EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4111323/2021 Hearing Held at Dundee on 20, 21, 22 and 23 June 2022

Employment Judge: M A Macleod
Tribunal Member: E Coyle
Tribunal Member: P Fallow

Elaine Taylor	**Claimant** **Represented by** **Mr J Lawson** **Solicitor**
The British Red Cross Society	**Respondent** **Represented by** **Mr P Grant-Hutchison** **Advocate** **Instructed by** **Mr T Hefford** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

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

REASONS

1. The claimant presented a claim to the Employment Tribunal on 8 September 2021 in which she complained that she had been unfairly dismissed, discriminated against on the grounds of disability and unlawfully deprived of pay.

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

3. A Hearing was listed to take place in the premises of the Dundee Employment Tribunal on 20 to 23 June 2022. The claimant was represented at the Hearing by Mr Lawson, solicitor, and the respondent by Mr Grant-Hutchison, advocate, instructed by Mr Hefford, solicitor.

4. A joint bundle of productions was presented to the Tribunal, upon which reliance was placed at the Hearing.

5. The respondent called as witnesses Joanne Thurman, Regional Retail Manager; Howard Bowles, Head of Retail (South); and Gareth John Morgan, Head of UK Retail Performance.

6. The claimant gave evidence on her own behalf, and called as a witness Elizabeth Ann Mackay, a Women and Family Safety Officer and fully accredited counsellor with the British Association of Counselling and Psychotherapy.

7. At the start of the Hearing, the Tribunal required to address two preliminary issues: firstly, parties were not agreed as to which should proceed first, and invited the Tribunal to issue a direction in this regard; and secondly, the claimant intimated further and better particulars of her claim on 6 June 2022 and sought to have these received by the Tribunal and included within her claim, which was opposed by the respondent.

8. Following short submissions by both parties, the Tribunal retired to deliberate and issued the following decision orally.

In determining these matters, the Tribunal takes careful consideration of the overriding objective of the Employment Tribunals Rules of Procedure 2013, in Rule 2.

We deal with the application to add further particulars first. The further particulars were intimated on 6 June 2022. Under normal circumstances, further particulars are simply regarded as additional

information provided by a party to assist the Tribunal and clarify her case. However, it is our view that the timing of the application to provide further particulars means that careful consideration requires to be given as to whether or not they should be accepted. This has not been presented as an application to amend the claim and we have not been addressed specifically on the principles set out in the well-known decision of Selkent Bus Co Ltd v Moore 1996 ICR 836, which would be applicable in such circumstances.

We considered the nature of the amendment sought. In our judgment, this is a significant amendment, not in the sense that it seeks to alter the fundamental basis of the claims but because it seeks to introduce very wide-ranging averments which alter the defence which the respondent would be required to present.

The 2 paragraphs set out in the proposed amendment each seek to make allegations which intend to fortify the claims made.

In relation to the first paragraph, it is entirely unclear to us how this paragraph assists the Tribunal. It seeks to introduce allegations which appear to intend to suggest that Ms Stuart-Cox had been guilty of bullying others. However, what the claimant offers to prove lacks any specification. We are not told when or how or where or indeed what this individual is said to have done, and we have not been advised that the claimant intends to call any witnesses to support these allegations.

In relation to the second paragraph, there is no new allegation about a reasonable adjustment which the respondent should have put in place, but the information presented does not specify who was involved, when any of this was done or where, or in what branches, the decisions were made.

The applicability of time limits must be considered. It appears that these allegations are out of time, but since we do not have any dates it is impossible to be clear on this.

The timing and manner of the application is also a relevant factor. The only explanation for the timing and manner of the application is that the information was uncovered during the preparations for the Hearing but we are unclear as to why the application has been brought so close to the Hearing. The respondent has said that they will require to carry out further significant investigations into these matters, with the probably consequence that the Hearing diet currently listed will require to be adjourned.

In all of the circumstances, we are not convinced that it would be in the interests of justice to allow the further particulars to be added by way of amendment at this stage, due to the disruption to the Hearing and to the additional cost to be incurred by both parties in preparing for the expanded case.

Accordingly, we are not prepared to allow the further particulars to be included within the claim.

So far as the other issue before is concerned, it is our conclusion that the respondent should present its evidence first. There is no doubt that much of the focus of the claim is on the dismissal. The respondent is ready and able to present their evidence, as confirmed by Mr Grant-Hutchison.

We do have a concern that the claimant would be placed at a disadvantage were she to be pressed into giving evidence first in this case. Perhaps this is a situation which could have been avoided but as things stand we are concerned that we have been told that her disability may mean that a late change in the order of witnesses would have an adverse effect upon her.

The Tribunal has an obligation to consider the institution of reasonable adjustments for parties before us in the course of proceedings, and in this case we consider that allowing the claimant to go second would be a reasonable adjustment, in the circumstances we are facing.

We have one proviso. If the respondent considers that they have been disadvantaged by this, and consider that a matter arises in the course of the claimant's evidence which requires a response, they may ask the Tribunal for permission to recall a witness.

9. The Hearing then proceeded. As it turned out, the respondent decided not to recall any of their witnesses following the claimant's case.

10. Based on the evidence led and the information presented, the Tribunal was able to find the following facts admitted or proved.

Findings in Fact

11. The claimant, whose date of birth is 26 February 1953, commenced employment with the respondent on 25 October 2010 as a Shop Manager. The respondent, which is a registered charity, operates two charity shops in Forfar, one which sells clothing and the other which sells furniture.

12. The respondent is a national charity which is arranged into regions across Great Britain and Northern Ireland.

13. The claimant was provided with a written statement of terms and conditions of employment (104ff), which confirmed that she was employed to work for 35 hours a week, on a base salary of £12,384 per annum. She accepted the terms and conditions by her signature on 10 October 2010 (107).

14. When the claimant commenced employment with the respondent, her line manager was Tracy Pickering, an Area Manager, who was based in Northern Ireland but covered Scotland for the respondent.

15. A restructuring process took place in January 2020. The respondent considered that the Area Managers were not in a position to offer "hands-on" support to the Shop Managers, and as a result introduced a number of Regional Cluster Managers, operating between Shop Managers and Regional Retail Managers (the new title for Area Manager). Such

Managers were appointed to oversee and provide support to a number of shops within each region, and were to answer to the Regional Retail Managers. They did not intervene in the line management between Regional Retail Managers and Shop Managers. Each Cluster Manager took responsibility for approximately 8 shops, and as a result lifted the burden of direct supervision of the shops from the Regional Retail Managers.

16. The number of regions was reduced from 8 to 6, and they were managed by 6 Regional Retail Managers, rather than 8 Area Managers.

17. Katie Stuart-Cox was appointed as Regional Retail Manager, and became the claimant's line manager. Valda Smith was appointed as Regional Cluster Manager in the claimant's region.

18. The claimant was absent from work due to annual leave for much of February 2020, and returned to work in early March. She was informed of the proposed structural changes prior to going away on leave.

19. The claimant became unwell in March 2020. She submitted a statement of fitness for work from her GP dated 21 March 2020, certifying that she was unfit to attend work until 13 April 2020 due to "Stress at work". The claimant had submitted a complaint on 2 November 2019 about the conduct of Alistair McGill, an Area Driver, towards her (167).

20. An Area Driver would be available to a number of shops within the area covered, and could be called upon by the shop managers in those shops as required. The claimant's position in evidence was that her furniture shop in Forfar had a dedicated driver allocated to it, Kevin Kemlo.

21. Kevin Kemlo was suspended pending an investigation into his conduct, during the claimant's absence on annual leave. On 13 March, Ms Smith contacted the claimant to advise that another driver, Mr McGill, would be coming in to assist; and suggested that the claimant had, contrary to instructions, been in contact with Mr Kemlo during his suspension. The claimant denied this. After she had spoken to Ms Smith, the claimant

spoke by telephone with Ms Stuart-Cox. That call left the claimant feeling upset, and so she went to see her GP, and was signed off work due to stress and anxiety. In particular, she was upset at the suggestion that Mr McGill, against whom she had complained, would be working for her as their local driver.

22. The claimant remained on sick leave until 18 May 2020, when she was placed on furlough due to the ongoing Coronavirus pandemic. The respondent's shops were closed due to the pandemic by this time.

23. On 23 June 2020, Ms Smith conducted an informal review with the claimant in relation to her absence, having reached the stage in the process where that was recommended. A note was taken of the meeting (191). Ms Smith noted that the claimant had been signed off due to stress, and when signed back to work on 19 May she was put on furlough due to the shop closure.

24. She recorded that *"Elaine still has issued regarding the situation with the van driver. Elaine feels threatened and uncomfortable with situation."*

25. Ms Smith also noted that the claimant felt that things returning to normal would help. She also advised that she was going to counselling.

26. It was planned that the stores would reopen the following week, and that that week would be used to prepare the stores for doing so.

