Case Number: 2300387/2016

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	and	Respondent
Mrs K Winnard		Lloyds Banking Group

HELD AT London South ON 08, 09 and 10 November 2016
In chambers 02 December 2016

Before: Employment Judge Freer
Members: Ms S Campbell
Dr R P Fernando

Appearances
For the Claimant: Mr L Godfrey, Counsel
For the Respondent: Mr E Williamson, Counsel

RESERVED JUDGMENT

It is the unanimous judgment of the Tribunal that:

The Claimant's claims of disability discrimination are unsuccessful;

The Claimant's claim of unfair dismissal is well-founded and there shall be a reduction of 90% to the Compensatory Award having regard to the *Polkey* principle.

REASONS

1. By a claim presented to the Tribunal on 12 February 2016, the Claimant claims unfair dismissal and disability discrimination.

2. The Respondent resists the claims.

3. The Claimant gave evidence on her own behalf and the Respondent gave evidence through Mr Jonathan Brown, Lending Channel Manager; Ms Amanda Petts, Senior Operations Manager; and Ms Amanda Adlington, Senior Retail Application Fraud Manager.

4. The Tribunal was presented with a lever-arch file comprising 407 pages and other documents during the hearing as agreed by the Tribunal.

5. The issues for determination are those agreed by the parties before a Preliminary Hearing on 26 April 2016, as set out in a document at page 31 of the Tribunal bundle.

The law

Unfair dismissal

6. The legal provisions relating to unfair dismissal are contained in Part X of the Employment Rights Act 1996.

7. Section 98 provides that, where dismissal is not controversial, the Respondent must show that the reason for dismissal is one of a number of permissible reasons. The Respondent in this case contends that the reason for dismissal is related to the Claimant's capability.

8. The Employment Tribunal will consider whether or not the dismissal was fair in all the circumstances in accordance with the provisions in section 98(4):

> "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"

9. The standard of fairness is achieved by applying the range of reasonable responses test. This test applies to procedural as well substantive aspects of the decision to dismiss. A Tribunal must adopt an objective standard and must not substitute its own view for that of the employer. (**Iceland Frozen Foods –v- Jones** [1982] IRLR 439, EAT as confirmed in **Post Office –v- Foley** [2000] IRLR 234, CA; and **Sainsbury's Supermarkets Ltd –v- Hitt** [2003] IRLR 23, CA).

10. In **Taylor –v- Alidair Ltd** [1978] IRLR 82, CA, it was held that the analysis in a capability dismissal includes:

> "Whenever a man is dismissed for incapacity or incompetence it is sufficient that the employer honestly believes on reasonable grounds that the man is incapable and incompetent. It is not necessary for the employer to prove that he is in fact incapable or incompetent".

11. The EAT in **Spencer –v- Paragon Wallpapers Ltd** [1976] IRLR 373, indicated that there are a variety of factors to be considered in assessing whether the decision to dismiss is reasonable, which include: the nature of the illness and the job; the needs and resources of the employer; the effect on other employees; the likely duration of the illness; how the illness was caused; the effect of sick-pay and permanent health insurance schemes; and alternative employment. The length of service of the employee may also be relevant. The weight to be given to particular factors is case specific.

12. This was reiterated in **Lynock –v- Cereal Packaging Ltd** [1988] IRLR 510, where the EAT stated:

> "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".

13. The likely duration of the illness is an important consideration. If after a reasonable period of time the employee is still unable to say when they are likely to be able to return, that will properly weigh heavily with an employer (see for example **Luckings –v- May and Baker Ltd** [1974] IRLR 151, EAT and also **McPhee –v- George H Wright Ltd** [1975] IRLR 132, EAT).

14. An employer must carry out a fair review of the attendance record and the reasons for absence; give the employee an opportunity to make

representations; and give appropriate warnings if things do not improve (see **International Sports Co Ltd –v- Thomson** [1980] IRLR 340, EAT).

15. In **Royal Liverpool Children's NHS Trust –v- Dunsby** [2006] IRLR 251, the employment tribunal considered that if disability related absences had been disregarded at stage two of a four stage sickness absence procedure, the last hearing would have been at stage three, not stage four and therefore dismissal was unfair as it was not fair for the Respondent to treat disability related absences as part of the 'totting-up' review process. The EAT overturned the decision holding that there was no absolute rule that an employer acts unreasonably if it treats disability-related absences as part of a totting-up review process. If the Tribunal considered that to do so was unfair, it should have explained why. The claimant's assertion for the first time at the fourth stage that two absences nearly a year before should have been left out of account, did not necessarily make it unfair for the respondent to dismiss the claimant looking at the whole pattern of absences. There was no rule that an employer must discount disability-related absences.

16. The Tribunal has referred itself to the ACAS Code of Practice on Disciplinary and Grievance procedures. A failure to follow the Code does not, in itself, make a person or organisation liable to proceedings. However, employment tribunals will take the Code into account when considering relevant cases.

17. The statutory provisions relating to remedy for unfair dismissal are set out in sections 112 to 127 of the Employment Rights Act 1996.

18. It is well-established law that the principle contained in **Polkey –v- A E Dayton Services Ltd** [1987] IRLR 503, HL, applies to the consideration of the just and equitable element of the Compensatory Award. A Tribunal may reduce the Compensatory Award where an unfairly dismissed employee may have been dismissed fairly at a later date or if a proper procedure had been followed.

19. There is no need for an 'all or nothing' decision. If the Tribunal thinks there is a doubt whether or not the employee would have been dismissed, this element can be reflected by reducing the normal amount of compensation by a percentage representing the chance that the employee would still have lost his employment.

20. In **Software 2000 Ltd -v- Andrews** [2007] IRLR 568, the EAT reviewed the authorities and set out some guidance, such as:

> "If the employer seeks to contend that the employee would or might have ceased to be employed in any event had fair procedures been followed, or alternatively would not have continued in employment indefinitely, it is for him to adduce any relevant evidence on which he wishes to rely. However, the Tribunal must have regard to all the evidence when making that assessment, including any evidence from the employee himself".

21. By combination of Section 207A and Schedule A2 of the Trade Union and Labour Relations (Consolidation) Act 1992 and section 124A of the Employment Rights Act 1996, where a claim by an employee is made under any of the jurisdictions listed in Schedule A2 of the 1992 Act and is also one to which the ACAS Code of Practice on Disciplinary and Grievance Procedures applies, where a party has failed to comply with that Code in relation to that matter, and that failure was unreasonable, the Tribunal may, if it considers it just and equitable in all the circumstances to do so, increase or decrease any compensatory award by no more than 25%.

22. Such an adjustment shall be applied immediately before any reduction for contributory fault and any adjustment under section 38 of the Employment Act 2002 for a failure to provide employment particulars.

23. By virtue of section 122(2), a Tribunal may reduce the basic award where the conduct of the employee before the dismissal was such that it would be just and equitable to do so. Also, by virtue of section 123(6), the Tribunal may reduce the compensatory award by such proportion as it considers just and equitable where the dismissal was to any extent caused or contributed to by any action of the employee.

The duty to make reasonable adjustments

24. Sections 20 to 21 of the Equality Act 2010 set out provisions relating to the duty to make adjustments

> "(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.
>
> (2) The duty comprises the following three requirements.
>
> (3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.
>
> (4) The second requirement is a requirement, where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.
>
> (5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid.
>
> (6) Where the first or third requirement relates to the provision of information,

the steps which it is reasonable for A to have to take include steps for ensuring that in the circumstances concerned the information is provided in an accessible format.

(7) A person (A) who is subject to a duty to make reasonable adjustments is not (subject to express provision to the contrary) entitled to require a disabled person, in relation to whom A is required to comply with the duty, to pay to any extent A's costs of complying with the duty.

(8) A reference in section 21 or 22 or an applicable Schedule to the first, second or third requirement is to be construed in accordance with this section.

. . . (13) The applicable Schedule is, in relation to the Part of this Act specified in the first column of the Table, the Schedule specified in the second column.

Part of this Act	*Applicable Schedule*
Part 5 (work)	Schedule 8

21 **Failure to comply with duty**

(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.

(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.

(3) A provision of an applicable Schedule which imposes a duty to comply with the first, second or third requirement applies only for the purpose of establishing whether A has contravened this Act by virtue of subsection (2); a failure to comply is, accordingly, not actionable by virtue of another provision of this Act or otherwise."

25. Schedule 8 provides:

SCHEDULE 8
Work: reasonable adjustments
Part 1
Introductory
1 Preliminary

This Schedule applies where a duty to make reasonable adjustments is imposed on A by this Part of this Act.

2 The duty
(1) A must comply with the first, second and third requirements.

(2) For the purposes of this paragraph—
(a) the reference in section 20(3) to a provision, criterion or practice is a reference to a provision, criterion or practice applied by or on behalf of A;

(b) the reference in section 20(4) to a physical feature is a reference to a physical feature of premises occupied by A;
(c) the reference in section 20(3), (4) or (5) to a disabled person is to an interested disabled person.

(3) In relation to the first and third requirements, a relevant matter is any matter specified in the first column of the applicable table in Part 2 of this Schedule.

Part 2
Interested disabled person
4 Preliminary

An interested disabled person is a disabled person who, in relation to a relevant matter, is of a description specified in the second column of the applicable table in this Part of this Schedule.

5 Employers (see section 39)

(1) This paragraph applies where A is an employer.

Relevant matter	*Description of disabled person*
Deciding to whom to offer employment.	A person who is, or has notified A that the person may be, an applicant for the employment.
Employment by A.	An applicant for employment by A. An employee of A's.

26. The Equality and Human Rights Commission has produced a Code of Practice on Employment (2011) ("the Equality Code"). The Code of Practice does not impose legal obligations, but provides instructive guidance. The Tribunal has referred itself to the Code as appropriate. This has been taken into account by the Tribunal. For example, the Equality Act 2010 no longer lists factors to be considered when determining reasonableness, but these factors appear in the Code of Practice (paragraph 6.28). However, it will not be an error of law to fail to consider any of those factors. All the relevant circumstances should be considered.

27. The duty to make adjustments may require the employer to treat a disabled person more favourably to remove the disadvantage which is attributable to the disability. This necessarily entails a measure of positive discrimination (**Archibald v Fife Council** [2004] IRLR 651, HL).

28. The test of reasonableness is an objective one.

29. A failure to consult is not of itself a failure to make a reasonable adjustment (see **H M Prison Service & Johnson** [2007] IRLR 951, EAT).

30. It is not a reasonable adjustment to discount *entirely* disability related absences when considering levels of absence. Otherwise an employee could be absent for a wholly disproportionate and unmanageable length of time with an employer being in no position to take any management action in relation to that absence. An employer would have no control over its own standards with regard to any disabled individual (see for example **Bray –v- Camden London Borough** EAT 1162/01 and **Robertson –v- Quarriers** EAT 104674/10).

31. The correct approach to assessing reasonable adjustments is addressed in **Smith –v- Churchills Stairlifts plc** [2006] IRLR 41; **Environment Agency –v- Rowan** [2008] IRLR 20; and **Project Management Institute –v- Latif** [2007] IRLR 579.

32. In **Smith**, the comparative exercise required by s.6(1) of the DDA was considered by the Court of Appeal having regard to the speeches contained in the judgment of the House of Lords in **Archibald**. Maurice Kay LJ stated:

> ". . . Notwithstanding the differences of language, it would be inappropriate to discern a significant difference of approach in these speeches. . . it is apparent from each of the speeches in **Archibald** that the proper comparator is readily identified by reference to the disadvantage caused by the relevant arrangements".

33. With regard to knowledge the EAT in **Secretary of State for the Department of Work and Pensions v Alam** [2009] UKEAT 0242/09 held that the correct statutory construction of s 4A(3)(b) involved asking two questions: (1) Did the employer know both that the employee was disabled and that his disability was liable to affect him in the manner set out in section 4A(1)? If the answer to that question is: 'no' then (2) Ought the employer to have known both that the employee was disabled and that his disability was liable to affect him in the manner set out in section 4A(1)? If the answer to that question is also 'no', there is no duty to make reasonable adjustments.

34. The Court of Appeal in **Matuszowicz –V- Kingston Upon Hull City Council** [2009] IRLR 288 held that there may breaches of the duty to make reasonable adjustments "due to lack of diligence, or competence, or any reason other than conscious refusal".

Indirect discrimination

35. Section 19 of the Equality Act 2010 provides:

> "(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.
>
> (2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—

(a) A applies, or would apply, it to persons with whom B does not share the characteristic,

(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,

(c) it puts, or would put, B at that disadvantage, and

(d) A cannot show it to be a proportionate means of achieving a legitimate aim".

36. Disability is a relevant protected characteristic.

37. When considering a proportionate means of achieving a legitimate aim, the Tribunal will assess whether the aim of the provision, criterion or practice is legal and non-discriminatory, and one that represents a real, objective consideration and if the aim is legitimate, whether the means of achieving it is proportionate including whether it is appropriate and necessary in all the circumstances.

Discrimination arising from disability

38. Section 15 of EqA 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.

(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability."

Burden of Proof

39. The burden of proof reversal provisions in the Equality Act 2010 are contained in section 136:

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

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

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

40. Guidance is provided in the case of **Igen Ltd –v- Wong** [2005] IRLR, CA. In essence, the Claimant must, on a balance of probabilities, prove facts from which a Tribunal could conclude, in the absence of an explanation by the Respondent, that the Respondent has committed an act of unlawful discrimination. The Tribunal when considering this matter will raise proper inferences from its primary findings of fact. The Tribunal can take into account evidence from the Respondent on the primary findings of fact at this stage (see **Laing –v- Manchester City Council** [2006] IRLR 748, EAT and **Madarassy –v- Nomura International plc** [2007] IRLR 246, CA). If the Claimant does establish a *prima facie* case, then the burden of proof moves to the Respondent and the Respondent must prove on a balance of probabilities that the Claimant's treatment was in 'no sense whatsoever' on racial grounds.

41. The term 'no sense whatsoever' is equated to 'an influence that is more than trivial' (see **Nagarajan –v- London Regional Transport** [1999] IRLR 573, HL; and **Igen Ltd –v- Wong**, as above).

42. The Court of Appeal in **Madarassy** above, held that the burden of proof does not shift to the employer simply on the Claimant establishing a difference in status (e.g. sex or race) and a difference in treatment. Those bare facts only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination.

43. Tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating on why the Claimant was treated as they were, and postponing the less-favourable treatment issue until after they have decided why the treatment was afforded. Was it on the proscribed ground or was it for some other reason? (*per* Lord Nicholls in **Shamoon –v- Chief Constable of the Royal Ulster Constabulary** [2003] IRLR 285, HL).

44. The Supreme Court in **Hewage –v- Grampian Health Board** [2012] UKSC has confirmed:

> "The points made by the Court of Appeal about the effect of the statute in these two cases [Igen and Madarassy] could not be more clearly expressed, and I see no need for any further guidance. Furthermore, as Underhill J pointed out in *Martin v Devonshires Solicitors* [2011] ICR 352, para 39, it is important not to make too much of the role of the burden of proof provisions. They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other."

Findings of fact

45. Employment Judge Freer apologises for the delay in providing these written reasons, which has been due to lack of judicial resources and available writing time.

46. This matter has a complicated history and the Tribunal has set out the framework of facts below. However, the Tribunal has taken all the evidence into account when making its decision.

47. The Claimant first began working for the Respondent on 31 October 2011 as a Personal Lending Officer.

48. The Claimant was absent from work through illness on three occasions on 6 December 2011, 10 January 2012, and 5 March 2012, after which a return to work interview was conducted by the Respondent.

49. The first two events were relatively minor but the third event involved back pain resulting in hospitalisation and the Claimant was signed off work for a period of three weeks. The Fitness for Work note recommended the Claimant returned to work on reduced hours.

50. On 20 April 2012 the Respondent conducted an Informal Wellbeing Review Meeting from which HR recommended a reduction the Claimant's hours to 20 hours per week. The Respondent agreed to that reduction in hours.

51. The Claimant was absent from work again on 2 July 2012 and a Return to Work Interview was held on 23 July 2012. The Respondent referred the Claimant to Occupational Health, which produced an Occupational Health Report dated 12 August 2012 commencing at page 130 of the Tribunal bundle.

52. The Report set out the background, the Claimant's back pain episode and states: "Mrs Winnard informs me that at the time of onset there was no specific cause, she states that the pain commenced on the way to work and it worsened as the day went on". The Report made a number of recommendations. The Practitioner states: "In my professional opinion Mrs Winnard is fit for her role and to attend work, she would benefit from some adjustments which should help towards alleviating some of her discomfort".

53. The adjustments suggested were, short regular breaks away from the Claimant's computer of at least five minutes in each forty-minute period to remain in place for at least the next three months; minimising sitting or standing in one position for more than 15 or 20 minutes and regular postural breaks of 30 to 60 seconds incorporated into the Claimant's work routine; a risk assessment; and time off to attend medical/physiotherapy appointments.

54. The Report also states: "Please consider allowing Mrs Winnard to remain on her reduced hours for at least the next three months. I am hopeful that within this timeframe she may have received further treatment to help reduce the

symptoms and coupled with these recommended adjustments I anticipate that her condition should have improved enough that she could attempt to return to her normal contracted hours".

55. On 21 August 2012 the Occupational Health Report was discussed between the Claimant and her then line manager, Mr Steve Compton. The note records: "Karen has requested a permanent decrease in her hours to 25 per week but this will be fewer hours then the department would normally sanction".

56. A Workplace Assessment Report was produced on 4 September 2012, which recommended chair and workstation adjustments, which were made.

57. On 8 October 2012 the Claimant attended at a Return to Work Interview after being signed off for a week with back pain. There was a further Return to Work Interview on 16 November 2012 after the Claimant had been absent from work due to “menstrual disorder”.

58. The Claimant had and MMI scan on her back on 18 November 2012 and the Respondent held her another Informal Wellbeing Review meeting with Mr Compton on 30 November 2012. At that stage the Claimant was still awaiting the results of the MMI scan.

59. The notes of the review meeting state: "I then referred Karen back to her conversation with Mike Naunton informing her that we need to work together looking at increasing her hours. Karen is fully aware of the aim to increase this back to 30 hours per week. Working together we have structured an increase to Karen’s hours to 27 hours per week, effective from Monday 10th December 2012. Then with effect from 31st December 2012, Karen’s hours will increase to 30 hours per week".

60. On 30 March 2013 the Claimant had a further Return to Work Meeting after being absent with a chest infection.

61. On 20 May 2013 the Claimant was invited to a “First Formal Review” under the Respondent’s Health and Attendance Policy. The invitation states: "The purpose of this meeting is to: Fully discuss and understand the reasons for your absences: Enable the Company to offer and provide appropriate support: Agree a suitable plan of action to help you sustain an agreed an acceptable level of attendance". The Claimant was notified of her right to be accompanied.

62. That meeting took place on 20 May 2013 with Mr Compton and the notes are at pages 155 to 156 of the Tribunal bundle. The notes indicate that the Claimant had increased her hours up to 30 hours per week and confirmed her workstation had no problems. The notes state: "Currently attendance rate is below the 97% department average. Your attendance level is currently 87%. The latest sickness has meant you have triggered another review, hence this meeting. What we need to do is agree a way forward with the aim of increasing your attendance level. What I propose to do is to progress this to

First Stage of Formal and set a proposal of an attendance level of 93% as from today, to run for a period of three months… I will ensure that we have monthly reviews within this 3 month period. At the end of the 3 months we will have another review at which stage you should have hopefully achieved the plan. This will be the Second review stage. If further absences continue and further absences mean that you have hit absence trigger points, you may return to the Second review stage, but this is something that we would need to discuss further with HR".

63. A formal action plan was produced and refers to reviews undertaken on 23 June 2013 and 29 July 2013. Both these reviews are signed by Mr Compton and the Claimant. The review on 29 July 2013, signed by the Claimant, records "no underlying issues".

64. By a letter dated 21 May 2013, the Claimant was provided with the meeting notes, the action plan discussed at the First Formal Review meeting and a Second Formal Review meeting was provisionally booked for 19 August 2013 subject to any change of circumstance during the action plan period.

65. By a letter dated 8 August 2013 the Claimant was invited to a Second Formal Review and the purpose of the meeting was expressed as: "Review the progress against the expectations set in the First Formal Review; Discuss any further medical reports and any resulting actions that could be taken up to help improve your recovery, attendance or return to work". Again the Claimant was informed of her right to be accompanied.

66. There were two further return to work meetings on 1 July and 17 August 2013 after absences with migraine.

67. The Second Formal Review meeting took place on 19 August 2013 with Mr Compton and the notes of that meeting are at pages 167 to 168 of the bundle. It was confirmed with the Claimant that her desk set up had no problems, everything else was satisfactory. The Claimant was offered a free eye test if required with regard to her migraine absences, but confirmed that it was not necessary.

68. The following exchange is recorded

> "SC: The last time we met your attendance was at 87%. We set the expectation at 93%. During the last three months it is now 95% so be pleased to know you have met the expectation. Well done.
> KW: thank you. I don't like taking days off.
> SC: However, I do need to make you aware that if any time during the next 12 months your attendance level deteriorates, the formal process may be reinstated at the second formal review meeting stage. However with your attendance levels improving, I would refer to HR first of all".

