidence, re-issue of a stage 2 outcome, setting another target or dismissal on the grounds of unsustainable levels of absence from work.

7.7. In the period from the end of April 2016 to mid-June 2016 the claimant had three periods of absence which in total amounted to 106.5 lost hours. The reasons given for absence were headache/migraine, 'sent home sick', chest/respiratory and cold.

7.8. Sister Yates made an occupational health referral of the claimant and that resulted in a report dated 14 April 2016 (pages 88 to 89). This referred to the claimant having had three episodes of tonsillitis which was described as an underlying medical condition causing the short-term absences. It was noted by the senior nurse advisor preparing that report, Julie Young, that the claimant was anxious about the amount of time she had taken off work due to tonsillitis. Ms Young advised that Sister Yates should continue to monitor the claimant's attendance at work.

7.9. On 3 May 2016 the claimant had what was thought at the time to have been a panic attack at work. That caused her to drop her lunch tray in the canteen. On the same day Sister Yates had a conversation with the claimant and her mother during which the claimant told Sister Yates that she had been to see a cardiologist and had been diagnosed with postural orthostatic tachycardia syndrome (POTS). The claimant had been experiencing dizzy episodes at work.

7.10. As a result of this conversation Sister Yates made a further referral of the claimant to occupational health. That referral is at pages 90 to 92. In that referral Sister Yates explained that she had already reallocated the claimant to a less stressful environment, the children's surgical unit and the claimant was now just working short day shifts. However Sister Yates was concerned that there remained a risk if the claimant had an episode whilst in the unit.

7.11. Senior Nurse Young provided a report in response dated 19 May 2016 (95 to 96). The report indicated that the claimant's neurologist had suggested that the claimant might be suffering from POTS. That condition was described as an abnormal increase in heart rate after sitting or standing up which typically caused dizziness, fainting, sweating and other symptoms. Nurse Young reported that until the claimant had a formal diagnosis and any required treatment it was likely that her current symptoms might impact upon her ability to do her job. Nurse Young agreed with the adjustments which had already been put in place but went on to recommend that the claimant might benefit from working in a less busy environment until she had been given a formal diagnosis and had treatment.

7.12. Sister Yates and the claimant met on 24 May 2016. After that meeting Sister Yates wrote two letters to the claimant, both dated 8 June 2016. The first is at page 99 to 100. With regard to the suggestion that the claimant should move to a less stressful area of work it was noted that the claimant had expressed an interest in transferring to the chronic obstructive pulmonary disease (COPD) ward. The claimant's temporary re-deployment to that unit was to take place with immediate effect. It was hoped that that would give the claimant the opportunity to demonstrate an improvement of her attendance. Pre-existing restrictions on the claimant's clinical practice – for instance not carrying children or lifting patients - was to remain in place. The letter went on to indicate that due to the claimant's ongoing level of sickness and absence Sister Yates would open a stage 1 formal capability case.

7.13. The second letter (pages 101 to 102) is formal notification of that. The claimant was invited to attend a stage 1 formal capability meeting to be held on 21 June 2016. At that meeting the claimant's failure to meet the sickness targets previously set would be considered, as would Sister Yates' view that due to the claimant's continual high sickness absence levels she had failed to fulfil her contractual obligation to attend work on a regular basis despite ongoing support and regular reviews.

7.14. The claimant's move to COPD probably took effect from 13 June 2016.

7.15. The stage 1 meeting was duly conducted by sister Yates on 21 June 2016. There are some handwritten notes (which erroneously give the date of the meeting as 21 January 2016), at pages 106 to 107. Sister Yates subsequently wrote to the claimant on 24 June 2016 (page 110 to 112) confirming what had been discussed at that meeting. It was noted that the claimant's absence regularly exceeded the absence targets which had been set for the three month review period. The claimant's absence for the rolling year to 21 June 2016 had been calculated at 11.46%. The reset target applicable after the 30 March 2016 meeting had been breached because the percentage was 6.64% by the end of May 2016. The claimant was informed that a persistent high level of absence was a regular feature of her employment and that it could not be sustained. It was noted that the Trust were awaiting the results of the claimant's cardiology appointment. Sister Yates believed that the Trust had been extremely supportive of the claimant and that the

recommendations of occupational health had been fully accommodated. The claimant indicated that she did not require any further adjustments.

7.16. The claimant was issued with improvement targets. Her attendance at work would be actively monitored over the next 12 months and the target set was no more than 3.5% absence in that period together with no more than three days within a six month period and no more than eight days within the 12 month period. If the claimant did not manage to achieve that target she was informed that the matter would progress to a stage 2 capability procedure which could result in the termination of the claimant's employment. Although the claimant had been informed of her right to be accompanied at this meeting she had attended alone.

7.17. On 28 June 2016 the claimant was formally diagnosed with POTS. The claimant informed Sister Fox of this diagnosis and, in her email of 29 June 2016 (page 120) Sister Fox informed Sister Yates. Sister Fox noted in that email that the claimant now needed to carry a health warning card and there was to be a risk assessment. The claimant had been informed that she must not lift or carry children at any time.

7.18. On 4 July 2016 the claimant commenced what would be an eight week absence, or in the way which the respondent calculated it, 450 hours. The reason for the absence was a combination of the claimant's adverse reaction to the diagnosis of POTS – a lifelong condition for which little treatment could be given at this stage and also because further medical investigations were taking place.

