EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4102771/2019

Held in Dundee on 2, 3, 4 and 23 September 2019

Employment Judge J Hendry
Tribunal Member W Canning
Tribunal Member S Currie

Mr M Jamieson	**Claimant** **Represented by:** **Mr J Lawson** **Trainee Solicitor**
HM Revenue & Customs	**Respondent** **Represented by:** **Mrs P Macaulay** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous judgment of the Tribunal is:

1) That the claimant was not unfairly dismissed from his employment by the respondent and that the claim for unfair dismissal is dismissed.

2) That the claim made for disability discrimination under Section 15 of the Equality Act 2010 does not succeed and is dismissed.

E.T. Z4 (WR)

3) That the claim made for a failure to make reasonable adjustments made under Section 21 of the Equality 2010 does not succeed and is dismissed.

REASONS

1. The claimant in his ET1 sought a finding that he had been unfairly dismissed from his position as Tax Credit Adviser with the respondent and that in respect that he was disabled in terms of the Equality Act they had failed to make a reasonable adjustment namely to adjust the terms of their absence management procedure (HR27000) to take account of absences that were disability related.

2. The respondent in their ET3 contended that the dismissal was fair on the grounds of capability and that there had been no discrimination or failure to make a reasonable adjustment. On the first day of the case the respondent also added alternative ground of dismissal namely that it was for some other substantial reason.

Issues

3. There were a number of issues for the Tribunal to consider. It had been accepted that the claimant was disabled in relation to three conditions namely pancreatitis, diabetes and depression. One of the principal issues revolved around whether or not the respondent had made sufficient allowances for the claimant's disability related absences ('EA' absences'). It was also suggested that they had mischaracterised some absences which were related to his disabilities as non-disability related absences and overall taken a 'mechanistic' approach to the application of the policy. The respondents had made some allowance in their absence management policy for disability related absences but it was argued that firstly it would have been reasonable if they had gone further and discounted further absences, secondly that the reasoning used in assessing which absences were disability related was flawed, that some were in fact disability related and further that insufficient account had been taken of

the fact that periods of absence for non- disability related absences had been extended because the claimant was slow to recover because of his various qualifying conditions. It was against this background that the Tribunal had to consider the following matters:

a) Was the dismissal of the claimant by the respondent for the potentially fair reason of capability and/or some other substantial reason, namely unsatisfactory attendance?
b) Did the respondent act reasonably in treating the claimant's capability and/or some other substantive reason as a sufficient reason for dismissing him?
c) Was dismissal of the claimant by the respondent procedurally fair?
d) Did the respondent treat the claimant unfavourably because of something arising in consequence of his disability?
e) If yes to 4, did the respondent show that the treatment was a proportionate means of achieving a legitimate end?
f) Did the respondent take all such steps as were reasonable to alleviate any disadvantage said to be suffered by the claimant?

Evidence

4. The Tribunal had the benefit of a Joint List of Documents ('JB') which was added to in the course of the hearing by agreement. The respondent called the following witnesses:

- Andrew David Evans, former Tax Credit Team Leader
- Thomas Dolan, Tax Inspector
- Paul David Ness, former Deputy Senior Delivery Manager

The claimant gave evidence on his own behalf.

5. It became clear during the course of the hearing that some difficult issues might arise in relation to remedy and in particular the quantification of any claim and accordingly parties agreed that remedy would be considered separately.

Facts

6. The claimant had previously worked for HMRC between March 2006 and December 2009 when his employment had come to an end. During that period the respondents had recognised that he was disabled in terms of the Equality Act and in terms of the absence management policy then in operation had at one point tolerated or discounted 30 days of disability absence. The claimant was ultimately dismissed on the grounds of capability.

7. On the 18 March 2015 he re-joined HMRC as a Tax Credit Adviser (Administrative Grade) engaged in telephony advice at the respondent's offices at Sidlaw House in Dundee. His employment was ostensibly terminated on the grounds of ill health/capability on 19 October 2018.

8. The claimant had a long history of ill health having had his first depressive episode while at university in his early twenties. His depression periodically reoccurred. He had later developed pancreatitis around 2002 and then , as a consequence of that condition he developed diabetes. Because of the damage to his pancreas he was insulin dependent. He disclosed his disabilities prior to his re-employment in 2015.

9. The respondent is a non-ministerial department of the UK government responsible for the collection of taxes and the payment of some forms of state support, administration and other regulatory regimes. It employs many thousands of staff at various sites throughout the UK.

10. At the time of the claimant's dismissal the respondent's offices at Sidlaw House in Dundee employed between 350 and 400 tax credit advisers engaged in giving advice on tax credits and construction industry tax matters. That number has steadily reduced and is now around 210. The Dundee offices had one of the highest percentage of staff dealing with tax credit. Other offices, generally smaller than the one in Dundee scattered throughout the UK carried out the same work.

11. The Offices at which the claimant worked operated from 8am to 8pm Monday to Friday and 8am to 4pm on a Saturday.

12. The claimant's main duties were taking telephone calls and dealing with tax credit applications/renewals and queries from the public. Along with other advisers he was expected to deal with between 30 and 40 calls per day. The length of the call varied. The work could be unrelenting and difficult. If an adviser was absent this led to increased pressure on the overall system and longer waiting times. The respondents tried to plan for surges in work and for absences such as maternity leave but could not 'backfill' unexpected absences through illness.

13. The claimant was in one of the many teams operating at the offices which comprised between nine and 10 Advisers in each. The teams were supervised by a team leader who in turn reported to more senior managers.

14. There was considerable pressure on tax credit advisers like the claimant. They would have to answer telephone calls which would "stack up" throughout the country as people sought advice from HMRC. There were often long delays in customer's calls being answered and as a consequence staff like the claimant had to regularly put up with frustrated or angry customers. If the calls could not be answered in Dundee, they could be passed to other sites throughout the UK to be answered.

15. The respondents were under pressure to provide a good service to customers and to reduce telephone waiting times. They were also concerned that staff absence was particularly high in Dundee compared to other offices. When the claimant re-joined the respondents in 2015 the offices in Dundee were the largest site dealing with tax credit advice but also had the highest number of days lost through absence in the UK recorded as 'Average Working Days Lost'.

16. The respondents decided to change their absence management policy including the policy around disability related absences. In the past absences in relation to disability were tolerated and discounted. The new system was designed to reduce absence including sickness absence and although allowances were made for disability related absence, they were in general no longer fully discounted.

Sickness absence policies and procedures

17. The respondents circulated changes to their approach in managing attendance to staff including the claimant (HR27000) (JB68/69). Copies of the new policies were available to employees such as the claimant on the intranet. The claimant was aware from other staff that changes had been made to managing attendance. He did not initially read the policies in any detail but believed, along with other staff, that the changes were likely to have a severe impact on his position and on others with disability related absences. He believed that their likely effect would be 'horrific'. The new approach was summarised by management as follows:

> *"We've updated our Managing Attendance Policy (link is external) on sickness absences. Our new approach, which comes into effect today, has a strong focus on helping colleagues remain in work, or return to their jobs as soon as possible following a sickness absence. The new policy has been shared with the department's trade unions through open and constructive discussions and has been thoroughly tested by line managers who will be using it. Key changes include:*
>
> - *removing the informal warning stage*
> - *adopting trigger points for formal action*
> - *recording part-day absences*
> - *an increased focus on continuous absence to improve a return to work at the earliest opportunity*
> - *a more proactive use of the Wellbeing services, including Occupational Health and Workplace Wellness."*

18. The new policies dealt specifically with disability related sickness absence (JB63/67). They provided that if a member of staff with a disability attended an appointment with their GP or a hospital appointment or had treatment this would be treated as disability adjustment leave (DAL) and would not be counted towards calculating absence days. A rolling period of a year was used to consider absences.