69. On 17 October 2013 there was a further Informal Wellbeing Review at which time the Claimant had been signed off work by her GP until 1 November 2013 with an overactive thyroid and had a hospital appointment arranged 25

October 2013. The Claimant was referred to Occupational Health, which produced a report dated 28 October 2013 at pages 184 to 187 of the bundle.

70. The report states: “Mrs Winnard informed me that she was diagnosed in 2009/2010 with a condition called Graves disease, an autoimmune condition where the body's immune system mistakes the thyroid gland for a toxic substance and attacks it. This resulted in her thyroid gland becoming overactive, producing high levels of thyroxine and other thyroid hormones. Initially Mrs Winnard was treated with medication in an attempt to reduce the level of hormone produced, however this proved unsuccessful. In May 2010 Mrs Winnard had surgery to remove her thyroid gland. Mrs Winnard was prescribed medication to replace the missing hormone and has had no problems for 2 years.… Mrs Winnard informed me that she is concerned regarding the frequent infections that she has contracted in recent months. This is likely to be due to her reduced immune system and is a well-documented side effect cited in many medical articles, in particular recurrent chest infections and sinus infections but other infection may also be noted".

71. The Occupational Health Advisor stated that in her opinion the Claimant was a disabled person under the Equality Act 2010. The report then made "recommendations for your consideration to support Mrs Winnard with her long-term health condition". Those recommendations were: a phased return to work plan over a period of 4 to 6 weeks commencing with 50% of contractual working hours for two weeks and gradually increasing until contractual working hours are achieved; weekly one-to-one meetings with the Claimant's line manager to discuss any barriers to a successful return to work; additional rest breaks as required due to extreme symptoms of fatigue; time off work to attend consultation and other treatment if it is not possible to arrange these on non-working days; adjust targets to reflect the requirement for additional breaks, time off for treatment, fatigue; all absence related to the Claimant’s disability (including recurrent infections as she has an autoimmune disease) is recorded separately as disability related and managed in accordance with the Respondent’s relevant policies and procedures, which may include allowing a higher rate of absence for these conditions"; a set shift pattern; and micro breaks for eye rest.

72. In answer to the query of whether the Claimant was likely to render reliable service and attendance in the future, the Occupational Health Advisor states: "It is often the case that past sickness absence is the best predictor of future sickness absence levels. Mrs Winnard has had thyroid problems since 2010, which following surgery have been under control for 2 years. She was on a very high dosage of thyroid hormone, which has now been reduced, however it may take some time for her specialist to achieve the optimum dosage. This is beyond Mrs Winnard’s control; there is nothing she can do to affect/improve the situation. It is possible that she may have further absence from work, particularly in relation to recurrent infection and fatigue, both of which are related to our autoimmune condition".

73. On 4 November 2013 there was a Return to Work Meeting and on 5 November 2013 there was a Phased Return to Work Meeting in light of the recent Occupational Health Report.

74. The Claimant started a phased return to work on 12 November 2013 and the weekly update note states: "Following on from a conversation that Karen had with Amanda we have tweaked the hours for her phased return with effect from 18th November to factor in an agreed 30 minute break. Her hours will be Monday, Thursday and Friday 9.30 – 3.30 with 30 mins lunch and Thursday 9.30 to 4.00 with 30 mins break". There was a further weekly update on 19 November 2013.

75. By a letter dated 2 December 2013 the Claimant was invited to a “Formal Performance Improvement Meeting-initial Review (Stage 1)”, which went ahead on 19 December 2013 with Mr Compton. The notes of that meeting are at pages 198 to 200 of the Tribunal bundle.

76. The outcome of that meeting was confirmed in a letter dated 23 November 2013 which states: "A formal action plan has been agreed to support the required improvement in your performance which is to be undertaken within the performance improvement review period timescales we discussed. Should you not be able to sustain the required improvement in your performance, it may be necessary to progress to the next stage of the formal performance improvement process. A date of 3rd February 2014 has been agreed to hold a formal interim review meeting (stage 2) in accordance with the Lloyds Banking Group Performance Improvement Policy". The Claimant was provided with a copy of the meeting notes.

77. On 17 January 2014 at a further Informal Wellbeing Review Meeting with Mr Compton it is recorded that the Claimant had only one period of absence during the three-month review period. It also records that the Claimant had now returned to work a scheduled 30 hours per week following at the agreed phased return.

78. On 3 February 2014 there was a further Informal Wellbeing Review Meeting, the notes of which are at pages 209 to 211.

79. Further Return to Work meetings were held on 18 February 2014 and 05 April 2014 after additional periods of absence. During the period from February to April the Claimant was undergoing a number of tests and treatment with regard to thyroid problems.

80. On 12 May 2014 the Claimant was signed off work until 2 June 2014 with a thyroid problem.

81. By a letter dated 5 June 2014 the Claimant was invited to a First Formal Review under the Respondent's Health and Attendance Policy.

82. The First Formal Review Meeting took place on 12 June with Mr Brown, who had just become the Claimant’s line manager, at which the Claimant

confirmed that she was to be referred to specialist to investigate her thyroid issue further and was signed off work for a further four weeks. The Claimant was referred to Occupational Health and Mr Brown stated: "We would be looking to set up the action plan from today when you return to work and we would look to establish whether a staged return may be appropriate. We will be looking to set a target of 93% over two months when you return". The meeting outcome states: "JB confirm to KW would start action plan but would discuss with HR before would confirm exact terms. This was in view of the fact that Karen will no longer be returning to work on 16/6/14 and has been signed off work for further four weeks". A formal action plan was produced signed by the Claimant.

83. An Occupational Health Report was provided from an assessment date of 31 July 2014, see pages 241 to 243.

84. Again the Report sets out the background and current situation and in answer to the question of whether the Claimant was fit to continue in her current post the Occupational Health Advisor states: "In my opinion Mrs Winnard remains unfit to return to work at the present time but with appropriate treatment and monitoring by her medical advisers I expect her to recover sufficiently to continue in her substantive role".

85. At a Return to Work Meeting on 26 August 2014 the Respondent agreed a phased return to work for the Claimant.

86. The Claimant was signed off work for two weeks from 24 September 2014 and was invited to a Second Formal Review Meeting, which took place on 6 October 2014 with Mr Brown. The notes of the meeting are at pages 249 to 251. It is recorded that the Claimant's formal attendance plan could remain at the first stage for a further three months and that the Claimant was to return to work and meet an attendance target of 93% and it was suggested that for an initial two weeks the Claimant would work 10.00 to 14.00 shifts while retraining and earning her lending discretion, with an aim to increase hours on a weekly basis back to contracted hours after six weeks. The outcome of the meeting was provided to the Claimant in a letter dated 8 October 2014. A Formal Action plan was produced.

87. By letter dated 13 January 2015 the Claimant was invited to a Second Formal Review Meeting which took place on 22 January 2015 with Mr Brown, the notes of which are at pages 261 to 262 of the bundle. The note records: "Whilst her condition hasn't been officially diagnosed, she's been told on several occasions that her symptoms suggest she has fibromyalgia…. Karen is currently signed off work until Monday 26th January. Her concerns are that she has good days and bad days, and can regularly feel tired from 3pm onwards. Jon highlighted that there could be potential difficulties in this respect, as there is no option for colleagues to work less than 30 hours per week within PLD. Given Karen's current concerns, Jon asked Karen if she feels this is achievable, Karen does not think so at the moment. Karen added that she was worried that she could come back to retrain and then find herself taking an extended period of absence soon after. Given the above, Jon then

raised a point of whether there may be options for redeployment within LBG, which would offer Karen a role that could be fulfilled working less hours per week, and Karen was open to listen to this". The outcome of the meeting was provided to the Claimant in a letter dated 26 January 2015.

88. There were three further Return to Work Meetings on 29 January 2015, 18 February 2015 and 9 March 2015 following periods of absence.

89. At the 9 March 2015 Return to Work Meeting it is recorded that the Claimant felt that a rest day was needed in the week so she did not work too many consecutive days, which would lead to a reduction in hours to approximately 22 hours.

90. There followed two further Return to Work Meetings after more absences and on 27 April 2015 there was a Final Formal Review Meeting with Mr Brown, the notes of which are at pages 283 to 286. Mr Brown advised the Claimant that her 82% attendance was below the target/baseline for the Department. The notes relating to the way forward record:

> "A large part of the HML report focused on the difficulty that Karen is having working 30 hours per week. Jon explained that for a colleague of Karen's experience 30 hours was regarded as the minimum hours she could do to maintain competency. However, on a temporary basis Jon advised that the operation were happy to agree a reduction in hours to 25 per week. The work life balance of other staff members have been taken into consideration and two options were proposed.
>
> Option One - Condensed hours. 2 consecutive work days. 2 consecutive non work days. 2 consecutive workdays.
>
> Option Two. Mon, Tue, Thur, Fri 09.30 to 15.00 with no lunch break. Sat 9.00 to 13.30 or Mon, Tue, Thur, Fri 09.30 to 15.30 with half an hour lunch break Saturday 9.00 to 13.30.
>
> Karen advised that she gets tired from 14.30 onwards and by the end of the week. Jon suggested option two may fit not having to work later on in the afternoon. Karen advised option two sounded best. Jon also advised that Amanda and HR have agreed a 90% attendance target, which is below the norm. Karen agreed and advised she was very grateful and this had made her feel much better. Jon advised happy to agree effective of May on a three month temporary basis".

91. The summary records that the Claimant needed to achieve a 90% or above attendance target for the next three months on a temporary basis and there were three options for the Claimant going forward: "Option One - maintain attendance and competency targets and plan will close: Option Two - termination of contract; Option Three - redeployment within LBG".

92. A formal action plan was documented and signed by the Claimant dated 28 April 2015, see page 220 of the Tribunal bundle.

93. The outcome of the meeting was confirmed in a letter to the Claimant dated 28 April 2015 which states: "I am pleased to confirm that you have returned to work and after an extended phased return you have now regained your lending discretion. However as your attendance has still fallen short of the required expectation we have agreed to extend the final stage of this plan by a further three months. After taking your most recent Occupational Health reported into consideration I can confirm that I am happy to agree a temporary reduction in hours from 30 per week to 25 per week for three months. This will come into effect from 1st May 2015. During this time you are expected to maintain competency in the role of lending officer and achieve 90% attendance in this time".

94. The Claimant was absent from work on 21 May 2015 and there was a Return to Work Meeting on 29 May 2015.

95. Further workplace adjustments were recommended after a workplace adjustments assessment on 2 June 2015. These were undertaken.

96. The Claimant attended a Return to Work Meeting on 30 June 2015 and an Occupational Health Report was provided from an assessment made on 28 July 2015. The current situation in the Report records that: "Mrs Winnard stated she is currently not off sick from work. She indicated that she is working reduced hours at 25 per week, and that she benefits from a positive and supportive working environment".

97. It is also recorded: "It is possible going forward, for the foreseeable future that her sickness absence levels may be higher than that of her peers, due to symptoms associated with anaemia, fibromyalgia and low thyroxine levels. These also make her more susceptible to minor infection such as coughs, colds and flu. The precise amount of sickness absence above peer average that the business may decide to accommodate in respect of this is a business decision in terms of sustainability. Ultimately, as you will be aware it is for the employer to determine what level of sickness absence can be accommodated in relation to business needs. If the situation in terms of ongoing sickness absence is not tolerable from an organisational perspective the management may need to consider managing the case in line with your policies and procedures if appropriate".

98. The Claimant was signed off work on a few more occasions and a Return to Work Meeting was held on 15 September 2015. The Claimant then had more absences from work and a further Return to Work Meeting was held on 19 October 2015. The Claimant was again referred to Occupational Health, who provided a brief report in a letter dated 20 October 2015 (pages 316 to 317 of the bundle). It is recorded that: "Her absences from work recently appear unrelated to the known medical problems".

99. With regard to opinion and recommendations the Report states: "This lady has two fairly long-standing background medical conditions, both of which do cause ongoing symptoms to some extent. She is received and is receiving

appropriate medical input to manage her symptoms but these will remain ongoing to some extent. Symptoms do appear to be exacerbated currently in the context of some ongoing stress, predominantly domestic. However there are some components indirectly related to work. There is no indication she needs any additional medical inputs at this point. She does appear well enough to remain in work and performing her usual role. However she will remain at increased risk statistically of further absences, particularly while the background stresses remain ongoing. I understand you have reduced her working hours to help try and help accommodate her fatigue symptoms. This will be helpful and, if her absence levels continue, it may be helpful to consider reducing these further. Specifically, discussing and agreeing some means of reducing her Saturday work will be helpful for her to balance specific commitments on the weekend, which should reduce her stress level somewhat. Whether this is feasible remains a business decision. We have not made an arrangement to see this lady again routinely but please feel free to contact us if you need any further advice".

100. The Claimant was signed off work again on 23 October 2015 and Return to Work Meeting was held on 2 November 2015.

101. By letter dated 2 November 2015 the Claimant was invited to a Final Formal Review Meeting. The purpose of the meeting was to review progress against the expectations set in the Second Formal Review; discuss any further medical reports and any resulting actions that could be taken to help improve recovery, attendance or return to work; and to make a final decision regarding the Claimant's ongoing employment with the Respondent, which could be termination of employment.

102. The meeting took place on 10 November 2015 with Mr Brown and the notes are at pages 323 to 327. At the conclusion of the meeting the Claimant's employment was terminated. The decision was confirmed to the Claimant in a letter dated 10 November 2015, which is in the bundle at pages 328 to 329.

103. The letter states:

> "At the Final Formal Review Meeting held under the Lloyds Banking Group Health and Attendance Policy on 10 November 2015 we discussed:
>
> The support that has been provided since you returned from a period of long-term absence in January 2015 - this has included:
>
> - An extended phased return to the business;
> - A reduction in hours (from 30 per week to 25 per week);
> - A preferential shift pattern that ensured that you worked no later than 3pm in any given day;
> - Occupational health assessments;
> - A referral to microlink to ensure your working conditions could help mitigate the effects of fibromyalgia;
> - The continued support that we have provided allowing you to go to medical appointments in work time.

The persistence absences that have occurred since you returned to the business on 29th January 2015:

- 9 absences in total for various reasons (joint pain\fibromyalgia, colds, chest infection, bladder infection, sick bug, graves disease and stress).

The failure to meet the attendance target that was set for the prolonged 2nd stage of your formal absence plan:

- Attendance in 3 months between May and August has been 80.7% (target 90%);
- Attendance in 6 months between May and November has been 71.3% (target 90%).

Therefore Lloyds Banking Group has decided to terminate your employment on the grounds capability as advised at our meeting on 10th November 2015".

104. The Claimant was informed of her right of appeal.

105. The Claimant appealed the decision by an undated letter received by the Respondent on 23 November 2015. The grounds for appeal were: "I don't feel I have been treated fairly. My absences have been due to suffering with my Thyroid, Graves and Fibromyalgia which was only diagnosed recently. These conditions cannot be helped and are classed as a disability". The Tribunal finds that the 'appeal against dismissal' documents at pages 332 to 333 of the bundle was not given t0 the Respondent or read verbatim at the appeal hearing.

106. The appeal hearing took place on 19 January 2016 conducted by Ms Adlington and a summary of the appeal meeting at page 341 sets out the reasons why the Claimant felt that she was unfairly treated: not being given the opportunity to reduce her hours to 25 per week despite a doctor advising Respondent to do that; being told that only those back from maternity leave are allowed to work 25 hours per week; not being treated equally by the Claimant's previous line manager; if the Claimant was able to work 25 hours per week and reduce the number Saturday worked each month she would be able to fulfil the role requirements; and that the Respondent had not recognised that the Claimant has a recognised disability and the Respondent did not make the necessary adjustments to target/working patterns.

107. Ms Adlingtom sent an e-mail to Ms Petts dated 19 January 2016, after the appeal hearing had concluded, which requested further information. The response was not conveyed to the Claimant for comment.

108. The Claimant was notified of the appeal outcome in a letter dated 25 January 2016. The appeal was not upheld by Ms Adlington who believed that the Respondent had made the necessary adjustments of which she records: "a further example of this was LBG reduced the number of Saturdays you are required to work per month, from 3 down to 2".

109. The Respondent's Performance Improvement Policy commences at page 54 and the Health and Attendance Policy commences at page 66.

Conclusions

110. It was conceded by the Respondent that the Claimant was a disabled person at the material times with regard to her pleaded conditions of Graves disease, Fibromyalgia and a thyroid condition.

111. The Tribunal concludes and the Respondent accepted that it did apply a pcp of performance management procedures and consequent attendance targets.

112. The Tribunal also concludes that this pcp placed the Claimant at a substantial disadvantage compared to non-disabled persons in that the application of the absence management procedure resulted in the Claimant's dismissal. Not all the absences could unequivocally be directly attributable to the Claimant's disabilities but some were which places the Claimant at a disadvantage compared to non-disabled persons.

113. The reasonable adjustments identified by the Claimant at the Preliminary Hearing that set out the issues to be determined in this case, were an alteration of the threshold tests under the absence procedure and a reduction to the number of Saturdays worked.

114. The Claimant's submissions further argued/developed the reasonable adjustments it is claimed were outstanding at the time of dismissal as: relaxing the Respondent's absence policy and attendance targets to exclude all disability related absences; a temporary reduction of the Claimant's working hours to 20 hours per week; confirmation of permanent hours of 25 per week consistent with colleagues returning from maternity leave; and a reduction in Saturday work to 3 to 2 Saturdays per four weekly rotation.

115. The Tribunal is aware that the duty is on the employer, but the Claimant's suggested reasonable adjustments are instructive.

116. With regard to attendance targets, the Tribunal finds as fact that the Respondent operated a 97% attendance target for all employees, although that is not a figure that can be found in the Respondent's Policy. The Claimant confirmed in evidence that "everyone" was aware of this target.

117. The Tribunal also accepts the Respondent's evidence that it operates a baseline attendance of 90% and had never reduced any attendance target below that limit. The actual level between 97% and 90% is set upon receiving advice from HR and having regard to the individual circumstances.

118. The Tribunal finds as fact that the flexibility between the usual 97% attendance target and the 90% baseline was to allow for reasonable accommodation depending on individual circumstances, which is in line with paragraph 4 of the Respondent's Health and Attendance Policy.

119. The Tribunal accepts the Respondent's evidence that the 90% baseline threshold is applied to meet the Respondent's business requirements. For example, the Tribunal accepts the Respondent's evidence, not materially challenged by the Claimant, that the Band C position undertaken by the Claimant is a complex role and generally involved high risk work, requiring competency over a range of products, such as loans, overdrafts and credit cards. It was necessary for the Claimant to analyse risk and be familiar with product updates. Making correct lending decisions is clearly and understandably paramount for the Respondent's business. The Tribunal concludes that the Claimant's continued competency is relevant to both attendance targets and hours worked.

120. The baseline was also applied to ensure that the Respondent met customer need. It is a busy Department with around 160 staff and the Tribunal accepts that the Respondent could not reasonably absorb individual attendance rates below 90%, certainly on a longer term basis.

121. In the Claimant's circumstances, at the time of dismissal her attendance was at 71.3% over the preceding six months, 80% for the first 3 months of that period and therefore around 60% for the final three months. The reality was that the Claimant could not maintain attendance anywhere near the 90% level.

122. In these circumstances the Tribunal concludes that it was a reasonable adjustment made by the Respondent to apply attendance levels between 97% and 90% and to apply attendance levels significantly below 90% only for short periods when it did do so. However, the Tribunal concludes that it was not a reasonable adjustment for the Respondent permanently to apply attendance targets lower than 90% in the Claimant's circumstances generally and also having particular regard to the Claimant's actual attendance levels, which were nearly 20% lower than the minimum for the six months preceding dismissal and had been more significantly below 90% for lengths of time.

123. In reaching its decision the Tribunal has taken account of the factors set out at paragraph 6.28 of the Code (which were originally contained in the Disability Discrimination Act 1995).

124. The Tribunal has also placed the argued reasonable adjustments and the assessment of reasonable adjustments generally in the context of all of the adjustments and accommodations made by the Respondent in respect of the Claimant, such as the workplace risk assessments and adjustments; regular Occupational Health advice; acting upon that advice such as reducing the total hours worked and changing shift patterns to allow for an early finish; phased returns to work including an extended phased return; regular return to work, wellbeing and other meetings; keeping the Claimant informed and liaising with her throughout the attendance process, giving suggested options for moving forward; and allowing for a long review periods, which spanned over a total period of over three years during which there were many temporary adjustments to the attendance targets and hours worked. While, of

course, none of the accommodations referred to above make reasonable any adjustment that would otherwise by unreasonable, they do corroborate the Respondent's arguments on business need. This is not an employer that is generally unwilling or reluctant to adjust for and accommodate individuals with disabilities, lacking in sympathy or patience, which corroborates the compelling evidence received by the Tribunal on the minimum standards required to maintain a workable level of essential employee competences, customer service and other business needs.

125. With regard to the hours worked, the Claimant's contract stipulates a 30 hour working week. The Tribunal accepts the Respondent's evidence that this figure can be reduced to 25 hours per week in special circumstances, for example where an employee has returned from maternity leave and permanently if the employee is competent and can sustain that reduction in hours. Those employees permanently on a 25-hour working week have been in the department for many years, have no performance issues and are meeting targets. The hours worked by any employee includes training time. Face to face training time is important for maintaining competencies. The Respondent's requirement for a level of competency when working in the Personal Loans Department is set out above in relation to attendance targets and the Tribunal accepts the Respondent's evidence, which was largely unchallenged by the Claimant, that 25 hours is the minimum weekly hours required to maintain competency. As stated, making sound lending decisions is paramount for the Respondent's business and this requires constant updates and training, which are built into working hours.

126. The Tribunal accepts the Respondent's evidence that no employee in the Personal Loans Department works less than 25 hours in the Claimant's job role for the reasons stated above regarding competency.

127. Having regard to all the circumstances the Tribunal concludes that it was not a reasonable adjustment for the Claimant to work less than a 25 hour week save for very short periods, as in April 2012, and that it was not a reasonable adjustment for the Claimant to work a twenty-five hour week on a permanent basis.

128. Connected with the reasoning above is whether there should have been a reasonable adjustment to the monitoring period, but the Tribunal finds that the monitoring period had been reasonably lengthy and there was no evidence that the Claimant's attendance would improve. The Claimant's attendance had been reviewed over a total period just short of a four years, during which on occasion the Claimant had achieved base targets and the final review period was extended to six months. As the Claimant stated herself in evidence, she had good days and bad days and was unable to state with any confidence that her attendance would improve. The medical evidence suggests that matters would not change. In any event, lengthening the monitoring period is not in itself a reasonable adjustment, but only a means for assessing what adjustment may be reasonable, much the same as with consultation or a trial period.

129. With regard to the potential reasonable adjustment of discounting all disability-related absences, a suggestion from Occupational Health was to discount disability-related absences and to manage that process under the Respondent's own procedures. The Respondent does not have any policy or procedure covering that possibility.

130. The Tribunal has been referred to and has considered the cases of **Griffiths –v- Secretary of State for Work and Pensions** [2015] EWCA Civ. 1265 and **The Commissioners for Her Majesty's Revenue & Customs –v- Whiteley** [2013] UKET/0581/12. The Tribunal also refers to the cases of **Bray** and **Robertson** above with regard to an employer having some management action and control over its own standards.

131. The principal difficulty for the Respondent and indeed the Tribunal when analysing all the evidence before it, is that it is far from clear what was/is a disability related absence and how that may be clarified.

132. The Claimant's absences involved a high number of illnesses absence that was not directly and unequivocally attributable to the disabilities relied upon. A consequence of the Claimant's thyroid problems is that her immune system is such that it makes her more susceptible to what might be described as common ailments.

133. However, what is not clear, and the Tribunal is not sure it could ever be made clear, is which illnesses contracted by the Claimant were due to a low immune system and which are ones that she would have contracted had her immune system not been affected by the thyroid problem.

134. The Respondent adopted the approach of making an assessment, with occupational health input, of what sort of periods of absence the Claimant might reasonably be expected to have over a period due to her disabilities and this assessment manifested itself in the reduced attendance percentage and working hours per week, also having regard to reasonable business needs (cross-reference **Whiteley** above).

135. The Tribunal concludes that in the circumstances this was approach was a reasonable adjustment and it was not reasonable for the Respondent to discount all disability-related absences, not least because that assessment has inherent accuracy problems and would necessarily require medical input on each period of absence to assess the possible connection with the Claimant's disability conditions and even then that advice is likely to be inconclusive on occasions.

136. Further the Respondent had reduced the attendance target and working hours over a long period to accommodate the Claimant's conditions and consequent absences. The Tribunal has found above that these were reasonable adjustments. The Respondent also adjusted the Claimant's shift patterns, as agreed by her, to address the Claimant's fatigue, which was also a reasonable adjustment.

137. Therefore, if in addition disability-related absences were also to be discounted at the time of dismissal, there would be a double adjustment made for the same purpose. In the case of the attendance targets it would be a case of double counting. This is an additional reason why the discounting of disability related absences would not be a reasonable adjustment in circumstances where the operation of that adjustment is uncertain and there are reasonable adjustments already in place attempting to prevent disadvantage on the same matter.

138. It seemed to be suggested on occasion that a reasonable adjustment may have been to obtain further medical input, particularly based on the argument by the Claimant that the final input from Occupational Health was not fit for purpose. However, the Tribunal concludes that further medical evidence would, like the undertaking of a trial period, simply inform the Respondent on the reasonableness of any prospective adjustment and would not be a reasonable adjustment of itself. In addition, the Tribunal has received no evidence on what the content of any further medical advice anticipated by the Claimant would have contained had it been sought at the time. The medical advices obtained by the Respondent were objectively reasonable in the circumstances.

139. The Tribunal also concludes that the Respondent had made reasonable adjustments to the Claimant's Saturday work. The Tribunal considers that this issue is part of the hours adjustment. The Claimant was given options of possible rota adjustments to account for the fact that she regularly felt tired from early afternoon onwards. The Claimant had chosen the suggested rota adjustment that included Saturday working of three in every four-week cycle. At the time the Claimant said that she was grateful for this approach by Mr Brown and it had made her feel better and later stated that she benefitted from a positive and supportive working environment.

140. The Claimant accepted in cross-examination that if she did not work on Saturdays, hours would need to be added to the other shifts, but she also became tired in the afternoons and that is why she chose the option to work the reduced daily shifts, which included Saturday working. The Tribunal accepts that Respondent's evidence that they provide a seven day a week service and Saturdays are busy periods that require appropriate staffing levels. Having regard to the overall evidence and conclusions relating to attendance targets, weekly working hours and the accepted business requirement for them both, the Claimant's request not to work into the afternoon and it being a reasonable adjustment for the Respondent to accede to that request, the Tribunal concludes that it was not a reasonable adjustment to reduce Saturday working to two in every four-week cycle as argued. Saturday working formed part of the reasonable adjustment relating to daily working hours.

141. The Tribunal also concludes that had Saturday working been reduced as argued, there would not have been a possibility of alleviating the disadvantage given the Claimant's hours worked and attendance levels.

142. With regard to the indirect discrimination claim, the Respondent did apply a pcp of applying performance management procedures.

143. That pcp was applied equally to all employees. However, the Tribunal has not received evidence to demonstrate that persons with the Claimant's specific disability, or combination of disabilities, would be placed at the particular disadvantage of triggering the Respondent's attendance management procedure.

144. First, it was not possible on the evidence before the Tribunal to ascertain which of some absences were due to the Claimant's condition/s as opposed to being general illnesses the Claimant would likely have had in any event.

145. Second, the evidence received by the Tribunal relates only to the Claimant's circumstances. There was no evidence on how the medical conditions would similarly effect others who had the same disability/s and there was no submission that the Tribunal should take judicial notice on how the conditions relied upon by the Claimant would effect others with the same disability to an equal or similar degree.

146. However, the Tribunal concludes in all the circumstances, even if it is accepted that persons with the same disability/disabilities as the Claimant would similarly not be able to achieve the attendance targets, that the pcp was a proportionate means of achieving a legitimate aim.

