EMPLOYMENT TRIBUNALS

Claimant: Ms Kirsty Cush

Respondent: The Warden and Council of Saint Andrew's College, Bradfield of Bradfield College

Heard at: Reading **On: 3, 4 and 5 January 2024**

Before: Employment Judge Gumbiti-Zimuto
Members: Mr P Hough and Ms J Smith

Appearances
For the Claimant: In person (assisted by Mr S Lambert)
For the Respondent: Ms M Sharp, counsel

RESERVED JUDGMENT

1. The claimant's complaints of unfair dismissal and discrimination arising from disability are well founded and succeed.

2. The claimant's complaint of direct disability discrimination is not well founded and is dismissed.

3. The claimant's complaints about unpaid wages, holiday pay and other payments are dismissed upon withdrawal.

REASONS

1. In a claim form presented on the 12 July 2022, the claimant made complaints about her dismissal, alleging that it was unfair and amounted disability discrimination. The claimant also complained that she was owed money by the claimant due to being underpaid wages and holiday pay. The respondent denied the claimant's complaints stating that the claimant had been fairly dismissed due to capability and that she had been paid all she was due. The claimant has subsequently agreed that she has been paid all that she was due and withdrawn her money claims.

Application to amend the claim

2. The claimant's application to amend the claim to add a claim of victimisation is refused.

3. We have reminded ourselves that the ET1 is to sets out the essential case. It is that to which a respondent is required to respond.

4. Tribunals should provide straightforward, accessible and readily understandable venue in which disputes can be resolved speedily, effectively and with a minimum of complication. We note that care must be taken to avoid undue formalism that prevents getting to grips with the issues which really divide the parties.

5. The core test in considering applications to amend is the balance of injustice and hardship in allowing or refusing the application. This means that we need to consider the specific practical consequence of allowing or refusing the amendment.

6. We have come to the conclusion that the claimant should not be allowed to amend the claim to include a complaint of victimisation. In coming to that conclusion we have taken into account that the application was made very late and at the point of making the application the claim would have been out of time. We have taken into account that the claimant is making a new legal complaint in the amendment i.e. an allegation of victimisation. We note that the claimant seeks to rely on the same facts already relied on.

7. We have taken into account the fact that the claimant is a litigant in person and not represented by lawyers. However, we note that on reading the claimant's witness statement with a lawyers eye that the claimant does not make any apparent allegation of victimisation, the claimant's witness statement cannot be analysed in a way that leads us to conclude that there was always intended to be an allegation of victimisation which was not specifically spelt out. We recognise that this should not be bar to allowing the application if the balance of injustice and hardship permits. The claimant's case is principally about the dismissal of the claimant and she will be making complaints of unfair dismissal, discrimination arising from disability and failing to make reasonable adjustments all in relation to the dismissal.

8. To be fair to the claimant, we note that the claimant says that she was provided with legal advice recently that alerted her the fact that she had a claim for victimisation arising from the same allegations. We have noted however that the respondent would not be in position to deal with the allegation of victimisation with the witnesses currently available to them, Ms Toms (the person alleged to be behind the victimisation allegation) has left the respondent's employment: it is the allegations that the claimant makes against her that the claimant says were the trigger for the detriment she suffered namely her dismissal.

9. We have also taken into account the lateness of the application in the context of the way that the case has proceeded, which includes the fact that there was a lengthy and detailed case management preliminary hearing where the claimant (acting in person) had been able to discuss with

Employment Judge at that hearing the issues in the case.

10. We have considered where the balance of injustice lies in allowing or refusing the application to amend. We consider that the claimant will be able to present the case she wished to present at the time that the claim was presented if no amendment is permitted, she suffers no disadvantage to that case by refusing the amendment. The respondent will have to meet that case as best it can having had the opportunity of preparing for such a case.

11. The Tribunal consider that the respondent however would be disadvantaged in the case they have to meet if the claimant is allowed to amend the claim. If the hearing proceeds on the evidence currently available the respondent would be denied the opportunity of addressing directly with relevant evidence the allegation of victimisation. The reality appears to be that the respondent would seek an adjournment to get evidence that it could not have anticipated was necessary to meet this new case, this evidence would come from witnesses including people who are no longer working for the respondent. This would result in further complication, and almost inevitably in a significant delay in the resolution of the case.

12. Taking all these matters into account and all the other points which have been raised by the parties on this issue we unanimously conclude that the application to amend should be refused.