19. Disability related sickness absences (DRSA) could be counted towards the total number of days . Advice was given to management that "*DAL can only be considered when the jobholder needs paid time off work for disability-related assessment, treatment or rehabilitation, but would otherwise be fit for work. It is usually for a fixed period that can be planned in advance.*"

20. Guidance is also given to managers in relation to the overall process namely the requirement to consult the employee, have regular discussions with them about their condition, and consider if it was likely to fluctuate. When considering whether to discount any DRSA the manager was required to: (JBp64)

"
- *treat each case individually, taking account of the severity of the condition and any changes*
- *have a clear understanding of the business needs of the area where the disabled jobholder works; speak to your own manager if unsure. Avoid generalising about HMRC or your business area as a whole; the decision must be justifiable in relation to that person's circumstances and job at that time and the impact on the jobholder's wider team and/or service delivery.*

Refer the matter to your own manager if you consider it reasonable to discount more than 5 days sickness absence in any 12-month period:

- *give the reasons for your recommendation. This does not mean that 5 days or less is generally reasonable regardless of the circumstances; more than 5 days may be appropriate to meet the legal requirements taking account of the wider picture. Where that applies, your manager will:*
  - *make a decision taking account of all the information available, seeking advice from CSHR Casework if necessary, and*
  - *aim to tell you what their decision is and the reason for it within 5 working days so that you can notify the jobholder.*

As a manager you must also

- *do all you can to help the jobholder to achieve a satisfactory level over a reasonable period of time*

- *consider instigating Managing Poor Attendance procedures if you have put all reasonable adjustments in place and given sufficient time for them to take effect but the jobholder remains unable to reach the required level of attendance."*

21. Unless the sickness absence trigger was adjusted eight days' absence in a rolling period of a year was taken as the trigger for the absence management process to commence.

22. Managers were given advice when considering adjustments to the policy. Advice was also given in relation to managing continued absence or irregular absences at paragraph 40 onwards (JBp81/82).

"Managing continued absence or absences
In this sub-section:
Decision points during formal action for unsatisfactory attendance
Written Improvement Warnings
Improvement and Sustained Improvement Periods
Managing continuous absence
Linking periods of continuous sickness absence
Meetings during continuous sickness absence
Informal Review
Formal Attendance Review Meeting
Ill Health Retirement
Considering dismissal or downgrading
49. Action regarding attendance must be considered unsatisfactory if a jobholder's sickness absence level reaches or exceeds eight working days (less, pro rata, for jobholders who do not work every day of the normal working week) or four spells of sickness absence in a rolling 12-month period. This is called the Trigger Point. The rolling 12-month period is the 12 months up to the last day of the most recent sickness absence.
……

50. The jobholder may reach or exceed their Trigger Point by taking frequent, short sickness absences or a continuous spell of sickness absence. Part-day sickness absences count towards their Trigger Point."

23. The number of spells of absence was not considered where an employee was disabled.

24. If an employee received a Written Improvement Warning they entered a six-month improvement period during which they had to meet the attendance standard expected of them (paragraph 67). If attendance was satisfactory during this period, the employee was expected to sustain the improvement for 12 months. This was known as the Sustained Improvement Period (SIP). Attendance was unsatisfactory during this period if the trigger point was reached. If attendance was satisfactory at the end of the SIP formal action ended. If attendance was unsatisfactory during the improvement period or SIP then formal action progressed if the manager considered it appropriate (paragraph 75). There was no necessity to wait until the end of the period before taking action if attendance was unsatisfactory. The policies provided rights of appeal at various stages.

25. Advice was given to managers in relation to trigger points for those with disabilities ('DTP') (JB100-107).

*"**Agreeing a Disability Trigger Point***

1. In deciding whether to agree a Disability Trigger Point, managers are not expected to decide whether a jobholder is disabled. The decision is about whether this is an appropriate reasonable adjustment which will enable the jobholder to attend work, be effective and safeguard their future employment. In deciding that, managers will need to form a view (informally and reasonably quickly, on the balance of probability, using available information) on whether the jobholder is or is likely to be disabled. However, managers are not expected to initiate formal assessments to form that view and should normally accept a diagnosis by the jobholder's GP if it is available. Any decisions taken in the context

of the Attendance Management Policy will not apply to other situations.

……

What level of Disability Trigger Point should be agreed?

5. The vast majority of jobholders will manage their condition within the standard trigger point applicable to their working pattern. A Disability Trigger Point should only be agreed if the manager has evidence that the jobholder will have absence over and above the standard trigger point.

6. A Disability Trigger point represents an increased trigger point to account for the jobholder's disability, compared to other jobholders of the same working pattern. In deciding the number of additional days to agree as a Disability Trigger Point, line managers should take into account:

- *the jobholder's absence record – the past level of absence due to the disability is a good indicator of the likely level of absence in the future although you should take into account any Occupational Health advice which suggests this may not the case*
- *the stability of the condition – the likely level of absence will be affected by whether or not the condition is stable*
- *the level of absence the business can support – you will need to consider factors such as cost, disruption to the business and impact on the organisation.*

7. Occupational Health cannot tell line managers how many additional days to agree but can give advice to inform the line manager's decision. This might, for example, include:

- *what sort of periods of absence someone with this condition might reasonably be expected to have over the course of an average year because of their disability, or*
- *whether future absences related to the disability are likely to remain at a similar level."*

26. It also recognised that setting a disability trigger point was not an exact science (paragraph 10) Paragraph 11 stated that formal action should be taken where

"- *There has been no relevant changes to the jobholder's disability, such as treatment or prognosis; and/or*

- *The Disability Trigger Point has been reached or exceeded and the absences have risen to a level which can no longer be supported."*

27. As part of the management absence process managers would log absences as being disability related ("EA") or non-disability related. There were a limited number of categories one of which had to be entered. The system would collate the information and could provide managers with the recorded data. Managers could also have regard to information contained on employee's personnel file in relation to absences which included more detailed information in relation to keeping in touch conversations (KIT) and return to work meetings (RTW). (Information in relation to the claimant's absences was produced at pages JB111-122).

28. After the claimant was re-employed by the respondent they had him assessed by their Occupational Health provider who prepared a report (JB123A-123) dated 3 December 2015. It stated under the heading 'Outlook' that the claimant's conditions were all long-term and that *'They may give rise to short term setbacks on an unpredictable basis: the frequency and severity of which is unable to be foreseen'* It noted that the claimant was struggling to cope with changes in his day to day working hours "*due to ongoing high levels of fatigue and tiredness"* related to chronic pancreatitis and associated diabetes. The report made various recommendations for adjustment of the claimant's working pattern. These were later discussed with the claimant and an alternative working pattern pout in place.

29. The claimant had a meeting with his manager Rebecca O'Rourke on 9 December 2015 to discuss his most recent absence which was for two days. The reason for the absence had been noted as being emergency dental surgery. It had been recorded that the condition was not likely to be covered by the disability aspect of the Equality Act. She recorded:

> "*I advised Martin that the departmental guidance HR27017 – Disability Related Absence, advises that we must be reasonable in regards to conditions covered by the Equality Act, however this does not mean that we discount all absences. I reminded Martin that we had met on 09-12-*

2015 and agreed we would look at any absence on its own merits in deciding on whether a tolerance/discount would be applied to the absence as a reasonable adjustment for his EA covered conditions.
I advised Martin that this absence was not as a result of his EA covered condition and will be used when considering MPA action."

30. The claimant had a further period of absence between 21 and 23 March 2016 in relation to his pancreatitis condition. He met his manager Russell Duke on 24 March 2016 who advised him that the most recent absence would be discounted. The claimant had a further period of absence of one day on 27 June 2016 in relation to pancreatitis. He was advised that the manager would not discount this absence from MPA action and asked that this matter might be looked at again. A further one day's absence was discounted. This was confirmed at a meeting on 13 July 2016 (JB135). The claimant was absent from work on 2 September 2016 because he forgot to take medication. He met his manager John Armstrong (JB137). Mr Armstrong indicated that they would not discount the absence from any MPA.

Poor Attendance

31. The respondent's new the sickness absence policy came into force in September 2016.

32. The claimant was invited to a meeting to discuss poor attendance (JB139). The meeting was dealt with by his team leader John Armstrong and the meeting was minuted (JB140-143). The claimant was represented at the meeting by a trade union representative.

33. The claimant believed that the action was premature. The manager decided that the claimant would be given a first written warning for attendance. The respondents later indicated that they would not give the claimant a first written warning (JB144) and it was withdrawn.

34. The claimant had further absences in December 2015, March, June September and October 2016. This included a 10 day absence due to a 'flare up' of his pancreatitis. This was the longest period he had in relation n to this

condition. These were recorded as “digestive system” and “endocrine, nutritional & metabolic”. As a consequence, Mr Douglas More the Customer Service Manager wrote to the claimant on 14 October inviting him to a meeting to discuss his absences.

