



EMPLOYMENT TRIBUNALS

Claimant: Mrs C McLean

Respondent: Northern Lincolnshire & Goole NHS Foundation Trust

Heard at: Hull **On:** 24, 25 and 26 July 2017

Before: Employment Judge Keevash
Members Mrs C Sanders
Mr G D Wareing

Representation

Claimant: In Person

Respondent: Miss L Armartey, Counsel

JUDGMENT

1. The complaint of unfair dismissal succeeds.
2. The complaint of failure to comply with the duty to make reasonable adjustments fails.
3. The complaint of discrimination arising under Section 15 of the Equality Act succeeds.

REASONS

Background

1. By her claim form the claimant complained that she was unfairly dismissed and she also complained of disability discrimination.
2. By its response the respondent resisted the complaints. It contended that it dismissed the claimant for capability, a potentially fair reason and that it

acted reasonably in the manner in which it reached that decision and conducted the dismissal.

Issues

3. At a Preliminary Hearing on 13 January 2017 an Employment Judge identified the issues.

Issues not determined

4. After the preliminary hearing the respondent conceded that the claimant was at all material times disabled by reason of her impairment of Chronic Fatigue Syndrome/ME and/or joint hyper mobility.

Hearing

5. At the beginning of the hearing the claimant explained that she was prepared to continue with the proceedings despite the fact that she had been let down at the last moment by her solicitor. The Tribunal took time to explain the procedure that it intended to adopt before adjourning with the parties' agreement to read the witness statements.
6. The claimant gave evidence on her own behalf. Caroline Johnson, Outpatients Nurse Manager, and Julie Anne Taylor, Head of Outpatients and Health Records, gave evidence on behalf of the respondent. The Tribunal also considered a bundle of documents.

The Facts

7. The Tribunal found the following facts proved on the balance of probabilities:-
 - 7.1 On or about 2 October 2010 the claimant was employed as a Senior Health Care Assistant based in the respondent's Outpatients Department. Since 31 October 2011 her weekly hours were increased to 28.
 - 7.2 On 26 February 2016 the claimant began a period of sickness absence. On 29 February 2016 her GP gave her a fit note in which he stated that he had assessed her case and she was not fit to work because of tonsillitis and fatigue.
 - 7.3 On 12 April 2016 the claimant attended a long-term sickness absence review meeting which was conducted by her then Manager, Sister Wattam. It was decided that the claimant would be referred to Occupational Health. She was given information about confidential counselling.
 - 7.4 By a letter dated 22 April 2016 Sister Wattam informed the claimant as to the outcome of the meeting.
 - 7.5 On 1 June 2016 Mrs Johnson ascertained that the claimant had not yet received an Occupational Health appointment. She contacted

Occupational Health and was told that the referral had gone missing. On or about that day Mrs Johnson completed another referral.

- 7.6 On 3 June 2016 the claimant attended a long-term sickness absence review meeting which was conducted by Mrs Johnson.
- 7.7 By letter dated 10 June 2016 Mrs Johnson confirmed the outcome of the meeting to the claimant.
- 7.8 On 17 June 2016 Carol Bunton, Occupational Health Nurse Advisor, sent a report to Mrs Johnson. She stated:-

“... ”

Medical Position

Chloe was initially absent from work with a persistent chest infection which was treated with 4 courses of antibiotics.

However Chloe’s current sickness absence is due to persistent post viral symptoms of exhaustion, lethargy and low mood which are having a significant impact on her daily activities...

What is the probable timescale for return to work

I am currently unable to predict a probable timescale for Chloe to return to work...”.

- 7.9 On 29 June 2016 Ms Bunton sent a further report to Mrs Johnson. She stated:-

“... ”

Medical Position

Chloe was seen by Dr Aye at Hull Royal Infirmary and has been given a provisional diagnosis of ME.

Chloe’s GP has undertaken additional blood tests and has referred her to the Grantham ME clinic for assessment, she is currently waiting an appointment.

On a day to day basis Chloe continues to suffer daily with extreme tiredness and lethargy, she needs to self-pace her daily activities, need regular rest periods throughout the day including most afternoons and evenings. Her energy levels fluctuate daily and she has bad and good days but currently continues to have more bad days than good days.

What is the probable timescale for return to work?

I am unable to predict a date for return to work at present and it is unlikely Chloe will return to work in the next 2-3 months...”.

- 7.10 On 13 July 2016 the claimant attended a long-term sickness absence review meeting which was conducted by Mrs Johnson. By a letter dated 21 July 2016 Mrs Johnson confirmed to the claimant the outcome of that meeting. She stated:-

“... ”

Your GP has referred you to Dr Aye, Endocrinologist ... The diagnosis of Chronic Fatigue Syndrome was confirmed. Dr Aye has written to your G.P. and asked him to refer you to Grantham where a specialist unit is designed to give guidance on how to manage you (sic) symptoms. Your G.P. has now referred and you are still waiting to here (sic) fro them.

We discussed your recent Occupational Health Appointment. The Nurse stated that you wouldn't be able to return to work for at least 2-3 months. As the department is struggling to manage this length of sickness. I asked if you had considered any other work within the outpatients setting or redeployment to another area within the hospital. You told me that you would have a think about this. Kerry Stones suggested sending the weekly vacancy bulletin which you are happy for this..."

- 7.11 On 9 August 2016 the claimant attended a long-term sickness absence review meeting which was conducted by Mrs Johnson. Ms Stones was also present. The notes of that meeting record that, in answer to a question about her current state, the Claimant replied:-
"Not bad but legs are sore and painful but just get on with it. Went to Grantham on Friday last minute and they have advised I have to do a rehab course to build up muscle on legs. Saw specialist Physio and **completed ... for 1.30** minutes and gave exercises to do on a daily basis. Stated that referring me for 10 x 2 hour sessions in Lincoln as I want to get back to work. No indication of when but that she would contact me next week and try 15 group sessions. Afterwards there is a network group to discuss with others."

The notes also record that Ms Stones explained to the claimant that the service could not sustain long term absence and that a decision to terminate her employment could be made since there was still no foreseeable return to work date.

- 7.12 By a letter dated 15 August 2016 Mrs Johnson confirmed to the claimant the outcome of that meeting.
- 7.13 By a letter dated 16 August 2016 the Chronic Fatigue Syndrome/ME Service of Lincolnshire Partnership NHS Foundation Trust invited the claimant to attend a Group Rehabilitation Programme. This letter indicated that there would be ten sessions commencing on 23 September 2016 and concluding on 9 December 2016.
- 7.14 On 6 September 2016 Ms Bunton sent an Occupational Health report to Mrs Johnson. In that report she stated-

"Medical Position

Chloe attended an appointment with the Grantham ME clinic at the beginning of August 2016 and was diagnosed with joint hypermobility and PoTS syndrome (Postural Tachycardia Syndrome).

She has been given daily exercises to complete and referred for a 10 week rehabilitation course, which she commences on 23 September 2016.

On a day to day basis Chloe continues to suffer daily with extreme tiredness and lethargy and needs to self-pace her daily activities. Her mother and husband are still providing support with daily household tasks and childcare...

What is the probable timescale for return to work?

I am unable to predict a date for Chloe's return to work at present and it is unlikely Chloe will be able to return to work until she has completed her 10 week rehabilitation course.

Are alternative duties/changes in hours and reasonable adjustments required, if so for how long?

N/A

What are the main barriers to return to work, including any work related issues?

The main barriers to Chloe returning to work are her ongoing persistent health problems and their impact on her functionality and limitation on her daily activities.

I have arranged a further telephone review appointment on 18 October 2016...".

7.15 On 19 September 2016 the claimant attended a long-term sickness absence review meeting which was conducted by Mrs Johnson. She was accompanied by Ms Holsworth a friend. Ms Stones also attended. The notes of that meeting record that they discussed the claimant's current condition, redeployment, the service's inability to sustain long term sickness absence, pension and ill health retirement.

7.16 On 28 September 2016 Mrs Johnson prepared a sickness absence summary report and in the conclusion of her report she stated:- "Chloe's continued absence from the workplace with no anticipated date of return to work can no longer be sustained by the Department, it is having a detrimental effect on staffing levels, I have to try and book bank staff to ensure that the clinics are staffed appropriately and at safe staffing levels, therefore this is having a financial impact on the department. If there is no bank staff available to cover the shifts then this has an impact on the staffing levels in clinic and frequently the clinics are having to work on skeleton staff. I feel that we have given Chloe the support whilst she has been absent from work but unfortunately its quite clear based on the reports received from Occupational Health that Chloe is currently not fit enough to return to her role as Senior Health Care Assistant...

Based on there being no predicted date of a return to work and having explored options such as redeployment and having sent the weekly vacancy bulletin and Chloe feeling there was nothing suitable and with

no other options available it is with regret that I must recommend Termination of Contract on the grounds of capability due to ill health.”

7.17 By a letter dated 30 September 2016 Mrs Johnson confirmed the outcome of the 19 September meeting to the claimant.

7.18 On 7 October 2016 Ms McGill, Senior Rehabilitation Assistant of the Lincolnshire Partnership NHS Foundation Trust Chronic Fatigue Syndrome/ME Service, gave the claimant a copy of a letter addressed to Mrs Johnson. In the letter she stated:-

“... ”

CFS/ME is a condition which cannot be cured but can be successfully controlled with good self-management. Regrettably set-backs are quite common and this, together with rehabilitation advice covering all aspects of self-management including very careful incremental pacing, sleep, diet, stress management and emotional coping with a long-term condition are all aspects of both the one to one work and group sessions that we offer. They are based upon the National Institute for Clinical Excellence (NICE) guidelines for managing FS/ME. Mrs McLean is currently attending the initial part of our 10 week Group Rehabilitation Programme. This is the first specialist treatment she has been offered since she was first diagnosed. It is envisaged that her treatment will continue until at least June 2017.

I understand that Mrs McLean has been off work since February 2016 on long term sick leave and as a consequence, on the 12 October 2016, is due before a panel which may result in the loss of her job. As a rehabilitation service our remit is to support patients to increase their level of functioning in order to be able to continue working or to return too work. I am therefore wondering if any reasonable adjustments have been considered in order for Mrs McLean to return to work, such as a gradual return, a reduction in hours or short rest breaks throughout he working hours in order to manage her symptoms. Medical evidence suggests that regular rest breaks away from the working area which allows a change of position will help her manage the fatigue she experiences.

I'm sure you will appreciate that Mrs McLean has felt extremely stressed by the possibility that she will lose her job due to ill health. Medical evidence suggests that the symptoms of CFS/ME are exacerbated further by stress leading to further long term chronic health difficulties. Mrs McLean reports finding this process so stressful that until now, after entering our services treatment programme, rather than her health improving whilst not at work it became progressively worse.

In addition, I understand that both Mrs McLean's GP and Occupational Health have recommended that she does not return to work until she completed her initial treatment with us. I am in agreement with this given her current level of functioning. However, her treatment is now underway and Mrs McLean has made a positive start, showing motivation to attend, actively taking part in the group

rehabilitation and is already taking on board the strategies she is learning in order to improve her health to be able to return to work, which she is keen to do. Our concern at this stage of her treatment would be Mrs McLean returning to work before she is physically capable of sustaining her working week and then having a further set back which may prolong the illness and not allow her to be at work again. The initial stage of her treatment will conclude on the 9 December 2016...".

- 7.19 On 10 October 2016 Ms McGill sent the top copy of that letter to Mrs Johnson.
- 7.20 On 12 October 2016 the claimant attended a meeting which was conducted by Mrs Taylor. She was accompanied by Ms Holsworth her friend, Ms Ligard and Ms Stones of HR were present, Mrs Johnson presented the management case. During that meeting Mrs Taylor told the claimant that she was dismissed.
- 7.21 At the end of the meeting the claimant and Ms Hallsworth left the room. A few moments later Ms Hallsworth returned and handed to Mrs Taylor the letter dated 10 October 2016 from Ms McGill to Mrs Johnson. Neither Mrs Taylor nor Mrs Johnson had seen the letter beforehand.
- 7.22 By a letter incorrectly dated 27 January 2017 which was sent on 14 October 2016 Mrs Taylor confirmed to the claimant the outcome of the meeting namely that she had decided to dismiss her with effect from 12 October 2016 and to make a payment in lieu of notice.
- 7.23 At the material time the respondent had a Policy for the Management of Absence Due to Sickness. This provided:-

"...

4.0 Principles

4.1 The overriding priority of the Trust is to provide the highest possible standard of health care to our patients. The regular and reliable attendance at work of all Trust employees is essential to achieve this. Employees have a responsibility to attend work in line with their Contract of Employment.

4.2 The Trust recognises that on occasions it may be necessary for employees to be absent from work for different reasons and has developed employment policies and practices which strike a balance between supporting those who need to be absent and where appropriate taking action in order to minimise the disruption to services. Employees should be reassured that they will be treated fairly and that their contribution is valued.

5.0 Absence Management Process

5.1 For the purpose of this policy, absences of less than 28 days are classified as short term and absences of 28 days and more are classified as long term ...

7.0 Equality Act (2010)

7.1 In accordance with the Equality Act (2010), the Trust will make reasonable adjustments to the workplace so that an employee with a disability, as covered under the Act, should not be at any substantial disadvantage. The Trust will endeavour to develop an environment within which individuals feel able to disclose any disability or condition which may have a long term and substantial effect on their ability to carry out their normal day to day activities...

7.2 The Trust will wherever practical make adjustments as deemed reasonable in light of an employee's specific circumstances and the Trust's available resources paying particular attention to the Disability Discrimination requirements...

8.0 Phased Return to Work

8.1 ...

8.2 For long-term sickness absence where Occupational Health recommends a structured programme for rehabilitating/trialling for work, the Trust will, wherever possible, support such a programme and employees will continue to receive full pay for their contractual working hours for up to a maximum of four weeks...

7.24 At the material time the respondent had a Procedure for the Management of Absence Due to Sickness. This provided:-

The Law

8. Section 98 of the Employment Rights Act 1996 ("the 1996 Act") 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 reason (or, if more than one, the principal reason) for the dismissal, and –
 - (b) that it is either a reason falling within subsection (2) ...
 - (2) A reason falls within this subsection if it –
 - (a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do...
 - (3) In subsection (2)(a) –
 - (a) "capability", in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality...
 - (4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –
 - (a) depends on whether in the circumstances (including the size and

administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
(b) shall be determined in accordance with equity and the substantial merit of the case...".

Section 20 of the 2010 Act provides:-

- "(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.
(2) The duty comprises the following three requirements.
(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled 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..."

Section 21 of the 2010 Act provides:-

- "(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.
(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person..."

Section 15 of the Equality Act 2010 ("the 2010 Act") provides: -

- "(1) A person (A) discriminates against a disabled person (B) if –
(a) A treats B unfavourably because of something arising in consequence of B's disability, and
(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim ..."

Section 39 of the 2010 Act provides:-

- "(1) ...
(2) An employer (A) must not discriminate against an employee of A's (B) –
(a) ...
(c) by dismissing B;
(d) by subjecting B to any other detriment."

The Tribunal also took into account the **ACAS Code of Practice 1 Code of Practice on Disciplinary and Grievance Procedures (2015)** and the **Equality and Human Rights Commission: Code of Practice on Employment (2011)**.

Submissions

9. Miss Armartey made submissions and she referred to **General Dynamics Information Technology v Carranza** [2015] IRLR 43 and **Newcastle City Council v Spires** 0034/2010 EAT. The claimant made submissions. Where appropriate the Tribunal will refer to those submissions in the discussion part of these Reasons.

Discussion

The unfair dismissal complaint

What was the reason for the dismissal?

10 The respondent contended that the reason for dismissal related to the claimant's capability, namely her long-term ill health. The claimant accepted that this was the reason for dismissal.

Did the respondent act reasonably or unreasonably?

11 The Tribunal understood that it had to determine whether the respondent could be expected to wait any longer for the claimant to return to work and whether the respondent followed a fair procedure.

12 In relation to whether the respondent be expected to wait any longer for the claimant to return to work, the Tribunal was careful not to substitute its view for that of the reasonable employer. It found that before making her decision Mrs Taylor had the claimant's sickness absence summary report prepared by Mrs Johnson. She was aware that the claimant had a fit note which lasted until 17 October 2016; Ms Bunton, the Occupational Health Nurse Health Adviser, was unable to predict a probable return to work date; Ms Bunton believed it unlikely that the claimant would return to work before the end of the rehabilitation course; the claimant had a telephone review appointment with Ms Bunton booked for 18 October.

13 The Tribunal found that Mrs Taylor was not aware of Ms McGill's letter dated 10 October 2016 until after she had made her decision on 12 October. Mrs Johnson was also unaware of it. The claimant was distressed during the final meeting. She honestly and reasonably believed that the document had been seen by the respondent. It was only after the decision to dismiss had been communicated that her friend and companion, Ms Hallsworth, gave the letter to the respondent's employees.

14 The Tribunal considered whether Mrs Taylor ought reasonably to have taken into account the letter from Ms McGill. In **West Midlands Co-operative Society Ltd v Tipton** [1986] ICR 192 the House of Lords held that information revealed in the course of an internal appeal that relates to the original reason for dismissal should be taken into account when considering the fairness of that dismissal irrespective of whether the internal appeal takes place before or after the dismissal has been effected. The claimant did not appeal the decision to dismiss because she was too distressed about losing her job. With that in mind and taking into account the circumstances in which Ms McGill's letter was brought to the respondent's attention and the fact that this happened only moments after Mrs Taylor had communicated her decision, the Tribunal found and decided that it was reasonable for the respondent to reconsider its decision in the light of that letter.

15 The Tribunal found that Mrs Taylor only gave the letter a cursory examination. It was significant that the notes of that meeting record:- "handed in diagnosis" which, in the Tribunal's judgment, barely scratched the surface of the content of

that letter. It was also obvious from the evidence of both Mrs Johnson and Mrs Taylor that the letter was barely discussed. It found that Mrs Johnson was not wholly candid about the extent of the discussion that did or did not take place when the letter was delivered. Mrs Taylor accepted that she did not give any thought to reconsidering the decision that she had made only a few moments earlier. Importantly, the Tribunal found that Mrs Taylor appeared to make an assumption from her reading of the letter that the claimant would not be able to return to work until at least June 2017. That assumption in the Tribunal's Judgment was misplaced. In the Tribunal's judgment a plain reading of the letter made clear that Ms McGill was of the opinion that the claimant should not return to work before 9 December 2016 (the date of the conclusion of the rehabilitation course). Thereafter there was some prospect that she would be able to return to work albeit with some adjustments. The Tribunal found that there was the letter did not support the conclusion reached by Mrs Taylor. Further Mrs Taylor failed to appreciate that the claimant might be a disabled person within the definition of the 2010 Act and that the respondent's policy and procedure might be of some significance. She received no advice from HR about the 2010 Act either before, during or after the meeting; she received no advice about the content of the letter. In those circumstances the Tribunal found that Mrs Taylor failed to give any proper consideration to the letter.

16 In her report Mrs Johnson stated that the claimant's absence was having a detrimental effect on the staffing levels in the Outpatients Department. The Tribunal found that the respondent covered the claimant's absence by asking other employees to increase their hours. It also used bank staff. During this Hearing the respondent adduced in evidence a document which purported to show the use of bank staff during the period 5 September and 16 October 2016. It also provided a calculation of the weekly cost of covering the claimant with bank staff and the cost for the entire period of her absence.

17 Mrs Taylor acknowledged that the figures in this document were not placed before her when she made her decision. Further the Tribunal found that the absences illustrated in the document were not all attributable to the claimant's absence. The Tribunal was unable to discern the extent and effect of other employees' absence. Further the document showed what was the cost over a period of eight months on the assumption that the claimant's absence was covered by Band 2 bank person. The Tribunal was unable to find that this constituted the true cost that was incurred by the respondent for several reasons. Firstly on the respondent's own case the claimant's absence was not entirely covered by bank staff. Some of her shifts were covered by existing staff who had been asked to increase their hours or possibly who had been asked to cover the shift on a skeleton staff basis. Any additional payment made to the existing staff was at a lower rate than the rate for bank staff. A member of staff was only paid at the enhanced overtime rate if such member of staff had worked more than 37 hours in the week. Secondly the document made no allowance for any annual leave that the claimant would have taken in any event during the period. Finally and perhaps most importantly, the true cost could only be arrived at by offsetting the recruitment and training costs of the claimant's replacement.

18 Mrs Taylor gave evidence that she considered the impact of the claimant's absence on the morale of her colleagues. The Tribunal understood that this was of potential relevance but it found that there was no evidence that morale was specifically adversely affected by the claimant's absence. It also found on the

respondent's case that it did not cancel any Outpatient clinics although some did run late when they were short staffed.

19 The Tribunal found that the respondent was a large employer and was in a better position to deal with the claimant's absence than a small employer would have been able to do. It decided that in all the circumstances no reasonable employer would have dismissed the claimant on 12 October 2016. It was not satisfied that there was any reasonable need for the respondent to dismiss when it did.

20 The Tribunal also considered whether the respondent follow a fair procedure. Once again the Tribunal took care not to substitute its view for that of the reasonable employer. It was not satisfied that the respondent had discovered the claimant's true medical position. Mrs Taylor did not establish clearly what was the nature of the claimant's condition and what was the likely length of absence. She did not have all the relevant facts. The respondent had not conducted such investigation as a reasonable employer in similar circumstances would have conducted. For the reasons explained in para 15 above, Mrs Taylor misunderstood what were the plain words of that letter. Even if there was any ambiguity, there was an obligation on the respondent to seek clarification. Further, it failed to give any consideration to the possibility that the claimant was disabled within the meaning of the definition in the 2010 Act. That led to a failure even to consider how that might affect the application of its Policy. In the Tribunal's judgment no reasonable employer would have begun contemplating matters such as redeployment and early retirement at such a stage particularly when the claimant was expressing her keenness to return to work and had started the rehabilitation course. No reasonable employer would have contemplated these matters until such time as more information was available. The Tribunal found and decided that, if it had acted reasonably, the respondent would have waited until after the GP consultation on 17 October; waited until after the telephone consultation with Ms Bunton on 18 October; and thereafter ascertained whether the claimant whether the claimant would make sufficient progress on the rehabilitation programme. By that time the claimant would have attended the third session on the rehabilitation programme. Mrs Taylor unreasonably failed to take into account the claimant's assertion during the final meeting that there had been some progress on the rehabilitation programme. The notes of that meeting albeit not verbatim notes contain a clear reference to the fact that the claimant made that assertion. No reasonable employer would have failed to ask Occupational Health and/or the rehabilitation team further questions about the claimant's future prospects.

21 The Tribunal was also critical of the respondent's conduct of that final meeting. There was no dispute that the claimant was not in a good mental condition at the beginning of this meeting. She was accompanied but she was not represented. The Tribunal found that Mrs Taylor pressed on with the meeting because she wanted to reach a conclusion. However, she reached her decision without any adjournment even after the claimant had given some fresh evidence about the rehabilitation programme, how she was improving and how she was finding it beneficial. It was clear from the notes of the meeting that Mrs Taylor made up her mind before she had given any or any proper consideration to what the claimant told her. She did so without conferring with HR and without giving HR the opportunity to offer any advice particularly in relation to the impact of the rehabilitation programme. Even at that late stage HR might have given some

advice as to the question whether the claimant was a disabled person and, if so, how the Code of Practice might have been of assistance.

22 Accordingly the Tribunal decided that the dismissal was unfair because the respondent did not act reasonably having regard to all the relevant factors in Section 98(4) of the Employment Rights Act 1996.

Complaint that the respondent failed to comply with the duty to make reasonable adjustments

23 The respondent accepted that there was a provision, criterion or practice ("PCP"), namely its requirement that employees be able to provide consistent attendance at work. During the course of her submission Miss Armartey also accepted that this PCP put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled.

24 During the course of submissions Miss Armartey submitted that it would be wrong for the Tribunal to depart from the issues which were set out by Employment Judge Maidment at the Preliminary Hearing on 3 March 2017. She relied on **Newcastle City Council v Spires** where the Employment Appeal Tribunal decided that an Employment Tribunal was not entitled to hold that the respondent was in breach of its duty to make reasonable adjustments in respects which were not identified as issues in the case. Employment Judge Maidment identified three adjustments which were asserted by the claimant as reasonably required:- reduced hours of work, a phased return to work and an alternative role including one on reception. Importantly, there was no reference to the claimant relying on a decision by the respondent to wait and see what steps should be taken until after the rehabilitation programme had been completed.

25 The Tribunal accepted Miss Amartey's submissions and decided that, although the claimant was at the time unrepresented, it would be contrary to the interests of justice for it to determine an issue of which the respondent had no prior notice. It then considered what reasonable steps could have been taken to avoid that disadvantage. It was apparent from the reasons given in relation to the unfair dismissal complaint that an important criticism of the respondent was that it had not waited to assess the claimant after she had attended more sessions in the rehabilitation programme. That was not an adjustment identified at the Preliminary Hearing.

26 Accordingly the Tribunal decided that the complaint under this head failed.

Complaint of discrimination arising from disability

27 The respondent accepted that the claimant was treated unfavourably and that the treatment was because of something arising in consequence of the claimant's disability. She was absent because of the disability and she was dismissed because of her long-term absence. It followed that the only issue was whether the respondent could or could not show that the treatment was a proportionate means of achieving a legitimate aim.

28 The Tribunal found and decided that the respondent did have a legitimate aim namely its need to maintain an efficient service in circumstances of significant pressures placed upon the respondent's staffing and financial resources in

providing alternative staffing arrangements. It then considered whether the claimant's dismissal was a proportionate means of achieving that aim. It recognised that in answering that question there had to be a balancing exercise. It had to assess the respondent's needs, whether it was reasonably necessary for the respondent to dismiss the claimant and assess the discriminatory effect of the respondent's decision. The Tribunal recognised that there was a real need to maintain the service, avoid cancellation of Outpatient clinics, avoid any adverse effect on staff morale and minimise the cost of covering for the claimant. Against that had to be set the effect of the loss of the claimant's job.

29 In reaching its decision the Tribunal had regard to its findings set out in paragraphs 16, 17 and 18 of these Reasons. It was careful to understand that the test in Section 15(1)(b) of the 2010 Act was not just simply a question of reasonableness. In conducting its analysis it was assisted by the Code of Practice. In the Tribunal's judgment the respondent's action was not proportionate. There was an alternative course of action that could have been taken, namely to wait and assess the claimant's situation after she had attended more sessions in the rehabilitation programme. The respondent's need was not so pressing as to warrant the claimant's dismissal. Accordingly, the Tribunal decided that the complaint under this head succeeded.

Conclusion

30 The Tribunal ordered that the matter be listed for a Remedy Hearing in Leeds on 6 October 2017 at 10am.

31 At the Remedy Hearing among other matters the Tribunal will determine the following:-

31.1 what is the claimant's actual loss of earnings to date?

31.2 has the respondent shown that the claimant failed to take reasonable steps to mitigate her loss?

31.3 if the respondent had adopted a fair procedure, would she have been fairly dismissed in any event? If so, to what extent and/or when?

31.4 did the claimant fail to comply with the 2015 Code of Practice when failing to appeal? If so, was her failure unreasonable? If so, to what extent, if at all, should the award of compensation be reduced?

31.5 should the Tribunal make an award in respect of any future loss of earnings?

32 The Tribunal made the following Case Management Orders in order to ensure that the matter was ready for the Remedy Hearing:

32.1 By 24 August 2017 the parties are to send to each other documents relevant to the remedy issues.

32.2 By 31 August 2017 the respondent is to send to the claimant a full, indexed, page numbered bundle of documents. It is to bring five copies of that bundle to the Tribunal for use at the Remedy Hearing.

32.3 By 7 September 2017 the parties are to exchange any witness statements on which they intend to rely at the Remedy Hearing.

Employment Judge Keevash

Date: 22 August 2017