27. On 6 July 2020, Ms Smith contacted the claimant to express concern about the level of sales in the shops. The claimant was concerned and anxious about this conversation, and interpreted Ms Smith as meaning that if the sales did not improve she would face an investigation. The claimant then sent an email to Gareth Morgan (192) on 11 July 2020:

"Good morning

My name is Elaine Taylor, manager of the 2 Forfar shops in M1.

During the Zoom/Conference calls I picked up the emphasis for shops reopening were

Getting the shops open again to welcome our customers back

The safety and wellbeing of the staff and volunteers.

That KPI's, Sales targets, and Audits were not to be the primary concerns.

To that end I would like to know why when I have had a relatively poor week in sales in a furniture shop (With all the restrictions surrounding deliveries) that I have been informed via my Cluster Manager that if it happens again I will under investigation (sic)

If I have totally misunderstood the message from coming from the company, I would be grateful if you could outline exactly what you are expecting from us as shop managers…"

28. Mr Morgan did not take any action when he received this email. He did not interpret it as a formal grievance.

29. On 11 July 2022, the claimant wrote to Vicky McGoff, in HR, (193):

"Hi Vicky

I spoke to you on the 6th May regarding concerns I had with my (acting) Regional Manager – Katie Stuart-Cox. At that time you suggested discussion and mediation might be the way forward. Unfortunately nothing has come of that.

I was off 9 weeks with Work Related Stress and Anxiety. I returned to work on the 22nd June hoping that I could resume my job minus that stress.

Unfortunately this has not been the case, therefore I now wish to take this to the next level and make this a formal complaint.

I would like to know what the company is going to do to make me feel safe and secure in the workplace as any employee has the right to…"

30. On 13 July 2020, the claimant sent a further email to Hannah Robinson (195), again of HR, attaching a document (196-198) which set out a narrative explaining her version of events and the concerns arising, starting on 2 March 2020 when she returned from a month's holiday. She narrated at length conversations with Ms Smith and Ms Stuart-Cox and the complaints which related to those.

31. Having then been asked to provide more clarity as to the points she wished to raise in her grievance, the claimant emailed Ms Robinson on 17 July 2020 (199) to attach a shorter summary of those points (200/1), which were as follows:

"From the day I returned on the 3rd of March 2020, which coincided with the Area/Regional changes, I noticed I was being … micro managed eg multiple instruction calls on a daily basis and other instances, as identified in previous correspondence.

By Friday 13th March 2020 my confidence and health both physical and mental had deteriorated to the extent that I had to attend my doctor and was subsequently signed off, as she deemed me unfit for work due identified work related stress.

On Friday 20th March I received a call from Katie Stuart-Cox (the details I have already given) which was nothing short of threatening and bullying. This exasperated (sic) my condition. I was now spending hours of uncontrollable tears, and days when I could not reach the end of my street due bowel irregularities caused by the anxiety I was suffering.

On April 21st I was eventually contacted by HR who suggested Katie Stuart-Cox's behaviour was merely a different style of management on her part and would I consider having a discussion with Katie Stuart-Cox to resolve. Having agreed to this as a way forward, I was surprised not to have a follow-up response.

I returned to the workplace on 22nd June, despite having had no contact from HR and still on medication and receiving counselling, for symptoms

of the anxiety this has caused, determined to try and regain my health and confidence through work.

Friday 10th July at shop closing time I received a call from my cluster manager telling me Katie Stuart-Cox was not happy with my shops takings for that day and listing the things she felt I was not doing right and finishing with, if this happens again I would be under investigation. Does this meet with the message we were given during the re-mobilisation briefing call?

In discussion with my GP it is not acceptable to let my health to start to deteriorate further due to work related stress. British Red Cross as an organisation founded on and constantly promoting itself as CARING for everyone would in breach of its own values by allowing this to go unchallenged.

There is a fundamental right for every employee to feel safe and secure in their workplace both physically and psychologically, as clearly stated in Scottish Office Legislation.

My expectations of you as my employer would be to assure me of my safety whilst in the workplace. The main issues are about the negative communication I have had from Katie Stuart-Cox in her role as my Line Manager towards my work practices. This has resulted in the deterioration of my mental well being.

I had to seek medical advice, resulting a period of absence from my workplace as directed by my GP.

While this matter is being looked into, I would prefer to have further work related communication via another senior manager

If this was put in place I would hope to recover from the symptoms I have been experiencing as a result of workplace bullying.

I am sure I do not have to remind you of my work ethic and record of attendance over the last 10 years."

32. In response, Ms Robinson confirmed (on 22 July) that she had sent this email and grievance letter to one of the Advice and Casework Advisors, and made her aware of the employee assistance programme, including access to counselling, online cognitive behavioural therapy and medical information.

33. Kevin Morgan wrote to the claimant on 7 August 2020 (206) inviting her to attend a grievance meeting on 18 August 2020. He confirmed that the purpose of the meeting was to allow her to explain her grievance and discuss with Mr Morgan how it could be resolved.

34. The claimant attended the grievance meeting on 18 August 2020. Mr Morgan chaired the meeting and Janice Baird took notes (208ff). The claimant was not accompanied.

35. The claimant explained that she was not feeling well and that she was due to return to see her doctor. She set out her concerns about being micro-managed, explaining that she was told that drivers were going to be managed by Regional Retail Managers and Cluster Managers (though she did not see the reason for this) and that Ms Smith was constantly on the phone to her issuing instructions. She said that she *"just felt control was being taken away from me. I have managed 2 shops for 10 years and now I was being told what to do."*

36. Mr Morgan proceeded to interview Ms Smith on 20 August 2020. Notes were taken by Ms Baird (215ff). Ms Smith denied that she or Ms Stuart-Cox were micro-managing the claimant, and in particular denied that she had had a conversation with the claimant in which she threatened her with investigation if her sales did not improve. She said that the only conversation she could recall related to concerns raised by staff about the lack of social distancing arrangements within the shop. She maintained that the claimant was making up a conversation about low sales.

37. Ms Stuart-Cox set out her response to the claimant's grievance in the form of a note (218ff).

38. Following his investigation, Mr Morgan set out his investigation report dated 14 September 2020 (228ff). He categorised and addressed each of the allegations in turn in his findings (233ff).

39. Allegation 1 was that the claimant was being micro-managed. On the balance of probabilities, he did not uphold this allegation. He observed that the claimant was clearly unhappy with the management style of Ms Stuart-Cox and Ms Smith, particularly in relation to the level of contact from them. He noted that requests were made of her by the managers to change the shop floor presentation, with which the claimant was not happy. He was unable to find that the remarks attributed to Ms Stuart-Cox and Ms Smith were in fact made.

40. Allegation 2 was that she was signed off by her doctor for work related stress. This complaint was upheld in part. In essence Mr Morgan did not consider that the management styles adopted by Ms Stuart-Cox and Ms Smith were inappropriate or that any of their actions were intended to cause the claimant any stress or upset. He went on to say that he was sorry to hear that the claimant had suffered stress and sought to address this in the recommendations section.

41. Allegation 3 was that the claimant received a call from Ms Stuart-Cox which was threatening and bullying. Mr Morgan did not uphold this on the balance of probabilities. Again, while he did not find that there was any threatening or bullying behaviour, he indicated his wish to recommend mediation in order to resolve the difficulties between the two individuals.

42. Allegations 4 and 5, which related to the fact that despite HR contacting her to have a call with Ms Stuart-Cox, no such call took place, and that she was surprised to have no follow up contact from HR, were not upheld by Mr Morgan. His solution was to recommend mediation, but he did not consider that there were any failings by HR or management in this regard.

43. Allegation 6 was that Ms Smith indicated that she would be under investigation, in relation to the lack of sales in the shop. Mr Morgan did

not uphold this allegation. He found that the alleged telephone conversation was refuted by Ms Smith and Ms Stuart-Cox.

44. Mr Morgan then made recommendations (236ff).

45. With regard to the alleged micro-management, he recommended that the claimant join the WhatsApp group of managers which would avert the need for so many phone calls, and would improve communications on both sides; and that she should respond to management instructions in a positive manner, appreciating that things were being done differently due to restructure across the whole of the Retail division. He recommended that she should see management input as a supportive measure.

46. With regard to the work-related stress, Mr Morgan hoped that the proposed mediation sessions would improve relations between the claimant and Ms Stuart-Cox, and said that if the claimant had any further concerns about the grievance she should address them directly to him. He also indicated that he would arrange for a stress risk assessment to be carried out, and provided the claimant with the details of the Employee Assistance Programme if she required immediate and confidential assistance.

47. With regard to allegation 3, he referred to the mediation process to be arranged.

48. With regard to allegations 4/5, he said that any further concerns related to the grievance should be addressed directly to him rather than to HR.

49. Mr Morgan wrote to the claimant setting out his findings in summary on 24 September 2020 (239). That letter should have been sent with the report but was inadvertently omitted. The letter also confirmed the details of an appeal process in the event that the claimant wished to do so, by 4 October 2020.

