



EMPLOYMENT TRIBUNALS

Claimants: Miss F Garcia

Respondent: Cumbria County Council

HELD AT: Carlisle

ON: 24 – 26 and
(deliberations) 27
October 2017

BEFORE: Employment Judge B Hodgson
Mr D Wilson
Ms E Cadbury

REPRESENTATION:

Claimant: Mr J Jenkins, Counsel

Respondent: Mr C Adjei, Counsel

RESERVED JUDGMENT

The unanimous Judgment of the Tribunal is that:

1. the claim of unfair dismissal is not well-founded and is dismissed
2. the claim of discrimination arising from disability is not well-founded and is dismissed
3. the claim of failure to make reasonable adjustments is not well-founded and is dismissed
4. the claim of breach of contract is not well-founded and is dismissed

REASONS

Issues

1. At the outset of the Hearing, it was clarified that the claimant's claims of breach of contract (save for the below-mentioned holiday pay issue), harassment, direct discrimination and indirect discrimination were not being pursued by the claimant and, to the extent it was necessary, the claimant consented to such claims being dismissed upon withdrawal.
2. It was also accepted by the respondent that, at all material times, the claimant was a disabled person, as defined, the impairment being categorised as a moderate depressive episode.
3. Accordingly, the parties agreed with the Tribunal that the following claims and issues remained to be determined.

Unfair Dismissal

4. Did the respondent dismiss the claimant for a potentially fair reason, namely capability/"some other substantial reason"?
5. If so, was the dismissal reasonable in all the circumstances?

Disability Arising from Discrimination

6. It is accepted that the respondent dismissed the claimant due to a reason arising in consequence of her disability, namely sickness absence.
7. The respondent accepted that the dismissal amounted to unfavourable treatment.
8. Was the dismissal a proportionate means of achieving a legitimate aim, namely absence management with the aim of ensuring efficiency of service?

Failure to Make Reasonable Adjustments

9. Did the respondent apply one or more of the following PCPs:
 - 9.1 The practice of only offering redeployment within Cumbria Care?
 - 9.2 The practice of counting disability absence towards overall absence for the purpose of the application of the 'positive attendance policy'?
 - 9.3 The practice of not ensuring weekly contact during the claimant's absence?

10. If so, did one or more of the PCPs above put the claimant at a substantial disadvantage in comparison to other persons who were not disabled?
11. If so, did the respondent know that the claimant was put to such a disadvantage?
12. If so, was it reasonable for the respondent to have made the following adjustments:
 - 12.1 To offer the claimant redeployment outside Cumbria Care?
 - 12.2 To have not counted disability absence towards overall absence for the purpose of the application of the 'positive attendance policy'?
 - 12.3 To have ensured weekly contact during the claimant's absence?

Breach of Contract

13. Did the respondent breach the claimant's contract of employment by failing to pay the claimant full holiday pay for the 2012/2013 holiday year?
14. If so, has the claimant waived the breach by accepting part payment? (although this contention was withdrawn by the respondent in their final submissions)

Remedy

15. If the claimant succeeds on one or more claims, to what compensation is she entitled?
16. In the event that the unfair dismissal claim is successful, should the claimant's compensatory award be subject to a *Polkey* reduction, and if so, to what extent?

Facts

17. The Tribunal heard oral evidence from the claimant herself together with supporting evidence from Patricia Atkinson and Lynnette MacPherson, both of whose written witness statements – being unchallenged by the respondent – were taken as read. The respondent called a total of four witnesses to give oral evidence: Ann Pattinson (Supervisor); Irene Maxwell (Manager); Guy van Dichele (at the relevant time, Interim Assistant Director); and Alice Madden (Manager). There was also before the Tribunal an impact witness statement from the claimant (dated 1 April 2016) prepared prior to the respondent's concession that the claimant was a disabled person as defined, together also with the jointly-commissioned Psychiatric Report dated 23 October 2016.
18. The parties had agreed a joint bundle of relevant documents and references within this Judgment to numbered pages are to such bundle as paginated.
19. There was effectively limited disagreement between the parties as to the facts but otherwise the Tribunal reached its conclusions as to the relevant facts on the balance of probabilities having considered all oral and written evidence produced to it.

