EMPLOYMENT TRIBUNALS

Claimant: **Mrs D Brightman**
Respondent: **TIAA Limited**

Heard at: **Ashford** **On:** **28-31 January 2019**
In Chambers: 12 March 2019 & 9 April 2019

Before: **EMPLOYMENT JUDGE CORRIGAN**
Members: **Dr T Okitikpi**
Mr N Phillips

Representation
Claimant: Mr B Jones, Counsel
Respondent: Mr J Dawson, Counsel

RESERVED JUDGMENT

1. The Claimant was not unfairly dismissed by the Respondent.

2. The Tribunal has not found a contravention of the Equality Act 2010 (not direct disability discrimination, discrimination arising from disability nor failure to make reasonable adjustments).

3. The Claimant's complaints are dismissed.

REASONS

Claims and issues

1. The Claimant, by her claim dated 8 June 2017, brought complaints of unfair dismissal and disability discrimination (direct, discrimination arising from, and

failure to make reasonable adjustments). A summary of the case and the substantive issues were set out by Employment Judge Sage in the Case Management Summary dated 1 December 2017. There was also a time limit point identified by Employment Judge Pritchard in the Case Management Order dated 17 August 2017 as the Claimant submitted her claim two days late, the deadline being 6 June 2017.

2. The matter was listed for full hearing on 22 May 2018 but in the event this did not go ahead for the reasons set down by Employment Judge Kurrein in the Case Management Order dated 22 May 2018. At that hearing it was decided that this hearing would be to address liability only (excluding, unusually, consideration of any Polkey issues). We were told by the parties this exclusion was a consequence of an application by the Claimant's Representative (opposed by the Respondent's Representative) in order to postpone the cost of medical evidence until remedy.

3. The Claimant was in hospital on 6-7 June 2017 (including intensive care on 6 June 2017). At the outset the Respondent's Representative confirmed that the Respondent did not contest the time limit point and the Tribunal agreed that time should be extended on the basis that it was just and equitable to do so for the discrimination claims and, in relation to unfair dismissal, not reasonably practicable for the Claimant to submit her claim in time, and she did so within such further period as was reasonable (the day after her discharge from hospital).

4. Otherwise the issues were discussed with the parties at the outset. The Respondent's Representative confirmed that there was no dispute that the Respondent had the requisite knowledge in respect of the reasonable adjustment claim.

5. The Claimant's Representative also confirmed the reasonable adjustments that it was asserted should have been made by the Respondent were:

    5.1 to discount the absence related to the Claimant's intravenous lines;

    5.2 to delay making a decision on dismissal pending the obtaining of up to date medical evidence;

    5.3 to delay making a decision on dismissal to see if the improved medical care described by the Claimant led to a sustained reduction in absence;

    5.4 to follow the sickness absence procedure;

    5.5 to tolerate the Claimant's existing level of attendance going forwards.

6. In his written submission the Claimant's representative added a further adjustment in relation to the annualized hours system, which had been explored in evidence.

Hearing

7. The Tribunal heard evidence from the Claimant on her own behalf.

8. On behalf of the Respondent, the Tribunal heard evidence from Ms Deborah Croad (Head of HR); Mr Simon Muir (Audit Director) and Mr Andrew Townsend (Managing Director).

9. There was an agreed bundle of 384 pages, to which further pages were added during the hearing with the agreement of the parties.

10. There was also a supplementary bundle of medical evidence in respect of the Claimant's health relied on by the Respondent. The Claimant's Representative objected to the evidence which post-dated the dismissal due to the decision to delay the Polkey issue made at the Preliminary Hearing and the fact the Claimant had therefore not obtained medical evidence herself. It was argued that the Respondent did not make clear it was relying on the medical evidence until after the witness statements were exchanged, though this was still several weeks before the hearing.

11. Our view was that this evidence was relevant to the failure to make reasonable adjustments claim. We allowed questions on it to be put to the Claimant and allowed further arguments in closing submissions as to why this evidence should or should not be taken into account in respect of particular aspects of the Claimant's claim. We have taken it into account where we find it relevant, along with the Claimant's decision to delay obtaining her own medical evidence.

12. The parties' representatives provided written submissions and also gave oral submissions.

13. This matter was listed In Chambers on 12 March 2019. However there were also other matters in the list that day, and unfortunately we were therefore not able to reach a final decision on that date and a further In Chambers was listed on 9 April 2019.

14. Based on the evidence heard and the documents before us we made the following findings of fact.

Facts

15. The Claimant commenced employment with South Downs Health NHS Trust on 26 November 2008 as a Principal Auditor. Her employment TUPE transferred to the Respondent on 1 January 2014. The Respondent provides internal audit services to organisations, including the NHS, throughout the UK.

16. The Claimant was a valued member of staff and performed her duties capably when she was able to attend work.

17. The Claimant throughout her employment had severe brittle asthma that required her to carry her own oxygen. She also had a blood clotting problem and from 2013 a slipped disc that required crutches for support. The Respondent accepted that the Claimant was disabled at the relevant times.

18. The Claimant initially worked 37 hours a week but in 2010, prior to the TUPE transfer, her contract was reduced to 34 hours a week. Ultimately her contract became an annualized hours contract with an average of 30 hours a week to give flexibility to the Claimant to manage around her conditions. By the relevant period she was effectively doing a 4 day week with every Friday off.

19. From the outset the Claimant had always had to have some absences as a result of her conditions, which her employer had tolerated. The Respondent had adjusted work to accommodate the fact that the Claimant might be absent with short notice by, for example, not giving the Claimant time pressured work. Other colleagues also had to step in from time to time to take over a piece of work from the Claimant.

20. The Respondent has a short term absence policy in which the Bradford Factor is applied (pp320-321) bundle and a longterm absence policy at page 321.

21. Between 2012 and 2015 the Claimant worked on her own on the ground floor as she found the stairs difficult, which the Claimant found isolating.

22. In 2015 the Respondent moved office premises. They were ultimately able to find a large ground floor office to accommodate all staff. The Claimant's conditions were a factor in the choice of a ground floor office.

23. Following the move there was a meeting on 30 April 2015 to discuss the Claimant's work station and ensure it was suitable for her needs pp76-77. As part of that meeting a medical report from the Claimant's GP was discussed, in order to confirm her fitness for work. The particular concern at that time was travel by car (p77). No letter was sent to her GP at that time.

24. In June 2015 the Claimant had her second longer absence of that year of 15 days. Then in October the Claimant was absent for 26 days. These absences were significantly longer than absences in the previous year (taken from the Claimant's sickness record at 73A). It was during this 26 day absence that the letter to the Claimant's GP previously discussed was finally sent (dated 21 October 2015) by Ms Croad (Head of HR). It listed the adjustments made following the move, asked whether there were other adjustments that could be made and also requested details of her current condition and future prognosis, including whether she was fit to perform her duties (pp97-99).

25. The Claimant's GP replied on 14 December 2015 (pp100-101). By the time of his reply the Claimant was still under fit notes under which she had been working from home since 17 November 2015 and on a phased return of reduced hours from 10 December 2015 to 22 December 2015.

26. The Claimant's GP said that the recent exacerbation had taken longer than others to settle and the delay in the report had been to wait until that phase of illness had passed before writing the report. He said the Claimant was fit for her role. He stated the Claimant's principle conditions. He mentioned that she had a central venous line for taking blood and administering drugs and had had issues with previous lines being infected and blocked. He finished saying that

she was very well motivated to do her job but that her respiratory condition was deteriorating which was likely to lead to longer exacerbations and thus longer periods of sick leave, but that in between he saw no reason why she could not be able to manage her work as she had done for many years.

27. 73A shows that the Claimant was absent 53 days in 2015, with a further 26 days when she was covered by a fit note with restrictions. Longer absences continued into 2016 with a 31 day absence between 29 February and 11 April 2016. Apart from one absence following surgery the reason for most of these was asthma attack related.

28. As a result on 25 April 2016 Ms Croad and Mr Muir (Line Manager) met with the Claimant to discuss her continuing low attendance. The Claimant agreed to attend Occupational Health provided she saw a suitably qualified doctor who had been provided with information about the doctors who were treating the Claimant, her medication and treatment plan, which were sent to Ms Croad by the Claimant on 26 April 2016.

29. The referral is at pages 121-124. The Respondent asked whether there were any further adjustments they could make which would improve attendance. They asked in particular whether permanently reduced hours would help. They also asked whether regular and sustained service was achievable.

30. The Claimant was given an appointment on 5 July 2016. She googled the doctor and found that he was a Senior Specialty Trainee in Occupational Medicine with a background in trauma and orthopaedics. The Claimant tried to check with Ms Croad whether he was fully briefed about her conditions. Ms Croad said she would check and return to the Claimant. When the Claimant heard nothing further she attended the appointment. The doctor did not have the supplementary information that the Claimant had sent. All he had was the referral form. She raised these issues with Ms Croad but received no reply.

31. She received the report, dated 13 July 2016, on 22 July 2016 and requested that it not be sent to the Respondent until she could address some concerns with it. She had a number of concerns, of which in our view the most significant were the fact that the doctor she saw had not been provided with her additional information and the report was written by a different doctor to the person she had seen. Ultimately Occupational Health replied on 13 September 2016 (pages 187-188) to say that Dr McKay who wrote the report had had full access to all the additional information but the information had now been sent to the doctor she saw for him to review.

32. There was further correspondence leading to the Claimant being sent a corrected report dated 13 July 2016 (pp147-149) and a further report dated 27 September 2016 which confirmed that the additional information made no difference to the opinion about the Claimant's fitness (pp245-246).

33. The substantive report said:

"[The Claimant] appears to be currently fit for work. Her underlying medical conditions are longstanding and unlikely to improve for the foreseeable future but are currently symptomatically under control with regular medications. It is likely that her asthma problems will continue to present with exacerbations in the future requiring periods of sickness absence. No specific adjustments appear to be relevant that would help her with her attendance in the workplace as any exacerbations of asthma are not particularly work related."

It also said the pattern of exacerbations would be unpredictable and the previous twelve months was likely to be the best predictor of her attendance going forwards. It was likely that she would have further absences in the future of this magnitude. The only recommendation was further flexibility for tolerating sickness absence.

34. The Claimant reluctantly agreed to the release of the report on 26 October 2016 and it was finally sent to the Respondent at the end of October 2016.

35. Meanwhile the Claimant had continued to have regular absence. These were no longer due to asthma attacks (as before) but were due to ongoing issues with her intravenous line. This led to another longer absence covering most of the period from 20 September 2016 to 23 October 2016. In this period she had an operation to fit a new central line (p73A). Following this she had a phased return of 4 hours a day for 4 weeks from 24 October 2016 (p93). The Claimant then had no further absence before her dismissal.

36. On 17 November 2016 the Claimant was invited by text message to meet with Ms Croad and Mr Muir on Tuesday 22 November 2016. She did not find out the reason for the meeting until she had seen her work emails on Monday 21 November 2016 because that was when she was next in work (as she did not tend to work Fridays). The invitation letter is at page 307. It explained that she had had a level of approximately 34% absence in 2015-2016 and currently 35% for the current year. Having received the Occupational Health report the meeting was to discuss whether there were any further adjustments that could be made, however it did warn that if the Respondent was "unable to facilitate appropriate arrangements to secure improved attendance levels" then her employment could be ended at that meeting.

37. The meeting took place the next day, 22 November 2016. The minutes are at pages 308 -311. At the outset it was confirmed that when she was able to attend the Claimant performed her duties. The Claimant was told the business could not continue to support the recent levels of absence. The Claimant explained the difficulties she had been having with her medical team and that she had "sacked" those treating the respiratory condition and that she now had a good team in place. She also had a new haemotologist. She was asked if she could suggest any other adjustments and told that they would do everything they could to support her. She said she felt that she now had the right team in place and the intravenous line was not getting as infected. The Claimant said she did feel it was going to improve and she was hopeful that her absences would reduce. The minutes record that the Respondent went through

possible further adjustments including working hours and asked the Claimant to think over what had been discussed. The meeting ended with Ms Croad saying they were going to agree a way forward and inform the Claimant.

38. A resumed meeting was then arranged for 10 January 2017. Again, the email to the Claimant was sent the Friday before, meaning she did not actually see it until the day before the meeting. This email did not repeat the warning about the possibility of dismissal.

39. The meeting notes are at pages 344 to 345. The Claimant was asked for any thoughts arising from the last meeting. Her reply was that she could not see how the Respondent could help her avoid going into hospital. Her colleague representative said the Claimant had not had any absence since the last meeting. She said she had been going to hospital every day and was still doing her hours. The Occupational Health report and the Claimant's concerns with it were mentioned. Her representative asked if she could be sent back to Occupational Health though the Claimant added that if it was the same person she would not go back as it was very stressful.

40. Mr Muir and Ms Coad adjourned to discuss and then reached the decision to terminate the employment on the basis of the medical evidence, the fact no further adjustments were possible, the level of attendance was not acceptable and was likely to continue, and there were no alternative roles. She was advised she had the right to apply for ill health retirement under the terms of the NHS pension scheme.

41. Mr Muir explained in evidence that the Claimant's hope that the new team would make a difference was seen in the context that the Claimant was always positive and hopeful, which was commendable, but that historically she had tried new treatment that she hoped would help but that this had not been borne out by what actually happened, such that she could be over-optimistic. He said that accommodating the absences was "quite difficult at a third" of the time off. That level of absence was detrimental and the Respondent was struggling, though managing, to rearrange resources to cover absences. The unpredictability was causing problems and making it difficult to manage. Plans were set with clients within a time scale and an unexpected absence could disrupt that and then work needed to be reorganized at short notice, and client expectations managed. Levels were set for the year and so this was affected by the unpredictable absences. It was a significant factor that the medical evidence indicated it could continue to get worse. If the absence level increased to 50% that would be more difficult. It would basically be the equivalent of working every other day. The Claimant did accept in evidence that if her absence continued at the high level it had been that was not something the Respondent could manage longterm. She said that if it had not improved she herself would eventually have made the decision to apply for ill health retirement or do something else.

42. The termination letter dated 11 January 2017 repeated the decision but did not refer to ill health retirement again (p340-341).

43. The Claimant was given the right to appeal, which she exercised. The Claimant appealed on 16 January 2017 (p346-347) and was invited to a meeting on 30 January 2017. The basis for the appeal was that insufficient consideration had been given to the reasons for her absence in 2016 and her expectation that her condition would improve with her new medical team; dissatisfaction with Occupational Health; failure to comply with the procedures; the fact that the Claimant had not been absent since the end of her phased return in November, supporting her view that her condition was improving with her better treatment. The Claimant prepared a statement at pages 358-363.

44. The Claimant raised background issues about not having been given enough work, being "harassed" by text messages when at hospital, for example asking her to transfer work onto the server, and the short notice of the capability meetings. A key point she raised in relation to her appeal itself was that sickness since April 2016 was due to line infections and the insertion of new lines and her asthma itself had only been a major problem at the beginning of 2016. She said the line infections were exceptional circumstances which she did not expect to continue. A new line had been inserted 18 October and was working well. At paragraph 4 she said the new medical team had made huge leaps in sorting out the problems with the lines.

45. She said that although this was at odds with her GP and Occupational Health reports, they were not specialists in the field of severe asthma and so additional information should have been sought. She did also say that she knew her condition was not likely to improve significantly.

46. At the appeal the Claimant had not provided any further medical evidence herself. The letter inviting the Claimant to the appeal meeting at page 349 had stressed that if there was any further evidence the Claimant wished to be considered she should bring it. This was repeated in a further letter at page 351.

47. The appeal was considered by Andrew Townsend. Having met with the Claimant he had further communication with Occupational Health who had said that the purpose of the referral was to assess fitness for work and not an opinion on the Claimant's medical conditions. OH confirmed the doctor concerned was qualified for that purpose.

48. The appeal outcome is dated 22 February 2017 (pp 364-366). Mr Townsend's decision was that sufficient consideration had been given to the Claimant's view that her condition would improve and that her view was measured against medical and other evidence which indicated this was unlikely. He found the Occupational Health report was unambiguous regarding the Claimant's future attendance level and noted the Claimant had not produced further medical evidence to support her view that her attendance would improve. Consideration was given as to whether a further report should be obtained but

this was not pursued on the basis he considered it would not change the outcome. He stated that in the absence of something demonstrating they were unreliable, the fact that the Claimant disagreed with the occupational health conclusions did not make him consider a further report should have been obtained.

49. He explained that the Claimant's situation did not fall neatly into either of the Respondent's sickness absence procedures as the issue was an inability to carry out her role on a consistent basis. The fact that the reasons for the absence had differed did not change their significant effect on the business.

50. He considered the recent improvement against the background of a period of reduced hours was insufficient to make the dismissal unreasonable.

51. The supplemental bundle contained some additional medical evidence that was not before the Respondent at the time. Not all of it was put to the Claimant. Our findings are limited to those pages which were put to the Claimant in evidence or otherwise directly referred to by the parties during the hearing. At pages 44-45 there is a letter from the Claimant's respiratory consultant Dr Philip to her GP dated 2 December 2016 which lists 20 diagnoses. That was at the time of the last phased return and records that the Claimant's chest is no better "indeed "awful"…. She is struggling at work managing 4 hours a day but worried about full time work". It further notes she was concerned about coping at work. The letter records the new intravenous line at diagnosis 1 but there is nothing in the letter that suggests that it was having a radical impact at that time.

52. Page 50 records that on hospital admission on 15 May 2017 the Claimant had an infected central line. This was not put expressly to the Claimant but is in agreement with the Claimant's witness statement in relation to the time limits issue which said her line had infection in May 2017. It was complications around that infection and changing the line which led to the Claimant's hospital admissions including intensive care on the deadline for her claim. Again, this incident does not give the impression of the Claimant being better with the new line at that stage.

53. Pages 51-52, dated 6 October 2017, record that "she continues to have problems with her line with clotting…", and "her chest has been worse than ever"…"She feels, she cannot carry on and is losing the will to live". When asked about this letter in evidence the Claimant said this was related in part to infections making her feel unwell (along with other matters).

54. Following a clinic on 16 January 2018 the consultant is recorded as saying "I am afraid that I do not know what to further recommend…(despite many discussions with my colleagues)".

