EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4104113/2020 Hearing at Edinburgh on 4, 5 and 6 May 2022

Employment Judge: M A Macleod
Tribunal Member: J Grier
Tribunal Member: L Brown

Elizabeth Stewart	**Claimant** **In Person**
Sky Subscribers Services Limited	**Respondent** **Represented by** **Mr M Leon** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous Judgment of the Employment Tribunal is that the claimant's claims ail fail and are dismissed.

REASONS

1. The claimant presented a claim to the Employment Tribunal on 28 July 2020 in which she complained that she had been unfairly dismissed and discriminated against on the grounds of disability; in addition, she claimed that she had been unlawfully deprived of certain payments

2. The respondent submitted an ET3 in which they resisted all claims made by the claimant.

3. A Hearing was fixed to take place in person at the Employment Tribunal in Edinburgh on 4, 5 and 6 May 2022.

4. The claimant appeared on her own behalf, and Mr M Leon, solicitor, appeared for the respondent.

5. A joint bundle of documents was presented to the Tribunal and relied upon by both parties in the course of the Hearing. References to documents within the bundle in this Judgment reflect the page numbers given to those documents in the bundle.

6. The claimant gave evidence on her own account.

7. The respondent called as witnesses Heather Elizabeth Stewart-Cunneen, Customer Experience Leader (CEL); Kevin Robert Fraczek, CEL; and Debbie Thomson, CEL.

8. Mr Leon explained at the outset that while the respondent had intended to call Amanda Arnott as a witness in addition to those already called, Ms Arnott was unavailable to attend at the Hearing as she required to be with a family member in hospice care.

9. The Tribunal was able to make the following findings in fact, based on the evidence led and information provided.

Findings **in Fact**

10. The claimant, whose date of birth is 23 August 1974, commenced employment with the respondent on 1 November 1999, as a Customer Sales Advisor. Her employment ended when the respondent dismissed her on 22 November 2019. At that point, she was working as a Sales Advisor in the Broadband Centre of Excellent (BBCoE).

11 In 2017, the claimant was experiencing a number of difficulties in her personal life, requiring her to move to accommodation in a different area

to the one in which she had previously been living She experienced a deterioration in her health. In order io assist her. the respondent agreed that she shotHe naige shifts, and move to a different team, in which she was line managed by Heather Stewart-Cunneen. Kevin Fraczek was Ms Stewart-Cunneen's line manager.

12. The claimant's hours were 9.30am to 2.30pm. Monday to Friday and 1 Saturday each month, based in the Dunfermline office of the respondent. When she moved to her new shift pattern to accommodate her family difficulties, her hours were 5pm to 8pm Monday to Thursday and 8.30am to 5.30pm on a Sunday.

13. The claimant began to experience difficulties in attending work on time for her shifts, and the respondent took action to address this.

14. On 14 August 2018, the claimant was invited to attend a conduct meeting (79) on 19 August 2018. The meeting was convened in order to investigate the allegation of *"Potential breach of Customer Contact Guiding Principles in relation to Being Here for Our Customers, which has had an impact on customer service."* A number of documents were attached to the invitation, including attendance reports covering the period from 2 June to 13 August 2018, a record of lateness, productivity reports and a copy of the first written warning issued to her on 17 November 2017 in respect of customer contact guiding principles.

15. The meeting was conducted by Mr Fraczek. Notes were taken and produced (82) of the investigation meeting on 14 August 2018.

16. It was noted that Mr Fraczek asked the claimant what breaks and lunch entitlement she had on her shift pattern. The following exchange was then noted:

"ES: For a while, I didn't know to log out and my stats were bade so I now log out but I get 2x15 min breaks on a Sunday (sic) and a 30 minute lunch on a Sunday.

KF Can you confirm your understanding of when you should be available to start your shift and use the system to make yourself available for handling calls or completing any other scheduled productive activity?

ES: Should be starting at 5pm on a Sunday at 8.30am and I should be available for then but I also get a brief for the first 15 minutes at the start so I know what's happening.

KF: Do you believe you comply with this?

ES: Most of the time. I do have a lot of MHRs cos I get involved with my customers as I don't want them to worry about any cases they have. I do sometimes get a row for this and that's why I stay late at night to complete some of these MHRs. ..

KF: I'm going to show you your lateness record since your IDD and over the past 11 weeks in particular. It's not improved. Why not?

ES: My car hasn't been reliable. Last Sunday I took my son to the airport at 4am so there would be late (sic) but the wheel fell off my car on the way back, so I was late,

KF: Whose responsibility is it to be at work and ready to start your duties on time?

ES: Mine

KF: And you have been advised previously that your persistent lateness is not something that can be maintained. Are there any factors which prevent you being ready to start your shift at the scheduled start time other than your daughter?

ES: No.

KF: Are there any other factors that we need to consider that prevent you adhering to your scheduled work pattern?

ES: No.

KF. Can you confirm that the shift pattern you are sc ■ ?d to *work is something that is the best fit from those we have available to accommodate your role within BBCoE?*

ES: I don't know if it is. I think it's affecting me and my daughter quite badly. She plays up because I have to go out at night..."

17. Mr Fraczek went on to discuss the claimant's lateness record, including some instances up to 29 minutes after her scheduled start time. In 11 weeks, he pointed out, the claimant had only arrived for work on time for 6 shifts out of a total of 28 completed, and not affected by absence or annual leave.

