THE INDUSTRIAL TRIBUNALS

CASE REF: 6421/19

CLAIMANT: **Madeline McKinley**

RESPONDENT: **Brett Martin Limited**

DECISION

The unanimous decision of the tribunal is that the claimant's claims of unfair dismissal and disability discrimination are dismissed.

CONSTITUTION OF TRIBUNAL

Employment Judge: **Employment Judge Orr**

Members: **Mrs L Torrans**
Mr M McKeown

APPEARANCES:

The claimant was represented by Mr A Sands, Barrister-at-Law, instructed by John Ross and Company Solicitors.

The respondent was represented by Mr P Bloch, of the Engineering Employers Federation for Northern Ireland.

CLAIMS

1. The claimant presented a claim to the tribunal on 6 March 2019 claiming unfair dismissal and disability discrimination by reason of failure to make reasonable adjustments.

2. The respondent disputes the claimant's claims in their entirety and contends the claimant was fairly dismissed by reason of capability for poor attendance and asserts that any absences in relation to the claimant's disability were not taken into account in its decision to dismiss.

ISSUES

3. The respondent accepts that the claimant is disabled within the definition of the Disability Discrimination Act 1995 by reason of her depression.

4. The representatives provided the tribunal with an agreed list of legal and factual issues as follows:

   (1) Was the claimant unfairly dismissed contrary to Article 126 of the Employment Rights (Northern Ireland) Order 1996.

   (2) Whether in dismissing the claimant for poor attendance the respondent failed to make reasonable adjustments to prevent the claimant being placed at a substantial disadvantage in comparison to non-disabled employees contrary to Section 4 of the Disability Discrimination Act 1995.

SOURCES OF EVIDENCE

5. The tribunal was provided with witness statements and heard oral evidence from the claimant on her own behalf and from the following witnesses on behalf of the respondent:

Mr Billy Edwards	-	Business Unit Manager (Plumbing and Drainage)
Ms Alyson Purvis	-	HR Advisor
Mr Noel Gourley	-	Production Manager
Ms Lynn Patterson	-	HR Manager
Mr Des Reid	-	Product Development Manager

6. The representatives referred the tribunal to documentation within the agreed trial bundle during evidence and submissions.

RELEVANT LAW

7. Mr Sands referred the tribunal to the following cases:-

   - **Griffiths v Secretary of State for Working Pensions [2017] ICR 160**
   - **O'Brien v Bolton St Catherine's Academy [2017] IRLR 547**
   - **Spencer v Paragon Wallpapers Ltd [1976] ICR 301**
   - **Spink v Express Foods Limited [1990] IRLR 320 EAT**

8. Mr Bloch referred the tribunal to the relevant section in ***Harvey on Industrial Relations and Employment Law – Division D1*** – see paragraph 12 below.

<u>Unfair Dismissal</u>

9. Article 130 of the Employment Rights (Northern Ireland) Order 1996 provides insofar as is relevant to these proceedings;-

   "130 (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 is either a reason falling within paragraph (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 paragraph if it –

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

…..

(3) In paragraph (2)(a)

(a) "capability", in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, …

(4) where the employer has fulfilled the requirements of paragraph (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."

10. The recent Northern Ireland Court of Appeal case ***Connolly v Western Health and Social Care Trust [2017] (NICA) 61*** held:

"[10] The wording of Article 130(4) which reflects earlier legislation in this jurisdiction and in England and Wales might appear to leave open to the Industrial Tribunal a very wide discretion. However this was narrowed by a decision of the Employment Appeals Tribunal, per Browne-Wilkinson J, as he then was, in ***Iceland Frozen Foods Ltd v Jones [1983] ICR 17*** *cited by the Tribunal in its judgment at paragraph 56. Having reviewed the authorities the Judge concluded as follows:*

"We consider that the authorities establish that in law the correct approach for the Industrial Tribunal to adopt in answering the question posed by Section 57(3) of the Act 1978 is as follows:

(1) the starting point should always be the words of Section 57(3) themselves;

(2) in applying the Section an Industrial Tribunal must consider the reasonableness of the employer's conduct, not simply whether

they (the members of the Industrial Tribunal) consider the dismissal to be fair;

(3) in judging the reasonableness of the employer's conduct an Industrial Tribunal must not substitute its decision as to what was the right course to adopt for that of the employer;

(4) in many, though not all, cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view, another quite reasonably take another;

(5) the function of the Industrial Tribunal, as an Industrial Jury, is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair; if the dismissal falls outside the band it is unfair."

[12] Section 57 sub-section (3) of the Employment Protection (Consolidation) Act 1978 is equivalent to our Article 130 although not in exactly the same terms.

57.-(3) Where the employer has fulfilled the requirements of subsection (1), then, subject to sections 58 to 62, the determination of the question whether the dismissal was, fair or unfair, having regard to the reason shown by the employer, shall depend on whether the employer can satisfy the tribunal that in the circumstances (having regard to equity and the substantial merits of the case) he acted reasonably in treating it as a sufficient reason for dismissing the employee. (4) In this section, in relation to an employee,- (a) " capability " means capability assessed by reference to skill, aptitude, health or any other physical or mental quality ; (b) " qualifications " means any degree, diploma or other academic, technical or professional qualification relevant to the position which the employee held."

[22] I do not see how one can properly consider the equity and fairness of the decision without considering whether a lesser sanction would have been the one that right thinking employers would have applied to a particular act of misconduct. How does one test the reasonableness or otherwise of the employer's decision to dismiss without comparing that decision with the alternative decisions? In the context of dismissal the alternative is non-dismissal ie some lesser sanctions such as a final written warning.

[40] *The interpretation of what, in this jurisdiction, is Article 130(4) (a) of the 1996 Order has been fixed by a series of Appellate Courts over the years, ie, that whether an employer acted reasonably or unreasonably is to be addressed as whether an employer acted within a band of available decisions for a reasonable employer even if not the decision the tribunal would make. That test, expressed in various ways, is too long established to be altered by this Court, and in any event has persuasive*

arguments in favour of it. But it is necessary for tribunals to read it alongside the statutory provision of equal status in Article 130(4)(b), ie, that that decision 'shall be determined in accordance with equity and the substantial merits of the case' …".

11. In ***Taylor v OCS Group Ltd [2006] EWCA Civ 702*****,** Smith LJ made the following observations:

> *'[47]…[the tribunal's] task is to apply the statutory test. In doing that, they should consider the fairness of the whole of the disciplinary process. If they find that an early stage of the process was defective and unfair in some way, they will want to examine any subsequent proceeding with particular care. But their purpose in so doing will not be to determine whether it amounted to a rehearing or a review but to determine whether, due to the fairness or unfairness of the procedures adopted, the thoroughness or lack of it of the process and the open-mindedness (or not) of the decision-maker, the overall process was fair, notwithstanding any deficiencies at the early stage.*
>
> *[48] In saying this, it may appear that we are suggesting that employment tribunals should consider procedural fairness separately from other issues arising. We are not; indeed, it is trite law that section 98(4) of the Employment Rights Act 1996 requires the employment tribunal to approach its task broadly as an industrial jury. That means that it should consider the procedural issues together with the reason for the dismissal, as it has found it to be. The two impact upon each other and the employment tribunal's task is to decide whether, in all the circumstances of the case, the employer acted reasonably in treating the reason it has found as a sufficient reason to dismiss So, for example, where the misconduct which founds the reason for the dismissal is serious, an employment tribunal might well decide (after considering equity and the substantial merits of the case) that, notwithstanding some procedural imperfections, the employer acted reasonably in treating the reason as a sufficient reason to dismiss the employee. Where the misconduct was of a less serious nature, so that the decision to dismiss was nearer to the borderline, the employment tribunal might well conclude that a procedural deficiency had such impact that the employer did not act reasonably in dismissing the employee. The dicta of Donaldson LJ in* ***Union of Construction, Allied Trades and Technicians v Brain [1981] ICR 542, 550****, are worth repetition:*
>
> > *"Whether someone acted reasonably is always a pure question of fact … where Parliament has directed a tribunal to have regard to equity-and that, of course, means common fairness and not a particular branch of the law-and to the substantial merits of the case, the tribunal's duty is really very plain. It has to look at the question in the round and without regard to a lawyer's technicalities. It has to look at it in an employment and industrial relations context and not in the context of the Temple and Chancery Lane".'*

12. ***Harvey on Industrial Relations and Employment Law – Division D1: Incapacity arising from Ill Health*** provides commentary on the relevant legal authorities when considering a dismissal by reason of incapacity at paragraphs [1190] to [1279]. Paragraph 1190 specifically provides:

"Ill-health can provide grounds for dismissal of an employee either because of a single extended absence or because of persistent intermittent absence. In either case, depending on the circumstances, there may come a point when the employer can dismiss fairly."

13. In ***Lynock v Cereal Packaging Ltd [1988] IRLR 510*** the EAT provided specific guidance in respect of dismissals on the grounds of capability due to absence, even when the employee is fit for work at the point of dismissal.

> *'…in our judgment, there was no requirement to have further medical evidence. Although the applicant was in employment again at the time when he was dismissed, this is likely to be the situation where you have these intermittent absences and the fact that there had been those absences since February 1986 indicated that there was no improvement. The approach of an employer in this situation is, in our view, one to be based on those three words which we used earlier in our judgment – sympathy, understanding and compassion. There is no principle that the mere fact that an employee is fit at the time of dismissal makes his dismissal unfair; one has to look at the whole history and the whole picture. Secondly, every case must depend upon its own fact, and provided that the approach is right, the factors which may prove important to an employer in reaching what must inevitably have been a difficult decision, include perhaps some of the following – the nature of the illness; the likelihood of recurring or some other illness arising; the length of the various absences and the spaces of good health between them; the need of the employer for the work done by the particular employee; the impact of the absences on others who work with the employee; the adoption and the exercise carrying out of the policy; the important emphasis on a personal assessment in the ultimate decision and of course, the extent to which the difficulty of the situation and the position of the employer has been made clear to the employee so that the employee realises that the point of no return, the moment when the decision was ultimately being made may be approaching. These, we emphasise, are not cases for disciplinary approaches; these are for approaches of understanding…'* [per Wood J at para 14].

14. In ***Davis v Tibbett and Britten Group Plc [2000] EAT 460*** Collins J summarised the position in relation to dismissals for reasons of intermittent absenteeism as follows:

> *"[6] It is well established by previous decisions of this tribunal that incapacity or persistent absenteeism for a variety of unconnected ailments in themselves minor, may be an admissible reason for dismissal and in those circumstances whether or not the employee is at fault being immaterial.*
>
> *[9] … In* ***International Sports Company Ltd v Thompson 1980 IRLR 30*** *a case of persistent absenteeism because of unconnected minor injuries, this tribunal at paragraph 20 of its judgement said:*
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> > *"Paraphrasing words used by Mr Justice Kilner Brown in giving the judgement of the Employment Appeal Tribunal in* ***The Post Office v MJ Jones [1977] IRLR 422****, there are circumstances in which a reasonable employer is entitled to say 'Enough is enough'."*

[14] It seems to us that the reasoning of this tribunal is of general application to cases where there are persistent absences for unconnected medical reasons, all those reasons being genuine in themselves. An employer is perfectly entitled to dismiss an employee who has been frequently absent for medical reasons over a significant period of time, whether or not the employee is in any way at fault because of the absences, provided that the employer has carried out a proper procedure including warning and counselling."

15. In ***International Sports Company Limited v Thomson [1980] IRLR 340***, a case where the employee had been dismissed after being issued with various warnings due to intermittent absenteeism, the EAT held:-

> *"In such a case, it would be placing too heavy a burden on an employer to require him to carry out a formal medical investigation and, even if he did, such an investigation would rarely be fruitful because of the transient nature of the employee's symptoms and complaints. What is required, in our judgment, is, firstly, that there should be a fair review by the employer of the attendance record and the reasons for it; and, secondly, appropriate warnings, after the employee has been given an opportunity to make representations. If then there is no adequate improvement in the attendance record, it is likely that in most cases the employer will be justified in treating the persistent absences as a sufficient reason for dismissing the employee".*

16. In ***Griffiths v Secretary of State for Work and Pensions (2015) EWCA Civ 1265*** – Elias LJ stated at paragraph 76:

> *"In this context I would observe that it is unfortunate that absence policies often use the language of warnings and sanctions which make them sound disciplinary in nature. This suggests that the employee has in some sense being culpable. That is manifestly not the situation here, and will generally not be the case, at least where the absence is genuine, as no doubt it usually will be. But an employer is entitled to say, after a pattern of illness absence, that he should not be expected to have to accommodate the employee's absences any longer. There is nothing unreasonable, it seems to me, in the employer being entitled to have regard to the whole of the employee's absence record when making that decision. As I mention below, the fact that some of the absence is disability related is still highly relevant to the question whether disciplinary action is appropriate."*

<u>*Contributory Conduct*</u>

17. Article 156(2) of the Employment Rights (NI) Order 1996 provides:

> *"Where the tribunal considers that any conduct of the complainant before the dismissal was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly."*

Article 157(6) of the Employment Rights (Northern Ireland) Order 1996 provides:

"Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding."

18. If the tribunal concludes that an employee was guilty of culpable or blameworthy conduct which contributed to his dismissal, both the basic award and compensatory award must be reduced by the same percentage - ***McFall v Curran [1981] NICA.***

19. If the employee is wholly to blame for the dismissal compensation may be reduced by 100% ***Hollier v Plysu Limited [1983] IRLR 260*****.**

"Polkey" Deduction

20. The House of Lords held in ***Polkey v Dayton Services Ltd [1987] 3 ALL England ER 974*** that if a dismissal is procedurally defective, then that dismissal is unfair but the tribunal has a discretion to reduce any compensatory award by any percentage up to 100% if the employer can satisfy the tribunal that following the procedures correctly would have made no difference to the outcome.

Previous Disciplinary Warnings

21. The Court of Appeal in ***Davies v Sandwell Metropolitan Borough Council [2013] EWCA Civ 135*** emphasised the need for a restrictive approach to the question of when it is legitimate for a tribunal considering the fairness of a dismissal to go behind a final warning given in the past and concluded;-

"There would need to be exceptional circumstances for going behind the earlier disciplinary process and in effect reopening it." (Per Beatson LJ)

Disability Discrimination - reasonable adjustments

22. An employer's duty to make reasonable adjustments is set out in the Disability Discrimination Act 1995 (as amended) at Section 4A and states, insofar as is relevant to these proceedings, as follows:

"4A – (1) Where –

(a) a provision, criterion or practice applied by or on behalf of an employer, …

places the disabled person concerned at a substantial disadvantage in comparison with persons who are not disabled, it is the duty of the employer to take such steps as it is reasonable, in all the circumstances of the case, for him to have to take in order to prevent the provision, criterion or practice, or feature, having that effect."

23. Section 18B(1) of the Disability Discrimination Act 1995 sets out, in so far as is relevant to these proceedings, factors to be taken into account when determining whether an adjustment is reasonable:

(a) the extent to which taking the step would prevent the effect in relation to which the duty is imposed;

(b) the extent to which it is practicable for him to take the step;

(c) the financial and other costs which would be incurred by the employer in taking the step to the extent to which taking it would disrupt any of his activities;

(d) the extent of his financial and other resources;

(e) the availability to him of financial or other assistance with respect to taking the step; and

(f) the nature of his activities and the size of his undertaking

24. Section 18(B)(2) provides the following as examples of steps which an employer may need to take in relation to a disabled person in order to comply with a duty to make reasonable adjustments –

(a) making adjustments to premises;

(b) allocating some of the disabled person's duties to another person;

(c) transferring him to fill an existing vacancy;

(d) altering his hours of working or training;

(e) assigning him to a different place of work or training;

(f) allowing him to be absent during working or training hours for rehabilitation, assessment or treatment;

(g) giving, or arranging for, training or mentoring (whether for the disabled person or any other person);

(h) requiring or modifying equipment;

(i) modifying instructions or reference manuals;

(j) modifying procedures for testing or assessment;

(k) providing a reader or interpreter;

(l) providing supervision or other support.

… ."

25. In ***The Environment Agency v Rowan [2008] IRLR 20*** the EAT outlined the steps that the Tribunal must go through in order to determine whether the duty to make

reasonable adjustments arises and whether it has been breached. The steps relevant to this case, are as follows:-

(i) identify the provision, criterion or practice (PCP) applied that has put the claimant at a disadvantage compared to those who are not disabled;

(ii) identify the non-disabled comparator (where appropriate);

(iii) identify the nature and extent of the substantial disadvantage suffered by the claimant.

26. If the duty arises the Tribunal then goes on to determine whether the proposed adjustment is reasonable to prevent the PCP placing the claimant at that substantial disadvantage. In **Smyth v Churchill Stairlifts PLC [2006] ICR 524**, the Court of Appeal confirmed that the test of reasonableness is an objective one and it is ultimately the Employment Tribunal's view of what is reasonable that matters.

27. Reasonable adjustments are limited to those that prevent the provision, criterion or practice (PCP) or feature placing the disabled person concerned at a substantial disadvantage in comparison with persons who are not disabled. Any proposed reasonable adjustments must be judged against the criteria that they must prevent the PCP from placing him at a substantial disadvantage.