55. The Claimant in evidence said her condition had now improved with her new team including Dr Wong. His name only appears on the list of names copied into reports in March/April 2018 and her consultant mentions referral to him on 4 April 2018 (page 64). The Claimant also in evidence said that now she is

much better and said this was from about April 2018. Since then she does not see her GP as often and nor does she need to see her consultant as often. This is because she does not need to see them as her symptoms are under control. She says this is because now she has a new line she is able to take more effective drugs. She said this improvement began much earlier, but we find this is not supported by the evidence currently available, and on balance, we find the improvement was from April 2018.

Relevant law

Unfair dismissal

56. In relation to ordinary unfair dismissal is contained in section 98 of the Employment Rights Act 1996. Section 98 provides:

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

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

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

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

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

(b) relates to the conduct of the employee,

(c) is that the employee was redundant, or

(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

(3). . .

(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.

57. In applying section 98(4) the Tribunal are not to substitute their own view for that of the employer. The question is whether the employer's decision to dismiss fell within the range of reasonable responses open to the employer, or whether it was a decision that no reasonable employer could have made in the circumstances.

58. The Respondent's representative referred us to the guidance in respect of longterm absence (though that is not the circumstances of the Claimant) in *BS v Dundee City Council* [2014] IRLR 13, quoted in *Monmouthshire County Council v Harris* UKEAT/0332/14/DA:

"…First it is essential to consider…whether the employer can be expected to wait longer. Secondly, there is a need to consult the employee and take [her] views into account….this is a factor that can operate both for and against dismissal….Thirdly, there is a need to take steps to discover the employee's medical condition and [her] likely prognosis, but this merely requires the obtaining of proper medical advice; it does not require the employer to pursue detailed medical examination; all the employer requires to do is to ensure that the correct question is asked and answered."

Direct disability discrimination

59. Under s13 Equality Act 2010 the Respondent discriminates against the Claimant if, because of her disability the Respondent treats the Claimant less favourably than the Respondent treats or would treat others.

Discrimination arising from disability

60. Section 15 Equality Act provides:

"(1) A person (A) discriminates against a disabled person (B) if—

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

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

61. Assessing justification is an objective exercise for the Tribunal. The Employment Tribunal must reach its own judgment upon a fair and detailed analysis of the working practices and business considerations involved. In

particular, it must have regard to the business needs of the employer (*Hensman v MoD* UKEAT/0067/14/DM, cited in *Monmouthshire).*

Failure to make reasonable adjustments

62. s20 Equality Act requires "…where a provision, criterion or practice of [the employer] puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled" [the employer]… "to take such steps as it is reasonable to have to take to avoid the disadvantage."

63. The Respondent's Representative referred us to *RBS v Ashton* [2011] ICR 632 in particular paragraphs 13 and 24 in which it was said:

"it is irrelevant…what an employer may or may not have thought in the process of coming to a decision as to whatever adjustment might or might not be made. It does not matter what process the employer may have adopted to reach that conclusion. What does matter is the practical effect of the measures concerned….It is an adjustment which objectively is reasonable, not one for the making of which, or the failure to make which, the employer had (or did not have) good reasons."

64. The Tribunal does need to consider how effective the adjustment would be in removing or reducing the particular disadvantage, and a real prospect of it doing so may make an adjustment reasonable (*Romec Ltd v Rudham* EAT 0069/07). As said in *Griffiths v Secretary of State for Work and Pensions* [2015] EWCA Civ 1265 at paragraph 9 "it may be that it is not clear whether the step proposed will be effective or not. It may still be reasonable to take the step notwithstanding that success is not guaranteed; the uncertainty is one of the factors to weigh up when assessing the question of reasonableness."

Conclusions

Unfair dismissal

What was the reason for the dismissal?

65. We find that the reason for dismissal was the Claimant's high level of absence in 2015 and 2016 and the Respondent's belief this was likely to continue or become worse ie capability.

Did the Respondent act reasonably in treating this as sufficient reason to dismiss?

66. The Respondent genuinely believed on the basis of high levels of absence dating back two years through 2015 and 2016, and two medical opinions (the GP and Occupational Health), that the levels of absence would not improve and, according to the Claimant's GP, would get worse.

67. We find this was a reasonable view based on reasonable investigation. The Respondent asked the view of the Claimant's GP in respect of her current condition and future prognosis, and whether she was fit to perform her duties. The GP report was dated 14 December 2015 and said it was evident that the Claimant's respiratory condition was deteriorating and was likely to result in longer exacerbations, as had just occurred, and therefore longer periods of sick leave.