7.19. In the meantime Sister Yates sought further advice from occupational health and that resulted in a report prepared by Dr Giri, consultant occupational physician. That report is dated 23 August 2016 (pages 129 to 130). The doctor noted that the heart condition of POTS could lead to the claimant's sudden incapacity resulting in collapse. Clinically, Dr Giri was optimistic about the claimant's prognosis. He believed that she would be able to achieve reasonable stability in the long run but that in the short and medium term intermittent difficulties could not be ruled out. The report went on to suggest some job modifications. Those included the claimant refraining from lone working, night duties and giving direct physical support to a dependant patient. Dr Giri's view was that the claimant was to be regarded as disabled under the Equality Act.

7.20. On the basis that it was intended that the claimant would now remain in COPD for the immediate future, the line management of the claimant was formally handed over from Sister Yates to Sister Fox during August 2016. There was a return to work interview conducted by Sister Fox with the claimant on 30 August 2016. It was agreed that the claimant's attendance record would again be reset because it was believed that she was now on the correct treatment to support her being able to work. The targets which were now to apply remained those which had been established at the stage 1 meeting.

7.21. The claimant had no further sickness absence until November 2016 when there were 30 lost hours because of a chest infection. There was then a further absence in January 2017, again a chest infection, when

37.5 hours were lost. There was then an absence in March 2017 when the claimant had diarrhoea and vomiting which in turn prevented the absorption of her POTS medication. That was another 37.5 hours.

7.22. On 28 March 2017 Sister Fox and the claimant met. Sister Fox's note of that meeting is at page 151. It refers to there being a long discussion about the claimant's ill health. The claimant had recently had the POTS diagnosis confirmed. There was a discussion of the claimant's rising sickness percentage and the claimant was informed that she would now be progressed to level two. It was noted that several of the claimant's absences had been related to investigations about her underlying cardiac condition. Reference is made to monthly sickness meetings which had been taking place. It was agreed that the claimant's hours would be reduced because she was suffering from fatigue.

7.23. On 3 April 2017 the claimant was absent from work again and in the event that absence lasted until 24 April 2017. It appears that the claimant had been upset by a letter which her cardiologist had written to her GP which suggested the claimant did not have POTS but was just suffering from anxiety. The reason which the respondent recorded for this absence was "stress and anxiety due to diagnosis". It calculated that a further 105 hours had been lost.

7.24. Dr Giri produced a further report on the claimant on 9 May 2017 (page 168 to 169). He noted that the claimant was likely to remain under the close surveillance of her specialist team for some time with "re-arrangement of tablets on an as and when required basis". Dr Giri remained optimistic about the claimant's prognosis in the long run. However he again said that in the short and medium term intermittent difficulties could not be ruled out. He said that by 'long term' he was thinking of months rather than weeks. The report went on to set out various proposals and it was noted that there had been a change in the claimant's workplace and practice and that she had been allowed to sit down intermittently when feeling exhausted. The doctor supported the reduction of working hours.

7.25. In anticipation of the stage 2 meeting, Sister Fox prepared a management report (162 to 165). This began by setting out the case history, the claimant's various absences and the targets which had been set. The "Allegation", as it was described, was that due to continual high absence levels the claimant had failed to fulfil her contractual obligation to attend work on a regular basis despite ongoing support and regular reviews". In her witness statement, at paragraph 15, Sister Fox explains that when preparing this report she was concerned that the claimant was still failing to be at work on a regular basis and that that had an impact on the department's ability to cover her absences which were often at short notice.

7.26. The second stage sickness management meeting took place on 25 May 2017. The meeting was conducted by Matron Andrea Bliss who was assisted by an HR case advisor, Ms Francis. The claimant was accompanied by Mary Potter an RCN officer. The only contemporaneous notes of this meeting are those taken by Ms Potter

(pages 173 to 178). Those notes show that Ms Potter suggested that if the claimant had a long-term illness could her trigger points be increased as a reasonable adjustment under the Equality Act (see page 176). The notes also record that Matron Bliss decided that the claimant's working hours would be reduced to 30 per week with immediate effect. The sickness percentage would be increased to 4.5% for a 12 month period and would then be reviewed. The claimant's attendance score would be put back to zero again.

7.27. The respondent's record of this meeting is contained in Matron Bliss' letter of 26 May 2017 (pages 179 to 181). It was noted that the claimant had shared that she felt she was now in a stronger position and had come to accept that she would never get better. The reduction in hours is confirmed.

The letter goes on to confirm the conclusion of Matron Bliss that the claimant had been unable to meet the targets set for her attendance and that was now unsustainable. A further period of formal monitoring would now be applied. This would give the claimant an opportunity to demonstrate regular attendance and her ability to fulfil her contract of employment. The improvement target set was that for the period 25 May 2017 to 24 May 2018 there would be no more than 4.5% absence in that 12 month period and no more than three episodes in any rolling six month period within that 12 month period. The letter concludes:

"*As advised in the meeting, you have the right to appeal against the decision to issue you with improvement targets under the Second Stage of the Sickness Management Procedure".*

The letter goes on to explain to whom an appeal should be addressed and within what period.

