THE INDUSTRIAL TRIBUNALS

CASE REF: 10254/18

CLAIMANT: **Tony Browne**

RESPONDENT: **Western Health & Social Care Trust**

DECISION

The unanimous decision of the tribunal is that the claimant's claims are dismissed.

Constitution of Tribunal:

Employment Judge: **Employment Judge Bell**

Members: **Mr R McKnight**
Mr A White

Appearances:

The claimant was represented by Mr B McKee, Barrister-at-Law, instructed by Donnelly & Kinder Solicitors.

The respondent was represented by Mr T Warnock, Barrister-at-Law, instructed by the Directorate of Legal Services.

1. The claimant in his claim complained that he was unfairly dismissed on the grounds of ill health and/or his inability to provide regular and effective attendance at work, and suffered discrimination on the grounds of his disability and that of his children and wife and failure by the respondent to make reasonable adjustments for his disability and that of his family in failing to attach any or appropriate weight to his/their disability and the impact of this on his level of absence when applying the respondent's sickness/absence management policy and its requirement of consistent attendance at work. The claimant contended the respondent had focussed on his past level of absence instead of dealing with the current sick year period and looking forward and relying upon the positive assessment of Occupational Health on 5 February 2018 but essentially ignored the Occupational Health medical opinion deciding that they had no confidence that the claimant's attendance was going to change going forward and dismissing him.

2. The respondent in its response resisted the claimant's claims contending that the respondent was not under a legal obligation to make reasonable adjustments due to disability of any other family members; had managed sickness absences appropriately; gave support to enable the claimant to come to work; treated him fairly; gave him opportunity to make submissions which were considered; and, gave written reasons for his dismissal.

3. The parties lodged with the office of the tribunals on or about 6 December 2018 a three page agreed statement of legal and factual issues.

4. At the outset of the substantive hearing on 20 March 2019 the claimant's claims of associate discrimination were dismissed following their withdrawal.

5. The substantive hearing was listed to run for three consecutive days but was adjourned generally on 21 March 2019 when legal counsel for the claimant took unwell. Dates were thereafter agreed by parties for the hearing to re-convene on 29 and 30 May 2019.

6. A panel meeting thereafter took place on 11 June 2019 at which this decision was reached.

THE ISSUES

7. The narrowed issues remaining for determination by the tribunal at substantive hearing were in summary:-

   (i) Was the claimant unfairly dismissed?

   In particular,

   - Did the respondent breach the audi alteram partem rule contrary to natural justice so as to constitute a procedural flaw rendering the dismissal unfair by not going back to the claimant for comment after enquiries made to verify the claimant's ground of appeal, that he had contracted at work the illness which caused his last absence and was prevented from attending work by infection control regulations?

   (ii) Did the respondent have a duty and fail to make reasonable adjustments in respect of any disability of the claimant?

   In particular,

   - Would it have been reasonable for the respondent to have disregarded on just this one occasion the claimant's prior disability related absences in assessing the likelihood of regular and effective service given the Occupational Health report of his condition effectively having 'settled'?

   (iii) Did the respondent directly discriminate against the claimant dismissing him on grounds of disability?

   If so,

   (iv) What remedy is appropriate?

SOURCES OF EVIDENCE

8. The tribunal considered the claim; response; agreed bundles of documentation; written statements of John Crockett (Assistant Support Services Manager),

Marina McShane (Human Resources (HR) Manager for the Directorate Support Team), Cara McLaughlin (Senior HR Manager) and Trevor McCarter (Senior Manager (Acting Assistant Director of Facilities Management previously Head of Estates Management)) on behalf of the respondent, and of the claimant together with their oral testimony.

FINDINGS OF FACT AND CONCLUSIONS

The tribunal found the following relevant facts proven on a balance of probabilities:

9. The claimant commenced employment on 13 October 2005 as a Support Services Assistant based in Altnagelvin Hospital and his employment transferred on 21 March 2007 under the Transfer of Undertakings (Protection of Employment) Regulations) to the respondent. The claimant was initially based in the Catering Department and latterly in Laundry Services until his dismissal on 30 April 2018.

10. The claimant was one of a Laundry Services team of five, working on Rota B, a seven day a week service, requiring him to work one weekend in five. For cross infection reasons used linen cannot be left sitting around the hospital. The claimant's duties centred upon the collection of used linen and separately delivering clean linen to all wards and departments. Production of clean linen was carried out Monday to Friday by staff on Rota A. A staff absence of a Rota B staff member on a week day meant a staff member had to be taken off Rota A Production duties to instead cover collections/deliveries consequently reducing the output of clean linen to cover hospital demand. At the weekend there were no other laundry staff on duty to cover the unexpected absence of a weekend operative. The efficient collection and distribution of laundry throughout the hospital requires knowledge of the layout of the hospital and location of collection and drop off points.

11. The claimant has for a number of years suffered from anxiety and depression and it is agreed that the claimant was disabled at the relevant time for the purposes of the Disability Discrimination Act 1995 (as amended) (DDA).

12. During the course of his employment the claimant was absent from work on numerous occasions in connection with ill health and his personal and domestic circumstances.

13. The claimant's absences were managed under the respondent's attendance management policies and the claimant was regularly seen by the respondent's Occupational Health practitioners. Core principals of the respondent's Managing Attendance Protocol that underpin and shape the decisions made under it include, '*Employees are required to give regular and effective attendance at work*' and '*Employees are not expected to come to work if they are clearly incapable of doing so. Similarly employees should not remain away from work where adjustments or modifications could be made to facilitate their return*.'

14. From March 2007 to March 2008 the claimant had nine episodes of sickness absence for a variety of reason and had five meetings with his manager and HR. An Occupational Health report of 12 September 2007 indicated that he had no underlying medical condition.

15. On 13 November 2007 the claimant was issued with an informal warning for his high absence level.

16. On 11 January 2008, following a disciplinary investigation, the claimant's manager discussed with him a possible change in working hours to enable him to address family issues.

17. From April 2008 to March 2009, the claimant had four episodes of sickness absence for a variety of reasons and eight episodes from April to March 2010. An Occupational Health report on 23 October 2009 advised that the claimant was fit for work following a bereavement.

18. On 8 March 2010 the claimant was issued with an informal warning for his high level of absence.

19. From April 2010 to March 2011 the claimant had five more episodes of absence for various reasons and attended meetings with his manager and HR on 8 June and 29 October 2010.

20. On 4 March 2011 Occupational Health reported that no underlying medical condition was identified.

21. From April 2011 to March 2012 the claimant had four episodes of absence and attended four meetings with his managers and HR.