35. The meeting took place on 24 October. The claimant was represented by his trade union official. The meeting was minuted (JB147/151). It confirmed that the claimant’s personnel file did include advice from “RAST” the respondent’s internal advice department on disabilities. There was a discussion in relation to the claimant being given an adjustment namely he could take short breaks during his working period. His representative had indicated that the claimant had been given insufficient support if this support had been provided earlier. He asked if the manager could check with RAST to see if the claimant could go over the 50% toleration.

36. A further Occupational Health report was obtained in relation to the claimant in November 2016 (JB153-155). His current health situation was summarised as follows:

> *“Mr Jamieson has a number of underlying health conditions. These are Chronic Pancreatitis, Diabetes and Depression. He has been having increased symptoms of pancreatitis with pain now daily to varying degrees. He reports having had a severe attack in September that resulted in a week off work. He is due to have a CT scan and further investigations for this. He is due to see the Diabetic clinic on the 3rd November for a full assessment and is having some gum problems as a consequence of his diabetes and is due to see the Dentist about this too.”*

The claimant was assessed as being fit to work at that time. The respondent was warned that stress was likely to impact negatively on his overall wellbeing. The report indicated that occupational health no longer advise on trigger points and also management to decide on what levels of absence to tolerate. It noted however: “*Future absence may exceed that for a healthy employee of the same age due to the above problems but the pattern is unpredictable. He is*

having increased symptoms and is under investigation for this. He will know more about his prognosis once these have been completed."

First Written Improvement Warning

37. Mr More wrote to the claimant on 9 November giving him a first written improvement warning. He wrote

> *"… I have decided to give you a first Written Improvement Warning and will instruct your current manager to monitor your attendance for 6 months from 01/11/2016 to 01/05/2017. This is called the Improvement Period. If your attendance is unsatisfactory at any time in the Improvement Period, your manager will consider your case again and may give you a final Written Improvement Warning. Your attendance will be unsatisfactory if your absences reach 50% of your adjusted disability trigger point (i.e. 6 days) or 4 spells during the Improvement Period.*
> *If your attendance is satisfactory during the Improvement Period, your attendance will be monitored for further 12 months. This is called the Sustained Improvement Period. If your attendance becomes unsatisfactory again during the Sustained Improvement Period, your manager may give you a final Written Improvement Warning."*

The claimant was advised of his right to appeal.

38. Mr More set out his reasoning in a document "First Written Warning Deliberations" (JB158-161). He made reference to the advice he had received from RAST. Mr More assessed the trigger point to be adjusted to 12 days after reviewing the jobholder's absence record, stability of the condition and level of absence business can support. He wrote

> *"Taking all this into account, it seems reasonable to consider that somewhere in the region of 12 days of flare ups may occur, save for any specific one off events, over a period of 12 months. Even accounting for these, it's not reasonable to consider allowing for all instances of absence. Based on that I'd therefore consider a 50% trigger adjustment reasonable to put in place at this time as this brings MJ into a position of*

reasonable parity in comparison to a non-disabled member of staff, as suggested should be the case by the Equality Act 2010.

The stability of MJ's condition is more difficult to assess at this time. He has had adjustments made to his medication following his most recent medical assessment which will hopefully lead to improvements however still has an appointment for a CT scan and with his dentist to come. I recommend reviews are completed after each of these to check for possible supports. Stress has been pin pointed on the most recent OH and steps should be taken to support this, beginning with a Stress Risk Assessment.

It would not be reasonable to accept all levels of absence in terms of what the business can support, however I believe reasonable adjustments have been made in terms of the discounted days on record and that this adjustment is fair based on the information available at this time. I do however plan to refer this to the RAST team to confirm and the decision can be reviewed if the advice from them is different. I felt however, that to delay this process further in light of the concerns highlighted around stress would not be appropriate."

39. The respondent's managers had received information from the Reasonable Adjustment Support Team (RAST) (JB164-166).

40. The claimant appealed on 24 November 2016 (JB162) arguing that all disability related occurrences should be discounted. He wrote:

"I feel that the Disability Trigger Point that has been put in place has set me up to fail as it's still lead to me being punished. I feel that the manager has seen the numbers 25% and 50% and just gone with these using no type of evidence as previous absences have not been in place as I'm a new member of staff.

I can't understand how a manager can use my history to work out what discounts can be put in place if I've only been a member of staff for a year."

41. The claimant had a CT scan which did not lead to any further treatment.

42. The claimant's appeal against the first Written Improvement Warning issued in 6 December was dealt with by a manager, Hazel Scrimgeour. The claimant was represented at the appeal hearing by his trade union representative. The meeting was minuted (JB169/172). Following the meeting the manager prepared a note of her deliberations (JB173/175). She concluded that the employee had been supported and reasonable adjustments had been put in place. She concluded the manager had considered all the relevant points and that the First Written Improvement Warning was appropriate.

Final Written Improvement Warning

43. Following a further two periods of sickness absence the claimant received a final written improvement warning (JB177). The claimant appealed. The appeal was dealt with by Hazel Scrimgeour. Her reasoning was set out in a document titled 'Decision-managers deliberations' (JB179/181). The appeal was rejected as the manager held that the claimant had been properly supported.

44. The claimant attended first Written Improvement Warning Reviews on 15 February and 14 March and 19 April (JB182-184).

45. The claimant was asked to attend a formal attendance meeting to discuss his attendance during the improvement period which began on 1 November 2016 and ended on 30 April 2017. This took place on 24 May and it was noted that the claimant's attendance was satisfactory during the improvement period. The result of this was that the improvement period was closed following a meeting between the claimant and his manager Sonja Pringle (JB188).

Sustained Improvement Period or 'SIP'

46. The claimant had further periods of absence during the sustained improvement period. As a consequence, the meeting took place on 31 October between the claimant and his team leader Sacha Martin. The claimant was represented by his trade union representative. The meeting was minuted. Ms Martin explained that the purpose of the meeting was to determine whether or not further sickness absence could be supported or if a final written improvement

warning would be appropriate. She summarised the position that in the last 12 months the claimant had been absent on four separate spells totalling 13 days of sickness. She set these out as being two days in relation to pancreatitis, two days in relation to a mouth abscess, four days in relation to pancreatitis and five days in relation to pancreatitis. The claimant indicated that pancreatitis and diabetes were connected and that if one 'flared up' then the other did too. He advised that since his last absence he had another hospital appointment where the doctors are now trying a different treatment on top of his current medication. He indicated that his current diabetes levels were stable. He was asked if there were any further reasonable adjustments that could be made. The claimant indicated that the disability trigger point was currently too low. He mentioned that under the previous guidance he had a toleration period of 40 days and this had now dropped to four.

Final Written Improvement Notice

47. Ms Martin wrote to the claimant on 6 November 2017 (JB194/195). She issued him with a final written improvement warning because he had hit the trigger points of four occasions over 12 days. Attendance was to be monitored in the six month period from 6 November 2017 to 5 May 2018. Ms Martin set out her decision making in her record (JB196/197). She wrote

> *"Martin was issued with a First Written Warning on 01/11/2017 with an increased DTP of 50%. Martin then had sickness absence from*
> *22/11/2016 to 23/11/2017 totalling 2 days*
> *08/05/2017 to 09/05/2017 totalling 2 days*
> *14/08/2017 to 17/08/2017 totalling 4 days*
> *25/09/2017 to 29/09/2017 totalling 5 days*
> *I have taken into consideration increasing Disability Trigger Points by 75%, however as Martin's sickness has improved in the previous 12 months I feel 50% above the standard trigger point is more than reasonable.*
> *The risk of taking no action is that the message is being given that the business can support a high level of sickness along with increasing DTP's after a period of 6 months where an increase of 50% was given to Martin.*

To mitigate this it is appropriate to issue a final written improvement warning."

48. The claimant appealed. He argued that the DTP was too low.

49. The appeal was dealt with by the appeals manager Ms Leigh-Jayne Marr. She met the claimant on 28 November 2017 to discuss his appeal. He was represented. The appeal meeting was minuted (JB206/209). She advised the claimant that she was not making any decision on his trigger points. She explained that her role was to determine whether the final written warning was appropriate or if his most recent absence should be supported. Any discussion regards his trigger points was between the claimant and his manager and his manager alone would make the decision, unless grade 7 approval was required.