28. A proper assessment of what is required to eliminate the disabled person's disadvantage is a necessary part of the duty of reasonable adjustment ***Southampton City College v Randall [2006] IRLR 18.***

29. Langstaff J in ***Royal Bank of Scotland v. Ashton [2011] ICR 632***, stated at paragraphs 12 and 13:

> "[The provisions concerning what reasonable adjustments could be carried out by the employer in s.18B of the DDA] *show clearly that the steps which are required of an employer are* ***practical steps****. They are intended to help the disabled person concerned to overcome the adverse effects of the relevant disabilities, at least to the greatest extent possible, so that he or she may fulfil a useful role as an employee. We accept that … the focus of the provisions as to adjustment requires a Tribunal to have a view of* ***the potential effect of the adjustment contended for****. The approach is an objective one. It follows … that it is irrelevant to the questions whether there has been or whether there could be a reasonable adjustment or not what an employer may or may not have thought in the process of coming to a decision as to whatever adjustments 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".*** (Tribunal emphasis added).
>
> *"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" (paragraph 24).*

30. In ***Bray v Camden London Borough EAT [1162/01]*** the EAT confirmed that disability related absences do not have to be discounted entirely when applying Absence Management Procedure.

31. Exempting employees from Absence Management Procedures was held not to be a reasonable adjustment by the EAT in ***Jennings v Barts and the London NHS Trust UKEAT/0056/12/DM***. Furthermore in the ***Royal Liverpool Childrens NHS Trust v Dunsby [2006] IRLR 351*** the EAT held at paragraph 17:

> *"In the experience of this tribunal, it is rare for a Sickness Absence Procedure to require disability related absences to be disregarded. An employer may take into account disability related absences in operating a Sickness Absence Procedure".*

32. In ***Griffiths –v- Secretary of State for Work and Pensions [2017] ICR 160 CA*** – the Court of Appeal considered the application of a sickness absence management policy and the identification of the relevant PCP. Elias LJ stated:

> *"There are in my view two assumptions behind the EAT's reasoning, both of which I respectfully consider to be incorrect. The first is that the relevant PCP was the general policy itself. If that is indeed the correct formulation of the PCP, then the conclusion that the disabled are not disadvantaged by the policy itself is inevitable given the fact that special allowances can be made for them. It may be that this was the PCP relied upon in the Ashton case. But in my view formulating the PCP in that way fails to encapsulate why a sickness absence policy may in certain circumstances adversely affect disabled workers – or at least those whose disability leads to absences from work. Moreover, logically it means that there will be no discrimination even where an employer fails to modify the policy in any particular case. The mere existence of a discretion to modify the policy in the disabled worker's favour would prevent discrimination arising even though the discretion is not in fact exercised and the failure to exercise it has placed the disabled person at a substantial disadvantage. (Paragraph 46)*
>
> *In my judgment, the appropriate formulation of the relevant PCP in a case of this kind was in essence how the ET framed it in this case: the employee must maintain a certain level of attendance at work in order not to be subject to the risk of disciplinary sanctions. That is the provision breach of which may end in warnings and ultimately dismissal. Once the relevant PCP is formulated in that way, in my judgment it is clear that the minority member was right to say that a disabled employee whose disability increases the likelihood of absence from work on ill health grounds, is disadvantaged in more than a minor or trivial way. Whilst it is no doubt true that both disabled and able bodied alike will, to a greater or lesser extent, suffer stress and anxiety if they are ill in circumstances which may lead to disciplinary sanctions, the risk of this occurring is obviously greater for that group of disabled workers whose disability results in more frequent, and perhaps longer, absences. They will find it more difficult to comply with the requirement relating to absenteeism and therefore will be disadvantaged by it." (Paragraph 47) (tribunal emphasis)*

33. Elias LJ further stated at paragraph 58 of the judgement:

"The nature of the comparison exercise in the former case is clear: one must simply ask whether the PCP puts the disabled person at a substantial disadvantage compared with a non-disabled person. The fact that they are treated equally and may both be subject to the same disadvantage when absent for the same period of time does not eliminate the disadvantage if the PCP bites harder on the disabled, or a category of them, than it does on the able bodied. Of course, if the particular form of disability means that the disabled employee is no more likely to be absent than a non-disabled colleague, there is no disadvantage arising out of the disability. But if the disability leads to disability-related absences which would not be the case with the able-bodied, then there is a substantial disadvantage suffered by that category of disabled employees."

34. As was noted by the House of Lords in its decision ***Archibald v Fife Council [2004] UKHL 32, [2004] IRLR 651 [2004] ICR 954*** (per Baroness Hale at paragraph 47), the duty necessarily requires the disabled person to be treated more favourably in recognition of their special needs. It is thus not just a matter of introducing a 'level playing field' for disabled and non-disabled alike, because that approach ignores the fact that disabled persons will sometimes need special assistance if they are to be able to compete on equal terms with those who are not disabled ... (Harvey on Industrial Relations and Employment Law L at [398.01]).

35. The burden of proof in relation to the duty to make reasonable adjustments, was specifically considered in ***Project Management Institute v Latif [2007] IRLR 579.*** Elias P stated:-

"The paragraph in the DRC's Code is correct. The key point identified therein is that the claimant must not only establish that the duty has arisen, but that there are facts from which it could reasonably have been inferred, absent an explanation, that it has been breached. Demonstrating that there is an arrangement causing substantial disadvantage engages the duty but it provides no basis on which it could properly be inferred that there is a breach of that duty. There must be evidence of some apparently reasonable adjustment which could be made. We do not suggest that in every case the claimant would have to provide the detailed adjustment that would need to be made before the burden would shift. It would, however, be necessary for the respondent to understand the broad nature of the adjustment proposed and to be given sufficient detail to enable him to engage with the question of whether it could be reasonably be achieved or not."

"[We] very much doubt whether the burden shifts at all in respect of establishing the provision, criterion or practice or demonstrating the substantial disadvantage. These are simply questions of fact for the Tribunal to decide after hearing all the evidence, with the onus of proof resting throughout on the claimant".

RELEVANT FINDINGS OF FACT

36. The tribunal makes the following findings of fact on the balance of probabilities.

Background

37. The respondent is a manufacturing company. The claimant was employed by the respondent as an operator in its Injection Moulding department from November 1995 until her dismissal on 18 December 2018.

38. There is no dispute that the claimant had a long history of disciplinary warnings due to poor attendance. The tribunal was not provided with a breakdown of the claimant's entire attendance history for the duration of her employment with the respondent, however by way of replies to a Notice for Additional Information dated 4 July 2019 the following undisputed evidence was provided to the tribunal:

9 September 1998	-	Final written warning for poor attendance
14 October 2009	-	Recorded verbal warning Week 21 unwell (2 shifts) Week 23 depressed (1 shift) Week 32 sick (1 shift) Week 34 sick (4 shifts) Week 38 sick (1 shift)
21 April 2010	-	Recorded verbal warning issued Week 45 flu (4 shifts) Week 11 chest infection (1 shift)
21 September 2010	-	First written warning issued Week 27 toothache (1 shift) Week 32 doctor's appointment 4.25 hours Week 36 viral infection (5 shifts) Week 37 sick (2 shifts)
27 October 2011	-	Recorded verbal warning issued Week 47 chest infection (1 shift) Week 14-15 chest infection 3.25 hours plus (4 shifts) Week 42 food poising (4 shifts)
3 July 2012	-	Recorded verbal warning issued Week 8 medical issue (4 shifts) Week 18 stomach upset (2 shifts) Week 24 ear infection (1 shift)
26 August 2013	-	Recorded verbal warning issued Week 3-4 pneumonia (3 shifts) Week 15 fluid in knee (4 shifts) Week 27 stomach bug (1 shift) Week 31 vomiting (1 shift)
3 February 2016	-	Recorded verbal warning issued Week 13 sore back not work related (2 shifts) Week 19 problems at home (1 shift) Week 20 swollen knee (1 shift) Week 22-24 depression/chest infection (12 shifts)

Week 35-37 depression 9.25 hours plus (7 shifts)
Week 39-40 brother ill/depression (8 shifts)
Week 51 sore knee (2 shifts)
Week 2-4 flu/chest infection (10 shifts)

7 March 2017 - Recorded verbal warning issued
Week 11-14 sick (15 shifts)
Week 18-19 family stress (7 shifts)
Week 27-40 flu/low mood (52 shifts)
Week 46 (½ shift)
Week 47 sick (4 shifts)
Week 2 sick (2 shifts)
Week 4-5 back pain (14 shifts)

28 June 2017 - First written warning issued
Week 13-14 chest infection (6 shifts)
Week 15 sore legs (4 shifts)
Week 19-22 anxiety and depression (13 shifts)

26 June 2017 - Final written warning issued for leaving site

1 March 2018 - Final written warning issued
Week 26 stomach bug 1 shift
Week 41 bad back (1 shift)
Week 42-2 depression/flu/swelling below eye (44 shifts)
Week 57 stomach bug/low mood/chest infection (12 shifts)

13 December 2018 - Dismissed
Week 15-20 depression/low mood/sciatica (21 shifts)
Week 22-25 trouble with knee/low mood (14 shifts)
Week 26-33 low mood (21 shifts)
Week 35 stomach upset (1 shift)
Week 37 sore knee/dentist (3.5 shifts)
Week 39 unauthorised leave (4 shifts)

39. The claimant was then absent for 38 shifts for weeks 41-49 (October 2018 until 10 December 2018) by reason of depression/sore knee. It is common case that a shift equates to one working day.

40. The tribunal was referred to an Occupational Health Report in the trial bundle which confirmed the claimant had a history of depression – Dr Mills' report dated 15 September 2016 records:

> *"(1) There is not a single underlying reason to account for all the absences however four of the absences listed were related to her problems with bereavement and depression.*
>
> *(2) I do not think this condition necessarily has implications for her work performance when the condition is controlled.*
>
> *(3) Ms McKinley intends to return to work within the next week.*

(4) I would expect she will manage to return to her normal duties.

(5) We did not discuss her absence related to her sore knee or her chest infection. However the other absences appear to be related to periods of low mood".

41. The respondent accepts the claimant is disabled pursuant to the Disability Discrimination Act 1995 by reason of her depression.

Absence Management Process/Disciplinary Process

42. It is common case that the respondent does not have a separate and distinct sickness absence procedure, the respondent at all times addressed the claimant's poor attendance under its disciplinary procedure. The tribunal accepts the unchallenged evidence of Mrs Patterson that this absence management process is agreed between the Works Council (consisting of union members), the Human Resources Team and the Company's owners. The respondent's Employee Handbook differentiates between 'Long-term absence' and 'Short-term persistent absence' as follows:

"Short term persistent absence.

This type of absence is the most costly to the company and is the absence which this policy specifically aims to control.

After each absence period, consideration will be given to all known background circumstances and will be fully discussed with each employee, before any action is implemented. The number of days sick in any given period of time will not be the only consideration. Each employee's case will be treated individually."

"Long term absence.

Generally this is absence continuing for six weeks or more. Where this occurs the company will take a sympathetic approach and consult the employee fully before making any decisions. Regular contact will be maintained throughout the period of absence by Company Personnel Department and/or the Departmental Manager and a visit to the Company Doctor may be required".

43. The Employee Handbook was updated in 2018 and amended the definition of long term sickness as follows:

"Generally this is absence continuing for four weeks or more. Where this occurs the Group will take a sympatric approach and consult you fully before making any decisions. Regular contact will be maintained through the period of absence by the Human Resources Department (if applicable) and/or your Departmental Manager and a visit to the Company Doctor may be required. You should also regularly update your Team Leader, Supervisor or Departmental Manager on your progress".

44. The respondent provides its employees and managers with the following "Absence/Lateness Guidelines". The tribunal accepts the evidence of all the respondent's witnesses that the guidelines as set out below are the relevant guidelines that should be followed when addressing absence; however in practice, this was not always applied and normally after two periods of absence, further disciplinary action was taken. The respondent's witnesses accepted that under the terms of these guidelines disciplinary action should be considered after each period of absence.