20. There were a number of interwoven strands throughout the relevant timeline but the Tribunal sets out the facts so far as possible in chronological order.
21. The claimant commenced employment with the respondent on 23 March 1998. Her initial role was a support worker on a relief basis working with adults with learning disabilities.
22. She was employed within what is known as "Cumbria Care". This is the in-house provider for the respondent, providing residential day services and (what are described as) reablement/domiciliary care services across Cumbria. The claimant's role fell under the respondent's Disability and Mental Health team with responsibility for providing day opportunities and support to adults with learning disabilities.
23. From 2010, the claimant held the position of Senior Support Officer and her contract of employment (signed by her on 25 September 2011) is at pages 52 – 64 of the bundle, with "normal working days and hours of attendance" to be "as agreed" but indicating her "normal hours of work" to be "15 per week" (see page 55).
24. From March 2012, her working hours were increased with a further 3 days per week but only on a cover basis owing to staff shortages.
25. In October 2012 there was an agreed amendment to the claimant's contract (see pages 65b – 65d) with an additional 4 hours per week, taking her official hours to 19 per week. She also continued to work the further hours as cover.
26. The respondent has a Positive Attendance Policy ("PAP") which deals with the manner in which sickness absence is managed (see pages 408 – 438). This is to be read in conjunction with the Positive Attendance Guidance Notes/Templates (see pages 439 – 480). This includes an overview for attendance management meetings at both informal and formal stages (see pages 452 – 456). The process commences on an informal basis before moving onto formal stages from 1 to 4.
27. The respondent also operates what is described as an Alternative Employment Programme ("AEP"). Guidance for this Programme is set out at pages 481 – 487. Under "Eligibility Criteria" (see page 481) it is stated that "there are various reasons why an employee may require the support of the AEP. An employee can join the AEP if 5) through ill health or disability, they cannot continue in their current post; or where another post could be more suitable due to their disability with a reasonable adjustment".
28. The Guidance also sets out "Manager responsibilities" and "Employee responsibilities" (page 482).
29. On 28 February 2013 the respondent (specifically Mr David Troughton, Locality Manager) was advised by telephone by a Social Worker that the Safeguarding Team had raised a safeguarding alert as a result of an anonymous allegation of bullying by the claimant on 26 February.

30. The following day, 1 March, the claimant was told of the allegation, that a fact finding exercise would have to be carried out to determine whether a full formal investigation would be necessary and that, in the meantime, the claimant was being asked to take time off work. She was told to treat this as leave but the issues would be dealt with as soon as possible.
31. On 5 March a second allegation of bullying against the claimant was received and Mr Troughton notified the claimant of this on the same day.
32. The claimant was advised that she could be transferred to a different work location whilst the allegations were investigated and a follow up meeting to discuss this was arranged for the next morning.
33. This meeting was with both Mr Troughton and Ms Joanne Laurie, a Team Leader in the team to which the claimant was temporarily transferred, with effect from 11 March.
34. On 27 March, the claimant met with Mr Troughton together with Ms Laurie. This was by way of an investigative discussion.
35. On 2 April, the claimant signed herself off on sick with "stress" (page 66) and subsequently forwarded a fit note dated 3 April identifying "stress at work"(pages 67 – 68).
36. On 11 April the respondent decided, in the light of the preliminary investigation, that there should be a formal disciplinary investigation (pages 70a - b). This was confirmed to the claimant in a telephone call on 12 April.
37. In light of the claimant's absence, Ms Laurie made an Occupational Health referral on 15 April (see pages 71 – 75) and their Report was issued dated 14 May (pages 87 – 88a). This recommended that progress be made with the investigation but that the claimant was not fit to be interviewed face- to-face.
38. The claimant submitted further fit notes, identifying "work related stress and depression", by letter dated 24 April (pages 76 – 78) and 21 May (pages 89 – 90) and she ultimately remained absent for reasons of ill-health through to the end of her employment.
39. By letter dated 4 June, Ms Laurie wrote to the claimant her inviting her to a coffee and catch up on 13 June (page 91), indicating that they would be joined by Mr Troughton at that meeting.
40. At the meeting (page 93), attended also by the claimant's daughter, Mr Troughton handed to the claimant a letter dated 13 June (pages 94 – 95) confirming that there would be a formal investigation followed by a decision as to whether or not formal disciplinary proceedings would be necessary. The claimant confirmed she had another Occupational Health meeting scheduled for July.
41. Occupational Health reported on 15 July indicating that the claimant was not in a position to attend an investigative meeting and recommending that there be a further four sessions of counselling (see pages 102 – 103).

