THE EMPLOYMENT TRIBUNALS

Claimant: **Miss L Hoggart**

Respondent: **Student Loans Company Limited**

Heard at: **Newcastle upon Tyne Hearing Centre (by CVP)**
On: **15th to 18th March 2021 inclusive**

Before: **Employment Judge Johnson**

Members: **Mrs B Kirby**
Mr A Lie

Representation:

Claimant: **In Person**
Respondent: **Mr D Stirrat (Solicitor)**
Mr A Pattie (In-House Solicitor)

RESERVED JUDGMENT

1. The claimant's complaint of unfair dismissal is not well-founded and is dismissed.

2. The claimant's complaints of unlawful disability discrimination are not well-founded and are dismissed.

REASONS

1. This hearing took place by way of CVP (Cloud Video Platform) from Monday 15th March to Thursday 18th March inclusive. The claimant conducted the hearing herself. The claimant gave evidence herself but did not call any other witnesses. The claimant asked questions of the respondent's four witnesses. The respondent was represented by Mr Stirrat (Solicitor) who called to give evidence Kerry Young (Line Manager), Ms Sue Trubshaw (Senior Team Manager), Ms Sarah Barton (Senior Team Manager) and Ms Lynn Wardrop (Operations Manager). The claimant and the four witnesses for the respondent had all prepared typed statements, containing all the evidence they wished to give to the

tribunal. There was an agreed bundle of documents marked R1, comprising an A4 ring-binder containing 234 pages of documents.

2. By a claim presented on 15th September 2019, the claimant brought complaints of unfair dismissal and unlawful disability discrimination. The respondent defended the claims. The claims arose from the claimant's dismissal on or about 18th June 2019, following a period of time during which the claimant's attendance at work had fallen below what the respondent considered to be acceptable levels. The claimant alleged that her dismissal was unfair and also that the dismissal and the respondent's treatment of her during the period leading up to the dismissal amounted to unlawful disability discrimination. The claimant alleged that her dismissal amounted to unfavourable treatment because of something (the absences) which arose in consequence of her disability. The claimant further alleged that the respondent failed to make reasonable adjustments which, if implemented, would have enabled her to remain in employment.

3. The parties had agreed a list of issues (R2) as follows:-

<u>Unfair dismissal</u>

1. What was the statutory reason for dismissal pursuant to Section 98 of the Employment Rights Act 1996?

2. Was a fair dismissal procedure followed by the respondent?

3. Did the respondent's decision to dismiss the claimant fall within the band of reasonable responses and as such was the dismissal fair in all the circumstances of the case?

4. If the dismissal was procedurally unfair, would the claimant, but for the procedural unfairness, have been fairly dismissed in any event?

<u>Disability discrimination (Section 15 Equality Act 2010 – Unfavourable treatment because of something arising in consequence of disability)</u>

1. Was the decision to dismiss the claimant as a result of something arising from her stated disability (ie were the absences which were taken into account in reaching the decision to dismiss, related to the stated disability)?

2. If the decision to dismiss was based only in part on absences related to the claimant's stated disability, did the disability related absences have a material effect on the decision to the extent that the dismissal can be said to have "arisen" due to her disability?

3. If so, was the decision to dismiss the claimant a proportionate means of achieving a legitimate aim in accordance with Section 15 (1) (b) of the Equality Act 2010?

Disability discrimination (Section 20 Equality Act 2010 – Failure to make reasonable adjustments)

1. Are the alleged failures to make reasonable adjustments time-barred in terms of Section 123 (1) (a) of the Equality Act 2010?

2. Did the respondent apply the provisions, criteria or practices (PCPs) as more particularly set out at paragraph 5.1 of the tribunal's case management summary of 27th November 2019?

3. If so did the PCPs applied put the claimant at a substantial disadvantage in comparison to non-disabled persons?

4. If so, in relation to each PCP did the respondent know or ought the respondent reasonably be expected to have known that the claimant would likely to be placed at a substantial disadvantage?

5. Would the asserted adjustments including those at section 5.2 of the tribunal's case management summary of 27th November 2019 have been reasonable to make in the circumstances?

6. Did the respondent fail to take such steps as it is reasonable to have taken to avoid the alleged substantial disadvantage?

The PCPs referred to at paragraph 5.1 of the tribunal's case management summary of 27th November 2019 were:-

(i) requiring the claimant to work in the migrant worker team (which the claimant says disadvantaged her because the nature of the work was difficult and more demanding);

(ii) requiring the claimant to work to targets;

(iii) requiring the claimant to work in a team or near Sue Young;

(iv) requiring the claimant to account for down-time;

(v) requiring the claimant to work at a monitor (which the claimant says disadvantaged her because she experienced headaches and dizziness).

The adjustments proposed by the claimant and set out in the case management summary referred to above are as follows:-

(i) allowing the claimant to work in Stephen Charlton's team, where the work was less demanding;

(ii) providing her with refresher training;

(iii) lowering the targets (the claimant said that in her previous team the targets had been lowered as a reasonable adjustment); the respondent did

eventually lower her targets in the migrant worker team, but she contends that adjustment should have been made sooner;

(iv) allowing the claimant to have down-time without having to explain or justifying herself ie to take herself away from her work area for five to ten minutes; the claimant said this was an adjustment that was in place when she was in her previous team but that it was not put in place initially when she was moved to the migrant worker team;

(v) providing the claimant with different tasks so that she could work away from her monitor and enabling her to move away from her monitor freely.

4. The claimant was employed by the respondent as a Student Finance Assessor, from April 2008 until she was dismissed with effect from 18th June 2019. It was accepted by the respondent that throughout her period of employment with the respondent the claimant was a competent and efficient worker during the time when she was in the office undertaking work.

