



EMPLOYMENT TRIBUNALS

Claimant: Mrs S Berganska
Respondent: Kerry Foods Limited
Heard: Remotely, by Cloud Video Platform
On: 15, 16 and 17 February 2021
Before: Employment Judge Faulkner
Mr J Akhtar
Mr K Libetta

Representation

Claimant: Mr M Berganski (lay representative)
Respondent: Mr M Warren-Jones (Solicitor)
Interpreters: Ms I Zieba and Ms G Odrowaz (Polish language)

JUDGMENT

The unanimous decision of the Tribunal is as follows:

1. The Respondent did not contravene section 39 of the Equality Act 2010 by failing to comply with the duty to make reasonable adjustments. The Claimant's complaints of failure to make reasonable adjustments are therefore dismissed.
2. Contrary to section 39, the Respondent discriminated against the Claimant by treating her unfavourably because of something arising in consequence of her disability, by dismissing her with effect from 27 February 2019.
3. The Claimant was also unfairly dismissed. Her complaint of unfair dismissal is therefore well-founded.
4. The Tribunal will determine the question of remedy at a further Hearing, details of which have been agreed with the parties.

REASONS

Complaints

1. By a Claim Form presented to the Tribunal on 19 March 2019, the Claimant complained of unfair dismissal, discrimination arising from disability and failure to make reasonable adjustments. All of her complaints related to the single event of her dismissal with effect from 27 February 2019.

Issues

2. It was agreed at the outset of the Hearing that the Tribunal was required to determine the following issues in relation to liability, it being also agreed that any question of remedy should be dealt with thereafter if relevant (see further below).

3. In respect of unfair dismissal, the issues were:

3.1. Had the Respondent shown the reason for the Claimant's dismissal? It relied on her absence from work because of ill-health.

3.2. If so, was it a fair reason within section 98(2) Employment Rights Act 1996 ("ERA")? The Respondent's case was that the reason related to the Claimant's capability to perform work of the kind which she was employed by the Respondent to do.

3.3. If so, was the dismissal for that reason fair in accordance with section 98(4) of the ERA? It was agreed that this would require the Tribunal to consider at least the following matters:

3.3.1. whether the Respondent had up to date medical evidence at the time of dismissal;

3.3.2. whether it consulted with the Claimant about the dismissal;

3.3.3. whether it considered alternatives to dismissal; and

3.3.4. whether it could be expected to put up with her absence any longer.

4. The Respondent accepted in its Response that the Claimant was a disabled person at the time of her dismissal and that it knew that to be the case. In respect of discrimination arising from disability, the Respondent agreed that the dismissal was unfavourable treatment, that the reason for it was the Claimant's absence from work and that this arose in consequence of the Claimant's disability. The single issue for the Tribunal was therefore whether dismissal was a proportionate means of achieving a legitimate aim.

5. In relation to the alleged failure to make reasonable adjustments, it was agreed that the Respondent had a provision, criterion or practice ("PCP") of requiring employees to be present to perform their duties. The issues to be decided were therefore:

5.1. whether the PCP put the Claimant at a substantial disadvantage in comparison with persons who were not disabled; and

5.2. if so, whether there were steps the Respondent could reasonably have taken, but failed to take, to avoid that disadvantage – the Claimant asserted that it could reasonably have adjusted her role and/or allowed her to work part time hours and/or redeployed her.

Hearing and evidence

6. The Tribunal read the relatively short agreed bundle of documents, together with the witness statements of the Claimant and, for the Respondent, Louise Wright (one of its HR advisers). We also read the very short statements provided by two of the Claimant's former colleagues, Mr G Warchol and Mr J Papp, although they were not present to give evidence and as we explained we were therefore able to attach less weight to their evidence because it could not be tested. We then heard evidence from the Claimant and from Ms Wright, and both parties made short closing submissions.

7. That took us to lunchtime on the second day of the Hearing. The Tribunal panel then considered its decision on the afternoon of the second day, delivering a decision to the parties on the morning of the third day. This took us to 1.00 pm, principally because of the process of translation, and also because of some IT difficulties. It was evident to us, and agreed, that neither party was ready to deal with remedy at that point and therefore a separate Remedy Hearing has been arranged. We should record our thanks to Ms Zieba and Ms Odrowaz, the interpreters who assisted the Claimant (and her husband who was representing her), by translating the proceedings into Polish. These written reasons are provided in response to Mr Warren-Jones' request made at the conclusion of the Hearing.

Facts

8. On the basis of the above material, we made the following findings of fact. The vast majority of our findings were based on uncontested evidence. Where there was a difference between the parties, we made our findings on the balance of probabilities. Page numbers are references to the bundle.

9. At all relevant times the Respondent was engaged in the manufacture and supply of foods, employing 4,000 people at twelve sites throughout the UK. The Claimant was employed from 17 July 2016 until 27 February 2019 as a Production Line Leader at the site in Burton on Trent, where at the time the Respondent employed around 1,500 people, largely in production roles, including line leaders, group leaders and the like. The Claimant's role involved standing at the production line on rotating 12-hour shifts, in a cold environment, ensuring all employees had the necessary tools to do their jobs, as well as working on the line herself. The non-production roles at Burton included those concerned with planning, supply chain, audit and compliance.

10. We need refer only briefly to the Claimant's contract of employment (pages 30 to 42). It included terms entitling the Respondent to insist on some flexibility from the Claimant as to her duties and the location at which she performed them. As to sick

pay, the contract provided for the Claimant to receive 18 days' basic pay during sickness absence (the amount due depended on length of service), and thereafter statutory sick pay ("SSP").

11. The Claimant began to experience health issues whilst pregnant from January 2017. She had experienced similar issues during her first pregnancy in 2013, prior to her employment with the Respondent. At pages 43 and 44 there is a letter from the Respondent to the Claimant referring her to an occupational health service provider ("OH"), in February 2017, and a copy of the referral itself. It was made because the Claimant had submitted a fit note relating to absence for hyperemesis and because she felt unwell being in the area where she was required to work. The Respondent asked OH "what we can do to accommodate Sandra in the workplace". In response, OH produced on 7 February 2017 what seems to have been a carefully considered report (pages 45 and 46). We do not need to refer to it in any detail, other than to say that it anticipated the Claimant taking at least two to four weeks off.

12. On 14 February 2017 the Respondent referred the Claimant to OH again (page 47) as the Claimant had requested reduced hours, amended duties and adaptations to the workplace. The OH report produced on 3 March 2017 (page 48) explained the context in which the referral was made. This was that the main medical concern regarding the Claimant was now back pain. The report detailed that the Claimant was required to rest for 20 minutes after 1 hour of walking; that physiotherapy was ongoing; and that she was unfit for her substantive duties. The Respondent was advised to offer her a sedentary role if that was operationally feasible.

13. The Claimant was either then or shortly thereafter on sick leave. She then took some annual leave, was on maternity leave from June 2017, and then had further annual leave which took her almost to the end of May 2018.