42. On 23 September there was a further referral to Occupational Health by Ms Laurie (pages 108 – 111).
43. The claimant raised a formal grievance by letter dated 25 September 2013 covering a number of issues (see pages 111a – 111b).
44. The claimant was invited to a formal grievance meeting by letter dated 14 October (page 115) which proceeded on 15 October, chaired by Ms Mary Barkhouse (Operations Manager) (pages 116 – 120). The claimant attended with her Trade Union representative. It was subsequently confirmed by letter dated 25 October that an Investigating Officer had been appointed to take the matter forward (page 122).
45. In the meantime, Occupational Health had issued a further report dated 14 October 2013 (pages 113 – 114) which recommended an attempt to take the disciplinary investigation forward by meeting with the claimant, subject to her being appropriately represented.
46. Mr Troughton wrote to the claimant by letter dated 29 October (page 123) indicating that he would wish to move forward with a meeting under the PAP but also recognised that there was an ongoing grievance, and gave the claimant the option to choose the order of those meetings.
47. There was correspondence between the claimant and the respondent dated 12 November and 25 November regarding the accuracy of the notes of the grievance meeting of 15 October, the respondent issuing amended minutes as a consequence (see pages 124a – 124c and 127 – 127b).
48. The respondent produced a Grievance Investigation Report dated 27 January 2014 which partly upheld the claimant's grievance in relation to the manner in which she had been told of the allegations and asked to leave the premises and an indirect breach of confidentiality (pages 134 – 143).
49. There was subsequently a further Occupational Health Report dated 12 February (pages 144 – 145) which recommended taking both the grievance and the disciplinary investigations through to a completion.
50. The claimant, by letter dated 27 February from Ms Annamarie Armstrong (Assistant Locality Manager), was invited to meet under the PAP on 6 March (page 146).
51. The PAP meeting proceeded on 6 March, the claimant being accompanied by her daughter (see respondent's notes at pages 150 – 151). The outcome was summarised in a letter from Ms Armstrong dated 29 April which included a positive attendance plan (see pages 157 – 160). A follow up meeting on 7 May was proposed.
52. Ms Barkhouse (by letter dated 5 March - page 147) invited the claimant to a meeting on 31 March to discuss the outcome of the grievance investigation. At that meeting, at which the claimant was accompanied by her Trade Union representative, the claimant indicated her partial dissatisfaction with the notified

outcome and asked for further investigation to which the respondent agreed (see page 152). The claimant also agreed now to meet in connection with the disciplinary investigation.

53. Accordingly, the claimant received an update from Ms Nancy Douglas (Locality Manager) regarding the disciplinary investigation, dated 7 April (pages 153 – 156), inviting her to an investigative meeting and enclosing a meeting framework. This meeting did not proceed as scheduled on 23 April but went ahead on 1 May, the claimant attending with her Trade Union representative (see pages 211 – 215). The claimant's statement was forwarded to her for approval by letter dated 21 May (page 163a)
54. Ms Barkhouse wrote to the claimant by letter dated 19 May inviting her to a reconvened grievance meeting on 3 June (page 163).
55. By letter dated 2 June, Ms Armstrong wrote further to the claimant inviting her to a Stage 1 Absence Management meeting on 4 June (see pages 165 – 166).
56. Ms Barkhouse met with the claimant and her Trade Union representative on 3 June providing her with feedback following further investigations in regard to the claimant's grievance (see pages 166a – 167). The claimant indicated that she was content that her grievance had now been resolved. This outcome was confirmed by letter dated 5 June from Ms Barkhouse (page 168).
57. On 4 June, Ms Armstrong conducted a Stage 1 Absence Management meeting (see pages 167a – b) at which it was agreed that the claimant would again be referred to Occupational Health. The claimant was offered the opportunity to be placed on the AEP but declined. Possible options for posts returning the claimant to work were proposed for the claimant's consideration. The outcome of the meeting was confirmed by letter dated 24 June enclosing the agreed action plan (see pages 223 – 225).
58. The disciplinary investigation report was concluded by Ms Douglas dated 13 June 2014 (pages 171 – 222). In light of the content of the Report, the conclusion reached was that the claimant's conduct was such that disciplinary action was not appropriate but that the concerns raised should be dealt with under the respondent's Capability Policy (page 227).
59. Mr Troughton wrote to the claimant by letter dated 11 July inviting her to meet on 16 July to be given that outcome (pages 234 – 235).
60. There was a subsequent Occupational Health report dated 23 July 2014 (pages 237 – 238) which advised that, the internal processes having now been completed, the physician did not feel that the barrier to returning to work was now a medical one, that the impression was that the claimant did not feel confident of returning to her previous role but that there was no medical reason why redeployment to another role could not be considered if this was an option.
61. Ms Ann Pattinson (Supervisor) wrote to the claimant by letter dated 21 August inviting her to a Stage 2 Absence Management interview on 26 August (see