Facts

13. The claimant gave evidence in support of her own case, and the respondent relied on the evidence of Mrs Alison Ruttle (Domestic Services Manager) and Mr Anthony Hough (Director of Estates) they all produced statements taken as their evidence in chief. We allowed the claimant to amend her witness statement to include a supplementary section on calculations of outstanding pay and the respondent relied on the witness statement of Ms Ellie Sinka, in the event we did not have to consider the claimant's supplemental statement or Ms Sinka's statement as the claimant withdrew her money claims. The Tribunal was provided with a trial bundle containing 425 pages of documents. We allowed the claimant to have included in the bundle a document relating to the "meta data" for the creation of the claimant's dismissal letter (in the event nothing turned on this document). From these sources we made the following findings of fact we considered necessary to decide the issues in dispute between the parties.

14. The claimant's employment with the respondent as a domestic cleaner commenced on the 4 January 2019 and ended with her dismissal on the 19 April 2022. At the point of her dismissal the claimant had been absent from work on the grounds of ill-health from 3 September 2021.

15. The claimant contended that she was a disabled person by reason of depression and anxiety, and PTSD. The claimant also suffered from migraine which the Tribunal understood to be a physical manifestation of

her depression and anxiety rather than a separate disability in itself. The respondent accepts that the claimant is disabled within the meaning of section 6 Equality Act 2010 by reason of anxiety and depression. The respondent denies that the claimant was disabled by reason of PTSD or Migraine. It is in issue between the parties whether the respondent, at the relevant time, knew that the claimant was a disabled person.

16. The respondent employs about 125 domestic cleaners who clean 12 boarding houses which accommodate student boarders. Mrs Ruttle's role was to manage the domestic cleaners. The domestic cleaners work in teams, the claimant's team initially consisted of 7 cleaners.

17. The claimant had periods of absence from work in May 2021 and June 2021 arising from migraine and stress respectively. The claimant was also having difficulties arising from her housing situation which added to her stress.

18. In the period prior to the summer holiday, the claimant's team was reduced from 7 to 4 cleaners as result of staff leaving. This resulted in the remaining staff, including the claimant, having to work overtime beyond the date on which they would usually finish for the long summer leave.

19. The claimant was due to return to work after the summer holiday on 3 September 2021, however the claimant was signed off work for 14 days with anxiety disorder by her GP. The claimant was to subsequently be signed off work with various fit notes citing that she was unfit to work due to anxiety disorder or citing that the claimant was unfit to work because of "mental health" for the entire period up to the claimant's dismissal.

20. The claimant and Mrs Ruttle spoke on a disputed number of occasions during the claimant's sickness absence. The claimant says that they had spoken on or around 3 September, 16 September, 5 October 2021 and then did not speak until 7 February 2022. Mrs Ruttle states that she and the claimant communicated by text or WhatsApp messages and also spoke around the time that the claimant submitted each of her various fit notes. When they spoke the claimant would update Mrs Ruttle on her situation and Mrs Ruttle would tell the claimant to concentrate on her recovery and offer her words of support. The claimant states that on one occasion, 5 October 2021, she informed Mrs Ruttle that she was having suicidal thoughts. Mrs Ruttle denies that the claimant made mention of suicidal thoughts on this occasion. Mrs Ruttle invited the claimant to come into the school for a "coffee and chat" in the hope it might be something that would, help the claimant. The claimant refused the offer on both occasions the offer was made as she did not "feel ready" to do that.

21. The Tribunal note that there was no record made of the contact between the claimant and Mrs Ruttle. The only contemporary record appears to be the text / WhatsApp messages between the claimant and Mrs Ruttle. The Tribunal consider that the claimant is more likely to be correct when she states that she did not speak to Mrs Ruttle between 5 October 2021 and 7 February 2022. While Mrs Ruttle states that she always spoke to the

claimant after receiving a fit note from the claimant we note that this is denied by the claimant. There is no direct evidence which points in favour of either version of events.

