Case Number: 2408953/2023

Claimant: Ms Zoe Kitching

Respondent: University Hospitals of Morecambe Bay NHS Foundation Trust

Heard at: Manchester Employment Tribunal

On: 28 - 30 October 2024 and in chambers on 13 November 2024

Before: Employment Judge Childe

Mr Q Colborn

Ms P Owen

REPRESENTATION:

Claimant: In person (assisted by her sister-in-law Ms Kitchup)

Respondent: Ms Senior (Counsel)

JUDGMENT

1. The complaint of failure to make reasonable adjustments for disability is well-founded and succeeds.

2. The complaint of unfair dismissal is well-founded. The claimant was unfairly dismissed.

3. There is no chance that the claimant would have been fairly dismissed in any event.

4. The complaint of unfavourable treatment because of something arising in consequence of disability is well-founded and succeeds.

REASONS

Introduction

1. The claim is about the claimant's dismissal. The respondent's defence is that she was fairly dismissed for a substantial reason which was her historic high levels of sickness absence.
2. The claimant says most of her absence (approximately 85%) related to her mental health conditions and that insufficient account was taken of the causes of these absences and/or alternatives to dismissal. Additionally, the respondent did not properly consider reasonable adjustments such as reducing her shift hours and/or days.
3. We had access to an agreed tribunal bundle which ran to 719 pages.
4. Witness evidence was provided by the claimant herself. From the respondent, we were provided with witness statements from Christopher Brisley, People & OD Business Partner, who supported Dave Passant at the absence dismissal meeting and Dave Sanderson at the appeal meeting, Dave Sanderson, Director of Estates & Facilities Appeal manager and Ruth Bradburn, Patient Environment Site Services Manager and the claimant's line manager. Christopher Brisley did not attend the tribunal to give evidence on behalf of the respondent, but the other witnesses who provided witness statements did.
5. The tribunal adjusted the process to simplify the language used during the hearing to enable the claimant to understood and participate effectively in the hearing. The tribunal agreed that Miss Senior did not need to put complicated documents to the claimant in cross examination, as they could be taken as read.

6. Ms Senior adjusted her cross-examination style by keeping her questions short and presenting them in a simple format, without referring to complicated documents.
7. These adjustments, made due to the claimant's disabilities, enabled the claimant to be placed on equal footing to the respondent.
8. On the first day of the hearing, we dealt with three preliminary matters.

First preliminary matter

9. Firstly, Ms Senior had produced a revised list of issues. This revised list of issues used the issues agreed in the case management hearing in April 2024 as a base but included three types of changes to that list of issues. That amended list of issue was only made available to the claimant shortly before the hearing.
10. The first of the categories of changes was an update to the disability part of the list of issues, to clarify the respondent agreed that the claimant was a disabled person at the relevant time and that the respondent had knowledge that the claimant was a disabled person from August 2019. The claimant agreed to these changes.
11. The second of the categories of changes was amendments to the original list of issues, for completeness. Additional issues were included about whether the recoupment provisions applied for the purposes of the unfair dismissal claim and whether the claimant was time-barred from advancing her reasonable adjustments claim. The tribunal explained that both points were issues the tribunal was bound to consider when determining this case. The claimant agreed to these changes once this had been explained.

12. The third of the categories of change related to the respondent adding an additional reason for dismissal of some other substantial reason (the claimant's historic sickness absence). The claimant was given some time to consider whether she agreed to this change. The tribunal assisted the claimant by indicating that it was unlikely to have any material impact on the merits of the claimant's case as the respondent had already pleaded the reason for the claimant's dismissal was related to her absence. The claimant agreed to this change once this has been explained.
13. Once agreement had been reached on those issues, it was agreed that these would be the issues the Tribunal will determine ("the Issues"). A copy of the Issues is appended to this judgement.
14. The tribunal discussed with the parties and subsequently decided to consider only issues in the Issues that are relevant to liability in this hearing (issues 1, 4 and 5) plus issue 2.2.4 (Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?).
15. In fact, during the course of the hearing, it became apparent that there were further reasonable adjustments relied on by the claimant there were not set out in the Issues. The respondent took no issue with those additional adjustments being raised by the claimant. The respondent had the opportunity to deal with these further adjustments during evidence and Ms Senior addressed the tribunal on those additional adjustments during her submissions, on behalf of the respondent. We refer to these in our analysis and conclusion, below.

Second preliminary issue

16. The second preliminary issue, which was raised by the respondent, was whether the tribunal should take time to watch the video of the final attendance hearing in which the claimant was dismissed. We were told that this video lasted around 40 minutes in total. Alternatively, it was suggested by Ms Senior that she could put specific extracts of video to the claimant in cross examination. The tribunal decided it was disproportionate to watch the video of the final attendance hearing in full. Ms Senior could not identify a specific issue in the Issues which the *watching* of the video would be relevant to and therefore the tribunal did not understand how the watching the video would assist the Tribunal in determining the Issues in this case, particularly when detailed notes were available of this hearing.
17. The tribunal did permit Ms Senior to put specific extracts of video to the claimant in cross examination. We found this to be a more proportionate way to consider this evidence. However, having reflected on the matter at the point of cross examination, Ms Senior chose not to do so.

Third preliminary issue

18. The third preliminary issue, which was raised by the respondent, was an application that the tribunal should decide to have a part heard hearing to enable Mr Brisley to attend the hearing on another occasion. The respondent had already applied for the final hearing to be postponed due to Mr Brisley not been available as he had booked a holiday at the same time as the final hearing,

and this postponement request had been refused. Mr Brisley had chosen to book his holiday after the tribunal had listed this case for a final hearing.

19. The claimant objected to the respondent's application. She said that attending the tribunal was difficult for her for several reasons. Firstly, the claimant's disability meant that it was very stressful for her to attend the final hearing and present her case. The claimant said that she had had to invest significant energy in preparing to attend the tribunal. The claimant was having to travel 60 miles each way to attend the tribunal and was unavailable during that time for her children. The claimant's preference was therefore for the case to be heard within the three days allocated.

20. The tribunal decided that the case would not be part heard and would be managed in a way to complete evidence and submissions within the three days allocated. The tribunal reach this view for the following reasons:

    a. Mr Brisley was not the decision maker in this case. He provided HR advice at the final absence meeting in which the claimant was dismissed and the appeal hearing.

    b. The tribunal has a full witness statement from Mr Brisley although, given the claimant could not cross examine Mr Brisley, we would attach less evidential weight to it.

    c. The tribunal considered Mr Brisley's evidence was relevant to the following Issues.

        i. The reason for dismissal (Issue 1.1). This is documented in the disciplinary outcome letter as the claimant's absences. The claimant accepts that she had significant periods of absence. We have decided we do not need to hear evidence from Mr Brisley

for there to be a fair trial to determine this issue as it can be decided on the documents and Mr Brisley's statement (where relevant).

ii. The reasonableness of the dismissal (Issues 1.2 and 1.3). There are full notes available of the final absence meeting itself. The letter setting out the decision maker's (Mr Passant) decision is comprehensive. Mr Brisley did not make the decision, it was Mr Passant. Taking all of this into account we have decided we do not need to hear evidence from Mr Brisley for there to be a fair trial to determine this issue as it can be decided on the documents and Mr Brisley's statement (where relevant).

iii. Whether the dismissal was a proportionate means of achieving a legitimate aim (Issue 4.4). Firstly, we observe that the respondent accepts the claimant was dismissed because of sickness absence and at least some of that sickness absence relates to the claimant disability (Issues 4.1 – 4.3). The focus of our enquirie is therefore on whether the decision to dismiss the claimant was a proportionate means of achieving a legitimate aim (Issue 4.4). The legitimate aim relied on is: ensuring acceptable levels of absence among staff members; preventing a disproportionate burden being placed on other staff members due to staff sickness and ensuring sustainable service levels of the respondent are unlikely to be controversial. The issue for us will be to decide for ourselves whether the claimant's dismissal was a proportionate means of achieving those aims. Taking all of this into account we

have decided we do not need to hear evidence from Mr Brisley for there to be a fair trial to determine this issue as it can be decided on the documents, Mr Brisley's statement (where relevant) and evidence available from other witnesses including Mrs Bradburn.

d. The tribunal considered that it would of course be preferable if Mr Brisley was present to provide oral evidence to supplement the documentary available, but for reasons unknown to us, he has chosen to be elsewhere when this case is due to be heard.

e. The tribunal decided it was possible to determine this case fairly based on the documentation and evidence we have, which includes Mr Brisley's witness statement, the contemporaneous notes of the relevant meetings and the decision to dismiss and the other witness evidence available.

f. If we were to say that this case was to go part heard at the outset of the hearing, the claimant would have to come back on another occasion. It is likely to be many months down the line. The claimant has a mental health condition, and this process is stressful. It is not in accordance with the overriding objective to unnecessarily delay this case, by saying at the outset that we will not finish the case and the claimant must come back.

g. Balancing the prejudice to both parties, we concluded that the balance of prejudice favours the claimant, and this case should be heard and submissions made within the three days allocated. We decided we would manage this case accordingly.