50. A further occupational health assessment was carried out and a report prepared dated 4 December 2017 (JB210/211). The respondents were advised

"With regards to Mr Jamieson's final written warning it is my opinion that he is likely to have more absences than someone who does not suffer from his conditions; he would benefit from management considering his trigger points; however this is a management decision and should be based on what the business can accommodate, the best indicator is to look back on previous levels of absence and use this as a guide."

Ms Martin did not uphold the claimant's appeal. She noted in her record of decision making (JB214/216) as follows:

"JH has an increased trigger point of 50%, affording him a Disability Trigger point of 12 days 4 occasions. JH states his manager had considered increasing this to 75%, 14 days 4 occasions, but reasoned his attendance had improved in the past 12 months and did not apply an increase. JH contests, had this increase been applied, the Final Written Warning would not have been issued.

When the decision was made to issue the Final Written Warning, in the previous 12 months, JH had been absent on 4 occasions totalling 13 days. In the 12 months prior to that, JH had been absent on 5 occasions totalling 16.5 days.

During the First Written Improvement Period from 01/11/2016 to 01/05/2017, JH had been absent on one occasion for 2 days.

It is therefore evident JH had made an improvement in his attendance and the manager's reasoning was sound. There is no justification in increasing an agreed DTP for the sole reason a JH has exceeded this."

End of Improvement Period start of Sustained Improvement Period

51. The claimant attended a monthly review meeting on 16 January 2018 (JB217/218). A meeting was held on 7 February 2018 (JB222/223) and on 6 March (JB224/225) and on 10 April (JB226/227) and on 15 May (JB228). The claimant received a letter on 15 May confirming that his attendance was satisfactory and that the improvement period had ended. He was now put on a 12 month sustained improvement period.

52. The claimant had further absences and as a consequence breached his trigger points for the sustained improvement period. A fact-finding meeting took place on 2 August 2018 which was minuted (JB234/236). The following absences were recorded:

"20/11/17-21/11/17 – Cold 2 days
05/04/18-09/04/18 – infection in tooth 2 days
04/06/18 – Pancreatic episode 1 day
17/07/18 – Viral 1 day
18/07/18 & 19/07/19 – DAL for eye operation
20/07/18 – recovery from eye operation 1 day
23/07/18 – Respiratory tract infection 11 days if returns after fit note"

The consequence of the meeting was that the claimant's situation was referred to a decision maker to decide whether or not he would be dismissed on the grounds of unsatisfactory attendance.

Decision to dismiss

53. The claimant's case was passed to Mr Andrew Evans a Team Leader to decide whether or not to make a referral recommending his dismissal. Following a meeting the claimant had with Mr Evans on 2 August Mr Evans made the referral recommending dismissal. He narrated the history of the management absence process. His reasoning was encapsulated in his decision-making record (JB238/239). He wrote as follows:

> *"If we continue to support Martin's absence level it is very likely that Martin will continue to have regular sickness absence. All support has been put in place and Martin is still unable to sustain regular and effective service however when he is on a formal warning his attendance improves during the review but when the review ends his attendance deteriorates. Martin has a DETP of 12 days/4 spells it's important to note that only 3 days out of the 17 days since 20/11/17 relates to his EA conditions suggesting he manages his conditions quite well. I feel it is a risk to not move to the DM as going by Martin's recent and previous history it is likely further absence would happen soon and a referral to the DM being made, looking at Martin's history he has regular occasions of sickness except when he is in a review period where he goes the majority of the review period without any sickness. I have considered if it is fair to the Martin to potentially delay the inevitable as well as weighing up the impact further sickness has on his colleagues and adding additional sick days to our AWDL. I believe that further absence will occur and it is reasonable and the correct decision to refer to the DM now."*

54. Mr Evans wrote to the claimant on 3 August confirming that a referral was to be made (JB240/241). The case was passed to Mr Tom Dolan a Tax Inspector who was to act as the decision maker. Mr Dolan had access to the claimant's personnel file and the records contained in it. He considered the minutes of the various meetings, correspondence, contents of return to work meetings, along with the Occupational Health reports.

55. A meeting took place on 17 August between the claimant and Mr Dolan. The claimant was represented at the meeting. It was minuted (JB247/252). The claimant lodged written representations (JB253). Mr Dolan also obtained an Occupational Health report (JB254/255). The claimant was not asked to comment on the terms of the report. The Occupational Health report noted

> *"Mr Jamieson has accrued several absences since November 2017; many due to opportunistic infections or viruses. Although having diabetes does not increase the likelihood of infections most diabetics do take longer to recover due to their immune system being compromised as appears to be the case with Mr Jamieson. He reports that most of the infections he picks up are the result of coming into contact with other people who are unwell."*

56. Mr Dolan considered the points made at the hearing and the claimant's submissions. He read and reviewed the decisions made at each step of the process from the initial setting of the DTP. He looked at information describing the absences taken from the AMDB. This was a database used when managers recorded absences in various limited categories which they would 'tick'. It also included more detailed notes of return to work interviews and keeping in touch calls. He took at face value the characterisation of the reasons given for absence recorded there. He considered that even if a 100% increase had been allowed the claimant would have exceeded the DTP. He believed that the claimant was likely to have further absences during the SIP period. He considered the claimant's length of service but concluded that the business, in all the circumstances, could not support the claimant's absences given their length, number and erratic nature against a background of high sickness absence at the offices in Dundee. He also considered the effect of the absences on the claimant's colleagues and on the wider service.

57. Mr Dolan wrote to the claimant on the 14 September 2018 terminating his employment *"because you have failed to maintain an acceptable level of attendance"* (JBP258). The letter informed the claimant of his right to appeal.

Appeal

58. The claimant appealed (JBp263). He argued that the employer had failed to set a reasonable DRP and make realistic estimate of likely disability related absences. He also argued that DAL should have been used. The letter noted that the claimant's pancreatic condition affected his immune system making him more vulnerable to infections.

59. The Deputy Senior Delivery Manager at Dundee Mr Paul Ness was tasked to deal with the appeal. He was an experienced manager and senior to Mr Dolan. He oversaw the performance of the Dundee offices.

60. A meeting took place on the 12 October 2018 to meet the claimant and set out the basis on which the appeal would be dealt with. The claimant was represented. The claimant's argued that a 'very mechanistic 'approach had been taken''. His representative argued that the DTP had been set too low at the outset. Reference was made to Mr Dolan saying that even if the DTP had been set at 100% it would not have covered the absences. He queried why it had to 'stop' at 100%.

61. Mr Ness considered the submissions he had heard. He was familiar with the Sickness Absence Policy and the published guidance. He had regard to the advice on intermittent absence. He was familiar with the claimant's role. He was concerned that out of ten centres providing telephony advice the Dundee offices had the highest lost days through sickness absence. He checked the process by which the DTP's had been set and the process adopted though the management of the claimant's absences. He was satisfied that a fair procedure had been adopted. He did not consider that he need to escalate any issues to higher management. He reviewed the correspondence and minuted meetings in the claimant's file. He concluded that the appeal should be refused as the decision taken to dismiss was a legitimate one and that the claimant was '*very likely'* to have further absences. .

62. Mr Ness wrote to the claimant on the 29 October confirming that his appeal had been rejected (JBp267).He set out his reasoning in full (JBp268-271)

63. The claimant subsequently had further ‘flare ups ‘of his pancreatitis which if he had remained in employment would have been likely to have necessitated further sickness absence during the SIP.

Witnesses

64. We found all the respondent’s witnesses to be both credible and reliable in their evidence which was given in a reasoned and professional manner. We also came to the conclusion that the claimant was an honest and candid witness who was also credible and reliable.

Submissions

65. The Tribunal extends its thanks to both agents who provided us with detailed written submissions fully setting out their respective client’s positions and which had clearly been prepared with considerable thought and care.

Respondent’s Submissions

66. Mrs Macaulay began by addressing whether or not the reason for dismissal was a ‘fair’ reason being either capability or some other substantial reason. Referring to the Employment Rights Act she pointed out that capability was an employee's capability assessed by reference to skill, aptitude, health or any other physical or mental quality (section 98(3)(a)). With regards to some other substantial reason or ‘SOSR’ this was she reminded us a potentially fair reason for dismissal where it relates to some other substantive reason of a kind such as to justify the dismissal of an employee holding the position which the employee held. In her submission the principal reason for dismissal was best characterised as capability. However, in the case of ***Wilson v Post Office*** [2000] IRLR 834) an employee with a poor absence record (due to genuine ill-health) was dismissed for failure to satisfy the employer's attendance policy. A tribunal found that the reason for dismissal was capability, but the Court of Appeal held that the reason was the employee's failure to meet the requirements of the policy, which was an SOSR reason.