Absence Period	Action Taken
1	RTWI, remind employee attendance is being monitored.
2	RTWI followed by an Attendance Review meeting, remind employee further periods may result in disciplinary action.
3	If warranted, disciplinary action. **RVW issued if necessary**.
4	RTWI followed by an Attendance Review meeting, remind employee further periods may result in disciplinary action.
5	If warranted, disciplinary action. **1st WW issued if necessary**.
6	RTWI followed by an Attendance Review meeting, remind employee further periods may result in disciplinary action.
7	If warranted, disciplinary action. **FWW issued if necessary**.
8	RTWI followed by an Attendance Review meeting, remind employee further periods may result in disciplinary action.
9	Depending on circumstances, **dismissal may be warranted**.

45. In the respondent company's disciplinary rules and procedures "*absenteeism*" is listed as an example of minor misconduct. The tribunal accepts the consistent evidence of all the respondent's witnesses that "absenteeism" was interpreted by the respondent as poor attendance and was at all times managed under the respondent's Disciplinary Rules and Procedures as this is the only procedure, in conjunction with the Absence Guidelines set out above, that the respondent has in place to manage absence.

46. The tribunal accepts the respondent's witness's consistent evidence that within the respondent company, all disability related absences are discounted for absence management purposes, albeit that this is not contained within a written policy or document.

47. There is no dispute that the claimant received a first written warning on 28 June 2017 which recorded as follows:

> *"Your absence pattern has continued to deteriorate despite being issued with a Verbal Recorded Warning on 7 March 2017. To date you have had a further three periods of absence which clearly indicates that there has been no improvement.*
>
> *Having considered the circumstances I am issuing you with this first written warning which shall remain on your personal file for 12 months. Subject to satisfactory conduct this warning will expire 28 June 2018. I must inform you that any future attendance related problems may result in further disciplinary action".*

48. The claimant did not appeal this warning and the tribunal is satisfied that this first written warning was issued following a recorded verbal warning in relation to poor attendance issued on 7 March 2017.

49. On 6 March 2018 the claimant received a final written warning for poor attendance, the letter records as follows:

> *"The hearing was to consider your continued poor attendance under the Company's disciplinary procedure and absence guidelines. You were previously given a first written warning on 28 June 2017. Since that date you have had the following periods of absence:*

Year	***Week Number***	***Duration***	***Reason for Absence***
2017	*26*	*1 shift*	*Stomach bug*
	41	*1 shift*	*Bad back*
2017-2018	*42-2*	*44 shifts*	*Depression/Flu/Swelling below eye*
2018	*5-7*	*12 shifts*	*Stomach bug/low mood/Chest infection*

> *I can confirm that I have made the decision to issue you with a final written warning because your attendance record is not of the standard required by the Company.*
>
> *You are required to achieve an immediate and sustained improvement in your attendance record. If your absence does not reach the required standard the Company may take further action under the next stage of the procedure, which may result in termination of your employment.*
>
> *Details of this final written warning will be recorded on your personnel file but will be disregarded for the purposes of the absence guidelines after 6 March 2019 that is after 12 months, unless your absence record gives us further cause for concern as set out in the procedure".*

50. The tribunal accepts Mr Edwards' evidence that when he issued the final written warning he did not take into account absences that related to the claimant's disability of depression. This was not expressly stated in the final written warning outcome letter, however the tribunal is satisfied from his evidence that this was made clear to the claimant at the disciplinary hearing held on 1 March 2018; specifically that absences were categorised as "countable" and "non-countable"; meaning that for absence management purposes, absences could be discounted. His evidence was consistent with the contemporaneous notes of the disciplinary hearing, which explicitly record that the absences relating to bad back, stomach bug, and flu were the only countable absences being considered at this disciplinary hearing. The claimant did not appeal this final written warning.

51. Following the issuing of the final written warning on 6 March 2018, the claimant was absent on seven further occasions as follows:

Week 15-20 depression/low mood/sciatica (21 shifts)
Week 22-25 trouble with knee/low mood (14 shifts)
Week 26-33 low mood (21 shifts)
Week 35 stomach upset (1 shift)
Week 37 sore knee/dentist (3.5 shifts)
Week 39 unauthorised leave (4 shifts)
Week 41-49 depression/sore knee (38 shifts)

52. It is common case that in October 2018 (week 39) the claimant was absent for four days by reason of unauthorised absence. The claimant accepted in cross-examination that she went on holiday having not obtained the requisite approval or authority from her line manager. The claimant, after being informed by her line manager that she did not have the necessary approval to take the annual leave simply failed to report to work. She accepted in questions from the tribunal that her sister had booked a holiday for her and she had not obtained approval or authority from her line manager in advance of this booking. The claimant also accepted in cross-examination that she was fully aware at the time she availed of this unauthorised absence she was subject to a live final written warning in relation to poor attendance. The claimant attended an investigatory meeting in relation to this unauthorised absence on 3 October 2018 and commenced a period of sick leave from 4 October 2018 until 10 December 2018. *(See paragraph 51 above (week 41-49)).*

53. The claimant attended an absence management review meeting with Mr Gourley on 29 November 2018 the purpose of which was to consider her ongoing absence. At the review meeting the claimant confirmed she would be fit to undertake duties in a sitting role.

54. The claimant was certified fit to return to work on 10 December 2018 on amended duties by reason of issues with her leg. The claimant attended a welfare meeting on 10 December 2018 at which amended duties due to her leg/knee pain were discussed, including the provision of a chair.