50. The claimant was very unhappy with the outcome of the grievance, and submitted an appeal on 6 October 2020, having secured an extension of the deadline from the respondent.

51. The letter set out her concerns relating to the outcome (244):

"I am listing a brief summary of the points on which I am basing my appeal. These are untruths, the questioning of doctors diagnosis of work related stress and anxiety, and questioning my professional work practices.

Allegation 4.1

14th January 2020 I asked Vada Smith if she would set up a Whats App group for our cluster to make it easier to ask general questions or make comments applicable to our group. We were part of a similar group with our previous RFM. Valda did this immediately and I thanked her.

Allegation 4.2

How can this be Partly Upheld? This appears to be doubting the severity of my condition or my doctors diagnosis of work related stress and instructions.

**My condition has not been exacerbated by this situation. It has been caused by it.* The symptoms I am experiencing are all attributable to how I have been prescribed medication (which I would prefer not to have to take) and I am meeting with a counsellor on a weekly basis to help me deal with how this situation has adversely affected my health.*

Reference is made to an anonymous call to HR (which I did not admit to as I did not make it). I cannot see how this is relevant to me being signed off due to Work Related Stress.

Allegation 4.3

This call was made to me as described. I have no reason to make this up. This resulted in increased, extreme bouts of anxiety.

Allegation 4.4/5

Have not made an allegation against HR, merely stated that HR offered to set up a mediation call with Katie S Cox and sent me a Stress Related Risk Assessment to complete and use during that call. The call never took place.

Allegation 4.6

This call DID take place, on Friday 17th July just after closing time. Again I have no reason to falsify this.

When can I expect to access the support processes which are mentioned as being put in place, as I have no recollection of them.

This Grievance Report contains some very blatant lies, and casts doubt on not only my professional integrity and a highly skilled, experienced manager, but also my personal mental state.

I would like to see which shop reports were examined during this investigation. I have always been flexible in Management changes. Up until March this year I have never had any reason to have issues Senior Management or shop procedures.

Up until receiving this grievance outcome, I have had no reasons to have issues with Valda Smith. I had believed her to be an honest and truthful colleague and would wonder about her motives for the way she has responded to this investigation…"

52. Valda Smith then invited the claimant to attend a 1st formal sickness absence meeting (246) on 12 October 2020. The meeting took place on 13 October by Zoom. The claimant attended, with the support of Karen Ross, the Glenrothes shop manager. Ms Smith conducted the meeting and Christine McKay, Regional Cluster Manager, attended to take notes (247).

53. The claimant explained that she was not feeling okay as her blood pressure was very high. Ms Smith asked if there was anything which the

respondent could do in order to help or support her to return to work. The claimant said that there was nothing at that time as she was following the advice of her doctor, but that she was absent due to work related stress. The note went on:

"Elaine was asked if there was anything the Red Cross could do to facilitate her return to work.

Elaine stated not sure what Red Cross could do.

I expressed to Elaine that we could refer herself to occupational health to see what we can do to support you? Elaine said if that would help then yes. I explained to Elaine that she has had a long time off work and that she had returned in June to then return to being on sick leave. Elaine interjected and said yes, but I can't cope with work at the moment.

It was explained to Elaine that I would request and (sic) occupational health appointment…"

54. The conclusion of the interview was that the claimant was place on formal review for 6/12 months, and that any further absences may result in further reviews being held according to the procedure.

55. The claimant was sent a copy of the note following the meeting and was therefore made aware that she was subject to review. The letter enclosing the note was issued on 4 November 2020 and gave the claimant the right to appeal against the outcome (269). Ms Smith explained that the claimant's absence level had continued to be "significantly high" which the respondent could not continue to sustain. She told the claimant that a sustained and significant improvement in her absence levels would be expected of her.

56. The claimant's grievance appeal hearing took place on 6 November 2020. Gareth Morgan chaired the hearing, and was assisted by Hannah Robinson, who took notes (272ff).

57. Mr Morgan asked the claimant to explain the points which she wished to raise in her appeal. She explained that in March 2020 she had felt micromanaged, by *"…the constant calls and myself having to come to terms with the new management structure and I felt that some of the control had been taken away from me. It took a week for it to be explained to me that I won't be managing my driver. I was concerned about this…"*

58. She felt she was constantly being told what to do and how to do it, whereas previously she had been told to run the shop herself and if that if all was going well she would be allowed to run the shop on her own.

59. Mr Morgan raised the point that some of the staff members had been in touch with Ms Smith about social distancing measures in her shop. The claimant indicated that there may have been mistakes as it was a "learning curve". He also asked her why she had stopped donations to the shop. The claimant said that she had made a sign to this effect, as well as a sign telling people to wear a mask. She asserted that Ms Smith came and took the signs down, and informed her that the shop was accepting stock.

60. The meeting concluded at length. Following the meeting, Mr Morgan issued a letter confirming the appeal outcome (281) on 18 November 2020. He attached the meeting notes for the claimant's attention.

61. He concluded that the claimant had not been micromanaged or managed excessively in any way, particularly given that there was a new structure. He found that the Whatsapp exchanges between the claimant and Ms Smith were cordial and supportive. He did not alter the conclusion of Mr Kevin Morgan that this allegation was not to be upheld.

62. He upheld the conclusion of Kevin Morgan that allegation 2 should be partially upheld. This was, he said, *"a reflection that you are obviously suffering stress that you believe to be attributable to conditions at work but also recognising that I cannot find conclusively that behaviours of our line management are in any way unreasonable."*

63. With regard to allegation 3, Mr Morgan found that he would not have said it was inappropriate had her line manager chosen to have a directive conversation with her as to her approach to the Kevin Kemlo investigation, and to remind her to be mindful of her conduct. He regarded this as very different to harassment, bullying or an inappropriate conversation, for which he could not find any conclusive evidence. He did not uphold this allegation.

64. With regard to allegations 4 and 5, he accepted that the anticipated call did not take place, but found that there was no malicious reason for this, and considered that there were a number of mitigating circumstances as to why she was not contacted, such as that Ms Stuart-Cox was extremely busy covering more than one role, that she was concerned that it may not be appropriate to contact her given that she was on furlough leave and that the claimant could have called Ms Stuart-Cox herself. He did alter the finding on these allegations to partially upheld, due to the fact that a follow up call did not take place as she would have expected, but not for any malicious reasons.

65. On allegation 6, he found that there was no basis to conclude that any inappropriate conversations took place with her, and did not uphold this allegation.

66. In his conclusions, Mr Morgan set out his views as follows:

"At the heart of this grievance I believe are two factors that have compounded the situation:

- *I feel that you have had difficulty working positively with the new national structure involving RCM's and wrongly saw the intervention of such as 'interference' and micromanagement. This was probably compounded by your level of experience and being used to more remote management and in recent times the lack of Regional or Area Management per se for significant gaps in time. The implementation of the cluster management structure however is bigger than any one shop and is felt to be right for our business*

and essential to driving best practise (sic) and consistency across our shops. Making a structural change like this work involved genuine 2 way interaction and for everyone involved to embrace change and find solutions. This has been lacking in this case.

- *I believe strongly (from what you said to me in our meeting) that your frustration and genuine concern regarding the Kevin Kemlo situation has been very contributory factor in how this sequence of events has evolved. Had this situation (with KK) not been playing out in the background I am sure that you could and would have developed a much more positive relationship with both VS and KSC. To some extent your working relationships have been tainted by your very strong beliefs on this subject, which has partly resulted in a breakdown of trust."*

67. He went on to say that it was now necessary to move on and implement Kevin Morgan's findings. He recommended mediation between herself and Ms Stuart-Cox as well as Ms Smith, and asked the claimant to confirm to Vicky McGoff that she would be willing to participate in this.

68. On 19 November 2020, Medigold Health, the respondent's Occupational Health adviser, provided a report to Ms Stuart-Cox (286) following a telephone assessment carried out with the claimant on 27 October 2020.

69. The Occupational Health Advisor (Lucian Deighton) reported that *"Miss Taylor is fully independent with all her day-to-day activities of living. She does have some good and bad days. On bad days, she will sleep throughout the day and can be very tearful. On discussion, it does appear that the unresolved work-related matters is the current trigger for her feelings of anxiety, stress and depressive mood. I believe that once the work-related matters have been resolved she is likely to return to work soon after."*

70. The advisor concluded that once the issue was addressed, the claimant was likely to experience an improvement in her symptoms and return to work; that she was currently unfit to be at work; that no workplace

adjustments could be recommended because she was unlikely to be able to remain in work while the work-related matters remained outstanding; and that the condition she suffered from was unlikely to be covered by the Equality Act 2010 as a disability. When fit for work, it was recommended that a phased return to work would be a reasonable adjustment for the respondent to put in place.