68. The request for the Occupational Health report (dated 28 April 2016) specifically asked whether the level absence from February 2015 to April 2016 was likely to continue and whether regular and sustained service was achievable. The report was based on a review of the Claimant in clinic on 5 July 2016, but was not sent to the Respondent until the end of October 2016 (with the Claimant's consent). That said the Claimant was currently fit for work, that she would continue to have exacerbations on an intermittent basis and the nature and pattern of these would be unpredictable. The previous 12 months of absence patterns were likely to be the best predictor of her attendance going forwards and it was therefore likely that she would continue to have absences of this magnitude/ "a high period of sickness absence" in the future.

69. The Respondent acted promptly upon the receipt of the Occupational Health report, inviting the Claimant to a meeting in November 2016. The Occupational Health report was based on the position in July 2016 and the GP report was by then almost a year old. However, the Claimant had continued to have a number of periods of absence, including a 22 day absence in September/October and was on a phased return of reduced hours. Until then, therefore, there had been no improvement in attendance.

70. The Respondent met with the Claimant twice, on 22 November 2016 and 10 January 2017. It is right that the letters inviting the Claimant to those meetings were just seen the day before, on both occasions, which was not ideal. However the Claimant took no issue with this in the meetings. On 22 November 2016 she said she had a new medical team in place and a new line and hoped the situation would improve. At the reconvened meeting though she said "I can't see how you can help me not going into hospital". It was stated on her behalf that she had not had any further absence. When her representative suggested a further Occupational Health report the Claimant said she would not go back to the same person as it was very stressful, giving the impression she was not keen for a further report.

71. Leading up to the appeal meeting on 30 January 2017 both letters gave emphasis that the Claimant could bring her own evidence to rely on, so she could herself have brought medical evidence to support her view that her new team would improve the situation. At the appeal the Claimant drew the distinction between past absence for asthma itself up to April 2016 and more recent absence due to the issue with her line. She said these were exceptional and had been resolved.

72. Some employers might have gone back to Occupational Health or requested further evidence given the Claimant's view that she hoped her health would change with the new team/line. However given the Occupational Health report was only received in October and the Claimant was saying she was not keen to return to Occupational Health we find it was not unreasonable to rely on that report.

73. It was also in the context that the Claimant over the years had tried various treatments but levels of absence had continued to rise and although she was saying she had a new team she gave no indication about how long the suggested improvement would take and it had already taken a lengthy time to get the reports.

74. We also find that at the appeal stage it was not unreasonable to take into account that the Claimant had not produced any further medical evidence she wished to rely on, despite the encouragement to do so in the invitation letters, and in the absence of that, to rely on what medical evidence the Respondent had before it.

75. It was not unreasonable not to give more weight to the recent improvement. It was only very recent, and the Claimant had in the previous two years had attendance for months at a time, despite the high level of absence overall. The difficulty for the Respondent was the unpredictability of the timing and length of absence. They had tolerated a level of absence, but by 2015-2016 the level of absence was becoming more difficult and if the condition worsened and absences did get longer, as the Claimant's own GP had said would happen, then it would become even harder to manage. The absence record on the face of it supported the GP's prognosis, with 53 days of absence in 2015 increasing to 71 days in 2016, including a 31 day absence at the beginning of the year and 22 days in total in September/October.

76. We also do not consider that it was unreasonable not to distinguish between the precise reason for each absence. What the Respondent had was two years of very high absence for reasons connected with the Claimant's asthma, and medical views that it was not likely to get better, and if anything was likely to get worse.

77. The Respondent did explain to the Claimant her right to request ill health retirement and she did not feel ready to go down that route.

78. We do not consider it unreasonable to dismiss the Claimant at this stage. The frequency, length and unpredictability of the absences was difficult to plan for and impacting the team, which does time pressured client facing work. She was not given the time pressured work and other colleagues had to pick up the Claimant's work if she was absent. The medical evidence did not suggest this would improve. The dismissal was within the range of reasonable responses. Other employers might have waited longer, others might have made the decision sooner. We do not consider that the Respondent could be expected to wait longer. The Claimant had been consulted and the Respondent

took steps to discover her medical condition and likely prognosis. Proper medical advice from an Occupational Health practitioner was obtained.

79. The Claimant chose not to obtain further medical evidence for this hearing to support her case that the previous medical evidence should not have been relied upon and she was about to improve her attendance. We accept that this was because her representative persuaded Employment Judge Kurrein to postpone considerations of Polkey to the remedy hearing. Nevertheless we find this a surprising approach on the Claimant's behalf given the Claimant's case was that the prognosis was wrong and she was about to improve her attendance. If there is evidence available or obtainable to support that contention then it is surprising she has not chosen to rely on it at liability stage. We note that in the absence of further evidence from the Claimant the evidence available up to early April 2018 that was put to the Claimant for comment does not reflect improvement, though we accept her evidence that her health has improved more recently, since April 2018. We note that were this matter to have progressed to considerations of Polkey then further evidence might yet have been produced.