5. The claimant has for several years suffered from a number of medical conditions, including depression and anxiety. The claimant described the side effects of her anxiety as including "sweating, becoming disorientated, numbness in my limbs, becoming unbalanced, falling and passing out plus severe headaches, vomiting and vertigo symptoms." The claimant described how those symptoms affect her concentration, which in turn impair her vision and increase the likelihood of panic attacks during the working day.

6. The claimant maintains that the respondent was fully aware of her health problems in 2009, when the claimant alleges she was bullied by her line manager, which led to an escalation in her depression and an increase in her absence levels. The claimant describes how her "work life" improved when she was moved onto a team led by Mr McGee, who arranged occupational health referrals for the claimant and who implemented the recommendations made by occupational health. The claimant has been prescribed anti-depressants since 2004, together with medication to control chest pains and erratic breathing.

7. At pages 76 – 81 in the bundle is a document headed "Attendance chronology for Lisa Hoggart". That document shows the claimant's attendance records from April 2008 through to her dismissal on 18th June 2019. The document describes in columns the date of the absences, the reason for the absences, the total number of days absent and the rolling percentage of total time lost in the previous twelve-month period. In March 2010 the claimant's absence record was 25%, in September 2012 it was 30%, in October 2012 it was 40%, in March 2015 27%, in September 2015 30%, in February 2016 32%, in October 2016 31%, in June 2017 35%, in August 2017 35%, in September 2017 40%, in November 2017 34%, in January 2018 30%, in October 2018 25%, in December 2018 38%, in March 2019 35%, in May 2019 34%. The unchallenged evidence from the respondent's witnesses was that in the twelve-month period up to and including the claimant's dismissal, her absence level was between 30% and 40%. This followed several years of poor attendance at a similar level. The claimant fully accepted the contents of that attendance chronology as being accurate in all respects.

8. The claimant was challenged by Mr Stirrat as to the reason for some of those absences. Mr Stirrat's point was that some of the absences were not related to the admitted disability of anxiety and depression. The tribunal accepted the claimant's description of her impairment, which was that at certain times her anxiety and depression were particularly severe, which in turn led to panic attacks during which the claimant suffered nausea, fainting, vertigo and severe headaches. The claimant's doctors explored whether she suffered from Fibromyalgia and also explored the possibility that her severe headaches in some way caused problems with her eyes. The tribunal saw no reason to attempt to separate out all of those symptoms. The tribunal was satisfied that by far the vast majority of her absences were related to the impairment which the respondent has admitted amounts to a disability.

9. During the course of the claimant's employment, the respondent implemented a sickness absence procedure dated 1st July 2015 (version 2) and an attendance management policy dated 1st August 2017. Copies of all three documents appear in the bundle.

10. In simple terms, those various policies are designed to encourage reliable attendance amongst all employees. Employees whose attendance record falls below the requisite standard are required to attend meetings at various stages of the policy, to discuss and consider the respondent's concerns about the attendance and to discuss what support may be made available to the employee so as to facilitate an improvement in attendance.

11. The policy recognises that employees will be absent from time to time and sets an acceptable standard of attendance at 2 instances of absence in any 6-month period, not exceeding a total of 7 days lost in any 12-month period. The policy states that the purpose of having those figure is to assist managers identify attendance problems early enough, in order to investigate. The policy sets out how important it is to have clear triggers in place and that those triggers are applied consistently throughout the company. The policy states that action will be taken according to the following triggers:-

    (i) 3 instances of absence (sickness and non-sickness) in the previous s6months (on a rolling basis) or

    - 8 days (60 hours pro-rata) or more (sickness and non-sickness) in the previous 12 months (on a rolling basis).

12. The process for managing non-attendance consists of 3 progressive stages, during which employees are encouraged to improve their attendance to the standard expected by the respondent. Attendance is managed by way of formal stages, comprising a formal attendance hearing and if there is insufficient improvement then a final formal attendance hearing/dismissal hearing. The policy states that the line manager will consider each situation on an individual basis and any decisions will be based upon "the relevant facts to ensure fair and reasonable treatment". This would include but is not exclusive to:-

- Whether the medical condition falls under the provision of the Equality Act 2010
- Whether the overall absence level has increased or decreased
- Whether the employee has provided consent to attend occupational health
- Whether the employee has taken all reasonable steps to improve attendance
- Whether the employee has complied with the attendance report and procedure

13. At a formal attendance hearing a line manager at a higher level than the employee and an HR advisor would address the following matters:-

- Allow the opportunity to explain any factors which may be contributing to high absence levels and any mitigating circumstances
- Discuss in further detail the reasons for absences and any appropriate means of minimising such absences
- Explore whether there are any internal or external influences impacting upon attendance at work
- Establish whether there are any underlying reasons for the high level of absence with a view to discussing how they may be overcome and how the company may be able to assist
- Consider any measures which could be put in place to minimise unplanned absences
- Consider any adjustments if required (including work patterns)
- Consider a referral to Occupational Health
- Determine sanctions to be applied until attendance meets the company standards. These are outlined in the attendance management policy
- Discuss the adverse effect unplanned absences have on the business
- Explain that the final formal stage, if triggered, may result in dismissal
- Agree a review in 12 months

14. At a final formal attendance hearing, a different senior manager and HR advisor will discuss and consider the employee's continued unacceptable attendance level, highlight the consequences of continued high absence levels and that this could lead to termination of employment. The nature of the meeting is to discuss all absences and recap on any previous actions taken under the attendance management procedures.

    If the manager decides that dismissal is not appropriate then the employee will remain at the final formal stage of the procedure and attendance levels will be monitored over the next 12 months until those levels return to the company's acceptable standard or better. If at any point during the 12-month period attendance continues to fall below the acceptable standard, then a further final attendance hearing will be arranged where dismissal will be a potential outcome.

15. An employee has the right to appeal against a decision imposed under the formal stages of the company attendance management policy where there is new information that was not available at the time to the manager who made the

decision and/or the employee believes that the hearing was not handled reasonably or in line with the company's policy/procedure.

16. The claimant's attendance chronology shows that she attended a stage 1 meeting on 14th June 2012, another stage 1 meeting on 20th March 2014, a stage 2 meeting on 9th December 2014, a stage 1 meeting on 18th March 2015, an informal review on 21st September 2015, a stage 1 meeting on 3rd February 2016 and a stage 2 meeting on 27th September 2016. At that stage 2 meeting, it was decided that the claimant should remain on stage 1 monitoring. That stage 1 was extended on 26th July 2017 and was followed by another formal attendance hearing on 8th August 2017. The claimant attended a final formal attendance hearing on 21st December 2017, where again a decision was taken to continue to monitor the claimant's attendance on a formal basis. There was a further formal attendance hearing on 14th March 2019, which again led to a decision that the claimant's absence should be monitored for a period of 12 months.

17. The claimant has not challenged the fairness of any of those hearings. The claimant accepted that her level of attendance was such that each relevant stage of the attendance management policy had been triggered. The claimant accepted that she could well have been dismissed at the final formal attendance hearing on 21st December 2017, due to her levels of absences as at that date. That hearing was conducted by Sue Trubshaw, who gave evidence to the tribunal. Ms Trubshaw confirmed that the main areas of discussion at that hearing related to the claimant's health issues. The claimant explained that her depression had become more acute and had been triggered by events in her personal life. The claimant explained that she had begun to suffer from headaches and vertigo symptoms and that she had three medical appointments to attend in January 2018, one of which was with a consultant. Ms Trubshaw explained how she had been unable to identify any further steps which would help the claimant to improve her attendance or cope better at work. The claimant's manager Mr McGee accepted that the claimant attended work "as much as she could" and he actively sought to persuade Ms Trubshaw not to dismiss the claimant. Having considered those matters, Ms Trubshaw decided that the claimant should not be dismissed but should remain at the final formal stage of the absence management procedure for a further year. During that time, the claimant's health issues and levels of attendance would be monitored.

18. Ms Trubshaw's decision at that stage was influenced by what she described as "a lack of absolute clarity on the reasons for the claimant's absences over the period of time under consideration." Ms Trubshaw accepted that the claimant suffered from an acute medical condition, namely her depression. However, the specialists who had been treating the claimant had not been able to establish a clear medical diagnosis. Ms Trubshaw's evidence at paragraph 32 of her statement was that she was in no doubt at that time that the claimant's level of attendances merited dismissal based upon a straightforward application of the absence management policy. The claimant's absence level had been between 30% and 40% over the previous 12 months and that in turn it followed several years of generally poor attendance. However, in view of the medical testing which was about to take place, Ms Trubshaw took the view that further monitoring was appropriate.

19. The claimant's levels of attendance did not improve over the next 12 months and Ms Trubshaw says at paragraph 36 of her statement that the claimant should really have attended a further final formal attendance hearing within the 12-month period from 21st December 2017. What actually happened, was that the claimant was invited to attend a formal attendance hearing (rather than a final formal attendance hearing) on 14th March 2019, again because her level of attendance had not shown the requisite level of improvement. From January 2018 the attendance levels were 30.38%, on 14th May 2018 28.08%, on 15th August 2018 20%, on 18th October 2018 25.38%, on 7th December 2018 37.69%, on 5th March 2019 32.31% and as at the formal attendance hearing on 14th March 2019, 34.74%. By 24th May 2019 the level of absence was 34.23% and the claimant was invited to attend a final formal attendance hearing on 18th June 2019.

20. In a letter inviting the claimant to that final formal attendance hearing appears at page 205 in the bundle and states as follows:-

> "As discussed at your recent return to work interview, your overall attendance level remains higher than the acceptable level as outlined in the company's attendance management policy. You are required to attend a final formal hearing on 18th June 2019. The purpose of this hearing is to discuss all absences and recap on previous actions taken under the attendance management procedures ie occupational health referrals etc. One possible outcome of this hearing could be the termination of your contract of employment. Please see attached report of your absences over the previous rolling twelve months (from the start date of your most recent absence).
>
> The "attached report" shows 6 separate absences from 15th August 2018 to 24th Mary 2019. Those absences were 3 days, 32 days, 47 days, 1 day, 5 days and 1 day."

21. The claimant attended the hearing on 18th June. Although she had been informed of her right to be accompanied and was aware of that right, the claimant had chosen not to be accompanied at the meeting. The meeting was conducted by Sarah Barton, a senior team manager within the respondent's operations section. Ms Barton took the claimant through her most recent absences in the previous 12 months and also referred to the claimant's earlier absence record. Ms Barton went through the occupational health records and discussed with the claimant the various reasons for her absences. The claimant has not challenged the accuracy of the minutes of this meeting, nor has the claimant challenged the fairness of the meeting. It is clear from reading the minutes that the claimant was given every opportunity to explain her absences and to provide any further information, medical or otherwise, which could assist the respondent in deciding whether any further steps could be taken to improve the claimant's level of attendance.

22. The claimant explained that an MRI scan in January 2019 had shown some "pressure on the side of my face" in respect of which further investigations were being carried out into the claimant's oxygen levels. The claimant indicated that there was a possibility she may suffer from Fibromyalgia and that she considered

her anxiety and depression caused her to suffer from vertigo symptoms which in turn led to her passing out on occasion. However, the claimant was unable to give any indication to Ms Barton that any additional tests may lead to another or a different diagnosis which in turn could lead to a change in medication or treatment which then would lead to a material improvement in her levels of attendance.

23. In her evidence to the tribunal, the claimant confirmed some of the matters she had raised during this meeting. The claimant suggested that her work in the migrant team section was more complex than in any other department and that this led to an increase in her levels of stress, which then triggered her anxiety and depression and led her to be absent from work. The claimant suggested that she be allowed to undertake "floor-walking" work, which she considered to be less demanding than working in the migrant workers team. The respondent's evidence was that the claimant had confirmed that she was one of the most experienced workers in the migrant workers team and thus more capable of undertaking that work than the other employees. The respondent's evidence was that the floor-walking tasks were equally demanding and that the claimant's level of attendance did not appear to change when her roles were changed. There appeared to be no connection between the type of work undertaken by the claimant and her levels of attendance.

24. The claimant indicated that she did not like working on Sue Young's team, because found that team to primarily comprise "females with strong personalities" which made her feel uncomfortable. Again, the tribunal found that there was no correlation between the team in which the claimant worked and her levels of attendance. The claimant indicated that working constantly on a computer monitor caused her to suffer from dizziness and headaches as did constantly working under bright lights. The respondent's evidence was that almost all of the work to be carried out involved working in the same place with the same lights and using the same kind of computers. The tribunal found that neither of these had any specific impact on the claimant's levels of attendance.

25. The respondent fully accepted that all of the claimant's absences were genuine, in that the claimant was genuinely unfit for work due to illness on each occasion. It was the claimant's longstanding ill-health and medical conditions that caused her to be absent from work for approximately 1 in every 3 working days.

26. Before the tribunal, the claimant challenged whether the respondent had properly calculated her absence record. On one occasion, the claimant had a week's holiday booked in December, which period of leave fell between two periods of absence. The claimant insisted that it was wrong of the respondent to categorise those absences as two instances, rather than one. The tribunal accepted the respondent's explanation that it was the total number of days absence in the rolling period that mattered and whether it was counted as one or two made no difference to the overall picture.

27. The claimant in her witness statement states, "I agreed my sickness levels were not acceptable but I disagreed with how they had been recorded and that my medical problems and disability were being dismissed. I was open and honest and explained that I had been receiving various treatment to find a diagnosis and

that the doctor had treated me for things like vertigo etc as a means of eliminating anything organic and that all my ailments were connected." The claimant stated that she was expecting to undergo further tests, the results of which should be available in approximately eight weeks time.

28. Finally, the claimant gave evidence to the tribunal about she found it difficult to have to "log-off" her computer every time she needed to take a break, or to report to her line manager when she needed to take a break, in each case related to her medical condition. The respondent's evidence was that all employees have to "log-off" when they leave their work station. Ms Young explained that she considered it important that the claimant tell her when she was leaving her workstation, in case something happened to the claimant when she was taking her break. The tribunal accepted Ms Young's explanation that there was a genuine reason why the claimant should be required to do this. However, Ms Young also stated that whenever the claimant left her place of work without logging off or informing her, then no criticism was made of the claimant nor was any sanction imposed upon her. That was accepted by the claimant.

29. Finally, the claimant complained that she was required to meet certain productivity targets while she was at work and she found it difficult to achieve those targets because her performance was adversely affected by her illness. The respondent's evidence, which was not challenged by the claimant and which was accepted by the Tribunal, was that the claimant's targets had in fact been reduced by 20% when compared to the other employees, again to accommodate the claimant's disability. The claimant accepted that she had been granted this reduction in target and that she had never been criticised or disciplined for failing to achieve her targets while she was at work. The respondent's only criticism of the claimant was that her levels of attendance were simply unsustainable.

30. Evidence was given to the tribunal by Sue Trubshaw and Sarah Barton about the impact upon the respondent's business caused by the claimant's absences. None of that evidence was challenged by the claimant. Sue Trubshaw explained that the claimant's role as an assessor of student eligibility for finance was important to the effective operation of the team and the results the team achieved. Those team members worked to individual targets and to a collective team target. The claimant's "unplanned absences would severely interrupt workflow results which immediately put pressure on her colleagues, both in terms of the volume of work allocated and which still needed to be completed and also with respect to the claimant's specific skills in migrant worker applications being missing from the team." Sarah Barton's evidence was that there was a negative impact on the team caused by the claimant's absences. Those absences resulted in a reduced capacity in the team meeting its targets and delivering the appropriate level of service. Ms Barton explained how capacity and work flow are key matters within the whole team and are subject to constant analysis and planning to ensure service delivery. Because the claimant's absences were irregular, it was "very difficult to plan in advance as the nature of the work we do requires delivery of a key service at a national level, which involves planning for and processing with a massive volume of individual matters, day by day." Ms Barton also referred to a "significant knowledge gap" whereby there is generally an effort made to ensure a balance of knowledge and experience across a given team so that colleagues can

support each other within the team. If specialist knowledge is regularly absent from the team, as in the claimant's case, it is often necessary for other team members to seek support from a different team. That has a knock-on effect and is disruptive to work flow and productivity overall in more than one team. The claimant's absences also adversely affected her own ability to keep fully trained and up to speed with the demands of her role, as there were frequent changes in policies, procedures and methods of working.

31. Having considered all of those matters, Ms Barton adjourned the meeting to consider all that had been said and to reach a decision. Ms Barton concluded that the claimant's high levels of absence did impact upon the operational efficiency of the company and could no longer be sustained in the longer term. Ms Barton considered that, despite having been given considerable support over a lengthy period of time, the claimant had been unable to demonstrate any improvement in her attendance, nor any likelihood of any significant improvement in the foreseeable future. As a result, Ms Barton decided that the claimant's employment should be terminated "due to unacceptable levels of absence".