22. On 27 July 2011 the claimant was issued with an informal warning.

23. From March 2012 to April 2013 the claimant had three episodes of absence.

24. On 22 August 2012 at a disciplinary hearing the claimant was issued with a formal warning.

25. The claimant was absent from work reported due to a sore back on 27 and 28 February 2014; absent for three days from 1 to 5 March 2014; and one day on 10 March 2014 recorded by the respondent as general debility.

26. The claimant made his first application for one day of carer leave on 14 March 2014 for childcare, which the respondent approved. The respondent allows no more than twelve days paid carer's leave with pay in any leave year, from a minimum of a half day to maximum three days at a time, to enable employees who are carers to respond to immediate needs arising from emergencies.

27. The claimant was again absent for one day on 18 March 2014; four days from 24 to 27 March 2014 recorded as general debility; nine days from 3 to 15 April 2014 recorded as influenza; four days from 29 April to 2 May 2014 recorded as general debility; on 22 and 24 June 2014 from general debility; four days due to vomiting from 17 to 22 September 2014; and twelve days from 13 to 28 October 2014 recorded as due to stress.

28. Occupational Health reported on 11 November 2014 that the claimant was fit for his usual duties; no short term or permanent adjustment was required; there was no significant underlying medical condition at that time which was likely to affect his future attendance; his absence had not been work related; and additional support

services had been recommended to the claimant of which he could avail if he wished.

29. On 28 November 2014 Mr Crockett held his first Attendance Management meeting with the claimant to discuss periods of absence since February 2014. The Occupational Health report was discussed and Mr Crockett's expectation of sustained service.

30. During 2015 the claimant had three episodes of absence on 3 to 9 February 2015, having fallen on his way to work, leading to an attendance management meeting on 6 March 2015 and informal disciplinary warning (expiring on 6 September 2015); an unauthorised day of leave on 3 March 2015; and absence from 13 March to 2 June 2015 due to a sore back. An attendance management meeting took place on 3 June 2015 and an Occupational Health referral appointment on 2 June 2015 which advised that the claimant was fit for duties and no workplace adjustments required.

31. On 19 June 2015 the claimant applied for three days' compassionate leave, his second carer leave application, which the respondent approved.

32. The claimant made a third carer leave application on 15 October 2015 for four days leave but it was not approved, the respondent noting that the claimant's partner's seizure had been the previous week and the claimant had been advised in the past to have alternative childcare arrangements in place.

33. On 12 November 2015 the claimant reported sick again with vomiting for one week and thereafter for one week from 19 November 2015 with a chest infection.

34. An attendance meeting took place on 4 December 2015, the claimant was referred to Occupational Health and they reported on 30 December 2015 that there was no underlying medical condition which would prevent him giving regular and effective attendance at work and that the claimant was fit to continue his usual duties without restriction.

35. The claimant considers that his absence records then changed *'to an unacceptable level around 2016'.*

36. On 22 January 2016 the claimant whilst at work suffered a needle-stick injury and he was thereafter absent from work for 14 days until 15 February 2016 in consequence of this and then from 22 February to 10 March 2016 with anxiety/a rash on his body. Following the needle-stick incident Mr Crockett personally attended the scene to deal with matters and arranged an urgent Occupational Health referral for the claimant to take place that same morning.

37. On 7 March 2016 Mr Crockett wrote to the claimant to advise that a medical certificate had not been received for his current absence. It was the respondent's practice to send to any employee who omitted to send in a medical certificate on time a standard letter reminding them to comply so that their records were kept up to date and for pay purposes. The respondent did so in respect of the claimant on a total of five occasions throughout his employment.

38. On 14 March 2016 the claimant attended an Occupational Health appointment and Dr Gable reported on 15 March 2016 that the claimant's absence was due to a

reaction to a situation where he had sustained a needle-stick injury on 25 January 2016; that he considered the claimant fit for work and recommended that he continue to attend for work as this would be beneficial for his health; he confirmed in relation to the needle-stick injury that the claimant would be kept under review but apart from that nothing else to do at present and no routine review arranged.

39. On 22 March 2016 a meeting was held by Mr Crockett with the claimant under the respondent's Disciplinary Procedure to review his attendance. Caoimhe Coyle HR advisor was also in attendance. Concerns were put to the claimant as to his non-compliance with the managing attendance protocol and failure to submit a medical certificate on time and impact of absence on the service highlighted. The claimant was informed that he would be notified of their decision.

40. On 17 May 2016 the claimant attended a disciplinary investigation meeting with Mr Crockett and Ms Coyle. The claimant was advised they would not proceed to disciplinary action because two of his last three absences were considered work related. The claimant was reminded that his attendance remained of concern and so would continue to be monitored and future absences could warrant formal disciplinary proceedings. By letter of 20 May 2016 the respondent confirmed this to the claimant.

41. From 15 July 2016 to 5 August 2016 the claimant was absent for sixteen days from work on sickness absence following collapsing at the gym and thereafter sickness certified as fatigue.

42. The claimant was then absent from work for eighty days due to anxiety from 24 October 2016 through to 10 February 2017.

43. The respondent referred the claimant to Occupational Health on 31 October 2016 but he failed to attend an appointment made for 2 December 2016.

44. On 19 December 2016 the claimant who was still absent on sick leave, attended an Absence Review meeting with Mr Crockett and Samantha Lynch (Senior HR Advisor) at which his absences were discussed and the claimant referred for a further appointment with Occupational Health to take place on 20 January 2017 for guidance.

45. On 16 January 2017 Mr Crockett wrote to the claimant advising that a medical certificate had not been received in relation to his current absence for the period from 5 January 2017.

46. In correspondence of 20 January 2017 Dr Hamilton from Occupational Health advised that the claimant's medical certificates noted depression and anxiety as the cause of his sick leave which at that time had been for a period of three months and set out, '*we discussed the potential reasons for the onset of his health problems and Tony is dealing with a range of very difficult personal circumstances at the minute. There are no workplace issues of concern*.' Dr Hamilton confirmed that the claimant had accessed support from his GP and had commenced an increase in the dose of his medication on 19 January 2017. He concluded by stating '*although Tony's health is improving and he is keen to return to work, I do not believe that he* [is] *yet ready to* [do] *so. He tells me that he has a medical certificate for another*

3 weeks so I am going to review him by telephone at that stage and if his health improves as hoped then he could be [in] *a position to return to work at that stage*.'

47. By letter of 10 February 2017 Dr Hamilton confirmed having spoken with the claimant that day that his health was much improved but '*as per the Case Conference last month, it remains unclear as to whether Tony will be able to maintain regular and effective service. No routine review has been arranged.*'

48. The claimant thereafter returned to work.

49. On 28 February 2017 the claimant attended a sickness review meeting with Mr Crockett at which it was confirmed that his previous absences had been managed as conduct issues, but now would be managed as capability as an underlying condition had been identified. Work issues, medication and the use of Care Call were discussed. The claimant was reminded that sustained attendance was needed and he may progress to a final review if levels of absence continued.

50. On Monday 6 March 2017 the claimant was rostered to work on delivery of clean linen, a service which is closed at the weekend and which the respondent considers an urgent and critical job, but the claimant failed to report at 8.00 am for duty and by 9.00 am had not made contact with the respondent as he was required to do.

51. The claimant was absent from work from 26 June 2017 until 13 July 2017, reported due to an ulcer until 2 July 2017, and thereafter due to anxiety.

52. On 9 October 2017 the claimant attended an appointment with Occupational Health to discuss the reason for his absence, who reported this was due to an underlying medical condition which at that time had settled and advised, '*we also discussed work issues today. Tony advises due to lack of resources this is causing him a stress reaction. I would advise that you meet with Tony and discuss how a plan can be put in place to resolve this matter. I would then hope that Tony will be able to give regular attendance in the future*.' The claimant's manager met with the claimant and discussed the matter, established that the issue involved complaints from nursing staff about the linen being provided to wards and it was agreed any further issues would be directed to his line manager.

53. The claimant was absent again from 6 November 2017 resulting from a panic attack and thereafter anxiety until 11 January 2018.

54. The claimant was unable to attend an Absence Review meeting arranged for 11 January 2018.

55. The claimant forgot to attend an Occupational Health appointment arranged for 16 January 2018.

56. An Absence Review meeting took place on 24 January 2018 with Mr Crockett and Ms Coyle as HR advisor which the claimant attended with his union representative Mr Thompson. The claimant's recent sickness absence from 6 November 2017 was considered. Minutes record:-

> '*John [Crockett] advised that Tony has been off work 200 days in the last year from end of Dec 16 until Jan 18. John says this affects the whole dept ... staff has reduced so impacts service if a person off'*

It was noted the claimant had not attended an Occupational Health appointment; had not followed the correct absence reporting protocol; submitted an incorrect self-certificate and doctor's medical certificate and delayed submitting the correct medical certificate. The claimant acknowledged that his attendance at work had not been good and that he had not followed the correct reporting procedures. The claimant's condition was discussed, its management and that his level of attendance was concerning, not sustainable and needed to be managed. The panel noted that the claimant had attended previous meetings to discuss his absence and had been issued with informal and formal warnings but had been no improvement. Minutes record:-

> '*Caoimhe said that Tony's overall attendance is a concern, advised absence not sustainable + needs to be managed. Explained 2 ways of managing absence, conduct if not related to UMC* [underlying medical condition*] or possible move to F.R* [final review] *if cont*[inued] *to have absence due to UMC where contract of employment may be terminated due to ill health. Advised OH* [Occupational Health] *stated in last report Feb 17 that it was unclear if Tony would be able to maintain attendance - advised Tony would be asking OH to confirm if Tony able to give R&E* [regular and effective] *attendance or anything we need to consider to help maintain attendance. Need make aware that if OH confirms off with UMC + likely to continue to have absence due to MC* [medical condition] *may need move to F.R.*
>
> *Have had meetings before to discuss absence, has been issued informal & formal warnings no sign of improvement other absences not related to UMC still continue. Not acceptable + need to decide how we proceed to manage absence. Advised absence priority for Trust due to impact on service & cost so needs to be managed, reiterated that has failed to comply with absence policy… failing to make contact on time- not first time have met + discussed previously ...'.*

57. Further Occupational Health advice was sought to help determine the likelihood of the claimant being able to maintain regular and effective attendance in the future; whether redeployment was an option and whether there were any workplace restrictions or accommodations that would support the claimant in being able to sustain his attendance.

58. The claimant attended an Occupational Health appointment on 5 February 2018 and by letter of same date they reported the reason for the claimant's absence commencing in November 2017 as *'a flare-up of an ongoing underlying medical condition which is likely to fall within the Disability Legislation'.* Occupational Health advised that there were no workplace restrictions or accommodations required in relation to managing his condition, that he was fit to continue with his usual duties and Occupational Health had not arranged a routine review. The report also set out also that '*Tony is under the care of his GP and on this occasion has commenced the appropriate treatment for his condition. This has resulted in his condition stabilising. Therefore in answer to your question, Tony should be able to maintain a regular and effective attendance at work in the future. I do not believe that redeployment is an option in this case.*'

59. On 23 February 2018 the claimant attended an absence review meeting with Mr Crockett and Ms Coyle to discuss his attendance. The most recent

Occupational Health assessment was shared with the claimant and panel's expectation outlined that he sustain regular attendance. Minutes record:-

> *'John said therefore going forward expect Tony to give R&E* [regular & effective] *attendance, has been given a clean bill of health, no issues that would cause absence.'*

60. The claimant, as per his evidence, considered reference made to him having a '*clean bill of health'* shows a lack of knowledge of depression, stress anxiety and mental health issues by the respondent and that they were putting him under more pressure to be in work without suggesting what they could do to help him manage his attendance better.

61. At 10.49 on Monday 26 February 2018 the claimant (who was required to make contact before 9.00 am) informed his line manager Mr Lynch by telephone that he could not attend work due to sickness and would be back on Wednesday 28 February 2018. As per the claimant's evidence '… *this time it had nothing to do with my disability or my family's disability. I think I told Trevor Lynch that I was sick and not able to attend work. Basically I had a virus that was going about at that time of year and it was hard to avoid. I believe I caught it from the ward*.' The claimant's statutory sick pay statement records details of the claimant's sickness as '*caught a virus in hospital from Ward 3'* and claimant's self certificate '*caught a virus in Ward 3'*.

62. The claimant did not attend for work on the morning of 28 February 2017. Mr Lynch accordingly telephoned the claimant at 1.00 pm. The claimant informed Mr Lynch that he had obtained new antibiotics which would take four days to start to work and that he would be in to cover the weekend shift on 3 & 4 March 2018. Mr Lynch considered that because the claimant had let him down in the past that he could not take the chance and arranged for another staff member to cover the weekend shift. The claimant remained absent due to sickness from 26 February 2018, returning to work on 5 March 2018.

63. Further to the Absence Review meeting on 23 February 2018 Mr Crockett wrote to the claimant a letter on 12 March 2018 summarising the process to date including his history of absences, requirement under his contract to give regular and effective attendance even with an underlying medical condition, advice received from Occupational Health of 5 February 2018 that he should be able to maintain regular and effective attendance at work in the future, advice given at the meeting on 24 February 2018 that failure to provide sustained attendance would lead to moving to a final review meeting and his sickness absence notified on 26 February 2018, in consequence of which they would now proceed to a final review meeting to take place on 27 March 2018 to discuss details of the claimant's continued absence and consider all the information available. Mr Crockett set out, '*Any decision will be made in conjunction with the most recent assessment from Occupational Health. Consideration will be given to the impact your medical condition has on your future employment with the Trust and termination of contract may be considered.'*

64. On 27 March 2018 Mr Crockett and Mr Lynch provided to Human Resources a letter summarising the claimant's repeated attendance issues and highlighting difficulty resulting when the claimant gave assurances of his certain return date and failed then to attend, thus putting undue pressure on other staff to maintain an effective service, causing in particular a major problem at weekends when there

was no other cover and vital linen supplies not met, directly affecting patient care. Both expressed the view that it was impractical to have someone on standby just in-case the claimant might not turn up.

65. The claimant's trade union representative was unavailable on 27 March 2018 and so the final review meeting was re-scheduled and took place on 18 April 2018 conducted by Maureen Kelly, Acting Director of Facilities Management and Maria McShane, Human Resources Manager. The claimant attended with Mr Liam Gallagher, his Trade Union representative. Mrs Kelly explained the purpose of the meeting. Ms McShane summarised the claimant's absence history and Occupational Health reports, read out the Occupational Health report of 5 February 2018 and noted the claimant had seven periods of absence between January 2016 and 18 April 2018 amounting to 194 days/27% absence. The panel held the claimant's complete absence file and noted that management of the claimant's attendance had been going on for some years prior to the most recent two year period and absences prior to 2016 were unrelated to any underlying medical condition. Mr Gallagher accepted that the claimant's record was bad. Submissions were heard from the claimant's manager. The claimant referred to his own ill health and that of his family. Mr Gallagher explained that the claimant's wife and two children suffered from Epilepsy which in turn impacted upon the claimant's health stating for example if they suffered a seizure the claimant would find it difficult to come into work. Mr Gallagher informed the respondent that the claimant's latest absence was due to contracting a virus that the claimant believed he had caught from the ward at the hospital and he was too unwell to attend work. The type of virus was not specified and no evidence presented to suggest the most recent absence was related to the claimant's disability. The claimant stated that he had come off his medication as he had been feeling better but realised that this was the wrong thing to do. Mr Gallagher appealed for another chance to allow for the claimant to build trust and asked if a probationary period could be applied to the claimant. Ms McShane advised that the respondent's Attendance at Work Policy and Procedures were followed in relation to sickness absence which provides for ongoing management and management of the absences rather than probationary periods. Ms McShane advised that they were not questioning the authenticity of the reasons for absence but the claimant's overall ability to provide regular and effective attendance. In closing the meeting Mrs Kelly advised that their determination would be confirmed in writing.

66. Consideration was thereafter given by the panel to the claimant's absences having been monitored from 2007 and seven periods of absence between January 2016 and 18 April 2018 amounting to 194 days/27% absence. The panel reviewed Occupational Health reports including the most recent of 5 February 2018 which advised that the claimant should be able to maintain regular and effective attendance at work. The claimant's further absence for 5 days from 26 February 2018 was noted and that his absence had a direct effect on the respondent's ability to provide an efficient service to its patients. All the claimant's absences, not just those relating to his underlying medical condition were reviewed. As per Ms McShane's evidence the main question the panel considered was, would the claimant be able to give regular and effective attendance going forward? The panel in particular took into consideration the following in their decision making:-

- In February 2017 when Occupational Health advised that the claimant may not be able to provide regular and effective attendance, the claimant on being afforded the opportunity to demonstrate that he could, had three further

episodes of absence on 26 June 2017 to 13 July 2017 of 14 days, 6 November 2017 to 22 January of 56 days, and 26 February 2018 to 2 March 2018 of 5 days.

- Following the claimant being informed on Friday 23 February 2018 that the Occupational Health advice was that he should be able to provide regular and effective attendance he immediately had another episode of absence on Monday 26 February 2018 not related to his underlying medical condition.

- The negative impact absences had on the Laundry Service and the claimant's colleagues.

- The claimant had attended numerous absence review meetings with HR and his managers and was well aware of the respondent's procedures in relation to his ongoing absences and risks to his employment if absences continued. The claimant had been provided with opportunity over the years to ascertain if his attendance would improve to a sustainable level.

- The claimant had been diagnosed with an underlying medical condition, likely to fall under the DDA and that the health needs of his family may have contributed to his underlying medical condition.

The panel concluded that it was clear the claimant's absences had an impact on the Laundry Service and his work colleagues and that his attendance record, despite being closely managed for years, and claimant's awareness of the need to provide regular and effective attendance provided them no confidence that the claimant would be able to give regular and effective attendance going forward. Occupational Health had confirmed redeployment was not an option and there were no workplace restrictions or accommodations needed. The panel did not consider there were any further reasonable adjustments that the respondent could put in place reinforced by the Occupational Health assessment. They did not consider that any adjustment to working hours would impact on the claimant's ability to attend as his absences were not work related or that reduced hours were likely to make any difference as most absences were long term.

67. By letter of 30 April 2018 the respondent notified the claimant of termination of his employment from Tuesday 1 May 2018 with pay in lieu of notice because he was unable to provide regular and effective attendance at work.

68. By letter dated 3 May 2018 the claimant raised an appeal against the respondent's decision to dismiss him. Consequently an appeal hearing was arranged to take place on 11 July 2018 but had to be postponed and re-scheduled and ultimately took place on 7 August 2018 before Trevor McCarter and Cara McLaughlin. The claimant attended accompanied by his Trade Union representative Gareth Scott. Mr McCarter introduced the panel and explained the process for the hearing. Mr Scott presented the case for the claimant and indicated that the crux of the appeal was that the claimant, following improvement in his health over recent months due to a change in his medication and return to work in January 2018, then contracted a viral bug in the hospital which meant that he was not able to work and infection control rules required that he did not attend work and so it was impossible to comply with the '*tablet of stone*' detailed at the meeting on 23 February 2018 that any future absences could result in a move to a final review stage. The claimant advised the panel that he had contracted an ear nose and throat illness on Ward 3.

Mr Scott also noted that most absences were related to the claimant's disability and medical advice was that his attendance was likely to improve and he questioned how based on five days absence unrelated to his disability could *no confidence in future attendance* be determined. No other grounds of appeal were put forward at the appeal hearing.

69. We find the evidence of Mr McCarter credible and are not persuaded that at the appeal hearing he could not look the claimant in the eye or that his decision was pre-determined.

70. The appeal panel considered the notes of the absence review meeting held with the claimant and agreed that in light of the support provided to the claimant and clear discussion on 23 February 2018, that it was not unreasonable to take the decision to move to Final Review, however that the reason for absence was relevant and that if the claimant's submission that he contracted the illness at work and was prevented from attending work by infection control regulations was correct that it may not be reasonable to terminate his employment. Mr McCarter advised the claimant and his representative that the panel would consider the presentation and endeavour to issue a decision within 7 days but that as the panel had to look into the circumstances relating to the claimant's final absence that it might take them a little longer.

71. Accordingly the panel thereafter made enquiries to Infection Control and Occupational Health. Ms McLaughlin was advised by the Trust's Infection Control Department that there were infection control guidelines regarding staff who have unexplained vomiting and diarrhoea but that there was no reason from an infection control perspective why a staff member could not be in work with an ear nose and throat illness. On reviewing the papers Ms McLaughlin noticed that the claimant referred to contracting Strep A and so she contacted Infection Control again to enquire if there were infection control guidelines pertaining specifically to Strep A. She was advised if there was an incident of a patient with Strep A staff are advised to wear masks and a sign put on the door of the patient who is put in isolation. If a staff member reports with a Strep A infection they are advised to report it to Occupational Health. Ms McLaughlin confirmed with Infection Control that there were no issues reported of any infection in Ward 3 or Strep A infection on any Ward in the hospital in February 2018 and with Occupational Heath that there were no Strep A referrals at all in February 2018. The panel considered accordingly that there were no infection control reasons why the claimant could not have attended work. The panel agreed, based on all the information, that the termination on grounds of ill health was reasonable.

72. Mr McCarter by letter of 17 August, issued on 28 August 2018, confirmed that following review of all information that the claimant had been provided with significant support and opportunity to maintain regular and effective attendance and in conclusion that the appeal could not be upheld.

73. The claimant presented his claim to the office of the tribunals on 27 July 2018.

74. The claimant sought re-instatement by way of remedy.

75. The claimant's post has been covered by agency staff since termination of his employment.

76. There were no incidents of misconduct or complaints made against the claimant by any of his colleagues throughout his employment or in respect of his performance when he was at work.

77. No evidence was led by the respondent objecting to re-instatement.

THE LAW

Disability Discrimination

78. The Disability Discrimination Act 1995 (as amended) (the DDA) prohibits disability discrimination.

79. For the purposes of the DDA a person has a disability if he has a physical or mental impairment which has a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities (Section 1 (1)). Where an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur (Schedule 1, Section 2(2)). An impairment which would be likely to have a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities, but for the fact that measures are being taken to treat or correct it (including in particular medical treatment), is to be treated as having that effect (Schedule 1, Section 6(1) & (2)).

80. Direct discrimination occurs where a person's disability is the reason for the less favourable treatment (Section 3A, DDA). Direct discrimination cannot be justified. The comparator may be actual or hypothetical and is someone who is not disabled, or who did not have the same disability as the claimant. Where there is no actual comparator the tribunal must identify the characteristics of the hypothetical comparator. It is however open to the tribunal to focus on the reason for the claimant's treatment. It is for the claimant to prove facts from which a tribunal could conclude that an act of direct discrimination on grounds of disability occurred. If he does so, the burden of proof shifts to the respondent to provide an untainted explanation.

81. Discrimination also occurs if a person fails to comply with the duty to make reasonable adjustments imposed on him in relation to the disabled person (S.3 A (2) DDA). Section 4A of the DDA imposes a duty to make reasonable adjustments:-

> *"(1) Where –*
>
> *(a) a provision, criterion or practice applied by or on behalf of an employer;*
>
> *… places the disabled person concerned at a substantial disadvantage in comparison with persons who are not disabled,*
>
> *it is the duty of the employer to take such steps as it is reasonable, in all the circumstances of the case, for him to take in order to prevent the provision, criterion or practice, or feature, having that effect."*

82. The duty to make reasonable adjustments is triggered where an employee becomes so disabled that he can no longer meet the requirements of his job description and hence liable to be dismissed. The duty may require the employer to treat a disabled person more favourably to remove the disadvantage which is attributable to the disability, involving a degree of positive action. Steps might include transferring the employee to another job. The comparative exercise to be carried out differs from that in direct discrimination. It is not necessary for the claimant to satisfy the tribunal non-disabled people doing the same job would have been treated differently. In many cases the facts will speak for themselves and the identity of the non-disabled comparators will be clearly discernible from the provision, criterion or practice (PCP) in play (***Archibald v Fife Council [2004] IRLR 65).***

83. In ***Environment Agency v Rowan [2008] IRLR 20*** the EAT set out that a tribunal considering a claim that an employer has failed to make a reasonable adjustments must identify:-

> *"(a) the provision, criterion or practice applied by or on behalf of an employer; or*
>
> *(b) the physical feature of premises occupied by the employer; or*
>
> *(c) the identity of non-disabled comparators (where appropriate); and*
>
> *(d) the nature and extent of the substantial disadvantage suffered by the claimant. It should be borne in mind that identification of the substantial disadvantage suffered by the claimant may involve a consideration of the cumulative effect of both the 'provision, criterion or practice applied by or on behalf of the employer and the physical feature of premises', so it would be necessary to look at the overall picture."*

84. If the duty arises then the tribunal goes on to consider if any proposed adjustment is reasonable to prevent the PCP placing the disabled person at the substantial disadvantage.

85. The factors to be taken into account in determining whether it is reasonable for a person to have to take a particular step in order to comply with a duty to make a reasonable adjustment and a non-exhaustive list of examples of reasonable adjustments are set out at Section 18B of the DDA. It is for the tribunal to decide whether something is a reasonable adjustment, objectively, on the facts of the particular case.

86. In ***Griffiths v Secretary of State for Work and Pensions [2015] EWCA Civ 1265*** it was considered that where an employee's disability makes them more likely to be absent from work than a non-disabled colleague the duty to make reasonable adjustments for a disabled employee may apply to an attendance management policy. In looking at the potential adjustment of dis-applying or disregarding disability related absence, in that case 62 out of 66 days, it was found that the adjustments sought were not within the scope of the statute which was designed to allow for the disabled employee to return to work or carry out their work.

87. A dismissal can itself be an unlawful act of discrimination by reason of a failure to make reasonable adjustments (***Fareham College Corporation Walters [2009] IRLR 991 EAT***).

88. The burden of proof in relation to the duty to make reasonable adjustments, was specifically considered in ***Project Management Institute v Latif [2007] IRLR 579***. The position, as summarised in *Harvey on Industrial Relations and Employment Law,* is:-

> *"… a claimant must prove both that the duty has arisen, and also that it has been breached, before the burden will shift, and require the respondent to prove that it complied with the duty. There is no requirement for claimants to suggest any specific reasonable adjustments at the time of the alleged failure to comply with the duty; in fact it is permissible … for claimants to propose reasonable adjustments on which they wished to rely at any time up to and including the … hearing itself."*

89. Possible remedies a tribunal may grant on finding a complaint under the DDA well founded, where it considers it just and equitable, are set out at Article 17 (2), these include compensation, which where ordered shall be calculated applying the principles applicable to the calculation of damages in claims in tort (Article 17 (3)), that is, to put the employee insofar as is possible in the position he would have been in had the unlawful act not occurred. Compensation may include an award for injury to feeling (Article 17 (4)). Awards should be just to both parties (***HM Prison Service v Johnson [1997] IRLR 162 EAT***). In ***Vento v The Chief Constable of West Yorkshire Police [2002] EWCA Civ 1871*** the Court of Appeal identified three broad bands of compensation for injury to feelings. Presidential Guidance issued for England and Wales and Scotland uprated the ***Vento*** bands in respect of claims presented on or after 6 April 2018 to £900 to £8,600; £8,600 to £25,700; and £25,700 to £42,900 (and thereafter for claims on or after 6 April 2019 to £900 to £8,800; £8,800 to £26,300; and, £26,300 to £44,000).

90. Under the Industrial Tribunals (Interest on Awards in Sex and Disability Discrimination Cases) Regulations (Northern Ireland) 1996 where a tribunal makes an award under the DDA it is obliged to consider the inclusion of interest thereon.

Unfair Dismissal

91. An employee has the right not to be unfairly dismissed by his employer under Article 126 of the Employment Rights (Northern Ireland) Order 1996 (ERO).

92. In relation to (ordinary) unfairness of a dismissal, Article 130 ERO provides:-

> *"(1) In determining for the purposes of this part whether the dismissal of an employee is fair or unfair it is for the employer to show:-*
>
> *(a) the reasons (or if more than one the principal reasons) for the dismissal, and*
>
> *(b) that it is either a reason falling within paragraph 2 or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.*

(2) A reason falls within this paragraph if it –

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

93. Where a potentially fair reason is shown under Article 130(1), then determination under Article 130(4) of the question whether the dismissal is fair or unfair, having regard to the reason shown by the employer:-

(a) depends on whether 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.

94. Per Philips J in ***Spencer v Paragon Wallpapers Ltd [1976] IRLR 373***, when considering the fairness of a dismissal on grounds of capability, every case will depend on its own circumstances and '[t]*he basic question which has to be determined in every case is whether, in all the circumstances, the employer can be expected to wait any longer and, if so, how much longer*?' Factors identified by him to be considered include the nature of the illness, the likely length of the continuing absence and the need of the employer to have the work done which the employee was engaged to do.

95. Where the absence is due to genuine illness and issue is one of capability the employer should take a sympathetic and considerate approach (Para 41 LRA Code of Practice on Disciplinary and Grievance Procedures).

96. In considering the appropriate response of an employer facing a series of intermittent absences, Woods J in ***Lynock v Cereal Packaging Ltd [1988] IRLR 510*** set out:-

'*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 judgement – 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 on its own facts, 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 for the employer for the work done by the particular employee, the impact of the absences on the 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 made may be approaching. These, we emphasise, are not cases for disciplinary approaches; these are for approaches of understanding.'

97. The decision to dismiss is not a medical question but one to be answered by employers in the light of available medical evidence. Consultation with the employee should take place with the employer taking such steps as are sensible according to the circumstances to discuss the matter with the employee, inform themselves as to the true medical position and allow the employee opportunity to state his case. (***East Lindsey District Council v Daubney [1977] IRLR 181 EAT***).

98. The approach to be adopted by the Industrial Tribunal in assessing the fairness of a decision to dismiss is that set out in ***Iceland Frozen Foods Ltd v Jones [1983] ICR 17*** as approved in ***Rice v Dignity Funerals Limited [2018] NICA (41 at 49)*** the principles of which are summarised by Gillen L.J. at para 28 of ***Connolly v WHSCT [2017] NICA 61.***

99. A complaint may be presented to an Industrial Tribunal against an employer by any person that he was unfairly dismissed by the employer (Article 145 ERO). Orders that the tribunal may make on finding grounds of a complaint presented under Article 145 ERO well founded and the complainant expresses such a wish include an order for reinstatement (Articles 146 & 147 ERO).

100. *Audi alteram partem* meaning *let the other side be heard as well* is a principle of natural justice such that no person should be judged without a fair hearing in which each party is given the opportunity to respond to the evidence against them.

101. *Harvey on Industrial Relations and Employment Law* deals with at Division D1 Unfair Dismissal/8. Capability and Qualifications/D Capability: incapability arising from ill health at paragraphs [1190] to [1279] and at Division L Equal Opportunities/ 3. Prohibited Conduct/B. The duty to make reasonable adjustments/(6) Reasonableness of adjustments at paragraphs [398] to [404] and have been taken into consideration by tribunal in making this decision.

102. The following authorities and commentary were referred to by the parties and have been taken into consideration by the tribunal:

Claimant:

Iceland Frozen Foods Ltd v Jones [1983] ICR 17

Rice v Dignity Funerals Ltd [2018] NICA 41 at 49

Connolly v WHSCT [2017] NICA

Hussain v Elonex PLC [1999] IRLR 420 at 24

Bentley Engineering Co Ltd v Mistry [1978] IRLR 436

Louies v Coventry hood & Seating Co. Ltd [1990] ICR 54

Environment Agency v Rowan [2008] IRLR 20 AT 27

Tenner v Price Waterhouse Coopers [2013] NICA 25 at 28

Carranza v General Dynamics IT [2015] ICR 169

Griffiths v Secretary of State for Work and Pensions [2015] EWCA Civ 1265

Spencer v Paragon Wallpapers Ltd

Lynock v Cereal Packaging Ltd [1988] IRLR 510

Lindsey District Council v Daubney [1977] IRLR 181 para 18

Rolls Royce Ltd v Walpole [1980] IRLR 343

Taylor v OCS Group Ltd [2006] IRLR 613

Polkey v AE Dayton Services Ltd [1987] IRLR 503, P508

Nicola Loughran v Department for Communities IT CRN: 1198/16

Respondent:

Whitbread plc v Hall [2001] EWCA CIV268 [2001] ICR 699

Whitbread & Co plc v Mills [1998] IRLR 501

Haddow v Inner London Education Authority [1979] ICR 202

Taylor v Adair [1978] IRLR 82

Environment Agency v Rowan [2008] IRLR 20

Smith v Churchill's Stairlifts plc [2005] EWCA Civ 1220

Archibald v Fife Council [2004] UKHL32

Project Management v Latif [2007] IRLR 579

Newcastle City Council Spires [2011] All ER (D) 60 (May)

Wilcox v Birmingham CAB Services Ltd [2011] All ER (D) 73 (Aug)

Camden London Borough v Price- Job UKEAT 10507/06

Tarbucks v Sainsbury's Supermarket Ltd [2006] IRLR 664

Royal Bank of Scotland v Ashton (2011) IRLR 632

Griffiths v Secretary of State for Work and Pensions [2015] EWCA Civ 265

Harvey at Division D1 Unfair Dismissal/9. Misconduct/C. Conduct and reasonableness/(5) Reasonable investigation: essential procedural safeguard/(a) The importance of a proper investigation at paragraphs [1482] to [1533]

SUBMISSIONS AND APPLYING THE LAW TO FACTS FOUND

103. Both parties provided written and made oral submissions.

Was the claimant unfairly dismissed?

104. Capability is a potentially fair reason for dismissal under the ERO 1996.

Procedure

105. It was common case that the final review and dismissal were triggered by the claimant's absence in February 2018. It was accepted by the appeal panel members that the circumstances of the claimant's absence were a crucial issue, such that if it was correct that the claimant had been absent due to a hospital acquired infection for which infection control regulations prohibited his attendance at work, then a decision to dismiss would or may have been considered unfair on appeal.

106. Mr McKee contended that the appeal procedure was flawed, the claimant had raised matters, the respondent had taken steps to find further information which contradicted same and did not go back to the claimant, as such the claimant was given no opportunity to comment on the evidence that the panel relied upon, contrary to natural justice so as to render the dismissal procedurally unfair, even if having done so were likely not to have made any difference, this being a matter relevant to remedy rather than liability.

107. Mr Warnock distinguished ***Tarbuck*** (authority for the proposition that if a defect is sufficiently serious, even if dismissal would be likely to have occurred in any event, affects compensation not fairness) in which the tribunal looked at the *audi alteram partem* rule in relation to the tribunal engaging in a folly of its own in making a finding in relation to a reasonable adjustment without the parties having the opportunity to be heard, *not* in relation to any conduct by the employer in relation to dismissal. He contended that the *audi alteram partem* rule did not apply in the claimant's case so as to render the dismissal unfair; that most of the authorities on natural justice and fair hearings and appeals relate to misconduct dismissals and even in these what is emphasised is that there ought not be a fundamental breach of the rules of natural justice, however that strict compliance with every aspect of natural justice is not necessary. Whilst the claimant was not contacted again after Infection Control were contacted by the appeal panel, this was in the context of the claimant himself having raised the infection control issues and the employer having then conducted due diligence checks in relation to the case which had already been made by the employee at hearing. The key point being that the step of contacting Infection Control was not a folly of the appeal panel which resulted in an issue being introduced upon which the claimant was not heard but was rather a step taken to ascertain if any verification existed in relation to the claimant's account which had been raised for the first time at appeal. Mr Warnock submitted that not contacting the claimant again was not a procedural flaw in that the procedure adopted was within the band of reasonable responses and cannot be credibly argued that the claimant was not heard so that there was a fundamental breach of the *audi alteram partem* rule.

108. Mindful of what a fair procedure required in this particular context, where the claimant had himself raised the point on appeal that his last absence was for a

hospital acquired infection for which infection control regulations prohibited his attendance at work and the claimant sought verification thereof, proceeding to make a decision on receipt of confirmation that the respondent's infection control regulations did not prevent attendance in the instance of an ear nose and throat illness (but rather applied to vomiting and diarrhoea) and of there being no recorded report of any infection on Ward 3/Strep A infection on any hospital Ward in February 2018, without returning to the claimant for comment, we consider procedurally fell within the band of reasonable responses and are not persuaded that the claimant was *not heard* so as to give rise to a fundamental breach of the *audi alteram partem* rule.

Fairness

109. Mr McKee contended that the respondent had conflated the issue of the claimant's history of bad attendance and future likelihood of regular and effective attendance; that there was no evidence upon which the respondent could rely to say regular attendance would not occur and expert evidence suggested that it would. The respondent had accepted that a key consideration in deciding whether to dismiss for capability was whether the employee could provide regular and effective attendance and unlike misconduct cases which look to past behaviour capability cases look to the future to determine whether the employee could provide regular and effective service. He contended that the respondent had strayed across that line and that the language used by the respondent, that the claimant being absent '*just 3 days after'*, shows misunderstanding and an unsympathetic approach to illness which is not the way to deal with a capability dismissal.

110. Mr McKee submitted that of 194 days absence in the previous two years, referred to by the respondent in meeting notes and the dismissal letter that two factors were ignored which rendered the dismissal decision unfair:

- That two episodes totalling 30 days absence were due to the needle-stick injury being an accident at work which was the respondent's fault, which it was unreasonable to rely upon as they were not the claimant's fault and was no prospect of further absences arising from the injury, and

- 145 days absence were the result of an underlying medical condition which the most recent medical evidence available asserted was stabilised and specifically stated that the claimant *would* provide regular and effective service [the actual report states '*should*']. That it was unreasonable to ignore the medical advice which was the only evidence relating to the prospect of future regular and effective attendance; that the medical evidence was provided at the respondent's specific request in answer to a specific question; it was unequivocal; there was no suggestion of it being flawed; there had been no absences since this prognosis; it was irrational to ignore this expert advice on a crucial issue.

Mr McKee submitted there would not have been a dismissal if these absences had been discounted.

111. Mr Warnock put that the claimant had a very poor record of attendance over many years, with 194 days absence in the previous two year period at the time of dismissal. He submitted that the respondent showed great restraint, sympathy, understanding and compassion in dealing with the repeated periods of intermittent

absences over the several years which preceded the claimant being given one final chance to show he could provide regular and effective attendance moving forward communicated to him at the meeting on Friday 23 February 2018 following which the claimant reported sick again on Monday 26 February 2018 triggering the final review which resulted in termination of his employment.

112. It was submitted that the respondent had followed a careful, staged and far from rushed review and consultation process which first commenced on 28 November 2014. That it was not until 23 February 2018 that it was finally communicated that further absence may lead to a final review meeting. It was in essence the respondent's case that it could not be expected to wait any longer and that the time had come that dismissal was appropriate on the basis of lack of belief that the claimant could in fact provide regular and effective attendance.

113. Mr Warnock contended that the claimant's absence must be seen in the context of the overall history and record of attendance, which from 2014 was very poor, and impacted upon service delivery logistics and workload of other employees as per Mr Crockett's evidence. Even discounting the needle-stick absences, the claimant was absent for approximately 164 days in his last two years; not all were disability related, the last two being a gastric ulcer and ear, nose and throat infection; the anxiety related absences whilst disability related, were still relevant absences for managing work procedures. Mr Warnock submitted it would be unreasonable to expect an employer to discount these very substantial absences and respondent had a real and legitimate need for regular and effective attendance in order to provide the necessary service provision to patients.

114. Mr Warnock contended that an employer is entitled to dismiss an employee where there is a reasonable belief that the employee cannot provide regular and effective attendance moving forward; and although the assessment is forward looking, in reality the assessment is informed by the past history of attendance which in the instant case was extremely poor. He contended that whilst one will have obvious sympathy for the claimant, the reality is that his absence record over the years was atrocious and respondent took a decision within the band of reasonable responses to finally draw a line in the sand and dismiss the claimant based upon his consistent record of non-attendance.

115. We consider that the respondent did show great restraint, sympathy, understanding and compassion in dealing with the claimant's repeated periods of intermittent absences over the several years. We overall prefer the respondent's contentions. We consider whilst the claimant's underlying medical condition had settled and OH advise was that he *should* be able to give regular and effective service, given the significant intermittent absences before and the proximity of his next absence thereafter that it was reasonable for the respondent to take the wider picture of factual circumstances into account in assessing whether the claimant was likely to be able to provide regular and effective attendance. We accept that the test is a legal rather than medical one. We consider that it was reasonable in the circumstances for the respondent to believe that the claimant could not provide regular and effective service and that in light of the difficulties caused by the claimant's absences and the need of the respondent for regular and effective attendance so as to provide necessary service provision to hospital patients that the respondent could not have in the circumstances have been expected to wait any longer and find that the respondent's decision to dismiss by reason of capability

was a reasonable one in all the circumstances of the case taking into account the equity and substantial merits of the case.

Did the respondent have a duty and fail to make reasonable adjustments in respect of any disability of the claimant?

116. The PCP was a requirement to provide regular and effective service.

117. The comparator is a non-disabled person who by reason of illness was subject to the same Attendance Management Policy.

118. The nature and extent of the disadvantage suffered by the claimant was the increased likelihood of sanction including dismissal because the claimant's underlying medical condition made absence more likely.

119. It was in contention whether it would have been reasonable for the respondent to have disregarded on just this one occasion the claimant's prior disability related absences when assessing whether he could provide regular and effective attendance, in the specific circumstances where the claimant's condition was stabilised by treatment (not *cured* otherwise as acknowledged by Mr McKee the claimant would no longer have had a disability for the purposes of the DDA), and on medical advice that no further absences related to that condition were anticipated. It was accepted on behalf of the respondent that it is established in case law that it is not reasonable for an employer to have to ignore disability related absences, but that an employer has to have the right to deal with these under attendance management. Mr McKee contended that his proposed very limited adjustment does not impinge upon this; that it would have ameliorated the disadvantage caused as 145 days of absence were disability related in the two year period before dismissal which if ignored the claimant would not have been referred for final review and been dismissed and that there was no evidence of any of the other factors set out in Section 18B(1) DDA such that the adjustment would have been unreasonable in terms of the extent to which it was practicable to take the step; the financial or other costs to be incurred; the extent of the financial resources of the employer; the availability of financial or other assistance; and the nature of the activities and size of the undertaking.

120. Mr Warnock referred to Griffiths where Lord Justice Alias set out at paragraph 68:

> *"I would accept that whilst a disabled person may suffer disadvantages not directly related to the ability to integrate him or her into employment, the steps required to avoid or alleviate such disadvantages are not likely to be steps which a reasonable employer can be expected to take. The O'Hanlon case, referred to above, provides an example… Hooper LJ also approved an observation by the EAT that: 'The Act is designed to recognise the dignity of the disabled and to require modifications which enable them to play a full part in the world or work, important and laudable aims. It is not to treat them as objects of charity which, as the tribunal pointed out, may in fact sometimes and for some people tend to act as a positive disincentive to return to work.'"*

Also at paragraph 76:

> "*I would observe that it is unfortunate that absence policies often use the language of warnings and sanctions which makes them sound disciplinary in*

nature. This suggests that the employee has in some sense been culpable. That is manifestly not the situation here, and will generally not be the case, at least where the absence is genuine, as no doubt it usually will be. But an employer is entitled to say, after a pattern of illness absence, that he should not be expected to have to accommodate the employee's absences any longer. There is nothing unreasonable, it seems to me, in the employer being entitled to have regard to the whole of the employees's absence record when making that decision. As I mention below, the fact that some of the absence is disability-related is still highly relevant to the question whether disciplinary action is appropriate."

121. The tribunal accepts the respondent's contention that given the nature and extent of the disability related absences and the need for effective service delivery that it would not have been reasonable to have disregarded the disability related absences and that the respondent was entitled to take into account the whole absence picture when assessing whether effective and regular attendance was likely. We are not in the circumstances persuaded that failure to ignore disability related absences was a breach of the duty to make reasonable adjustments.

<u>Did the respondent directly discriminate against the claimant dismissing him on grounds of disability?</u>

122. *Whether the respondent subjected the claimant to direct discrimination* which was identified as a legal issue in the agreed statement of legal and factual issues was not addressed by the parties at hearing. It is for the claimant to prove facts from which a tribunal could conclude that an act of direct discrimination on grounds of disability occurred. If he does so, the burden of proof shifts to the respondent to provide an untainted explanation. We do not consider on the evidence before us that the claimant has proven facts from which a tribunal could conclude that he was treated less favourably than an appropriate comparator on grounds of his disability and apparent that the claimant's treatment arose from his repeated absences for which a comparator in similar circumstances without the claimant's disability would have been treated no differently.

CONCLUSION

123. The claimant was fairly dismissed on grounds of capability, was not subjected to unlawful disability discrimination directly or by way of a breach of the duty to make reasonable adjustments and the claimant's claims are dismissed.

Employment Judge:

Date and place of hearing: 20 & 21 March and 29 & 30 May 2019, Belfast.

Date decision recorded in register and issued to parties: