EMPLOYMENT TRIBUNALS

Claimant: Mr A Grant

Respondents: EE Limited

Heard: Remotely (by video link) **On:** 19, 20, 21 and 22 April 2021

Before: Employment Judge S Shore
NLM – Mr E Euers
NLM – Miss B Kirby

Appearances

For the claimant: In person
For the respondent: Ms A Niaz-Dickinson (days 1, 2 and 3)
Ms A Ruffle (day 4)

JUDGMENT ON LIABILITY

The unanimous decision of the Tribunal is that:

1. The claimant's claim of unfair dismissal is dismissed upon withdrawal.
2. The claimant's claim of direct disability discrimination is dismissed upon withdrawal.
3. The claimant's claim of discrimination arising from disability is not well-founded and fails
4. The claimant's claims of failure to make reasonable adjustments is not well-founded and fails.

REASONS

Introduction

1. The claimant was employed as a customer advisor in a call centre by the respondent from 30 April 2018 until 17 April 2019, which was the effective date of termination of his employment. The claimant started early conciliation with ACAS

on 7 July 2020 and obtained a conciliation certificate on 5 August 2020. The claimant's ET1 was presented on 7 August 2020. The respondent operates a very large mobile phone network, over 550 retail stores, and several call centres.

2. The claimant presented claims of:

    2.1. Unfair dismissal;

    2.2. Direct discrimination because of the protected characteristic of disability;

    2.3. Discrimination arising from disability; and

    2.4. Failure to make reasonable adjustments.

3. From the joint bundle, we note that the claims were case managed by Employment Judge Martin on 7 October 2020. She discussed the claims and issues with the parties and made case management orders, which included a requirement for the claimant to produce a Scott Schedule relating to his disability discrimination claims. The claimant said that his trade union representative produced the Scott Schedule and that he had limited input into the document. If he is dissatisfied with the advice he received from his trade union, that is a matter between them and cannot be factored into our decision.

4. It is essential for any Tribunal hearing a claim to clarify exactly what claims are made before it hears evidence. A Scott Schedule is a document that claimants are sometimes required to complete to assist the Tribunal understand the claims that it must determine and for the respondent to know what claims it has to defend.

5. The claimant's Scott Schedule was produced at pages 57 to 65 of the joint bundle and contained relevant details of the claims advanced by the claimant and the respondent's responses to those claims. The claimant's Schedule detailed:

    5.1. Three separate acts of discrimination arising from disability contrary to section 15 EqA (which were numbered 1.1, 1.2, and 1.3);

    5.2. One allegation of direct discrimination because of the protected characteristic of disability contrary to section 13 of the EqA (which was numbered 2.1); and

    5.3. Five separate instances of failure to make reasonable adjustments contrary to sections 20 and 21 of the EqA (which were numbered 3.1, 3.2, 3.3, 3.4, and 3.5).

6. The first allegation of discrimination arising from disability (1.1) was the claimant's dismissal itself. It was accepted by Ms Niaz-Dickinson that dismissal was unfavourable treatment and it arose from the claimant's absence record. The other two intimated claims (1.2 and 1.3) listed "failure to consider [Chronic Fatigue Syndrome ("CFS")/Fibromyalgia] was likely to be covered by the [EqA]" and "move to Stage 3 and disregard OHS advice".

7. We discussed the second and third claims with the claimant. In his own words, he was protesting his dismissal. The unfavourable treatment arising from the 'something' was a "failure to recognise the potential of CFS/Fibromyalgia considering substantial and long-term impact because of lack of diagnosis" and the "failure to consider medical evidence (from OHS and NHs Specialist) and advice to allow time for treatment and recovery". In essence, both were picking out elements of the claim that he had been dismissed because of something arising from his disability. The second and third claims were based on a disability that was not conceded by the respondent and added little to the overall section 15 claim before the Tribunal even got to considering the evidential and legal issues raised by the claims. The claimant was offered time to consider his position and agree to limit his claim to claim 1.1, with the proviso that the facts alleged in 1.2 and 1.3 were relevant to the first claim.

8. The allegation of direct discrimination (2.1) made reference to an incident in early 2020. The respondent's comments on the claim in the Scott Schedule alleged that the claim was not contained in the ET1 and would require an application to amend the claim, which would include an application to determine if it would be just and equitable to extend the time for bringing the claim. After discussing the claim with the claimant, he asked to withdraw it.

9. The five claims of failure to make reasonable adjustments were numbered 3.1, 3.2, 3.3, 3.4, and 3.5. Claims 3.1 and 3.2 alleged PCP's of:

    9.1. Moving to Stage 3 of the respondent's Sickness Absence Procedure ("SAP"); and

    9.2. Considering dismissal for repeated absence.

10. The adjustments contended for were

    10.1. Adjust trigger points for absence and alter the date of SAP meetings to await the results of diagnostic appointments (3.1); and

    10.2. Consider alternatives to dismissal such as further monitoring period to allow for diagnosis treatment and recovery.

11. The PCP's for matters 3.3, 3.4 and 3.5 were stated to be:

    11.1. Uphold dismissal without consideration of adjustment for disability;

    11.2. 8-week return to work rehabilitation plan; and

    11.3. Support adjustments.

12. The claimant also withdrew his unfair dismissal claim on the first morning, as he accepted that his effective date of termination of employment was 17 April 2020, as evidenced in the letter confirming his dismissal dated 1 May 2020 [331-337], which left him with less than two years' continuous service at the date of dismissal. He had continued with the claim on the basis that he felt the respondent had terminated his employment to avoid his getting to the two-year threshold of continuous service, but accepted our observation that this was highly unlikely to be a successful argument.

13. The claimant's closing submissions contained a slightly different PCP to the Scott Schedule, but Ms Niaz-Dickinson did not object and we have considered all PCPs in our decision.

Issues

14. The parties agreed following list of issues (questions that the Tribunal has to find answers to):

Jurisdictional Issues

1. *What is the effective date of termination of the Claimant's employment? Does the Tribunal have jurisdiction to hear the Claimant's claim of unfair dismissal given that he does not have the requisite qualifying period of service (2 years)?*

Unfair Dismissal

2. *Was the Claimant dismissed for a potentially fair reason pursuant to s.98(2)(b) of the Employment Rights Act 1996 ('ERA'), namely Capability / Ill Health?*
3. *Was the dismissal of the Claimant fair in all the circumstances? In particular, was the dismissal within section 98(4) ERA and the band of reasonable responses available to the Respondent?*
4. *Did the Respondent follow a fair procedure when dismissing the Claimant?*
5. *Did the Respondent follow the ACAS Code when dismissing the Claimant?*
6. *If the Claimant's dismissal is found to be unfair, which is denied by the Respondent, did the Claimant's conduct cause or substantially contribute to his dismissal? If so, by what proportion would it be just an equitable to reduce the compensatory award?*
7. *If the Respondent failed to follow a fair procedure, can the Respondent show that following a fair procedure would have made no difference to the decision to dismiss? If so, by what proportion would it be just an equitable to reduce the compensatory award?*
8. *If the Respondent failed to comply with the ACAS Code, was its failure reasonable? If the Respondent's failure to comply with the ACAS Code was unreasonable, is it just and equitable to increase any award made to the Claimant?*
9. *Has the Claimant complied with the ACAS Code? If not, should any compensatory award made to the Claimant be reduced by to take into account the Claimant's unreasonable failure to comply with the ACAS Code? If so, by what proportion should the compensatory award be reduced?*
10. *To what extent, if any, has the Claimant mitigated his losses?*
11. *To what, if any, compensation is the Claimant entitled?*

Direct Discrimination (s13 Equality Act 2010 'EqA 2010')

12. *Does the Claimant's pleaded secondary condition of Chronic Fatigue Syndrome amount to a disability pursuant to the definition of disability under the Equality Act 2010?*
13. *Who is the correct comparator for the purposes of the Claimant's claim of direct discrimination?*
14. *Did the Respondent treat the Claimant less favourably than it treated or would treat the relevant comparator?*
15. *If so, was the less favourable treatment because of/on the grounds of the Claimant's Disability, contrary to the EqA 2010?*

Discrimination Arising from Disability (s.15 EqA 2010)

16. *Did the Respondent know, or could the Respondent reasonably have been expected to know that the Claimant was disabled for the purposes of section 6 of the EqA 2010?*
17. *Did the Respondent treat the Claimant unfavourably?*
18. *Did the unfavourable treatment arise in consequence of the Claimant's disability?*
19. *If so, can the Respondent show that the treatment was a proportionate means of achieving a legitimate aim?*

Duty to Make Reasonable Adjustments (s.20 EqA 2010)

20. *Did the Respondent know, or could the Respondent reasonably have been expected to know that the Claimant was disabled for the purposes of section 6 of the EqA 2010?*
21. *Did the Respondent apply a provision, criterion or practice which placed the Claimant at a substantial disadvantage in comparison with persons who are not disabled?*
22. *Did the Respondent's premises have any physical feature which placed the Claimant at a substantial disadvantage in comparison with persons who are not disabled?*
23. *If so, did the Respondent take such steps as were reasonable to avoid the disadvantage to the Claimant?*
24. *Did the Respondent take such steps as were reasonable to provide auxiliary aids to prevent the Claimant being placed at a substantial disadvantage in comparison with persons who are not disabled?*

Remedy (discrimination)

25. *If the Claimant was discriminated against, what level of compensation should be awarded to the Claimant?*
26. *In particular:*

    26.1 If the Respondent failed to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures ('the ACAS Code'), was

its failure reasonable? If the Respondent's failure to comply with the ACAS Code was unreasonable, is it just and equitable to increase any award made to the Claimant?

26.2 Has the Claimant complied with the ACAS Code? If not, should any compensatory award made to the Claimant be reduced to take into account the Claimant's unreasonable failure to comply with the ACAS Code? If so, by what proportion should the compensatory award be reduced?

15. As the claimant withdrew his claims of unfair dismissal and direct discrimination, we gave no consideration to items 1 to 15 above. As we have dismissed both remaining claims, we did not consider items 25 and 26.

Law

16. The law relating to discrimination arising from disability is set out in section 15 of the EqA.

15 Discrimination arising from disability

(1) A person (A) discriminates against a disabled person (B) if--

1. (a) A treats B unfavourably because of something arising in consequence of B's disability, and
2. (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.

17. The law relating to the failure to make reasonable adjustments is set out in sections 20 and 21 of the EqA.

20 Duty to make adjustments

1. (1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.

(2) The duty comprises the following three requirements.

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

21 Failure to comply with duty

(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.

(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.

18. We were referred to a number of cases by the claimant and respondent, which we considered and have quoted in these reasons where appropriate:

18.1. **Griffiths v The Secretary of State for Work and Pensions** [2015] EWCA Civ 1265;

18.2. **Salford NHS Primary Care Trust v Smith** [2010] EAT 0507/10;

18.3. **Archibald v Fife Council** [2004] ICR 954 ;

18.4. **General Dynamics Information Technology Ltd v Carranza** [2015] IRLR 43;

18.5. **Chagger v Abbey National plc and another** [2009] EWCA Civ 1202 CA;

18.6. **Department for Work and Pensions v Boyers** EAT 0282/19; and

18.7. **Hensman v Ministry of Defence** UKEAT/0067/14.

Housekeeping

19. The parties produced a joint bundle of 427 pages. Various documents were added to the bundle during the hearing by both sides. They were put into an Additional Disclosure Bundle that was numbered sequentially from the main bundle with page numbers 428 to 464. The claimant then added two pages of text messages that were numbered 465 and 466. The respondent added four pages of text messages that were numbered 467 to 470.

20. If we refer to pages in the bundle, the page number(s) will be in square brackets [ ].

21. We advised the parties that we would only deal with liability (whether the claimant had succeeded in one or both of his claims) in the first instance. This was because it would not be a good use of time or save costs if we dealt with remedy before we had made a decision on liability. We also advised the parties that we would not deal with any arguments on the potential effect of the case of **Chagger v Abbey National plc and another** on compensation in our liability decision. We did not get to the issue of compensation.

22. The claimant gave evidence in person and produced a witness statement dated 22 March 2021, that ran to 107 paragraphs.

23. Evidence was given in person on behalf of the respondent by:

20.1. Laura Smart, who was the claimant's line manager and is Retentions Team Leader at the respondent's North Shields call centre. Her witness statement dated 6 April 2021 consisted of 34 paragraphs.

20.2. Joanne Markin, Operations Manager for the respondent's North Shields call centre and the dismissing officer. Her witness statement dated 6 April 2021 consisted of 65 paragraphs.

20.3. Fiona Walker, Operations Manager at the respondent's North Shields call centre and the appeal officer. Her witness statement dated 1 April 2021 consisted of 29 paragraphs

21. We case managed the case at the start of the first day. As indicated above, the claimant had produced a Scott Schedule with the assistance of his trade union representative. As recorded above, the claimant withdrew his claims of unfair dismissal and direct discrimination. We discussed the details in his Scott Schedule relating to the remaining claims of discrimination arising from disability and failure to make reasonable adjustments. It was agreed by the claimant that the 'something arising in consequence of his disability' was his absence record and that it was his absences that led to his dismissal. Everything in the Scott Schedule on the issue of discrimination arising from disability was encompassed in section 1.1 of the Schedule and points 1.2 and 1.3 were not separate claims under that heading.

22. It was also agreed by the claimant that his claims for failure to make reasonable adjustments boiled down to matters 3.1 and 3.2 in the Scott Schedule:

22.1. Moving him to Stage 3 of the Sick Absence Procedure; and

22.2. Operating the Sick Absence Procedure to dismiss him because of his absences. Matters 3.3; 3.4; and 3.5 were instances of adjustments contended for, not instances of PCPs, so were part of 3.2.

23. At the end of the evidence, we received written and heard oral closing submissions from Mr Grant and Ms Niaz-Dickinson. We considered our decision and gave an oral judgment and reasons. We did not have the facility to record the oral judgment, so our oral judgment and reasons was made from our notes and may differ in some respects to these written reasons that were requested.

24. The hearing was conducted by video on the CVP application and ran intermittently, with some technical issues. We are grateful to all who attended the hearing for their patience and good humour in the face of the technical glitches.

25. The hearing was listed for three days, but it became apparent that this was not an adequate time estimate. We case managed the timetable to ensure that the evidence and closing submissions were dealt with by the end of the third day. We were able to add a fourth day and to use the CVP platform to conduct our deliberations. We invited the parties to join the CVP hearing to hear the judgment and reasons. Ms Niaz-Dickinson had another hearing that could not be avoided on the fourth day, but as we had said that we were going to deal with remedy on a new date, she was happy that her instructing solicitor was present to hear our decision.

Findings of Fact

26. All findings of fact were made on the balance of probabilities. If a matter was in dispute, we will set out the reasons why we decided to prefer one party's case over the other. If there was no dispute over a matter, we will either record that with the

finding or make no comment as to the reason that a particular finding was made. We have not dealt with every single matter that was raised in evidence or the documents. We have only dealt with matters that we found relevant to the issues we have had to determine. No application was made by either side to adjourn this hearing in order to complete disclosure or obtain more documents, so we have dealt with the case on the basis of the documents produced to us. We make the following findings.

27. A number of the facts in this case were agreed, so we record them as findings here:

    27.1. The claimant was employed as a Customer Advisor by the respondent from 30 April 2018 to 17 April 2020, which was his effective date of termination.

    27.2. The claimant was good at his job and his performance figures whilst at work were good. He was a valued member of the team. The issue was with his attendance.

    27.3. At all material times, the claimant met the definition of 'disabled person' contained in section 6 of the EqA. He has the physical impairment of Bile Acid Malabsorption ("BAM") and Obstructed Bowel ("OB"). The conditions are interrelated and we will refer to them collectively as BAM in these reasons.

    27.4. The respondent operates a number of call centres. The claimant worked at the North Tyne call centre. He was part of a team that varied in size from 8 to 14 members. He reported to a Line Manager, Laura Smart, who ran the team.

    27.5. Laura Smart reported to an Operations Manager, Joanne Markin, who had responsibility for a number of teams such as the one in which the clamant worked.

    27.6. Mrs Markin reported to a Site Manager, who ran the whole call centre.

    27.7. The dismissal of the claimant was unfavourable treatment and so was the 'something' and his dismissal arose from his absence record. This was conceded by Ms Niaz-Dickinson and meant that the only decision we had to make on liability in the section 15 claim was whether the dismissal of the claimant was a proportionate means of achieving a legitimate aim.

    27.8. The respondent's legitimate aim was ensuring that its employees were attending work. It was never suggested by the claimant that this was not a legitimate aim and the cases of **Griffiths v The Secretary of State for Work and Pensions** and **Carranza** support the respondent's position that such an aim is potentially legitimate.

28. We find that the two heads of claim; discrimination arising from disability and failure to make reasonable adjustments are inextricably linked by the same factual matrix. We will deal with both separately, but some of our findings cover both claims.

Disability status

29. The claimant's case was that in addition to the conceded disability of BAM, he also met the definition of disability in section 6 of the EqA because of the physical/mental impairment of CFS/Fibromyalgia. We find that the clamant has not shown to the required standard of proof (the balance of probabilities) that he has that condition. We make that finding for the following reasons:

    29.1. There was no medical document other than MED3 certificates that gave such a diagnosis;

    29.2. The letter dated 14 November 2018 from the claimant's consultant immunologist, Dr Price [302] stated that the claimant had experienced fatigue since a viral infection in 2017. Dr Price added that "The key thing that we need to exclude is sleep apnoea…If he has sleep apnoea this may be a treatable condition…If he does not have it, he fits the criteria for CFS…"

    29.3. The claimant's own evidence was that sleep apnoea is assessed on a scale of 0-20, with 14 being the threshold at which treatment is given. His score was 14 and he was provided with a mask to aid his breathing when asleep.

    29.4. We accept the claimant's evidence that CFS is diagnosed by exclusion, but the letter of Dr Price clearly states that CFS would be diagnosed (by exclusion) if the claimant did not have sleep apnoea. He does have that condition.

30. The implications of our finding are very limited. The reason for this is that the respondent accepted that the claimant was a disabled person because of BAM at all material times and made adjustments to deal with his symptoms. A series of OH reports were obtained. The first was dated 19 July 2018 [172-174], which noted that the claimant had a neurological condition and recommended that a formal DSE risk assessment be carried out.

31. Subsequent OH reports mentioned some of the symptoms that the claimant attributed to CFS/Fibromyalgia and the respondent acted on recommendations in the reports, so we find that the respondent reacted to the symptoms the claimant described, even though we find that he has not shown on the balance of probabilities that he had the named impairment he alleged he has. We acknowledge that it is not necessary to put a 'name' of an impairment, so the net position of our decision is neutral.

Discrimination arising from disability

32. The EAT in **Hensman v Ministry of Defence** held that when assessing proportionality, while a Tribunal must reach its own judgment, that must in turn be based on a fair and detailed analysis of the working practices and business considerations involved, having particular regard to the business needs of the employer.

33. The Court of Appeal in **City of York Council v Grosset** stated that the test of proportionality is an objective one, underlining that 'the test under s 15(1)(b) EqA is an objective one according to which the ET must make its own assessment'.

34. This was not an easy case to determine. There were cogent arguments advanced by both parties and we had to consider a wide range of factors. We were careful to bear in mind the guidance of HHJ Gullick in **Department of Work and Pensions v Boyers** (§ 30):

> *"It is…an error for a tribunal to focus on the process by which the outcome was achieved. That was explained by this Tribunal in Chief Constable of West Midlands v Harrod, [2015] ICR 1311 at [41]: "I consider also that [Counsel for the employer] is right in his contention that the Tribunal focused impermissibly on the decision-making process which the Forces adopted in deciding to utilise A19. When considering justification, a Tribunal is concerned with that which can be established objectively. It therefore does not matter that the alleged discriminator thought that what it was doing was justified. It is not a matter for it to judge, but for courts and tribunals to do so. Nor does it matter that it took every care to avoid making a discriminatory decision. What has to be shown to be justified is the outcome, not the process by which it is achieved."*

35. Taking all the factors into consideration we find that the that the decision to dismiss the claimant was proportionate means of achieving the respondent's legitimate aim because:

    35.1. The respondent operated a Sickness Absence Policy ("SAP") which includes trigger guidance in relation to sickness absence and disciplinary action [112-119]. It is established law that such a system is not, of itself, discriminatory.

    35.2. The trigger guidance enabled the respondent to implement Stage 1 of the SAP after three separate occasions of absence or 10 or more days absence in a 12-month rolling period; Stage 2 of the SAP after two separate occasions of absence or seven or more days absence whilst under a stage one caution; and Stage 3 of the SAP following three or more days' absence whilst on an active stage to caution. Therefore, the trigger points allow for 20 days of absence in total, prior to dismissal.

    35.3. Ms Smart held off the Stage 1 meeting until the claimant had reached 26.5 days' absence, which was 16 days more than the trigger point. We find this to be a reasonable adjustment.

    35.4. We find no legal or procedural error in the implementation of a Stage 1 sickness sanction on the claimant on 9 January 2019 [226-248]. In actuality, the claimant had amassed sufficient instances and length of sickness absence at that point to trigger dismissal.

    35.5. The records show that the claimant's absences increased significantly after the first sanction. These include partial day absences that were

disregarded. The claimant had four instances of sickness absence, when the trigger point was two instances.

35.6. A Stage 2 meeting was held on 1 May 2019 [251-254], when Mrs Markin issued a Stage 2 sickness caution that was confirmed by letter dated 11 May 2019 [257-258]. We find the sanction to be reasonable.

35.7. We do not accept the claimant's evidence and submission that there was something unlawful about the respondent imposing the SAP because it had the effect of increasing his stress and exacerbating the symptoms of his condition. The logical extension of that submission is that no employer would be able to take any action against any disabled employee for absence issues if the process would cause the employee to be stressed. It is a natural consequence of these procedures that employees are stressed by them. We find that the respondent operated its procedures in a way that was likely to minimize the stress of the claimant.

35.8. The respondent engaged OH support from a very early stage and acted on the recommendations of the OH professionals in nearly all instances.

35.9. The respondent implemented the following adjustments:

35.9.1. Extending trigger points for the SAP;

35.9.2. At least 8 attempts at a phased return;

35.9.3. Reduced hours;

35.9.4. Extending Stage 2;

35.9.5. Later starts;

35.9.6. Unlimited OH breaks;

35.9.7. Arranging physiotherapy;

35.9.8. Offering EAP;

35.9.9. A DSE assessment;

35.9.10. Flexibility with medical appointments; and

35.9.11. Regular wellbeing meetings.

35.10. By September 2019, the claimant had been absent for a further 63 days and was invited to a Stage 3 meeting on 16 October 2019 [262-275]. The respondent could have dismissed the claimant, but Mrs Markin decided to extend the Stage 2 caution in order to see what progress the claimant made in his diagnosis and treatment and to facilitate an attempt at a phased return.

35.11. There were multiple failed attempts at a phased return from January 2020, all of which failed. The claimant never succeeded in increasing his length of shift beyond 6 hours. He was contracted to work 12 hours.

35.12. The claimant never requested a reduction in contracted hours.

35.13. We do not accept that the claimant's performance of his job in any way contributed to or exacerbated his condition. We make that finding because he said that he liked the job and his team.

35.14. We also do not accept that the claimant's journey to work was a significant factor in his symptoms as he alleges because it never was raised in meetings with the respondent and does not appear as a factor in the OH reports.

35.15. We are critical of the way that the respondent dealt with the DSE assessment process. The assessments were delayed and implementation of findings were insufficiently robust. However, that is not sufficient to tip the balance of proportionality in favour of the claimant.

35.16. The claimant's absences continued and he was called to a Stage 3 meeting on 17 April 2020 [319-330] at which he was dismissed [331-344].

35.17. At this stage, the claimant had had a long period of intermittent illness with a high level of absence. His absences were greatly in excess of the respondent's policy.

35.18. Our main finding is that on 17 April 2020, the claimant could show no reasonable prospect of any improvement in his absence rate. We accept that the pandemic had caused a delay in his diagnosis and treatment, but at the date of this hearing, the claimant's diagnosis and treatment seem to be no further forward.

35.19. We considered the issue of home working, but find that the only discussions around that topic were linked to Covid, not to a suggestion that home working may improve the claimant's absences. We find that there was no evidence offered that met the standard of proof to show that home working had any prospect at all of improving his absence rate. His evidence was that when his condition was severe, he would be unable to do work. That situation would be the same if he was working from home.

35.20. We also note that the claimant has been certified as unable to work because of ill health since his dismissal. We were provided with no letter or report from any medical professional that attributes his inability to work to the adverse effect of his dismissal.

35.21. Whilst we have a great deal of empathy with the claimant, who was in a situation that was caused by something out of his control; his health,

we find that on balance, the decision to dismiss was proportionate when balancing the competing interest of the parties.

35.22. We find no fault in the way that Ms Walker dealt with the appeal hearing, as she endorsed a decision that we have found to be proportionate.

Reasonable adjustments

36. In making our decision on reasonable adjustments, we repeat our findings in paragraph 35 above.

37. The claimant's submission on this issue was as follows:

> *I submit that R's sickness absence policy and its requirement for good attendance was a PCP which applied to all staff.*
>
> *The application of R's sickness absence policy amounted to a requirement to attend work at a certain level in order to avoid receiving warnings / exceeding trigger points and a possible dismissal. This put me at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled as my disabilities increased the likelihood of me being absent from work.*
>
> *R's requirement for good attendance put me at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled in that I was less likely to be able to comply with this requirement.*
>
> *R's sickness absence policy stated that if you are issued with a sickness absence caution, you will normally no longer be eligible for Company sick pay for the first three days of any subsequent periods of sickness absence during the next 12 month rolling period. This put me at a substantial disadvantage in comparison with persons who are not disabled as my disabilities increased the likelihood of me being absent from work.*

38. The last paragraph above was not part of the claimant's claim.

39. We have already listed the reasonable adjustments that were made. On this issue, we prefer Ms Niaz-Dickinson's submissions to the claimant's and make the following additional findings:

39.1. The claimant relies on the PCPs of moving to stage 3 of the SAP and considering and upholding dismissal. It was conceded that both are capable of amounting to PCPs [63-70].

39.2. The claimant contends that the respondent should have adjusted the trigger points and awaited diagnosis and treatment. We find that those adjustments would not have prevented the disadvantage caused by the PCPs for the reasons we have set out above.

39.3. The claimant argued at the dismissal and appeal stage that the respondent should wait longer to dismiss and stated in his witness statement that he "*wanted the timeline to be extended*" (§ 97). We find that waiting for a diagnosis and treatment, and effectively tolerating the claimant's absence, would not have been a reasonable adjustment in and of itself because reasonable adjustments are adjustments to the workplace that enable an employee to work, rather than adjustments that ensure that the employee remains out of the workplace.

39.4. We agree with Ms Niaz-Dickinson's submission that the other adjustments relied upon by the claimant are simply not reasonable adjustments. We find that he did not suggest part time working or a change of department at the time of his dismissal or appeal, and he accepted during cross examination that he was happy in his role and saw no reason to move departments and would not have agreed to a contractual change in relation to part time hours.

39.5. We find that the claimant was also permitted to attempt a phased return to work on 8 occasions and therefore an 8-week phased return to work period had simply not been successful. The parties meddled with semantics on this point. The claimant was correct in saying that the *formal* 8-week plan was only allowed to run for 5 weeks before dismissal. The respondent was correct in submitting that it had been trying an *informal* phased return unsuccessfully since January.

39.6. Homeworking had not been recommended by OH (although we accept that it was not ruled out) and there was no medical evidence to suggest that it would have prevented the substantial disadvantage caused by the PCPs. However, we place more weight on the absence of any recommendation, as the claimant must have described his condition and its effect upon his ability to work to the OH professional, who then omitted to make any suggestion that home working should be tried.

39.7. We find that homeworking would not have prevented the disadvantage as the claimant was extremely unwell at that time (as he accepted during his evidence) and did not have the treatment that he was awaiting which he hoped would improve his health. In the absence of that treatment, we find on the balance of probabilities, that he was likely to remain on sickness absence and he has in fact been signed off as unfit to work since his dismissal. Homeworking was not therefore a reasonable adjustment that the respondent was required to make.

Applying the Findings of Fact to the Law and Issues

40. Using the list of issues above, we make the following findings:

40.1. The respondent accepted and knew the claimant met the definition of disability.

40.2. The respondent treated the Claimant unfavourably by moving him to Stage 3 of the SAP and dismissing him.

40.3. The unfavourable treatment arose in consequence of the claimant's disability.

40.4. The respondent showed that the treatment was a proportionate means of achieving a legitimate aim.

40.5. The respondent applied a provision, criterion or practice which placed the claimant at a substantial disadvantage in comparison with persons who are not disabled.

40.6. The respondent's premises did not have any physical feature which placed the claimant at a substantial disadvantage in comparison with persons who are not disabled.

40.7. The respondent took such steps as were reasonable to avoid the disadvantage to the claimant.

41. Both the claimant's remaining claims fail.

Note: This has been a remote hearing. The parties did not object to the case being heard remotely. The form of remote hearing was V - video. It was not practicable to hold a face to face hearing because of the Covid19 pandemic.

Employment Judge Shore
22 April 2021