71. On receipt of this report, a 2nd formal sickness absence review was arranged for 23 November 2020. The claimant attended with Karen Ross, and the meeting was chaired by Ms Smith, assisted by Sharon Easton, who took notes (292).

72. In that meeting, the claimant confirmed that the Occupational Health assessment was that she was not fit to work until the situation at work was resolved, and referred to the recommendation by Mr Morgan that parties go to mediation.

73. Ms Smith advised that *"I also need to make you aware that the BRC cannot sustain the level of absence, your sick line is not up until the end of January, we will put a review period in for 6 weeks or so and that if there is no improvement within that time, we will have to move to the final formal review stage which may result in termination of your employment on the grounds off (sic) ill health."*

74. Following the meeting Ms Smith confirmed the terms of the discussion by letter dated 26 November 2020 (295). She reiterated the claimant's wish to participate in mediation which she believed would help her return to work.

75. Mediation did not take place. The claimant was shown the statements produced by Ms Smith and Ms Stuart-Cox as part of the grievance process, and was of the view that the facts set out in the statements had been skewed, and that there were lies in both. As a result, she declined to participate in mediation with the two managers.

76. The claimant confirmed this in her email of 18 January 2021 (315). She said that she would want a written apology from Ms Smith and Ms Stuart-Cox before she would consider sitting in a meeting with them. She went on: *"Their behaviour, which appears to be condoned by the organisation has left me doubting that I could ever trust them again. I believe it is up to the organisation to be offering solutions.*

One that would possibly enable me to return and feel safe and valued as employee is to be managed by another RFM until North 1 has a permanent replacement…

I would like to hear what other suggestions your Dept can offer."

77. Karen O'Neill, of Human Resources, replied on 10 March 2021 to say that moving the claimant under the management of another Regional Retail Manager was not a feasible option, especially given the restrictive circumstances under which they were operating. She encouraged the claimant to consider mediation and explained that the respondent could not proceed down this route without the agreement of all concerned.

78. The claimant did not respond to that email. She remained absent due to ill health.

79. Ms O'Neill emailed Kevin Morgan on 11 March 2021 (317) to advise that the claimant had refused to participate in mediation. She said that *"There was a bit of back and forth regarding alternatives – she suggested that she be moved under the management of another RRM. I discussed this with my line manager and we both agreed, particularly given the current restrictions/circumstances, that this wasn't a feasible or practical option. She did also ask for an apology from both Katie and Valda, but I explained that it's not within our processes to enforce apologies because of an appeal. Mediation remains the only viable option, but she hasn't provided consent to participate."*

80. The respondent invited the claimant to attend a final formal sickness absence meeting by letter dated 1 April 2021, to take place on 13 April

2021 (321). She was advised that one possible outcome of the meeting could be that she would be dismissed from her post. The meeting was arranged to take place by Zoom video conferencing.

81. The meeting took place on 13 April 2021. Joanne Thurman chaired the meeting. Joanne Turner and Karen O'Neill were in attendance to support her. The claimant attended and was accompanied by Karen Ross.

82. Handwritten notes of this meeting were produced to the Tribunal (324).

83. The Tribunal had some difficulties with understanding the format of these notes. We do not doubt that they were appropriately reflective of what was said, but the format suggests very strongly that parts of the notes were written in advance of the meeting, and responses from the claimant were thereafter inserted. Although the handwriting is all Joanne Turner's, there are differences which suggest that the claimant's responses were written at a different time and possibly more quickly than the other parts of the document. In particular, there is a section (330) in which it is suggested that Ms Thurman told the claimant that she was able to make a decision on the day, and that that decision was to dismiss her. However, Ms Thurman's evidence before us was that that section was not read out, and that the paragraph below was in fact the one related to the claimant.

84. We were left to conclude that the notes were completed in advance of the meeting, to the extent that they represented what was to be said by Ms Thurman, in the form of a script. Ms Thurman said that she prepared a script for herself in advance of the meeting, and that what appears in these produced notes were simply notes taken by Ms Turner on the day. However, this cannot be correct. The section on 330 would not appear in these notes if they were a record of what was said, since Ms Thurman did not say that she was able to conclude the meeting then.

85. It is our view that this is unhelpful and confusing, but we are finally of the view that the notes are reasonably accurate, and that there is nothing sinister in the confusion which has arisen here. We accept that Ms

Thurman did largely read out her script, but that she must have given an indication to Ms Turner in advance of the meeting about what she intended to say. It is clear that Ms Thurman did not read out the section mentioned, and yet it appeared in Ms Turner's notes. As a result, while there is a lack of clarity as to how the notes came into being, we are prepared to accept that they are of assistance in demonstrating what was said at the meeting.

86. The claimant explained that if she went back to the same situation, with the same Regional Retail Manager, she would be exposing herself to further bullying, and she would have nobody to turn to in the event that problems arose.

87. When Ms Thurman asked her if there was anything else which the respondent could do to help her return, she was noted as saying: *"Working under a different Mgr – Apparently the RCM takes instruction from the RRM so I have no one to turn to if I am being bullied again… Work under a different Mgr – Although I know that's probably not possible…I feel that going back to work under Katie – I would feel really uncomfortable."*

88. She stressed that she did not engage with mediation because she could not trust Ms Stuart-Cox. When asked if there was anything else, she replied *"Nothing else other than moving out of retail in admin but I just don't know what else."*

89. At the end of the meeting, Ms Thurman confirmed that she was unable to make a decision on that day, as the claimant had made a suggestion she had not previously made that she should be moved to an alternative non-retail role in the organisation. She said that she would seek to compile a list of roles which could be suitable and then discuss it with her.

90. Ms Thurman gave consideration to whether the claimant could be allocated a different Regional Retail Manager, but concluded that this was not possible. She said that she thought about removing the Cluster Manager role from her management, and allocating a different Regional

Manager to her, but considered that it was impracticable to do so. It would mean that a Regional Manager from a different region would be asked to take day to day responsibility for the claimant's shops, without the moderation of a Cluster Manager, and that could give rise to difficulties. For example, if the claimant required the services of a driver, the Regional Manager would have no authority to direct that driver to do anything, as the driver would come under the authority of the local Cluster and Regional Managers. Having no Cluster Manager would leave the claimant without the support that such a role was designed and introduced to provide to the shop managers.

91. If the claimant were to be allocated another Regional Manager, it would be a manager located outwith Scotland, as the Scottish region was managed by Ms Stuart-Cox.

92. She also considered that the grievance and appeal raised by the claimant about Ms Stuart-Cox and Ms Smith were concluded some 5 months prior to the final review hearing, and that neither had been upheld.

93. Ms Thurman also investigated with Human Resources whether or not it would be possible for the claimant to be moved to a non-retail role. Ms Thurman contacted the claimant by telephone on 16 April to talk about roles which may be available. The claimant agreed that she would go online in order to explore which current vacancies available within the organisation would be suitable for her, and then that they would meet on 23 April. Ms Thurman confirmed this to Ms O'Neill that day (334) by email.

94. Ms Thurman invited the claimant to a meeting on 23 April 2021, by letter dated 16 April 2021 (335), reconvening the final review. She took notes of the meeting herself (336). She asked the claimant if she had, in exploring the vacancies, found any positions she was interested in applying for. The claimant replied that there was currently nothing in her area. She said that there was only a vacancy at the Dundee shop which was "obviously not suitable".

95. Ms Thurman advised the claimant that as a result of this, and of the fact that she was of the view that all reasonable adjustments had been considered for the claimant, she was dismissing her on the grounds of ill health.

96. She then confirmed her decision in a letter dated 30 April 2021 (337). She explained in that letter:

"During the meeting, we reviewed your levels of absence and considered what support was required to facilitate your return to work and I explained that British Red Cross could no longer continue to sustain your high absence levels.

Your ongoing sickness absence and health issues began in March 2020 due to stress at work following issues with a colleague. You were then placed on furlough between 18th May and 22nd June 2020. An informal sickness absence review was held on 23rd June 2020, a first formal review was held on 13th October 2020 and you were placed on formal review for six months. An Occupational Health review was carried out on 27th October 2020 and you were deemed unfit for work until the workplace issues, as raised in your grievance, were resolved. A second formal absence review was held on 23rd November 2020 and you were placed on review for a further three months. Mediation was suggested as a remedy for the aforementioned workplace issues, but you did not feel that this would be a useful exercise in repairing your working relationships. During the initial final formal absence review, you suggested that you would be interested in an alternative role elsewhere in BRC and I adjourned the meeting to explore this as an option. Following the break, you confirmed you had not found any suitable vacancies."

97. She advised that she had decided to dismiss the claimant on the grounds of ill health, and that the claimant had a right to appeal against that decision if she chose to do so, within 9 calendar days.

98. The claimant emailed the respondent on 13 May 2021 (340) to appeal against her dismissal. She said that she had been suffering from work

related stress and anxiety for more than a year, and that the respondent had failed in their duty to find solutions that would have enabled her to return to work. She acknowledged that the appeal was presented outwith the set timescale, but said that the decision had had a negative impact upon her health.