22. If the claimant and Mrs Ruttle spoke between 5 October 2021 and 7 February 2022 it would only have been on two further occasions and nothing of significance is alleged to emerge from any alleged conversations. The text / WhatsApp messages show communication about a food bag and a Christmas hamper but do not suggest that there was other contact in the form of a conversation between the claimant and Mrs Ruttle. We note that while after receiving the January fit note Mrs Ruttle spoke to Ms Toms (head of HR operations) about obtaining an occupational health report and discussing reasonable adjustments with the claimant, there is in fact no evidence given by Mrs Ruttle of any conversation with the claimant discussing any adjustment to assist her return to work, if there had been a discussion between the claimant and Mrs Ruttle we would therefore have expected to see some mention of the outcome of such discussion. This suggests to us that the claimant and Mrs Ruttle did not speak in January 2022. In our view the claimant is more likely to have a correct recollection of these events which were directly affecting her in a way that does not compare with Mrs Ruttle who would have been busy managing the cleaning service in addition to trying to maintain contact with the claimant.

23. Following a query about an error in her pay the claimant received an email from Mr Noman (Peoples Director HR) on 27 October 2021 which included the following:

> "I will pass the pay query on as I can't deal with it directly. In the interim, I will be making a referral for you to speak with our Occupational Health Adviser as we need to assess your all-round health and the way forward for you to return to work at Bradfield. Don't be alarmed by this, we're trying to help you so please do co-operate with Cordell Health. In the interim, have you spoken to a Counsellor through LifeWorks via Firefly? This is a free service for all staff."

Following a further email from the claimant about the pay query Ms Toms wrote to the claimant on 29 October 2021, and she too made reference to a referral to Occupational Health:

> "On a separate note, I have been asked by Mahmood Noman, People Director, to complete a Occupational Health referral for you following discussion with Ali Ruttle. Our OH provider will be in contact with you next week to arrange an appointment. Our OH provider is Cordell Health."

On this occasion no action was taken by the respondent to refer the claimant to Occupational Health.

24. Whilst taking her children to school in December 2021 the claimant met a

work colleague Miss Jury who was also off sick. As a result of what she was told by Miss Jury the claimant concluded that she was being treated differently to her in that the claimant had not had any contact with Mrs Ruttle since around 5 October 2021 when Miss Jury was having regular contact with Mrs Ruttle.

25. Following a discussion between Mrs Ruttle and Ms Toms a meeting with the claimant was set up for 8 February 2022. An email was sent to the claimant informing her about the meeting.

> "I am emailing to invite you for a meeting with myself and Kay Toms (Senior HR Business Partner) regarding returning to work. Please can you let me know if you are available on Tuesday 8th February at 9.00am to meet at Crundells you are also welcome to bring a work colleague with you."

The email was sent to the claimant's work email account. The claimant who at that time was not able to access her work email account did not see the email.

26. On 7 February 2022 the claimant received a telephone call from Mrs Ruttle. The claimant states that she was asked to come into Mrs Ruttle's office for a "catch up" on the following day, and that Ms Toms would also be present, and that the claimant could be accompanied by a colleague. The claimant agreed.

27. On 8 February 2022 the claimant sent an email to Mrs Ruttle. In the email the claimant explained that she had not received the email invitation and that she would not be able to attend the meeting. The claimant explained that reference to a meeting with HR present had increased her anxiety, the claimant explained that her personal circumstances had not changed and that the decline in her mental health persisted, that the invite to a meeting on 24 hours' notice out of the blue was unfair, and that the suggestion of a meeting had triggered a panic attack.

28. In response Mrs Ruttle sent the claimant a more formal response by email. In that response Mrs Ruttle explained the services that were available to the claimant; informed that claimant that she would be referred to occupational health; informed the claimant that her absence was being managed in line with the respondent's capability policy and attaching a copy of the policy; and arranging a further meeting in the week commencing on 21 February 2022. Ms Toms also sent the claimant an emailing in which she stated that the intention was for occupational health to assess if the claimant would be able to return to work in 4-6 weeks and if not, then a final capability meeting would be held where one outcome could be the termination of the claimant's employment.

29. On 25 February 2022 the claimant had an occupational health assessment, and an occupational health report was prepared. The claimant was assessed as not fit for work "*but can be considered for a phased return to*

work once psychological therapies have commenced." Under the heading capacity for work the report stated that the claimant "*will require a period of additional absence whilst her therapies take effect and, once she has shown signs of improvement and a subsequent phased return to work she should be able to deliver her full contractual obligations."* The report stated that the claimant could not return to work in the next 4-6 weeks because she will require a further period of absence whilst waiting for her formal NHS counselling to commence.