Direct disability discrimination

Has the Respondent subjected the Claimant to less favourable treatment than they would have treated the comparator by dismissing her? The Claimant relies upon a hypothetical comparator. Was this because of her disability?

80. We accept the comparator is a person with the same attendance record who was not disabled.

81. We do not consider the Claimant has been subjected to less favourable treatment in comparison to the comparator. We find that the Respondent was very sympathetic to the Claimant's disability and tolerated her absences, and a substantial period of disruption as the absences became higher in 2015 and 2016. We find it likely that someone with the same absence levels who was not disabled would have been dismissed much sooner. The Respondent's short-term absence policy shows that action would normally have been taken much earlier in respect of someone who was not disabled.

Discrimination arising from disability

82. The Respondent accepted the Claimant was dismissed because of her absence record which was something arising from her disability.

Was this a proportionate means of achieving a legitimate aim?

83. Our task is to balance the employer's needs against the discriminatory effect on the employee. It is clear that the Claimant was fighting to remain in

employment and maintain her income in the face of her medical conditions and that dismissal would be very detrimental.

84. On the other hand the Respondent had the legitimate aim of running an efficient business with good service to clients and looking out for all staff including those covering for the Claimant. The Respondent was trying to meet commitments to clients within timescales without overloading colleagues. The Respondent had tolerated absences of 53 days and 71 days over two years and was concerned about it continuing or increasing. Managing the absences meant the Claimant could not take any time critical work and there was disruption if she was absent and work needed to be shared amongst colleagues. We explored in some detail how the Respondent could have managed to continue with the level of absence, and are satisfied the Respondent was already making all the possible adjustments to workload and enduring a significant degree of disruption and that any increase in absence would be unsustainable. The Claimant herself accepted in evidence that if her absence continued at the high level it had been that was not something they could manage longterm.

85. We find on balance dismissal was proportionate. Although to date the Respondent had managed the absences they had been having a significant impact for some time and it would be disproportionate to expect that they continue to do so for longer when the medical evidence was that attendance was unlikely to improve.

Failure to make reasonable adjustments

Did the Respondent apply the following provision, criteria, and/or practice generally, namely that a certain level of absences would result in dismissal?

86. We find the PCP was that the Claimant was required to be able to undertake her role on a consistent basis in the foreseeable future (dismissal letter page 340 which is an adaptation to the Claimant's situation of the wording on page 330 that an employee not capable of performing at the required standard within a reasonable timescale may be dismissed). We agree with the Respondent that the PCP is not that set out in the question above. The Respondent asserted it was the generic phrase on page 330 (skeleton paragraph 41) but we find this was tailored to the Claimant's case in the dismissal letter as set out above.

Did this put the Claimant at a substantial disadvantage in comparison to those are not disabled?

87. We accept this did put the Claimant at a substantial disadvantage as she could not ensure consistent attendance in the foreseeable future as she was likely to continue to have a high level of absences and was therefore dismissed. The medical evidence, including that put to the Claimant that postdated dismissal

does not suggest absences would have reduced, though they may have from April 2018.

What steps would it be reasonable for the Respondent to have to take to avoid the disadvantage?

Discounting the absences because of the line

88. We do not consider this an adjustment that it would be reasonable to expect the Respondent to take. The Claimant's absences were due to asthma, either directly, or indirectly because of the line she needed to administer the medication. Both types of absence were therefore related to her disability. The medical evidence up to March/April 2018 does not suggest that absences would have reduced, though they may have after that date. The evidence does suggest there would be continuing absences because of the line. Indeed the hospitalization which led to the Claimant putting her claim in late was to do with her line. It would not be reasonable to expect the Respondent to discount those disability related absences, which were substantial. Moreover, the Claimant's high level of absence was likely to continue in the immediate future due to the underlying disability, and it is this, and not the particular nature of each of the past absences, which meant she was disadvantaged by the requirement to undertake her role on a consistent basis in the future. Simply discounting the absences that had been because of the line therefore would not remove or reduce the disadvantage.

Delaying dismissal pending up to date medical evidence; delaying the dismissal to see if the Claimant sustained a reduction in absences.

89. We consider that obtaining medical evidence, or not, is part of the process that the employer took in deciding whether to make an adjustment and therefore is not a matter with which we are concerned. It is not a reasonable adjustment in itself.

90. The question with which we are concerned is whether delaying the decision would have had a chance of avoiding the disadvantage and if so whether that is a reasonable adjustment the employer should have had to take. We consider therefore that the above potential adjustments are one and the same and relate to the question of whether delaying the decision could have removed or reduced the disadvantage.

91. We find on the evidence that it is unlikely that delaying the decision would have made a difference until after April 2018. That is when we consider the Claimant's health improved and her absences are likely to have reduced and she might have been able to show better levels of attendance. We do not consider it reasonable to expect the employer to wait over another year to see that change in improved attendance, especially as at the time of the decision that improvement did not appear likely.

To delay making a decision on dismissal to permit the Claimant an opportunity to work to make up her absences (under the annualized hours system)

92. This was explored in evidence but there was insufficient time remaining in the year for the Claimant to make up her absences. She accepted herself she could not have made up for all of her absences. She was absent 44 days in the period 1 April 2016 to December 2016, so even if she could work 5 days a week instead of her usual 4 (which was already an adjustment for her condition), it was not possible to make up that absence in the rest of that financial year and the Claimant still would have had significant absence over the year. This therefore would have made no difference but would have placed the Claimant under significant pressure, given the 4 day week she was working under her annualized contract was already an adjustment to help her manage her condition. We do not find it a reasonable or realistic adjustment.

Following the sickness absence procedure

93. The submission on behalf of the Claimant was that following the sickness absence procedure would have given the Claimant more information and warning about what was expected of her and involved the setting of a clear timeframe around which she could have prepared properly to make the case for her continued employment.

94. We agree with the Respondent that the Claimant's illness did not fall neatly into either process. If the Bradford Factor in the short term absence policy had been applied to the Claimant's absences formal action would have been taken much sooner. We consider it was a reasonable adjustment not to apply the short term absence process and the Respondent did make that adjustment. The short term absence policy does say that where there is an underlying medical reason for the absences the line manager should liaise with HR to seek advice from a Medical Professional, which is what happened in the Claimant's case (p320 of the bundle).

95. We find that the Respondent did follow a process akin to the long term absence policy (page 321). They did seek advice from a Medical Professional. They did arrange a review meeting with the Claimant. The policy provides that where the employee is not capable of carrying out their contractual duties, medical advice has been sought and all other reasonable options explored, termination of the employment may be necessary, following the final stage of the capability and performance management policy. That policy is at page 330 and states that "if it becomes clear that an employee is not capable of performing at the required standard within a reasonable timescale, the line manager, together with support from the HR Team, will request a meeting to consider termination of employment". That is what happened in the Claimant's case, though in her case there were two meetings. She was given a right of appeal in accordance with the procedure.

96. In any event adjusting the process to give more information and warning about the meetings was unlikely to have made any difference to whether the Claimant's attendance improved in the foreseeable future, and therefore would have had no impact on the substantial disadvantage. It is right that there was very short notice given for the meetings. This could have been handled better

but there is no evidence of this affecting the Claimant's position. We accept the Respondent's point that the Claimant was a Principal Auditor, which is a relatively Senior position, and can be assertive when necessary yet she did not take any issue with proceeding with the meetings and had a representative at both. Nor did she ask for additional time to provide additional evidence. There was a break between the November and January meetings when the Claimant knew that the meeting would be resumed but sought no further evidence. Nor did she provide any at her appeal, despite the invitations to do so in her invitation letters.

97. We find that adjusting the process followed would have had no impact on the substantial disadvantage and would not have led to the Claimant remaining in employment. It is accepted by the Respondent and the Tribunal that the Claimant worked hard to manage her work with her health issues and there is no criticism of her in finding the Respondent could not reasonably be expected to continue to tolerate absences of that level.

Tolerating the level of absence

98. Clearly tolerating the absences would remove the substantial disadvantage. We agree that it is reasonable to expect the Respondent to tolerate a certain level of disability related absence, as the Respondent had done from the outset. Moreover for a certain period it was reasonable to expect the Respondent to tolerate a higher level of absence. However the Respondent had tolerated a high level of unpredictable attendance for two years and the evidence was it was worsening or likely to worsen. We consider it would not be reasonable to expect the employer to tolerate this level of unpredictable absence for an open-ended period. The Claimant's actual improvement took over a further 12 months and we do not consider it reasonable to expect the employer to tolerate it that long. In any event at the time of dismissal the improvement did not appear likely and there were no time scales for it. We have accepted that the difficulty for the Respondent was the unpredictability of the absences in the context of the Respondent's business which is client based and time critical.

99. For the avoidance of doubt we consider that there are no further adjustments which the Respondent could reasonably have been expected to make. Various adjustments had been made to the Claimant's hours, and to the distribution of work, for example time critical work was not assigned to her. A certain level of absences had been tolerated. We explored whether there were other alternatives in managing the workload and are satisfied the Respondent had already made the possible adjustments.

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Employment Judge Corrigan
29 May 2019