99. The respondent extended the deadline for submitting the grounds of appeal until 21 May 2021, by email of 17 May (342). The claimant then responded on 19 May 2021 (344) setting out a number of issues she took with the decision to dismiss her.

100. Howard Bowles, Head of Retail South, was appointed to hear the claimant's appeal against dismissal, and he wrote to her inviting her to an appeal hearing on 1 May 2021 – in error since the letter was dated 25 May 2021. That hearing was adjourned until 4 June 2021 (363). The claimant attended and was supported by Karen Ross. Mr Bowles chaired the hearing and was assisted by Vicky McGoff, who took notes (365ff).

101. Mr Bowles summarised the points made by the claimant which related to her grievance, and which would not be discussed at the appeal hearing. These points were therefore left to the side.

    1. *"When I first raised concerns about bullying in the workplace, I was told it was just a different way of working and I needed to accept and adjust.*

    2. *When I first made an unofficial grievance complaint, I was asked to consider mediation, to resolve the issue, which I accepted, but the other party declined.*

    3. *I am now aware that the person accompanying me at my Grievance Meeting should have been permitted some input instead of being told they were not allowed to speak."*

102. Mr Bowles then raised the first point of the appeal: *"I was sent a Stress Risk Assessment by HR at this time to be used during this meeting. This was never followed up by anyone, at that time or since."*

103. The claimant confirmed to Mr Bowles that she had completed the Stress Risk Assessment, and retained it in her records, but that she had not sent it to anyone as it was to be used at a meeting which did not ultimately take place. She accepted that she did not share the document with anyone, nor did she raise that afterwards.

104. The second point was: *"Also challenging the fact that one of the people mentioned in my grievance was allowed to interview me in Absence Meetings."*

105. Mr Bowles understood this to be a reference to Ms Smith. The claimant's point (reinforced in evidence before us) was that the respondent did not follow their own process, but she did not think it made any difference to the process that Ms Smith was involved.

106. The third point was: *"The way the onus has consistently been put on me to find a solution to getting back into the workplace."*

107. She explained that she felt that the respondent should be more sympathetic, and could have encouraged more professional counselling; and that she should have been given an opportunity to work under another "area manager" to build her confidence back up.

108. The fourth point was *"I suggested being put under a different Regional Manager for a period of time to allow me settle back after such a long time. Rejected by yourselves as not being practical in the current climate. I know of at least two occasions in the past where this has been used to diffuse (sic) a situation. The technology available in back office and Zoom, added to fact that actual physical shop visits were not happening, seems to make that reason redundant."*

109. She said that she was suggesting that this should be put in place for 3 to 6 months, and that once she had built up confidence she could deal with the issues relating to Ms Stuart-Cox and Ms Smith.

110. The fifth point was *"When I asked what assurances could be given as to my safety and welfare if I returned under the same Line Management, none were offered."*

111. The claimant referred to threatening phone calls, threats of being suspended, investigated and reprimanded; telling her to get the sales up and to "get the finger out", which she did not see as being nice and how she felt threatened due to the way she was feeling at the time. She said that when she raised this she was told that in order to get back to work she would have to attend mediation. She maintained that Ms Stuart-Cox was in a temporary position as the Regional Retail Manager.

112. The final point was *"When I mentioned that no offers of redeployment had been made, I was told to check to Red Cross website myself."*

113. She complained that she felt it was the "whole way" she had been treated by the respondent, a caring organisation, in being told to go and look herself and see if there was anything that she saw there.

114. The meeting concluded, and Mr Bowles took time to consider the points raised by the claimant and the information available to him. He wrote to the claimant on 4 June 2021 (395) to advise of the outcome of the appeal hearing.

115. He addressed the points in turn. He said that there was no evidence that the claimant was asked for a Stress Risk Assessment at any other time, but also said that the claimant had not sent the document to anyone nor raised it at any stage. He said that it was a useful tool used by the respondent but not a requirement of their sickness absence policy in this case that a Stress Risk Assessment should be completed.

116. Mr Bowles accepted that the first formal review meeting was conducted by Ms Smith during the course of the grievance, and that while there was nothing in the respondent's policy about this, it was *"poor practice and not ideal".* However, he found that Ms Smith provided consistency as

someone who personally knew the claimant and her case as her line manager.

117. In fact, Ms Smith was not the claimant's line manager, and had no line management responsibilities as the Regional Cluster Manager.

118. He said he could not identify any issue arising from the questioning apparent in the notes of the meeting which suggested that matters had been skewed by Ms Smith being involved in the grievance.

119. He also pointed out that there was no objection raised at any time by the claimant to her involvement, and that she had had the opportunity to appeal at each stage.

120. Mr Bowles observed, with regard to the third point of appeal, that the respondent had offered the Employee Assistance Programme; a Stress Risk Assessment was carried out, and an Occupational Health Assessment was done, which reported that no adjustments were required other than the workplace issues being resolved and a phased return. He also pointed out that the claimant had made Ms Smith aware that she was undergoing professional counselling privately. She did not make any request for counselling though it could have been provided if requested.

121. Mr Bowles investigated the claimant's assertion that a shop had been managed by a different Regional Retail Manager than the one responsible for the region in question, and said that he had not found any details of such an arrangement within the previous 3 years, or if it was successful.

122. He said that visiting shops was still a fundamental part of the role of the Regional Retail Manager. He went on:

"There are currently no plans to change the RRM structure of KSC managing region M.

The suggestion made by yourself was a solution, although unfortunately it was not practical in the current climate. A RRM and RCM manager is

responsible for, not just the welfare of the team, but also the financial and performance outputs of the shop. It would be unreasonable to have the responsibility of a shop moved to another RRM that was not even based in the same nation (KSC covers all of Scotland) and one that the team had no knowledge of or were available to visit. The other concern is that it defers the issue of resolving the matters further down the line timewise. It is appreciated that you might be in a better place to handle mediation then but there is a requirement to continue to move the situation forward."

123. Mr Bowles confirmed that it would have been difficult for anyone to have given the claimant assurances about her safety when returning to the same line management, given that the grievance was concluded and the claimant had turned down the opportunity to address these matters through mediation.

124. Finally, he said that inviting the claimant to have time to consider the respondent's job side was normal practice in such circumstances. The employee is in the best position to decide which of the roles they would be best suited to due to location and the skills and qualifications required, he said. He confirmed that had the claimant found a role which she would have been interested in, she would have been given priority assessment on the role.

125. Mr Bowles therefore concluded that the appeal was not upheld.

126. Following the claimant's dismissal, she has been unable to find full time employment, though she did work for some time, part time, as part of the vaccination programme conducted by Angus Council. She sought to apply for a number of jobs, and was interviewed on more than one occasion.

127. She did not apply for any state benefits following her dismissal.

Submissions

128. The respondent presented a written submission, to which Mr Grant-Hutchison spoke. A brief summary of the respondent's submission follows.

129. He submitted that the respondent has accepted that the claimant was a disabled person within the meaning of the Equality Act 2010 at all relevant times. He observed that the claimant's condition deteriorated rapidly from 2019 to March or April 2020.

130. He suggested that the Tribunal faced a particularly difficult task in having to apply three different tests to the claims made by the claimant, of unfair dismissal, discrimination arising from disability and failure to make reasonable adjustments.

131. He addressed the Tribunal on the unfair dismissal claim first. The dismissal was for a potentially fair reason, namely capability (ill-health and absence). He submitted that dismissal was reasonable in the circumstances.

132. Mr Grant-Hutchison argued that the process followed by the respondent was fair and exhaustive, leading to the decision to dismiss. His alternative position was that if the Tribunal did not consider that the claimant was dismissed on the grounds of capability, she was dismissed for some other substantial reason, namely the irretrievable breakdown of her relationship with Ms Stuart-Cox.

133. Addressing the section 15 claim, he submitted that dismissal is potentially an unfavourable act towards the claimant. It is therefore necessary for the respondent to argue that it was a proportionate means of achieving a legitimate aim. That is that the respondent needs a healthy workforce, and cannot have an employee who is so severely ill as the claimant was. It is the Tribunal's view of this that counts, he said – the Tribunal is the "man on the Clapham omnibus". The Tribunal must take into account

what the respondent says about its business and the practices and requirements of that business.

134. In this case the claimant had been absent for 9 months and it was not feasible to facilitate a return to work.

135. Turning then to the claim that the respondent had failed to make reasonable adjustments, the PCP, he submitted, was the legitimate aim of having a healthy workforce. The claimant was ill by the time of her dismissal. The respondent offered a lot, though the claimant does not see that, he said. Mediation and counselling were offered to the claimant. What they could not offer was a new line manager. Even if that had happened before, there is no basis for finding that such an arrangement could fit in with the new cluster structure.