32. The claimant was notified of that decision in writing by letter dated 24th June 2019, a copy of which appears at page 213 in the bundle. The claimant was advised of her right to appeal. The claimant submitted an appeal in a two-page letter which appears at page 214-215 in the bundle. That letter raises the same issues as the claimant had raised at the final informal meeting, but also alleged that Ms Barton's decision had been "pre-judged" because Ms Barton had with her at the meeting, pre-prepared letters confirming the dismissal.

33. The appeal was heard by Lynn Wardrop, Operations Manager, on 18th July 2019, by telephone. It was conducted by telephone at the claimant's request. Again, the claimant had chosen not to be accompanied. Ms Wardrop confirmed that prior to the hearing she had been sent a document pack containing all the relevant documents, including the claimant's letter of appeal. Again, the claimant does not challenge the fairness of the appeal hearing itself. The tribunal found from the minutes at page 217 – 223 that the claimant was indeed given a fair hearing and a reasonable opportunity to set out all of her grounds of appeal. Ms Wardrop's evidence to the tribunal was that she considered the appeal as a "review of the earlier decision" where her focus was on the claimant's specific points of appeal, rather than a complete re-hearing of the earlier decision. Having said that, it is clear that Ms Wardrop did consider everything that the claimant had put forward at the final formal hearing, together with those matters set out in her appeal letter.

34. Having considered everything said by the claimant, having examined everything that was considered by Ms Barton and having carried out a thorough review of the claimant's attendance record, Ms Wardrop concluded that "Lisa's case had reached the point whereby there were no clear prospects of her attendance improving, either in terms of the medical advice or on Lisa's own account of her health and progress. There were no immediate prospects of a diagnosis which might indicate any immediate or longer-term prospects of Lisa being able to improve her attendance. I do not think that Lisa herself thought that there were any prospects of her health or attendance improving. She did not ever suggest

this, or present it as part of her appeal against dismissal. Lisa understood that her absence levels were very high and very difficult for the company to manage. I think she also accepted that they were unlikely to improve in the future. I felt that the respondent had been response and accommodating to Lisa's health issues. Adjustments had been made and in place for several years. I think these appeared to be effective when Lisa was at work. I also felt that the organisation had shown a lot of historic leniency in the application of the absence management process, so as to allow Lisa every chance to improve her attendance."

35. Having carried out a thorough review of the claimant's attendance records, her medical information, Ms Barton's decision and the claimant's letter of appeal, Ms Wardrop's concluded that the original decision to dismiss the claimant was correct and the claimant's appeal was dismissed. That decision was confirmed in a letter dated 31st July 2019, a copy of which appears at page 224 – 225 in the bundle.

36. The claimant presented her complaint to the employment tribunal on 15th September 2019.

The law

37. The statutory provisions engaged by the claimant's complaints are set out in the Employment Rights Act 1996 (unfair dismissal) and the Equality Act 2010 (unlawful disability discrimination).

Unfair dismissal

Employment Rights Act 1996

Section 94 The right

(1) An employee has the right not to be unfairly dismissed by his employer.
(2) Subsection (1) has effect subject to the following provisions of this Part (in particular sections 108 to 110) and to the provisions of the Trade Union and Labour Relations (Consolidation) Act 1992 (in particular sections 237 to 239).

Section 98 General

(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) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this 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,
(b) relates to the conduct of the employee,
(c) is that the employee was redundant, or
(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

(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, and
(b) "qualifications", in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.

(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 merits of the case.

Unlawful disability discrimination

Equality Act 2010

Section 6 Disability

(1) A person (P) has a disability if--

(a) P has a physical or mental impairment, and

(b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.

(2) A reference to a disabled person is a reference to a person who has a disability.

(3) In relation to the protected characteristic of disability--

(a) a reference to a person who has a particular protected characteristic is a reference to a person who has a particular disability;

(b) a reference to persons who share a protected characteristic is a reference to persons who have the same disability.

(4) This Act (except Part 12 and section 190) applies in relation to a person who has had a disability as it applies in relation to a person who has the disability; accordingly (except in that Part and that section)--

(a) a reference (however expressed) to a person who has a disability includes a reference to a person who has had the disability, and

(b) a reference (however expressed) to a person who does not have a disability includes a reference to a person who has not had the disability.

Section 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.

Section 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.

(4) The second requirement is a requirement, where a physical feature 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.

(5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put 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 provide the auxiliary aid.

(6) Where the first or third requirement relates to the provision of information, the steps which it is reasonable for A to have to take include steps for ensuring that in the circumstances concerned the information is provided in an accessible format.

(7) A person (A) who is subject to a duty to make reasonable adjustments is not (subject to express provision to the contrary) entitled to require a disabled person, in relation to whom A is required to comply with the duty, to pay to any extent A's costs of complying with the duty.

(8) A reference in section 21 or 22 or an applicable Schedule to the first, second or third requirement is to be construed in accordance with this section.

(9) In relation to the second requirement, a reference in this section or an applicable Schedule to avoiding a substantial disadvantage includes a reference to--

(a) removing the physical feature in question,

(b) altering it, or

(c) providing a reasonable means of avoiding it.

(10) A reference in this section, section 21 or 22 or an applicable Schedule (apart from paragraphs 2 to 4 of Schedule 4) to a physical feature is a reference to--

(a) a feature arising from the design or construction of a building,

(b) a feature of an approach to, exit from or access to a building,

(c) a fixture or fitting, or furniture, furnishings, materials, equipment or other chattels, in or on premises, or

(d) any other physical element or quality.

(11) A reference in this section, section 21 or 22 or an applicable Schedule to an auxiliary aid includes a reference to an auxiliary service.

(12) A reference in this section or an applicable Schedule to chattels is to be read, in relation to Scotland, as a reference to moveable property.

(13) The applicable Schedule is, in relation to the Part of this Act specified in the first column of the Table, the Schedule specified in the second column.

Part of this Act	**Applicable Schedule**
Part 3 (services and public functions)	Schedule 2
Part 4 (premises)	Schedule 4
Part 5 (work)	Schedule 8
Part 6 (education)	Schedule 13
Part 7 (associations)	Schedule 15
Each of the Parts mentioned above	Schedule 21

Section 21 Failure to comply with duty

(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.

(3) A provision of an applicable Schedule which imposes a duty to comply with the first, second or third requirement applies only for the purpose of establishing whether A has contravened this Act by virtue of subsection (2); a failure to comply is, accordingly, not actionable by virtue of another provision of this Act or otherwise.

Section 136 Burden of proof

(1) This section applies to any proceedings relating to a contravention of this Act.

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

1. Impairment

Regulations may make provision for a condition of a prescribed description to be, or not to be, an impairment.

2. Long-term effects

(1) The effect of an impairment is long-term if--

(a) it has lasted for at least 12 months,

(b) it is likely to last for at least 12 months, or

(c) it is likely to last for the rest of the life of the person affected.

(2) If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur.

(3) For the purposes of sub-paragraph (2), the likelihood of an effect recurring is to be disregarded in such circumstances as may be prescribed.

(4) Regulations may prescribe circumstances in which, despite sub-paragraph (1), an effect is to be treated as being, or as not being, long-term.

3. Severe disfigurement

(1) An impairment which consists of a severe disfigurement is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities.

(2) Regulations may provide that in prescribed circumstances a severe disfigurement is not to be treated as having that effect.

(3) The regulations may, in particular, make provision in relation to deliberately acquired disfigurement.

4. Substantial adverse effects

Regulations may make provision for an effect of a prescribed description on the ability of a person to carry out normal day-to-day activities to be treated as being, or as not being, a substantial adverse effect.

5. Effect of medical treatment

(1) An impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities if--

(a) measures are being taken to treat or correct it, and

(b) but for that, it would be likely to have that effect.

(2) "Measures" includes, in particular, medical treatment and the use of a prosthesis or other aid.

(3) Sub-paragraph (1) does not apply--

(a) in relation to the impairment of a person's sight, to the extent that the impairment is, in the person's case, correctable by spectacles or contact lenses or in such other ways as may be prescribed;

(b) in relation to such other impairments as may be prescribed, in such circumstances as are prescribed.

6. Certain medical conditions

(1) Cancer, HIV infection and multiple sclerosis are each a disability.

(2) HIV infection is infection by a virus capable of causing the Acquired Immune Deficiency Syndrome.

7. Deemed disability

(1) Regulations may provide for persons of prescribed descriptions to be treated as having disabilities.

(2) The regulations may prescribe circumstances in which a person who has a disability is to be treated as no longer having the disability.

(3) This paragraph does not affect the other provisions of this Schedule.

8. Progressive conditions

(1) This paragraph applies to a person (P) if--

(a) P has a progressive condition,

(b) as a result of that condition P has an impairment which has (or had) an effect on P's ability to carry out normal day-to-day activities, but

(c) the effect is not (or was not) a substantial adverse effect.

(2) P is to be taken to have an impairment which has a substantial adverse effect if the condition is likely to result in P having such an impairment.

(3) Regulations may make provision for a condition of a prescribed description to be treated as being, or as not being, progressive.

9. Past disabilities

(1) A question as to whether a person had a disability at a particular time ("the relevant time") is to be determined, for the purposes of section 6, as if the provisions of, or made under, this Act were in force when the act complained of was done had been in force at the relevant time.

(2) The relevant time may be a time before the coming into force of the provision of this Act to which the question relates.

38. Section 98 of the Employment Rights Act 1996 imposes a burden on the employer respondent to satisfy the Tribunal as to what was its reason, or if more than one its principle reason, for dismissing its employees. The reason proffered must be one of those falling within sub-section (2) or “some other substantial reason” of a kind such as to justify the dismissal of the employee holding the position which this employee held. An employee who was dismissed due to a long-term absence or a series of short-term absences is frequently dismissed on the grounds of no longer being “capable” of performing his or her role, contrary to Section 98 (2) (a). Alternatively, where the recurring absences themselves are the reason for the dismissal and where a specific attendance policy has been triggered, the Employment Appeal Tribunal has indicated that “some other substantial reason” is the correct characterisation of the reason for **dismissal [Ridge v HM Land Registry – 2014 – UKEAT/0485/12].** In the present case, Mr Stirrat for the respondent asserts that “some other substantial reason” is the one relied upon by

the respondent, or alternatively a reason related to the claimant's capability. Whilst the difference in this case may be little more than a labelling exercise, it is important to establish the principles behind a dismissal of an employee where that employee's attendance record is said to be no longer acceptable.

39. There are a number of authorities which are now well recognised as giving guidance to the employment tribunal on the interpretation of Section 98 (2) and (4) in cases such as the claimant's. Those cases are as follows:-

Spencer v Paragon Wallpapers Limited [1977 ICR301]
BS v Dundee City Council [2014 IRLR1431]
East Lindsey District Council v Daubney [1977 ICR566]
HJ Heinz Company Limited v Kenrick [2000 IRLR144]

The basic principles established by those cases are as follows:-

- It is essential to consider whether the employer can be expected to wait any longer for the employee to return to work or to establish a satisfactory level of attendance at work. The tribunal must expressly address this question, balancing the relevant factors in all the circumstances of the case.

- Those factors include whether other staff are available to carry out work in the absence of the employee, the nature of the employee's illness, the likely length and frequency of the absences, the cost of continuing to employ the employee, the size of the employing organisation and the general unsatisfactory situation of having an employee on lengthy sick leave or who is frequently absent from work.

- A fair procedure is essential. This requires in particular consultation with the employee, a thorough medical investigation (to establish the nature of the illness or injury and prognosis) and consideration of other options (in particular alternative employment within the employer's business).

- The employee's opinion on his or her likely date of return, what level of attendance can be maintained and what work he or she will be able to perform, should be considered.

- In one way or another steps should be taken by the employer to discover the true medical position prior to any dismissal. Where there is any doubt, a specialist report may be necessary. The employer must take into account not only the employee's current level of fitness and attendance, but also his or her likely future level of fitness and level of attendance.

40. In the claimant's case, the tribunal found that the respondent had fairly, reasonably and properly considered each of those basic principles. The respondent had been more than patient and reasonable with the claimant's level of attendance over many months. The respondent had properly, fairly and reasonably followed its own absence management procedure. The respondent had frequently considered the claimant's views and had where appropriate sought

Occupational Health advice, together with information from the claimant's GP. The claimant had been given every opportunity to persuade the respondent that her level of attendance would improve and that the improved level could be maintained. The claimant herself accepted that she could not give any such assurance.

41. The Tribunal accepted the respondent's evidence as to the impact of the claimant's regular absences on the respondent's business. Again, the claimant did not challenge the respondent's evidence in that regard.

42. It was reasonable for the respondent to accept that the claimant's absences were all related to her diagnosed medical condition of stress, anxiety and depression. The other symptoms which from time to time occurred were likely to be related to those conditions. The tribunal found it likely that the claimant could have been fairly dismissed at the final formal attendance hearing which took place on 21st December 2017, but again the claimant was given the benefit of the doubt.

43. Looking at all the circumstances of this case, the tribunal was satisfied that a stage had been reached where the respondent could not reasonably be expected to wait any longer for the claimant to achieve and maintain a reasonable standard of attendance. In the absence of any genuine prospect of any such improvement, the tribunal accepted that some reasonable employers in all the circumstances of this case would have decided that the claimant should be dismissed. For those reasons the complaint of unfair dismissal is not well-founded and is dismissed.

<u>Unlawful disability discrimination</u>

44. The claimant alleges that her dismissal was unfavourable treatment because of something (her absences) which arose in consequence of her disability. Whilst the respondent sought to persuade the employment tribunal that some of the claimant's absences were not in fact in consequence of her disability, the tribunal was not persuaded by that argument. The respondent has conceded that all of the claimant's absences were because of genuine illness. The tribunal found that the reasons for each absence were inextricably linked with her depression, which the respondent has conceded amounts to a disability. Dismissal is undoubtedly "unfavourable treatment". The tribunal found that the claimant's dismissal was unfavourable treatment, that it was because of her absences and that those absences were as a consequence of her disability.

45. The tribunal then has to consider the question of whether the respondent's dismissal of the claimant in those circumstances was a proportionate means of achieving a legitimate aim in accordance with Section 15 (1) (b) of the Equality Act 2010.

46. The respondent's position in this case is that its dismissal of the claimant was indeed a proportionate means of achieving a legitimate aim and was thus "objectively justified". The respondent asserts that its legitimate aim was to have employees who can attend work and render effective and efficient service so that the respondent can manage its workplace and ensure delivery on service level agreements. The tribunal accepted that this was indeed a legitimate aim.

47. It is then for the respondent employer to discharge the burden of proving that, objectively viewed, its dismissal of the claimant was proportionate in all the circumstances of the case. The role of the employment tribunal in assessing the employer's justification under Section 15 (1) (b) was considered by the Employment Appeal Tribunal in **Hensman v MOD [UKEAT/0067/14/DM]:-**

> "The role of the employment tribunal in assessing proportionality is not the same as its role when considering unfair dismissal. In particular it is not confined to asking whether the decision was within the range of views reasonable in the particular circumstances. The exercise is one to be performed objectively by the tribunal itself. The tribunal must reach its own judgment upon a fair and detailed analysis of the working practices and business considerations involved. In particular, it must have regard to the business needs of the employer."

48. The Court of Appeal said in **Hardys & Hansons PLC v Lax [2005 ICR1565]:-**

> "It is for the employment tribunal to weigh the real needs of the undertaking, expressed without exaggeration, against the discriminatory effect of the employer's proposals. The proposal must be objectively justified and proportionate."

49. The Court of Appeal said in **O'Brien v Bolton St. Catherine's Academy [2017 EWCA-CIV-145**] that, whilst the test for unfair dismissal and the proportionality test under Section 15 of the Equality Act are different, where the tribunal is dealing with a dismissal for long-term absence, considerations for the tribunal are realistically likely to be very similar. Lord Justice Underhill stated as follows:-

> "It would be a pity if there were any real distinction in the context of dismissal for long-term sickness, where the employee is disabled within the meaning of the 2010 Act. The law is complicated enough without parties and tribunals having routinely to judge the dismissal of such an employee by one standard for the purpose of an unfair dismissal claim and by a different standard for the purpose of discrimination law. Fortunately, I see no reason why that should be so."

50. In the present case, the claimant has not challenged the description given to the tribunal by Sue Barton and Lynn Wardrop as to the impact of her frequent and lengthy absences on her colleagues, the efficiency of the team and the respondent's performance generally. This is not a case of infrequent but numerous short-term absences. The claimant's absences were numerous and often lengthy over a sustained period of time and averaged 1 day out of 3. There was no prospect of that level of attendance improving in the foreseeable future. The impact of the claimant's absences was considerable. The Tribunal accepted that, to enable the respondent to meet its targets and ensure the appropriate level of service delivery, it would require an employee in the claimant's position to attain and maintain a much better level of attendance than that which the claimant had achieved or was likely to achieve. The Tribunal was satisfied that in all the

circumstances of the case, the respondent's dismissal of the claimant was proportionate and objectively justified.

51. The claimant's final allegation is that the respondent failed to make reasonable adjustments to remove the substantial disadvantage caused to her by the application of a number of provisions, criteria or practices (PCPs) applied by the respondent. The alleged PCPs, together with the adjustments sought by the claimant in respect of those PCPs, were set out by Employment Judge Aspden at paragraph 5 of her case management summary dated 27th November 2019. They are as follows:-

    (i) requiring the claimant to work in the migrant worker team, which the claimant says disadvantaged her because the nature of the work was more difficult and more demanding. The proposed adjustment would have been to allow the claimant to work in Stephen Charlton's team, where the work was less demanding;

    (ii) requiring the claimant to work to targets. The adjustment would have been to lower the target although the claimant accepted that in her previous team the targets had been lowered as a reasonable adjustment, that the respondent did subsequently lower her targets again in the migrant worker team but the claimant contends that this should have been made sooner;

    (iii) requiring the claimant to work in a team with or near Sue Young. The adjustment would have been to move the claimant to a team where Sue Young was not involved;

    (iv) requiring the claimant to account for down time. The adjustment would have been to allow the claimant to have down time without explaining herself so that she could take herself away from her work station for five to ten minutes without informing her supervisor. This again was an adjustment which the claimant said had been put in place in her previous team but was not put in place initially when she moved to the migrant worker team;

    (v) requiring the claimant to work at a monitor which the claimant says disadvantaged her because she experienced headaches and dizziness. The adjustment would have been to provide her with different tasks so that she could work away from her monitor and enabling her to move away from her monitor freely.

52. The Tribunal found that from time to time the claimant was required to work in the migrant worker team. The Tribunal accepted the claimant's evidence that she found this more demanding, but was not satisfied that the claimant was put to a substantial disadvantage by having to work in the migrant worker team. The claimant accepted that she had considerable experience working in that team and that, following her return to work after a lengthy absence, she quickly settled down into the routine of that work. The Tribunal was not satisfied that a transfer to a floor-walking role would have made any difference to the claimant's level of attendance. The substantial disadvantage alleged by the claimant was that a

more demanding role made it more likely she would suffer from stress and anxiety, which would trigger depression and which would, in turn, trigger her absences. The Tribunal was not satisfied that the claimant had shown this to be the case. The Tribunal found that the different roles made no difference whatsoever to the claimant's levels of attendance. Accordingly, there was no substantial disadvantage caused by working in the migrant worker team and therefore the duty to make adjustment did not arise.

53. The Tribunal accepted that the claimant was required to work to targets, as were all the other employees, whether disabled or not. The Tribunal found that the claimant's disability made it more difficult for her to achieve targets and thus she was more likely to be subjected to performance management and/or disciplinary proceedings for failing to achieve those targets. However, the respondent accepted that the claimant would find it more difficult to meet her targets and hers were therefore adjusted to 80% of the target set for non-disabled employees. The claimant hsd never complained that she was unable to meet that adjusted target. Furthermore, the claimant has never alleged that she was subjected to performance management or threatened with any kind of disciplinary proceedings because she had failed to achieve a target. The level of target applied to the claimant had no influence whatsoever on her level of attendance. The Tribunal was not satisfied that making any further adjustments to the targets would have made any difference whatsoever to the claimant's level of attendance. Again, the Tribunal was not satisfied that the claimant was put to any substantial disadvantage by having to work to the 80% target. The Tribunal was satisfied that the reduction to 80% was a reasonable adjustment in all the circumstances, after which the claimant was not put to any substantial disadvantage. The respondent was therefore not in breach of its duty to make any reasonable adjustments in that regard.

54. The respondent accepted that the claimant had been placed for some time in a team which included Sue Young. The claimant's explanation for her dissatisfaction with this, was that Sue Young was one of the females with a strong personality, who worked in that team. Sue Young was simply someone with whom the claimant did not really get along. However, working in the same team as Sue Young had not impact on the claimant's level of performance or upon her attendance record. The Tribunal was not satisfied that being asked to work in the same team as Sue Young could properly be described as a substantial disadvantage. Therefore, the duty to make an adjustment did not arise.

55. The Tribunal found that the claimant was required to account for "down time", in that she had to log off when she left her work station and log on again when she returned. That requirement applied to all employees, whether disabled or otherwise. The claimant explained that from time to time she had to urgently leave her work station and in those circumstances was either unable to log off or found it frustrating to have to do so. The respondent's evidence was that the claimant was never criticised, disciplined or threatened with disciplinary action on the occasions when she failed to log off or log on at the appropriate time. The Tribunal was not satisfied that the claimant was placed at any substantial disadvantage by having to do so. Nor was the claimant criticised or disciplined for

not doing so. There was no substantial disadvantage. The duty to make an adjustment did not arise.

56. The claimant alleged that she was required to work at a monitor which put her at a disadvantage because she experienced headaches and dizziness. The claimant alleged that she should have been allocated different tasks from time to time which would enable her to work away from the monitor. The claimant accepted n cross examination that she had never raised with her managers any concerns whatsoever about having to work in front of a monitor. The claimant had informed her Occupational Health physician that she had "no concerns with her work station" or with the overhead lighting. Of course, the overhead lighting would remain the same throughout the open plan office where the claimant worked. Almost all of the work taken by the claimant would involve using a monitor. If the respondent was unaware of any disadvantage or any potential disadvantage caused to the claimant, then it could not be expected to make any kind of adjustment. There was no evidence whatsoever put forward by the claimant to the effect that working without a monitor or with different lighting would have made any difference whatsoever to her attendance record. Again, the Tribunal was not satisfied that there was any disadvantage to the claimant by the imposition of these practices and accordingly the obligation to make adjustments did not arise.

57. For those reasons the claimant's complaints of unlawful disability discrimination are not well-founded and are dismissed.

EMPLOYMENT JUDGE JOHNSON

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON 13 April 2021