In her statement (at paragraph 8) Ms Potter explains that she did not challenge the 1% increase, nor did she encourage the claimant to appeal the stage 2 outcome because the 1% increase had been agreed. Ms Potter confirmed to us that she was a full-time RCN officer – in the sense that that was her "day job" - although she worked in that capacity part-time. Under cross-examination Ms Potter said that it had been an oversight not to appeal the decision to only increase to 4.5% and she should have challenged this. She had not thought that 4.5% was right. However, Ms Potter also accepted that at the stage 2 meeting there had been nothing to cause her to think that the figure should have been increased to 7% - this was a figure which subsequently the claimant would contend for at the stage 3 hearing. However Ms Potter accepted that as of the stage 2 hearing she was aware from her own previous experience that targets had been increased to as high as 7% in other cases.

7.28. On 1 October 2017 the claimant's hours were increased from 30 hours to 33.75 hours per week. That was at the claimant's request but Sister Fox had reservations. She was concerned how that would potentially affect the claimant's health and then impact on the team (there would usually be four health care assistants on the ward per shift)

if the claimant was unwell again. However, and it seems with some reluctance, Sister Fox agreed to this increase on a trial basis.

7.29. On 10 October 2017 the claimant was absent for a day because of stress and then had two further days of absence at the end of October by reason of diarrhoea and vomiting.

7.30. On 14 November 2017 Dr Giri prepared a further report (pages 190 to 191). He had been asked to advise on whether the claimant should increase her hours at work. His opinion was that the claimant should achieve full stability in the long-term but there had been a recent deterioration. The doctor was sceptical about the claimant increasing her hours to full-time.

7.31. On 17 November 2017 the claimant had an accident at work. She had slipped on some liquid on a stairwell and injured her ankle. To the claimant's credit she nevertheless came into work on 23 November 2017, albeit on crutches. Unsurprisingly Sister Fox felt that this was not safe and so she sent the claimant home as sick. The claimant then continued to be absent up to 28 December 2017. However the last two weeks of that absence was because the claimant had a chest infection which in some documents is referred to as pneumonia – although in evidence before us the respondent pointed out that there had never been this diagnosis. When preparing her report for what would be the subsequent stage 3 meeting, Sister Fox calculated that in the November to December absence 93.75 hours had been lost due to the ankle injury and a further 63.25 hours because of the chest infection. In the fit note that was submitted in respect of the chest infection (page 199) the condition is described as 'recurrent viral infections'.

7.32. In her management report dated 31 January 2018 (215 but particularly page 221) Sister Fox had noted that in the six months since the 4.5% target over 12 months had been set, the claimant had been absent for 205 hours which represented 11.76%. However, because the ankle injury resulted from an accident at work the 93.75 hours related to that were discounted. That still meant that in the six month period the claimant's percentage sickness was 6.33%. Controversially (at least in the proceedings before us) the respondent did not discount the absence for the chest infection on the basis that the Trust did not consider that that was connected to either the claimant's POTS condition or to the accident at work.

7.33. A return to work interview was conducted with the claimant on 17 January 2018 and a brief note about that is on page 201.

7.34. On 18 January 2018 Sister Fox made a further referral to occupational health (205 to 208). She explained that the claimant had been off work until 5 December 2017 because of the ankle injury and thereafter because of contracting a chest infection, which developed into pneumonia. We should add that we understand that Sister Fox referred to pneumonia because she had been told that by the claimant. The referral mentions what is described as a longish discussion which Sister Fox had had with the claimant the previous day (the return to work

meeting) and it was noted that the claimant had considered reducing her hours back to 30. There is a reference to a discussion as to how well the claimant had been on less hours over the summer and how the additional day off per week had allowed her to make a good recovery. Sister Fox sought guidance from occupational health as to whether they were happy for the claimant to continue in her role within the COPD.

7.35. Also on 18 January 2018 Sister Fox wrote to the claimant notifying her that she would be submitting a sickness management report to the head of nursing, Chris Beattie in line with stage 3 sickness management (pages 203 to 204). The letter went on to note that following a review of that report Chris Beattie would make a decision as to whether there was a need to progress to a stage 3 sickness management hearing.

7.36. On 22 January 2018 it was agreed that the claimant's hours would be reduced to 30 per week and that was to take effect from 4 February 2018.

7.37. As we have noted above, Sister Fox's management report for the stage 3 process is dated 31 January 2018 and begins at page 215. The report sets out the case history since March 2016 – the claimant's various absences and the steps taken at stage 1 and stage 2 in terms of resets and new targets. Sister Fox noted that the claimant having failed to meet her adjusted target of 4.5%, she had decided to refer the claimant to the head of nursing. The report goes on to set out the various adjustments which had been made to the claimant's working arrangements. Sister Fox's conclusion was that the claimant had failed to meet the Trust targets, despite ongoing support and guidance and therefore had failed to fulfil her contractual obligation to attend work on a regular basis.

7.38. On 13 March 2018 Dr Giri wrote a further report (page 267 to 268). His opinion was that the claimant had made good clinical progress with tablets and lifestyle but had residual tiredness. It was hoped that remaining compliant with specialist advice would enable her to keep her symptoms under control. The doctor went on to say that unfortunately the claimant had been prone to developing infections which could only make her condition worse. Based on his assessment he could not identify any reason why the claimant was likely to remain prone to developing infections but felt that the claimant's GP would be able to provide the necessary support. We find therefore that Dr Giri was not of the view that there was a connection between POTS and the infections. Nor is there any reference in his report to the chest infection in December 2017 having been caused by the claimant's enforced inactivity because of the ankle injury. We note however that the claimant's case has been that there was such a connection. We have not seen any medical evidence to that effect. Dr Giri recommended that the current job modifications/support should continue.