67. We were then referred to ***Ridge v HM Land Registry*** *[2014] UKEAT/0485/12*, in which the tribunal found that the dismissal had been for "some other

substantial reason", not "capability" as asserted by the respondent. The EAT held that the re-labelling of the reason for dismissal had caused no procedural unfairness or practical difficulty for the parties. The EAT developed the point made in ***Wilson***, and emphasised that the correct characterisation of the reason for dismissal will depend on what was at the forefront of the employer's mind. If it was the employee's "skill, aptitude, health or any other physical or mental quality", then the reason for dismissal will be capability under section 98(2)(a). But where the recurring absences themselves are the reason for dismissal (which is not unusual) and an attendance policy has been triggered, the better characterisation may be SOSR.

68. The respondent's agent submitted that it was the claimant's ill health and whether or not they could rely on him to provide sustained and effective attendance going forward that was at the forefront of the decision makers minds.

69. Turning to the respondent's actions in this case she submitted that the Tribunal should have regard to the various factors as being relevant when considering the reasonableness of the decision to dismiss. The chronic nature of the employee's illnesses which are lifelong. The OH advice suggested that there are likely to be 'flare ups' of the various conditions but the duration and frequency of those flare ups could not be predicted.

70. In addition, the claimant had absences caused by colds and a viral infection which did not, in the respondent's decision maker's view, appear to be linked to the claimant's disability conditions, albeit that his conditions might prolong any absences as it may take him longer to recover. The prospects of the employee returning to work and the likelihood of the recurrence of the illness. The claimant himself referred to the risk of infection within the working environment and gave evidence that he had 2 or 3 pancreatic episodes since his dismissal. It was therefore very likely that there would be further absence that would take him well over the trigger point which had been applied. The need for the employer to have someone doing the work. The department is clearly a very busy one. The effect of the absences on the rest of the workforce and their unpredictability. In cross examination, Mr Evans said that the impact

of one person's absence was "negligible". This was not the view of the respondent's other witnesses, both of whom, given their managerial positions are likely to have a better understanding of the wider impact of absence. The extent to which the employee was made aware of the position adopted by the respondents over absences. The claimant's relatively short length of service. The size of the respondent did not mean it would tolerate any level of absence. The absence management procedure changed in September 2016. However, the Claimant did not seek to argue that he was unaware of that change. He also had the support of the trade union throughout the process. The employee's relatively short length of service. The size of the organisation - HMRC is a large organisation and it does have a greater responsibility to employees to seek to facilitate a return to work and meet the employees sick pay entitlement. However, HMRC, like any Government Department, is accountable to the tax payer. A large budget is not the same as an unlimited budget. HMRC must put limits on the amount of time that their employees remain off sick to ensure that it continues to offer an effective service to the public. It cannot be the case that a large organisation must tolerate any level of absence because it has more resources available. The case of ***Bray v London Borough of Camden*** *UKEAT/1162/01* makes it clear that an employer is not expected to ignore absences solely because they are EA related.

71. The respondent's solicitor then made reference to the Burchell Test which in her view applied here. The respondents had satisfied the Burchell test as they had a genuine belief that ill-health was the reason for dismissal; had reasonable grounds for its belief; and had carried out a reasonable investigation. The tribunal should guard against the substitution mindset in this case. The respondent must be judged on the basis that dismissal with notice fell within the band of reasonable responses of a reasonable employer. The issue was not whether, objectively speaking, the employee was or was not capable of remaining in employment.

72. Looking at Mr Dolan's pivotal role Mrs Macaulay suggested that there was no evidence that he was assessing matters simply on the number of EA related absences on the relevant part of the AMDB. That was simply one aspect of

the AMDB. Mr Dolan was aware of the overall number of absences and the differential here between his assessment and the claimant's was insignificant (one extra day counted). In his deliberations document, he addressed what would have happened had an increase of 100% been given and his view was that the increased trigger would not have been met either and this would accordingly have resulted in action being taken. He maintained this position in evidence.

73. It was the respondents position that carrying out a balancing exercise led to the conclusion that in all the circumstances the respondent could not be expected to allow the Sustained Improvement Period to run its course in light of the extensive absence already incurred, the OH advice received and the claimant's own representations. No one was expecting the claimant's absence record to reduce to nil. However, the respondent's managers reasonably believed that the claimant's absence record would continue in a similar vein and that dismissal was inevitable

74. In her submission a fair process was followed throughout. There was a clear Absence Management Policy which was followed. Evidence was heard about the extent to which the absences were properly recorded and there was a dispute as to whether some of these absences properly fell to be regarded as disability related. It is accepted that at the point at which Mr Dolan reviewed the absences he had regard to the information recorded on the AMDB in terms of the number of EA related absence. However, that was not the only information he considered. He reviewed the file in relation to the setting of the DTP and the subsequent appeals in which there is clearly reference to the reasons for absence. The decisions were not based on that aspect of the AMDB information alone. While Mr Dolan accepted that he might have reconsidered the setting of the AMDB - he had already dealt with a 100% increase in his deliberations and the outcome, dismissal, would be the same.

75. The respondent's solicitor then considered the claim for Disability Discrimination and whether the claimant had been treated unfavourably because of something arising in consequence of his disability. Accepting that the claimant's absences, to a large extent were related to his disability

conditions the respondents concede that they treated the claimant unfavourably because of something arising in consequence of his disability because the claimant's dismissal arose, in part, from his sickness absence which, in part was in consequence of his disability.

76. The legitimate aim of HMRC was she indicated to provide the public with an efficient and effective service. In order to achieve that legitimate aim the Respondent requires employees to attend work regularly and carry out their full duties. Mr Dolan referred to this as having "bums on seats" to do the work. Employees need to be at work to carry out the essential tasks in order to provide that efficient and effective service. The respondent's managers are in a difficult position in terms of his ability to manage attendance. It is operating in an environment of significant absence and they are required to take steps to manage that. We heard evidence that the claimant's place of work was at the bottom of the league table in terms of attendance. It is common sense that the absence of employees on sick leave will have a negative impact on service delivery. To suggest otherwise was she said absurd.

77. Turning to the evidence of Mr Ness the solicitor pointed to the evidence he gave about the planning team based outwith the Dundee contact centre whose role it is to set staffing requirements. Schedules are planned looking at 30 minute intervals having regard to historic data and anticipated demand. This information feeds into staff forecasting and planning. Whilst there may be an element built in to that forecasting to take account of absence due to various factors such as holiday, flexi-leave, appointments and sickness absence, intermittent unplanned absence is clearly going to have an impact on the quality of the service being provided. The respondent's managers in assessing whether or not it was appropriate to terminate the claimant's employment were not considering that in a vacuum. In addition, absence was an issue which was replicated across HMRC sites.

78. Reference was then made by Mrs Macaulay to the case of ***Griffiths v Secretary of State for Work and Pensions*** *[2015] EWCA Civ 1265*, in which the Court of Appeal held that a tribunal had been entitled to conclude that it would not have been reasonable adjustments for an employer to disregard a

period of disability-related absence under its attendance management policy or extend the consideration point by a further 12 days so that no disciplinary action would be considered until the employee had been absent for 20 days. In this case, adjustments had already been provided in terms of the claimant's working pattern and the provision of additional breaks. In addition, the DTP was adjusted by 50%.

Claimant's Submissions

79. The first issue the claimant's solicitors raised was the size of the respondent undertaking. He submitted that would not be controversial to suggest that the respondent is a huge organization which operates throughout the UK. Evidence was led that the Contact Centre in Dundee where the Respondent was employed, had approximately 300 to 600 members of staff doing the same role as the claimant. In addition, they had "a couple thousand" other telephony employees around the UK able to pick up calls.

80. Turning to the witnesses Mr Lawson suggested that Mr Evans was not forthcoming and failed to concede that some absences marked as non-disability related were clearly disability related. His evidence was that when looking absences you can click on them on the database and access Keeping in Touch notes and Back to Work discussions which offer more information. Although this is accepted the documents which were lodged on day 2 showing in more detail the reason for the dismissal were never put to him as he gave evidence before they were lodged. He said he had read this information but his calculations were flawed. Mr Evans could be considered credible but it was submitted he was not wholly reliable.

81. Mr Lawson accepted that Mr Dolan was to the most part a credible and reliable witness. Once the new documents at 289 to 370 were introduced into evidence he made concessions that his deliberations on the number of EA related dates was wrong. He also, it was suggested , gave valuable insight to the Tribunal on the reason he had got this number so incorrect. Mr Dolan accepted in cross-examination that the fact the absences had been recorded incorrectly and he had made a mistake when considering this he accepted that this could have

had an impact on his view to the claimants Disability Trigger Points. He further accepted the premise that the Disability Trigger Points should have been reviewed earlier. It was clear that the claimant made the respondents aware of the issues with his mouth, gums and dental work. The reasoning not to include such absences was 'bizarre' as was excluding the infection most likely caught from having emergency surgery because of something related to his disability.

82. In relation to Mr Ness Mr Lawson suggested that he was in part a credible and reliable witness. He acknowledged in cross-examination that the fact he did not know of the policy justifications for putting up someone's Disability Trigger Points and this undermined his decision. The claimant was candid and both credible and reliable.

83. Mr Lawson then addressed the legal framework referring the Tribunal to the terms of Section 15 of the Equality Act 2010.It was he continued important to assess a claim of section 15 (Discrimination arising from disability) looking at a two-step process as explained in ***Basildon & Thurrock NHS Foundation Trust v Weerasinghe*** *[2016] ICR 305*.

84. Looking at the first step, it was not contentious that the claimant has been dismissed for his absences. Therefore, the claimant's "something" is his absences. Turning to the second step Mr Lawson submitted that it was clear that the claimant has been dismissed for disability related absences. It was not denied that he suffered from diabetes and pancreatitis. It was apparent when looking at the bundle of papers at 289 onwards that the vast majority of absences were directly linked to the claimant's disabilities. He had an absence caused by an infection following emergency eye surgery. It was accepted by the respondents that the surgery itself was covered as a Disability related absence but they did not discount the subsequent infection It is reasonable to believe that had Mr Jamieson not had to go for an emergency eye operation the chances of him catching an infection would be a lot lower.

85. The respondent's position is nevertheless flawed as the OH report dated 3 September 2018 (p 254) stated *"although diabetes does not increase the likelihood of infection most diabetics do take longer to recover due to their*

immune system being compromised as appears to be the case with Mr Jamieson". This shows that the infection would have caused him to take more days off due to his disability. The respondent's position was that they looked at the core reason for the absence and not the consequent impact demonstrates their flawed and discriminatory thinking. The solicitor submitted that the absences were disability related and that the claimant was dismissed because of disability related absences.

86. In relation to whether the treatment was justified regard had to be had to Section 15(1)(b). In his submission the respondents have failed to show that the dismissal was a proportionate means of achieving a legitimate aim. It is submitted that both Mr Dolan and Mr Ness failed to show any significant insight into the actual effects the claimant's absences were having on the organisation as a whole or even Dundee. They did not reference any clear impact the claimant's absences were having in their deliberations. Their position seems to be a rigid one which was the absences were too high to support, without doing any investigation of whether that was actually true or not. It is submitted to the Tribunal that both Mr Dolan and Mr Ness took a mechanistic approach to the question of whether absences could be supported or not. It is submitted that they viewed this case as the Claimant hitting trigger points and therefore action had to be taken. This was in his view clearly flawed as rather than investigating the matter and seeing what the actual effects were on the business, what the effects were on other employees and what the additional cost was, the respondent failed to look at any of these matters in any detail and simply formed the view that these absences would have an knock on effect and could not be sustained.

87. Further, it is not clear what the legitimate aim was let alone whether the dismissal was a proportionate means of achieving it. In assessing if the discriminatory act is a proportionate means of achieving a legitimate aim, the Tribunal must take into account the severity of the discriminatory act and the more severe the discriminatory act the more cogent must be the employer's need to achieve a legitimate aim. In this case the discriminatory act was dismissal the most severe action to take and one which has multiple consequences for the claimant.

88. The claimant also claimed a breach of Section 20/21 of the Equality Act 2010. The PCP which put the claimant at a substantial disadvantage was the requirement to attend work within the parameters of the attendance targets fixed by the Respondent. The claimant relies on a hypothetical comparator. The substantial disadvantage the claimant has suffered was dismissal. It is contended that an increase of the Disability Related Trigger Points would have solved this disadvantage. It is the claimant's position that with regard to the reasonable adjustment claim, the Tribunal can substitute their own view for that of the employer. It is an objective exercise. Mr Lawson then explored the evidence around the DTPs and the failure to increase these at various stages.

89. It was he said clear from the OH reports that the claimant was more likely to have days off compared to that of an able-bodied person or someone who did not have his conditions and yet the respondents failed to address the clear issue in relation to the Disability Trigger Points. By only increasing the claimant's trigger points to 12 days meant that the respondent was only allowing for 4 days absences related to his disability. The claimant should have been allowed his normal 8 days like an able-bodied person and then a further increase to reflect a reasonable number of EA related absences. Had his EA absences been identified correctly by the respondent this substantial disadvantage the claimant faced would have been prevented though increases in the DTPs.

90. Mr Dolan confirmed that authorisation from a Grade 7 was needed to increase trigger points beyond 50%. Such authorisation was not sought. The policy itself states at page 105 that managers should not take a mechanistic approach to setting DTP. It is submitted to the Tribunal that it is clear that the respondent took a mechanistic approach to the question of DTP.

91. It was submitted by the respondent's agent that increasing the DTP to 100% or higher would not be reasonable. It is respectfully submitted that HMRC is a massive organisation, and potentially one of the largest employers in the UK with the full resources of the Government behind them. Furthermore, we have heard very little credible and reliable evidence to suggest that HMRC could not support a disabled worker having 8 or even 12 more days off than the standard

abled bodied person. The adjustment was reasonable in all the circumstance and the Respondent's failure to make the adjustment amounts to disability discrimination.

92. Mr Lawson then turned to the fairness of the dismissal suggesting that they had failed to reasonably investigate matters which they ought to have done prior to dismissing the claimant. They further failed to provide the claimant with any evidence of this investigation. They failed to reasonably investigate the nature of the employee's illnesses. Both Mr Dolan and Mr Ness confirmed that they had used the wrong figures in assessing EA related absences. The claimant did offer through the process to allow the respondent to contact his GP or the various specialists he receives treatment from. The respondent's position is contradictory in that on the one hand they looked at the claimant's absence history concluding that his level of absence does not warrant the DTP being increased but now stating that his absence history shows that he is likely to be off ill again with a recurrence of illness. It is also submitted that the respondents failed to properly adhere to their own policy which states that 'spikes' should not be taken into consideration. It is submitted that the final absence which tips the claimant over the trigger point is a spike and unlike the other absences.

93. The respondent in his view took into consideration the need for the employer to have someone doing the work but this was not properly investigated. They failed to ask them what if any effect was the claimant's absences having. The respondent took a broad-brush approach.

94. Finally, the claimant's agent submitted that the sanction was not within the band of reasonable responses as no reasonable employer would have made the decision to dismiss in these circumstances.

Discussion and Decision

Unfair Dismissal

95. This is a case of genuine sickness absence which led the respondent to dismiss the claimant after putting in place various adjustments to his working

environment to try and take account of his various disabilities which adjustments are not at issue here.

96. We firstly had regard to Section 98 of the Employment Rights Act 1996 ("ERA"). In terms of that section the onus is on the employer to show the actual or principal reason for dismissal. This is the reason that was in the mind of the respondent's manager at the time of dismissal (***Abernethy v Mott, Hay and Anderson*** *[1974] ICR 323*). The respondent's primary position was that the reason was capability, a potentially fair reason. Capability means an employee's capability as assessed by reference to their skill, aptitude, health or any physical or mental quality (Section 93(3)(a)) Their secondary position was that the dismissal arose for 'some other substantial reason' again a potentially fair reason. The burden of proof is neutral and it is for the tribunal to decide.

97. The test of whether or not the employer acted reasonably is an objective one, and it is for tribunals to determine the way in which a reasonable employer in particular circumstances would have behaved. The Tribunal must determine whether the employer's actions fell within the range of reasonable responses open to a reasonable employer in the circumstances (***Iceland Frozen Foods Limited v Jones*** *[1983] ICR 17* (approved by the Court of Appeal in ***Post Office v Foley, HSBC Bank PLC (formerly Midland Bank PLC) v Madden*** *[2000] IRLR 827)*). The Tribunal must not substitute its decision for that of the employer. The range of reasonable responses test (the need for the tribunal to apply the objective standards of the reasonable employer) must be applied to all aspects of the question whether the employee was fairly and reasonably dismissed (***Sainsbury Supermarkets Limited v Hitt*** *[2003] IRLR 23*).

98. The Tribunal accepted that the evidence showed that the respondent's managers were relying on the absence policy both to guide and validate their decisions. Mr Dolan specifically made reference to the claimant not maintaining acceptable levels of attendance and those levels were set out in the new attendance management policy. They came to believe that the claimant, ,because of his various chronic conditions, was unlikely in the future to be fit enough to give sustained and effective service as they put it but the catalyst

was the claimant's absences exceeding the trigger point set through the application of the policy: they did not rely on section 98(2)(a).

99. In these circumstances, we formed the view that the reason for dismissal more properly falls into the category of being an 'SOSR' one. This view also seems to us to be in accordance with the reasoning set out in the cases of ***Wilson*** and ***Ridge*** to which we were referred. The claimant's position appeared relatively neutral on this point recognising no doubt that they were advancing arguments that straddle both positions.

100. The first issue we will address is whether the policy was applied fairly. No issue was taken that there were any procedural flaws. The respondent's various managers took the various steps they did following the procedures set out in the policies. The claimant's argument related to two principal matters. The first was that the trigger point (DTP) was set too low and he was bound to fail. The second was that the policy required the review of the DTP at various stages and the failure to recognise that some absences were intimately connected with his disabilities meant that the trigger point was not reviewed upwards as the process progressed. Specifically he argued that some absences such as absences for dental treatment should have properly have been considered as such and discounted either as 'DAL' (in essence for treatment of the disability or disability related matter) or as disability absences.

101. We considered this issue first namely what should count towards the trigger and what should not. The first thing to observe is that the policy does not prevent all disability absences from being considered but allows some absences to be wholly discounted as disability adjustment leave or DAL. This is dealt with at paragraph 17 of the policy (JBp76). It relates to time off for disabled jobholders who are fit for work to have time off for medical appointments and hospital treatment '*related to the management of their disability*' This could be read quite restrictively arguing perhaps that a dentist's surgery is not a hospital but there is no suggestion that the respondent's managers took such a view. It appears that when an absence is recorded by a manager in the AMDB database they 'tick' a category for the absences and if it clearly related to the disability it is recorded as such. There are common

categories for non EA absences and the dispute focussed around the proper recording of the claimant's absences for dental treatment.

102. The claimant had dental treatment in December 2015 and April 2018 the last treatment leading to 2 days recorded absence. The claimant says that the requirement to have this dental work arose from his diabetes and we have no reason to disbelieve him. The respondent's occupational health report dated 2 November 2016 (JB p53) makes reference to him having gum problems as a consequence of his diabetes and this suggests to us that such problems might arise as a direct result of the condition. The policy is not as clear as it could be. We noted that Dal was given for eye treatment in July and it is difficult to understand why, in principle, dental treatment would have been treated differently. It may be that a distinction was made between the actual day off for treatment and a subsequent day off for recover was included (JBp234). It seemed to the Tribunal that such dental treatment is arguably within the terms of the policy and should have been discounted if the treatment had actually lasted over two days. In the end however the reclassification of these two days would not have had much impact as the claimant would still have breached the DTP at a point when he had 24 days absence (or is discount allowed 22) in the running 12-month period (JB p248).

103. The claimant also argued that the trigger for failing the SIP period was his 11 days' absence for a respiratory tract infection. He contended that he picked up the virus in hospital when having his eye operation and it should be discounted as it was related to/connected with being in hospital because of one of his disabilities. We noted that the respondents Occupation Health providers had given advice that he was not more susceptible than others to picking up infections in the first instance although his recovery time might be slower than the recovery of those without disabilities. In addition, we did not accept that the claimant could pin point that it was the hospital where he picked up what is a common infection. It could as easily have been contracted at work, on public transport and so on.

104. The claimant's argument that some account should have been taken about his slower recovery rate had some merit but in a situation where absences wholly

attributable to EA (or disability absences) are counted we are not convinced that even if this was recognised by Mr Dolan and a couple of days discounted for the purposes of the triggering of the breach that it would have prevented the DTP being triggered and all the absences being considered. It would have still led to the situation where he would not have 'passed' the SIP period which in turn would have led to an evaluation of whether the business could continue supporting his absences.

105. Where the claimant has a stronger argument, in our view, is in the assertion that the recording of the reason for absence was somewhat mechanistic and unsophisticated with limited categories and perhaps did not assist the manager properly characterise absences which were intimately bound up with disability to be recorded as such. However, the respondent's position was that this system produces what could be described as somewhat 'raw' data which managers can then assess through reading the Minutes of the return to work meetings and keeping in touch notes and in consultation with the employee. We considered that it would be a difficult and onerous task to expect a manager to make what could possibly be a quite sophisticated assessment over the telephone when noting an absence although it should be clearer to those looking at the data that they need to look again carefully at the reasons for absence to ensure they are properly recorded as occurred here.

106. Looking back at the history of this matter we have some sympathy for the claimant who clearly feared that setting the DTP at 12 days (four days more than the trigger for other staff which was 8 days) would not provide sufficient leeway for him particularly if he had a major 'flare up' of his pancreatitis condition. This was an important issue for the claimant who had insight into his conditions. He was desperate to continue working despite his considerable health problems. He feared that triggering the process would in turn cause him stress which in turn would be likely to lead to flare ups with his pancreatitis, more absences and ultimately dismissal.

107. We examined the setting of the trigger points and in particular the initial DTP. It should be recalled that the new policy had been brought in to help reduce absences. The manager did not just make a calculation of how many estimated

days of illness relating to the claimant's three chronic conditions should be added to the base number of eight absences. He was constrained by the policy not to exceed a 100% uplift without authority. The policy also asked the manager to consider not only historic absences and the stability of the condition but also at that stage what the business could support. This latter question became crucial to the dismissal.

108. The respondents had in place a robust process to assist managers and in the claimant's case advice was sought from a specialist internal team called RAST as to what adjustments could be put in place to assist him at work and to advise about the levels of absence that could be tolerated. The setting of the DTP was also unsuccessfully appealed by the claimant. We noted the comment of one of the appeal managers, Ms L-J Marr, that she felt that the manager had set the DTP correctly at 50% because during the First Written Improvement period the claimant's absences did improve and he was below the DTP (JBp215).

109. Our one area of concern was that it was unclear why if the DTP could be raised to a higher level there was not more guidance around the issue of what the business could ultimately support. We assumed that that factor might change with circumstances for example if the level of work dropped but that a starting point was to consider the policy itself which was the expression of the respondent's position and it envisaged staff taking no more than 8 days a year and authority being needed to increase it above 100%. As Mrs Macaulay observed this was not a target to be aimed at and most staff would have had much fewer days absence. We concluded that team leaders and other managers would have been well aware of the high level of sickness absence and would be adopting a relatively conservative approach to setting a DTP on the basis that the policy had further built in safeguards to examine whether it was sufficient.

110. In the event it was clear that both Mr Dolan and Mr Ness concluded that even if the DTP had been set higher the level of the claimant's absences would have meant that he would have breached even an amended higher DTP and was

likely to have further absences during the remainder of the SIP period which had some time to run.

111. Considering this evidence in the round we concluded that setting such an initial DTP at this level was within the managers discretion and although hindsight showed it was too low to take account of general ill health there would still have been no guarantee that a higher level could have been justified or would have altered the eventual dismissal.

112. We then turned to consider if the respondents had acted within the band of reasonable responses by dismissing the claimant in these circumstances. Having come to the view that the process was by and large fair and the aims of the policy to ensure that absences were managed to allow the provision of an efficient service to the public we concluded that the dismissal was fair in terms of the law. The claimant's conditions were not going to improve. No further adjustments would have altered the situation and adjustments had been made to the working environment to assist the claimant. The harsh truth was that despite his efforts he was unlikely to be well enough to maintain long term a sufficiently low absence rate to fall within the standards set by the employer.

Discrimination Arising from Disability

113. We turned to consider the claim for disability discrimination. The relevant section of the Equality Act is section 15:

> ***15 Discrimination arising from disability***
> *(1) A person (A) discriminates against a disabled person (B) if—*
> *(a) A treats B unfavourably because of something arising in consequence of B's disability, and*
> *(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.*
> *(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.*

An employer has a defence if he can show that the policy is a proportionate means of achieving a legitimate aim.

114. We also considered the Judgment of the EAT in the case of ***Bray v London Borough of Camden*** *UKEAT/1162/01*. That case was similar on its facts to the present case in that the respondents argued that they had a statutory duty to process housing benefit and that if they ignored EA related absences it would undermine the sickness absence policy. That case did not consider the terms of the relatively recent protection added by section 15 and while it is a useful principle to consider it has more relevance when considering reasonable adjustments which we do later.

115. We were not referred to the case of ***HMRC V Whiteley*** *UKEAT/0581/12/MC*. That case also related to an employer's absence management policy where absences, in that case related to the disability of having severe asthma, were apportioned between those that were directly related to the condition which were discounted and those that were not. The Tribunal held that the employer had not discounted some absences which were directly attributable to the condition. The court at paragraph 14 made the following general observation:

> *"14. There are, in principle, at least two possible approaches to making allowances for absences caused by a disability that interacts with other ordinary ailments. One is to look in detail and with care and, if necessary, with expert evidence at the periods of absence under review and to attempt to analyse with precision what was attributable to disability and what was not. The alternative approach, which we anticipate will be of greater attraction to an employer, is to ask and answer with proper information the question: what sort of periods of absence would someone suffering from the disability reasonably be expected to have over the course of an average year due to her disability?"*

116. There are elements of the first approach in the policy but essentially the setting of the DTP is reflected in the second where we have found that there was a reasonable attempt to conduct such an exercise in setting the DTP.

117. Both agents agreed that the proper approach to be adopted was set out by the then President of Employment Tribunals Mr Justice Langstaff where he wrote at paragraph 26:

> *"26. The current statute requires two steps. There are two links in the chain, both of which are causal, though the causative relationship is differently expressed in respect of each of them. The Tribunal has first to focus upon the words 'because of something', and therefore has to identify 'something' - and second upon the fact that that 'something' must be 'something arising in consequence of B's disability', which constitutes a second causative (consequential) link. These are two separate stages. In addition, the statute requires the Tribunal to conclude that it is A's treatment of B that is because of something arising, and that it is unfavourable to B."*

118. Parties accepted that the claimant had been dismissed on account of his absence record and that these absences arose in consequence of his disability. The issue was then whether section 15(1)(b) was engaged and the respondent could demonstrate that "*the treatment is a proportionate means of achieving a legitimate aim".*

119. It should be kept in mind that procedural failings that may be relevant to the fairness or unfairness of a dismissal are not relevant factors when addressing the balancing exercise required by section 15.

120. The employers had looked at the claimant's particular circumstances. That was evidenced by the care which had been take throughout the process of decision making and appeals and the recording of information including the claimant's position. We also considered these circumstances and then the purposes of the policy. We bore in mind that the policy made allowances for his disability by way of wholly discounting treatment/appointments (DAL) and by allowing him more than the standard rate of absences before action was taken. In addition, there were various steps required by the policy, managers had discretion and appeals were allowed, and exercised, so that in short there

were a series of possible responses were available to take account of the claimant's particular circumstances.

121. There were only two alternative courses of action available to the employer here. One was to dismiss the claimant as he had breached the DTP or to tolerate the further absences perhaps by revisiting the DTP. We considered these matters carefully and concluded that the second alternative would have been likely to lead the breach of the policy and as there was no likelihood that the claimant's absences would improve. If they did not, then he would be once more facing dismissal in a short period. If ,as we did accept ,the respondents are entitled ensure an efficient service to the public and are required to set limits of absences given the difficulties such absences cause then set against the bleak prospects of any improvement dismissal was in our view an unfortunate but proportionate response. In these circumstances the claim under section 15 is also dismissed.

122. Finally, we turned to the claim for reasonabe adjustments. The duty arises from Section 20 of the EA:

> ***"20 Duty to make adjustments***
> ***(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.***
> ***(2) The duty comprises the following three requirements.***
> ***(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage."***

123. Section 21 is in the following terms:

> ***"(1) A failure to comply with the first ... requirement is a failure to comply with a duty to make reasonable adjustments.***

2) [The employer] discriminates against a disabled person if [the employer] fails to comply with that duty in relation to that person."

124. We were referred to the case of ***Griffiths v Secretary of State for Work and Pensions*** which looked at a claim for adjustment of a sickness absence policy which worked in much the same way as the respondent's policy appeared to. In that case the Court of Appeal held that policy was reasonably applied to a disabled person and that varying to policy to prevent a warning being given and to further extend absences were not reasonable adjustments.

125. In this case we noted that adjustments had already been provided in terms of the claimant's working pattern through the provision of additional breaks and the DTP was adjusted up by 50%.

126. When and in what terms a reasonable adjustment is applied is not an easy matter and the preferred approach is often to make a claim under section 15 (***General Dynamics Information Technology Ltd v Carranza*** *ICR 169*).

127. It was accepted that the claimant was a disabled person in terms of the Act. The absence management policy was referred to in order to identify the correct PCP which was submitted to be the requirement to attend work in accordance with the targets fixed by the policy. It was common ground that we had to look at the application of the policy to the claimant in the particular circumstances of his case. A hypothetical comparator was used namely someone who did not have the claimant's disabilities. The specific suggested adjustments were increases in the DTP's to prevent the substantial disadvantage which was said to be dismissal.

128. In the course of the evidence there was something of a moving target with the respondent's managers initial DTP being attacked and then it being argued that the DTP should have been increased, as it could have been, at various points to 100%. During the attendance management process, reference was made to an increase in the DTP to 80% (14.4 days) and 100% (16 days). The claimant in his evidence did not seem to rule out a tolerance of up to 30 days

which as Mrs Macaulay pointed out equates to an additional six weeks leave per year on top of any holidays and DAL.

129. The decision of Mr Dolan became the focus of the argument that he should have reviewed the setting of the DTP and concluded that it had been set too low despite the claimant's repeated protestations and requests for an increase. To an extent this argument was that the claimant's DTP should have been high enough to prevent the claimant ever falling foul of the absence management process. It ignores, however, that the starting point of the policy was not to ignore all EA related absences but to adjust out hospital appointments and treatment but still to weigh whether the business can cope with higher absences caused by a disability. In setting the DTP the managers had to consider the effect of the business (paragraph 6). We accepted that Mr Dolan had considered the full background although he had made an error in using the 'raw' data in the AMDB characterising absences. The corrected data was put to him in evidence and his position was that it would have made no difference to his decision as it was the quantity of the absences and likelihood of further absences in the SIP period that concerned him. He also considered the terms of the most recent OH report which commented that the claimant's condition would mean that his recovery from common ailments such as viral infections would be slower that of others. The only effect this had was to potentially push some of the absences into being regarded as 'EA' absences. This would present managers with an impossible task (even with OH support) to try and allocate some of the 'ordinary' absences' to EA absences. Mr Dolan was aware of the terms of the report from OH indicating the claimant's likely slower recovery rate. As mentioned before such absences could in any event be counted.

130. In arguing that because of the size of the organisation the claimant should have had the DTP set at 100% or higher seems effectively to be saying that all his EA absences should be discounted no matter how high. This would not be a reasonable adjustment in our view given the impact absence was having on the respondent. Irrespective of the size of the respondent it is entitled to run its services efficiently, within the budget set for it, and for the public good and

this means that such an open-ended tolerance of absences would not be a reasonable adjustment in these circumstances.

131. In any event it became clear in the evidence that a higher DTP would not have prevented the claimant being given a warning at a later stage and ultimately prevented the issue of dismissal having to be addressed.

132. Finally, let us conclude by saying that the Tribunal had nothing but admiration for the claimant's considerable determination to try to stay in employment despite having a number of serious conditions which caused him discomfort and pain on virtually a daily basis and there is nothing in this Judgment which is critical of those not inconsiderable efforts.

Employment Judge: **Ian McFatridge**
Date of Judgment: **09 October 2019**
Date sent to parties: **10 October 2019**