



EMPLOYMENT TRIBUNALS

Claimant: Mrs J Williams

Respondent: Newport City Council

Heard at: Cardiff

On: 20, 21, 24, 25, 26, 27 (in
chambers) and 28 May 2021

Before: Employment Judge S Jenkins
Ms C Peel
Mrs L Owen

Representation:

Claimant: Ms E Misra (Counsel)

Respondent: Mr J Bromige (Counsel)

JUDGMENT

1. The Claimant was not disabled at the relevant times for the purposes of Section 6 of the Equality Act 2010, and her claims of discrimination arising from disability, indirect discrimination on the ground of disability, and failure to make reasonable adjustments therefore fail and are dismissed.
2. The Claimant's claim of victimisation is dismissed on withdrawal.
3. The Claimant was unfairly dismissed and therefore her claim of unfair dismissal succeeds.
4. A remedy hearing will take place on 17 November 2021 to consider what remedy to award in respect of the Claimant's unfair dismissal claim unless that can be agreed between the parties.

REASONS

Background

1. The hearing was listed to consider the Claimant's claims, initially commenced by two separate claim forms. The first was issued on 9 July 2018 when the Claimant was still employed by the Respondent, and raised claims of indirect discrimination on the ground of disability and failure to make reasonable adjustments. The second, issued on 6 February 2019, after the Claimant's employment had ended, raised further claims of indirect discrimination on the ground of disability and failure to make reasonable adjustments, but also raised claims of unfair dismissal, discrimination arising from disability, and victimisation. In the event the Claimant confirmed at the hearing that she was not pursuing the victimisation claim.
2. The hearing took place in person, with only the two non-legal members participating remotely by video. We heard evidence from the Claimant and from Professor Tahir, Consultant Psychiatrist; Mrs Marjorie Devlin, former Senior Practitioner employed by the Respondent; and Mr Andrew Anderson, former Social Worker employed by the Respondent; on her behalf. We heard evidence from Ms Joanne Llewellyn, Service Manager; Ms Sally Anne Jenkins, Head of Children's Service; and Councillor Deborah Davies on behalf of the Respondent.
3. We considered the documents in a bundle spanning 397 pages to which our attention was drawn, and we also considered the written and oral submissions of the parties' representatives.

Issues

4. The issues that we had to consider in relation to the Claimant's initial claim were comprehensively set out by Employment Judge Vernon in a summary issued following a Preliminary Hearing on 19 September 2018 at paragraphs 14 – 17. No similar step however was taken in respect of the Claimant's second claim. In that regard the issue of whether or not the Claimant was disabled for the purposes of the Equality Act remained, and the issues arising in respect of the indirect discrimination and failure to make reasonable adjustments claims were very similar to those identified by Judge Vernon, being expanded to take into account the Claimant's dismissal.
5. With regard to the claim for discrimination arising from disability, we had to consider whether the dismissal amounted to unfavourable treatment of the Claimant because of something arising in consequence of any disability, which the Respondent could not then show was a proportionate means of achieving a legitimate aim. It was accepted by the Respondent that

dismissal was capable of amounting to unfavourable treatment, and our principle focus would therefore be on the objective justification of that treatment, the legitimate aim contended to be the protection of children at risk.

6. With regard to the unfair dismissal claim, we first had to be satisfied that the Respondent had demonstrated a potentially fair reason for the dismissal, its contended reason being capability in the form of the Claimant's ill health. If we were satisfied about that we then needed to consider whether dismissal for that reason was fair in all the circumstances, applying the provisions of Section 98(4) of the Employment Rights Act 1996.
7. With regard to a dismissal for incapacity, that involved considering whether the Respondent genuinely believed that the Claimant was no longer capable of performing her duties, whether it carried out a reasonable investigation of the Claimant's circumstances, in particular the medical position, whether it adequately consulted with the Claimant, whether it could reasonably be expected to wait longer before dismissing, and whether the decision to dismiss fell within the range of reasonable responses.

Law

8. In terms of the prevailing law much of the relevant law was identified within the issues. However we bore in mind a number of additional principles, but, bearing in mind our conclusion that the Claimant was not disabled at the relevant times, we only set out those relevant to that issue and to the Claimant's claim of unfair dismissal.