18. She accepted that it was unacceptable to have this level of lateness, owing to the fact that she was not there for her customers, and that her colleagues were having to take her calls. She confirmed that it was a busy call centre, and that they did not wish customers to be grumpy if they are in a queue longer than they should be.

19. The claimant signed the notes of this meeting (which covered other matters) on 14 August 2018, as being an accurate account.

20. The claimant, in her evidence, said that she could not recall receiving the invitation letter (though she did attend at the meeting), and felt that the respondent was not asking her how they could help her. She also suggested that she was just going along with Mr Fraczek and trying to do her best in the meeting. She accepted in evidence that she did not tell Mr Fraczek that she was "in a bad place" at that time. She believed that she was depressed at that time, but did not specifically tell the respondent so.

21. The claimant was then invited to attend a conduct meeting - in effect, a disciplinary hearing following on from Mr Fraczek's investigation meeting - on 19 August 2018. Notes of that meeting were taken and produced (95). The meeting was chaired by Debbie Thomson, and the notes taken by Pam Brown. The claimant was not accompanied at the meeting, and signed the note as being accurate (108).

22. Ms Thomson, in the course of the meeting, said:

"DT: We have no record of any occupational health refe • s or any reasonable adjustments on record which you confirmed. Can I ask do you have any medics ■ •?t - we need to be aware of?*

ES: I have that I suppose, got asthma and allergies I have put that on the system, I have came to work with allergies, been admitted to hospital with asthma and came to work when been no well."

23. At the conclusion of the meeting, Ms Thomson decided to issue the claimant with a final written warning, to last 12 months on her record, and set out the following explanation:

"There was no ownership taken by Elizabeth to improve her time keeping, whilst she advised that her head wasn't in the right place. She still continued to come into work late due to factors outside of work which made it impossible for her to get here on time.

Even when Elizabeth demonstrated that her aux target was 6.3% when in fact 67%, she still failed to deliver 63%, she made no attempt io keep track of her breaks and lunch times and forgot to add notes on whilst on the calls, she failed to adhere to correct outbound guidelines and called customers back, after 8pm to try and improve her aux."

24. Ms Thomson then made a number of recommendations for the claimant, including speaking to her CEL to see if a more suitable shift pattern would help improve her work/life balance to prevent further lateness, speaking to her CEL to discuss an occupational health referral for support with additional unplanned breaks should this be required, speaking to her CEL in relation to system issues and using the aux codes correctly.

25. Ms Thomson confirmed the outcome of the meeting by letter dated 19 August 2018 (109). and gave her the right to appeal against the decision. The claimant did not appeal.

26. On 17 November 2018, Ms Stewart-Cunneen took the step of sending an email to the claimant (111):

"Hey Libby

We spoke today regarding your lateness, you are aware further instances will result in a more formal approach again.

I have given you the support numbers and you have committed to using these.

You have said you will be here for 9.30am every morning ready to take calls.

Any further support you require please let me know.

Thanks."

27. The respondent referred the claimant to their Occupational Health department (OH), and a report was provided to Ms Stewart-Cunneen on 29 November 2018 (112).

28. The report, by Sharon Farrell, Senior OH Nurse, confirmed that the claimant had reported a history of recurring symptoms of bladder infections and personal family domestic issues that appeared to be having an impact on her mental health and wellbeing. The key symptoms were altered sleep pattern fatigue and decreased concentration and memory. She also advised that the claimant was fit for work with adjustments, and made the following recommendations:

- *"Time to attend medical appointments*
- *To attend GP for a review of symptoms and explore her treatment options*
- *Consider using the support available through Sky including Peace of Mind Sky UK resources for support with varying organisations*

listed in that booklet, and directed her to other external sources of support

- *in my clinical opinion, the disability remit of the Equality Act is unlikely to apply to Libby's symptoms condition, however the decision as to whether the act applies is a legal decision that can only be made in an Employment Tribunal."*

29. The respondent took steps to apply these recommendations, and the claimant was, in particular, allowed time to attend medical appointments, and encouraged to attend her GP and the Sky UK resources in order to seek advice and support,

30. The claimant was invited to attend a further conduct meeting on 22 January 2019 (114). Ms Stewart-Cunneen identified the reason for investigation as being that the claimant had continued to demonstrate a lack of ownership around timekeeping when reporting for work. The investigation meeting took place on 10 January 2019, and the notes were produced (119).

31. In the course of that meeting, the following exchange took place and was norod:

"HSC: I sent you an email on the 17/11/2018 advising you, you had to be here and ready to take calls at 09.30am and any further lateness instances would result in a more forma! approach. I have a copy of this email here can you tell me your understanding of this?

ES: I was to adhere to this and be here on time or I was going to lose my job.

HSC: In that email I advised you to communicate any further support that you may require with me. You have made to [understood to mean 'no'] approach to me to confirm any further support was required, can you confirm this is accurate?

ES. Yes there is nothing you can do. If there was Occupational Health w ?/c - : ve also advised me of it. Also my councillor [understood to mean counsellor]…

HSC: …Can you confirm what your understanding is of the final written warning you were issued is?