pages 239 – 241). This was cancelled by the claimant and rearranged - by subsequent letter dated 9 October 2014 (pages 250 – 251) – to 16 October.

62. The claimant attended the Stage 2 meeting on 16 October which was attended also by Ms Linda Walker (Service Manager). The claimant was accompanied by her daughter.
63. The outcome was confirmed by letter dated 27 October (see pages 252 – 254), setting out the agreed actions and enclosing an action plan.
64. The claimant indicated that she felt the opportunities of returning to work, as had been raised at the Stage 1 meeting, were not an option as she had concerns over returning to the care sector. A further Occupational Health Report was to be requested.
65. The ensuing Occupational Health report is dated 6 November 2014 (pages 271 – 272) and repeats the earlier indication that the reason for continued absence appears to be managerial and organisational. The advisor was unable to predict a return to work date and there were no reasonable adjustments that could be suggested to expedite a return to work at that time.
66. On 11 November 2014 there was a review of Stage 2 meeting chaired by Ms Walker (pages 272a – 272b). At the meeting there was a request from the claimant's Trade Union representative for the respondent to consider whether it could offer the claimant voluntary redundancy. Ms Pattinson confirmed the outcome by letter dated 24 November (pages 275 – 276). Voluntary redundancy in fact ultimately turned out not to be an option available to be offered.
67. Ms Walker also wrote to the claimant by letter dated 20 November (pages 273 – 274) confirming the next stage of the process being a Stage 3 meeting.
68. The timing of the Stage 3 meeting was confirmed by letter from Ms Pattinson dated 12 December (pages 277 – 278).
69. The Stage 3 Absence Management meeting proceeded on 19 December (pages 278a – b and 279). The claimant attended with her Trade Union representative. The discussion centred on the claimant's position that she was unable to work and was looking for an exit strategy. With other possibilities ruled out, it was agreed that the respondent would explore the potential of an ill-health retirement.
70. The outcome was confirmed to the claimant by letter dated 20 January 2015 from Ms Pattinson with an updated action plan (pages 287 – 289).
71. The subsequent Occupational Health Report was dated 10 February (pages 290 – 291). It could not recommend ill-health retirement but indicated that there was no medical reason why redeployment to areas of work outside of support care could not now be considered either within or without the [respondent].
72. Ms Pattinson wrote to the claimant by letter dated 5 March inviting her to a review of Stage 3 meeting (pages 292 – 293).

