EMPLOYMENT TRIBUNALS

Claimant: Mrs C Carrabyne

Respondent: The Department for Work and Pensions

HELD AT: Liverpool **ON:** 14, 15 and 16 March 2017

BEFORE: Employment Judge Robinson
Mr W K Partington
Dr L Roberts

REPRESENTATION:

Claimant: Mr D Campion of Counsel
Respondent: Mr S Redpath of Counsel

RESERVED JUDGMENT

The judgment of the Tribunal is that:

1. The claimant's claim for unfair dismissal, breach of section 15 of the Equality Act 2010 and breach of the duty to make reasonable adjustments contrary to section 20 of the 2010 Act all succeed.

2. The remedy hearing will take place at **Liverpool Employment Tribunal** at **10.00am** for one day on **9 June 2017**.

DIRECTIONS

1. By no later than 28 April 2017 the expert evidence with regard to medical issues of pension matters shall be served by the claimant's solicitors upon the respondent's solicitors.

2. A Schedule of Loss with supporting documents shall be served by the claimant upon the respondent by 28 April 2017.

3. A counter schedule shall be served by the respondent upon the claimant by no later than 12 May 2017.

4. Any witness statements upon which either party wishes to rely shall be served by no later than 26 May 2017, and those statements must be typed, paragraphed and paginated.

5. No further order or direction need be made.

REASONS

1. The Tribunal had to deal with three claims: unfair dismissal, a breach of the duty to make reasonable adjustments and a breach of section 15 of the Equality Act 2010.

Findings of Fact

2. The facts of the case are as follows.

3. The claimant started work with the respondent in July 2012. Her attendance record was not good from March 2013 through to her dismissal on 5 March 2016.

4. The claimant was given five weeks' notice in lieu and received also 100% compensation under the Civil Service Compensation Scheme. The claimant was dismissed for capability. The tipping point as far as her dismissal was concerned is that she was absent from work from 4 January to 8 January 2016 with gastric flu. This absence fell within the six month review period following the claimant's final written warning issued on 28 July 2015.

5. The claimant is a disabled person within the meaning of section 6 of the Equality Act 2010 in that she has a hip problem and also suffers from depression.

6. The last Occupational Health report was dated 25 January 2015. It was available to the claimant and the decision maker, Mrs Sheree Bennett, at their meeting on 26 January 2016 and confirmed that the claimant had a longstanding history of depression which was well maintained with medication, that she also had daily hip pain which again was "maintained with medication and causes limitation with her mobility". The claimant, however, remained fit for her normal duties with no adjustments needed to be considered.

7. The Occupational Health report expressed the outlook for the claimant as follows:-

> "Her hip and depression conditions are currently well maintained. However, she may remain vulnerable to flare ups of both conditions, in the future, the frequency or severity of which I cannot predict."

8. Mrs Bennett accepted that the claimant was disabled for the reasons set out above and she considered the whole history of the claimant's absences. She

recognised that the claimant's last absence due to hip pain was on 29 January 2015 and that save for the initial absence after a hip operation from 2 April to 24 June 2014 and the days during 2014 when the claimant was absent because of hip pain, the claimant had only been absent from work with illnesses not related to her hip problem in 2014 for two days, on 20 and 21 November 2014.

9. Mrs Bennett also accepted that the claimant had had a steroid injection on 30 January 2015 and was allowed that day's absence with no penalty. The claimant was issued with a first written warning on 12 February 2015 with a review period which ended on 9 August 2015.

10. The claimant appealed that decision by way of grievance but it was not upheld.

11. The claimant then had a further period of sickness absence from 7 April 2015 to 13 July 2015. She did return briefly in June but found she could not cope and returned to sickness absence.

12. The last absence due to her depression (her disability) was 13 July 2015. Mrs Bennett agreed that that was the case.

13. The claimant received a final written warning on 28 July 2015 with a review period which ended on 27 January 2016.

14. Mr Woodward, her line manager, who referred the claimant to Mrs Bennett for a decision, and Mrs Bennett herself both agreed that the claimant's absences were genuine.

15. The final straw as far as absences were concerned occurred during the review period when the claimant had four days' absence at the beginning of 2016 from 4 January to 8 January 2016 with gastric flu. Again, the two respondent witnesses accepted that those absences were genuine.

16. The claimant then returned to work on Monday 11 January 2016 and was not absent again for any reason until eventually she was dismissed. The claimant appealed the decision but the decision to dismiss was upheld.

17. We did not hear from Mr Searson, the appeal officer, as there was no issue with regard to that matter.

18. When the claimant was at work she had various reasonable adjustments in place. She had also had in the past a phased return to work.

19. The provision, criterion or practice ("PCP") upon which the claimant relied was the application requiring the claimant to maintain a certain level of attendance at work in order not to be subject to the risk of sanction or dismissal.

20. The claimant worked in a team of 15 people at the Belle Vale Department for Work and Pensions. She was employed as a case manager dealing with Personal Independence Payments. Mr Woodward took over as manager of the claimant on 16 October 2014. He knew something of the claimant's past attendance history but

understood that the claimant had specialist workstation equipment, a specialist chair and increased consideration points in relation to the department's sickness absence trigger points. The claimant had four days' additional to the standard eight days in a rolling 12 month period with regard to those trigger points. In other words, that equated over a six month period to four days allowed to a non disabled person as an appropriate absence figure. However the disabled claimant had two further days added in line with policy making a total of six days.

21. As the claimant's absences were in January 2016, and as they were in the review period, the claimant triggered the absence management policy process because she had four days' absence not connected to either of her disabilities.

22. Mr Woodward referred the claimant to a decision maker in January 2016, saying that the claimant's absence record was unsustainable and that there was no evidence of sustained improvement in the claimant's overall absence, especially as she was still within her final written warning review period.

23. Mrs Bennett's reasons for dismissing the claimant were based on both the past and the future. It was her considered opinion that the claimant had not shown an improvement in her attendance during the six month review period, and that she was not convinced that a sustained level of attendance could be achieved in the future.

24. One of the reasonable adjustments that had been put in place was that the claimant did not work on a Wednesday but she was absent on Monday 4, Tuesday 5, Thursday 7 and Friday 8 January 2016.

25. It was accepted by Mrs Bennett that the claimant had had 64.5 days' absence which were all related to her hip problem, and 59 days' absence due to depression, but those long periods of absence were in 2014 and 2015 respectively.

26. Mrs Bennett accepted also that the claimant was absent in January 2016 through no fault of hers. Picking up a tummy bugs was part of working life and normal living. Mrs Bennett accepted that taking 2014 through to 2016 the claimant had had two days' absence for period pains and four days' absence for gastric flu, and the rest of the absences were all related to her disability. Mrs Bennett also accepted that if that had been the sole absences for the claimant she would not have triggered any points under the absence policy. However, as she pointed out, she had to look at the whole picture and take into account not only the non disability absences but all the disability absences as well.

27. The respondent's absence management policy acknowledges that employees can experience isolated incidents of absence, one-off illnesses such as a one-off experience of say chicken pox, an illness or condition which is fairly uncommon or unusual, an illness or condition which is fairly common but has a uncommon or unusually extreme impact such as cases requiring hospital treatment and absences following an accident or injury. A manager should also only treat an absence as exceptional based on the facts of the case at the time.

28. The policy also urges managers to focus on what can be done or might be capable of being done with reasonable help and support from the department in

order to help the employee stay in work or return sooner than might otherwise be the case. The policy also states that any decision will be made on a case by case basis and the policy recognises that the manager has a duty to make reasonable adjustments to enable the person to attend work and carry out their role effectively.

29. Both Mr Woodward and Mrs Bennett accepted that when dealing with first written warnings at attendance meetings the manager must consider all known circumstances and have a possible course of action in mind before the meeting. However, the outcome of the meeting must not be predetermined and that interviews can result in more than one outcome.

30. A first written warning should not be given where the employee is disabled and the absence is directly related to the disability and it is reasonable to increase the trigger point, or the absence is directly caused by an operation or treatment which could help to improve attendance or prevent sickness absence. The manager must also take into account the exceptional nature and circumstances of the absence, the employee's satisfactory attendance record and having done that should not issue a first written warning if it would be perverse, unfair or disproportionate to give that warning.

31. Similarly, at the final written warning stage a manager should consider all the issues that he or she is asked to consider at the first warning stage, including considering what reasonable adjustments may be necessary.

32. When it comes to the decision maker making a decision with regard to whether the employee is to be dismissed or some other sanction placed upon them the following applies:

> "A decision to dismiss should not be taken lightly or as anything other than a last resort. In coming to their decision, the decision maker must consider the following:-
>
> (1) Whether everything reasonable has been done to support the employee back to work;
>
> (2) Whether there is a reasonable expectation of improved and sustained attendance to a satisfactory level;
>
> (3) Any mitigating circumstances;
>
> (4) The nature of any underlying medical condition or disability and any reasonable adjustments that have been considered, made or not made to the working environment….Where it is viable to do so if a reasonable adjustment can be made with the prospect of removing some or all of the disadvantage it should be put in place as an alternative to dismissal;
>
> (5) Deciding what is a reasonable level of absence to support for a disability is not an exact science and dismissal decisions should not turn on a disabled employee going a day or two over their rigger point;

(6) The employee's length of service and previous attendance record."

33. The respondent gave some evidence with regard to the effect of the claimant's absence on the office where she worked. Mrs Bennett thought the effect of the absence of the claimant from a team of 15 was obvious and she accepted that line managers have a responsibility for making sure that adequate staffing levels were in place to meet the department's statutory obligations and to provide a good level of service to members of the public. Mr Woodward also considered that high levels of sickness affect the department's ability to comply with its statutory duties and deliver a quality service to its customers. The purposes of the PIP benefit (which is what the claimant worked on) is to support customers with disabilities to live as independently as possible. Each day lost due to absence could potentially delay the processing of a minimum of eight claims which would delay this benefit reaching some of the most vulnerable members of society.

34. Mrs Bennett accepted that if the claimant had not been given a first written warning the four day absence in January 2016 would not have meant that she was sent to a decision maker.

35. Mrs Bennett also accepted the department could have dealt with a five day absence and accommodated it, and that the main requirement of the employees is to attend 100% of the time because that is what they are paid for. Mrs Bennett had the power to retrospectively increase trigger points or alternatively discount some or all of the disability absences retrospectively. However, she felt that she could not overturn the previous decisions with regard to the claimant. Mrs Bennett asked herself is this individual likely to give a good level of attendance?

36. The decision Mrs Bennett made was not just made on that four day absence in January 2016 but the whole of the attendance record of the claimant and what may have happened, in Mrs Bennett's words, "going forward". She also noted that the absence she was considering at the time was not disability related.

37. Those are the facts.

The Law

38. With regard to the unfair dismissal it is for the respondent to show that they have dismissed for a potentially fair reason under section 98 of the Employment Rights Act 1996. It is accepted by all parties that the respondent has satisfied that burden. The question then is whether the dismissal is fair in all the circumstances of the case, and this 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 shall be determined in accordance with equity and the substantial merits of the case.

39. With regard to reasonable adjustments, there is a duty imposed upon an employer to make reasonable adjustments. The provision, criterion or practice ("PCP") has to be identified and that PCP must put a disabled employee, if the employee is to win his or her case, at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, and to take such

steps as it is reasonable to have to take to avoid the disadvantage. If there is a failure to comply with that section then an act of discrimination has taken place. There must be a causative link between the PCP and the disadvantage.

40. Any complaint of discrimination must be brought within three months beginning with the act of discrimination to the Employment Tribunal. It is subject to the Tribunal's discretion to extend time where it is just and equitable to do so.

41. With regard to section 15 of the Equality Act 2010 a person discriminates against a disabled person if that person treats the disabled person unfavourably because of something arising in consequence of the disabled person's disability, and that person cannot show that the treatment is a proportionate means of achieving a legitimate aim. In other words, they cannot justify the treatment.

42. In dealing with these cases the Tribunal should consider the Code of Practice on Employment 2011. The relevant paragraph as far as this case is concerned is paragraph 4.6 which requires the employer to justify the provision so the burden is upon them. It is a requirement that the employer produce evidence to support their assertion that the treatment is justified. Generalisations will not be sufficient to provide justification. It is not necessary for that justification to have been fully set out at the time that the provision, criterion or practice was applied, however if that issue is challenged the employer can set out the justification to the Employment Tribunal.

43. According to paragraph 6.23 of the same Code the duty to make adjustments requires employers to take such steps as it is reasonable to have to take in all the circumstances of the case in order to make adjustments. The Act does not specify any particular factors that should be taken into account. What is a reasonable step for an employer to take will depend on the circumstances of each individual case.

44. Paragraph 6.28 of the Code sets out some of the factors which might be taken into account when deciding what is a reasonable step for an employer to take, and includes such things as the step be effective in preventing the substantial disadvantage, the practicability of the step, the financial and other costs of making the adjustment and the extent of any disruption caused, the extent of the employer's financial or other resources, the availability to the employer of financial or other assistance to help make an adjustment, and the type and size of the employer.

Conclusion

45. Applying that law to the facts of this case we came to the following conclusion.

46. We noted that this was a large employer with large resources, being a Government department, and that the managers in this case had resources such as the Human Resources department together with the opportunity to take advice from solicitors at their fingertips.

47. The two reasonable adjustments contended for in this case by Mr Campion on behalf of the claimant were to either discount the absences or extend the trigger points.

48. We have already set out the PCP at the head of this judgment, and that PCP did put the claimant at a disadvantage when compared with any non disabled employee. We were not given a specific comparator but we can set up our own hypothetical comparator.

49. The cost to the respondent to extend the trigger points to discount absences would have been nil. Those reasonable adjustments were available to the respondent and were not put in place.

50. With regard to section 15, the respondent accepted that the respondent had treated the claimant unfavourably because of something arising in consequence of her disability, and therefore the issue between the parties related to whether the respondent could show that the treatment is a proportionate means of achieving a legitimate aim.

51. We had precious little information as to the effect the absence of the claimant had upon the department and the team she worked for.

52. In particular, Mrs Bennett accepted that the four days that she was absent in January 2016 could be dealt with and accommodated by the team she was in. There was no specific evidence that the previous long absences of 64.5 days and 59 days all relating to her disabilities had caused any discomfort to the team. Of course we accepted that any absence of any member of staff can cause some difficulty, but we had no evidence to suggest that her team members were complaining, that there were high levels of stress, that there were complaints from the public or from ministers, or from the department's more senior managers that the claimant's absence was causing difficulties at the Belle Vale office, other than a general view by both Mr Woodward and in particular Mrs Bennett that it was obvious it would cause difficulties.

53. Mrs Bennett was concerned that the four days' absence were not disability related. She accepted, however, that the claimant was on the precipice and therefore would have to accept logically that it only needed a short nudge for her to be pushed over that precipice and lose her job.

54. However, it was open to Mrs Bennett not to dismiss the claimant. Mrs Bennett told us that she felt that she had to look at the whole of the circumstances of the claimant and the absences in the past. This meant that the claimant's absences relating to both her hip and depression were returned to and reconsidered. That counted against the claimant during the dismissal process. Her non disability absences would not have got her dismissed. They would not even have got her to a first written warning.

55. The disability absences were a long time in the past. The evidence showed that there were no absences for the claimant relating to her hip after January 2015, and no absence due to her depression after July 2015. The Occupational Health evidence was that both her hip issue and depression were well maintained and looked after, both by the claimant having the operation and by her medication for depression. The proof of the pudding was in the eating. The claimant had not been absent at all for the whole of the review period due to her disability.

56. It was open to Mrs Bennett to allow the claimant to go one day over her trigger point. If the claimant had been away three days in January 2016 for a non disabled reason she would not have been dismissed. We accept that the claimant must have known that she was putting her employment at risk by being off for those four days, but we heard nothing to suggest that the claimant was languishing at home, indeed the evidence was that both Mr Woodward and Mrs Bennett thought that the claimant's absence for gastric flu in January 2016 was genuine.

57. The claimant's attendance therefore had improved radically. Her disabilities at that point were not causing her absences. We accepted that her hip complaint caused her some mobility problems, indeed she walked into the Tribunal with a walking stick, but her hip problem had not caused her to be absent for a year.

58. The claimant at the time of her dismissal was in work. However galling it must have been for Mrs Bennett and Mr Woodward to find that the claimant was absent again for four days, as they expected 100% attendance from their employees, the fact is that reasonable adjustments could have been put in place at very little expense to the respondent and they would have maintained a fully trained PIP case manager in post.

59. The burden is upon the respondent to show justification. In these circumstances they have not done so. The balancing act between the loss to the claimant of her job and the inconvenience to the respondent's other employees weighed in favour of the claimant retaining her job.

60. Finally, in relation to the Equality Act issues, we could not understand the logic of Mrs Bennett's claim that the claimant's history of absences would necessarily mean that in the future she would be absent for long periods of time. The evidence showed quite the opposite that absences in relation to her hip and in relation to depression had disappeared. Applying the respondent's own policy there was a reasonable expectation that the claimant's attendance would be sustained and it had already improved dramatically from what it had been.

61. In those circumstances we found that the respondent was in breach of both section 15 and section 20 of the Equality Act 2010.

62. Turning now to the unfair dismissal, we found that the respondent is a large organisation with huge resources. Mrs Bennett dismissed for a potentially fair reason, but the respondent is in breach of section 98(4) of the Employment Rights Act 1996 in that it did not act reasonably in treating the circumstances as a sufficient reason for dismissing the employee. More importantly, in determining the case in accordance with equity and the substantial merits of the case, the substantial merits of the case again tipped in favour of the claimant retaining her job and not losing it.

63. We accept that the sanction of dismissal is one which is open to a dismissing officer and it is a wide band. We also note that we must not substitute our views for the views of the dismissing officer (a slightly different test from whether the actions of the respondent were proportionate), but it was wholly unfair to dismiss the claimant at this point in time when she had clearly made huge strides in relation to her attendance and that more importantly her disability related absences had declined to nil. No reasonable employer would have dismissed.

64. Any employee can catch a stomach bug and be off for a period of time. That is one of the vicissitudes of life but there was no necessity here to dismiss the claimant and in all the circumstances of the case and looking at the size and resources of the respondent this was also an unfair dismissal.

65. The matter will now move to remedy on the date at the head of this judgment and we have made directions for the future good conduct of the hearing to that remedy trial.

19-04-17

Employment Judge Robinson

JUDGMENT, DIRECTIONS AND REASONS
SENT TO THE PARTIES ON

21 April 2017

FOR THE TRIBUNAL OFFICE