ES: My understanding was that if I keep being late there is a risk to my job and that I was going to lose my job. I haven't been able to resolve all the issues at home because it's not that easy. I felt that crap about being late that I got in a right state about it now I feel like I am being supported so *I don't panic as much about being late. I have crashed 2 cars trying to get to work on time.*

HSC: Are there any other factors that we need to consider that prevent you adhering to your scheduled work pattern and being here?

ES: It feels like it's never going to end, I am now seeing a councillor (sic) it might help me deal with my home situation better. Because my home situation has gone on so long it doesn't even seem that bad anymore "

32. The meeting continued, and the notes were produced (130), and signed by the claimant as accurate on 10 January 2019. In that meeting, it was noted that Ms Stewart-Cunneen had reminded the claimant that she had started an investigation into her lateness on 3 January, and that on the following day. she had called in to do a "shift slide" as she was not going to be able to attend on time. The claimant explained that she had had issues with her daughter, and had been up al! night. She felt that she was struggling to stay awake on the way home, such was her exhaustion due to dealing with her daughter. She said that she was expecting to start counselling but was awaiting an appointment. She declined to raise any further points when invited to by Ms Stewart-Cunneen in relation to her lateness.

33. Following the conduct meeting on 22 January 2019, Ms Amanda Arnott. CEL, issued the claimant with a final written warning (146) as a result of

"Persistent poof timekeeping, specifically arriving late to work on 8 occasions between 9th October 2018 and 14th December 2018."

34. The claimant was informed in that letter that the warning would remain on her personal file until disregarded after 12 months; and that she had the right to appeal against the decision. She did not appeal against this decision.

35. The decision was taken by Ms Arnott after hearing from the claimant in the conduct meeting of 22 January 2019, notes of which were produced (137ff). She accepted that she had been persistently late, and explained the reasons why, though she did not deny that her persistent lateness was unacceptable. It was noted that she was seeing her doctor on 31 January 2019 and intending to seek help, and that she had also spoken to Aviva about counselling.

36. On 1 March 2019, the claimant secured and attended an appointment with Sharon Farrell, OH Nurse (148). No written report was issued by OH following that meeting (which took place by Zoom video conferencing facility), but the claimant recalled in evidence that Ms Farrell advised her that she was suffering from depression at that time. The claimant's evidence was that she emerged from the room in the office where she had conducted the meeting, and told Ms Stewart-Cunneen of this diagnosis. Ms Stewart-Cunneen had no recollection of this.

37. Ms Stewart-Cunneen met with the claimant again on 9 March 2019 Notes of this meeting were produced (153ff).

38. During that meeting, Ms Stewart-Cunneen asked the claimant if there was anything else which she felt may be relevant. The claimant replied: *"I think that I probably been (sic) depressed a long time and I have had a lot to deal with over the past couple of years. I try my hardest to deal with it and hide it but it all becomes too much to cope with."*

39. The claimant was assessed by OH by telephone on 19 March 2019, and a report was provided by Andrea Martin. OH Nurse (163). In it she

recorded that the claimant had reported a 2-3 year history of worsening depression, and that she had experienced a number of significant personal stressors at that time. She said that the claimant now had a stable living situation, and had told her that 3 level c her mpton ad made getting into work on time and performing in her job role difficult.

40. Ms Martin advised that *"In my opinion Libby is unfit for work at this time and is likely to remain so for 2-4 weeks, depending on her recovery."*

41. She anticipated that once the claimant had access to further treatment she would make a good recovery and her level of sickness absence would then reduce correspondingly.

42. She recommended that the claimant's sickness absence triggers were adjusted for her mental health issues and that when she returned to work an increased number of unplanned breaks as well as good support in stressful situations should be allocated to her.

43. The claimant remained absent from work due to ill health until she was assessed again by OH on 3 May 2019, again by Andrea Martin (167). She advised that the claimant had experienced a very good improvement in her mental health, and that she was keen to return to work. Ms Martin advised that she was now fit to return to work, subject to a phased return to work being put in place for her, in which she would work 50% hours in her first week returning to work, 75% hours in her second week and thereafter full time hours. She also recommended an increased amount of unplanned breaks as well as good support in stressful situations.

44. On 4 May 2019, the respondent's payroll department wrote a letter to her (169) to advise that with effect from 30 April 2019 she had been paid for 12 weeks Company Sick Pay benefit. It was confirmed to her in that letter that she would not be paid any further Company Sick Pay, but that she may be entitled to Statutory Sick Pay.

45. The claimant returned to work on 13 May 2019 Ms Stewart-Cunneen met with her and recorded the terms of her discussion in a note (171). She stated in the note:

"I welcomed Libby back to work and asked if she was 100% fit to work. Libby was absent due to stress and depression, Libby has let an accumulation of things build up and then couldn't cope. Libby went to see her doctor who certified her unfit for work. Libby was put on medication to help with her mood and started counselling. Libby has had a nervous breakdown in the past and came to work but feels as though she was going round and round in circles. She felt unable to deal with home life and parenting. Libby has been seeing a counsellor and used the company health care to get this support. She feels this has been really helpful and understands that 'getting better' is her responsibility. Libby is going to continue with her counselling and medication to sustain this more positive state. Libby feels more in control and able to deliver the best service…

Review any other periods and if there is any action required; Any additional support required: Libby is requiring a phased return 1st week 50% shift, 2nd 75% shift returning to 100% week 3. We *will support this. As Libby's levels are still unsustainable and her last hearing was adjourned we will be looking to pick this up to discuss further in a formal meeting. Libby will be given catch up time but doesn't require any further support currently."*

46. The respondent put in place measures to assist the claimant with her return to work: a phased return, as set out above, gradually returning to 100% hours in the 3rd week; time off to be granted for counselling sessions; and additional breaks required for the claimant not to be recorded or relied upon against her.

47. The phased return was implemented. The claimant was permitted to attend all counselling sessions which she had arranged. The claimant's position was that Ms Stewart-Cunneen refused to grant her permission to

attend one session in June 2019. On 19 June 2019, the People department emailed Ms Stewart-Cunneen (1771 to ask her to approve special leave for the claimant. Ms Stewart-Cunneen emailed the ciaimant to remind her to sign off the return to work discussion which they had had. The claimant asserted, before us, that in effect one was used as a condition of the other, and that permission to attend that counselling session was withheld. Ms Stewart-Cunneen's evidence was that she did in fact sign off the claimant's time off, but sent the email about the return to work as a reminder to the claimant that she required to sign that off. The two were not connected.

48. We concluded that there is no clear evidence that the claimant was prevented from attending any counselling sessions by Ms Stewart-Cunneen, and indeed it was Ms Stewart-Cunneen's evidence that she did approve this leave. Our conclusion was that there was some confusion about this matter and that the claimant did not, for whatever reason, attend one counselling session, but that Ms Stewart-Cunneen did not intend to prevent her from going, and thought she had in fact authorised her attendance.

49. The claimant was absent from work again from 11 to 17 June 2019, with stress, anxiety and depression being given as the reason for her unfitness.

50. She then took a period of annual leave and was due to return to work on 5 July 2019. Kevin Fraczek became involved at that point He telephoned the claimant on that date and spoke to her. The claimant expressed a fear that a decision had already been made to terminate her employment, but Mr Fraczek reassured her that that was not the case, and that she would be able to express herself fully at the meeting to be arranged Mr Fraczek believed that he had reassured her sufficiently that she would attend a meeting when she was due to arrive on 8 July. Mr Fraczek spoke in a conciliatory manner, but did not apologise to the claimant in that call.

51. The claimant texted him on 8 July (186) to say: *"Hi it's Libby am not going to manage in* to see *you today stressed about it* so *much never slept".* Mr Fraczek replied: *No proble 7 Libby. I'm here if you need to talk about anything, at any time. Just let me know, Kevin."*

52. It was noted on 13 July that the respondent had not been able to contact the claimant on either land line ar mobile. They believed that she was absent without leave and noted this in an internal email on 13 July 2019 (189). On 18 July 2019, Ms Stewart-Cunneen noted that she was still absent without leave and that there had been no contact with the claimant despite attempts (192). As a result, she wrote to the claimant on 18 July 2019 (193):

"Dear Elizabeth.

I am concerned that you have been absent from work since 12/07/2019 and have not advised us of a reason for this absence nor have you provided a Fit Note to cover your absence.

I have been trying to contact you by phone without success. We would really like to know that everything is OK with you. You should also be aware that it does cause us operational problems when our people fail to let us know that they will not be coming to work or fail to provide Fit Notes to cover absence.

We would take this opportunity to remind you of your reporting obligations under the Absence Policy and enclose a copy for your reference. Failure to comply with the Absence Policy without good reason will be treated as a Conduct matter. ..

If we haven't heard from you and received a fit note to cover your absence by 25/07/2019 10.30AM we will move to the next stage in our process which will mean you will be advised when a Conduct Meeting will take place in relation to your unauthorised absence and your failure to comply with your reporting obligations under the Absence Policy. .."

53. The claimant did not dispute that she received this letter, but said that she did not open it nor read it.

54. She submitted a fit note covering the period 30 June to 19 June (assumed to be an error meaning 19 July) dated 24 July (194).

55. The respondent wrote again to the claimant to invite her to a meeting on 15 August 2019 to discuss the options open to them (199). Again, however, the claimant did not open the letter, and accordingly did not attend the meeting. Ms Stewart-Cunneen wrote to her again, unaware that the claimant was not opening her mail from the respondent, on 15 August 2019 (200) setting out the attempts made to contact her over the period from 28 June to 15 August. She said:

"I would really like to know that everything is OK with you.

I invited you to a tong term sick meeting scheduled for 15th August 2019 but you failed to attend the meeting.

I would also like to reiterate the importance of keeping in contact with the business. It is imperative that you maintain regular contact and ensure that all medical certificates are kept up to date. I would take this opportunity to remind you of your reporting obligations under the Absence policy and enclose a copy for your reference…

I want to support you as much as I can while you are sick and I would like to keep in touch to update you on what's happening with work, i would also appreciate you keeping me informed about any changes to your condition…"

56. The claimant communicated with People Plus, the respondent's HR department, during this time to provide medical certificates and find out about her pay. but did not respond to any correspondence or phone messages from Ms Stewart-Cunneen attempting to find out her position in relation to her absence or condition.

57. Tne claimant s absence continued, with intermittent contact made by her to the People Plus department to pass them fit notes, until 21 ■ er 2019, when Ms Stewart Cunneen wrote to her (220) to invite her to a meeting on 30 October 2019 at 9.30am. She advised that the purpose of the meeting was to r ake ire at they rere eeping n - ch with the claimant, discuss her health in general and ask if there was anything they could do to help.

58. Again, the claimant did not open the letter, which, like the earlier correspondence, came in an envelope marked with the respondent's name and logo on it.

59. On 7 November 2019, Ms Stewart-Cunneen wrote again to the claimant (222) advising that she was invited to an Absence Meeting on 14 November 2019, and set out the lack of contact with the claimant since she had spoken to Mr Fraczek on 5 July 2019. The purpose of this meeting was to discuss her future employment with the respondent, and the letter confirmed that one possible outcome of the meeting was the termination of her employment on grounds of ill health.

60. Once again, the claimant did not open the letter, nor did she contact the respondent in response.

61. Accordingly, Ms Stewart-Cunneen wrote to the claimant again on 18 November 2019 (225) to invite her to a further meeting on 25 November, given that she had not attended the previous meeting. She stressed that the respondent was keen to near the claimant's side and suggested that if she did not feel she was well enough to attend the meeting in person, there were alternatives which could be offered, such as that the meeting could take place on 22 November by telephone or that she could provide a written submission by 22 November which could be taken into account. She was warned that if she failed to attend the meeting or provide a written submission, a decision could be taken in her absence, based on the available information, which could include the termination of her employment.

62. The claimant did not open that letter. and therefore did not attend the meeting, nor did she provide any submissions to that meeting.

63. Ms Stewart-Cunneen wrote to her on 25 November 2019 (230) to confirm that the Absence Meeting had proceeded on 25 November in her absence. She set out the history of the claimant's absence and advised that she had had no communication from the claimant since 27 June 2019. She set out the details of the letters sent to the claimant on 7 May, 8 August and 21 October 2019 inviting her to meetings, to which she had not replied nor attended at the meetings.

64. She then said;

"After reviewing the facts of this case, I can confirm that the decision was taken to terminate your employment with Sky. This was as a result of your failure to attend work since 27th June 2019 and your failure to make contact and provide a reason for your non-attendance. You have not provided a Fit Note to cover your absence since your most recent one expired on 11th November 2019.

Therefore your employment has been terminated on the grounds of ill health in accordance with the Sky's Absence Policy & Guidelines. Your last day of service with the Company will be 25th November 2019 "

65. The letter confirmed the claimant s right to appeal against her dismissal by writing to Mr Fraczek.

66. The claimant did not open the letter of dismissal. Her evidence was that she became aware that she had been dismissed when she opened a letter from the respondent enclosing her P45. but that she did not read the letter of dismissal until after she had presented the Eli to the Tribunal. The P45 was sent to her, she said, towards the end of December, and she or her daughter did open the envelope enclosing that She then handed over al! the correspondence which she had received from the respondent to a friend cf hers who was a teacher, to get her help

in working out what to do next. The claimant thought she did that in approximately February 2020.

67. The claimant wrote to the respondent's Chief Executive a Mr Styllanou, in February 2020 (233). She set out her version of events in the letter, and [illegible] stated: *"I reviewed documents regular from my CEL with all the things she had put in place for me returning back to work which were certainly not true and every time I received a letter would call and ask if they would get someone else to contact me, became so desperate fearing that I would lose my job that I called Sky's whistle blowing department. .."*

68. The claimant was upset by her dismissal from her employment in a job which she had worked in for some 18 years and which she enjoyed very much. She felt that her treatment by the respondent was "disgusting".

69. Since her dismissal, the claimant has been unable to apply for alternative employment. She remains unfit for work and has been in receipt of state benefits in the form of Universal Credit. She believes that her treatment by the respondent has inflicted a significant blow to her confidence and that that has had an impact on her ability to apply for alternative employment.

Issues

70. The issues in this case were set out in Employment Judge Jones' Note (32/3).

71. Mr Leon noted that reference was made, in the reasonable adjustments section, to the disability related absences, whereas he understood that the sanctions applied had related to the claimant's lateness. He confirmed he would deal with both.

72. The issues for determination, therefore, are:

1. Did the respondent fail to make reasonable adjustments in terms of section 21 of the Equality Act 2010:

a. In relation to the operation of the respondent's disciplinary procedure. It was said that the respondent ought not to have taken into account disability related absences when seeking to discipline the claimant.

b. In relation to a requirement that the claimant be 100% fit for work in order to attend work and could not be transferred.

c. By failing to allow flexibility in start and finish times, by allowing the claimant to make up any time she was late for her shift at the end of her shift.

d. Failure to adjust the bonus scheme to ensure that the claimant and her colleagues were not disadvantaged by a failure to meet targets as a result of the claimant having extended breaks or transferring the claimant.

e. Failing to allow the claimant to attend counselling appointments.

2. Did the respondent harass the claimant on the grounds of disability in terms of section 26 of the Equality Act 2010 by her line manager saying to her that she should get another job "where less brain cells were needed", by alleging she was "skiving" and by failing to offer any support to her in relation to her disability?

3. Did the decision by the respondent to dismiss the claimant amount to discrimination arising from her disability in terms of section 15 of the Equality Act 2010?