21. At the outset of the second day of the hearing the tribunal made a request for a document, referred to in the appeal meeting notes and in paragraph 9 of Mr Sanderson's witness statement, called the Support and Retention of Disabled Employees Policy.
22. The tribunal was initially told that this policy was in fact already in the bundle and was entitled the Disability Leave Policy.
23. Later on during the morning of the second day of the hearing, during the claimant's cross examination, we were told that this document did exist and had in fact replaced the Disability Leave Policy in July 2022. We took a break to enable the claimant, Ms Senior and the Tribunal to read this document. We allowed it to be introduced into evidence and the claimant and respondent's witnesses were questioned on it.

Findings of fact

24. The relevant facts are as follows. Where we have had to resolve any conflict of evidence, we indicate how we have done so at the material point.
25. The claimant was employed as a cleaner at the respondent hospital, and she commenced employment on 3 September 2018. The claimant was a good worker and well-regarded in her role.
26. The claimant worked on the Lancaster Suite in the respondent hospital alongside two other cleaners.
27. There are 148 cleaners in the respondent's hospital.
28. The claimant's line manager was Ruth Bradburn. Her job title was Patient Environment Services Site Services Manager, Royal Lancaster Infirmary.

Attendance Management at Work Policy

29. The respondent has an Attendance Management at Work Policy ("the Absence Policy"). The Absence Policy required managers to ensure sickness absence was appropriately recorded. Under this policy, managers were instructed to refer to the Disability Leave Policy when a member of staff has a known disability or a disability developed whilst they are employed.
30. The Absence Policy contained trigger points for short-term and/or repeated absence. These trigger points were set at 3 episodes in a rolling 6-month period or 2 working weeks (single days or cumulative) in a rolling 12-month period.
31. Long term absence is defined in the Absence Policy as where a colleague has continued absence of four working weeks or more.
32. Under section 4.7.1 of the Absence Policy, where a member of staff exceeded the trigger points outlined in paragraph 30 above, they should be invited to *an extended return to work interview* and an improvement target for their attendance should be set. The Absence Policy leaves the setting of that target to the manager's discretion and simply states '*All targets set should be reasonable and fair with the main aim of supporting the individual to improve their attendance'*.
33. Under section 4.8 of the Absence Policy, where a member of staff has failed to achieve the improvement targets set at an *extended return to work interview* a formal meeting takes place in which a colleague is entitled to be represented and given advance notice of the meeting. The possible outcomes of those formal meetings are extending the improvement target referred to in paragraph 32 above, issuing a *first letter of concern* if initial targets have been breached

or issuing *a final letter of concern* if the first letter of concern has been issued and the targets have been breached.

34. Under section 4.9 of the Absence Policy, if a member of staff has failed to achieve the improvement targets set in a *final letter of concern,* they may be invited to a formal hearing. Again, the member of staff has the right to notice of the meeting and representation at the meeting. Possible outcomes of such meetings are the extension of the final letter of concern, any other reasonable alternative other than dismissal or termination of employment on the grounds of capability due to ill.

35. Section 4.10 of the Absence Policy sets out steps manager should take when managing long-term absence. The policy says *effective management of long-term sickness absence should focus on assisting colleagues to recover and return to work at the earliest opportunity*. The policy directs managers to consider referring such members of staff to the occupational health and well-being service.

36. Section 4.11 of the Absence Policy requires a manager to arrange a case review with the member of staff who is absent due to long-term sickness. The purpose of such a meeting is to discuss the member of staff's illness, discuss any relevant medical advice, identify areas for support, consider reasonable adjustments where a condition is considered within the definition of disability under the Equality Act 2010 and confirm the likely return to work date.

37. Section 4.18 of the Absence Policy refers managers to the disability leave policy for details of the process of supporting members of staff who have a known disability or develop a disability whilst employed. Managers are directed in this section to the requirement to consider reasonable adjustments. Those

adjustments for such members of staff could consist of but are not limited to adjusting hours of work and working pattern, amongst other things.

Support and Retention of Disabled Colleagues

38. From July 2022 the disability leave policy referred to in paragraph 29 was replaced by the Support and Retention of Disabled Colleagues policy ("the Retention Policy").

39. Section 3.4 of the Retention Policy states, in connection with the management of sickness absence related to disability, *Management of sickness absence relating to a disability will focus on what further adjustments will support the individual, and the process will acknowledge that for some disabilities it is reasonable to expect a higher level of absence, or to support a period of extended absence. This will be taken into account before any formal absence management procedures are started …*

40. Section 4.2 of the Retention Policy states: *As an employer we have a legal duty to make reasonable adjustments to make work accessible to someone with a disability. These adjustments may include the following broad areas of consideration:*

- *Working time and flexible working (e.g. adjusted working patterns, home working)*
- *Job design or re-design (allocating some tasks elsewhere and adjusting the job to focus on the things the individual can do)*

41. Section 4.2.3 of the Retention Policy refers to a Health and Well-Being Passport, which is said to be a document used to record the adjustments agreed between a manager and a disabled colleague. This section states: *The*

Health and Wellbeing Passport should be used to record the adjustments agreed between a manager and disabled colleague.

42. Section 4.3.2 of the Retention Policy makes it clear that line managers have responsibility to:

    a. *Ensure that any staff who declares a disability is supported with reasonable adjustments which will enable them to perform to the best of their ability at work.*

    b. *To record Disability Leave and Sick Leave in accordance with the instructions set out in this policy and the Absence Management Policy, and to sensitively manage sickness absence relating to the staff member's disability with a focus on making adjustments which will support better attendance at work and which are reasonable adjustments for their disability.*

43. Section 4.4.3 of the policy states:

    a. *When a member of staff is off sick and the sickness is directly linked to their disability, this must be reported on ESR as sickness absence. However, in order to distinguish it from ordinary non-disability related sickness, it should be marked as "Disability Related";*

    b. *An assessment of reasonable adjustments will be made and a reasonable amount of sickness absence relating to the disability will be considered separately from the normal triggers for absence management. This is in recognition of the fact that some disabilities will inevitably result in higher levels of absence and it is reasonable for the employer to accept this as part of the condition. The managers' focus should move to finding ways to support the individual to maintain a better*

working attendance and to putting adjustments in place which will accommodate this. The management and reporting of sickness absence should be done so in accordance with the Trust's Attendance Management at Work Policy.

c. *It is the manager's responsibility to ensure that when an employee commences a period of absence related to a disability that this is recorded on:*

   i. *Electronic Staff Record (ESR) via manager self-serve*

   ii. *When inputting a period of absence that is related to a disability, the manager will need to tick the 'Disability Related' box. This will ensure that any absence management process will take into account a reasonable adjustment for disability, and will focus on ensuring reasonable adjustments are in place to support attendance at work.*

The claimant's absence and Ruth Bradburn's management of this absence

44. The claimant had six separate periods of absence in 2019 totalling a period of 70 days. One period of absence was for and was recorded as being due to anxiety/depression. Six of those days was due to the claimant sustaining an injury through domestic abuse. The claimant attended an extended return to work meeting on 19 August 2019, with Ruth Bradburn. Ruth Bradburn recorded in the letter dated 19 August 2019, sent to the claimant after the meeting, that she was aware the claimant had been diagnosed with bipolar and also that part of the reason for the claimant's absence in 2019 was due to anxiety.

45. An occupational health report was prepared for the respondent on 28 August 2019 and which informed the respondent that the claimant have been diagnosed with complex mental health issues and that the claimant had a disability under the Equality Act 2010.
46. A second occupational health report dated 27 August 2019 said that the claimant had a disability under the Equality Act 2010.
47. The claimant was placed on a first letter of concern, under the Absence Policy, on 26 November 2019 by Ruth Bradburn due to her absence level in 2019.
48. The claimant had five separate periods of absence from 1 January 2020 to 9 January 2021 for a total of 182 days. All these periods of absence were said to be due to anxiety, stress or depression. The final absence, from 19 September 2022 to 9 January 2021 was for a period of 130 days and was recorded on the claimant's fit note as being due to mixed anxiety and depressive disorder.
49. The respondent was provided with an occupational health report dated 23 September 2020 which said that the claimant had a disability under the Equality Act 2010.
50. On 12 January 2021 the respondent received an occupational health report which said, curiously, that the claimant was not a disabled person within the meaning of the Equality Act 2010.
51. The claimant had an extended return to work meeting with Ruth Bradburn on 9 February 2021, held under the Absence Policy. The claimant was issued with a final letter of concern and trigger points were set by Ruth Bradburn for the claimant to meet. The claimant discussed with Ruth Bradburn reducing her hours of work but remaining on the Lancaster Suite during this meeting.

52. Ruth Bradburn said that the claimant could reduce her hours, but if she did so she could not remain on the Lancaster Suite. The claimant decided that she would find it more anxiety provoking to work in a different area of the hospital, where she didn't know the people or cleaning processes. Therefore, she reluctantly decided to continue to work her current shift pattern on the Lancaster Suite.
53. The evidence Ruth Bradburn gave to the tribunal about why the claimant couldn't work on the Lancaster Suite part time, or for fewer days, was because *"logistically it doesn't work."* Ruth Bradburn did, fairly, agree that she could have trialled an arrangement where the claimant worked fewer hours or part-time, but did not do so.
54. From 10 January 2021 to 7 December 2021 the claimant had 6 separate absences over a total of 28 days. Three of those absences were due to stress or anxiety.
55. The claimant met with Ruth Bradburn 8 July 2021 and the final letter of concern issued on 9 February 2021 was extended.
56. The claimant attended an attendance hearing under the Attendance Policy on 16 September 2021 with David Passant, Divisional Manager Facilities and the final letter of concern issued on 9 February 2021 was extended.
57. Between January 2022 and 6 February 2023, the claimant had eight periods of absence for a total of 72 days. Three of those absences were due to sickness, vomiting, acid reflux or asthma. Two were due to Covid. The remaining two absences were due to a breakdown and mental health issues.
58. The claimant attended an attendance hearing under the Attendance Policy on 8 March 2022 with David Passant and the final letter of concern issued on 9

February 2021 was extended. The decision was taken that the claimant's targets for improvement set would return to the respondent's trigger points set out in the Attendance Policy. These are: 3 episodes in a rolling 6-month period or 2 working weeks (single days or cumulative) in a rolling 12-month period.

59. The claimant had a 53-day period of absence between 8 July 2022 and 29 August 2022 due to a breakdown. This absence is recorded as low mood on the claimant's fit note.

60. The claimant missed occupational health appointments on 30 August 2022 and 6 September 2022 because she was prioritising the medical support she was getting externally to support her mental health and well-being outside of work. The claimant could not manage additional occupational health appointments within work at this time for this reason.

61. On 14 September 2022 the claimant attended an extended absence meeting under the Absence Policy, with Ruth Bradburn. The claimant was issued with a first letter of concern under the Absence Policy. The claimant was informed in this letter that the following targets for improvement had been set: Short term target of zero sickness for the next 3 months.

62. The claimant was absent on 1 November 2022 for seven days due to Covid.

63. The claimant was absent on 23 November 2022 due to stress.

64. The claimant was absent for a 42-day period of absence between 27 December 2022 and 6 February 2023. This is recorded as due to mixed anxiety and depressive disorder in the fit note supplied by the claimant.

65. On 22 February 2023 the claimant attended an extended absence meeting under the Absence Policy, with Ruth Bradburn. The claimant was issued with a

final letter of concern under the Absence Policy. The following targets for improvement were set:

a. Short term target of zero sickness for the next 3 months with the exception of one episode in relation to the claimant's anxiety totalling no more than 5 days.
b. Long term target, to remain within the trust triggers under the Absence Policy for 9 months thereafter.

66. On 13 April 2023 the claimant had one day's absence due to anxiety.
67. On 1 May 2023 to 8 May 2023 the claimant had eight day's absence due to a chest infection.
68. On 17 June 2023 the claimant had one day's absence due to anxiety.
69. At no point during the claimant's employment did Ruth Bradburn form the view that the claimant had a disability as defined in the Equality Act 2010. We don't understand how Ruth Bradburn failed to recognise that the claimant had a disability, given the claimant told the Ruth Bradburn she had bipolar in 2019 (as identified in paragraph 44 above), the clear evidence from occupational health in 2019, 2020 and 2021 that the claimant had a disability as defined in the Equality Act 2010 (as identified in paragraphs 45, 46 and 49 above), and the reason given for the claimant's absence from 2019 to 2023, as set out in her sick notes, which are all connected to mental health issues (as identified in paragraphs 48, 59 and 64 above).
70. Ruth Bradburn agreed in evidence that she did not identify any of the claimant's absences between 2019 and 2023 as being disability related.
71. Ruth Bradburn did not follow the disability leave policy or the Retention Policy when managing the claimant's absence between 2019 and 2023, nor did she

consider that the claimant had a disability under section 4.18 of the Absence Policy.

72. The claimant attended a formal attendance meeting under the Absence Policy, with David Passant on 27 June 2023. The claimant was dismissed at this formal attendance meeting.

73. Prior to this meeting the respondent did not arrange for the claimant to attend occupational health to obtain medical information about the claimant's mental health condition, her diagnosis, prognosis or likely attendance levels in the future.

74. The claimant was dismissed by David Passant on 27 June 2023. We find that the reason for dismissal was because of the totality of the claimant's historic absences from the start of her employment in 2019 to 27 June 2023. We accept the submissions of the respondent that the dismissal letter placed a distinct emphasis on the history of the claimant's absences as being the reason for dismissal. This is supported by Mr Passant's rationale for his decision, set out in paragraphs 17 and 18 of a document entitled "rationale for decision made on 27 June 2023". Mr Passant said in paragraph 18 of this document *"the panel believed that it was important to address Zoe's levels of attendance throughout* ***her whole employment*** *as well as more recently (this information having been provided to the panel). This included 406 days of absence over 29 occasions (approximately a 25% absence rate) of which 113 days and 7 episodes were in the preceding 12 months. The claimant had a significant period of absence during her employment* (our emphasis)*."*

75. In this meeting, the claimant said that she couldn't achieve the target that had been set on 22 February 2023 (referred to in paragraph 65 above) to only have

one bout of sickness with anxiety. The claimant asked for another chance and explained that her absences had been due to mental health. The claimant said it was unnecessary for her to lose her job.

76. Mr Passant did not agree that the claimant had a disability, as defined in the Equality Act 2010, when making his decision to dismiss the claimant. He did not consider an alternative to dismissing the claimant under the Absence Policy, was to manage the claimant under the Retention Policy. Mr Passant was specifically told by Christopher Brisley that the claimant did not have a disability under the Equality Act 2010. According to the notes of the hearing, this was based on the occupational health report dated 12 January 2021, referred to at paragraph 50 above which curiously said the claimant was not a disabled person. This ignored all the other evidence, including occupational health reports and the claimant's own fit notes which either explicitly said the claimant was a disabled person for the purposes of the Equality Act 2010 or made clear reference to mental health conditions which could be a disability for the purposes of the Equality Act 2010, as referred to in paragraph 69 above.
77. The claimant was extremely upset by the decision to dismiss her and the refusal of Mr Passant to recognise that the claimant was a disabled person as defined under the Equality Act 2010. We have accepted the claimant's evidence on this point.
78. The claimant appealed the decision to dismiss on 3 July 2023.
79. Mr Passant allowed the claimant to continue working as bank staff from 27 June 2023 onwards. The claimant worked from the date of her dismissal until 15 August 2023 as bank staff on the Lancaster Suite successfully, without any notable absence. The claimant worked on the same rota, doing the same shift

hours on the same workstation as she had done as an employed member of staff. We've accepted the evidence of the claimant that she did so because she genuinely believed the decision to dismiss would be overturned at appeal and she was able to maintain attendance as she was placed on the Lancaster Suite where she knew the staff and the cleaning needs of that part of the hospital.

80. On 8 August 2023, Angela Kearns, independent sexual violence advisor, who was supporting the claimant wrote an email to Iain Mooney regarding the external support the claimant was receiving to deal with, amongst other things, her mental health and well-being. Angela Kearns said the following in this email:

    1. *I believe that with the correct structures and support in place, Zoe will continue to feel more empowered and will continue to overcome the Trauma and recover from it which will, in turn, improve her Mental Wellbeing and contribute to her being able to continue to be an integral and valued member of staff for the Trust.*
    2. *As a member of the Trust Team, Zoe would continue to be entitled to the Counselling from Occupational Health and also to enhanced support from myself and my colleague, Becky. I hope that as a Trust, we can continue to support and care for Zoe, and to help her find her way through the Trauma and to live a full and happy life, free from the worry and entrapment of the Trauma she has been subjected to and to journey with her on her road to recovery and see the benefits of this in her life and to the patients and team she works so hard to support.*

81. The claimant's appeal was not upheld by David Sanderson, Director of Estates and Facilities and Appeal Hearing Chair, on 15 August 2023. Mr Sanderson did not agree the claimant had a disability as defined in the Equality Act 2010, for

broadly the same reasons as set out in paragraph 76 above. Mr Sanderson was given the same advice from Mr Brisley about whether the claimant would be considered to be a disabled person for the purposes of the Equality Act 2010 as Mr Brisley gave to Mr Passant. Mr Sanderson did not consider the Retention Policy, when deciding whether to overturn the decision to dismiss. Mr Sanderson could not recall when giving evidence whether he considered the Retention Policy, despite Win Robertson, Union Convener and the claimant's representative at the appeal meeting, specifically making the point that the claimant should be dealt with in accordance with the Retention Policy rather than the Absence Policy, at the appeal meeting.

82. The claimant was extremely upset after the decision was taken at appeal not to overturn the original decision to dismiss. We've accepted the claimant's evidence that she felt that she had been dismissed twice. The claimant felt that her mental health disability had been ignored by Mr Sanderson and she had not been heard by him as a result. The claimant felt unable to continue to work for the respondent as bank staff because staff members at the hospital were telling her that it wasn't right to sack her due to ill health, but to say she was well enough to work on the bank and ultimately she felt she didn't belong any more. The claimant was able to work one shift as bank on 13 November 2023, but after that point she could not do any further work for the respondent because of the way she had been treated by the respondent.

83. We accept the claimant's evidence that the respondent's decision to dismiss the claimant and the decision not to overturn that dismissal on appeal "knocked the wind out of her" and had a negative impact on her mental health and well-being, in significant part because she considered she was not heard or

understood as a disabled person, nor were her disabilities taken seriously by either Mr Passant or Mr Sanderson.

Relevant Law

Failure to make reasonable adjustments

84. The duty to make reasonable adjustments is found in sections 20 and 21 Equality Act 2010. The relevant parts of these sections state:

20 Duty to make adjustments

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

(2) The duty comprises the following three requirements.

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

21 Failure to comply with duty

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

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

85. It is unique as it requires *positive action* by employers to avoid substantial disadvantage caused to disabled people by aspects of the workplace. To that extent it can require an employer to treat a disabled person more favourably than others are treated.

86. The Equality Act 2010 Statutory Code of Practice on Employment at §6.28 lists factors which might be taken into account when deciding what a 'reasonable step' is:

1. whether taking any particular steps would be effective in preventing the substantial disadvantage;
2. the practicability of the step;
3. the financial and other costs of making the adjustment and the extent of
4. any disruption caused;
5. the extent of the employer's financial or other resources;
6. the availability to the employer of financial or other assistance to help make an adjustment (such as advice through Access to Work); and
7. the type and size of the employer.

Unfair Dismissal

87. The relevant statute is section 98 Employment Rights Act 1996 ('ERA 1996'). The relevant parts of s.98 are as follows:

98 General.

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) … s98 ERA 1996 requires a two-stage analysis:

1. The employer must show the reason or principal reason for the dismissal falls into one of the categories in s98(2) or is s98(1)(b) 'some other substantial reason' ('SOSR').

2. The Tribunal must decide whether it was reasonable of the employer to dismiss the employee for that reason.

88. In *Wilson v Post Office [2000] IRLR 834* at 20-21 the reason for dismissal was the Claimant did not fulfil the requirements of an attendance agreement; this can be SOSR. A two-stage test applies to SOSR dismissals:

1. The employer must demonstrate that the reason could justify dismissal (*Mercia Rubber Mouldings v Lingwood* [1974] I.C.R. 256 at p.257)

2. The Tribunal must then determine if the decision was reasonable in all the circumstances.

89. *Turner v East Midlands Trains Ltd* [2012] EWCA Civ 1470 establishes that:

1. "*When an employment tribunal has to determine whether an employer has acted fairly within the meaning of section 98 of the Employment Rights Act 1996, it applies what is colloquially known as the "band of reasonable responses" test. In other words, it has to ask whether the employer acted within the range of reasonable responses open to a reasonable employer. It is not for the tribunal to substitute its own view for that of the reasonable employer*." (§1)

90. *O'Brien v Bolton St Catherine's Academy* [2017] EWCA Civ 145 establishes:

1. Both the s.94(4) ERA 1996 and the s15 Equality Act 2010 tests are objective;

2. A finding that dismissal was disproportionate for the purposes of s15 Equality Act 2010 can also mean that it was s98(4) unreasonable, Underhill J doubts whether the two tests should lead to different results noting that "*in an*

appropriate context a proportionality test can, and should, accommodate a substantial degree of respect for the judgment of the decision-taker as to his reasonable needs (provided he has acted rationally and responsibly), while insisting that the tribunal is responsible for striking the ultimate balance."

Discrimination arising from disability

91. This claim is brought under section 15 of the Equality Act 2010. This provides:

15 Discrimination arising from disability

(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.

92. In order for the claimant to succeed in his claims under section 15, the following must be made out:

a. there must be unfavourable treatment;
b. there must be something that arises in consequence of the claimant's disability;
c. the unfavourable treatment must be because of (i.e. caused by) the something that arises in consequence of the disability;
d. the alleged discriminator cannot show that the unfavourable treatment is a proportionate means of achieving a legitimate aim.

93. Paragraph 5.20 of the ECHR Code says that employers can often prevent unfavourable treatment which would amount to discrimination arising from disability by taking prompt action to identify and implement reasonable adjustments.

94. Paragraph 5.2.1 of the ECHR Code says that if a respondent has failed to make a reasonable adjustment it will be very difficult for it to show that its unfavourable treatment of the claimant is justified.

95. As to justification, in paragraph 4.27 the code considers the phrase "a proportionate means of achieving a legitimate aim" (albeit it in the context of justification of indirect discrimination) and suggested that the question should be approached in two stages:-

a. is the aim legal and non-discriminatory, and one that represents a real, objective consideration?
b. if so, is the means of achieving it proportionate – that is, appropriate and necessary in all the circumstances?

96. As to that second question, the code goes on in paragraphs 4.30 – 4.32 to explain that this involves a balancing exercise between the discriminatory effect

of the decision as against the reasons for applying it, taking into account all relevant facts.

97. *Griffiths v Secretary of State for Work and Pensions* [2015] EWCA Civ 1265, at §26 suggests:

"Second, it is perfectly possible for a single act of the employer, not amounting to direct discrimination, to constitute a breach of each of the other three forms. An employer who dismisses a disabled employee without making a reasonable adjustment which would have enabled the employee to remain in employment — say allowing him to work part-time — will necessarily have infringed the duty to make adjustments, but in addition the act of dismissal will surely constitute an act of discrimination arising out of disability. The dismissal will be for a reason related to disability and if a potentially reasonable adjustment which might have allowed the employee to remain in employment has not been made, the dismissal will not be justified. Finally, if the PCP, breach of which gives rise to the dismissal, also adversely impacts on a class of disabled people including the claimant, the conditions for establishing indirect discrimination will also be met."

Time limits

98. The relevant section of the Equality Act 2010 is:

s123 Time limits

(1) proceedings on a complaint within section 120 may not be brought after the end of—

(a) the period of 3 months starting with the date of the act to which the complaint relates, or

(b) such other period as the employment tribunal thinks just and equitable.

(3) For the purposes of this section—

(a) conduct extending over a period is to be treated as done at the end of the period;

(b) failure to do something is to be treated as occurring when the person in question decided on it.

(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—

(a) when P does an act inconsistent with doing it, or

(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

99. Per Lord Justice Underhill in *Adedeji v University Hospitals Birmingham NHS Foundation* [2021] EWCA Civ 23 at paragraph 37 *"…The best approach for a tribunal in considering the exercise of the discretion under section 123 (1) (b) is to assess all the factors in the particular case which it considers relevant to whether it is just and equitable to extend time, including in particular (as Holland J notes) "the length of, and the reasons for, the delay…".*

Polkey

100. *Software 2000 Ltd v Andrews* UKEAT/0533/06/DM establishes the following principles in relation to compensation at §54:

1. In assessing compensation the task of the Tribunal is to assess the loss flowing from the dismissal, using its common sense, experience and sense of justice. In the normal case that requires it to assess for how long the employee would have been employed but for the dismissal.
2. If the employer seeks to contend that the employee would or might have ceased to be employed in any event had fair procedures been followed, or alternatively would not have continued in employment indefinitely, it is for him

to adduce any relevant evidence on which he wishes to rely. However, the Tribunal must have regard to all the evidence when making that assessment, including any evidence from the employee himself. (He might, for example, have given evidence that he had intended to retire in the near future).

3. However, there will be circumstances where the nature of the evidence which the employer wishes to adduce, or on which he seeks to rely, is so unreliable that the tribunal may take the view that the whole exercise of seeking to reconstruct what might have been is so riddled with uncertainty that no sensible prediction based on that evidence can properly be made.
4. Whether that is the position is a matter of impression and judgment for the Tribunal. But in reaching that decision the Tribunal must direct itself properly. It must recognise that it should have regard to any material and reliable evidence which might assist it in fixing just compensation, even if there are limits to the extent to which it can confidently predict what might have been; and it must appreciate that a degree of uncertainty is an inevitable feature of the exercise. The mere fact that an element of speculation is involved is not a reason for refusing to have regard to the evidence.

…

5. Having considered the evidence, the Tribunal may determine employment would have continued indefinitely… However, this last finding should be reached only where the evidence that it might have been terminated earlier is so scant that it can effectively be ignored.

Analysis and conclusion

101. We follow numbering in the Issues, in our analysis and conclusion.

5. Reasonable Adjustments (Equality Act 2010 sections 20 & 21)

5.1 Did the respondent know or could it reasonably have been expected to know that the claimant had the disability? From what date?

102. The respondent accepts they knew of the claimant's disability from August 2019.

5.2 A "PCP" is a provision, criterion or practice. Did the respondent have the following PCPs:

5.2.1 Application of the respondent's managing sickness absence policy

103. Yes, they did. This is the Absence Policy.

5.3 Did the application of the managing sickness absence policy put the claimant at a substantial disadvantage compared to someone without the claimant's disability?

104. Yes, it did because someone with the mental health disabilities the claimant has is more likely to have a period of sickness absence and reach the triggers in the Absence Policy, both short and long term. The respondent agreed with this in submissions.

5.5 What steps could have been taken to avoid the disadvantage? The claimant suggests:

Reducing her hours and/or length of shifts

105. The claimant's evidence was that it was easier for her to contemplate coming into work, if she had fewer hours, or fewer shifts to do each week. However, her work had to be on the Lancaster Suite due to the stress and anxiety she would experience, because of her mental health condition, if she were asked to clean in an unfamiliar part of the hospital with unfamiliar colleagues or by herself. The claimant said that work was very important to her and attending work helped with her mental health and well-being.

106. As we have found at paragraph 51 above, the claimant had a discussion with Ruth Bradburn on 9 February 2021 about reducing her hours but remaining on the Lancaster Suite. We have also found at paragraph 52 the Ruth Bradburn

agreed that the claimant could reduce her hours but could not remain on the Lancaster Suite at this time.

107. We accept the claimant's evidence that had she been allowed to remain based at the Lancaster Suite on reduced hours and/or days, her attendance would have improved. We believe the claimant when she says that it was easier for her to contemplate leaving her home, bearing in mind her mental health condition, to go to work knowing that she would not be working all day or all week if she committed to this. The claimant was frank in her evidence about the challenges and stressors in her home life, coupled with her mental health, and we can well understand that the claimant was trying to prioritise these challenges with the need to attend work for the respondent. If the expectations of the respondent, in terms of time input required from the claimant, were less, the claimant could have more easily attended work.

108. We therefore find the proposed adjustment would have been effective in preventing the substantial disadvantage, because the claimant would have attended work more often and therefore would not have triggered the short- or long-term triggers in the Absence Policy.

109. We therefore do not agree with the respondent's submission that the issue for the claimant was she couldn't come back to work *at all* because she had difficulty in leaving the house. As we have found at paragraph 107, the claimant's issue was the prospect of being required to come into work *full-time*.

110. The next question for us is, how easy was it for the respondent and in particular Ruth Bradburn to offer the claimant part time work or fewer days?

111. We already found at paragraph 27 that there are approximately 148 cleaners in the respondent hospital. The respondent also engages cleaners as

bank staff and we have found at paragraph 79 that this is how the claimant was employed after her dismissal. It is also the case that the claimant tended to return to work on a phased basis after her periods of long-term sickness absence.

112. It therefore seems to us, on first review, that it would be relatively easy for Ruth Bradburn to organise the cleaning rota in such a way that the claimant worked part-time or fewer days on the Lancaster Suite. She was able to do this when the claimant turns work on a phased basis. This was surely preferable to the claimant being absent from work due to sickness and Ruth Bradburn having to cover her absence in full.

113. We were unimpressed with Ruth Bradburn's explanation that it would be a *logistical nightmare* to arrange the claimant's rota in this way. Ruth Bradburn gave evidence that part of the problem was because there were three cleaners on the Lancaster Suite, but she did not provide an adequate explanation as to why this made it more difficult for her to find cover for the claimant's hours. Overall, Ruth Bradburn did not explain why this was so adequately to us. Crucially, Ruth Bradburn agreed in evidence that she could have trialled this working arrangement for the claimant but did not do so.

114. Ruth Bradburn was able to offer the claimant part time work in a particular area of the hospital, where she would be cleaning by herself. For the reason set out in paragraph 105, this was not an effective adjustment as it would have made the claimant's mental health worse and would have led to more absences.

115. In the absence of a clear and compelling reason from the respondent as to why it would not be practicable to offer the claimant few hours or fewer shifts,

we find this was a practicable step for them to take. The financial cost would be limited as the claimant would be paid for the work that she was doing only. The disruption would be limited as the claimant's other hours could be covered either by bank staff or by Ruth Bradburn reorganising the rota to provide alternative cover. The respondent is a large NHS hospital with significant financial resources and 148 cleaners, who presumably could be deployed to the Lancaster Suite if necessary to make up the short fall in the claimant's hours.

116. Indeed, this is just the sort of adjustment envisaged in the Retention Policy. We have found at paragraph 40 that the Retention Policy specifically refers to it being a reasonable adjustment to adjust working patterns or allocate some tasks elsewhere. This supports our conclusion that this was a reasonable adjustment for the respondent to do this for the claimant.

117. We find it would have been a reasonable adjustment for the respondent to have made this adjustment and that they failed to do so.

Adjusting sickness absence triggers

118. As we have found at paragraph 61, the claimant was given a short-term absence target of no sicknesses for the following three months, on 14 September 2022.

119. As we have found at paragraphs 62, 63 and 64 the claimant was then absent on three separate occasions, two of which were connected to her mental health disability.

120. Pausing there, rather than permitting the claimant to have a higher level of absence under the Absence Policy due to her disability, as was envisaged in

paragraph 3.4 of the Retention Policy (referred to in paragraph 39 above), Ruth Bradburn did the exact opposite and exercised her discretion under section 4.71 of the Absence Policy to require the claimant to have **less** absence than was envisaged in the Absence Policy. As we say at paragraph 30 above, under section 4.7.1 of the Absence Policy, employees were permitted short-term absences of 3 episodes in a rolling 6-month period.

121. By imposing a lower level of tolerated absence than was envisaged under the Absence Policy, and indeed by requiring the claimant to have no absences due to sickness, Ruth Bradburn placed the claimant at a disadvantage. The claimant triggered the next phase in the Absence Policy, due to the sicknesses referred to at paragraph 119 above, which was a final letter of concern (as set out in section 4.8 of the Absence Policy referred to in paragraph 33 above.)

122. As we have found at paragraph 65, on 22 February 2023 the claimant was issued with a final letter of concern under the Absence Policy and was set a short-term target of zero sicknesses for the next three months with the exception of one episode in relation to the claimant's anxiety totalling no more than 5 days.

123. Again, for the same reason as set out in paragraph 120 above, Ruth Bradburn exercised her discretion under section 4.71 of the Absence Policy to require the claimant to have **less** absence than was envisaged in the Absence Policy.

124. As we have found at paragraphs 66, 67 and 68, the claimant had two separate absences of one day each for anxiety on 13 April 2023 and 17 June 2023 respectively, and one eight day period of absence due to a chest infection.

125. The net result of this was, in accordance with section 4.9 of the Absence Policy, referred to in paragraph 34 above, the claimant was referred to a formal hearing in which she was dismissed because of all her historic absences.

126. We find that it would have been a reasonable adjustment for Ruth Bradburn to have tolerated a higher level of absence from the claimant due to her disability, as envisaged in paragraph 3.4 of the Retention Policy (referred to in paragraph 39 above).

127. The respondent should have taken medical advice from an occupational health provider as to the likely level of absence an individual with the claimant's disabilities might have in the three-month period from 14 September 2022 and if relevant, from 22 February 2023 and should have adjusted the short term triggers under the Absence Policy accordingly.

128. In the absence of such medical evidence available to us about what absence an individual with the claimant's medical condition might be expected to have, we conclude that the absence the claimant actually had during this period was to be expected for someone with the claimant's disabilities and the respondent should have tolerated those absences, as envisaged in paragraph 3.4 of the Retention Policy (referred to in paragraph 39 above).

129. We find that had the respondent made the adjustment set out at 127 above, the claimant would not have been issued with a first or final written warning and would certainly not have been dismissed at a formal meeting, because she would not have triggered the short trigger points under the Absence Policy. We conclude therefore that the proposed adjustment would have been effective to prevent the disadvantage the claimant suffered, which was her dismissal from the respondent under the Absence Management policy.

130. We find this would have been a practical step for the respondent to take. As we have said, it is specifically envisaged in paragraph 3.4 of the Retention Policy (referred to in paragraph 39 above). We do not agree with the respondent's submission that it could not continue to operate the cleaning service in a way that accommodated the claimant's degree of long and short-term sickness absence. As we have said at paragraphs 66, 67, 68 and 79 the claimant was able to work from 22 February 2023 until her dismissal on 27 June 2023 and then for a further three weeks as bank staff until 15 August 2023, with only 10 days absence, of which two were connected to the claimant's disability.

131. We find that the respondent could continue operate their cleaning service and tolerate this level of absence. The respondent was required to balance the needs of the claimant to be allowed to have a higher level of absence due to disability against the needs of the respondent to run an effective cleaning service on Lancaster Suite. Given the level of absence the claimant had during this period, in our judgement the balance favours the respondent tolerating the claimant's absent and not dismissing her.

132. We conclude it would not have been prohibitively disruptive or costly to the respondent, given the size of the respondent organisation and its financial resources, to tolerate a higher level from the claimant due to her disability during this period.

133. We find it would have been a reasonable adjustment for the respondent to have made this adjustment and that they failed to do so.

Permitting higher level of sickness absence overall

134. For the same reasons as set out in paragraphs 118 to 133, we find the respondent should have permitted a high level of sickness absence overall from the claimant and the failure to do so was a failure to make adjustments.

Disability passport

135. Section 4.2.3 of the Retention Policy requires the respondent to record the adjustments agreed between a manager and a disabled colleague in a health and well-being passport.

136. We have set out in paragraphs 105 to 134 above which adjustments the respondent ought to have made.

137. The respondent did not make those adjustments, in breach of their duty to make reasonable adjustments.

138. As we have found at paragraphs 76 and 81 neither Mr Passant nor Mr Sanderson believed the claimant had a disability as defined in the Equality Act 2010. They did not follow the Retention Policy. This is one of the reasons we have found the dismissal to be unfair and discriminatory, as referred to in paragraphs 157 and 162161 below.

139. Had the claimant been provided with a health and well-being passport, this would have prompted and recorded the adjustments that should have been agreed between the claimant and Ruth Bradburn and would have been available to Mr Passant and Mr Sanderson at dismissal stage.

140. We do not agree with the respondent's submission that Ruth Bradburn, or indeed anyone else from the respondent, had already recorded the

adjustments agreed between the claimant and Ruth Bradburn. We find this did not take place.

141. Having a health and well-being passport would have made a real tangible difference to the way the claimant felt about how seriously the respondent took the claimant's mental health disability. It would have provided some validation that the respondent understood the claimant's mental health disability and valued her as an employee with a mental health condition. The claimant gave evidence, which we have accepted, that the respondent's failure to acknowledge that she had a mental health condition was very damaging for her, as we find paragraph 83 above.

142. We find it would have been a reasonable adjustment for the respondent to have made this adjustment and that they failed to do so.

When was a decision taken not to make the reasonable adjustments?

143. We have found that in failing to consider the Retention Policy the respondent failed to consider making any reasonable adjustments including those set out in paragraphs 105 to 142 above. The final time this decision was taken was by Mr Sanderson on 15 August 2023, as we have found at paragraph 152 below.

7. Jurisdiction

7.1 Was the failure to make reasonable adjustments complaint made within the time limit in section 123 of the Equality Act 2010?

Given the date the claim form was presented and the dates of early conciliation, any complaint of discrimination about something that happened before 16 May 2023 may not have been brought in time. The Tribunal will decide:

7.1.1 Did the respondent decide not to make the adjustment, or do an act inconsistent with the making of the adjustment? If so, the time limit begins to run from this point.

144. We have found in 143 above that the final time the respondent decided not to make the reasonable adjustments proposed by the claimant was on 15 August 2023. The claimant reasonable adjustment claim was therefore brought within time as the time limit runs from 15 August 2023 which is after 16 May 2023.

1. Unfair dismissal

1.1 What was the reason or principal reason for dismissal? The respondent says the reason was new to the claimant's sickness absence record, which was a substantial reason justifying the claimant's dismissal.

145. We have found at paragraph 74 above that the reason for the claimant's dismissal was because of the claimant's historic absences.

146. We have been taken to the authority of *Wilson v Post Office [2000] IRLR 834 at 20-21* which states the reason for dismissal was the Claimant did not fulfil the requirements of an attendance agreement, which can be identified as some other substantial reason.

147. We find that the claimant historic absences could justify the claimant's dismissal in this case. They were substantial absences over a sustained period.

1.2 If the reason was some other substantial reason, did the respondent act reasonably or unreasonably in all the circumstances, including the respondent's size and administrative resources, in treating that as a sufficient reason to dismiss the claimant?

148. No, we find that the respondent did not act reasonably in treating that as a sufficient reason for dismissing the claimant in the circumstances. The claimant's dismissal was unfair for the following reasons.

149. At no time during the dismissal meeting or appeal meeting did the respondent agree that the claimant was a disabled person, within the meaning of the Equality Act 2010, which led to an unfair and fundamentally flawed and discriminatory decision to dismiss the claim, which was not one open to a reasonable employer.

150. There was a wealth of medical evidence available to Mr Passant and Mr Sanderson that the claimant was a disabled person, within the meaning of the Equality Act 2010, as we have found at paragraph 69 above. We were particularly surprised that Christopher Brisley advised Mr Passant, that the claimant was not a disabled person, within the meaning of the Equality Act 2010. The decision to deny that the claimant was disabled was irrational and wrong, given the medical evidence available to the contrary.

151. It appears from the contemporaneous notes that Christopher Brisley seized on the occupational health report from 12 January 2021, referred to in paragraph 50 above, which we have found curiously suggested the claimant was not a disabled person for the purposes of the Equality Act 2010. However, in choosing to look at this one occupational health report in isolation, Christopher Brisley ignored the wealth of other information available to the respondent at the time that clearly demonstrated the claimant was disabled person for the purposes of the Equality Act 2010. Every other occupational health report available to the respondent said the claimant was a disabled person for the purposes of the Equality Act 2010. We have identified in paragraph 69 the information available to the respondent which ought to have identified to anyone with HR experience that the claimant's mental health condition could amount to a disability. The respondent chose not to commission an occupational health report shortly prior to dismissal, which would have provided Mr Passant with clear information that the claimant was a disabled person for the purposes of the Equality Act 2010. We

find there was a complete lack of an enquiring mind into whether the claimant was disabled or not for the purposes of the Equality Act 2010 and this set the tone for the unreasonableness of the decision to dismiss the claimant.

152. The effect of this decision was that neither Mr Passant nor Mr Sanderson gave any consideration to whether the claimant's attendance should be managed in accordance with the Retention Policy. We have found at paragraph 74 that the Retention Policy was not considered by them.

153. As we have found at paragraph 37 above, section 4.18 of the Absence Policy requires managers to follow the disability leave policy (which we have found at paragraph 38 became the Retention Policy from July 2022), when managing staff who have a known disability. We find it was unreasonable of neither Mr Passant nor Mr Sanderson to take this approach as it should have been clear to them that, given the claimant was a disabled person, that she should have been managed in accordance with the Retention Policy.

154. The net result of this is that neither Mr Passant nor Mr Sanderson gave any consideration to which of the claimant's historic absences were connected to her disability. Indeed, given we have found at paragraph 70 that that Ruth Bradburn did not record the claimant absences correctly, in that she didn't identify which of the claimant absences were connected to disability, it was not possible for Mr Passant or Mr Sanderson to know which absences were connected to disability.

155. In fact, based on the document provided to us by the respondent which summarises the claimant's absences from 2019 until June 2023, of the claimant's total absence of 406 days, 59, or 15% appeared to be for non-disability reasons with the vast majority the claimant's absences, 85%, being connected to her disability.

156. As we have found at paragraph 39 above, paragraph 3.4 of the Retention Policy required Mr Passant to consider whether it was reasonable to expect a higher level of absence from the claimant due to her disability or to consider whether the respondent should support an extended level of absence, before commencing the formal absence management procedure. This was not done, and we have found at paragraphs 133 and 134 that this was an unlawful failure to make a reasonable adjustment on the respondent's part.

157. We find that no reasonable employer would have ignored their own Retention Policy and dismissed the claimant, without giving some consideration to the link to those absences to disability and whether:

a. disability related absences should be discounted, as envisaged under the Retention Policy.
b. an extended level of absence should be supported, as envisaged under the Retention Policy.
c. Reasonable adjustments should have been put in place to enable the claimant to improve her attendance, as we set out in paragraphs 105 to 141 above.

158. The unfairness in dismissing the claimant is particularly stark when the claimant's actual absence pattern is analysed. The respondent had tolerated a significant level of absence from the claimant between 2019 and 6 February 2023, as we have set out in paragraphs 44, 48, 54 and 57 above.

159. From 6 February 2023 to the claimant's dismissal on 27 June 2023, the claimant's level of attendance had improved and, as we find at paragraphs 66, 67 and 68 the claimant only had three separate bouts of absence for a total period of 10 days. Two of those instances of absence were for anxiety which we find were connected to the claimant's disability. The third period of absence was for eight days due to a chest infection.

160. Under section 3.4 of the Retention Policy (referred to in paragraph 39), consideration should be given to discounting the two absences for anxiety.

161. We conclude that no reasonable employer would have tolerated the claimant's level of absence until 6 February 2023, and then moved to dismiss the claimant at the point that her attendance had improved and in circumstances where they failed to follow their own Retention Policy and had failed to make reasonable adjustments to support the claimant to attend work effectively (as we set out in paragraphs 105 to 139 above).

162. We have found at paragraphs 174 to 176 that the dismissal of the claimant was unlawful discrimination. The claimant's dismissal was also unfair because no reasonable employer would have subjected the claimant to unlawful discrimination in dismissing her.

2.2.4 Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?

163. We go on to consider the prospect of whether the claimant would have been dismissed fairly on the grounds of her historic absences, in due course.

164. We have found that the claimant's dismissal was substantially unfair but also discriminatory. We do not find that the claimant would have been fairly dismissed due to some other substantial reason, in due course.

165. We have found at paragraph 83 that the decision to dismiss the claimant and not to reverse that decision at appeal, had a significant detrimental impact on the claimant due to her mental health condition.

166. As we find at paragraph 80 above, independent evidence from Angela Kearns on 8 August 2023, shortly before Mr Sanderson took the decision not to overturn the decision to dismiss at appeal, was that the claimant will continue to *improve her Mental Wellbeing and contribute to her being able to continue to be an integral and valued member of staff for the Trust.*

167. We have found at paragraph 79 that the claimant continued to work as bank staff without any sickness absence up until the point that the decision was taken at appeal not to overturn the decision to dismiss.

168. We find, based on this evidence, that had the claimant not been unfairly dismissed and subjected to unlawful discrimination by the respondent, the claimant would have continued working for the respondent, would have maintained an acceptable level of attendance and would not have been dismissed.

169. We therefore conclude that there is no chance the claimant would have been fairly dismissed anyway if a fair procedure been followed.

4. Discrimination arising from disability (Equality Act 2010 section 15)

4.1 Did the respondent treat the claimant unfavourably by: 4.1.1 Dismissing her.

170. Yes they did and the respondent agreed with this in submissions.

4.2 Did the following things arise in consequence of the claimant's disability: 4.2.1 the claimant's sickness absences?

171. Yes, as we have found at paragraph 155 above, 85% of the claimant's absences between 2019 and 2023 were connected to, or in other words arose in consequence of, the claimant's disability. This was again agreed by the respondent in submissions.

4.3 Did the respondent dismiss the claimant because of that sickness absence record?

172. Yes. We have found in paragraph 145 the reason for the claimant's dismissal was because of her historic sickness record. This was again agreed by the respondent in submissions.

4.4 Was the treatment a proportionate means of achieving a legitimate aim?

4.5.1 was the treatment an appropriate and reasonably necessary way to achieve those aims;

4.5.2 could something less discriminatory have been done instead;

4.5.3 how should the needs of the claimant and the respondent be balanced?

173. The aims of the respondent are said to be:

a. Ensuring acceptable levels of absence among staff members;

b. Preventing a disproportionate burden being placed on other staff members due to staff sickness;

c. Ensuring sustainable service levels of the Respondent.

174. We find that to be proportionate, this had to be a forward-looking exercise. In order to achieve the aims set out in paragraph 173 above, the step taken should go some way towards achieving those aims. It could not therefore be a backward-looking process as this would not enable the respondent to determine effectively whether the decision to dismiss would achieve those future aims. It therefore follows that to dismiss purely because of the history of absences, rather than the likelihood or propensity for future absences, cannot in our view be justified.

175. This is particularly so where the respondent did not have any medical information available to it either at dismissal or appeal stage about what the claimant's future attendance might be. No occupational health evidence was requested by the respondent prior to dismissing the claimant, as we have said paragraph 151 above.

176. We find that a more proportionate and less discriminatory step to dismissing the claimant would have been to not dismiss the claimant, but to retain her in employment with certain conditions attached to her continued employment as follows:

a. The respondent obtain advice from occupational health as to the likely level of absence the claimant might have from work over 12 months due to her disability. The trigger points under the Absence Policy be adjusted to reflect this, as envisaged in section 3.4 the Retention Policy identified in paragraph 39 above.

b. The respondent making reasonable adjustments to the claimant's work by allowing her to work fewer hours or days in the Lancaster Suite, as we set out in paragraph 116 above.

4.6 Did the respondent know or could it reasonably have been expected to know that the claimant had the disability? From what date?

177. The respondent accepts they knew of the claimant's disability from August 2019.

Employment Judge Childe

14 November 2024

JUDGMENT SENT TO THE PARTIES ON

21 November 2024

FOR THE TRIBUNAL OFFICE

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IN THE MANCHESTER EMPLOYMENT TRIBUNAL **CASE NO: 2408953/2023**

MS ZOE KITCHING

Claimant

AND

UNIVERSITY HOSPITALS OF MORECAMBE BAY NHS FOUNDATION TRUST

Respondent

REVISED LIST OF ISSUES – 30 OCTOBER 2024

The initial list of issues in the above matter was drawn up by EJ Howard following a Preliminary Hearing on 15 April 2024 [39]. The Respondent provided its amended Grounds of Resistance on 28 May 2024 [46].

Proposed updates to EJ Howard's list have been provided in tracked changes.

The Respondent's position is that the reason for dismissal is a finding of fact to be made by the Tribunal, and following Wilson v Post Office [2000] I.R.L.R. 834 should consider whether the reason or principal reason for dismissal *was capability or some other substantial reason.*

1. Unfair dismissal

1.1 What was the reason or principal reason for dismissal? The respondent says the reason was capability (long term absence), or some other substantial reason (the Claimant's sickness absences). The Tribunal will need to decide what considerations were at the forefront of the employer's mind when dismissing the employee.[1]

1.2 If the reason was capability, assessed by reference to skill, aptitude, health or any other physical or mental quality, did the respondent act reasonably or unreasonably in all the circumstances, including the respondent's size and administrative resources, in treating that as a sufficient reason to dismiss the claimant? The Tribunal's determination whether the dismissal was fair or unfair must be in accordance with equity and the

[1] §61 *Ridge v HM Land Registry* UKEAT/0485/12/DM https://assets.publishing.service.gov.uk/media/5937fccced915d20f8000182/Mr_C_Ridge_v_HM_Land_Registry_UKEAT_0485_12_DM.pdf

substantial merits of the case. It Tribunal will usually decide, in particular, whether:

1.2.1 The respondent genuinely believed the claimant was no longer capable of performing their duties;
1.2.2 The respondent adequately consulted the claimant;
1.2.3 The respondent carried out a reasonable investigation, including finding out about the up-to-date medical position;
1.2.4 Whether the respondent could reasonably be expected to wait longer before dismissing the claimant and/or whether alternatives to dismissal were properly considered.
1.2.5 Whether the respondent adopted a procedurally fair process.
1.2.6 Dismissal was within the range of reasonable responses.

1.3 If the reason was some other substantial reason (the Claimant's absence record),

1.3.1 Could the reason justify dismissal?[2]
1.3.2 If so, did the respondent act reasonably or unreasonably in all the circumstances, including the respondent's size and administrative resources, in treating that as a sufficient reason to dismiss the claimant? The Tribunal's determination whether the dismissal was fair or unfair must be in accordance with equity and the substantial merits of the case.

2. Remedy for unfair dismissal

2.1 The claimant does not seek reinstatement/re-engagement.

2.2 If there is a compensatory award, how much should it be? The Tribunal will decide:

2.2.1 What financial losses has the dismissal caused the claimant?
2.2.2 Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?
2.2.3 If not, for what period of loss should the claimant be compensated?
2.2.4 Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?
2.2.5 If so, should the claimant's compensation be reduced? By how much?

[2] *Mercia Rubber Mouldings v Lingwood* [1974] I.C.R. 256

2.3 What basic award is payable to the claimant, if any?

2.4 Do the Employment Protection (Recoupment of Jobseeker's Allowance & Income Support) Regulations 1996 apply?

3. Disability

3.1 The Respondent has conceded that the Claimant was disabled by reason of PTSD, depression and anxiety and Emotionally Unstable/Borderline Personality Disorder at the material time.

4. Discrimination arising from disability (Equality Act 2010 section 15)

4.1 Did the respondent treat the claimant unfavourably by:

4.1.1 Dismissing her.

4.2 Did the following things arise in consequence of the claimant's disability:

4.2.1 the claimant's sickness absences?

4.3 Did the respondent dismiss the claimant because of that sickness absence record?

4.4 Was the treatment a proportionate means of achieving a legitimate aim?

The Respondent's relies upon the following legitimate aims:
Ensuring acceptable levels of absence among staff members;
Preventing a disproportionate burden being placed on other staff members due to staff sickness;
Ensuring sustainable service levels of the Respondent.

4.5 The Tribunal will decide in particular:

4.5.1 was the treatment an appropriate and reasonably necessary way to achieve those aims;

4.5.2 could something less discriminatory have been done instead;

4.5.3 how should the needs of the claimant and the respondent be balanced?

4.6 The Respondent concedes actual or constructive knowledge of the Claimant's disability from August 2019.

5. Reasonable Adjustments (Equality Act 2010 sections 20 & 21)

5.2 A "PCP" is a provision, criterion or practice. Did the respondent have the following PCPs:

5.2.1 Application of the respondent's managing sickness absence policy

5.3 Did the application of the managing sickness absence policy put the claimant at a substantial disadvantage compared to someone without the claimant's disability?

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

5.5 What steps could have been taken to avoid the disadvantage? The claimant suggests:

5.5.1 Reducing her hours and/or length of shifts

5.6 Was it reasonable for the respondent to have to take those steps?

5.7 Did the respondent fail to take those steps?

6. Remedy for discrimination or victimisation

6.1 Should the Tribunal make a recommendation that the respondent take steps to reduce any adverse effect on the claimant? What should it recommend?

6.2 What financial losses has the discrimination caused the claimant?

6.3 Has the claimant taken reasonable steps to replace lost earnings, for example by looking for another job?

6.4 If not, for what period of loss should the claimant be compensated?

6.5 What injury to feelings has the discrimination caused the claimant and how much compensation should be awarded for that?

6.6 Has the discrimination caused the claimant personal injury and how much compensation should be awarded for that?

6.7 Is there a chance that the claimant's employment would have ended in any event? Should their compensation be reduced as a result?

6.8 Should interest be awarded? How much?

7. Jurisdiction

7.1 Was the failure to make reasonable adjustments complaint made within the time limit in section 123 of the Equality Act 2010?[3]

Given the date the claim form was presented and the dates of early conciliation, any complaint of discrimination about something that happened before 16 May 2023 may not have been brought in time. The Tribunal will decide:

7.1.1 Did the respondent decide not to make the adjustment, or do an act inconsistent with the making of the adjustment? If so, the time limit begins to run from this point.
7.1.2 If not, by when might the respondent have reasonably been expected to make the adjustment? The time limit begins to run from this point.

7.2 If the claim was not brought in time, is it just and equitable for the Employment Tribunal to extent time for the presentation of the complaint pursuant to section 123(1)(b) of the Equality Act 2010?

[3] The test is explained in *Matuszowicz v Kingston upon Hull City Council* [2009] EWCA Civ 22