147. The attendance targets were a legitimate aim in order to maintain an appropriately skilled and present workforce. That aim is legal and non-discriminatory. The Respondent adopted a proportionate means of achieving that aim when objectively considered. The Respondent had incorporated a flexible approach to the pcp in respect of the Claimant over a long period of time. The attendance target was flexible within limits and those limits were set by reasonable and necessary business requirements. The Respondent also adopted a range of reasonable adjustments and accommodations for the Claimant as set out above, for example relating to hours worked, attendance targets, phased returns to work, occupational health input, support meetings, and additional equipment. The means of applying the attendance targets in the Claimant's case were certainly necessary and appropriately applied.

148. With regard to the discrimination arising from disability claim, the Claimant did receive unfavourable treatment for a reason relating to her disability. The Claimant's unequivocal disability-related absences were at least part of the reason for her dismissal (as stated, some absences may not have been disability-related). However, the Tribunal finds that the treatment of the Claimant was a proportionate means of achieving a legitimate aim. The Tribunal adopts the same reasons as set out above in relation to indirect discrimination. The Respondent applied a known absence policy, which it did after liaison with the Claimant and advice from Occupational Health, to which there was reasonable flexibility coupled with an adoption of reasonable adjustments and other accommodations.

149. With regard to the unfair dismissal claim, there is no doubt that the Respondent applied a genuinely permissible reason for dismissal relating to capability.

150. The Tribunal has reviewed the process implemented by the Respondent. It involved liaison and input from the Claimant at multiple stages throughout the period in question with return to work meetings, informal wellbeing meetings, formal review meetings, regular input and advice from Occupational Health, workstation risk assessments and reasonable adjustments.

151. However there are a few matters that the Tribunal considers require particular consideration: redeployment; the appeal against dismissal and further medical evidence.

152. With regard to possible redeployment, this was considered by the Respondent in isolation. The Claimant was not informed that this was a matter being considered by the Respondent on its own initiative. The Claimant had no input, such as a relevant CV, whether or not she was prepared to work on Wednesdays, or prepared to travel. There was no production of a vacancy list for the Claimant to consider whether there were any vacancies she may have preferred, particularly as an option to dismissal.

153. Further, the redeployment opportunities were considered by the Respondent in March 2015 and nothing further appears to have been considered, particularly at the time the decision to dismiss was made. When considering all the circumstances the Tribunal concludes that the Respondent's approach to redeployment, objectively considered, was outside the range of reasonable responses. An objective reasonable employer in the overall circumstances relating to the Claimant would have done more with regard to potential redeployment.

154. No available and suitable position had been identified in evidence as being appropriate for the Claimant during the period leading up to dismissal. That will be considered as part of remedy. Also, although not proposed by the Claimant as a possible reasonable adjustment, the lack of any available position would inevitably lead to a conclusion that an adjustment of redeploying to another position was not available.

155. With regard to the appeal process Ms Adlington made an error relating to Saturdays worked, which demonstrates that there was a mistake in the logic adopted for refusing the appeal. Objectively considered, the Tribunal concludes that this error, whilst of course errors do occur, places the decision outside the range of reasonable responses as it was a material element of the appeal. Also, the Tribunal concludes from the evidence received that Ms Adlington did not consider the medical evidence in full. Ms Adlington also did not return to the Claimant for comments on the input received from Ms Petts after the appeal hearing. The Tribunal concludes these matters also place the procedure outside the range of reasonable responses. Again, this conclusion does not conflict with the Tribunal's decision on reasonable adjustments as that has been determined on whether or not any such adjustment was

objectively reasonable on the facts. The thought processes and actions of Ms Adlington are not relevant.

156. The medical evidence obtained by the Respondent overall, however, was within the range of reasonable responses. It was argued that the Respondent should not have relied upon the last Occupation Health input of the letter dated 20 October 2015 and that it should have obtained more substantive medical input. The Tribunal concludes that it was within the range of reasonable responses for the Respondent to reply upon that Occupational Health communication. The Respondent had reasonably sought Occupational Health input throughout the process and given the history of the matter and the various other Occupational Health inputs, it was objectively reasonable for the Respondent to reply upon that final communication.

157. Accordingly, the Tribunal concludes that the dismissal process was unfair on the basis of the redeployment and appeal processes.

158. The Tribunal concludes that, subject to those flaws, the Respondent's procedure and decision to terminate the Claimant's employment comfortably fell within the range of reasonable responses. The Claimant's lack of capability was honestly believed on reasonable grounds.

159. The Respondent, principally at the termination of employment stage, considered the whole circumstances, the consistency of the historical pattern and that the medical evidence confirmed that it was a situation that was going to endure. The Respondent genuinely considered the nature of the illnesses; the pattern of absence and attendance levels; the likelihood and extent of recurring absence levels; and the essential business requirements for levels of attendance. The Claimant was fully appraised of the difficulties of her attendance levels, given reasonable periods for review and given a full opportunity to make representations. It was within the range of reasonable responses in the circumstances for the Respondent to conclude that the matter could not continue any longer.

160. The Tribunal found the evidence of Mr Brown to be credible and his actions were taken with a substantial amount of sympathy towards the Claimant, which for example accounts for the extended periods under which the matter was reviewed. The Claimant remarked at the end of the Final Formal Review Meeting after she had been informed of the termination of her employment that Mr Brown had "personally been very supportive".

161. As stated in **Griffiths**, although on a reasonable adjustment point it is equally applicable to the objective reasonableness of dismissal: an employer is entitled to say, after a pattern of illness absence, that it should not be expected to have to accommodate the employee's absences any longer and in doing so the employer is entitled to have regard to the whole of the employee's absence record when making that decision. The Tribunal objectively concludes that it was reasonable for the Respondent to take the decision to terminate the Claimant's employment in the particular circumstances of this case.

162. Therefore it is the conclusion of the Tribunal that the Claimant's dismissal was unfair on the basis of the procedural matters identified.

163. The Tribunal further concludes that with regard to remedy and the procedural flaws, no job was identified that the Claimant considered she could have done at the time of her dismissal or the period leading up to it. Accordingly, when having regard to all the evidence when making its assessment, the Tribunal concludes that there is nothing to suggest that had redeployment been considered it would have made any difference to the decision to dismiss, certainly it appears that there was little likelihood of it doing so.

164. The Tribunal concludes on balance that the errors in the appeal process regarding viewing medical evidence, Saturday working and providing the views of Ms Petts to the Claimant for comment, are also unlikely to have materially altered the Respondent's position on the Claimant's continued employment at the time of the appeal hearing given, in particular, the initial reason for termination of employment, the conclusion of Ms Adlington and the limited impact the Tribunal concludes the matters identified would have made. Although Ms Adlington did not review all of the medical material she did read all of the management meeting notes which summarised some of the material, the Claimant did not identify in evidence what parts of Ms Petts e-mail she would have taken issue with had the opportunity arisen, and Saturday working is part of the overall assessment of working hours as addressed in detail above.

165. However, the Tribunal concludes that with all of the matters giving rise to a finding of unfair dismissal there is a chance that had the flaws not occurred the Claimant's dismissal may have been avoided. However, the Tribunal concludes on balance that it would have been unlikely and that it is just and equitable to make a reduction to the Compensatory Award of 90% to reflect the possibility. There is clearly no element of contributory fault.

Employment Judge Freer

Date: 22 March 2017