Submissions

73. Mr Leon, for the respondent, made an oral submission whose terms are summarised briefly below.

74. With regard to the list of issues in this case (set out below) he first addressed the claimant's ciaim under section 15 of the Equality Act 2010.

The res, ondem accepts that the claimant was disabled at the material time and that her absence arose from tier disability. The defence is that the respondent took reasonable steps to achieve a legitimate aim.

75. Dismissal was a proportic" te means of achieving a legitimate aim, namely avoiding expense and reducing the demands on the remainder of the team. It was a difficult situation for the claimant, but also for the management. The claimant was off for 5 months, during which she was contacted numerous times but did not respond at all. Mr Leon suggested that it was not credible for the claimant to say that she had not opened the letters because she knew they were from Ms Stewart-Cunneen, since she could not possibly know who had written to her without actually reading them.

76. He also noted that the claimant had said that she asked for someone else to contact her, but that was not her decision to make A supervisor is entitled to manage the absence of an employee for whom she has responsibility. The claimant's absence was lengthy, and if the team was reduced customers would have to wait longer to have their calls answered. While the claimant remained in employment, the team could not recruit another employee to take her place. There was no indication of any prospective date upon which she could return to work, especially in circumstances where she was simply not communicating with the respondent. It was reasonable and proportionate to dismiss the claimant.

77. An employee has a duty to engage with her own management, and not just OH.

78. Mr Leon then addressed the claimant's complaints that the respondent had failed to make reasonable adjustments He submitted, having dealt with each one in detail, that there was no failure on the part of the respondent to make reasonable adjustments in respect of the ciaimant.

79. Finally, he submitted that the claimant's claim of harassment should be dismissed, on the basis that Ms Stewart-Cunneen was an entirely

credible witness who denied that she had made ary comments amounting to harassment of the claimant

80. The claimant, though offered the opportunity to make a submission, declined to do so, having been reassured by the Tribunal that no disadvantage would accrue to her in the event that she chose not to make a submission.

Observations on the Evidence

81. The claimant gave evidence in a reasonably straightforward manner and emerged as a pleasant and articulate individual. However, her evidence was not impressive. It may well be that it is a feature of her illness that she has poor recall of events, meetings and conversations, but she was unable to answer many questions about what had happened or been said in particular situations because she had no memory of them, she said. The difficulty for the Tribunal is that we received very little medical evidence about this, to support her contention that her illness prevented her from remembering what had been said. It is clear that the claimant frequently disregarded correspondence from the respondent and that provides an explanation for the gaps in her memory: that is. that she simply had nothing to remember because she ignored voicemail messages, letters and emails.

82. The claimant plainly felt that she was treated very unfairly by the respondent, particularly after a lengthy period of service, and this may have motivated her evidence, but it was evident to the Tribunal that she was selective in her recall of what had happened or been said.

83. By contrast, we found the evidence of Ms Stewart-Cunneen entirely credible and reliable. She spent a great deal of time seeking to communicate with the claimant and to point out to her the need to improve her performance, but her efforts proved fruitless. Nevertheless, she did not express any irritation or frustration with the claimant, but sought to apply the respondents policy in a professional but sympathetic manner. Her correspondence with the claimant betrays a concern for her

and a desire to reassure her that she would still be able to continue working in the department. We accepted her denials of the damaging allegations made by the claimant that she had acted in such a way as to harass her on the grounds of he (bii *j* **J, e e** was **a** conflict between her evidence and that of the a tank **we preft < he** vidence **of Ms** Stewart-Cunneen.

84. Mr Fraczek gave evidence in fairly short compass, but did so in a clear and honest manner, and again we found his evidence to be reliable and credible. He emerged as a compassionate manager who had reassured the claimant in his phone call with her on 5 July 2019, and we preferred his evidence when he denied that he had apologised to the claimant in that phone call

The **Relevant** Law

85. Section **15(1) of the Equality Act 2010 ("the 2010 Act") provides:**

"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."

86 Section 20 of the 2010 Act sets out requirements which form part of the duty to make reasonable adjustments, and a person on whom that duty is imposed is to be known as A. The relevant sub-section for the purposes of this case is sub-section (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."***

87. Section 21 of the Equality Act 2010 provides as follows:

"(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..."

88. The Tribunal also had reference to section 26(1) of the 2010 Act:

"A person (A) harasses another (B) if-

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of-

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B..."

Discussion and Decision

89- We approach this task by addressing the Issues presented to us in this case.

90 The first issue in this case is whether the respondent failed to make reasonable adjustments in respect of the claimant in a number of regards. The first was set out as follows:

In relation to the operation of the respondent's disciplinary procedure. It was said that the respondent ought not to have taken into account disability related absences when seeking to discipline the claimant

91. It is understood by the Tribunal that this is a reference to the two written warnings issued by the respondent to the claimant, one on 19 August 2018 (109), and the other on 22 January 2019 (146).

92. There is no doubt, in our judgment, that the application of the respondent's disciplinary procedure to the claimant amounted to a provision, criterion or practice.

93. Essentially, as we read it, the claimant is arguing that the respondent should not have applied the disciplinary process to her on the basis that she was disabled and therefore it was inappropriate to do so.

94. Clearing up the issue of whether or not there was a reference to disability related absences here, it is plain that the written warnings in these two instances were issued in respect of the claimant's persistent lateness and productivity concerns. Accordingly, we proceed on the basis that the issue before us relates to the question of whether or not the claimant s lateness should have been used as a basis for disciplinary action.

95. There is no doubt that the claimant was, on a large number of occasions, late in starting her shift. She did not deny this in either of the disciplinary hearings: indeed, she admitted it but sought to explain that she had domestic difficulties and traffic problems which made it impossible for her to arrive on time.

96 It is necessary to remember that the claimant was on a shift pattern which had been amended to take account of her domestic circumstances, and that when the respondent agreed to that change, she was very pleased.

97. The claimant did not clearly express a view to the respondent that she was regularly late owing to illness or any reason related to her disability.

98. The length of time by which the claimant was persistently late was notably short, and on many occasions a matter of minutes. However, the respondents position, clearly set out by their witnesses both in evidence and in the hearings with the claimant, was that a short delay can be particularly grievous, since the consequences for customers is that they are kept waiting unnecessarily at a time of heavy traffic on the system. In addition, the respondent sought but failed to obtain an explanation as to why the claimant could arrive close to her start time, but not at or before that start time, when the margins were so fine. She was given two final written warnings, an unusual step when the first of those warnings had not expired by the time of the second hearing, but in our view that was an indication that the respondent was willing to take account of the

claimant's personal circumstances in dealing with the disciplinary process.

99. In our judgment, there was no reason why the respondent should not have proceeded down the disciplinary route on these occasions They did not know that the claimant was suffering from a condition amounting to a disability at that stage, since the claimant herself was unaware of her own condition until it was diagnosed, and even then the likely length of time it would last was still unclear. However, the claimant did not clearly state to the respondent that the reason for her lateness was other than the domestic and traffic problems she stressed in the meetings.

100. In addition, the claimant had the opportunity to appeal against the sanctions imposed, but on neither occasion did she do so. We infer from that that she understood and accepted the penalty for her persistent lateness, and therefore did not seek to challenge it

101. It would not amount to a reasonable adjustment for the respondent to deal with the claimant's lateness outwith the disciplinary procedure. The claimant was plainly guilty of misconduct, and did not seek to defend herself by reference to a disability.

102. Accordingly, we do not find that the respondent failed to make reasonable adjustments in relation to this matter.

in relation to a requirement that the claimant be 100% fit for work in order to attend work and could not be transferred.

103. The claimant asserted that the respondent told her that she had to be 100% fit for work in order to return. Ms Stewart-Cunneen confirmed that what she did, in her return to work meeting, was to ask the claimant, as she always asked any employee, whether they were indeed 100% fit for work. She anticipated that the claimant might answer by saying that she was not 100% but she was fit for work.

104. There was no requirement, in our judgment, that the claimant should be 100% fit for work, nor indeed that any other employee should fit such a

categ y. The explanation given by Ms Stewart-Cunneen was entirely be! wable. It was at most- a conversational o□■er to try to establish how fit an employee would feel, but there is simply no evidence that had the claimant said she was not 100% fit she would not have been permitted to attend work.

105. So far as the question of a transfer was concerned, there was very little evidence to assist the Tribunal on this point In our judgment, there is no basis upon which we could find that transferring the claimant to a different section would amount to a reasonable adjustment in order to take account of the alleged disadvantage arising from this PCP. However, it is our conclusion, in any event, that no such PCP was applied in this case: no employee required io be 100% fit to attend work on the evidence we heard.

106. Accordingly, the respondent did not fail to make reasonable adjustments in relation to the claimant on this point.

By failing to allow flexibility in start and finish times, by allowing the claimant to make up any time she was late for her shift at the end of her shift.

107. The respondent did apply this PCP to the claimant, as to other employees not sharing her disability. The reason why they did this was to ensure that shifts were fully covered, and that customers calling in were given an answer as quickly as possible. The claimant's station could not be left unattended even for a matter of minutes at the start of her shift, particularly given that she started at a busy time of day when customers tended to call after work to seek to resolve a problem with their service.

108. We are unable to sustain the submission that a reasonable adjustment would have been to adjust the claimant's start times. That would have meant adjusting the shift pattern to suit her, without any basis having been established that the cause of her inability to attend at the start of her shift was in any way related to her disability, in addition, there is no basis to find that the claimant was prevented in some way from arriving on time.

It was treated as a disciplinary matter, justifiably in our view and the claimant did not challenge the warnings issued as a result.

109. Accordingly, in our judgment the respondent has not failed to make a reasonable adjustment in relation to this matter.

Failure to adjust the bonus scheme to ensure that the claimant and her colleagues were not disadvantaged by a failure to meet targets as a result of the claimant having extended breaks or transferring the claimant

110. We heard no evidence about the bonus scheme and the impact of the claimant's need for extended breaks, and accordingly we cannot make any finding to the effect that this was a PCP actually applied to the claimant and others.

111. As a result, we are not prepared to find that the respondent failed to make any reasonable adjustment in this regard.

Failing to allow the claimant to attend counselling appointments.

112. No PCP is properly identified here. There is no evidence that **the** respondent operated or applied a PCP to the effect that staff could not attend counselling appointments. Indeed, there is positive evidence, accepted by the claimant herself, that the respondent did allow her to attend counselling appointments.