73. The claimant attended the Stage 3 review meeting on 11 March (pages 294 and 295 – 296) with her Trade Union representative and daughter. The claimant confirmed that her condition had remained unchanged and that she could not envisage a return to work
74. The outcome was confirmed by letter dated 24 March from Ms Pattinson to the claimant (pages 295 – 296). It set out the current options, one of which (by agreement) was not appropriate to be disclosed to the Tribunal, the one remaining being progression to Stage 4. The respondent confirmed that if there was no contact by 10 April to progress any alternatives, the parties would have to move on to Stage 4
75. On 22 June, the claimant's Trade Union representative, Mr Cliff Evans, spoke to the claimant's manager Ms Armstrong indicating the claimant's medical condition had improved such that she considered a return to work would be possible. Ms Armstrong confirmed that this would necessitate a further reference to Occupational Health and the prospect would then be discussed at the next stage of the process, namely stage 4.
76. The claimant was called to the Stage 4 absence management hearing by letter dated 16 July from Irene Maxwell, Manager (pages 317 – 318).
77. In advance of the meeting, the respondent put together a detailed Absence Report (319 – 361).
78. Mr Evans spoke further to Ms Armstrong to advise that, having received the invitation to Stage 4 letter, the claimant felt that she was not now in a position medically to return.
79. The Stage 4 meeting proceeded on 30 July (page 362). Issues were raised on behalf of the claimant as to the process that had been followed up to this point but the Trade Union representative's summary was the claimant could not return to work – however, he did not believe the claimant's employment should be terminated on the grounds of capability but on the grounds of ill-health. After an adjournment, the claimant was advised that the decision was to terminate her employment.
80. By letter dated 30 July Miss Maxwell confirmed the outcome and included the minutes of the meeting. The claimant was advised that the respondent had taken the decision to terminate her employment on the grounds of capability due to health reasons (pages 363 – 364).
81. There was a subsequent Occupational Health Report dated 3 August (and therefore not available at the Stage 4 meeting but referred to in the later appeal hearing) which records the medical assessment as at 23 July, namely that the claimant was unfit to return to work and at that point there was no foreseeable return date. No consideration or adjustments that would facilitate a return to work could be identified.
82. The claimant appealed against her dismissal through her Trade Union by letter dated 8 October (page 370).

83. As a result of the claimant's particular home circumstances, an extension of time was granted allowing the appeal out of time.
84. The appeal proceeded on 1 December, chaired by Mr Guy van Dichele (pages 373 – 383).
85. The outcome of the appeal, which was that it was rejected, was confirmed by letter dated 15 December (pages 386 – 389). Despite the claimant's appeal being rejected, she was offered the possibility of being considered for alternative employment within the respondent for a further period of 12 weeks,
86. The respondent sought to pursue this option with the claimant through her Trade Union representative and then direct (pages 389 a – b, 390 and 391),
87. The claimant responded on 18 January 2016 (page 392) indicating that she had referred the matter to the Employment Tribunal,
88. Further attempts by the respondent, both direct and through her solicitors, to meet with the claimant were not taken up (pages 400 – 407).

Law

89. Section 98 of the Employment Rights Act 1996 deals with unfair dismissal and provides as follows:
 - (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 for more than one the principle reason) for the dismissal; and
 - (b) That it is either a reason falling within sub-section (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) The reason falls within this sub-section if it:
 - (a) Relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do.....
 - (3) In sub-section (2)(a):
 - (a) "capability", in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality.....
 - (4) Where the employer has fulfilled the requirements of sub-section (1) the determination of the question whether the dismissal is 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 employer's 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 equity and the substantial merits of the case.
- 90. With a neutral burden of proof the Tribunal must decide whether the respondent had reasonable grounds to believe the claimant was incapable of doing the job she was employed to do. Helpful cases on fairness in ill health capability dismissals are *Spencer v Paragon Wallpapers* and *East Lindsey DC v Daubney* both of which place emphasis on the need to consult with the employee to give her the opportunity to put forward all relevant facts. Then the employer must decide whether it should wait any longer for the claimant to recover her health having regard to the nature of her illness, the likely duration of her absence and its need to have its work done.
- 91. It is not for the Tribunal to substitute its own view for that of the employer unless the latter falls outside the band of reasonable responses (see *Iceland Frozen Foods v Jones*). This applies to procedural as well as substantive matters (see *Sainsburys v Hitt*).
- 92. Section 15 of the Equality Act 2010 deals with discrimination arising out from disability as follows:
 - (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.
- 93. Section 20(3) of the Equality Act 2010 provides:
 - (2) The first requirement is a requirement, where a provision criterion or practice of A's puts the 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.
- 94. Guidance in this regard is given in the case of *Environment Agency v Rowan*. As well as identifying the offending PCP (and, where appropriate, the identity of non-disabled comparators), the Tribunal must establish the nature and extent of the substantial disadvantage suffered by the disabled employee. Further, it must be clear what "step" the employer has allegedly failed to take to remedy that disadvantage and whether it was reasonable to take that step. *Project Management Institute v Latif* gives guidance on the application of the burden of proof provisions in relation to the duty to make reasonable adjustments.

95. Paragraph 20 of Schedule 8 to the Equality Act 2010 provides

(1) A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know ...

(b) ...that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement

Submissions

96. The parties' representatives produced very helpful written submissions to which they each spoke and the Tribunal gave full consideration to these including the case-law referred to the Tribunal by the respondent's Counsel.

Conclusions

Unfair Dismissal

Did the respondent dismiss the claimant for a potentially fair reason, namely capability/SOSR?

97. This issue was not ultimately challenged on behalf of the claimant. The Tribunal finds that the claimant was in fact dismissed by reason of capability, specifically reference to her health.

If so, was the dismissal reasonable in all the circumstances?

98. The basic overall position is that the claimant was initially absent by reason of ill-health on 2 April 2013 and remained absent until the termination of her employment on 30 July 2015. A total period therefore of approximately two years and four months.

99. The claimant submits, as a general proposition, that the intervening process as a whole was operated largely as a tick box exercise with little in the way of genuine thought given as to how the claimant could be supported back to work. The Tribunal rejects this submission on the basis of the evidence and facts found for reasons to be expounded.

100. The claimant identifies what are described as three primary criticisms. The first of these is that it was unreasonable to decide to start the PAP procedure in February 2014.

101. The claimant's argument is that the PAP envisages an initial meeting after an absence of between six and eight weeks (see page 429). In fact the process was only commenced by the respondent's letter of 27 February 2014.

102. The Tribunal's view is that such timing was not unreasonable on the part of the respondent. There was a series of interlocked processes each of which fed off the others in terms of impact upon timing, coupled with the information the respondent was receiving as to the claimant's medical condition both through

expert medical opinion and direct from the claimant. The respondent was equally potentially open to criticism for starting the process too early had it done so.

103. The second criticism is that the claimant was not adequately supported during the procedure, by reference to both the frequency and quality of the contact maintained by the respondent with the claimant.
104. The Tribunal is referred to the expectation of managers set out in the PAP (page 413) which includes "ensure contact with absent employees is reasonable" but this would be an expectation in the circumstances of long-term absence whether express or not.
105. It is clear that the claimant consistently raised what she considered to be the unacceptable level of contact throughout the period of her absence. It is also correct to say that reference to regular or weekly contact was made in both the PAP action plans and the accompanying pro-forma letters.
106. The Stage 4 Absence Report has a section (pages 322 – 332 and see also pages 339 – 359)) setting out the various contacts made or attempted. The Tribunal notes that, on a number of occasions, attempts to contact the claimant were not responded to or resulted in messages being left on both sides.
107. Interspersed with what may be described as catch up calls, made or attempted, were the frequent more formal exchanges whether concerning the disciplinary process, the grievance process or the PAP process itself.
108. Looking at the position in the round, the Tribunal's conclusion is that it cannot be said that the overall level of contact can be properly categorised as unreasonable in all the given circumstances and cannot be reasonably said to be indicative of a fundamental failure to support the claimant.
109. The third criticism concerns the issue of possible alternative employment.
110. Again the PAP makes a specific reference to what in any event would perhaps be an implied obligation, namely that "managers will do all they can to help an employee return successfully to work" (page 430).
111. As indicated above, the respondent operates the AEP. The claimant was not placed on this. It is agreed between the parties that the claimant was offered the opportunity to be placed on the AEP at the Stage 1 meeting but declined.
112. There was an acceptance by the respondent's witnesses in giving their evidence to the Tribunal that ideally the claimant should have been placed on the AEP.
113. It is correct to say that the claimant, who was represented by a Trade Union representative, at no time after declining the respondent's initial offer, requested to be placed on the AEP. One of the stated manager's responsibilities (page 482) is to arrange any training or support to assist in securing a suitable alternative post. Again, there were no requests made by or on behalf of the claimant along these lines.