136. So far as the second suggested adjustment was concerned, a suitable alternative role, Mr Grant-Hutchison argued that this was a tautology. The claimant was very candid and said that there were no suitable alternative roles. In any event, she was seriously ill and only had retail experience in Scotland.

137. With regard to remedy, Mr Grant-Hutchison adopted the terms of the counter-schedule produced by the respondent.

138. For the claimant, Mr Lawson also presented a written submission, to which he spoke. Again, a brief summary of that submission follows.

139. The claimant's disabilities are anxiety, depression and stress, and Mr Lawson pointed out that the respondent not only accepts that the claimant was at all times a disabled person, but also that they were aware of that at the time.

140. He submitted that the Tribunal should not find that the reason for dismissal was some other substantial reason. There were actions which the respondent should have taken in order to address that relationship and which they did not.

141. The respondent should have agreed to the claimant's request for a new Regional Retail Manager. In fact, it is now known that Ms Stuart-Cox left that role in November and accordingly the claimant would have been able to return to work without the need for mediation.

142. He submitted that the claimant's evidence should be preferred in the event of conflict with that of the respondent's witnesses, though in general he accepted that the witnesses for both parties were seeking to assist the Tribunal.

143. The respondent is a very large undertaking, and should therefore be held to the highest of standards. The reason for dismissal is certainly due to the claimant's absences, which amounts to a potentially fair reason. It was not in the mind of the decision makers at the time that the reason for dismissal was or could be some other substantial reason, namely the irretrievable breakdown of relationships. The dismissal was all about her absences, caused by her disability.

144. That dismissal therefore amounted to unfavourable treatment under section 15 of the Equality Act 2010. The respondent must demonstrate that it was a proportionate means of achieving a legitimate aim. Mr Lawson submitted that the legitimate aim, of having employees discharge their duties, could have been achieved in a less discriminate, more proportionate way. If the adjustment proposed by the claimant had been put in place, she could have returned to work. The OH report supported the claimant's position that if the workplace situation had been resolved, she could have returned to work.

145. The respondent's position was that by giving the claimant another line manager, that would simply have moved the matter down the line, but Mr Lawson submitted that doing so would have assisted the respondent in achieving its legitimate aim by helping the claimant return to work.

146. So far as the reasonable adjustments claim is concerned, the claimant felt that the respondent could have done more in seeking alternative

employment, though she did feel that there was nothing suitable available.

147. Mr Lawson submitted that putting in place a new Regional Retail Manager for the claimant would have been a reasonable adjustment. It was accepted that they had 8 such managers, and that the role was a more remote role than before. The claimant had previously been line managed by Tracy Pickering, who was based in Northern Ireland. Given the increased use of online communications during the coronavirus pandemic, this is even more practical now.

148. While it may have been inconvenient, the existence of the Regional Cluster Manager would assist in the day to day management of the claimant, and that inconvenience should be disregarded when compared with the requirement of an employer to make an adjustment for a disabled employee. A Regional Retail Manager could manage a shop from outwith their region, given the remote nature of the role, and with the support of the Cluster Manager that could have been overcome.

149. The adjustment was sought on a temporary basis by the claimant, which would allow her to return to work and build up her confidence again. She may then have been better able to face mediation by that stage.

150. The claimant was adamant, he submitted, that she could have returned to work with Ms Smith and bore her no hostility following the grievance.

151. With regard to the second adjustment, Mr Lawson pointed out that it would have been reasonable and possible to have placed the claimant in an alternative role, but that the respondent did no research about this, had over 100 vacancies available and had vacancies in lots of different sectors.

152. Mr Lawson then submitted that the claimant did not fail to mitigate her losses. The Tribunal should adopt the submissions arising out of the claimant's schedule of loss.

The Relevant Law

153. In an unfair dismissal case, it is necessary for the Tribunal to have regard to the statutory provisions of section 98 of ERA. The Tribunal considered the requirements of section 98(1) of the Employment Rights Act 1996 ("ERA"), which sets out the need to establish the reason for the dismissal; section 98(2) of ERA, which sets out the potentially fair reasons for dismissal; and section 98(4) of ERA, which sets out the general test of fairness as expressed as follows:

> *"Where the employer has fulfilled the requirements of sub-section (1), the determination of the question whether the dismissal was fair or unfair (having regard to the reason shown by the employer) –*
>
> > *(a) depends on whether in the circumstances (including the size and administrative resources of the employers undertaking), the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee and*
> >
> > *(b) shall be determined in accordance with the equity and substantial merits of the case."*

154. **DB Schenker Rail (UK) Ltd v John Doolan 2011 WL 2039815** is an EAT decision in which Lady Smith clarified that the well known test in **British Home Stores Ltd v Burchell [1978] IRLR 379** can apply to capability dismissals, and accordingly a Tribunal must consider:

i. whether the respondents genuinely believed in their stated reason;

ii. whether they had reasonable grounds on which to conclude as they did; and

iii. whether it was a reason reached after a reasonable investigation.

155. The EAT has made it clear that the decision to dismiss on the grounds of capability is a managerial, not a medical, one.

156. Section 15 of the Equality Act 2010 provides:

(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.*

157. 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."*

158. Section 21 of the 2010 Act 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.

(3) *A discriminates against a disabled person if A fails to comply with that duty in relation to that person…"*

Discussion and Decision

(1) The claimant brings the following claims:

a. Unfair Dismissal contrary to section 94 and 98 Employment Rights Act 1996

b. **Discrimination arising from a disability contrary to section 15 of the Equality Act 2010**

c. **Failure to make reasonable adjustments contrary to sections 20 and 21 of the Equality Act 2010**

(2) Did the respondent treat the claimant unfavourably? The claimant alleges that her dismissal amounted to unfavourable treatment.

(3) If so, did the respondent treat the claimant unfavourably because of something arising in consequence of her disability?

(4) If so, can the respondent show that that treatment was a proportionate means of achieving a legitimate aim within the meaning of section 15(1)(b) of the Equality Act 2010?

(5) Did the respondent operate a provision, criterion or practice ('PCP') which put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who do not have her disability?

a. **The claimant relies on the PCP of maintaining a satisfactory level of attendance.**

b. **The claimant alleges that the substantial disadvantages were the dismissal, the likelihood of being dismissed and being subject to the absence management process.**

(6) If so, did the respondent know or could they reasonably have been expected to know that the claimant was likely to be at a substantial disadvantage by that PCP when compared with persons who do not have her disability?

(7) If so, did the respondent take such steps as it was reasonable to have taken in order to avoid the disadvantage, in accordance with section 20 of the Equality Act 2010? The claimant alleges that the following adjustments should have been made:

a. **Allocating the claimant a new line manager**

b. **Offering the claimant a suitable alternative role.**

(8) Did the respondent fail to make these adjustments?

(9) If so, was it reasonable for the respondent to make these adjustments?

(10) If the respondent had implemented the adjustments that the claimant contends should have been made, would this have alleviated any disadvantage?

(11) Can the respondent show that the claimant was dismissed for a potentially fair reason for dismissal pursuant to section 98(1) or (2) of the Employment Rights Act 1996? The respondent says that the reason for dismissal was capability, or in the alternative some other substantial reason.

(12) If so, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason for dismissing the claimant pursuant to section 98(4) of the Employment Rights Act 1996?

(13) Did the respondent follow a fair procedure when dismissing the claimant?

(14) In the event that some or all of the claimant's claims are successful:

a. **What financial loss has the claimant suffered?**

b. **What level of compensation should be awarded for injury to feelings?**

c. **Should there be any reduction of the award of compensation?**

159. Before determining these issues, we make some observations about the evidence in this case. Generally, we agree with the parties' legal representatives that the witnesses in this case emerged as genuine and wiling to assist the Tribunal. We found each of the respondent's

witnesses to be entirely straightforward in their evidence, and prepared to concede points where it was appropriate to do so. For example, Mr Bowles rightly raised in evidence, as in his appeal outcome letter, that it was not best practice for the first formal absence review meeting to be conducted by a manager who was at that time the subject of a grievance by the claimant.

160. The claimant's evidence did give rise to some difficulties. We were not in a position to assess her credibility in comparison to Ms Stuart-Cox or Ms Smith, as neither was called as a witness before us. However, there were aspects of the claimant's evidence which caused us concern. We noted that when discussing the issue of whether or not suitable alternative employment was offered to her, she sought to suggest that there were "other vacancies" which were not online but which were not put forward to her (in evidence in chief). When the Employment Judge challenged her about this, she denied that she had said this, but in any event confirmed that she did not mean to say that the respondent had concealed vacancies from her. We were concerned that the claimant was prepared to make such an assertion without foundation and to withdraw it when challenged.

161. We do not find, however, that the claimant was seeking to be deliberately untruthful or unhelpful to us in her evidence. She is plainly a committed and sincere individual, as demonstrated by her long service to the respondent. We formed the impression that she was angry with her former employer, and anxious to convince us that her employer had failed her on a number of levels. This perhaps led her into saying things which she did not entirely mean.

162. Dealing then with the issues before us, we take them in the order set out in the List of Issues.

(2) Did the respondent treat the claimant unfavourably? The claimant alleges that her dismissal amounted to unfavourable treatment.

(3) If so, did the respondent treat the claimant unfavourably because of something arising in consequence of her disability?

(4) If so, can the respondent show that that treatment was a proportionate means of achieving a legitimate aim within the meaning of section 15(1)(b) of the Equality Act 2010?

163. It is admitted by the respondent that the claimant was, at all material times, a disabled person within the meaning of the 2010 Act, and that they were, or ought reasonably to have been, aware of this. Accordingly, we move to address the points above without dwelling on that issue.

164. It is, in our view, correct to say that the respondent treated the claimant unfavourably by dismissing her. Dismissal is an unfavourable act towards an employee, and there is no doubt that it was unfavourable to the claimant. She lost her job, which she had held for a number of years, and which she enjoyed and was committed to.

165. In dismissing her, we also find that she was treated unfavourably because of something arising in consequence of her disability. We address below the reason for dismissal, but it is clear in this case, in our judgment, that the reason for dismissal at the time and based on the minds of the decisions makers revealed in their correspondence was her long term absence from work, and not the breakdown of her working relationships. There is no evidence at all to suggest that that formed part of the reasoning which led to dismissal, and accordingly we are satisfied that the claimant's absence was the reason for her dismissal.

166. Her absence arose in consequence of her disability, which was anxiety and depression. There is clear medical evidence, not disputed by the respondent, that the claimant's absence was related directly to her condition of anxiety and depression, and arose out of circumstances in the workplace. Accordingly, we find that the claimant was dismissed, and thereby treated unfavourably, due to something arising in consequence of her disability.

167. The respondent did assert in their ET3 (paragraph 56)(7) that the reason why the claimant could not return to work was that her relationship with Ms Stuart-Cox had broken down and she had rejected the offer of mediation. This does not alter our view that the claimant's dismissal arose from her disability, which caused her absence. We do not have clear evidence to allow us to conclude that the claimant's absence was not caused by her condition of anxiety and depression. Occupational Health clearly advised that she would not be fit for work until the workplace situation was resolved. However, whatever the steps which may have been suggested in order to resolve the situation, the reason for her continued absence was that she continued to be unfit for work, due to anxiety and depression. That was the cause of her absence, and in our judgment, that was what led to her dismissal.

168. The question which then arises is whether or not dismissal was a proportionate means of achieving a legitimate aim.

169. In submissions, Mr Grant-Hutchison proposed that the legitimate aim was that of having a healthy workforce. However, the ET3 puts forward a different form of words, in paragraph 57 (7), namely that of "having employees that are able to discharge their duties".

170. In our judgment, it is a legitimate aim for an employer to have employees who are able to discharge their duties, or to have a healthy workforce. It is entirely reasonable for an employer to seek to manage the sickness absences of staff in order to secure their effective service, for the advancement of the aims of the business.

171. Did dismissal amount to a proportionate means of achieving that legitimate aim? Essentially, this involves the Tribunal in striking a balance between the discriminatory effects of an act and the legitimate business aims which led to the decision. The Code of Practice on Employment (2011) (to which we were not referred but which provides useful guidance) provides, at 4.31, that it must be an "appropriate and

necessary" means of achieving a legitimate aim; it must be that the same aim could not be achieved by less discriminatory means.

172. Dismissal is a draconian measure, and any employee whose employment is terminated will feel, as the claimant does, that they have been harshly dealt with when their absence arises from an illness or, as in this case, a disability.

173. In our judgment, given that the claimant had been absent for a period of some 9 months, that there was no prospective return date provided by the claimant or her medical or occupational health advisers, that she had rejected the option of mediation to assist with resolving the workplace situation and that there was no suitable alternative employment available to her, it was proportionate in this case for the respondent to take the decision to end the claimant's employment. They were left with little alternative. Had there been any reasonable prospect that the claimant would be able to return to her contracted employment as shop manager, then a less discriminatory solution may have been available to them. However, in all the circumstances, having had the claimant absent from the workplace for a significant period of time without a date upon which she could be expected to return, the respondent was entitled in our judgment to take the step of terminating the claimant's employment. An employer is not required to await the employee's recovery indefinitely, particularly where measures had been suggested whereby the outstanding impediment to her return could be resolved.

174. We note that the claimant rejected mediation, apparently on the basis that she would be unable to face the prospect of discussing matters with the managers concerned. However, there are two important points to be taken into account when considering this matter.

175. Firstly, the claimant rejected mediation when she was advised that her demand that the managers issue a written apology to her as a condition of proceeding with mediation was refused by the respondent. This was, in our view, a quite unreasonable demand. The purpose of mediation is to

seek to resolve matters on a voluntary basis between parties. When one party to that mediation makes it a condition of participation that the other party effectively concedes their point to them, it renders mediation pointless and places a barrier between those parties. Accordingly, the fact that mediation was frustrated cannot be laid as a criticism at the door of the respondent.

176. Secondly, the grievance process, which had been to a hearing and an appeal, had concluded that the claimant's allegations of bullying and harassment had not been upheld. In these circumstances, it would have required the respondent, in effect, to overturn their own grievance process by acceding to the claimant's demands. The respondent had to observe fairness to both the claimant and to her managers. The grievance process had been completed some months before this. It was reasonable for the respondent to regard that aspect of the matter to be closed. The claimant refused to accept that, and sought, in effect, to reopen her complaints in a manner which placed the respondent in an impossible position.

177. In light of these actions by the claimant, it cannot be said that the claimant's inability to return arose due to fault on the part of the respondent. The respondent was therefore entitled to conclude that dismissal was an appropriate course of action, and to find that there was no less discriminatory way of dealing with the matter available to them.

178. Further, the claimant sought to have a different Regional Retail Manager appointed to be her line manager as a condition of her return to work. For reasons which we set out under the next claim, of failure to make reasonable adjustments, we concluded that this did not amount to a reasonable adjustment to take in this case. As a result, we cannot find that there was a less discriminatory approach which the respondent could have taken in these circumstances.

179. Accordingly, we have concluded that the respondent's decision to dismiss the claimant amounted to a proportionate means of achieving a legitimate aim in this case.

(5) Did the respondent operate a provision, criterion or practice ('PCP') which put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who do not have her disability?

a. The claimant relies on the PCP of maintaining a satisfactory level of attendance.

b. The claimant alleges that the substantial disadvantages were the dismissal, the likelihood of being dismissed and being subject to the absence management process.

(6) If so, did the respondent know or could they reasonably have been expected to know that the claimant was likely to be at a substantial disadvantage by that PCP when compared with persons who do not have her disability?

(7) If so, did the respondent take such steps as it was reasonable to have taken in order to avoid the disadvantage, in accordance with section 20 of the Equality Act 2010? The claimant alleges that the following adjustments should have been made:

a. Allocating the claimant a new line manager

b. Offering the claimant a suitable alternative role.

(8) Did the respondent fail to make these adjustments?

(9) If so, was it reasonable for the respondent to make these adjustments?

(10) If the respondent had implemented the adjustments that the claimant contends should have been made, would this have alleviated any disadvantage?

180. In our judgment, the respondent did impose a requirement that staff maintain a satisfactory level of attendance at work, and thereby imposed that as a PCP upon the claimant.

181. The disadvantage to which the claimant, as a person with a disability, was placed was the process which led to her dismissal as a result of the respondent's decision that she did not maintain a satisfactory level of attendance over a period of some 9 months prior to dismissal.

182. It is clear that the respondent did not put in place the adjustments upon which the claimant relies. They did not allocate her a new line manager, nor did they make her any offer of suitable alternative employment.

183. The Tribunal must determine whether these proposed adjustments were reasonable in all the circumstances, however.

184. Firstly, was it a reasonable adjustment that the respondent should have allocated the claimant a new line manager? Mr Lawson put forward a number of attractive arguments to seek to persuade us that it would have been a simple matter for the respondent to have allocated the claimant a new line manager.

185. On the evidence, we considered that the most significant factors to be considered in determining the reasonableness of this adjustment were as follows:

- The Regional Retail Manager is directly responsible not only for the shop or shops managed by the claimant but also for the other shops within the region into which that shop or those shops fall. It is not simply a matter of allocating the shop to a manager and leaving the relationship to grow. Having a manager outwith the relevant region would, in our view, mean that a number of consequences would arise: the Regional Manager would not be aware of the local circumstances in which the shop operated, would not have authority to allocate resources to that shop from the neighbouring areas over which they would have no control, could not provide easy solutions to

that shop without a cumbersome process of cross checking with the Regional Manager responsible for that region, and the possibility for confusion and inefficiency arising is considerable.

- The claimant sought to downplay the effect of her criticisms of Ms Smith as the Regional Cluster Manager, and suggested that she would have no difficulty in working with her on an ongoing basis. We were not persuaded that this was correct. She had made some very strong criticisms of Ms Smith from the earliest stage of her grievance, and her rejection of mediation was fundamentally because she accused not only Ms Stuart-Cox but also Ms Smith of having been untruthful in their statements to the grievance. In our view, removing the Regional Retail Manager would not resolve the issue, and would require the consequent removal of the Regional Cluster Manager as well. In these circumstances, the local knowledge and support available through the Cluster Manager would be lost, and no alternative suggestion was proposed by the claimant to resolve that.

- If the respondent were to take a decision to remove responsibility for line management of the claimant from Ms Stuart-Cox, and also remove management responsibility for the shop from Ms Smith, that would be a significant employment decision to make in relation to those two management employees. Removing a contractual responsibility from such individuals could not be done without proper justification. In this case, the respondent had investigated the grievance raised by the claimant and had not upheld any significant aspect of it. If they had acted to remove responsibility from Ms Stuart-Cox and Ms Smith, they would, in our judgment, have acted in breach of contract, and without any basis for doing so.

186. Taking these factors into account, it was plain, in our judgment, that the allocation of another manager to the claimant was not a reasonable adjustment to be put in place by the respondent. The claimant's proposal only takes account of her own perspective, and fails to understand the difficulties raised both from a practical and from a contractual point of

view. It would be unreasonable to insist that the respondent take such a decision in the context as we have set it out, and accordingly, we reject the claimant's argument that it was a reasonable adjustment to allocate her to a new line manager.

187. Even though the claimant sought to argue that the Regional Manager's role was by nature now more remote, and could have been carried out from another part of the United Kingdom, we were not convinced that those arguments were sufficient to override the difficulties which such a proposal would have caused.

188. Accordingly, the Tribunal finds that the respondent did not fail to make a reasonable adjustment in not allocating the claimant a new line manager, and this claim fails.

189. Secondly, the claimant argues that there was a failure to offer suitable alternative employment to her, presumably prior to the decision to dismiss her.

190. It was a theme of the claimant's evidence that she felt that the onus to find a solution to her problems was always cast back upon her by the respondent, and in this regard, she argued that the respondent failed to take proper steps to secure her suitable alternative employment.

191. However, that is not an accurate reflection of the steps taken by the respondent. When it became apparent, for the first time, that the claimant was willing to consider alternative employment in a different sector of the business, they placed the dismissal process on hold, and agreed with the claimant that they would place before her the list of available vacancies, in order to allow her to identify any in which she was interested. Ms Thurman not only provided that list to her, but also spoke to her between the first and adjourned final review meetings to secure her agreement to this process.

192. Further, the claimant admitted in evidence that there was, on scrutiny of this list, only one vacancy in which she may have had an interest, and

she did not wish to pursue it. Had she expressed an interest in any of the other vacancies, she would have been given priority. She did not.

193. As a result, a general criticism that there was a failure to make a reasonable adjustment by not offering her suitable alternative employment is of little effect. No specific criticism is made of the respondent that there was a suitable vacancy which they failed to put forward. The claimant hinted in evidence that there was another list concealed from her, but clarified later that she did not mean to suggest that.

194. In our judgment, it would be grossly unfair to criticise the respondent for failing to offer to the claimant any suitable alternative employment when the claimant herself has not identified that there was any suitable alternative vacancy which should have been offered to her. They did present to the claimant an open list of vacancies, and in our judgment, that was a reasonable step to take, in order to develop an understanding of the type of vacancy in which she may have been interested. They did not narrow that list down, but invited her to point them in the right direction. The claimant did not take up that opportunity, but it was provided to her nevertheless.

195. In our judgment, the respondent did not fail to make a reasonable adjustment by not offering the claimant any suitable alternative employment, for the reasons we have stated, and accordingly, this claim must fail.

(11) Can the respondent show that the claimant was dismissed for a potentially fair reason for dismissal pursuant to section 98(1) or (2) of the Employment Rights Act 1996? The respondent says that the reason for dismissal was capability, or in the alternative some other substantial reason.

(12) If so, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason for dismissing the claimant pursuant to section 98(4) of the Employment Rights Act 1996?

(13) Did the respondent follow a fair procedure when dismissing the claimant?

196. In our judgment, the respondent did dismiss the claimant for a potentially fair reason, namely capability, on the basis that she had had a significant absence from work due to illness. That was the stated reason on the letter of dismissal. The claimant accepts that that was the reason for her dismissal.

197. The respondent seeks to argue, in the alternative, that she was dismissed for some other substantial reason, that is, the irretrievable breakdown of relationships between herself and her line manager. In our judgment, we cannot find that that was the reason in the minds of the decision makers in this case. They were quite clear that the reason for dismissal related to the claimant's absence, and accordingly there is no basis for a finding that the claimant's dismissal was for any other reason.

198. We then require to consider whether the respondent acted reasonably by considering that a sufficient reason for dismissal. In our judgment, they did. The claimant had been absent for some 9 months, and there was no prospective date for her return to work. The claimant rejected the offer of mediation which may have resolved the workplace issues which were a barrier to her return to work, and at the time of dismissal, by her own admission, she remained significantly unwell and was unquestionably unfit for work.

199. We must consider whether the respondent took reasonable steps to inform themselves of the claimant's condition and its prognosis. In our judgment, they did. They conducted three separate review meetings, in accordance with the sickness absence procedure, and they informed themselves of the claimant's condition by discussing that with her on each occasion, allowing her a full opportunity to explain the nature and impact of her condition upon her, as well as obtaining an Occupational Health assessment which confirmed that she remained unfit for work. At no

stage was there any evidence which suggested that she would be able to return to work within the foreseeable future.

200. We also considered whether the respondents took reasonable steps to avoid the claimant's dismissal. They offered the claimant the possibility of mediation with the managers against whom she had taken her grievance, but she rejected this on the unreasonable basis that she would only participate if the managers were to give her a written apology for her treatment. Given that the respondent could not require such an apology of those managers, since mediation was said to be a voluntary process and they had been cleared by the grievance process, they were not acting unreasonably by refusing to accept the claimant's condition for participation in mediation.

201. We have also rejected the claimant's contention that it would have been reasonable for the respondent to have allocated her a new line manager, but they did give consideration to whether or not that was possible and rejected it, with good reason. We did note that the claimant, at the time in question, acknowledged that it would probably not be possible to be allocated a new line manager, but wanted to raise it anyway.

202. We accepted the evidence of the respondent that there was no precedent for this having been done in the organisation. The claimant's contention on this was vague and unspecific, and the respondent's witnesses were unable to identify any example of a line manager being asked to manage a situation outwith their own region since the restructuring of the business had taken place.

203. Finally, the respondent did seek to establish whether or not the claimant was interested in any of the current vacancies available to her but at no stage did the claimant identify a suitable vacancy or vacancies which she would be interested in taking up. In our judgment, the respondent acted reasonably in this regard.

204. Finally, we are asked to determine whether or not the respondent followed a fair procedure in reaching the decision to dismiss.

205. In our judgment, they did. They followed their own sickness absence policy by conducting three review meetings, and warned the claimant that if her attendance did not improve her employment could be terminated. They invited her to attend each meeting and to be accompanied. She suggested that she was told that Ms Ross, who accompanied her to the meetings, could not speak at all during those meetings. In fact, we concluded that she was told that Ms Ross could not speak for her, in the sense of answering questions instead of the claimant. She was there to assist and support her and there is no evidence to suggest that the claimant was prevented from having access to that support.

206. The one area of criticism of the respondent which we found was that Ms Smith conducted the first review meeting (and indeed the second at a later stage) when she was the subject of the claimant's grievance. We agree with Mr Bowles that this did not amount to best practice, as there may have been seen to be a conflict of interest on the part of Ms Smith.

207. However, it is clear that not only did the claimant not complain about this at the time, but also she did not complain about it before us. She did not object to Ms Smith's involvement when the meetings took place, or in advance, and when asked about it before us, the claimant said that she did not consider that Ms Smith acted in any way inappropriately during or around those meetings, but that her concern was that the respondent may have been in breach of their own policy.

208. Since there is no basis in evidence for us to find that Ms Smith acted in any way improperly in her conduct of those meetings – and indeed the notes of the meetings demonstrate that she acted appropriately throughout – we do not consider that this criticism amounts to such a flaw in the procedure as to render the dismissal unfair.

209. We therefore conclude that the claimant's dismissal was fair in all the circumstances, and that the claimant's claim of unfair dismissal must fail.

210. In light of our conclusions, there is no requirement for us to address the question of remedy.

211. It is therefore our conclusion that the claimant's claims all fail and are consequently dismissed.

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Employment Judge: **M MacLeod**
Date of Judgment: **04 August 2022**
Date sent to parties: **05 August 2022**