113. The evidence demonstrated that there was one occasion upon which there was a delay or possibly an emission with regard to the authorisation of time off to attend a counselling appointment, but that if that did happen, it arose from a misunderstanding either by the claimant or by her manager. The claimant suggests that her right to attend that appointment was conditional upon her completing the return to work form, but **Ms** Stewart-Cunneen confirmed that it was not. and indeed the terms of the exchange do not read in such a way as to permit that interpretation.

114 However, since this >sa matter which only has reference to the claimant, and not to any other employee, on the evidence we heard, there is no basis upon which it can be said that this was a PCP applied by the respondent.

Did the respondent harass the claimant on the grounds of disability in terms of section 26 of the Equality Act 2010 by her line manager saying to her that she should get another job "where less brain cells were needed", by alleging she was "skiving" and by failing to offer any support to her in relation to her disability?

115. As Mr Leon put it, this is a simple credibility point. The claimant asserted that Ms Stewart-Cunneen made these comments; Ms Stewart-Cunneen denied it.

116. We found that Ms Stewart-Cunneen's evidence was credible and reliable, and that the claimant's evidence was very difficult to rely upon, owing to her failure to remember a considerable number of events and comments made. In addition, we found that Ms Stewart-Cunneen was a professional and sympathetic manager, who sought to assist the claimant at each stage, though without much success, largely because of the claimant's failure to open or read correspondence for some months.

117. The claimant's allegations are serious allegations, and of course we considered them carefully, but in our judgment, Ms Stewart-Cunneen did not say to the claimant that she should get another job where less brain cells were needed, call her a skiver or fail to provide her with support in respect of her disability.

118. With regard to the point that she failed to provide the claimant with support, we found that, to the contrary, Ms Stewart-Cunneen sought the advice of OH, and once that advice was received, was careful to implement the recommendations received. She applied a phased return to work to the claimant on two separate occasions: she confirmed to the claimant that she could take unplanned breaks without any impact upon her performance or statistics: and she allowed the claimant time off to

attend counselling appointments. It is not clear what support the claimant was looking for, beyond these recommendations.

119. Accordingly, we find that the respondent was not guilty of harassment on the grounds of di- oility ur erse 12 of the Equality Act 2010.

Did the decision by the respondent to dismiss the claimant amount to discrimination arising from her disability in terms of section 15 of the Equality Act 2010?

120. There is no dispute by the respondent in this case that dismissal amounted to unfavourable treatment of the claimant by them, and that that arose from her disability, which was the cause of her lengthy absence from work.

121. The question then is whether this decision amounted to a proportionate means of achieving a legitimate aim by the respondent.

122. The legitimate aim put forward by the respondent was that of avoiding expense and reducing the demands upon the team. In our judgment, these amount to legitimate aims. Although the respondent is a very large organisation, the pressures caused by the absence of one member in a small team have to be absorbed by that team; and the team, as we heard, could not replace the claimant while she remained in employment. The effect was therefore to place greater pressure and demands upon the other members of the team, and to sustain the claimant's absence for a period of time which was unknown.

123. Was dismissal a proportionate means of achieving that legitimate aim? In our judgment, it was. While the ciaimant understandably fee's aggrieved and upset at the loss of her job. the circumstances in which the decision was taken must be borne in mind. The pressures upon the remainder of the team had been unrelieved through the claimant's absence, and the concern of the respondent to ensure that customers receive a good service meant that they wished to ensure, reasonably, that they had

sufficient staff able to carry out their duties to the appropriate standard and present at work

124. Further, the respondent had no information as to when and if the claimant would be fit for work again, indeed, on her own evidence, the claimant remains unfit for work to the date of this Tribunal hearing, and therefore it cannot be suggested on her part that the respondent was wrong in its assessment of her fitness for work or the prospect of her returning to work.

125. There is no reason why an employer should be expected to retain an employee indefinitely, particularly in circumstances where they have no indication from the claimant as to when and whether they will be likely to be able to resume effective service to their employer.

126. The claimant's own conduct must be taken into account as well. She disregarded or ignored correspondence from the respondent throughout the lengthy absence leading to her dismissal. She left the respondent with little option but to dismiss her She completely failed to engage with them at any stage during those months, other than contacting People Plus to supply her fit notes, irregularly.

127. The claimant provided no explanation as to why she simply went to ground like this. There is no medical evidence to support her lack of communication. An employee has a duty to communicate with her employer, unless there is a sound basis for refraining from doing so. In this case, the claimant asserted that she had told People Plus or OH (her evidence was rather unclear on this) that she did not want contact from her management. That may have been the case, though the reason for it was not supported by any medical evidence supplied by her. The claimant, however, rather undermined this argument by simply ignoring all correspondence coming from the respondent without actually knowing who was writing to her at any stage.

128. It cannot be justifiable for the claimant to criticise the respondent for any failures in this regard given her own utter lack of engagement with them.

129. Accordingly, it is our judgment that the respondent did not discriminate against the claimant under section 15 of the Equality Act 2010. on the basis that the decision to dismiss her was a proportionate means of achieving a legitimate aim.

130. It is our unanimous judgment, therefore, that the claimant's claims all fail **and are dismissed.**

Employment Judge: M Macleod
Date of Judgment: 17 June 2022
Entered in register: 20 June 2022
and copied to parties