55. The claimant was invited to a disciplinary hearing by letter dated 11 December 2018 as follows:

> "*Dear Madeline*
>
> *RE: DISCIPLINARY HEARING*
>
> *Further to your attendance review with Sammy Beattie, you are now required to attend a Disciplinary Hearing on 13 December 2018 at 11:30 am in the Account meeting room. Please report to reception at this time.*
>
> *The Company considers the above allegation potentially to be the final stage of the disciplinary process and may constitute an act of Minor Misconduct. I would inform you that the potential outcome of the above hearing could be dismissal as you received a Final Written Warning on 6 March 2018 for the same type of offence and this warning remains live.*

In order to fully prepare for this hearing I attach a copy of the attendance review held with Sammy Beattie, your attendance record and a copy of the Company's Disciplinary Rules and Procedures.

Noel Gourley, Production Manager will be conducting the Hearing. You will, of course, be given an opportunity to put forward your case.

You have the right to be accompanied at this Disciplinary Hearing as per the Employee Handbook. If you would like to be accompanied, please confirm in advance who will be attending.

Yours sincerely

Alyson Purvis
HR Advisor"

56. Mr Gourley conducted the disciplinary hearing and was accompanied by Ms Purvis who took notes. The minutes of the disciplinary hearing record that typically after a final written warning, two absences will result in further disciplinary action. The claimant was dismissed with notice by letter dated 18 December 2018 by reason of poor attendance taking into consideration that she had been previously issued with a final written warning for poor attendance in March 2018. The letter of dismissal confirmed:

> *"I have now considered all the relevant information in relation to this matter. The decision I have reached is that you are guilty of Minor Misconduct, poor attendance. The appropriate sanction is the termination of your employment as you were issued with a final written warning for the same offence on 6 March 2018."*

The claimant was also provided with the right of appeal.

57. The tribunal accepts the consistent evidence of Mr Gourley, Mr Reid and Ms Patterson that short term absence has a significant impact on the respondent workplace, more so than long-term absence. This is because of the very tight manning structure that exists within the respondent company arising from customer requirements. The nature of persistent short-term absence can result in a machine having to be shut down for a day due to difficulties in sourcing cover for one shift unlike long-term absence where production schedules can be managed and cover put in place in the knowledge of the long-term nature of the absence. This evidence is consistence with the wording of the respondent's Employee Handbook – see paragraph 42 above. The tribunal accepts that at all times the claimant's absence was considered as short-term persistent absence under the respondent's Handbook.

58. The tribunal accepts that Mr Gourley did not take into account absences relating to the claimant's depression; his decision to dismiss was based on absences relating to knee pain, stomach bug and the claimant's unauthorised absence. His evidence, which was not disputed was that the claimant had reached and exceeded the trigger points in the respondent's absence guidelines.

59. It was not in dispute that reasonable adjustments had previously been put in place for the claimant including a change from night shift to day shift for over a year, extension of trigger points in the Absence Guidelines and the provision of lighter duties.

60. The claimant appealed the decision and attended an appeal hearing on 10 January 2019 conducted by Mr Reid. The appeal was unsuccessful and the outcome letter records:

> "*I have not taken into consideration any absences relating to depression/low mood.*
>
> *Since your Final Written Warning issued in March 2018, you have had a further three periods of countable absence:*
>
> *(1) Week 35, one shift with a stomach upset.*
>
> *(2) Week 37, 3 shifts with a sore knee.*
>
> *(3) Week 39, 4 shifts unauthorised leave.*
>
> *You have agreed with me during the meeting on Thursday 17 January 2019 that the reasons for the absences in weeks 35 and 37 are correct.*
>
> *Regarding your third period absence, as per the Employee Hand Book you failed to give four weeks' notice in advance regarding taking your holidays outside the normal shut down periods.*
>
> *Equally you failed to get permission from your Department manager, Billy Edwards, as is also a requirement in the Employee Hand Book. Michael Keenan states that he did not give you permission to proceed with these four shifts as holidays.*
>
> *Due to the fact that further periods of countable absences is listed above, within a rolling 12 months of being issued with a Final Written Warning, I must uphold the decision to terminate your employment with the company on the grounds of poor attendance*"

61. Mr Reid and Mr Gourley were consistent in their evidence that each case is looked at individually and that trigger point guidelines had been reached and exceeded by the claimant. The tribunal accepts the evidence of both Mr Reid and Mr Gourley that they did not take into consideration any absences relating to depression or low mood.

THE PARTIES' SUBMISSIONS

62. The submissions on behalf of the claimant in relation to her claim of unfair dismissal can be summarised as follows:

(i) that "absenteeism" as defined in the Oxford Dictionary means absence without excuse, that poor attendance is not absenteeism and that absence by reason of genuine illness is not a disciplinary issue;

(ii) that "capability" as the ground relied upon by the respondent in its decision to dismiss runs contrary to the evidence. He argues that the respondent at all times treated the claimant's absence as misconduct and in this he relies on the respondent's use of the disciplinary procedure, the wording of the invite to the disciplinary hearing and its outcome, and he asserts, that this dismissal was a 'category error' in that the claimant's poor attendance was at all times viewed as misconduct, despite the genuine nature of the claimant's absence; and

(iii) that the decision to dismiss for short term intermittent absence on the grounds of capacity was a sham and that the real reason was the claimant's absence due to her depression.

63. In respect of the claimant's claim of failure to make reasonable adjustments, her representative initially contended that the respondent's application of the disciplinary procedure was a PCP which placed the claimant at a substantial disadvantage in comparison with non-disabled persons, however in submissions he confirmed that the PCP being relied upon was as identified in the case of ***Griffiths v Secretary of State for Work and Pensions (2015),*** (see paragraphs 32 and 33 above) namely the requirement to maintain a certain level of attendance at work in order to avoid the risk of disciplinary or other sanctions. The claimant's representative argues that the respondent did in fact take into account the claimant's absences relating to her disability and that the suggestion that the absences in relation to depression were not taken into account has an *"air of unreality about it"*; in this he relies on the wording of the outcome letters of the first written warning and the final written warning which make no reference to absences relating to disability being discontinued.