7.39. On 14 March 2018 Chris Beattie wrote to the claimant (272 to 273) inviting her to a third stage formal attendance management meeting on 27 March 2018. Enclosed was a copy of Sister Fox's management report. The letter warned this was a serious matter which could result in the claimant's dismissal.

7.40. The stage 3 meeting duly took place on 27 March 2018. Chris Beattie head of paediatric nursing conducted the meeting and was supported by Hannah Rowland, HR business partner. Sister Fox presented the management case and she too was supported by an HR advisor, in this case a Ms Hodgkinson. The claimant was represented by Ms Potter of the RCN. Ms Potter took notes of that meeting and these appear at pages 274 to 281 in the bundle. Ms Potter has maintained during her evidence that these notes were wholly contemporaneous. However she was challenged in cross-examination as to whether this was the case. Ms Gould pointed out that the notes at least in part were couched in the past tense. She also queried with Ms Potter how she had been able to pose questions during the meeting and simultaneously make a detailed handwritten note of the question. Despite these challenges Ms Potter insisted that the notes were wholly contemporaneous. The respondent's notes of this meeting, also handwritten, are at pages 282 to 286.

7.41. In Ms Potter's notes at the foot of page 276, she is recorded as asking why the claimant's absence trigger had only been increased by 1% and not higher. The response which Ms Potter has recorded from Ms Beattie (top of page 277) is "CB said trigger points were only ever increased by 1%".

7.42. In evidence before us Ms Beattie denied that this had been her response. What appears to be the same exchange as recorded in the respondent's note is at page 285 where Ms Potter says "when targets increased only 1% could we increase this more with advice from occupational health". The response recorded from Ms Beattie here is "we can look and discuss this".

On the question of the chest infection, Ms Potter's note of her own presentation of the claimant's case (at page 279) was that the last period of sickness was initially due to ankle injury at work and then due to being less active because of that, the claimant got a chest infection which prolonged the absence. It is to be noted that the claimant has also disclosed the note of a pre-meeting discussion which took place between the her and Ms Potter (see page 274). It appears that the claimant told Ms Potter that getting the chest infection *could* be related to her lack of activity whilst immobile following the accident at work.

Returning to Ms Potter's note of the meeting, at page 279 she records Ms Beattie asking the claimant whether she had discussed with occupational health the recurrent infections because Ms Beattie interpreted the occupational health reports as saying that POTS would not mean the claimant was more prone to infection. The claimant replied "yes, it is being less active and worrying which leads to infections".

It had not been part of the claimant's case as presented at the stage 3 hearing that the respondent should consider re-deploying her. However this was an issue raised by Ms Rowland at that meeting where on page 280 she is recorded as asking the claimant whether she had considered changing roles. The claimant's reply to that was, yes, but she liked the work she did. The claimant clarified at the hearing before us that she particularly liked working with children. In fact in the respondent's note

of that exchange at page 286, the answer the claimant is recorded as giving is "looked in pharmacy but really want to work with children outpatients and surgery". When at the conclusion of the meeting Ms Rowland asked the claimant whether all the support that she had needed had been given the claimant's response was it had been great.

7.43. Ms Potter's note goes on to record the decision as Ms Beattie announced it at that meeting (page 281). That indicates that Ms Beattie said that despite the support which had been given, the claimant had been unable to maintain her attendance and so a decision to dismiss with immediate effect had been reached.

7.44. The dismissal was confirmed in Chris Beattie's letter of 27 March 2018 (pages 288 to 290). She noted, and this was an issue which had been raised at the hearing, that the claimant had not in fact been required to work any late shifts since November 2017. Ms Beattie went on to explain that she did not consider that re-issuing a stage 2 improvement target was appropriate and nor was re-deployment. That was because the claimant had been unable to sustain an improved attendance record for a sustained period of time. It was clear that that was having a negative impact on the claimant's colleagues and on the Trust's ability to deliver high quality patient care.

7.45. We should add that when Ms Beattie was being cross-examined, Ms Hashmi asked if there were any specific instances of problems arising due to the claimant's non-attendance. Ms Beattie, and indeed other respondent witnesses to whom the same question was put, accepted there had not been. However the gist of their evidence was that it stood to reason that if a shift was supposed to run with four health care assistants and it turned out there were only three, those three would have to cover for the work which the missing member of staff would otherwise have done. A further consequence of that was that the same level of care could not be delivered to patients as would be the case if the team had been at full strength.

7.46. Ms Beattie had concluded, having heard both side's evidence, that management had established that "due to continual high absence levels you have failed to fulfil your contractual obligation to attend work on a regular basis, despite ongoing support, reasonable adjustments to shift patterns and hours, regular face to face reviews and an adjusted sickness percentage from the Trust 3.5% to 4.5%". As that was unacceptable and not a sustainable level of attendance Ms Beattie felt she had no other option than to terminate the claimant's employment on the grounds of ill health.

7.47. The claimant appealed the decision to dismiss. On 14 April 2018 she wrote, as required, to the respondent's chief executive, Richard Parker setting out the grounds of her appeal. We understand that Ms Potter assisted the claimant in the preparation of those grounds. A copy of that letter is at pages 361 to 362. The claimant believed that dismissal had been too harsh. She referred to her diagnosis of POTS and said that the medication she was taking had helped her to control her symptoms but that had taken a considerable time whilst changes were made to the

dosage. She noted that both occupational health and her specialist nurse (who as far as we are aware had not provided a report directly to the respondent) had indicated that the claimant's condition would stabilise when her medication was at its most effective level. She went on to say that the last absence which was related to her medical condition was March 2017 and that subsequent absences were "due to self-limiting issues which are not likely to reoccur." The last absence was November 2017 "following an injury at work and a chest infection which I believe was precipitated by my inactivity due to the ankle injury".

The claimant noted that the trigger point had been increased to 4.5% which the claimant described as helpful but only a very small increase. Her actual percentage of non-attendance was decreasing and following her last absence it was 6.33%. She had not had any absence since 28 December 2017. If her trigger had been increased to 7% for a 12 month period she would have achieved the target. The claimant believed that since returning to work on 28 December 2017 she had shown a sustained improvement in her attendance. It is to be noted that there is no reference to re-deployment within these appeal grounds although the claimant's case before us, certainly in respect of unfair dismissal complaint, includes the contention that the respondent failed to consider re-deployment options.

7.48. The claimant's counsel has referred us to an email of 27 April 2018 which Diane Culkin, human resources case manager, sent to Anthony Jones, deputy director of people and organisational development (338 to 339). In it Ms Culkin expresses the view that it was the claimant's absence which began on 23 November 2017 (the ankle injury) which took the claimant over the trigger point. "Prior to this she would have been on just over 2% absence, as a rough calc", Ms Culkin wrote.

7.49. We have also been referred to a further email from Ms Culkin to Mr Jones, this being sent on 23 May 2018 (page 337). The subject of that email is "Amess appeal" and Ms Culkin begins her message as follows:

"*This was the appeal that Richard (*Richard Parker chief executive*) was considering reinstatement without a hearing".* (sic)

She went on to write that she had provided Mr Jones with a summary and, not being able to remember, enquired whether Mr Jones had confirmed that "we could go ahead with the appeal hearing".

We have not heard from either Ms Culkin or Mr Jones.

Ms Beattie was asked to comment on this correspondence during the course of her cross-examination. She said that she did not know why Mr Parker had been considering reinstatement without a hearing. She also indicated that there had been no reference in the management report which had been before her as to the claimant only being on 2% absence prior to the November 2017 absence.

When Ms Barnard was asked about these matters by the Employment Judge she said that she could not recollect Mr Jones having had a conversation with her prior to the appeal hearing. Mr Jones was her deputy. She had had no conversation with Mr Parker. She thought that

his provisional view (reinstatement without a hearing) would have been without the benefit of the input from the management report).

7.50. The appeal hearing took place on 12 July 2018 before a panel comprising Kathryn Smart, a non-executive director of the Trust, and Karen Barnard, director of people and organisational development. Diane Culkin was in attendance as secretary to the appeal. The claimant was again represented by Ms Potter. The management case was presented by Ms Beattie who was supported by Ms Rowland. The respondent's notes of the appeal hearing (typewritten in this case) are at pages 452 to 455. Ms Potter's handwritten notes of the appeal are at pages 460 to 465.

Ms Potter read a statement of case which she had prepared and that document is at page 375. She acknowledged that the claimant had been "well supported by her managers". However, if further support had been offered the claimant would have been able to improve and sustain her attendance at work. It was suggested that the 1% increase should have been higher. "For example if Chloe's trigger had been increased to 7% Chloe would have remained within her target". It was contended that the claimant had not breached the no more than three absences in a six month rolling period target because the absence which began on 23 November 2017 should have been treated as one absence rather than two – ankle and then chest infection. The claimant suggested that the whole of the absence should have been discounted "as she'd become sick (unwell) with a chest infection due in part to her inactivity due to the ankle injury". It was reiterated that there had been no further absences after the claimant's return to work on 28 December 2017.

7.51. The management case for the appeal prepared by Chris Beattie is at pages 382 to 389. Ms Beattie stated that although the claimant now had medication for her diagnosis her absence from work had continued. There had been no definitive advice from occupational health to suggest that her condition would stabilise on medication. Ms Beattie did not consider that the claimant's contention that she had not had any absence related to her condition since March 2017 to be incorrect because her lengthy absence in April 2017 was described as stress and anxiety due to diagnosis. Ms Beattie also noted that the claimant through her representative suggested that vulnerability to infection was a direct result of her diagnosis so that the chest infection was related. Ms Beattie referred to a document which the claimant had produced containing information about POTS and which identified that a weakened immune system could be a symptom (see page 388).

During the appeal meeting Ms Beattie expressed the view that there had been nothing to indicate that the claimant's chest infection had been due to the ankle injury. The claimant could still move around and so it was not relevant to discount the chest infection absence.

There was then a discussion about the Trust's practice with regard to increasing the 3.5% target. Ms Rowland explained that the issue was considered on a case by case basis. Generally, they looked at a 1% increase, but that could vary depending on the circumstances. Ms

Barnard noted that Miss Potter was asking for a 7% target. Ms Rowland said that that would normally be where there were linked absences eg linked to the disabling impairment and in this case that was not so. Ms Barnard raised the question of re-deployment and Ms Rowland said that they had looked at NHSJobslive but that the claimant wanted to work with children and couldn't identify anything else (see page 454).

Ms Beattie said that nothing had given her reassurance that sickness absence would improve. Nothing she had heard that day changed that opinion. In summing up the management case Ms Beattie explained that the decision to dismiss had not been taken lightly but she believed it was a reasonable decision. It was noted that there were no issues with the standard of the claimant's work (when at work).

Ms Potter had prepared a written summing up and a copy of that is at page 456. It was suggested that a reasonable adjustment would have been for the percentage increase to have been higher. For example if it had been increased to 7% over a 12 month period the claimant would have remained within her target. The number of absences trigger could have been increased as well. Ms Potter said that management had calculated the claimant's absences incorrectly – however that was a criticism directed only at the way in which the absence which began on 23 November 2017 had been labelled. The claimant contended that it should have been regarded as one episode not two and the whole of the absence in November/December 2017 should have been discounted as the chest infection was "due in part to her inactivity due to the ankle injury".

The appeal panel reserved their decision.

7.52. On 13 July 2018 Kathryn Smart wrote to the claimant (pages 478 to 481). The conclusion of the appeal panel was recorded in these terms:

"*The panel concluded that your sickness management process had been managed fairly and in accordance with Trust policy and the Equality Act 2010. The decision to dismiss you had been made taking current medical opinion into consideration. Absence improvement targets and modifications had been made appropriately and in accordance with requirements. You had been supported by an additional stage in the absence management process. The panel were very sad that, despite the significant support you have received, you were unable to sustain an acceptable attendance at work. It was the unanimous decision of the panel therefore that the decision taken to terminate your employment on the grounds of ill health was the correct outcome, taking into account all the information Chris had at the time and the information presented at your appeal hearing. Therefore, the panel concluded that your appeal against this decision has been unsuccessful".* (Pages 480 to 481).

8. The parties' submissions

The Tribunal reconvened on 23 September 2019 to hear both sides' oral submissions. Miss Gould had prepared a skeleton argument and among other things that set out the relevant law. Miss Hashmi agreed that the

skeleton contained an accurate statement of the law. However Miss Hashmi put before us a first instance Employment Tribunal Judgment in the case of **Miss C Sutton** v **Sheffield Children's NHS Foundation Trust** 1800471/2017 in which she had appeared for the claimant. Initially we were told that the purpose of giving us this Judgment was because it helpfully set out the applicable law. However later in her oral submissions Miss Hashmi suggested that there was a factual similarity between the cases of Miss Sutton and the case we are hearing. On the basis that Miss Sutton's claim had been successful, we assume that Miss Hashmi considered that the same approach should be adopted for Miss Amess.

We think it unlikely that there is sufficient similarity between the facts of these two cases to lead to this conclusion. We note from a brief consideration of the facts found in Miss Sutton's case that she was a nurse (not a health care assistant) and that she had 20 years' service, as opposed to the two years' service of Miss Amess. Unsurprisingly Miss Sutton's disabling impairments were not the same as Miss Amess'.

In these circumstances we have considered that the approach we should adopt is to determine the case before us on the basis of the facts we have found and by applying the relevant law to those facts.

9. **The Tribunal's conclusions**

9.1. <u>The reasonable adjustments complaint</u>

9.1.1. It is agreed that the respondent had the practice of requiring it's health care assistants, of which the claimant was one, to attend work and to maintain a certain level of attendance in order to avoid being put at risk of sanction.

9.1.2. <u>Did that PCP put the claimant at a substantial disadvantage</u>?

The respondent contends that there was no disadvantage because the claimant's numerous absences from work were not primarily related to her disability. This is a proposition with which we do not agree. By reference to the very useful summary provided in Sister Fox's management report (which begins at page 215) it can be seen that the reasons for absence which led to the beginning of the formal sickness procedure were unlikely to be disability related (headache, migraine, chest respiratory and cold). However the claimant's absences from October 2016 onwards were very often related to her disabling impairment. For instance in January 2017 a chest infection took longer to treat because a particular medication had been recommended by the claimant's cardiologist and there was a delay in that being prescribed. An absence in March 2017, primarily because of diarrhoea and vomiting, had a knock on effect because the absorption of medication for the claimant's POTS condition was diminished and this made the claimant unsteady. Her lengthy absence in April 2017 was at least in part attributable to the claimant's reaction to the POTS diagnosis followed by a suggestion that there could have been a misdiagnosis.

These disability related absences led to the stage 2 meeting. We would agree however that the absences which occurred in June, October, November and December 2017 – which ultimately led to the claimant's dismissal – appear less likely to be related to disability comprising as they do, migraine, stress, diarrhoea and vomiting and obviously the two weeks for the ankle injury. There is of course the vexed question as to whether the subsequent two further weeks' absence because of a chest infection was related to either the accident at work – which at present seems to be the claimant's case and/or whether it was related to the disabling impairment – which had hitherto been the claimant's position. We would add that neither of these propositions is supported by any medical evidence and so appears to be simply the claimant's own opinion. In fact the opinion expressed by Dr Giri in his report of 13 March 2018 (page 267) is that he could not identify any reason why the claimant was likely to remain prone to developing infections.

On the basis of the analysis above, we are satisfied that at least during what we might term the stage 2 period, the PCP had put the claimant at a substantial disadvantage because it was disability related absences that had prevented her attending work and had therefore contributed to her failing to meet the attendance target.

We do not understand the respondent to be denying that it had knowledge of the disadvantage.

9.1.3. Were there steps that were not taken but which could reasonably have been taken by the respondent to avoid that disadvantage?

As we have noted, the claimant contends that two further reasonable adjustments should have been made. At the time of her appeal against dismissal she said that the non-attendance trigger point should have been increased to 7%, rather than the increase from 3.5% to 4.5%. Within these proceedings, on the claimant's amended case, she has also contended that a reasonable adjustment would have been to simply discount all her disability related absences.

9.1.4 Increasing the percentage trigger point

9.1.4.1 We remind ourselves that when assessing whether or not an adjustment would have been reasonable, that is a decision for the Tribunal on the evidence before it, contrary to the approach which we must take when dealing with an unfair dismissal complaint, where substituting our own decision on reasonableness is forbidden. That being said, our decision on the reasonableness of the adjustment must be informed by the views expressed and rationales relied upon by the parties.

In this regard we consider that it is significant that neither the claimant nor her experienced trade union representative challenged the employer's decision to increase the target by only

1%. That decision had been taken by the respondent in May 2017 but there was no suggestion that that had been the wrong approach until after the claimant had been dismissed and during the consideration of the appeal against dismissal in July 2018. That is particularly significant because Ms Potter accepts that she knew from her experience in dealing with other NHS Trusts that higher increases than 4.5% were possible.

Even if we were to accept the claimant's contention that in May 2017 the respondent stated that it would only ever increase by 1% (a contention which in fact we do not accept) that would not alter the fact that by her own admission, Ms Potter would have been very likely to suspect that any such assertion was incorrect. The claimant's position in her post stage 2 employment had never been that the target percentage should be increased incrementally from 4.5%. Instead, after the event – that is the claimant having incurred a downward adjusted sickness absence of 6.33% - the claimant contended that the target should have been increased to the next point upwards. We agree with Miss Gould's analysis that the only rationale the claimant has put forward for 7% being a reasonable adjustment is that the claimant would thereby have avoided being dismissed in March 2018.

9.1.4.2 On the other hand, the respondent has been able to explain to us it's rationale for the approach it took. At the appeal hearing on 12 July 2018 Ms Rowland, the HR business partner who was supporting the appeal officer, explained that trigger targets were reviewed on a case by case basis and

"we generally look at a 1% (increase) but they do vary depending on the circumstances and an adjustment made to suit them … normally around linked absences – this case not all linked – that is the difference for me" (page 454).

The evidence of Matron Bliss, who at the stage 2 hearing had made the increase to 4.5%, was that this was done because at that stage the view of occupational health was that the claimant's attendance was improving and would continue to improve. Her evidence was that if she had felt there had been exceptional circumstances which justified a greater increase she would have sought advice from human resources about that at the time (see paragraph 10 of Matron Bliss' witness statement).

We heard further evidence on this matter from Ms Barnard, the appeal officer. Referring to the comments made by Ms Rowland she confirmed to us that the advice given had been that adjustments were looked at on a case by case basis and Ms Rowland had also indicated that the respondent had gone as far as a 7% absence target where there were absences for the same reason or a linked reason – in other words underlying health problems. However in the claimant's case it was considered that there were a series of unlinked absences.

9.1.4.3 When assessing reasonableness we have also taken into account the reason why the respondent has a sickness absence policy which includes what could be described as an aspirational target of no more than 3.5% sickness absence in a rolling 12 month period. It is fairly obvious that the rationale for this is that by reason of the service which the respondent Trust provides it needs it's health care professionals to attend work when rotered to do so in order to provide the appropriate level of care for patients and to ensure that the workload is spread fairly. Whilst there will be cases where allowing an employee to have more time off work without sanction outweighs the respondent's needs and obligations, a careful and appropriate balance must be struck.

In the circumstances which prevailed in this case we find it would not have been reasonable to increase the target to 7%. We base that finding on the weakness of the claimant's rationale, the strength of the respondent's rationale and our own considered view.

9.1.5 Discounting all disability related absences

As we have noted, this was not an adjustment which the claimant ever sought at the material time – during the employment. We accept however that that does not of itself mean that it could not have been a reasonable adjustment. On the basis that on numerous occasions the claimant's attendance record was "reset", the respondent had discounted substantial periods of absence, whether the reason for the absence was disability or not. It is also significant to bear in mind that none of the absences which occurred between the stage 2 meeting and the stage 3 meeting were disability related.

We do not accept that the two weeks absence for chest infection following the ankle injury was disability related. We bear in mind that the claimant's primary case is that it's relationship was with her accident at work, not her disability. It follows that even if the respondent had chosen to discount disability related absences in that period it would have had no positive effect on the outcome as far as the claimant was concerned.

In any event we do not consider that discounting all disability related absences – across the board – would have been a reasonable adjustment in the circumstances which applied to the claimant's employment. It would not have achieved the necessary balance between the needs of the Trust and the needs of the claimant.

For all these reasons we conclude that the reasonable adjustments complaint fails.

9.2. Discrimination arising from disability

9.2.1. Was the claimant's absence from work something which arose in consequence of her disability?

On the basis of the summary record prepared by Sister Fox, the accuracy of which we accept, the answer to that question is that it was in part, although, as we have noted, there were also absences which

were unrelated. We therefore disagree with Miss Gould's submission that the absence should be regarded as not arising from the disability simply because some of the absences were not. Looking at the global reason for the claimant failing to meet the attendance target, it is clear that her disability related absences contributed substantially.

It is not in dispute that the subjection of the claimant to the absence procedure and ultimately her being dismissed under that procedure was unfavourable treatment.

9.2.2. Can the respondent show that it had a legitimate aim and that treating the claimant in this way was a proportionate means of achieving that aim?

9.2.2.1 Legitimate aim

As we have noted in the list of issues, the aim was ensuring that there were sufficient health care assistants on a given shift to ensure that the appropriate level of patient care was provided and that those health care assistants present on shift were not subjected to a higher workload than would be reasonable or anticipated. There can be little doubt that that was a legitimate aim.

9.2.2.2 Proportionality

We have been referred to the EAT decision in **Hensman** v **Ministry of Defence** where it was said that it was appropriate to apply the test which had been established in the case of **Hardy and Hansons Plc v Lax** [2005] ICR 1565 (where the question arose in the context of an indirect sex discrimination complaint). There it was held that an Employment Tribunal was required to make its own judgment as to whether, on a fair and detailed analysis of the working practices and business considerations involved, the practice was reasonably necessary, but not to consider the matter on whether it came within the range of reasonable responses. We observe that that decision (**Lax**) predated the Equality Act.

We have also given consideration to the Court of Appeal Judgment in the case of **O'Brien** v **Bolton St Catherine's Academy** [2017] ICR 737. There it was said by Underhill LJ that it was well established that in an appropriate context a proportionality test can and should accommodate a substantial degree of respect for the judgment of the decision taker as to its reasonable needs, although it was for the Tribunal to strike the ultimate balance.

Clearly the dismissal of an employee is very much towards the top end of unfavourable treatment which an employer can subject an employee to. It is a step not to be taken lightly or with undue haste and so all practical alternatives should be considered first.

We find in this case that the respondent did not rush to a decision. The formal process from stage 1 to stage 3 took just under two years. During that period of time the respondent had made various adjustments for the claimant other than the one which has been at the centre of this case. She had been relieved of the obligation to undertake night shifts, she

had been excused such normal duties as lifting and carrying child patients and she had been allowed to move to a ward which was more suited to her personal circumstances. There were also the adjustments by way of cancelling out significant periods of absence by the resetting process and the adjustment to the target.

Despite taking those steps there was no significant consistent improvement in the claimant's attendance. The claimant points out that she had been able to attend work without absence for some three months prior to her dismissal. However experience had shown that that did not necessarily indicate a permanent resolution to the attendance problem. For instance, the claimant had been able to attend work for four months between 21 June 2017 and 10 October 2017 without absence but that was followed by absences in October, November and December.

In all these circumstances we conclude that the respondent could not, by the date of the stage 3 hearing and for that matter the subsequent appeal hearing, have confidence that it's legitimate aim would be met by the claimant continuing to be employed. Instead it was proportionate for the claimant to be dismissed in order that the respondent could recruit an employee whose attendance would meet the appropriate targets and so ensure that the legitimate aim was achieved. The dismissal of the claimant was therefore justified and the respondent has made out this defence to this complaint. Accordingly, the complaint fails.

9.3. Unfair dismissal

9.3.1. Can the respondent show the potentially fair reason for dismissal?

The respondent seeks to show the reason of capability. Capability is one of the potentially fair reasons set out in the Employment Rights Act 1996, section 98(2). We therefore find that the respondent has shown a potentially fair reason.

9.3.2. Was that reason actually fair?

The appropriate statutory test is that set out in section 98(4) of the Act.

As noted in the list of issues, the claimant has raised four specific matters which she contends render her dismissal unfair.

At the stage 3 hearing, failing to return the claimant to stage 2

It is convenient to consider this issue with one of the other four reasons for alleged fairness – the respondent's alleged failure to take proper account of the claimant's improved attendance. We accept that it is unfortunate that part of the claimant's final four weeks of absence from work were because of an accident at work when she injured her ankle. However that does not alter the fact the respondent was again faced with a lengthy period of time when the claimant was not at work and that against the backdrop of her history of poor attendance. Moreover, as we have observed above, we consider that a reasonable employer faced with the claimant's attendance history would be entitled to have ongoing concerns despite a three month absence free period immediately prior to dismissal. There had been earlier false dawns.

Clearly one of the options open to Ms Beattie would have been the re-issue of a stage 2 outcome. However, in the absence of a sustained pattern of good attendance we take the view that a reasonable employer was entitled to conclude that it had waited long enough for a significant improvement.

As was observed in the case of **Lynock** v **Cereal Packaging Limited** [1998] IRLR 510 (a case referred to us by Miss Gould) there is no principle that the mere fact that an employee is fit at the time of dismissal makes her dismissal unfair. That is because it is necessary to look at the whole history and the whole picture.

We therefore conclude that there was no unfairness here.

Failure to adequately consider re-deployment options

Whilst this remains an allegation of unfairness by the claimant it is very difficult to see the basis for it. As we have found, re-deployment was raised by HR during the process but ruled out by the claimant because she wanted to continue to work with children. As we note above, re-deployment is something which a fair employer would usually wish to consider in an appropriate case but an employer would put itself in a difficult position if it imposed a change of role on an employee against her wishes. We find no unfairness here.

Failing to increase the percentage target "to the same levels as had been permitted for other employees"

This of course is the same argument as put forward in the reasonable adjustments complaint which we have rejected. We reject it too in the context of the unfair dismissal complaint.

Overall the Tribunal must consider whether the decision to dismiss came within the band of decisions which would be open to the reasonable employer in the relevant circumstances. Whilst we acknowledge that this is a sad case and one where the claimant feels particularly aggrieved, we are of the unanimous view that applying the appropriate tests and standards this was nevertheless a fair dismissal.

Employment Judge Little

Date 25th October 2019

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FOR EMPLOYMENT TRIBUNALS