Disability

9. With regard to the question of whether the Claimant was disabled at the relevant times, we considered closely the Government Guidance on matters to be taken into account in determining questions relating to the definition of disability ("Guidance"). In that regard we noted that the question of "mental impairment" is to be given its ordinary meaning and can include mental health conditions such as anxiety, and mental health illnesses such as depression and PTSD.
10. The Equality Act 2010 ("Act") provides that "substantial" means more than minor or trivial, and that long-term means that an impairment must have lasted for at least 12 months or be likely to have lasted for at least 12 months, that being determined at the date of the alleged discriminatory act or acts and not the date of the hearing. The Guidance, echoing the House of Lords decision in SCA Packaging -v- Boyle [2009] ICR 1056, notes that

“likely” should be interpreted as meaning that it could well happen rather than something which is probable or more likely than not.

11. The Act also notes that if an impairment ceases to have a substantial adverse effect on a person’s ability to carry out a normal day to day activity it is to be treated as continuing to have that effect if it is likely to recur, “likely” again being assessed on the basis of “could well happen”. The Guidance notes that if the effects are likely to recur beyond 12 months after the first occurrence they are to be treated as long-term. The Guidance also notes that account should only be taken of the circumstances at the time the alleged discrimination took place, and that anything which occurs after that time will not be relevant, echoing the Court of Appeal decision in Richmond Adult Community College -v- McDougall [2008] ICR 431.
12. The question of what are “normal day-to-day activities” must also be assessed by reference to the ordinary meaning of those words. The Guidance notes that they are things that people do on a regular or daily basis, and can include work related activities such as interacting with colleagues and preparing written documents. The Employment Appeal Tribunal (“EAT”), in Patterson -v- The Commissioner for the Police of the Metropolis [2007] ICR 1522, noted that normal day-t- day activities must be interpreted as including activities relevant to professional life, but the EAT also clarified. in Chief Constable of Dumfries and Galloway Constabulary -v- Adams [2009] ICR 1034, that that involves activities found across a range of employment situations.

Unfair dismissal

13. With regard to unfair dismissal, we noted that where a dismissal on the grounds of incapacity arising from long-term illness is involved the Court of Session, in BS -v- Dundee City Council [2014] IRLR 131, noted that the critical issues are whether, in all the circumstances, a reasonable employer would have waited longer before dismissing the employee, the steps taken to discover the employees medical condition and likely prognosis, and the consultation undertaken with the employee about their position.
14. In considering the question of whether an employer can be expected to wait longer, the Tribunal must balance the relevant factors in all the circumstances of the individual case. These include; the availability of other staff to carry out the absent employee’s work, the nature of the illness and its likely length, the cost of continuing to employ the employee, and the size of the employer, all of which need to be balanced against the unsatisfactory situation of having an employee away on lengthy sick leave.

Findings

15. There were no significant disputes between the parties over the material factual matters in this case, and our findings, on the balance of probabilities, where there was any dispute on the factual matters relevant to the issues in this case were as follows:
16. The Claimant began work in the social care sector in 1982 and qualified as a Social Worker in 1989. She started work for the Respondent in September 2011 as a Fostering Officer within its Fostering Team. She was promoted to a Senior Practitioner role in December 2012, initially on a job-sharing basis, continuing with her Fostering Officer role for the other half of her time, and became a full-time Senior Practitioner in July 2013.
17. A job description for the role of Senior Practitioner, produced in September 2012 and issued to the Claimant, included, amongst a number of duties, the requirement to attend court as and when required and to prepare any necessary reports, although an accompanying job requirement document did not include attendance at court as a matter for which experience was required to be demonstrated.
18. A job evaluation document from April 2012 also referred to “representation in court” as part of a Senior Practitioner’s role. A later job description for the role from November 2015 did not include any reference to court attendance but the Claimant confirmed that she did not receive that document, although it was provided to Mr Anderson, who took over the Claimant’s duties on a temporary basis between September 2017 and December 2018.
19. The Claimant confirmed that, apart from in relation to one case in June 2016, she never attended court during her career, and that was not disputed by the Respondent. Similarly, Mrs Devlin, the other Senior Practitioner in the Fostering Team at the time, gave undisputed evidence that in her 19 years with the Respondent she only attended court on two occasions and then only in a supportive capacity and not as a witness.
20. Whilst we were satisfied that attending court was a potential duty of the Claimant in her Senior Practitioner role, we did not consider that it was a core element of her duties, whether before 2015 or afterwards.
21. At the start of 2015 the Fostering Team was given responsibility for undertaking viability assessments. These were assessments of the suitability of, generally, family members to be carers of a particular child, in contrast to the more general assessment of someone as a foster carer to whom an individual child could then subsequently be assigned. A decision made in a viability assessment is capable of being challenged in the Family Court, although it appears that such a challenge is, in reality, quite rare.

Where such a challenge arises, the person who undertook the assessment may be required to attend court to give evidence to explain their decision.

22. From January 2015, the viability assessments were undertaken by social workers within the Claimant's team, although not by the Claimant herself. She allocated assessments to the social workers and supervised them, but did not sign the assessments off. That was done by the then Fostering Team Manager or someone more senior.
23. From January 2015, notwithstanding that viability assessments were undertaken within the Claimant's team, she was not required to attend court apart from in relation to one case in June 2016. On that occasion, the Judge in a particular case required someone from the Respondent to be present and the Claimant, although not involved with the case directly, was asked by the Team Manager to attend. The Claimant's inability to answer the Judge's questions led to the Judge being deeply critical of her and the Claimant recorded the Respondent's Barrister at the time describing her as having been a "human punch bag". The Claimant was significantly impacted by her treatment by the Judge, describing herself as traumatised although she did not take any sickness absence at the time.
24. Following that event, the Claimant continued with her duties and was not required to attend court on any subsequent occasion. The Fostering Team Manager was due to retire at the end of March 2017 and, on 17 March 2017, a meeting took place at which the Claimant was informed that a decision had been taken that she was going to be required to undertake viability assessments following the Team Leader's retirement, and potentially to attend court if any were challenged. The Claimant was broadly unhappy about that direction, feeling that it was not part of her duties and that she had no court experience or training. More acutely however, the Claimant was disturbed by the prospect of having to attend court again, mindful of her experiences of the previous June. As a consequence, the Claimant attended her GP on the following Monday, 20 March 2017, and was signed off as unfit for work for 28 days due to stress at work. In the event she never materially returned to work from that point on.
25. In line with its Management of Attendance policy in relation to absences due to stress, an early referral to Occupational Health was made by the Respondent, and a report from the Respondent's Occupational Health Adviser was issued on 25 April 2017. That recorded the Claimant as not fit for work in any capacity, but that the long-term prognosis was good and that it was expected that the Claimant would make a full recovery.
26. A further report was issued by the Occupational Health Adviser on 13 June 2017. In that, the Claimant was again recorded as unfit for work, the Adviser referring to the Claimant still experiencing debilitating tiredness,

with a timescale for improvement being noted as unclear and potentially taking months rather than weeks. Similar Occupational Health reports were issued on 26 July 2017 and 28 August 2017, continuing to note the Claimant's unfitness for work. In the former report, the Adviser referred to the Claimant saying that her tiredness was gradually improving, but that she was still significantly affected by it on a day to day basis. In the latter however, the Adviser recorded the Claimant saying that her tiredness continued to improve.

27. The latter document also recorded the Claimant's anxiety about doing the viability assessments and attending court arising from her experience in June 2016, and noted that the main problem delaying the Claimant's return was work related stress related to having to produce reports which led her into court. The Occupational Health Adviser recommended a wellbeing referral to Health and Safety, which we observed was never undertaken, and that the Claimant could consider meeting with HR and management to put a plan in place to begin to address the issues causing the stress. The Occupational Health Adviser also advised that a return on a two-week phased basis could be considered and that the Claimant could use annual leave to extend that.
28. Contact had been maintained between the Claimant and the Respondent, principally with Cath Hywood, who had assumed Team Leader responsibility since the start of the Claimant's absence. Records of her contacts with the Claimant over this period, which were not disputed, were in the Bundle. These indicated that on, on 4 July 2017, the Claimant had described herself as "exhausted", and, on 31 July 2017, had described herself as "very tired".
29. However Ms Hywood's notes, starting from 24 August 2017, indicated improvement. On 24 August Ms Hywood recorded the Claimant as "appearing a lot better" and that the Claimant was going to talk about a phased return at her Occupational Health appointment on 29 August. On 31 August Ms Hywood recorded a telephone conversation with the Claimant in which the Claimant indicated that she had discussed with the Occupational Health Adviser a phased return at the end of September 2018. Throughout however, the prospect of having to do viability assessments which might require court attendance impacted on that.
30. A meeting took place between the Claimant, Ms Hywood, and another senior member of the Department, on 2 October 2017. That included a discussion that the Claimant could return on a phased basis when ready to do so and also a confirmation that it would be expected that the Claimant as Senior Practitioner would undertake viability assessments.

31. A further referral to Occupational Health was made on 30 October 2017 and a further report was issued on 19 December 2017. That again recorded that the Claimant was unfit for work in any capacity, and that the timescale for her return was likely to be dependent on the timescale for resolving the work related factors that had led to her stress. The Occupational Health Adviser confirmed that she had written to the Claimant's GP for a report on her condition.
32. Ms Hywood's notes also referred, on 13 December 2017, to the Claimant stating that she was feeling well enough to return but only if there was a change to her conditions of employment which excluded viability assessments and attending court.
33. The GP's response was issued on 27 February 2018. In that, she recorded that the Claimant was likely to make a full recovery as long as she was not required to make court appearances, and that her recovery would be immediate, that there had already been significant improvement in the Claimant's symptoms, and that her prognosis was good in the short, intermediate and long-term as long as she did not have to appear in court.
34. In the meantime however, on 3 January 2018, the Claimant had filed a grievance about being asked to undertake court work. In that she described that, from 20 March 2017 until approximately late August, she had slept, was exhausted and very emotional with the slightest activity leaving her feeling drained. She confirmed that, throughout her absence, she had made it clear that she wanted to return to work and that it was her anxiety surrounding court related reports that prevented that.
35. Ms Llewellyn was assigned to consider the Claimant's grievance, and met with her on 5 February 2018. She then wrote to the Claimant on 8 February noting that there would be a delay in providing the outcome as there was a need to gather further information from the Occupational Health Adviser. In that regard, the Occupational Health Adviser prepared a letter, dated 2 April 2018, noting her conclusion that the Claimant was unlikely to have a disability under the terms of the Equality Act. She then sent a further report, dated 10 April 2018, enclosing the letter from the Claimant's GP, the Claimant having consented to its disclosure, noting that there had been no diagnosis of PTSD, the point having been specifically raised by the Respondent, and repeating the opinion that the Claimant was not likely to be regarded as disabled.
36. Two versions of Ms Llewellyn's grievance outcome were then produced in the bundle, one dated 4 April 2018 and one dated 5 May 2018. Ms Llewellyn in her evidence indicated that her recollection was that she had issued her outcome in May, and an examination of the documents

appeared to support that, as it referred to the Claimant's GP's report of 27 February, which was not received by the Respondent until 10 April.

37. Regardless of the date however, Ms Llewellyn rejected the grievance. She responded to each of the Claimant's raised grounds, but broadly concluded that removal of viability assessments and court related work would not be a reasonable adjustment. She indicated that if the Claimant required support with that then support could be provided including court skills training to facilitate her return.
38. The Claimant appealed Ms Llewellyn's decision and an appeal meeting took place on 5 June 2018 with Mr Dan Jones, a Service Manager, with the appeal not being upheld.
39. Whilst not within the knowledge of the Respondent at the time, the Claimant's solicitors wrote to her GP on 29 June 2018 seeking copies of her patient records and asking several questions relating to the question of whether or not the Claimant was disabled. This included a request to describe the impact the GP would expect the Claimant's condition to have on her ability to perform day to day activities. The GP replied, on 12 July, noting that the Claimant's condition would not affect her ability to perform day to day activities as long as they did not involve making, or considering making, court appearances.
40. On 6 July 2018, a meeting took place between the Claimant, Ms Llewellyn who was seconded to the Fostering Team Manager position in the period April to December 2018, and a member of the Respondent's HR Team. The application of the Respondent's Management of Attendance policy was discussed, which included the possibility of exploring ill health early retirement, mutual termination, or proceeding to an inability hearing to consider the Claimant's continued employment. The Claimant was asked to provide her preferred option by 13 July.
41. The Claimant replied on 16 July 2018, noting that she had, throughout her absence, considered herself able to do her job subject to the adjustment of not being required to attend court, and that she did not think any of the options were viable. She concluded her email by saying that her current Fit Note expired the following day, that she had an appointment with her GP and that she expected to be signed as fit for work, and therefore intended to return following the appointment.
42. Following the GP appointment, a Fit Note was issued saying that the Claimant may be fit for work with adjustments of a phased return over two weeks and of there being no requirement to undertake court related work. Although not able to provide a copy of the Fit Note due to her GP being unable to print it, the Claimant emailed Ms Llewellyn on 17 July 2018 with a

summary of it. The Claimant did then attend work that afternoon but was required to go home as the Fit Note needed to be provided.

43. Ms Llewellyn then emailed the Claimant the following day, noting the content of the Fit Note, but observing that, as had been indicated to the Claimant in the grievance outcome, the Respondent was unable to make adjustments around court work, and therefore that the Claimant was not fit and should return to her GP to obtain a further Fit Note confirming that. Ms Llewellyn also noted that, as the Claimant had confirmed that none of the options under the Management of Attendance policy were acceptable to her, an inability hearing would be arranged. That was initially arranged for 27 July 2018, but was rearranged to 22 August due to Mrs Devlin's absence and inability to attend as the Claimant's companion. It was to be before Ms Jenkins, as the Respondent's Head of Service.
44. In advance of the hearing, Ms Jenkins was provided with format guidelines within which to conduct the inability hearing, which noted that the Chair of such a hearing should consider a number of points, one of these was "*Have all avenues for redeployment, adjustments in working hours, working methods or the physical environment been explored and exhausted?*" In advance of the hearing, Ms Llewellyn prepared a report in which she concluded that the genuineness of the Claimant's absence had never been in question, but that, in order to maintain the consistent and effective operation of the service, her absenteeism could not be sustained.
45. The Claimant also provided a written document in advance of the hearing, in which she summarised her position. She noted that she would be able to return once the adjustment, i.e. the removal of court work, had been implemented, and that she would have been able to return at a much earlier date had that happened earlier. She also noted that she did not consider that the need to attend court was a fundamental part of her role, and that Mr Anderson, who had undertaken her role in the interim, had only completed some four or five 5 viability assessments since September 2017.
46. Ms Jenkins provided her decision to the Claimant on the day of the inability hearing, 22 August 2018, which was that the Claimant's employment should be terminated on the grounds of ill health, but would be delayed for four weeks to enable a redeployment search to be undertaken. She confirmed that in a letter of the same day confirming that the dismissal would be held in obedience until 24 September 2018. She noted that the dismissal was on the grounds that the Claimant was unable to fulfil her role as a Senior Practitioner, that the Respondent was unable to accommodate the removal of work which may require the Claimant to attend court, and that she did not conclude that that was a reasonable adjustment.

47. In the event no alternative position was identified and the Claimant's employment therefore ended on 24 September 2018 and Ms Jenkins wrote to her on that date to confirm that.
48. Ms Jenkins also confirmed the Claimant's ability to appeal her decision, which the Claimant did by letter dated 28 September 2018, contending that Ms Jenkins had failed to take account of medical advice, had failed to make reasonable adjustments, and had failed to properly consider redeployment opportunities.
49. Prior to the appeal, Professor Tahir, in a report dated 14 November 2018, noted that the Claimant was suffering from symptoms which could be classed as PTSD, and which had also suggested a major depressive disorder.
50. An appeal hearing took place on 22 November 2018 before a panel of three Councillors, chaired by Councillor Davies. The panel provided their decision on the day, which was that, although it acknowledged that the Claimant's medical condition was not doubted and that it sympathised with the Claimant's experience at court, it accepted that any role within Social Services, especially at a senior level, came with the likelihood of an appearance at court. The panel concluded that it believed that Ms Jenkins was unable to make reasonable adjustments to prevent future court appearances, and therefore the decision to dismiss the Claimant on the grounds of inability was upheld. Councillor Davies confirmed the panel's decision by letter of the same date.
51. In relation to the question of the Claimant's health, and the impact of her condition on her, the first time that the Claimant was prescribed with anti-depressant medication was in August 2018 after she had been informed that she was to be dismissed.
52. The Claimant's direct evidence of the impact of her condition on her was relatively brief, both in her disability impact statement which she provided on 30 November 2018, and in her witness statement before us, and appeared broadly to tie in with the medical documents, with particular difficulties being identified in the immediate aftermath of the commencement of her sickness absence in March 2017 and then a general improvement in the latter part of 2017. In her disability impact assessment, the Claimant recorded that when she met the Occupational Health Adviser in December 2017, she told her that if it was not for the requirement to undertake court work she felt that she could be back in work. She also referred to battling further with the symptoms after her dismissal.

53. In answer to specific questions from the Tribunal the Claimant confirmed that she had good days and bad days, that she lived alone and did not have assistance with her household tasks.
54. The only other relevant factual matters for us to note from the evidence were; first, that in early 2019 the Respondent set up a new Friends and Family Team, which took over responsibility for viability assessments. Second, that in August 2019 the Respondent transferred an employee from its Safeguarding Hub to the Fostering Team as a Senior Practitioner with no prior experience in that area. That had arisen following the employee's suspension for some eight months arising from a matter in the employee's personal life in relation to which no action was ultimately taken, but where it was considered inappropriate for the employee to return to the Safeguarding Hub.
55. Third, in October/November 2020 the Respondent advertised for a Social Worker in its Safeguarding Hub, a Senior Practitioner in its Safeguarding Hub, and a Consultant Social Worker in its Fostering Team, and only in relation to the first of these did the job description include reference to attendance at court as a core duty, despite the Safeguarding Hub being more of a front line team, and therefore potentially more likely to involve court matters than the Fostering Team.
56. Finally, the Claimant was due to reach her state retirement age of 66 in July 2020.

Conclusions

57. Applying our findings to the issues identified at the outset, and taking into account the prevailing law, our conclusions were as follows.
58. First with regard to the issue of disability, we noted that the Claimant was suffering with a mental health condition at the relevant times. Much of the medical documentation in the bundle referred generically to stress at work, and did not specify the underlying medical condition, but it appeared to us that there was an underlying anxiety disorder as that was specifically referred to in the GP's letter to the Claimant's solicitor of 12 July 2018, and appeared to be referred back to the onset of the Claimant's absence in March 2017.
59. As we noted above, after the dismissal, Professor Tahir, in a report dated 14 November 2018, noted that the Claimant was suffering from symptoms which could be classed as PTSD, and which had also suggested a major depressive disorder, but that did not, in our view, add anything material to our conclusion that the Claimant did have a mental impairment in the form of anxiety at the relevant times.

60. With regard to the question of the longevity of the condition, we were satisfied from the medical material in the Bundle, that the Claimant suffered from it during the relevant times, that is from March 2017, when she commenced her sickness absence, up to the decision that she be dismissed in August 2018.
61. We then considered whether the Claimant's condition had the required substantial adverse effect on her day-to-day activities during that period and we were not satisfied that it had.
62. We noted that the Claimant had been significantly unwell from March 2017 up to broadly the end of August 2017. In her grievance submitted in January 2018, she referred to being exhausted and very emotional during that period, and that the slightest activity had left her feeling drained and that she had little interest or energy to do daily activities. That view appeared to be shared by Ms Hywood, as, as we have noted above, her notes of her contact with the Claimant, which formed part of Ms Llewellyn's report submitted to the inability hearing in August 2018, referred to the Claimant being exhausted on 4 July 2017, and very tired on 31 July 2017. However Ms Hywood's notes, starting from 24 August 2017, indicated improvement. On 24 August Ms Hywood recorded the Claimant as "appearing a lot better" and that the Claimant was going to talk about a phased return at her Occupational Health appointment on 29 August. On 31 August Ms Hywood recorded a telephone conversation with the Claimant in which the Claimant indicated that she had discussed with the Occupational Health Adviser a phased return at the end of September 2018. Throughout however, the prospect of having to do viability assessments which might require court attendance impacted on that.
63. As we have noted, Ms Hywood's notes referred again, on 13 December 2017, to the Claimant stating that she was feeling well enough to return but only if there was a change to her conditions of employment which excluded viability assessments and attending court.
64. Similarly the medical documents in the bundle did not suggest that the Claimant was suffering substantially from her condition from the latter part of 2017 onwards. As we have noted, the Occupational Health letter of 13 June 2017 referred to the Claimant still experiencing debilitating tiredness, and the Occupational Health letter of 26 July 2017 referred to the Claimant saying that her tiredness was gradually improving, but that she was still significantly affected by it on a day to day basis. The Occupational Health letter of 28 August 2017 however recorded the Claimant saying that her tiredness continued to improve.

65. In the earlier Occupational Health letters the Claimant had been recorded as unfit for work due to her symptoms, whereas in the 28 August 2017 letter, whilst the Claimant was still recorded as unfit for work, the Occupational Health Adviser recorded that the main problem delaying her return was the stress related to her having to produce reports leading to court appearances. In this letter, the Occupational Health Adviser referred to potential discussions between the Claimant and the Respondent to address the causes of the stress and that a phased return could then be considered.
66. The Claimant's GP then, in her letter of 27 February 2018, noted that the Claimant would make a full immediate recovery as long as she was not required to make court appearances, and also recorded that there had already been significant improvement in her symptoms and that her prognosis in the short, intermediate and long-term was good as long as she did not have to appear in court.
67. The GP recorded similar points in her letter to the Claimant's solicitor of 12 July 2018, when she said the Claimant's condition would not affect her ability to perform day to day activities as long as they did not involve making or considering making court appearances. The Claimant was then certified as fit to return on 17 July 2018 provided that her duties were amended so as not to undertake court related work and she did indeed present herself at work on that day.
68. We also noted that the first time that the Claimant was prescribed with anti-depressant medication was in August 2018 after she had been informed that she was to be dismissed.
69. As we have noted above, the Claimant's direct evidence of the impact of her condition broadly tied in with the medical documents with particular difficulties being identified in the immediate aftermath of the commencement of her sickness absence in March 2017 and then a general improvement in the latter part of 2017. We also noted that, in her disability impact assessment, the Claimant recorded that when she met the Occupational Health Adviser in December 2017, she told her that if it was not for the requirement to undertake court work she felt that she could be back in work. She also referred to battling further with the symptoms after her dismissal.
70. We also noted that, in answer to specific questions from the Tribunal, the Claimant confirmed that she had good days and bad days, that she lived alone and did not have assistance with her household tasks.
71. Ultimately, from the evidence before us, we were not satisfied that the Claimant's condition had had the required substantial impact on her day-to-

day activities beyond approximately the end of August 2017. From that point on, the Claimant appeared to be ready to return to work subject only to the removal of the requirement to attend court.

72. It appeared to us that, leaving court attendance to one side, the Claimant's work activities would encompass many typical day-to-day activities, both physical, in terms of getting ready for work and moving around in terms of getting to work and actually at work; and mental, in terms of interacting with people, dealing with paperwork, and working on a computer. It seemed to us therefore that the Claimant herself accepted that from the latter part of 2017 she was in a position to undertake those activities and did, in her general life, undertake them.
73. Clearly the Claimant was not, at any time, in a position to attend court, but we did not consider that that was in any sense a day-to-day activity, whether in relation to the Claimant's specific role as a Senior Practitioner or in general life.
74. We considered whether, at any time in the period from the end of August 2017 onwards, it could be said that it was likely that the Claimant's acute symptoms would return such that it would have been likely that the substantial impact on her day-to-day activities would have recurred, noting that the Claimant's symptoms did deteriorate after her dismissal. However, assessing whether it could reasonably have been said at that time that the recurrence of the substantial impact on day-to-day activities could well happen, we did not think that it could. As we have noted, from that point on the Claimant appeared to have recovered from the acute impact of her condition, and we saw no reason why it should have been considered likely that that acute impact would have returned.
75. Our conclusion therefore was that the Claimant was not disabled for the purposes of Section 6 of the Equality Act at the relevant times and therefore that all her claims of discrimination relating to disability failed.
76. Turning to the Claimant's remaining claim of unfair dismissal, we were satisfied that the reason for dismissal was capability in the form of the Claimant's perceived inability to attend work due to her health. We then moved to assess whether dismissal was fair in all the circumstances for that reason. In that regard, we were mindful of our need to assess the Respondent's decision from the perspective of the range of responses open to an employer acting reasonably in the circumstances, and that we should take care not to substitute our own view for that of the Respondent.
77. We noted that the crucial question for us to assess was whether a reasonable employer would have waited longer before dismissing the Claimant or, to put it another way, whether the Respondent in this case

acted unreasonably, or outside the range of reasonable responses, in dismissing the Claimant when it did.

78. We noted the need to balance all relevant factors. On the one hand in this case, there was the less than ideal situation of having to accommodate the Claimant as a Senior Practitioner who could not undertake work which might lead to her being required to attend court. On the other hand, the Claimant was in a position to undertake all the other duties of her role in circumstances where her role had never, up to that point, other than the one unfortunate case in 2016, involved her attending court. More than that, the evidence indicated that the Claimant's counterpart as Senior Practitioner in the Fostering Team, Mrs Devlin, had never attended court in relation to the assessments being undertaken in her part of the team, and nor had the outgoing Fostering Team Manager had to attend court, certainly with any regularity.
79. It was also clear from the evidence that Mr Anderson, who covered the Claimant's role over a 16 month period, only attended court as a witness once during that period. It seemed to us therefore, that the Claimant would have been able to undertake the vast majority of her role had she returned with the recognition that she should not undertake court work.
80. We recognised the position, of both Ms Llewellyn and Ms Jenkins, that the Respondent could not guarantee that the Claimant could never be required to attend court as that is something which would be ordered by a Judge. However, we did not see that that would, in practice, arise, unless the Claimant was directly involved in a matter being considered by the court. We considered that it would not have been difficult for the Respondent to have accepted that the Claimant should not have to undertake viability assessments which could then have removed the practical prospect of her being required to attend court.
81. There were indications given on behalf of the Respondent that it was possible that someone fulfilling the Senior Practitioner role could be required to attend court from a managerial perspective, but the evidence indicated that it did not appear that that had ever happened in relation to the different types of assessment undertaken by Mrs Devlin's part of the team, and had not happened in relation to the Claimant or in relation to the Fostering Team Manager in relation to viability assessments in the two-year period prior to March 2017.
82. We also noted the contention by the Respondent that a Judge may require attendance of any person from the Respondent to explain its general policy or strategy, but we considered that that would, or certainly could, have been undertaken by other more senior employees.

83. We also noted that Mr Anderson had indicated that, in the event of the Claimant's return, he would have been prepared to undertake the viability assessments and to attend any Court hearings as a consequence, and also that the Claimant was due to reach her state retirement age in July 2020, and therefore, whilst it was not certain that employment would end at that point, it must have been likely that it would. It was therefore likely that the Claimant would only be employed for just under a further two more years.
84. We also noted that Ms Llewellyn had already taken over as Fostering Team Manager in April 2018 on an interim basis, and that the responsibility for viability assessments transferred away from the Fostering Team in early 2019. We also noted that the Respondent did make quite a significant adjustment to accommodate the Senior Practitioner from the Safeguarding Hub in August 2019, leaving his post in that Hub unfulfilled for a period, and that the job description of the Senior Practitioner in the Fostering Team in October/November 2020 made no reference to the need to attend court.
85. With regard to the other two core elements identified by the Court of Session in BS -v- Dundee City Council, the steps taken to discover the medical position and the consultation with the employee, we observed that these took place, but that the Respondent did not seem to fully take into account what the medical advisers were saying or what the Claimant herself was saying.
86. All the indications were that the Claimant would be able to return if the requirement to attend court was removed from her duties and yet the Respondent did not seem to realistically consider whether and how that might be achieved. The Respondent seemed, in our view, to focus on the question of disability, and that reasonable adjustments were not required to be made following its conclusion, with which we have agreed, that the Claimant was not disabled for the purposes of the Equality Act.
87. However, we considered that, notwithstanding the conclusion that the Claimant was not disabled, a reasonable employer would nevertheless have considered whether alterations to the Claimant's role to enable her to remain in work could have been made.
88. In our view, notwithstanding the theoretical accuracy of the Respondent's stance that there could be no guarantee that court appearances could be avoided, the very minimal practical likelihood of that, coupled with the willingness and ability of Mr Anderson to undertake the work which could potentially lead to court appearances, for a period which was unlikely to extend beyond two years, would have led a reasonable employer to consider that the requested adjustment could have been made.

89. Overall therefore, balancing all the factors in this case, we considered that a reasonable employer in the circumstances of this case would have considered that it could have waited longer, indeed would have considered that it could have maintained the Claimant's employment, subject to the very minimal practical alteration to her role of removing court work, and therefore her dismissal was unfair.
90. A remedy hearing to consider what compensation to award in respect of that unfair dismissal will take place on 17 November 2021, unless the parties are able to reach agreement on the sums due.

Employment Judge S Jenkins
Dated: 18 June 2021

JUDGMENT SENT TO THE PARTIES ON 21 June 2021

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FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS
Mr N Roche