114. The first of the stated employee responsibilities is a requirement to "check the Council's current vacancies on a daily basis and submit an application for any jobs they wish to be considered for". Being on the AEP does not give an employee access to any job vacancies that are not otherwise available but assists in the shortlisting and interviewing processes. The claimant's evidence was that at no time during her absence did she endeavour to check any available positions despite having the facility to do so.
115. The claimant's verbal evidence (although not in her witness statement) was that she was advised prior to the start of the Stage 3 meeting and the arrival of her Trade Union representative that no position other than within Cumbria Care could be considered. Assuming that evidence to be correct, the Tribunal concludes that it had no material effect on the overall position. Acknowledging that the possibility of redeployment elsewhere was raised within the various Occupational Health reports, the consistent position of the claimant, and that of her daughter and Trade Union representative, was that she was medically unable to return to any form of work. The focus at both Stage 3 and Stage 4 was on the possible options for an exit strategy. By the time of the appeal, the medical position was further unambiguously confirmed by Occupational Health.
116. The Tribunal, whilst of course alive to the potential impact of timing, notes the response of the claimant to the possibility of being placed on the AEP following her appeal and the position set out by the claimant and the jointly-instructed expert in connection with the (then) potential dispute as to whether or not the claimant was a disabled person.
117. The Tribunal concludes that both in terms of its decision to dismiss and the process followed to reach that decision, the respondent was acting within the band of reasonable responses and actions.

Disability Arising from Discrimination

It is accepted that the respondent dismissed the claimant due to a reason arising in consequence of her disability, namely sickness absence.

118. This is noted.

The respondent accepts that the dismissal amounted to unfavourable treatment.

119. This is noted.

Was the dismissal a proportionate means of achieving a legitimate aim, namely absence management with the aim of ensuring efficiency of service?

120. The aim contended for is as stated above. Such an aim, the respondent correctly submits, was accepted as legitimate in the case of *O'Brien v Bolton St Catherine's Academy*. There is no challenge on behalf of the claimant to the stated aim and it is conceded that it is a legitimate aim.
121. The issue therefore is whether or not the dismissal of the claimant was a proportionate means of achieving that aim.

122. The claimant relies on the arguments pursued in connection with the claim of unfair dismissal with regard to alternative employment. For the reasons set out in that regard, the Tribunal rejects those arguments.

Failure to Make Reasonable Adjustments

Did the respondent apply one or more of the following PCPs:

- i) *The practice of only offering redeployment within Cumbria Care?*
- ii) *The practice of counting disability absence towards overall absence for the purpose of the application of the 'positive attendance policy'?*
- iii) *The practice of not ensuring weekly contact during the claimant's absence?*

123. Given the guidance in *Environment Agency*, the first question is whether all or any of the above amount to a PCP and this was addressed by the Tribunal with counsel for the parties as part of their submissions, with particular regard to the first and third elements of this issue.

124. The Tribunal noted that there is an expectation for there to be an element of repetition to give rise to a "practice" (see *Nottingham City Transport Limited v Harvey*).

125. With regard to the first proposition, there is in fact an actual provision, namely the AEP. The argument pursued on behalf of the claimant is counter-intuitive in that it appears to be alleged that the claimant was treated – individually – other than under the general provision of placing those in her circumstances on the AEP. There was no evidence produced to the Tribunal, or suggested (other than a vague indication that the fact that it occurred may mean it had wider application), that such a step had been applied to others.

126. Similarly with regard to the third proposition, which appears to be an allegation that, insofar as its specific treatment of the claimant is concerned, the respondent has gone outside of the provisions of its PAP. Again, the only counter was that the fact of (alleged) lack of contact was perhaps indicative of a wider practice.

127. On the evidence, the Tribunal's conclusion was that, whilst the respondent did "apply" the actions contended for, neither of those two alleged practices amounted to a PCP. The Tribunal, notwithstanding, considered the remaining issues including these matters

128. The second proposition was accepted on behalf of the respondent as amounting to a "practice".

If so, did one or more of the PCPs above put the claimant at a substantial disadvantage in comparison to other persons who were not disabled?

129. The Tribunal, following through the logic, does not see – were only offering redeployment within Cumbria Care to amount to a practice – how it can be said

to put the claimant to a substantial disadvantage in comparison with persons who are not disabled. As referred to in the AEP, there may be a number of reasons why redeployment for any given employee may fall to be considered. The Tribunal comes to the same conclusion with regard to the third proposition concerning the level of contact.

130. It is conceded by the respondent that counting disability absence towards overall absence for the purpose of the application of the PAP does put the claimant at a substantial disadvantage.

If so, did the respondent know that the claimant was put to such a disadvantage?

131. The respondent argues the narrow point that it had knowledge save only in respect of the alleged practice of not ensuring weekly contact and limited to the likelihood of the claimant being placed at a disadvantage.

132. The Tribunal rejects the respondent's argument in this regard as a stand-alone proposition. The claimant consistently raised concerns over the level of contact during the internal processes.

If so, was it reasonable for the respondent to have made the following adjustments:

- i) *To offer the claimant redeployment outside Cumbria Care?*
- ii) *To have not counted disability absence towards overall absence for the purpose of the application of the 'positive attendance policy'?*
- iii) *To have ensured weekly contact during the claimant's absence?*

133. The Tribunal concludes that it would not have been a reasonable adjustment to have offered the claimant redeployment outside of Cumbria Care. As referred to above, there is ample evidence that this would have made no difference to the claimant's position and her ultimate dismissal or its timing.

134. To have discounted all disability-related absences would result in all the claimant's absences being discounted. Such a step has been held not to be a reasonable adjustment (see *Bray v London Borough of Camden*), the logical consequence being that the employee could be absent throughout the working year without the employer being able to take any action in relation to that absence, and the Tribunal finds accordingly.

135. As with the issue of redeployment, the Tribunal, for the reasons referred to above, concludes that more regular, or weekly, contact with the claimant would not have impacted on the eventual outcome of her dismissal or its timing and would accordingly not have been a reasonable adjustment.

Breach of Contract

Did the respondent breach the claimant's contract of employment by failing to pay the claimant full holiday pay for the 2012/2013 holiday year?

136. This issue is narrowed down to an interpretation of the following wording to be found in the claimant's contract in regard to holiday pay (see page 56):

"You are entitled to leave proportionate to the number of completed day's [sic] service during your annual leave year".

137. The claimant's argument is that this means that holiday pay should be calculated by reference to the actual days worked in practice, whether contractual or otherwise.

138. The respondent's position is that this wording covers the position of starters and leavers in the course of the holiday year when all entitlement is calculated pro-rata to their contractual days actually worked up to or from that point, and this is how they have applied it.

139. The Tribunal prefers as matter of construction the respondent's position. On the face of the claimant's position, any days worked in addition to those contracted, even sporadic and limited, would impact on holiday entitlement and in practical terms for a large organisation like the respondent would be effectively unworkable. There is no suggestion or evidence before the Tribunal that the clause has ever operated in that fashion.

Remedy

If the claimant succeeds on one or more claims, to what compensation is she entitled?

140. In the light of the Tribunal's findings, the issue of remedy does not arise.

In the event that the unfair dismissal claim is successful, should the claimant's compensatory award be subject to a Polkey reduction, and if so, to what extent?

141. The Polkey argument does not fall to be considered in the light of the Tribunal's conclusion that the claimant was not unfairly dismissed.

142. For the sake of completeness however, the Tribunal did proceed to consider this point in the event that its conclusions were found not to be correct.

143. Were it to have been the case that the Tribunal had decided that the defects in process contended for were such that the claimant had been unfairly dismissed, the Tribunal's conclusions were that the primary arguments of timing of PAP, level of contact and the issue of alternative employment – whether taken individually or collectively – would have had no impact on the ultimate decision to dismiss or the claimant's potential for continuing in employment beyond the dismissal date. The Tribunal accordingly would have assessed a 100% Polkey reduction to any compensatory award.

144. The Tribunal had considerable sympathy for the claimant who conducted herself admirably throughout the proceedings. However, on the basis of the above findings, the unanimous conclusion of the Tribunal is that all claims fail and are dismissed.

Employment Judge B Hodgson

Date 22 December 2017

JUDGMENT AND REASONS SENT TO THE PARTIES ON

4 January 2018

FOR THE TRIBUNAL OFFICE