14. On 17 April 2018 (page 49), at the Claimant's request and prior to the end of her maternity leave, the Respondent arranged a return-to-work meeting with the Claimant to take place on 27 April 2018. On the same date, it appears as a result of the meeting, the Respondent wrote to the Claimant (page 51) to tell her that she was required to attend a further OH appointment on 9 May 2018 relating to her absence from work "so that we as your employer can receive guidance and support on what adjustments we can put in place to help you while at work". Ms Wright made the referral (page 53), explaining to OH that although the Claimant was on maternity leave, she was due to return shortly and was "still having issues with her hips and struggling walking, standing. We just require an update before she returns to work". It follows that the Claimant must have communicated this to the Respondent during the meeting on 27 April. Also on 27 April (page 52), the Claimant was invited to "a review meeting", to take place on 15 May 2018, "to discuss your ongoing absence".

15. The Tribunal was not shown any record of either the return-to-work meeting or the review meeting referred to above. The latter appears to have been attended by the Claimant and her Group Leader, Mr M Pelehatijs. The Claimant says that they discussed her health, Mr Pelehatijs asked about her returning to work, and she said that she did not know when she would be able to do so, for the time being.

16. An OH report was produced on 9 May 2018 (page 51). It stated that the Claimant's lumbar and pelvic pain was at severe levels; the grip in her right hand was markedly reduced; and she was not able to achieve prolonged standing and walking. OH indicated that it was suspected these symptoms were linked to low blood platelet counts, for which the Claimant had been under the care of Haematology; she had also been referred to Rheumatology and was awaiting an appointment. In addition, she had been for MRI scans and was undertaking physiotherapy. The report concluded that the Claimant was unfit for work in any capacity, that the timescale for her return to work was unpredictable and that it was likely she would be absent for the foreseeable future. The Claimant agrees that the report was accurate – she told us that at this point she needed time for rehabilitation.

17. The Claimant was at this point signed off work because of sickness until 23 August 2018. She remained off sick until she was dismissed in February 2019. As someone who oversaw production on a line, the Claimant had to be replaced by an operative, whose role was backfilled, in all likelihood by an agency worker, although Ms Wright could not be sure about that. The Respondent had an agency based permanently on the Burton site, as it had a regular need for agency cover. It must be the case, though this was not put in evidence, that similar arrangements were made to cover the Claimant's maternity leave.

18. On 29 June 2018 (page 55), the Respondent wrote to the Claimant again, using the same format, informing her that she was required to attend another OH appointment. This was rearranged by a letter from Ms Wright dated 16 July 2018 (page 56), which was also the date on which she made the referral (page 57). The referral noted that the Claimant was signed off to 23 August 2018 and requested an update on progress and whether any "support/adjustments" were likely to be required on the Claimant's return to work. The appointment appears to have been rearranged, possibly more than once. It was eventually arranged to take place on 17 August, to be immediately followed an hour later by a "welfare meeting" with Mr Pelehatijs (see Ms Wright's letter at page 59). Ms Wright explained that this was to save the Claimant having to attend the Respondent's site twice, given her mobility issues. Ms Wright told us that OH reports are usually generated immediately following the appointment, though she could not be sure if on this occasion the report was available at the welfare meeting.

19. The report is at page 60. It stated that nerve conduction tests had been carried out on the Claimant's hand, ruling out carpal tunnel syndrome, and that she had been re-referred to Rheumatology in July by her GP. A specialist physiotherapy review was anticipated. It went on to state that no particular improvement in the Claimant's condition was either reported or evidenced. Broadly consistent with what had been said in May, it was reported that the Claimant described constant lumbar and pelvic pain at severe levels; that her right-hand grip was markedly reduced; and that she was not able to achieve prolonged standing or walking. It added that the Claimant's "activities of daily life are impeded with help being provided – and with some aspects of her personal care". The conclusion was that the Claimant was unfit for work in any capacity at that point; that return-to-work timescales were not predictable, with further medical evaluation required to help provide a diagnosis for

her ongoing symptoms; and that it remained likely she would be absent for the foreseeable future. The Claimant agrees that this report was also accurate, as she was undertaking physiotherapy. She says that she saw both this and the May report, around a week after the respective assessments took place.

20. Again, there was no record before the Tribunal of the review meeting which followed the August appointment, and the Claimant has no recollection of what was discussed.

21. There is furthermore no record of any other contact between the parties thereafter until early 2019, although it seems to be accepted that there were some telephone conversations between the Claimant and Mr Pelehatijs. Ms Wright says that she expects Mr Pelehatijs prepared notes of those discussions and indeed of the earlier review meetings, but did not pass them to HR to be placed on the Claimant's file. There can of course be no criticism of Ms Wright that this was not done.

22. On 22 January 2019 (pages 61 to 62), Ms Wright wrote to the Claimant again, setting up another OH referral which was to take place on 5 February. The purpose of the referral was said to be "so that we, as your employer, can receive medical advice and guidance on what support and adjustments we can put in place". The appointment was eventually rearranged by a later letter (pages 64 to 65) dated 29 January 2019, to take place on 19 February 2019, again the stated purpose being "so that we as your employer can receive medical advice and guidance on what support and adjustments we can put in place". The referral (page 63) stated, "Employee is off long term due to lumbar and pelvic pain. Last seen [17 August], please can we have an update on her progress since her last visit and advice on whether her absence is still for the foreseeable?".

23. The resulting report, dated 19 February 2019, is at page 66. After rehearsing the familiar background, the key points reported were:

23.1. the Claimant advised having had a Rheumatology appointment, x-rays of her pelvis showing no anomaly, she believed;

23.2. a review by Rheumatology was expected later in February or in March;

23.3. her GP had advised that further investigations were to be arranged;

23.4. physiotherapy had ceased, as it was not perceived to be of benefit;

23.5. no particular improvement was reported or evidenced since the last appointment in August 2018;

23.6. the Claimant described constant lumbar and pelvic pain at severe levels;

23.7 she was observed to be slow to get up and to sit, and was at that point unable to achieve prolonged walking and standing;

23.8. she was unable to make a fist with her right (dominant) hand and had advised that she was dropping things;

23.9. she was said to be “not fit for work in any capacity at present and timescales for recovery are unclear, therefore it is unlikely that a return will be feasible in the reasonably foreseeable future. Please refer to your sickness absence policy”. The Tribunal was not shown that policy.

24. The Claimant agrees that the report accurately records what she told OH. She did not agree with all of the report’s conclusions however, telling us that at this point she had “small problems” with standing and sitting, so that she would have needed regular breaks if carrying out a job that required her to stand. She evidently feels that the report should have said something to that effect. She also disagrees with the report’s conclusion about her fitness to work. Specifically, she referred to the Work Capability Assessment carried out by the DWP just over a month later, on 27 March (see below) which stated that she was capable of doing some work. She also says she would have been fit to work reduced hours in a different department, though she accepts that she was not fit to work in the role she had occupied before her sick leave, or indeed in the same department where that role was performed. The report did not offer any advice on specific adjustments or support that might be implemented to support a return to work in any capacity.

25. At this point, the Respondent’s Production Stream Manager, Mr P Iqbal, advised by HR, decided on the basis that there was no change in the Claimant’s condition, no indication that treatment was forthcoming that would make a difference to her condition, and no predicted timescale for her recovery, that the Respondent needed to assess whether it could continue to sustain her absence. Ms Wright therefore wrote to the Claimant on 20 February 2019 (pages 67 to 68). The letter stated:

“The business cannot sustain your current level of absence, and should we be unable to identify a resolution, i.e., suitable duties to enable you to return to work in the foreseeable future, based upon the advice from [OH], we may have no alternative but to review your continued employment”.

26. The letter arranged for a meeting to take place between Mr Iqbal and the Claimant a week later. It said that the meeting would be an opportunity to go through the Claimant’s absence history, review her current state of health, consider the latest medical report and review the possibility of making adjustments to her role. It would also be an opportunity to look at whether there might be any alternative work which the Claimant could undertake. It reassured the Claimant that she would be given a full opportunity to put her case forward, but advised that a possible outcome of the meeting was that the Respondent would decide to dismiss her. It said that the Respondent would review the information previously discussed regarding the Claimant’s absence from work and “consider any further solutions before a final decision is made”.

27. Ms Wright informed us that the Respondent has a sickness absence policy, though as indicated above it was not in the bundle. She told us that it has a section relating to welfare and a section relating to capability, we take it the first being focused on the employee’s return to work and the second on action to be taken by the Respondent in the event of continuing absence. This was the first meeting with the Claimant under the capability part of the policy.

28. The Claimant says that she did not receive the OH report of 19 February 2019 before the meeting with Mr Iqbal, at which Ms Wright was also present – see below. The Claimant told us that she only saw it a couple of days after her dismissal, when it was sent to her by OH. She cannot recall if the OH adviser went through the report at the appointment. Whilst Ms Wright cannot say for certain that the report was sent to the Claimant with her letter of 20 February, she told us that this was standard practice and so believes that it was. She also told us that OH never send reports directly to employees, which is what the Claimant seemed to indicate. Ms Wright's letter did not say that the report was enclosed, though as noted above it did say that it would be discussed at the meeting. Ms Wright informed us that it was not her standard practice to detail what was enclosed with a letter within the text of the letter itself.

29. This seems to be the only important conflict of evidence. It was difficult for us to resolve it, given the limited evidence on the point. Often medical reports are sent to employees for approval first, though in this case the Claimant's employment contract stated that she authorised OH to notify the Respondent of any matters they considered may impair her from properly performing her duties (page 32, paragraph 9.6) and so this does not take us any further forward. Focusing on the evidence that was presented to us, it is unusual in our view that the letter did not say the report was enclosed. Whilst Ms Wright was adamant that the Claimant was wrong if she was suggesting the report came to her directly from OH, given that the report was not mentioned in the letter and given the Respondent's previous practice in August 2018 when it seems very unlikely the report on that occasion was available at the meeting the Claimant had with Mr Pelehatijs, we concluded on balance that the Claimant did not see the report before she met with Mr Iqbal and Ms Wright.

30. The notes of the meeting on 27 February 2019 are at pages 69 and 70. Prior to the meeting, Mr Iqbal and Ms Wright checked the Respondent's careers website for advertised vacancies and spoke to the recruitment team about forthcoming vacancies that had not yet been advertised. They did not check for vacancies at sites other than Burton, as the nearest is in Ossett, which is 1 hour 40 minutes' drive away. The Claimant could not have travelled that distance to and from work on a daily basis. In closing submissions Mr Berganski suggested they might have considered relocation, as he is employed as a long-distance lorry driver and so not required to be based in any particular location. That was never part of the Claimant's case however, whether at the dismissal meeting, in her Claim Form or in her witness statement, and we therefore disregarded it.

31. The meeting was chaired by Mr Iqbal. He began by stating that the Respondent could not sustain the Claimant's absence levels and asked her for an update. The Claimant replied that there was "nothing new", saying that the problem was thought to be with her hips and back and that she could not squeeze her hand. She said that her GP had advised her that her scans would be done again. In reply to Mr Iqbal's question or comment about a date for her to return to work, she said that she could not provide a date; she said she could not stand for more than twenty minutes before needing to sit or lie down and could not stand in the cold (her usual working environment).

32. Mr Iqbal then referred to the latest OH report, saying that it confirmed the Claimant was not fit for work, and asking her if she agreed with that. She replied that she did. She stated that she wanted to return, but needed to get fit first. She also stated that she was going back to her GP at the end of the month or in March – this is consistent with what had been reported by OH as summarised above. The Claimant says she was probably shown a copy of the OH report at the meeting, though she cannot recall if Mr Iqbal went through its contents with her. On balance we find that it was at least referred to and summarised. She did not say to Mr Iqbal that she disagreed with the assessment. She was unable to give an indication of when she would be fit to work.

33. The Claimant enquired about part-time work, though she accepts that she did not say expressly that she would be fit for part-time work, or when. Mr Iqbal's reply was that there were no such jobs. The Claimant then asked about office-based positions, but was told there were none available at that point.

34. This discussion lasted for 5 minutes, which Ms Wright agrees was very short for a meeting of this nature. She nevertheless said that they looked at the OH report and asked if the Claimant agreed with it. When the Claimant confirmed she could only stand for 20 minutes, she and Mr Iqbal felt they had sufficient information to adjourn.

35. The adjournment also lasted for 5 minutes. Ms Wright told us that she and Mr Iqbal reviewed all of the OH reports, which were consistent in their message that the Claimant was not able to stand for more than 20 minutes, and was unfit to work in any capacity, whatever the hours. We note that in fact none of the reports dealt expressly with the Claimant's ability to work part-time hours, though the Respondent did not have any part-time roles available at Burton at that juncture, nor any office-based roles; in fact, there were no vacancies at Burton at all.

36. Mr Iqbal and Ms Wright considered the length of the Claimant's absence and concluded that no change in her condition and no indication of a recovery had been reported. They returned to the meeting, where Mr Iqbal told the Claimant that because she and OH had confirmed she was unfit and the timescales for a recovery were unclear, her employment was terminated with immediate effect, giving her details of payment in lieu of notice and of her right to appeal. Ms Wright told us it is not always the case that the Respondent would dismiss an employee at the first capability meeting, though there have been similar cases to that of the Claimant; we were not given any details of either type of case involving other employees.

37. Mr Iqbal's letter dated 28 February 2019 confirming the Claimant's dismissal is at pages 71 to 72. He has since left the Respondent's employment. It stated:

“At the meeting, we discussed the fact that you had been absent from work since 24 May 2018 due to back pain. We reviewed your current state of health and considered the occupational health reports from 19 February 2019 and 17 August 2018.

We also considered whether there was any reasonable alternative work you could undertake either with or without adjustments. However, you advised

that at present you [were] only able to stand for 20 minutes at [a] time and unable to work in the cold environment. You requested whether there [were] any office-based positions available however unfortunately there are no positions available.

Having reviewed all of the above, and considered all of the circumstances, we have decided that there is no reasonable prospect of you resuming full duties. It is therefore with regret that we are terminating your employment on the grounds of your continuing ill health and its impact on your ability to carry out your role”.

It then dealt with the financial formalities and confirmed the Claimant’s right to appeal. She did not do so because she had been told the Respondent could not offer her reduced hours.

38. In summary, the Claimant accepts she could not go back to the role she had occupied before her sick leave, not least because she had been advised by her GP that she should not work in very cold temperatures. She needed to work in a warmer department, such as the “sleeving” department, though she would have needed regular breaks whatever department she worked in. She says other employees with health problems have been given part-time hours by the Respondent, but was unable to give details. The two additional statements, from Mr Warchol and Mr Papp, both state that the Respondent employs a number of part-time staff, which is of course unsurprising. At the time of her dismissal, the Claimant was either being paid statutory sick pay only or, in all likelihood, was on zero pay

39. On 27 March 2019, the Claimant saw a healthcare professional appointed by the Department for Work and Pensions for an assessment of her entitlement to Employment and Support Allowance. The resulting correspondence from the DWP dated 16 April 2019 is at pages 73 to 82. It concluded that she was no longer entitled to ESA because “although you may have a disability, illness or health condition, you’re now capable of doing some work”. To retain ESA, the points scored by the Claimant needed to be 15 or higher; she scored zero. The report, partly based on what the Claimant said and partly based on observation, noted that the Claimant could: walk for 15 to 20 minutes at a normal pace before needing to rest for about 20 minutes; sit in one place for more than an hour without having to move away; rise from sitting without assistance from another person; and pick up and move objects such as an empty cardboard box or a carton of liquid. It also found she had normal range, power and movement in the lower limbs.

40. The Claimant did not describe to the Tribunal any significant change in her condition from February to April 2019, but did tell us that she did a warehouse job for around 6 months at weekends, though she had to leave it as she found it too physically demanding. At page 83 there is an email from the OH adviser to the Respondent dated 1 July 2019. Ms Wright could not tell us how it arose. It states that there were no adjustments identifiable at the time of the Claimant’s dismissal that would have facilitated a return to work.

Law

Unfair dismissal

41. Section 98 ERA says so far as relevant to this case:

“(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 ... a reason falling within subsection (2) ...

(2) A reason falls within this subsection if it –

(a) relates to the capability ... of the employee for performing work of the kind which he was employed by the employer to do, ...

(3) In subsection 2(a) –

(a) “capability”, in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any or physical or mental quality ...

(4) [Where] the employer has fulfilled the requirements of subsection (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”.

42. As Section 98(1) ERA puts it, it is for the employer to show the reason, or if more than one, the principal reason for the dismissal. The question to be considered is what reason the Respondent relied upon. The case of **Abernethy v Mott, Hay and Anderson [1974] IRLR 2013** is long-established authority to the effect that the reason for dismissal is “a set of facts known to the employer or as it may be of beliefs held by him, which cause him to dismiss the employee”. That case also made clear that the reason given by an employer does not necessarily constitute the real reason for dismissal. The reason or principal reason is to be determined by assessing the facts and beliefs which operated on the minds of the decision-makers, in this case Mr Iqbal, leading them to act as they did in effecting the Claimant's dismissal. If and when the employer shows the reason for dismissal as above, it must then establish that it falls within one of the fair categories of dismissal set out by section 98(2) ERA (here the Respondent relies only on capability).

43. If the Respondent shows the reason and establishes that it was a reason falling within section 98, the Tribunal must then go on to consider section 98(4) ERA in order to determine whether the dismissal was fair. The burden is no longer on the Respondent at this point. Rather, having regard to the reason or principal reason for dismissal, whether the dismissal is fair or unfair requires an overall assessment by the Tribunal, and depends on whether in the circumstances, including the size and administrative resources of the business, the Respondent acted reasonably or unreasonably in treating the reason as a sufficient reason for dismissing the Claimant, determined in accordance with equity and the substantial merits of the case. This overall assessment is in part concerned with the steps taken by the Respondent to effect dismissal and certainly requires an assessment of the reasonableness of the decision to dismiss. In all respects, the Tribunal must not substitute its opinion for that of the employer; rather, the question is whether what the employer did was within the band of reasonable responses of a reasonable employer.

44. The decision of the Employment Appeal Tribunal (“EAT”) in **East Lindsay District Council v Daubney 1977 ICR 566**, established the importance to fairness of an employer establishing the true medical position and consulting with an employee before dismissing them. It said, *“While employers cannot be expected to be, nor is it desirable they should set themselves up as, medical experts, the decision to dismiss or not to dismiss is not a medical question, but a question to be answered by employers in the light of the available medical advice. It is important therefore that when seeking advice employers should do so in terms suitably adjusted to the circumstances ... Unless there are wholly exceptional circumstances, before an employee is dismissed on the ground of ill health it is necessary that he should be consulted and the matter discussed with him, and that in one way or another, steps should be taken by the employer to discover the true medical position. We do not propose to lay down detailed principles to be applied in such cases, for what will be necessary in one case may not be appropriate in another. But if in every case employers take such steps as are sensible according to the circumstances to consult the employee and to discuss the matter with him, and to inform themselves upon the true medical position, it will be found in practice that all that is necessary has been done. Discussions and consultation will often bring to light facts and circumstances of which the employers were unaware, and which will throw new light on the problem. Or the employee may wish to seek medical advice on his own account, which, brought to the notice of the employers' medical advisers, will cause them to change their opinion”*.

45. In **O'Brien v Bolton St Catherine's Academy 2017 EWCA Civ 145**, a case also dealing with section 15 (see below), the Court of Appeal summarised unfair dismissal case law in relation to sickness absence dismissals by quoting the EAT's decision in **Spencer v Paragon Wallpapers Ltd [1977] ICR 301**, to the effect, *“Every case depends on its own circumstances. The basic question which has to be determined in every case is whether, in all the circumstances, the employer can be expected to wait any longer and, if so, how much longer? Every case will be different, depending upon the circumstances”*. The EAT in that case noted that the relevant circumstances include *“the nature of the illness, the likely length of the*

continuing absence, [and] the need of the employers to have done the work which the employee was engaged to do". The last of these points is another way of referring to the impact on the Respondent of the continuing absence, which was something the Court of Appeal in **O'Brien** dealt with at more length in the context of section 15 – again see below.

46. Other matters relevant to whether a sickness absence dismissal is fair will include whether an employer has properly considered alternatives to dismissal and, although of course the ACAS Code on Disciplinary and Grievance Procedures does not apply in such cases, the procedure followed by an employer in effecting dismissal.

Section 15

47. Section 39 of the Equality Act 2010 (“the Act”) provides, so far as relevant:

“(2) An employer (A) must not discriminate against an employee of A's (B)— ...

(c) by dismissing B.

48. Section 15 of the Act provides:

“A person (A) discriminates against a disabled person (B) if –

(a) A treats B unfavourably because of something arising in consequence of B's disability, and

(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim”.

49. We need only deal with the law on the question of whether unfavourable treatment was a proportionate means of achieving a legitimate aim, which we will refer to as “justification” for ease. We took into account a number of principles emerging from the relevant case law, in so far as relevant to this case.

50. First, the burden of establishing this defence is on the Respondent.

51. Secondly, it is for the Tribunal to reach its own decision as to whether what the Respondent did was justified. In assessing the Respondent's actions therefore, the Tribunal is not to assess whether the Respondent acted within the range of reasonable responses open to reasonable employers in the circumstances. These were points made by the EAT in **Hensman v Ministry of Defence [2014] UKEAT/0067/14**. The more serious the discrimination, the more convincing the justification must be, though as Mr Warren-Jones submitted – he referred to the EAT's decision in **British Airways plc v Starmar [2005] IRLR 863** where this point is dealt with in passing – the justification defence can be made out whether or not the particular justification was in the minds of the decision-makers at the time the decision was made.

52. Thirdly, it follows that the Tribunal must undertake a fair and detailed assessment of the Respondent's business needs and working practices, making clear findings on why the aims relied upon were legitimate, and whether the steps taken to achieve those aims were appropriate and necessary.

53. Fourthly, what the employer does must be an appropriate means of achieving the legitimate aims and a reasonably necessary means of doing so. In **Homer v Chief Constable of West Yorkshire Police [2012] UKSC 15** it was said by the Supreme Court, approving the judgment of Mummery LJ in **R (Elias) v Secretary of State for Defence [2006] EWCA Civ 1293**, that three things are required: first, a real need on the part of the employer (in other words something sufficiently important to justify limiting a fundamental right); secondly, what the employer did must have been appropriate – that is rationally connected – to achieving its objectives; and thirdly, what the employer did must have been no more than was necessary to that end.

54. The fifth principle the Tribunal noted, again with reference to the judgment of Mummery LJ in the case just mentioned, is that it is necessary to weigh the Respondent's needs against the seriousness of the detriment to the disadvantaged group (as it would be in a case of indirect discrimination), or in a case under section 15 the disadvantaged person. In other words, as was said by the Court of Appeal in **Hardy & Hansons plc v Lax [2005] EWCA Civ** part of the assessment of whether the aim can be justified entails a comparison of its impact upon the affected person as against the importance of the aim to the employer. It is not enough that a reasonable employer might think the aim justified. The Tribunal itself has to weigh the real needs of the Respondent, against the discriminatory effects of the requirement. A measure may be appropriate to achieving the aim but go further than is reasonably necessary in order to do so and thus be disproportionate.

55. Sixthly, in **O'Brien v Bolton St Catherine's Academy [2017] EWCA Civ 145**, Underhill LJ giving judgment for the Court of Appeal held that in principle the severity of the impact on the employer of the continuing long-term sickness absence of an employee must be a significant element in the balance that determines the point at which their dismissal becomes justified, going on to say that it is not unreasonable for a tribunal to expect some evidence on that subject. He added, "*What kind of evidence is appropriate will depend on the case. Often, no doubt, it will be so obvious that the impact is very severe that a general statement to that effect will suffice; but sometimes it will be less evident, and the employer will need to give more particularised evidence of the kinds of difficulty that the absence is causing*". Underhill LJ went on to say that the proportionality test can, and should, accommodate a substantial degree of respect for the judgment of the decision-maker as to his reasonable needs (provided he has acted rationally and responsibly), but it is for the tribunal to strike the ultimate balance. A number of factors were recognised by the Court of Appeal as relevant to the tribunal's assessment in that case and it seemed to this Tribunal that they were no less relevant in the present case. Those factors were the duration of the employee's absence; the evidence as to when she might be expected to return; the reasonableness of the employer waiting a little longer; and the impact of her continuing absence.

56. Lastly, it is also appropriate to ask whether a lesser measure could have achieved the employer's aim - see **Naeem v Secretary of State for Justice [2017] UKSC/27**.

57. In summary, the aims pursued by the Respondent must equate to a real business need on its part; the actions it took must have contributed to achieving those aims; and this must be assessed objectively, regardless of what the Respondent considered at the time. Proportionality is about considering not whether the Respondent had no alternative to dismissal, but whether dismissal was reasonably necessary to achieve its aims.

58. We also note, the comments in **O'Brien** on the relationship between section 15 and unfair dismissal. Underhill LJ said, "*it would be a pity if there were any real distinction in the context of dismissal for long-term sickness where the employee is disabled within the meaning of the 2010 Act. The law is complicated enough without parties and tribunals having routinely to judge the dismissal of such an employee by one standard for the purpose of an unfair dismissal claim and by a different standard for the purpose of discrimination law. Fortunately, I see no reason why that should be so. On the one hand, it is well established 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; and I see good reason for such an approach in the case of the employment relationship*". To the same point, Mr Warren-Jones referred to the decision in **City of York Council v Grosset [2018] ICR 1492**. There the Court of Appeal stated that the test for unfair dismissal allows significant latitude to an employer, by way of the range of reasonable responses test referred to above; the test for justification is an objective assessment based on the evidence before the Tribunal, which may not have been before the employer at the time of dismissal. We would add that of course, it might be that there was no discrimination but an unfair dismissal if there was procedural unfairness in effecting the employer's decision. The Court also reflected on the relevance to the justification defence of whether or not reasonable adjustments have been made.

59. Mr Warren-Jones also referred to the EAT's decision in **Iceland Foods Ltd v Stevenson UKEAT/0309/19**. That decision was concerned with the importance of consistency of findings across all three complaints (unfair dismissal, section 15 and failure to make reasonable adjustments) and also said that generally the approach to the inter-relation between unfair dismissal and section 15 complaints set out in **O'Brien** was to be preferred, particularly in long-term absence cases.

Reasonable adjustments

60. Section 20 of the Act provides:

"(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 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”.

61. Section 21 provides:

“(1) A failure to comply with the first, second or third requirement is a failure to comply with the 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”.

62. The Tribunal had regard to the Court of Appeal’s decision in **Griffiths v Secretary of State for Work and Pensions [2016] IRLR 216**. Albeit on somewhat different facts to the present case because it concerned the application of a series of warnings for sickness absence, the Court noted that there is a certain artificiality to a complaint of failure to make reasonable adjustments in a case of this nature, section 15 seeming to fit the facts more appropriately. Nevertheless, the Court emphasised the importance of properly articulating the PCP, which as noted above was accepted in this case to be the requirement to attend to perform one’s duties – and thus avoid the possibility of dismissal.

63. The Court went on to say that when the PCP is articulated in that way, it will often be clear that there is a substantial disadvantage for the disabled employee because their disability increases the likelihood of sickness absence, and thus of action being taken by the employer. The comparator is merely someone who was not disabled. The fact that they and the disabled person were treated equally and might both be subject to the same disadvantage when absent for the same period of time did not eliminate the disadvantage if the PCP bit harder on disabled persons, or a category of them, than it did on able-bodied persons. The Court found that it was an error to hold that the section 20 duty had not been engaged because the policy applied equally to everyone. Whilst it is no doubt true that both disabled and able-bodied persons alike will be affected in circumstances which may lead to sanctions by the employer, the risk of this occurring is obviously greater for disabled workers whose disability results in more frequent, and perhaps longer, absences. They will find it more difficult to comply with the PCP and therefore will be disadvantaged by it.

64. The crucial question is therefore whether any reasonable steps the Respondent could have taken to avoid the disadvantage were not taken. It is well known that assessing whether a particular step would have been reasonable entails considering whether there was a chance it would have helped, whether it was practicable to take it, the cost of taking it, the employer’s resources and the resources and support available to it.

65. Mr Warren-Jones referred to the Court of Appeal’s decision in **Home Office v Collins [2005] EWCA Civ 598**. In that case, the employee’s absence was of considerable length. So far as relevant to the present case, the Court held that since she could not return to work at all, consideration of part-time work did not arise as a possible reasonable adjustment. The tribunal was entitled to conclude that it was

reasonable for the employer not to pursue the possibility of a phased part-time return to work until the employee was able to indicate a definite date for her return.

Burden of proof

66. Given the Respondent's concessions in relation to the section 15 complaint, the burden of proof provisions only really apply in relation to the complaints of failure to make reasonable adjustments. We therefore deal with them only briefly. Section 136 of the Act provides as follows:

(1) This section applies to any proceedings relating to a contravention of this Act.

(2) If there are facts from which the court [which includes employment tribunals] could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision”.

67. Tribunals frequently have to consider whether it is possible to infer unlawful conduct from all the material facts. This has led to the adoption of a two-stage test, the workings of which were described in the annex to the Court of Appeal's judgment in **Wong v Igen Ltd [2005] ICR 931**, updating and modifying the guidance that had been given by the EAT in **Barton v Investec Henderson Crosthwaite Securities Ltd [2003] ICR 1205**.

68. The Claimant bears the initial burden of proof, that is of establishing a prima facie case. At this first stage, the Tribunal does not have to reach a definitive determination that there are facts which would lead it to the conclusion that there was an unlawful act. Instead, it is looking at the primary facts to see what inferences of secondary fact could be drawn from them. As was held in **Madarassy v Nomura International plc [2007] IRLR 246**, “could conclude” refers to what a reasonable tribunal could properly conclude from all of the evidence before it. In considering what inferences or conclusions can thus be drawn, the tribunal must assume that there is no adequate explanation for those facts.

69. If the burden of proof moves to the Respondent, it is then for it to prove that it did not commit, or as the case may be, is not to be treated as having committed, the allegedly discriminatory act. That would require that the explanation given by the Respondent is adequate to discharge the burden of proof on the balance of probabilities, for which a tribunal would normally expect cogent evidence.

Analysis

70. We began our analysis and conclusions with the obvious but important point that the Tribunal can only, and indeed must only – in fairness to both parties – decide the case based on the evidence presented to it. As made clear below, the evidence

presented by both parties was lacking somewhat in various respects. We did our best, with careful and appropriate questioning, to enable both parties to present evidence on all of the relevant issues identified above, but it is not our role to plug holes in either party's case when it comes to reaching our conclusions once the evidence and submissions have been heard.

Failure to make reasonable adjustments – sections 20 and 21 of the Act

71. The burden was on the Claimant to establish the PCP and that the PCP put her at a substantial disadvantage compared with persons who are not disabled. If she did, the Tribunal was then required to consider the reasonableness of the adjustments she says the Respondent failed to make.

72. As already indicated, the Respondent accepted that it had a PCP along the lines that it required the Claimant to be present at work to perform her duties. As also indicated, that is the correct way to articulate the PCP in cases such as this, according to the decision in **Griffiths**.

73. The Respondent did not accept however that the PCP put the Claimant at a substantial disadvantage when compared with persons who are not disabled, on the basis that it applied equally to all employees, including those who were not disabled. That is the error identified in **Griffiths**, and in fairness to Mr Warren-Jones, he fairly accepted in his submissions that the case law was against him in this regard. We have referred to the Court's judgment in some detail above. In short, the fact that disabled employees and those who were not disabled were treated equally and might both be subject to the same disadvantage when absent for the same period of time did not eliminate the disadvantage if the PCP bit harder on disabled employees. Both disabled employees and those who are not disabled alike will, to a greater or lesser extent, encounter the disadvantage of being susceptible to sanction by the employer, but the risk of this occurring is obviously greater for that group of disabled employees whose disability results in more frequent, and perhaps longer, absences.

74. The fact is that the Claimant, with her particular disability, was plainly going to find it more difficult to be at work than colleagues who were not disabled, because her disability would – and did – necessitate lengthy absence from work, so that the risk of her being subjected to some form of sanction was greater than the risk for non-disabled comparators. We were readily satisfied that she has established that the PCP put her at a substantial disadvantage compared with persons who were not disabled.

75. The key question for us to consider therefore was whether there were reasonable adjustments which the Respondent could have made to overcome the disadvantage but which it did not make. As we have already indicated, the case law recognises that the reasonable adjustments provisions are a somewhat awkward fit with this kind of case because it can be difficult to identify a particular step which would enable the employee to retain their employment. Nevertheless, such cases are often put in this way, and the Claimant specifically identified three adjustments which she says the Respondent could have made and which were examined in the evidence. Of course, the adjustments she says the Respondent could have made do not really sit in isolation from each other; they have to be considered in the round.

76. First, the Claimant contended that the Respondent could have made adjustments to her role, that is her role as a Production Line Leader in the department in which she had worked for the duration of her active employment. Ignoring for the moment any change in the Claimant's hours of work, we heard no evidence which suggested that at the time of her dismissal there was an adjustment which the Respondent could reasonably have made to the Production Line Leader role to enable the Claimant to carry it out effectively. Specifically, the Claimant was clear in her evidence that she could not return to the role because of the temperature in which she would have had to work and because of the need to stand for long periods. It was not put to us that the role could have been properly performed in a warmer environment or without long periods of standing. We found therefore that the Claimant had not established a prima facie case from which we could conclude, in the absence of an adequate explanation, that the Respondent had failed to make a reasonable adjustment to her role as Production Line Leader.

77. Secondly, the Claimant said that the Respondent could have offered her part-time hours. Given what we have just said about her substantive role, we take this as a reference to part-time hours in another role, rather than in her role as a Production Line Leader, not least given the Claimant's GP's advice, which applied at the time of her dismissal, that she should not work in a cold environment. The Claimant's contention that the Respondent should have offered her part-time hours is therefore wrapped up with other the other adjustment that she says the Respondent could reasonably have made to avoid her dismissal, namely redeployment.

78. There is no doubt in principle that redeployment could be a reasonable adjustment in a case such as this. In fact, it can properly be said to be a classic example of a reasonable adjustment. Case law makes clear however that it is not a reasonable adjustment to create a vacancy where one does not otherwise exist, unless an employer agrees that it could, such as happened in **Southampton City College v Randall [2006] IRLR 18**. That is not the case here. In fact, in this case the Respondent's position was that there was no vacancy at the time of the Claimant's dismissal at all, discounting – for the reasons given above – any role at one of the Respondent's sites other than that in Burton. Shortly before the dismissal, the Respondent's decision-makers looked on its careers website and checked with its recruitment team to see if any other vacancies were forthcoming. Whilst we found it surprising that the Respondent did not include any documentary evidence of job vacancies for any period of time leading up to the Claimant's dismissal, and whilst we were also somewhat surprised that there was no vacancy at all at a site where there were 1,500 employees, Ms Wright was clear that the results of those searches was that there was no vacancy at the time of the Claimant's dismissal. We heard no evidence to contradict that assertion.

79. We considered the question of whether any suitable vacancy may have existed at an earlier stage, something raised during Ms Wright's evidence on the basis of the Claimant's suggestion – albeit made only briefly during her own oral evidence – that she enquired regularly about part-time roles whilst she was off sick, and on Ms Wright's acceptance that it might have been possible to find a job-share arrangement for the Claimant. We concluded however that it was neither possible nor appropriate

for us to reach a different conclusion as to available vacancies in relation to any earlier period for the following reasons:

79.1. first, unlike in the case of the February 2019 OH report, which we come to below, the Claimant agreed with earlier OH reports that she was not able to perform any role for the Respondent at the point at which they were written – although that only takes us to August 2018;

79.2. secondly, there was no evidence before us of roles that the Claimant could have redeployed into at an earlier point – and it was certainly not for us to guess that there might have been; and

79.3. thirdly and most importantly, as the list of issues set out above makes clear, it was not the Claimant's pleaded case that she should have been considered for redeployment at an earlier stage; it would obviously have been unfair on the Respondent for us to consider a case which it had not had opportunity to prepare to answer.

80. In conclusion, the Claimant has not been able to identify a vacancy to which she could have been redeployed. That is on one level understandable, in that any such information would have been in the Respondent's possession, not hers, although she could in preparing her case have requested full details from the Respondent of vacancies at the Burton site over any relevant period of time. In any event, as already indicated, it is not possible for us to gainsay the Respondent's case as to the position in February 2019 by saying that such a large employer must have been able to find a redeployment opportunity. We cannot do so, and therefore the complaints of failure to make reasonable adjustments must fail as no prima facie case has been established to pass the burden of proof to the Respondent. As indicated above, Mr Warren-Jones referred to the decision in **Home Office v Collins** (he also referred to **NCH Scotland v McHugh UKEATS 0010/06** which followed it). Given our conclusions that there was no role for the Respondent to redeploy the Claimant into at the point of her dismissal and that she could not come back to her existing role, they are nothing to the point in this case.

Discrimination arising from disability – section 15 of the Act

81. Given that Mr Warren-Jones conceded in his submissions that dismissal of the Claimant was unfavourable treatment, the single issue for us to decide was whether that dismissal was a proportionate means of achieving a legitimate aim, for which we will sometimes use the shorthand "justified" and its cognates.

82. We began our analysis of this complaint by noting that the burden was on the Respondent to establish justification. This required it to produce evidence to show that it had one or more legitimate aims and, if it did, that dismissal was a proportionate means of achieving them. We also noted that dismissal is a very serious act of discrimination, so that we were entitled to require a convincing explanation from the Respondent as to why it was justified. In short, we were required to consider why the Respondent's stated aim was legitimate, and whether dismissal was an appropriate and necessary means of achieving it.

83. It must be said at the outset that the Respondent's evidence in this regard was very limited indeed. In fact, without the questions asked of Ms Wright by Employment Judge Faulkner, it seems unlikely to us that any evidence would have been given on this point at all, other than the assertions that the Claimant had been off for a good while and that the Respondent did not need to wait any longer. In saying this, we wish to make clear that we were not levelling any criticism at Ms Wright – she is employed in Human Resources, not on the production line, and so could not necessarily have been expected to explain, for example, the practical impact of the Claimant's absence. We also acknowledge that the Claimant's dismissal and the events leading up to it took place a long time before this Hearing, that Mr Iqbal has since left the Respondent's employment and that, as Ms Wright told us, the Burton site closed in August 2020. All of that said however, and as already made clear, it was not for us to plug the gaps; the burden of establishing justification remained on the Respondent.

84. We can deal very briefly with the legitimate aim on which the Respondent relied, namely the need to have staff present at work to maintain production. We had no difficulty in accepting the proposition that for any employer, any business, that is a legitimate aim. It could not be seriously argued otherwise.

85. The second question, and therefore the crux of the issue before us, was whether dismissing the Claimant was a proportionate means of achieving that aim.

86. We accepted that, in principle, dismissing an absent employee is a measure which is capable of meeting the aim. That is a matter of logic and also of industrial sense: it enables their replacement to be appointed and the continuation of their work. That is the position in principle. The question for us was whether dismissal of this particular Claimant was an appropriate and necessary means of achieving that aim in this case. At its heart this required us to consider the impact of the Claimant's absence on the Respondent, and the impact of the dismissal on the Claimant.

87. As already made clear, the Respondent produced very little, in fact almost no, evidence of the impact of the Claimant's absence. This is consistent with the fact that no such evidence or explanation was given to the Claimant herself before, at or indeed after the meeting at which she was dismissed. We accept that nine months is a not insignificant period of time and we accept that a colleague working on the production line stepped up into the Claimant's role and that the Respondent filled that person's position with an agency worker. We conclude however that the Respondent has not discharged the burden of establishing that the impact of the Claimant's absence necessitated her dismissal, for the following reasons:

87.1. Ms Wright described the role of Production Line Leader as a key position, which can be accepted in the sense that the person occupying it managed a number of other staff to ensure production took place appropriately. The Respondent did not put forward however any argument that it was important to be able to appoint someone into the role to replace the Claimant on a permanent basis.

87.2. In fact, on the Respondent's own case, it must have covered the Claimant's absence for around two years by the time of her dismissal, taking into account her sickness absence prior to maternity leave, the maternity leave itself and then her

nine-month sickness absence which followed it. Of course, the Respondent was legally obliged to allow the Claimant to take the maternity leave part of this overall absence, but the point is that we heard no evidence, or indeed any argument, that the Claimant's absence for any of this time presented any practical difficulty for the Respondent.

87.3. As to financial matters, it seems fair to assume that the cost of continuing to employ the Claimant herself was zero or next to zero – it seemed likely to us that even SSP entitlement had been exhausted, or was close to being exhausted, by the time she was dismissed. It might also be assumed that the person acting up into her role was paid at a somewhat increased rate, and of course we assume that the Respondent was paying for agency cover as well, via its well-established arrangements on site. Therein lies the Respondent's difficulty however – these are assumptions. They may be well-founded, but the Respondent has not produced evidence of the additional cost, if any, it was incurring as a result of the Claimant's absence, and certainly not that this was a cost it could not be expected to continue to bear.

87.4. Although the letter inviting the Claimant to the meeting at which she was dismissed stated that the Respondent could not sustain her absence, it did not even begin to spell out why. We noted too that there was nothing in the dismissal letter itself that set out or even referred to the impact of the Claimant's absence on the Respondent.

88. Balanced against the lack of evidence of impact on the Respondent, the impact of dismissal for the Claimant was of course very severe. In addition, the following matters led us to conclude that dismissal was more than was necessary at the point at which it was effected:

88.1. Whilst she accepted that she could not return to her existing role, the Claimant expressly put forward at the dismissal meeting her case that she could undertake another role, and specifically raised the question of part-time hours. Of course, this was in the face of the prospect of losing her employment, but the Claimant was nevertheless clearly indicating to the Respondent the possibility of her being able to work in some capacity at this point, or at least in the near future.

88.2. The OH report obtained by the Respondent shortly before dismissal did say in its "Management Advice" that the Claimant was not fit for work in any capacity, but it also indicated that she had been referred to Rheumatology and that her GP had advised that further investigations were to be arranged. The Claimant herself said at the dismissal meeting that she was going back to her GP and that the GP had advised that all of her scans were to be done again.

88.3. Mr Warren-Jones drew our attention to the August 2018 report in which OH mentioned an earlier Rheumatology referral. His submission was that this shows the Respondent was prepared to wait for that further medical assessment to take place even though the assessment of the Claimant's capacity was the same as it turned out to be in February 2019. What the Respondent has not shown however is why it could not wait in the same way in February 2019, when the Claimant was herself indicating a wish to carry out some work and where further medical investigations

remained in view, at least to see the outcome of those investigations in circumstances where it appears there would have been no adverse impact on Respondent in doing so.

88.4. That in our view would have been an evidently less discriminatory measure at that stage. What its practical outcome would have been is a matter for consideration at the remedy stage, and of course we are not saying that an employer in these circumstances must wait indefinitely. We noted however that the DWP assessment undertaken a few weeks after the dismissal, albeit in different circumstances and for different reasons, at least suggests continuing progress in the Claimant's recovery such that even if she remained unable to do her Production Line Leader role, she would have been a candidate for any vacancy that emerged at around that time or in a reasonable period thereafter, if indeed there was any such vacancy, which was unknown to us at the date of this Hearing.

89. For the reasons given above, the Respondent has not made out the justification defence. The complaint of discrimination arising from disability therefore succeeds.

Unfair dismissal

90. We begin with the reason for dismissal which we were able to deal with very briefly. The Respondent had clearly shown what was in the minds of the decision-maker, Mr Iqbal, even though he was not present to give evidence. All of the documentary evidence, and the confirmatory oral evidence from Ms Wright, shows that what he had in mind was the Claimant's absence. There was nothing in the evidence which suggested otherwise. Her absence clearly related to capability as defined by the ERA. The Respondent therefore established that the Claimant was dismissed for a fair reason.

91. The question for us to determine therefore was whether the dismissal for that reason was fair within the meaning of section 98(4) ERA. That required us to consider whether it was reasonable for the Respondent to treat the Claimant's absence as a reason to dismiss. Whether it was depends on whether in the circumstances (including the size and administrative resources of the Respondent's business – and we noted that the Respondent is a large business) it acted reasonably or unreasonably in treating the absence as a sufficient reason for dismissing the Claimant, something which fell to be determined in accordance with equity and the substantial merits of the case.

92. We were mindful that we must not substitute our decision for that of the Respondent, by considering what we would have done in the same circumstances. Rather the question before us was whether the Respondent acted within the range of reasonable responses. As Mr Warren-Jones said, that entailed consideration of four main issues, namely whether at the time of dismissal the Respondent had taken sensible steps to establish the Claimant's medical position, consulted with her about the possibility of dismissal, given reasonable consideration to alternatives to dismissal, and could reasonably be expected to wait any longer. We considered those four matters in turn, whilst always keeping in mind the importance of maintaining an overview of all of the relevant circumstances.

93. First therefore, did the Respondent take sensible steps to establish the true medical position?

94. As our findings of fact made clear, it obtained an OH report just before deciding to dismiss the Claimant, a report which in its "Management Advice" said that the Claimant was not capable of fulfilling her role or fit to work in any capacity at that point and that the author of the report did not foresee an imminent return to work.

95. As we have pointed out however, the report indicated that further investigations were planned, which we concluded should reasonably have led the Respondent to await their outcome before making a decision that it had no alternative but to dismiss her, especially given that it is a large employer and in the face of the Claimant's indication that she was capable of some work. We have accepted that there were no alternative vacancies at the Burton site at the time. It is nevertheless a separate question what the position would have been in this regard at the point at which further enquiries had been made of – or at least awaited from – those treating the Claimant, both as to what the Claimant would then have been medically capable of and what roles the Respondent would then have had available which were potentially suitable for her, if any.

96. What of consultation? We noted the following:

96.1. First, we saw very little evidence of the consultations with the Claimant during her absence – as stated in our findings of fact, we saw no notes of any of the pre-dismissal meetings or copies of follow up correspondence, if any was written. We can only conclude therefore that at no point prior to the invitation to the meeting at which she was dismissed, did the Respondent warn the Claimant that there would come a time, if her absence continued, when it would have to consider her dismissal. The switch from welfare and support to consideration of dismissal was therefore as stark as our findings of fact portray, coming unannounced after several months in which there was no contact between the parties at all that we saw or heard evidence about, other than perhaps some telephone calls, the content of which is unknown. Of course, an employer who fairly dismisses a long-term absentee must at some point tell the employee for the first time that dismissal is under consideration, but it was unreasonable of the Respondent in our judgment not to spell out the overall process to the Claimant once her absence had gone beyond its first few months so that the switch from welfare support to possible dismissal could be properly discussed and managed.

96.2. Secondly, we have concluded that the OH report was not sent to the Claimant ahead of the dismissal meeting. We accept that the report was for the Respondent's benefit, but plainly, if it was to be the basis of a discussion about the possibility of dismissal, it was essential that the Claimant see it and have a proper opportunity to consider and comment upon it. It is very difficult to have a meaningful conversation about it when the employee is only shown the report at the dismissal meeting, and as a result very difficult for example to raise and explain any disagreement with the Management Advice, such as we accept the Claimant would have wished to do in this case.

96.3. Thirdly, the dismissal meeting itself was perfunctory. There is no merit in a long meeting, even a long dismissal meeting, just for the sake of it, but the brevity of this particular dismissal meeting was, we thought, revealing of its limitations in effecting meaningful consultation and time for the Claimant to properly consider the Respondent's position, what it was relying on and provide a considered response. This would not have been helped by the failure to allow the Claimant properly to engage with the OH report.

96.4. In all these respects, the Respondent acted in our judgment outside of the range of reasonable responses. Had the OH report been provided beforehand and had more time been taken to enable mutual understanding of both parties' positions, it would reasonably have been clear to the Respondent that the outcome of the further medical enquiries referred to above should have been awaited so that a proper assessment of the Claimant's position and the Respondent's ability to retain in her employment could have been made at that later point.

97. As to consideration of alternatives to dismissal, we repeat our finding that there were no vacancies at the Burton site at that point. We also repeat however that in our judgment it was outside of the reasonable responses of a reasonable employer to not wait longer in all the circumstances of the case as we have outlined them and for the reasons we have given.

98. That takes us to that crucial final question. In view of the very limited impact of the Claimant's absence on the Respondent and its business, which we have analysed in detail in the context of the section 15 complaint, and given also the fact that the final OH report highlighted forthcoming medical assessments, reinforced by the Claimant herself at the dismissal meeting, we conclude that it was also outside of the range of reasonable responses for the Respondent to conclude that it could not wait any longer to see what emerged, both by way of medical assessment and opportunities, if any, for the Claimant to be retained once the results of those medical assessments were to hand.

99. For all of the reasons outlined above we find that the Claimant's dismissal was unfair. That conclusion is not affected by the Claimant's decision not to appeal against her dismissal; whether the Respondent wants to make any point about that on the question of remedy is for it to decide. The complaint of unfair dismissal is well-founded.

Remedy

100. As we have already indicated, it was abundantly clear, and the parties agreed, that they were not ready to deal appropriately with the question of remedy i.e., what compensation should be awarded to the Claimant. This is not least because it appeared to us that neither of the parties were prepared to deal with the following (listed in no particular order):

100.1. the relevance, if any, of the Claimant's medical condition in the period following her dismissal;

100.2. what, if any, vacancies the Respondent had at Burton in the period following dismissal;

100.3. the Claimant's injury to feelings;

100.4. the amount of the Claimant's basic pay during her employment with the Respondent;

100.5. what the Claimant has earned since her dismissal, including as a result of her weekend warehouse job;

100.6. what other jobs, if any, the Claimant has applied for since dismissal and the outcome of those applications; and

100.7. any State benefits received by the Claimant since dismissal.

101. It was therefore necessary to list a separate hearing, for which we also made Case Management Orders already sent to the parties. One advantage of the delay in dealing with remedy is that it not only gives the parties time to consider the above issues and anything else of relevance, but also to see if they can resolve matters amicably without the need for a further Hearing.

102. Although at the date of this Judgment there is still a period of more than eight weeks until the Remedy Hearing takes place, which is ample time to prepare for it (if it is required) with the Judgment to hand, Employment Judge Faulkner apologises to the parties for the delay in issuing it, which is entirely his responsibility.

Note: This was a remote hearing. The parties did not object to the case being heard remotely. The form of remote hearing was V - video. It was not practicable to hold a face-to-face hearing because of the COVID-19 pandemic.

Employment Judge Faulkner

Date: 9 April 2021

JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE

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