64. The respondent's representative submits that at all times the respondent managed the claimant's absences through its disciplinary procedure and that the reason for the dismissal was capability and not misconduct. He submits that the claimant had been managed through this process on numerous occasions over the duration of her employment and that she was fully aware of the procedures and the reasons for the numerous disciplinary hearings. In addition he argues that the claimant was at no disadvantage by reason of the identified PCP because the entirety of her absences relating to her disability – namely depression/low mood were not taken into account and were fully discounted despite the respondent being under no legal obligation to do so.

CONCLUSION

Unfair dismissal

65. The findings of fact are set out above. The tribunal is satisfied that the reason for the claimant's dismissal was capability - arising from her extensive poor attendance. This arose from a variety of health causes – as set out in paragraph 38 above. There was no suggestion on the part of the respondent or any of its witnesses that the claimant's absences, by reason of sickness were not genuine, this was not the case advanced at any time during the disciplinary process or before this tribunal. There was no dispute that the claimant had reached and exceeded the trigger points in the respondent's absence guidelines. The tribunal rejects the claimant's

argument that the claimant was dismissed by reason of misconduct or because of absence relating to her disability. It is the tribunal's unanimous finding that the reason for the dismissal was the claimant's extensive level of absence after a considerable number of disciplinary hearings and warnings and when trigger points had been reached and exceeded. Accordingly the tribunal finds that the reason for the claimant's dismissal was capability which is a potentially fair reason as per Article 130(1) of the Employment Rights Order (Northern Ireland) 1996.

66. The tribunal finds that the employer acted reasonably in treating capability as a sufficient reason for dismissing the claimant for the following reasons:

- the claimant had an extremely poor attendance record which had not improved despite being managed by the respondent over many years by way of disciplinary hearings;

- the claimant had been subject to this process many times and was fully aware of the absence management process within the respondent company; she had been consulted and received repeated warnings in relation to this on numerous occasions throughout her employment; warnings that the claimant did not appeal at any time;

- the claimant had a live final written warning after which she had seven further periods of absence, three of which the respondent deemed "countable". As per ***Davies v Sandwell Metropolitan Council [2013]*** set out above, there must be exceptional circumstances for going behind an earlier disciplinary process and in effect reopening it. There were no such exceptional circumstances advanced before the tribunal and the tribunal is satisfied, based on the evidence presented, that none exist;

- the Occupational Health report dated September 2016 makes it clear that there was no single underlying reason to account for all the short-term absences (save for the claimant's depression), accordingly in all the circumstances of this case, the tribunal is satisfied that there was no requirement for the employer to seek medical evidence as the tribunal finds that no medical enquiries would have assisted in relation to these intermittent absences going forward; there was no evidence provided to the disciplinary panel or appeal panel that the claimant's absence level was going to improve;

- an absence management process is required within the respondent company to maintain a level of manpower to ensure customer service levels are met. The process in existence in the respondent company was one that had been agreed between management, company owners and the Works Council.

- the respondent company had a need for the work to be carried out and the tribunal accepts the consistent evidence of all the respondent witnesses that short term intermittent absences had a significant impact on the business, specifically meeting customer requirements; this is also reflected in the wording of the respondent company's Employee Handbook;

- it is the tribunal's finding that the respondent demonstrated considerable understanding and compassion in managing the claimant's numerous periods of absence, over the years, including those for depression and those relating to bereavement, to the extent that the respondent discounted entirely all absences relating to the claimant's disability.

67. Apart from the use of the disciplinary policy to manage absence and the use of disciplinary language, the claimant makes no other allegations that the dismissal process was unfair. The tribunal is satisfied that absences are managed by the respondent company under its disciplinary procedure. The tribunal accepts the position as referred to by Elias J in ***Griffiths v Secretary of State for Work and Pensions (2015) EWCA Civ 1265*** above, that absence policies often use the language of warnings and sanctions which make them sound disciplinary in nature; and that this is not ideal given that absence is not a misconduct issue. The tribunal does not accept the claimant's argument that 'absenteeism' or poor attendance was viewed by the respondent as fault based or intentional by its use of the disciplinary process. In this case, the disciplinary procedure was the means of managing sickness absence. There is no dispute that the claimant was invited to a disciplinary hearing, given the right to be accompanied, provided with a written outcome and provided with the right of appeal. The tribunal is satisfied, from the claimant's evidence, that at each stage of the absence management process she fully understood the reason for the process and why she was attending the hearing and the purpose of that hearing. The tribunal finds that all times the procedure complied with Article 130(A) of the Employment Rights Order (Northern Ireland) 1996 and was a fair procedure.

68. The tribunal accepts that it was reasonable in all the circumstances for the respondent to dismiss the claimant on the grounds of capability; the respondent had made adjustments by discontinuing all periods of absence relating to depression, which in themselves were substantial; the tribunal accepts that the respondent was entitled to say 'enough was enough' in its consideration of the claimant's extensive absence over the years, it is an undisputed fact that the absence trigger points had been reached and had been extended in relation to the claimant's absence over the years. The tribunal finds that, taking all of this into consideration and its impact on the respondent's business, the decision to dismiss was well within the band of reasonable responses.

Disability Discrimination

69. As per the tribunal's findings of fact, the tribunal concludes that the respondent did not take into account any of the claimant's absences relating to depression/low mood in its decision to dismiss. Furthermore, absences relating to the claimant's disability – depression/low mood were also discounted in respect of the first written warning and final written warning. Given this conclusion, the claimant was quite clearly not placed at a substantial disadvantage by reason of the identified PCP in comparison with persons who were not disabled - as a non-disabled person with the same level of absence (excluding those relating to depression and low mood) would have suffered the same disadvantage - therefore the duty to make reasonable adjustments is not triggered. The claimant's claim of disability discrimination is therefore dismissed.

70. In summary the claimant's claims of unfair dismissal and disability discrimination are dismissed.

Employment Judge:

Date and place of hearing: 1 and 2 October 2019, Belfast.

Date decision recorded in register and issued to parties: