EMPLOYMENT TRIBUNALS

SITTING AT: **LONDON CENTRAL**

BEFORE: **EMPLOYMENT JUDGE F SPENCER**

MEMBERS: **MR S WILLIAMS**
MS L JONES

BETWEEN: **X** **CLAIMANT**

AND

Y **RESPONDENT**

ON: **9-12 September 2019**

Appearances

For the Claimant: Mr T Perry, counsel
For the Respondent: Mr G Anderson, counsel

RESERVED JUDGMENT

The Judgment of the Tribunal is that the Claimant's claim of disability discrimination is not well founded and is dismissed.

REASONS

1. The Claimant is a disabled person and in 1996 was diagnosed with obsessive-compulsive disorder (OCD). This has affected her in varying degrees of severity since then.

2. The Claimant was dismissed by the Claimant following a lengthy sickness absence. The Claimant has less than 2 years' service, so does not qualify for the right not to be unfairly dismissed. She claims (i) discrimination arising from disability contrary to section 15 of the Equality Act 2010 and (ii) failure

to make reasonable adjustments. Although the Respondent accepts that the Claimant was a disabled person by reason of a diagnosis of OCD at the time that she was dismissed, they deny that they knew or could reasonably have been expected to know that the Claimant was disabled.

3. The agreed list of issues is set out in the bundle (53) as follows:

Knowledge

a. Did the Respondent know, or could it reasonably have been expected to know, that the Claimant had the disability?

Discrimination arising from disability

b. It is common ground that, in dismissing the Claimant because of her sickness absence, the Respondent treated the Claimant unfavourably because of something arising (her absence from work) in consequence of her disability. The issue therefore was whether the Respondent could show that dismissal was a proportionate means of achieving a legitimate aim.

Failure to make reasonable adjustments.

c. Did the Respondent apply a PCP of requiring the Claimant to work full-time in the Respondent's office and maintain a certain level attendance at work? If so, did the PCP put the Claimant at a substantial disadvantage in comparison with non-disabled employees? The substantial disadvantage on which the Claimant relies is disciplinary action and significant emotional distress (in particular a requirement to use public transport to attend the Respondent's office)

d. If so, did the Respondent know or could it reasonably have been expected to know that the Claimant was likely to be placed at that disadvantage?

e. If so, did the Respondent take such steps as it was reasonable to have to take to avoid the disadvantage? The Claimant contends the Respondent should have implemented a phased return to work, including a period of remote working.

Evidence

4. The Tribunal had 2 lever arch files of documents. We heard evidence from the Claimant. From the Respondent we heard from Mr J Koffash who, at the time was Deputy Editor of Pulse and Mrs K Jovanoski, who is the Respondent's HR manager.

Findings of relevant fact.

5. The Respondent is a healthcare marketing agency. It employs approximately 85 people across 5 divisions of business. Amongst other businesses it owns and operates a magazine called Pulse for nurses and GPs. Articles are published in the magazine and on the website.

6. The Claimant began work for the Respondent on 31 July 2017 as a clinical reporter for Pulse. She completed a "Personal and Payroll Form" on 7 August 2017 but did not declare any medical conditions. She was recruited for her scientific experience.

7. The Claimant took a few days unexpected leave from 14-17 August as her uncle was terminally ill. On 29th August 2017 the Claimant was absent from work again because her uncle had passed away, returning to work on 7th and 8th September.

8. On Monday 11th September, however, the Claimant sent a lengthy email to Mr Kaffash explaining that her uncle's death had triggered "my usually entirely manageable OCD". She said she was going to the GP to get referrals, would need intensive therapy and may have to ask for a month or more off work. (104) She attached a letter from a psychiatrist to her GP dated 10th September 2017 as follows:

> "*I saw [x] with her mother today. Her OCD has become much worse within the past couple of weeks and it is now crippling. I suggested she requested an emergency appointment at the Groves Medical Centre, and you may consider she should be seen on a domiciliary visit in my view by a consultant psychiatrist. [x] needs inpatient care at this point."*

It must have been obvious from the content of that letter that the Claimant was suffering from a serious condition. We note in particular the use of the word "crippling" and the recommendation for inpatient care.

9. The Respondent was initially sympathetic. They told her she should not worry about work (103) but that time off would need to be taken as unpaid sick leave, as she was still in her probationary period. The Claimant sent a fit note in which she was signed off work until 27th October.

10. On 6th October the Respondent emailed the Claimant to ask for her views on the possibility of a phased introduction to work, involving working from home and shorter days. The Respondent suggested that she come into the office on 30th October to discuss it further (147). The Claimant said that her GP had suggested a similar approach and she was happy to come in for a meeting on the 30th.

11. In the event the Claimant could not attend on the 30th. She had a hospital appointment which overran, but by agreement she attended on 31st October and agreed a return to work plan that involved: –

    a. 2 weeks working light duties from home (e.g. writing 2 web stories a day, carrying out a clinical new search each week and reporting back to Ms Lind her line manager)
    b. 2 weeks working from 10 to 4, 3 weeks 3 days in the office and 2 days at home with a reduced workload
    c. 2 weeks working 10 to 4 but 5 days a week building up to full capacity over that period.

    The Respondent emphasized that they wished to be as supportive as possible, asked her to advise them if there were any changes in her condition and stated that the plan could go slower or faster as required.

12. The Claimant told the Respondent that she was happy with the plan and said that she was keen to get back to work. It was agreed that the Claimant should start her phased return to work on Thursday 2nd November.

13. However later on the 31st October the Claimant sent a lengthy email to the Respondent. This explained in more detail some of the symptoms of her OCD (160). In particular she said that she had been abused in childhood and had been diagnosed with PTSD and OCD. She explained that the journey to the meeting that day had caused her considerable OCD anxiety, had made her feel very dirty/contaminated, that she had to take of all her clothes when she returned home and take a long shower and that "at the moment public transport is still virtually impossible for me at any time". She had started private therapy for the trauma/abuse and she was making progress. She had not been sleeping, but that was improving. She had been referred to an anxiety disorder unit for the OCD but the waiting list was very long.

14. On 1st November the Claimant provided a sick note signing her off until 13th November. She emailed the Respondent to say that she had seen her GP who thought a phased re-introduction to work would be ideal but *"unfortunately he doesn't think I'm quite ready to start back yet because of the stuff I'm currently working through in therapy…. He's extended my sick note till 13th November so I would be able to start with the first stage of your plan from that Monday*."

15. During this period the Claimant and the Respondent were in constant contact and it is fair to say that the tone of the Respondent's emails was sympathetic and understanding.

16. On 9th November the Claimant postponed her return to work by a day to 14th November (175). On the 13th she postponed it again to the 15th and then on the 14th asked to postpone to Monday 20 November (183). In her email of

14th November postponing her return to work she says she had seen her psychiatrist which had set her back slightly "*but we're sure that I'll be fine again by Monday"* and *"I'm very sorry for the inconvenience but please do count on my starting on Monday. There are no more painful assessments, only treatment, so I'll definitely be able to start work next week".*

17. On 20th November the Claimant again said she was not ready to return to work (188). She said the thought of working and of telling the Respondent that she couldn't work was causing her a lot of stress and asked if she could return to work on Monday 27th November *"or if you prefer we can agree 1st December, by when I definitely will be ready to start phase 1".*

18. On 22nd November the Respondent wrote to the Claimant asking for her consent for them to request a medical report from her GP or her consultant. (193) the Claimant's response was that she was reluctant to ask for a full medical report at that stage but that *"if I am still unable to return by 1st December then I will agree to it."*

19. The Claimant began her phased return to work on 1 December 2017 although she told the Respondent that working from home would need to be extended. The agreement was to work light duties from home (e.g. writing 2 web stories a day, carrying out a clinical new search each week and reporting back to Ms Lind her line manager) and attending a meeting at the office to review progress at the end of the 2 weeks (158).

20. During the first week the Claimant produced one web story a day which was of good quality. However, the Respondent's view (evidenced at the time) was that while the quality of her work was good, the quantity was insufficient and she was not providing the two web stories a day as agreed. (On the first day when she was asked to file a web story by 3 pm the Claimant said she hoped not to have to meet any deadlines that day as she believed her return to work would not be high pressured, but in any event the Claimant did complete the story by the deadline.)

21. On Thursday 14th December the Claimant was ill and, in the period from then until early January, the Claimant was advising of her inability to work on a day by day basis. Sofia Lind provided a report on the phase 1 period on 19th December 2017 (374). In the new year the Claimant was again unwell and on 12th January provided a sick certificate to cover the period from 2nd January to 26th February.

22. On 25th January 2018 the Respondent wrote to the Claimant noting that she had been absent for an average of 78% of her working days since the start of her employment and they wanted to arrange a formal capability meeting to discuss the concerns about the level of her absence and any ways in which the company could assist her in improving her attendance and

performance They referred to the earlier request for a medical report from her GP and the Claimant's response and asked again for the Claimant's consent to approach her GP to obtain a medical report, to include an estimate from her doctor as to how long her condition was likely to last, whether it was classed as a disability etc.

23. The Claimant's probationary period was due to come to an end on 30th January 2018, but was extended to 30th July 2018 *"to allow adequate time to address the concerns about your absence and to assess your performance"*. (573).

24. A meeting was arranged for 31st January 2018 which took place by telephone as the Claimant was not able to travel. The Claimant reported that she had been to an assessment at the anxiety disorder unit and was waiting to hear. She was having other treatments which were progressing well. She was moving flats at the beginning of March to get back to normal. Public transport was a big issue. Once she was comfortable with her living environment however she should be fine, and she thought she could start work in the "middle of March as absolute cut-off point".

25. The Respondent again asked the Claimant for permission to approach her GP for a medical report. The Respondent offered to email the Claimant a list of questions that the company would like to put to her GP so that she could see what was being sought. Ms Jovanoski duly emailed the Claimant the relevant questions (605). These were standard questions and sought to establish, inter-alia, the precise nature of the Claimant's illness, the treatment she was receiving, the date of the diagnosis, the effect it had on her ability to carry out normal day-to-day activities, any adjustments which could be made and when she would be fully fit to resume her normal duties.

26. The Claimant responded that she wanted to ask her GP for the report, rather than allowing the Respondent to approach him directly. She told the Respondent that this would ensure (i) it would be done quickly and (ii) by her own GP (rather than another GP in the practice). The Respondent agreed, but asked the Claimant to "*request that he answers all the questions I emailed to you to enable us to obtain a full picture*." The Respondent said they would cover any charge.

27. By now the Respondent was considering disciplinary action but wanted to obtain a medical report before doing so.

28. Up until this point the Claimant's absence had been causing considerable operational difficulties for the Respondent. No-one else in the team had a clinical background and the quality of the clinical reporting had deteriorated. Others who were less qualified to cover the clinical news stories were covering her work, increasing the pressure on them and the Respondent was also using freelancers. In mid-February the Respondent recruited

another individual to cover the clinical reporting role that the Claimant was doing and there were no further operational or budgetary issues.

29. On 26 February, the Claimant's medical certificate was about to expire. The Respondent wrote to the Claimant to say that they had not heard from her and they anticipated that she was unable to come to work. The Respondent asked for a new medical certificate, chased the GP report, asked for a general update and whether the Claimant still considered the middle of March was a reasonable return to work date.

30. The Claimant responded that she was making *"good progress*". She was "*almost at a place now where I'm really feeling that I can work, but only remotely, as the journey is the barrier. That may be the case for a month or possibly two, after which I would hope to be able to travel in. I may be able to start travelling on a phased basis in the 2nd month."* She said she would send a fit note, confirmed that her GP had the Respondent's questions and would start on the report "asap".

31. The Claimant sent a further fit note to the Respondent on 6 March 2018 which signed her unfit until 23rd March. In the meantime the Respondent was moving offices and kept the Claimant updated about the move.

32. On 16 March the Claimant emailed saying that it might be "*a week or two before I'll be ready to start on a return to work plan. But please let me assure everyone it won't be later than end of March."* She said that her GP was requesting a charge for the medical report which would be forwarded.

33. On 28th March the Respondent chased the medical report. *"Can you please let me have your doctors contact details so that I can follow up directly with him re-the charge? We really require the report as soon as possible now, but it might simplify and expedite things if I speak to the practice directly."* This prompted the Claimant to forward her GP's invoice (which had been issued on 9th March) to the Respondent the next day (650). The Respondent paid the invoice promptly.

34. The Respondent chased the Claimant on 10th April for another fit note and the Claimant responded that she would get a fit note. She was moving into her new flat on 22nd April *"I'm definitely looking at discussing a phased return to work (and a period of homeworking) shortly after that if that okay. I'm looking forward to it".*

35. On 18th April the Respondent chased the doctors report again. (677)

36. The Claimant sent another fit note on 20th April signing her off from 23rd March until 22 May. However, in her accompanying email the Claimant said that 23 May was not set in stone and she had discussed with her GP that she should be able to start a phased return one she had settled in her new flat. She was moving later that week. She said that the medical report should be with them early next week. (675)

37. On 18th May the Respondent had heard nothing further and chased another fit note and the medical report.

38. The medical report was sent on 21 May 2018. This was 6 months after the Respondent had first asked the Claimant for her consent to approach her GP. It was not helpful. It failed to answer the questions that the Respondent had emailed to the Claimant. It referred to her *"current illness of obsessive compulsive disorder which has significantly impaired her ability to function at present".* However, it did not state when she was diagnosed and was vague about the prognosis.

39. In terms of day-to-day activities, the GP refers only to the Claimant's difficulty in getting to work via public transport. As to prognosis he says "*it is difficult to predict at this stage when [X] will be fit to work again. However, with therapy, in conjunction with her medical input, I would hope she would be fit to return to work within the next couple of months".* As to adjustments he says that she would be able to resume her usual work duties as normal *"I do not see any reason at present that she would be limited in her capacity to perform her previous duties which, as stated above, I believe should be possible within the next 2 to 3 months.*" He said a recurrence of illness was a possibility but with intensive treatment "a recurrence will be less likely the intermediate term". No workplace adjustments were necessary to aid her condition other than working from home a reduced number of hours as part of a phased return to full-time duties. He opined that the Claimant was <u>not</u> disabled under the disability act as "she should be able to continue with her normal activities in the long term".

40. This is a somewhat surprising report. The GP had been treating the Claimant for OCD since 2007 and was aware of her history and of the fact that she had been suffering from OCD for 22 years. He does not refer to the assessment report from St George's Mental Health Team dated 8th May 2018 which he had recently received containing a detailed analysis of the very real, difficult and long term problems that the Claimant was having with her OCD (836-840).

41. The Claimant now says that the GP wrote this report "as he thought it was the most likely way to assist me in my return to work" and that the Respondent had misled him as to the legal queries surrounding this submission. She says that had she known that the Respondent would use the report as their sole source of information she would have objected.

42. The Tribunal does not accept that the Respondent misled the GP. The questions provided were standard questions to assist an employer to understand the true medical position. If the Claimant knew that she was disabled (and her GP must have done) then the report ought to have said so. Subsequently in April 2019 the same GP reports that the Claimant is a disabled person "and her condition is formally documented in her notes from 1996." Those notes must have been available to him at the time that the May 2018 report was prepared.

43. Two weeks after receiving the medical report (KJ had been on leave), on 7 June the Respondent wrote to the Claimant asking her to come in early the next week for "a discussion". They also chased the latest fit note (the previous one having expired on 22nd May).

44. In response the Claimant sent a further fit note signing her off until 22nd June. She said that she was *"starting a final bout of residential treatment in Oxfordshire which will last 2 to 4 weeks"*. She was happy to come in for a chat on Monday, just before she went, or they could do it by phone. The Respondent asked her to attend on Monday afternoon at 2.30 but the Claimant asked to do it by phone on Tuesday. A call was then set up for Tuesday but the Claimant missed it.

45. The Respondent wrote her later that day asking her to provide an update, in particular how long the residential treatment would last. The Respondent said it would need to arrange a formal capability meeting once the course had finished and suggested 10th July, being 4 weeks away. The Claimant responded that she would provide an update over the weekend.

46. The Claimant did not respond until 3 July. She told the Respondent that she would want 1-4 more weeks residential treatment to be really back to her normal self. However, she was keen to have the capability assessment. She would be happy to do it by phone from Oxfordshire, or they could wait until she returned to London.

47. A telephone meeting was eventually arranged for 18th July at 3 p.m. The Respondent wrote to the Claimant with a formal interview letter noting that the meeting was a formal one *"to discuss the concerns the company has about the ongoing level of your absence, which currently stands at 90% since the start of your employment on 31st July 2017 and your return to work."* She was told that at the meeting she would be given *"an opportunity to explain your position, ask questions and to provide anything you may have to evidence any likely imminent improvement."* She was told that the outcome of the meeting could result in disciplinary sanctions being taken. This could take the form of *"a warning up to and including dismissal if the company deems this necessary*". She was informed of her right to have a companion.

48. In the event the meeting was re-arranged, at the Claimant's request, to 20 July. The notes appear at page 782. Mr Kaffash chaired the meeting and Ms Jovanoski attended and took notes. It was evidently a short telephone call.

    a. The Claimant she thought she would be able to start a return to work plan "in a month or so", working from home at first but it was difficult to predict for how long.

    b. public transport could still be an issue, but this would need to be seen "further down the line".

c. She had extended her stay in Oxfordshire for a further month until "around 10th August". She would move into permanent new accommodation once she was back in London. She would only need a few days for that. The Respondent then asked whether that meant she thought 20 August would be a likely date for return to work in the Claimant said yes.

d. It was put to the Claimant that she had been saying she would be ready to start work on a return to work plan since December. "What had happened to make it different now?" The Claimant said that this was the continued and current treatment she was having. She could ask the doctor who wrote the previous medical report to do another one.

e. When asked whether there was any medical evidence that she would be ready to return to work, the Claimant said no; that it was just her own opinion. She would start with a slight reduction in hours but would build them up quickly.

49. Mr Kaffash's evidence was that he was not surprised by the Claimant's response as she had been providing projected return to work dates since November and they had never materialised. *"Unfortunately she gave me no reason to believe that what she was saying would happen this time as it had never happened as she said before.*" On 25 July 2015 the Respondent wrote to the Claimant dismissing her from their employment. She was paid in lieu of notice. The Respondent said that the reason for her dismissal was that she had been absent for 90% of working days since the start of her employment and that this was having a detrimental impact on the business and her colleagues.

50. The Respondent extended the usual deadline for the submission of any appeal against the decision to dismiss to 17 August, so that would allow her a week after the end of her residential treatment. The Claimant responded on 9 August saying she was deciding whether to appeal but that she would not do so unless she was sure "that I will be able to travel into work daily from a certain date."

51. On 17th August the Claimant appealed her dismissal saying that she wanted to return to her job under a phased return plan. By email dated 21st August the Respondent refused to convene an appeal meeting (804) saying that the points that she had made had already been taken into consideration in the original decision and the decision to dismiss was confirmed.

52. On 7th September the Claimant responded saying "*if I provide a letter from my treatment centre clinical director, who has also been my primary therapist, stating that I'm fit for work, could that be grounds for appeal? (803)*." The Respondent responded that the process was now complete

53. In the event the Claimant remained in residential care until 5th October 2018.

54. She told the tribunal that her condition had deteriorated after her dismissal but it was the injustice of the dismissal that caused her to relapse. Had she not been dismissed she would have been able to return to a job with the Respondent on 20th August. She had intended to get a flat in Dolphin Square "there are always flats available there" and return to work on 20th August, although it was "not set in stone". She was not fully cured but would have been able to return to work on a phased basis.

55. The Claimant has not produced any medical evidence to support her case that she would have been fit to return to work on a phased basis from 20th August. The Claimant told the tribunal that she has been in dispute with the residential facility and could not obtain the necessary medical evidence of her health**.**

56. A letter in the bundle dated 29th April 2019 from the Claimant's GP reports that the Claimant is suffering from significant obsessive-compulsive disorder, that it has lasted for more than 12 months and that although she had seen mental health teams and clinical psychologists "her symptoms have not improved for any long-term period". The Claimant seeks to persuade the tribunal to ignore this email as she told the tribunal that he wrote this without having seen her since she finished her residential treatment in Oxford.

Submissions

57. For the Respondent, Mr Anderson submits that the claim of failure to make reasonable adjustments could not succeed in circumstances where the Claimant accepted that she was not at any stage fit for work. Home Office v Collins 2005 EWCA Civ 598 and Doran v DWP 2014 UKEAT 0017.

58. In relation to the complaints of discrimination arising from disability

    a. The Respondent knew that the Claimant had OCD and that it had a substantial adverse effect on her ability to take public transport, but was not aware that the Claimants OCD was long term. When the Respondent took the decision to dismiss, the Claimant's GP had opined that the Claimant was not disabled, and that the effect on her ability to carry out day-to-day activities was temporary.

    b. Dismissal was a proportionate means of achieving a legitimate aim. The legitimate aims relied on were "maintaining a workforce that is capable of reasonably full attendance for the performance of their work and minimizing disruption to its business".

    c. The law did not require employers to retain indefinitely employees who are not capable of performing their duties. The tribunal was referred to the following passage in O'Brien v Bolton Saint Catherine's Academy 2017 ICR *"[this] was not a case where the Claimant was predicting that she would be fit soon and asking the school to wait a little longer for that point to be reached. If it had been I might very well have found it hard to accept that it was*

disproportionate for the school, after so long a period to say that it could not proceed on the basis of predictions."

d. In considering proportionality the tribunal should consider length of the Claimant absence, the Claimant's prognosis, the Respondent's inability to help, operational disruption, administrative disruption and continuing obligations to the Claimant during her long-term absence.

59. For the Claimant Mr Perry submitted that the Respondent clearly had knowledge of the likely long-term effects of her disability. At the time the decision to dismiss was made at the end of July the Respondent knew, or should have known, that the Claimant had actually suffered adverse effects in the past (because of the consultants letter of 10 September 2017 (101)), the Claimant email of 11th September referring to her "usually manageable" OCD symptoms. The fact that the Claimant had been off work for so long should have put the Respondent on notice that it could well last for at least a year.

60. In relation to the failure to make reasonable adjustments Mr Perry submitted that the Claimant had made a commitment to return on 20 August and at that point the Respondent should have taken steps to devise and implement a phased return to work plan.

61. The Claimant was dismissed because of her absence which in turn arose from disability. That dismissal was not justified. The Respondent had no legitimate aim in dismissing the Claimant. If it did its actions were disproportionate. The Respondent had hired a replacement and was under no business need to terminate the Claimant employment in circumstances where she was not in receipt of pay. The medical evidence from her GP was positive about her ability to return to work in the relatively near future.

Relevant law

62. Section 15 of the Equality Act 2010 provides that

> (1) A person (A) discriminates against a disabled person (B) if—
>
> (a) A treats B unfavourably because of something arising in consequence of B's disability, and
>
> (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.
>
> (2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

63. It is not disputed that the Claimant was dismissed because of her sickness absence and that this in turn arose from her disability. What is disputed is (i) whether the Respondent knew or should have known that she was disabled and (ii) whether the Respondent could show that dismissal was justified.

64. Section 20 of the Equality Act provides that where a provision, criterion or

practice (a PCP) applied by or on behalf of an employer, places the disabled person concerned at a substantial disadvantage in comparison with persons who are not disabled, it is the duty of the employer to take such steps as it is reasonable to have to take in order to avoid the disadvantage. Section 21 of the Equality Act then provides that an employer discriminates against a disabled person if it fails to comply with a duty to make reasonable adjustments.

65. The Code of Practice on Employment 2011 (chapter 6) gives guidance in determining whether it is reasonable for employers to have to take a particular step to comply with a duty to make adjustments. Paragraph 6.28 sets out some of the factors which might be taken into account in determining whether it is reasonable for an employer to have to take a particular step in order to comply with the duty to make reasonable adjustments. These include whether taking the step would be effective in preventing the substantial disadvantage, the practicability of the step, the cost to the employer and the extent of the employer's financial and other resources.

66. Para 20 (1) of Schedule 8 to the Equality Act also provides that a person is not subject to a duty to make reasonable adjustments if he does not know, and could not reasonably be expected to know, that the disabled person has a disability and is likely to be placed at a disadvantage by the PCP. An employer is required to make reasonable enquiries as to whether an employee is disabled and as to the effect of that disability.

67. Section 15 is focused upon making allowances for disability. Sections 20-21 are focused upon affirmative action. In many cases the two forms of prohibited conduct are closely related: an employer who is in breach of a duty to make reasonable adjustments and dismisses the employee in consequence is likely to have committed both forms of prohibited conduct. But not every case involves a breach of the duty to make reasonable adjustments, and dismissal for poor attendance can be quite difficult to analyse in that way.

68. In Doran v DWP above the EAT held that the duty to make reasonable adjustments was not triggered in a case where the Claimant remained unfit for work.

69. As to the burden of proof section 136 of the Equality Act 2010 provides that: -

> "(1) This section applies to any proceedings relating to a contravention of this Act.
>
> (2) If there are facts from which a court could decide, in the absence of any other explanation that a person (A) contravened the provision concerned, the court must hold that contravention occurred.
>
> (3) But section 2 does nor apply if A shows that A did not

contravene the provision."

Conclusions

Knowledge

70. Did the Respondent know, or should it reasonably have known, that the Claimant was disabled? What is necessary is that the Respondent must have actual or constructive knowledge of the facts constituting the disability (but not necessarily the consequences of those facts).

71. The definition of a disabled person is set out in section 6 of the Equality Act 2010 which provides that "a person (P) has a disability if he has a physical or mental impairment and the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities"

72. "(1) The effect of an impairment is long-term if—

(a) it has lasted at least 12 months;

(b) the period for which it lasts is likely to be at least 12 months; or

(c) it is likely to last for the rest of the life of the person affected.

(2) If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur."

73. It is accepted that the Respondent knew that the Claimant had an impairment which had a substantial adverse effect on her day to day activities. Did or should the Respondent have known it was long term? As set out above Mr Anderson submits that the Respondent could not reasonably have been expected to know at the time of dismissal that the Claimant's OCD was long term in the light of the medical report from her GP.

74. In Gallop v Newport City Council the Court of Appeal held that an employer could not rely on lack of knowledge of disability when it had "unquestioningly accepted" the opinion of its occupational health advisor that the employee was disabled. This does not mean, however, that in general great respect should not be shown to the views of the doctor (Donelien v Liberata UK Limited 2018 EWCA Civ 129).

75. In this case the Claimant's own GP had opened that the Claimant was not a disabled person as her condition was not long term. The Respondent did not have the information now before the Tribunal that the Claimant's OCD had been an ongoing since 1996. Nonetheless at the time of her dismissal in July, apart from a period of just under 2 weeks working from home in December, the Claimant had been off work since September 2017. In July, at the time of the dismissal meeting, she was in a residential facility to treat OCD at which she said she would remain till 10th August. Thereafter she would need to work from home for an unspecified period of time. The

Respondent was also aware from the letter that the Claimant had provided at the start of her absence that the OCD was not a new condition in September 2017. In her email of 11 September the Claimant referred to her "usually entirely manageable OCD" and to the fact that she had been to see "a former psychiatrist". She enclosed a letter from a psychiatrist which refers to her OCD having becoming "much worse within the past couple of weeks".

76. By the time the Claimant was dismissed the Respondent knew that the Claimant had been off work/ unable to travel for 10 months, that this was not a new impairment in September 2107. At the dismissal meeting the Claimant was not saying that she was free of OCD. Rather she was saying that with a following wind she would be able to work from home "but it was "difficult to predict for how long". The submission that the Respondent was entitled to rely on the medical report is at odds with Mr Kaffash's own evidence that he did not accept the prognosis that the Claimant would be able to return to work 2-3 months from the date of the report.

77. We conclude that, despite the medical report the Respondent knew or should have known that the Claimant had an impairment which, in July 2018, had either lasted or was "likely to last for a year". As the Respondent accepts that it was aware that the Claimant's mental impairment had a substantial adverse effect of on her day to day activities we find that they has knowledge that she was a disabled person.

Failure to make reasonable adjustments.

78. Both counsel accepted that a duty to make reasonable adjustments does not apply until the employee is ready to return to work (Doran v DWP). However, for the Claimant, Mr Perry submitted that at the capability hearing the Claimant had indicated that she was able to return to work on 20th August.

79. We do not accept that. The notes of the capability hearing on 20th July indicate a much vaguer analysis than that. The Claimant "*predicts she would be able to start a return to work plan in a month or so working from home at first".* She would then work from home for 1-2 months "*but it could be shorter or longer, difficult to say".* She was still in residential treatment which she had just extended for a further month until around 10 August. It was the Respondent who asked if 20 August might be a "likely date" for the Claimant to return to work and the Claimant simply agreed.

80. We do not read the notes of the capability hearing as indicating that the Claimant is saying that she would definitely be ready to begin a phased return to work on 20th August." The nature of the Claimant's condition was that the length and extent of the impact was difficult to predict. Recovery is not subject to fixed timetables and the Claimant was understandably choosing to be optimistic rather than pessimistic as to her chances of full recovery. She had been optimistic about her prognosis for the previous 10 months. If the Claimant had said I will return to work next week, then the Respondent would have been required to put in place a phased return (as it

had in the past), but she was not saying that she was saying she would return “in a month or so “.

81. This case is not entirely on all fours with the decision in Doran as in that case the employee on that case had been given no indication of a date when she might be fit to return to work on a phased basis, whereas in this case the Claimant had indicated that she might be fit to return in a month or so. However, given the history of assurances that had been given in the past, the Respondent was not obliged to take her at her word in the absence of medical evidence to support her assertions.

82. The duty to make reasonable adjustments arises when the disabled person is placed a substantial disadvantage by the application of a pcp. As at the date of the dismissal the Claimant was not fit to work at all and so the Respondent could not alleviate the disadvantage. The duty to put in place a phased return had not yet arisen.

Section 15

83. It is common ground that the Claimant was dismissed because of something arising from disability, namely her lengthy absence. The real issue in this case is whether the dismissal was a proportionate means of achieving a legitimate aim. The Claimant did not qualify for the right not to be unfairly dismissed so the tribunal was not concerned with the standard test under section 98(4) of the Employment Rights Act 1996, and issues as to the adequacy of the appeal.

84. Instead the tribunal is required to consider whether dismissal was a proportionate means of achieving a legitimate aim. This is a balancing act which does not depend on the subjective thought process of the employer and is not to be decided by reference to an analysis of the employer’s thoughts and actions which would be appropriate in a reasonableness consideration. The question is whether the dismissal is, objectively assessed, a proportionate means to achieve a legitimate end irrespective of the process adopted by the employer (DL Insurance Services Ltd v O’Connor UKEAT/0230/17).

85. The tribunal accepts that the Respondent had a legitimate aim, namely maintaining a workforce that was capable of reasonably full attendance and minimising disruption to its business.

86. The real battleground in this case was whether the dismissal was proportionate. The tribunal considered that this was a finely balanced exercise. In considering proportionality we considered the following factors:

    a. At the time of the Claimant’s dismissal she was not in receipt of any income from the Respondent and she was not a drain on their financial resources.

    b. The Respondent had, by then, recruited an individual to cover the clinical reporting that was part of the Claimant’s duties. Although

there had been disruption to the business in the early part of the Claimant absence by February the clinical reporting was being adequately covered.

c. The Claimant said that she should be ready to return to work within a few days of the end of her residential treatment on 10th August

d. The Claimant's GP had said on 17th May 2018 that he "would hope that she would be fit to return to work within the next couple of months" and that she would be able to resume "as normal" within the next 2 to 3 months."

e. The Respondent was open to accommodating the Claimant's return to work when she was ready, including working from home and a phased return to work. We accept that there would have been work for the Claimant to do when she returned.

f. At the time of the Claimant's dismissal she had been absent from work for 90% of her time.

g. The Claimant had only worked for the Respondent for a total of 26.5 days, (10.5 of which had been working from home on light duties during a phased return to work.)

h. The Claimant was not a long-standing employee.

i. The Claimant had made repeated assurances that she would be back to work within the next few days/weeks/months but, had been unable to. Mr Anderson had listed at the back of his submissions some 14 indicated return dates. We accept that she had indicated a positive return to work date on very many occasions. The Claimant wanted to be able to return to work but the Respondent concluded that her assurances were more wishful thinking than genuinely informed assessments.

j. The medical report which the Claimant had obtained was vague and not particularly helpful to the Respondent in assessing the Claimant's condition. It did not answer the questions that the Respondent had specifically asked and took 3 months to arrive.

k. Prior to the dismissal meeting the Claimant was asked to provide any evidence that she was in a position to return imminently but could not do so. At the dismissal hearing she offered to provide a report from her GP but did not offer a report from her specialist psychiatrist at the Oxfordshire facility.

l. At the meeting the Claimant was not saying that she was now better and would be able to return to work for definite on 20 August. She was simply saying that she was hopeful that she would be able to do so. She had been hopeful of an imminent return for the last 9 months.

m. The Claimant did not suggest offering a letter from her treatment centre until 2 weeks after the dismissal

n. While there was no operational disruption, it was clear that the Claimant's absence required significant management time in monitoring the Claimant's absence.

o. The team were unsettled about the future, whether the Claimant would return and if she did what the impact of her return would be on the individual who was covering her duties.

p. The Claimant was continuing to accrue employment rights and holiday pay.

87. In considering whether the dismissal of the Claimant was justified the Respondent has to show that the reason for the less favourable treatment was "both material to the circumstances of the particular case and substantial". The Code of Practice on Employment (2001) notes that the term "proportionate" is taken from EU directives, and that EU law views treatment as proportionate if it is an "appropriate and necessary" means of achieving a legitimate aim. "Necessary" may require the employer (or the Tribunal) to consider whether the same aim could not be achieved by less discriminatory means. In this case the Respondent sough certainty. It was either waiting longer or dismissal.

88. The Tribunal has to balance the impact of the treatment on the Claimant against the reasonable requirements of the business. We did not find this an easy task. This was not an employee who was critical to the smooth operation of the business. The Respondent had recruited a replacement and was operating reasonably efficiently in her absence. She was not in receipt of sick pay. On the other hand, even in those circumstances an employer is not required to retain indefinitely an employee who has been off sick for a significant period of time and whose return is uncertain. It requires significant management time and uncertainty for the person whose is covering the Claimant's duties.

89. The question in this case was really whether the Respondent should have been required to wait a bit longer and, if so, how much longer? We concluded that in these circumstances the Respondent had waited long enough.

90. We considered also whether the Respondent had acted proportionately without having obtained further medical evidence as to the Claimant prognosis. The Respondent had had first requested a medical report from the Claimant in November 2017 and had not received it until 21st May. Although it was two months old by the time of dismissal this was not fault of the Respondent who had tried to progress matters as early as 7 June but had been unable to do so. The fact was that the prognosis was, and remained, uncertain.

91. We conclude that the Claimant's dismissal was a proportionate means of maintaining a workforce that was likely to provide regular attendance. That analysis is based on the material before the employer at the time.

92. Mr Perry submitted that in making its own assessment of proportionality, the Tribunal was entitled to take into account material not before the employer as the tribunal was making its own assessment rather than assessing the reasonableness of the Respondent's actions. We found this a somewhat difficult concept. It would be a difficult task for employers to make lawful decisions about proportionality if those decisions could be affected by material of which they were unaware.

93. In this case there were numerous documents before the tribunal (in existence at the time of dismissal) which were not before the Respondent. We refer to the documents at pages 826 – 841 and the Claimant's impact statement (66) prepared in April 2019 in which the Claimant says that she continues to have severe OCD. From those documents it is apparent that the Claimant has been suffering from obsessive-compulsive disorder since 1996, has had several spells of residential treatment and her condition in April 2018 was severe. We refer in particular to the assessment report prepared by St George's Mental Health NHS trust. If that material was evidence which the Tribunal should take into account in assessing proportionality, it would reinforce the Tribunal's view that the Claimant was unlikely to be able to return to work in the near future and that dismissal was a proportionate means of achieving a legitimate aim. It would of course also have gone to remedy.

94. For these reasons the claim is dismissed.

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Employment Judge Spencer
9th October 2019

JUDGMENT SENT TO THE PARTIES ON

11/10/2019.....

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FOR THE TRIBUNAL OFFICE