30. On 27 February 2022 the claimant raised a grievance. In her grievance the claimant mainly addressed issues concerning incorrect pay. She also raised issues relating to Ms Toms and Mrs Ruttle. The claimant complained that she had been the subject of workplace gossip; that she had been called to a meeting with 24 hours' notice; that there had been breach of the duty of care to her in not notifying her of services available to her until 8 February 2022 when she had been off work since 3 September 2021 and that there had been misrepresentation of the claimant's circumstances in the referral to occupational health.

31. The claimant was not invited to a grievance meeting, but she was informed of the reply to her grievance in an email of 3 March 2022.

32. On 9 March 2022 the claimant was informed that a meeting had been arranged for 16 March 2022 with Mrs Ruttle and Mr Hough to discuss her absence. The meeting was to be a "Third and Final Formal Performance Review Meeting". The claimant was informed that one outcome of the meeting could be the termination of her employment. The claimant was informed that she could submit a written statement to Mr Hough instead of attending in person.

33. The claimant sent an email on 15 March 2022. The email stated that the claimant wanted to attend in person but *as* the meeting date has approached her anxiety has increased she was now *"even more anxious and fraught and cannot bring myself to attend in person."* The claimant continued:

> "I am unsure what I can say in regards to providing a statement for Anthony to consider in relation to the matter when he has seen my occupational health report."

The claimant then went on to say that life had not been easy for her and her children; that she had been good at her job; she explained her feelings about the current circumstances and apologized for not being able to attend the

34. Mr Hough was provided with a copy of the claimant's occupational health report, he was also provided with a copy of the claimant's email. Mr Hough decided that as the claimant had not asked for an adjournment the meeting would go ahead.

35. Mr Hough states that prior to the final sickness absence review meeting he

had a meeting with Mrs Ruttle to get "*more information*" about the claimant's "*situation, the contact she had with Ms Cush during her sickness absence and the type of employee Ms Cush he had been before her sickness absence.*" There is no record of this meeting and the claimant was not told about or invited to comment on whatever might have been said at this meeting.

36. In the meeting on 16 March 2022 Mr Hough states that he went through the summary provided by Mrs Ruttle and considered the occupational health report. Mr Hough noted that the claimant had been absent from work for 6 months in his witness statement Mr Hough states:

> 12. During the meeting, Ms Toms and I went through the summary that Ms Ruttle had provided to us prior to the meeting. We also, once again, considered the Occupational Health report and Ms Cush's statement. It was clear from the information available to me that Ms Cush's personal situation, which had led to her sickness absence, was very difficult and I sympathised with her. However, Ms Cush's absence from work, which had been going on for over six months with no end in sight, was having an adverse impact on staff in the domestic and cleaning department and the College was struggling to meet the relevant standards of cleaning the boarding houses. As such, Ms Cush's sickness absence could not go on indefinably.
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> 13. As Ms Cush's sick pay was due to come to an end, Ms Toms and I also discussed that if her employment was terminated she would potentially be entitled to more benefits than if she remained on the College's payroll.
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> 14. Other than remaining on sick leave, Ms Cush did not suggest, in her written statement, any alternative options nor did she suggest any reasonable adjustments that the College could consider in order to bring her back to work. There were also no alternative jobs that could be offered to Ms Cush nor were there any reasonable adjustment that we could consider putting in place, as Ms Cush was simply not fit to work.
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> 15. The College needs people that are capable of performing their role not only to ensure effective and efficient working practices, but also to ensure that staff have reasonable workloads and working conditions, as this will impact on productivity and staff morale. The house domestic teams are relatively small and any absenteeism needs to be covered by the other Domestic Staff (Cleaners), as we cannot take on agency workers due to safeguarding aspects as they are working with children in a vulnerable environment.
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> 16. Based on all the information available to me, I genuinely believed that Ms Cush was no longer capable of doing her job.

> Even during these proceedings, she has confirmed that she is still unfit to return to any type of work. As such, I decided to terminate Ms Cush's employment on grounds of capability (ill-health). That said, I asked Ms Toms to include in the final outcome letter an offer of re-employment for Ms Cush once she was capable of re-entering the workplace.

37. The claimant was sent an email informing her of the decision which was made by Mr Hough to terminate her employment. In an email dated 16 March 2022 the claimant was informed that she was dismissed and that she would be provided with a "*full letter with the outcome and rationale to the decision in the next few days".* The claimant was told that she was dismissed on the "*grounds of capability due to ill-health*". The claimant was given four weeks' notice commencing on the 22 March 2022. The claimant's employment terminated on 19 April 2022.

38. The claimant was not provided with a 'full letter' until on 23 May 2022 the claimant received the letter dated 20 May 2023. The claimant was informed that she had the right to appeal the dismissal within 5 days of the receipt of the letter. The claimant did not appeal.

39. The Tribunal were provided with written submissions from the respondent and the claimant's friend Mr Lambert presented useful submissions on behalf of the claimant. We have taken all these matters into account in arriving at our conclusions.

Disability

40. The respondent does not accept that the claimant was a disabled person by reason of PTSD at the relevant time. We are satisfied that at the relevant time the claimant was not a disabled person by reason of PTSD. The claimant's PTSD was diagnosed during the period of the claimant's absence on about 5 October 2021. There is no evidence that the claimant's PTSD had been present for a period of time that was long term, there is no evidence that the effect of the PTSD on the claimant's ability to carry out normal day to day activities has been impacted on to the extent that is a disability at the relevant time. While the claimant's PTSD may well be a disability for the purposes of the Equality Act in this case the claimant has not produced the evidence which she is required to do in order to prove that it was a disability at the relevant time.

41. We have understood the claimant's case as being that the migraine was a disability, but she stated that it was a matter which formed part of the effects of her disability of stress and anxiety we have not gone on to consider whether the claimant's migraines were a separate disability as we did not need to do so.

42. The Tribunal are satisfied that the respondent had sufficient information about the claimant's condition of depression and anxiety from about October 2021 to have knowledge of the disability. The respondent was informed

expressly in the occupational health report that the claimant's condition was likely to be a disability for the purposes of the act. We are satisfied that from about 5 October 2021 the respondent was aware of the claimant's disability of depression and anxiety.

Direct disability discrimination

43. An employer must not discriminate against an employee by dismissing him or subjecting him to any other detriment (section 39 Equality 2010 ('EA')). An employer discriminates against an employee if because of her disability the employer treats the employee less favourably than the employer treats or would treat others (section 13 EA). Where the employee seeks to compare her treatment with that of another employee there must be no material difference between the circumstances relating to each case (section 23 EA).

44. If there are facts from which the employment tribunal could decide, in the absence of any other explanation that the employer contravened the provision concerned the employment tribunal must hold that the contravention occurred. However, this does not apply if the employer shows that it did not contravene the provision (section 136 EA).

45. The parties agree that the respondent dismissed the claimant, and that is conduct falling within section 39 Equality Act.

46. The issue between the parties is whether the respondent treated the claimant as alleged less favourably than it treated or would have treated the comparators who are not in materially different circumstances.

47. The claimant relies on the way that Ms Jury was treated in contrast to the claimant. There must be no material difference between her circumstances and those of the claimant.

48. The claimant states that Ms Jury was someone who was on long term sickness and was not dismissed. The claimant states that Ms Jury had a physical impairment which was not a disability in contrast to the claimant who had a mental impairment which amounted to a disability. The respondent takes issue with the claimant's characterisation of the position of Ms Jury and states that she had both physical and mental impairment which prevent here from being able to attend work.

49. In her evidence Ms Jury explained that she had a combination of mental health and physical health issues. The only explanation for the claimant's dismissal was ill health over a prolonged period of time with no foreseeable date of return. Mr Hough in evidence noted that he did not consider the claimant to have a disability. Unlike the claimant Ms Jury had been seen by occupational health and she had already been able to return to work briefly unlike the claimant, she was deemed fit for work with adjustments and required a further period off sick. Ms Jury was subsequently signed off sick but remains employed by the respondent.

50. The claimant's dismissal by Mr Hough was in our view due to his conclusion that the claimant could not work, and he had no indication of when the claimant was likely to be able to work. Mr Hough did not consider the question of disability it did not form part of his reasoning. It was the fact that the claimant could not do her job. We are satisfied that the claimant's complaint about direct disability discrimination is not well founded and is dismissed.

Discrimination arising from disability

51. A person discriminates against a disabled person if they treat the disabled person unfavourably because of something arising from, or in consequence of, that disabled person's disability, and they cannot show that the treatment is a proportionate means of achieving a legitimate aim, and they knew, or could reasonably have been expected to know, that the disabled person had the disability. This provision is of relevance where a disabled person is treated unfavourably because of something arising from, or in consequence of, their disability, such as the need to take a period of disability-related absence, rather than because of the disability itself.

52. We have come to the conclusion as set out above that the respondent knew, or ought reasonably to have been expected to know, that the claimant had a disability from about October 2021.

53. We have further concluded that the claimant's absence from work from 3 September 2021 until her dismissal on 19 April 2022 arose from her disability. The claimant's disability meant that the claimant was unable to work at the relevant time and as a result of this the respondent concluded that the claimant could not continue in employment and she was dismissed from 19 April 2022. We are satisfied that the claimant's absence from work from 3 September 2021 until her dismissal on 19 April 2022 arose from her disability.

54. The Tribunal is satisfied (and the respondent concedes) that the dismissal of the claimant was unfavourable treatment.

55. We are not satisfied that the respondent has shown, on the balance of probabilities, that the treatment of the claimant was a proportionate means of achieving a legitimate aim.

56. The Tribunal accepts that it is a legitimate aim for the respondent to manage employee absence; to ensure productivity delivering domestic and cleaning services; to provide effective and profitably working practices within the business; to ensure staff moral and reasonable workloads and conditions to other employees; to avoid cost inefficiencies and otherwise promoting the business interests of the respondent. We have not been convinced that the evidence shows that it was the case that dismissal of the claimant at the time she was dismissed was a proportionate means of achieving these stated aims.

57. The respondent has relied on the evidence of Mr Hough as summarised in paragraph 87 of the closing submissions. We note that the statements asserted there have not been supported or illustrated by evidence either orally or some from of corroboration. However, we note that commencing at about the same time as the claimant's absence was being considered was the absence of Miss Jury, she has now been absent from work for a much longer period of time than the claimant was. The role that the claimant was performing is the same as that which the claimant was performing. The reasons for absence incorporate similarities with the claimant's absence. Each of the matters relied on by the respondent as set out in paragraph 87 of the closing submissions could be applied equally to the case of Miss Jury as they do to the claimant. We are not satisfied that they justified the dismissal of the claimant if they were not sufficient for any similar action to be taken in the case of Miss Jury.

58. The respondent states that there was further insight provided by the evidence of Mrs Ruttle. The respondent summarised the evidence given by Mrs Ruttle in paragraph 88 of the closing submissions. The comments we make about the effect of the claimant's absence seen alongside the absence of Miss Jury apply equally to the evidence of Mrs Ruttle as they do to the evidence of Mr Hough. That dismissal of the claimant was not proportionate in our view is illustrated by the evidence relied on by the respondent where it is stated that Mrs Ruttle commented in her evidence in answer to questions from the claimant: "*You weren't dismissed and then replaced. It was the pressure with long term sick. The position is held open for you to return, we have morning and evening staff and we had to shuffle to help in other boarding houses."*

59. We note that this was an employer who employed approximately 125 cleaners. The absence of an employee from time to time is something that must be accommodated on a practical level at all times. The respondent has been able to accommodate the absence of Miss Jury for much longer than the claimant was absent from work. We reject the contention that the dismissal of the claimant was in any sense necessary so as ensure morale as was suggested in the respondents submission at paragraph 88 when the respondent is saying that the claimant's role is being held open for her.

60. We have asked ourselves whether the treatment of the claimant in dismissing her was no more than was necessary to achieve the legitimate aim. In circumstances where the claimant's role is being held open for her and in circumstances when other employees have been absent through ill-health for period of time that are as long and longer than the claimant it is our view that there is clearly a viable, less discriminatory alternative means of achieving the aim that does not involve dismissing the claimant. The claimant dismissal was discrimination arising from disability.

Failure to make reasonable adjustments

61. Section 20 EA provides that the duty to make adjustments, includes circumstances where a provision, criterion or practice of an employer'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. "Substantial" should take its ordinary meaning of "more than minor or trivial". Where an employer fails to comply with a duty to make adjustments the employer discriminates against a disabled person. The employer is not subject to the duty to make reasonable adjustment if they do not know and could not reasonably be expected to know that an interested disabled person has a disability and is likely to be placed at the disadvantage. The claimant has the burden of establishing the existence of a substantial disadvantage. The failure to make an adjustment is an omission for the purposes of section 123.

62. The claimant relied on a PCPs alleging that the respondent required an employee to maintain an acceptable level of attendance and subjected staff who hit a certain absence trigger points to be subjected to an absence management procedure. The respondent concedes that it applied the alleged PCPs.

63. However, the Tribunal have not been able to conclude that there was a failure to make reasonable adjustments. The claimant never indicted to the respondent that she wanted to be contacted more by the respondent. The Tribunal also have not been able to conclude that had the respondent contacted the claimant more that it would have enabled her to be able to return to work. The claimant was able to articulate any adjustment she felt necessary but did not do so. We have been unable to conclude that there was a breach of the duty to make adjustments by the claimant.

Unfair dismissal

64. Section 94 of the Employment Rights Act 1996 ('ERA') provides that an employee with sufficient qualifying service has the right not to be unfairly dismissed by his employer. Capability is a potentially fair reason for dismissal.

65. We remind ourselves that in an unfair dismissal claim where the reason for dismissal is the employee's capability due to ill-health in circumstances where the employee has been absent for work for some time, it is essential to consider the question of whether the employer can be expected to wait longer.

66. There is a need to consult the employee and take her views into account. This is a factor that can operate both for and against dismissal. If the employee states that she is anxious to return as soon as she can and hopes that she will be able to do so in the near future, that operates in her favour; if, on the other hand she states that she is no better and does not know when she can return to work, that is a significant factor operating against her.

67. There is a need to take steps to discover the employee's medical condition and her likely prognosis, but this merely requires the obtaining of proper medical advice; it does not require the employer to pursue detailed medical examination; all that the employer requires to do is to ensure that the correct question is asked and answered.

68. The decision how to act in circumstances such as the present is that of the employer. It is the function of the employment tribunal to determine whether the employer has satisfied us that in the circumstances (having regard to equity and the substantial merits of the case) they acted reasonably in treating it as a sufficient reason for dismissing the employee. It is not the function of the employment tribunal to take the employer's decision for it, but only to decide whether the decision taken by the employer passes that test.

69. The employment tribunal in assessing the fairness of a dismissal must avoid slipping into a “substitution mindset” by forming an opinion of what the employment tribunal would have done had they been the employer. The correct approach is for the employment tribunal to determine whether in the particular circumstances of the case the decision to dismiss “fell within “the band of reasonable responses which a reasonable employer might have adopted”.

70. We are satisfied that the reason for the claimant’s dismissal was because of her absence from work due to ill health, a potentially fair reason for dismissal.

71. We have considered whether the employer had a genuine belief in the reason for the claimant’s dismissal.

72. The claimant does not accept that this is the real reason for her dismissal which she says was because of her disability or for her absence from work that was arising from her disability. We have not been able to find that the reason for dismissal was her disability, we are satisfied that the reason was capability.

73. We have considered whether the respondent had a genuine belief that the claimant's ill-health meant that the claimant was incapable of doing her job? The respondent came to the conclusion that the claimant was not capable of doing her job. We have doubts about whether that conclusion was a genuinely held belief.

74. Such a conclusion was not one a reasonable employer with the information before the respondent would have reached. The claimant’s occupational health (OH) report (p229) states that “Miss Cush is not fit for work”. The dismissing officer had sick certificates and knew she had been absent for a period of time and also had the OH report, which goes onto say she can be considered for phased return once therapies have commenced. The OH report also goes onto say that the claimant should be able to fulfil her

contractual obligations in future. The respondent did not have a genuine belief that C was incapable of doing her job. The OH report made it clear that the claimant would be able to return to work after treatment. The OH report said that there should be a phased return once counselling commenced. The expectation was that the claimant would be fit for a phased return to work once the counselling commenced.

75. We have considered whether at the point the respondent reached its conclusion that it was "following as reasonable an investigation as was warranted in the circumstances". The respondent had ascertained up to date medical information, including the observation that this was a disability issue. We consider that this required a reasonable employer to pause and give this some reflection. In our view the evidence shows that the dismissal officer didn't consider disability as relevant, he didn't properly consider the OH report and he never ascertained the answer to the question "when is she likely to come back to work if not in 4-6 weeks?"

76. We have considered whether the respondent consulted with the claimant. The respondent offered the claimant the ability to attend or provide written submissions, the claimant did not attend and through no fault of the respondent it was a one way process which ideally should have been two way. The claimant's submission (p252) explained that "*as the meeting date has approached* [the claimant's] *anxiety has increased".* The claimant' submission includes the observation "*I don't know what I can say in regards to providing a statement*". That this is clearly the case is illustrated by the information the claimant does provide which to some extent is missing the point or at least not addressing important issues. We have gone on to consider what would a reasonable employer faced with this information do, we remind ourselves that we must not replace our views for that of the employer. We note that there are a number of things that could have been done including giving the claimant questions to answer or suggested that the claimant provide evidence about her health/ prognosis, her own views on when on the likelihood of her return, sending the claimant a copy of respondent's Capability Policy to remind her of its contents. We note that the Capability Policy states that:

> "The meeting can be postponed once if the employee or his or her companion cannot attend on the exceptional circumstances."

77. The claimant was an employee who could not attend she was sick with stress/anxiety and the prospect of meeting increased anxiety. The claimant's email was forwarded to hearing officer. We consider that the respondent hasn't properly consulted with the claimant in circumstances where her uncertainty as displayed in the email was clearly expressed, against an apparent desire to attend but being unable to due to illness. Where the respondent has a policy that says the meeting can be adjourned once, the email should have triggered consideration of whether an adjournment should take place, but there was no consideration of the email.

78. Mr Hough states that he did consider alternative employment for the

claimant, but nothing was available.

79. We have gone on to consider the question of procedural fairness. We note that the list of issues states as a follows:

> "The burden of proof is neutral here, but it helps to know the Claimant's challenges to the fairness of the dismissal procedure in advance and they are identified as follows:
> (i) No meetings were held prior to her dismissal;
> (ii) No final outcome letter was provided to the claimant and so she was denied the right of an appeal."

80. We note that there was no meeting with the claimant before dismissal and the outcome letter was provided to the claimant a long while after the dismissal took place. We recognise that the claimant was informed of the right to appeal 10 weeks after the dismissal, we are satisfied that she genuinely misunderstood that the opportunity to appeal remained due to the time that had elapsed between the dismissal an the outcome letter.

81. We have also gone on to consider "whether any reasonable employer would have waited longer before dismissing the claimant". The respondent says that there were problems with operation presented by the claimant's absence. There was no specific evidence submitted to support this assertion, the respondent had an establishment of 125 cleaners and accepted that from time arrangements are made to cover absence. The respondent said that it was hard to get agency staff due to DBS requirement. The Tribunal however note that there are a very wide range of jobs that require DBS checks (e.g. hospital jobs, education jobs, childminder jobs) that we don't consider that this in reality would present a significant difficulty for a school who would be well used to the need for DBS checks as a precursor to employment, it is not a unique and unusual difficulty. We also note that the respondent has had at about the time before the claimant was ill and when the claimant was ill that the respondent had a significant turnover of staff, in the evidence we heard at one stage 4 out of 7 cleaners in the claimant's house were needed and that the respondent recruited 4 further employees in a short time frame.

82. The respondent relied on the fact that the claimant had exhausted her sick pay entitlement. The Tribunal is not clear why exhaustion of sick pay would make a difference in this case. We do not consider that there arises a distinct justification for dismissing someone just because their sick pay has run out. In any event we note it was not a consideration of Mr Hough in making his decision to dismiss the claimant.

83. Before making a decision to dismiss a reasonable employer would have made sure that they had consulted properly with the claimant and allowed her position to be properly taken into account in a way that this employer hadn't done. We are of the view that the dismissal of the claimant at the point that the claimant was dismissed was outside the range of responses open to a reasonable employer.

84. Taking into account all the matter set out above we have come to the conclusion that the claimant was unfairly dismissed.

Polkey

85. The evidence of Ms Jury shows that the respondent would not necessarily have been dismissed by the respondent despite being long term sick for a longer period than she had been. We note that the claimant continues to present as someone still suffering, had she not been dismissed at the time that she was dismissed it does not follow that she would necessarily have been dismissed in any event. What is the chance that the claimant would have been dismissed? We find it difficult to assess whether if a fair procedure had been followed the claimant would have been dismissed in any event. We consider that the just and equitable way of considering this case is not to make Polkey type reduction but to consider whether the claimant's state of health would have prevented her from working or not. If the claimant in any event could not have worked if she was in employment then we consider that the award of any compensation ought to reflect that the dismissal has not resulted in any loss.

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Employment Judge Gumbiti-Zimuto

Date: 25 January 2024

Sent to the parties on: 7 February 2024

For the Tribunals Office