EMPLOYMENT TRIBUNALS

Claimant: **Ms M Ottewill**

Respondent: **Iceland Foods Limited**

Heard at: **Southampton** **On: 13 and 14 January 2025**

Before: Employment Judge Cuthbert

Representation
Claimant: Represented herself
Respondent: Mr the respondent Hignett (counsel)

REASONS

Introduction

1 These written reasons are provided following a request by the claimant in writing, made subsequent to oral reasons being given at the end of the hearing. Her claims for unfair dismissal and disability discrimination failed and were dismissed at the hearing.

Procedure at the hearing

2 The claim had originally been listed before a full Tribunal panel but owing to unavailability of members, the parties were informed by the Tribunal on 9 January 2025 that the Regional Employment Judge had decided that the case would be heard by a judge sitting alone.

3 At the start of the hearing, I asked the parties if any reasonable adjustments were required during the hearing. Both sides indicated that additional breaks may be needed. Breaks were taken at various points throughout the hearing, at appropriate stages including when requested or suggested.

4 I received a main bundle consisting of 239 pages. I was also provided with a 100-page supplementary bundle. I explained to the claimant that I would not be reading all of the documents and would read the documents which both sides had referenced in their witness statements and which were referred to during oral evidence. I explained that this meant that, if the claimant wanted me to read any additional documents, she would need to ask the respondent's witness about them during her cross examination of its witness. Neither party

subsequently made any reference to the content of the supplementary bundle during the evidence and so I did not read any of its content. References in square brackets below in these reasons, [xx], are to pages within the main hearing bundle.

5 There were just two witnesses – the claimant and Simon Barton, a manager at one of the respondent's stores and the individual who conducted most of the sickness absence procedures and dismissed the claimant. Each provided a written witness statement and gave oral evidence.

6 The hearing was originally listed for three days, at which point the issue of the claimant's disability had remained live.

7 On Day 1, after completing my reading, I heard oral evidence from the claimant in the morning before lunch, and then in the afternoon from Mr Barton. The oral evidence had concluded before the end of Day 1. I agreed with Mr Hignett's request that closing submissions should be the following morning, as the timetable had envisaged that these would take place on Day 2.

8 On Day 2, I heard closing submissions in the morning and gave an oral judgment and reasons in the afternoon. The claimant left the hearing during the course of the Tribunal delivering the oral reasons, declining the offer from the Tribunal of a short adjournment; her mother and her sister-in-law remained present on her behalf for the delivery of the rest of the oral reasons and dismissal judgment.

Issues to be decided

9 The issues to be determined had been identified at an earlier preliminary hearing with the parties before EJ Dawson and agreed (see point 11 on [34]) and were set out in the bundle at [42 – 46]. The issue of disability had been conceded by the respondent earlier in the proceedings. Those issues are reproduced as an **appendix** to these reasons. I reminded the parties of the issues at the outset of the hearing and neither party suggested that the issues were incorrect. I also drew the claimant's attention to the issues at the end of her oral evidence, before the start of her cross examination of Mr Barton which was to begin after lunch and reminded her of the issues again at the end of Day 1, prior to each party preparing their closing submissions.

Facts

10 I made the following findings of fact relevant to the issues to be determined. I explained to the parties that just because I had not mentioned something or made a finding upon it did not mean I had not had regard to it in reaching my decision.

11 In summary, the attendance management process and related decisions of the respondent, including to dismiss the claimant, were heavily documented. There were very few **relevant** disputes of fact in this case at all. At some points during the oral evidence, I moved the questions along, in accordance with

Rule 41, to avoid the hearing dwelling on matters which were irrelevant to the claimant's claims and to the issues as identified, mainly relating to historical matters around the claimant's employment. The disputes between the parties on the relevant issues were mostly about the **interpretation** of the relevant facts.

12 The claimant was employed by the respondent supermarket chain between 9 July 2007 and 12 July 2023 at its Westbourne Store. In 2021, the claimant was promoted from a customer assistant role to the role of supervisor, having previously been a trainee supervisor for a period before this.

13 Fifteen staff were employed in the Westbourne store - one store manager, one senior supervisor, one supervisor (the claimant) and twelve part-time colleagues.

14 The respondent had conceded during the Tribunal proceedings that the claimant was disabled at all relevant times by reason of the following medical conditions: epilepsy, pernicious anaemia, anxiety and depression.

15 The claimant had a relatively high level of sickness absence in the years immediately preceding her dismissal, in particular the following continuous periods:

(1) 25 August 2019 – 26 January 2020: stress at work

(2) 19 May 2020 – 5 October 2020: anxiety and depression

(3) 12 October 2020 – 19 October 2020: anxiety and depression

16 She was then continuously absent again from 15 September 2021 until her dismissal on 12 July 2023 (a period of approximately 22 months).

17 The respondent's attendance management policy was at [197 – 200]. It did not set out any minimum level of attendance and made clear that discretion in terms of decision-making lay with the managers dealing with the attendance management process in a given case.

18 The claimant's duties as a supervisor included working alongside the store manager and the wider store team, managing the team and day to day running of the store in the absence of the Store Manager. Simon Barton explained in evidence how these duties were covered during the claimant's absence, namely by supervisors from other stores having to work in the Westbourne store and that this created operational pressures in the stores in the area, for example around not having the necessary skill levels in place and around supervisors taking holidays. The claimant did not put forwards any evidence to the Tribunal to suggest that her duties were being covered in some other way or that they were not being covered at all, during the period of her absence. There were some references during the internal attendance

management proceedings, summarised below, to the claimant's substantive role remaining vacant. In the circumstances, I accepted Mr Barton's evidence that the claimant's absence had created operational pressures for the respondent.

The attendance management process – meetings and OH reports

19 The respondent held a number of attendance management meetings with the claimant during the 22-month sickness absence between 2021 and 2023. The absence was initially managed by the Westbourne Store Manager, James Tomlinson, and then, from around August 2022, by Mr Barton, who was the Store Manager of the Christchurch Store. Some of the meetings were re-arranged owing to the claimant's health or because her preferred companion (her mental health support worker) was unable to attend.

20 The respondent also obtained three OH reports from its providers during the process.

21 The key chronology is as follows in terms of attendance management meetings and OH reports, with points of particular note/relevance to the issues summarised.

(1) Meeting 25 October 2021

(2) Meeting 19 November 2021

(3) Meeting 31 January 2022 [72] – the claimant had completed a 6-week group therapy course and had started one-to-one counselling.

(4) Meeting 9 March 2022

(5) 28 April 2022 [77] – first OH report by Jenny McClean OH adviser. At that time the claimant had *"…started to make a good recovery"* Medication and group therapy sessions had helped. It was suggested by OH that she should be fit to return to work the following month on a phased basis. That return did not materialise.

(6) Meeting 20 September 2022 [100]. The claimant told Mr Barton that she had undertaken a therapy course for 8 weeks, then another therapy course for 6 weeks, and another for 8 weeks, and she was looking at further therapy, CBT, in the near future.

(7) 17 October 2022 [104] – second OH report by Haleema Wazir, trainee OH adviser. The claimant had her driving license revoked for medical reasons, which had impacted upon her mental health. She experienced anxiety symptoms when she left her house alone. Medication was not helpful and she was due to start a CBT course that week. She was experiencing severe fatigue. The claimant was

not fit for work and a return-to-work date remained unclear. There were no adjustments to be made by the respondent to enable a return to work.

(8) Meeting 22 November 2022 [116]. During the meeting the claimant said her body felt like a prison and there were no adjustments which the respondent could make. She had her third CBT session scheduled for the following day. Mr Barton told the claimant later in the meeting that she had been off for over a year with no foreseeable prospect of a return to work. The next meeting could result in the termination of the claimant's employment.

(9) 15 December 2022 – the respondent sent a list of questions to which the claimant responded in writing [125]. The claimant had undergone five sessions of CBT with the Retail Trust with her last session due on 17 January. The last few sessions had been *"helpful"* and the claimant was going to look into more CBT via a different route. Her current health had not changed and she was *"really struggling"* with her issues. Not much had changed, she said, apart from the CBT had been helping with her daily struggles.

First capability hearing – January 2023

22 On 17 January 2023, the first capability hearing took place, with Mr Barton [132]. The claimant had been informed by the respondent that her employment could be terminated at the meeting. The claimant explained that she was nearly through the current CBT course. A return-to-work date remained unclear. The claimant said would like to think she would be ready to return with a few further sessions of CBT, and gave a date for a potential return at roughly the end of February/March 2023. She was told by Mr Barton that the respondent was having to cover her ongoing absence and that it could not recruit for her role. A re-referral back to OH after some more CBT was proposed.

23 The possible return dates mentioned in the January 2023 meeting again did not materialise. The attendance management process subsequently progressed as follows:

(1) 9 March 2023 [140] – third OH report by Susan Phakrun, OH adviser (RN). The claimant had not had the further CBT which she had mentioned to the respondent at the January meeting, by the time of this report. The OH report stated that the claimant was currently waiting to start a course of CBT (in fact she had already carried out one course). The report advised that the claimant was temporarily unfit for work due to ongoing symptoms adversely affecting her normal day to day function. She was unlikely to be fit to return to work within the next 8 - 12 weeks (i.e. 2 – 3 months) whilst completing the envisaged (further) CBT course and until her symptoms had improved sufficiently, allowing her to function better

day to day. OH advised the respondent that the outlook for a return to normal activity must remain guarded until the claimant had completed the course of CBT.

(2) Meeting 24 April 2023 – a welfare meeting [145] – the claimant said to Mr Barton that she was on a waiting list for CBT and would hopefully have a date *"within two weeks"*. This was the further CBT which was first alluded to back in December 2022. The claimant hoped that she might feel well enough to return to work by the end of May/beginning of June 2023. Mr Barton said that he would aim for a further welfare meeting in four to six weeks to give the claimant time to start the CBT sessions.

24 Mr Barton made attempts to arrange a further welfare meeting during the next few months, which the claimant asked to reschedule on several occasions. Her further CBT did not commence within the two weeks which she had indicated in the April meeting. [147 – 150]. The possible return dates at end of May/beginning of June 2023, mentioned in the April 2023 meeting, also did not materialise.

Final capability hearing and dismissal

25 On 20 June 2023, the claimant was invited to a further capability hearing by the respondent and told, again, that one outcome could be the termination of her employment. The capability hearing was eventually scheduled for 12 July 2023.

26 On 7 July 2023, the claimant wrote to the respondent's HR team to say that she was due to start further CBT on 17 July 2023 [159]

27 In the lead up to the capability hearing, the claimant raised concerns with Mr Barton about a part-time supervisor role being advertised for the Westbourne store. She also complained that she was taken off some work schedules for the store. She claimed that this was evidence that the respondent had already decided to dismiss her before the hearing. The respondent provided evidence to the Tribunal that it was advertising for supervisor roles in a number of its stores in the area at the time, and said that this was not specifically the claimant's role being advertised. Mr Barton explained that the schedules issue was due to an error by a new manager in the store.

28 There was no evidence before the Tribunal that these matters established that the outcome of the claimant's scheduled capability hearing was pre-determined or that it was her role which was already being advertised, which would be a serious finding to make and would require clear evidence of the same, as opposed to merely circumstantial evidence for which the respondent had put forwards a potentially plausible explanation.

29 On 12 July 2023, the final capability hearing took place [161 -164] before Mr Barton. During the meeting, the claimant said that she had her first further CBT

session booked for the following week with *"a trainee therapist"*. The claimant was unable to say how many sessions were planned, when asked by Mr Barton. The claimant said in the meeting that the trainee had told her that there would be weekly sessions for now, they would see how it goes and if it helped, until she could see a trained therapist.

30 The possibility of a future phased return to work was discussed in very general terms, depending upon how the CBT went, but it was stated that there was nothing the respondent could do by way of adjustments at that time. The claimant was asked if her GP had offered any further view on her fitness for work when she had seen him recently, but she said that this had not been discussed with him (she had remained signed off throughout as unfit for any work).

31 During cross examination, the claimant accepted that she had completed three courses by this stage, with elements of CBT and that she then undertook a specific CBT course in late 2022 with Retail Therapies. The claimant also attempted to distinguish in her oral evidence between the CBT she had undertaken to this point (i.e. July 2023) not having been in person and the further CBT which lay ahead, at the point of dismissal, which she said was due to be in person. There was no evidence before the Tribunal to suggest that how the further CBT was administered was relevant to whether or not it was likely to succeed in rendering her fit for a return to work.

32 There were two adjournments during the capability hearing, whilst Mr Barton sought HR advice. He then decided to terminate the claimant's employment in light of her absences to date, the prognosis for return (i.e. no estimated date for return) and given that the respondent was having to cover her management role in the store, as the notes of the hearing record.

33 I accepted Mr Barton's evidence that he had thought about the potential for redeployment of the claimant to an alternative role, but that he had considered this was not appropriate because the claimant was too unwell to carry out work in any capacity, and so it had not been discussed with the claimant. There was no contradictory evidence. The claimant remained signed off by her GP as unfit for all work at all relevant times. The possibility of an alternative role was also not raised by the claimant or on her behalf at the time of her dismissal, by her or by her support worker who attended meetings with her. There was no evidence to suggest that she would have been fit to return in some other role.

34 Mr Barton's decision to dismiss was subsequently confirmed in writing on 17 July 2023 [168].

35 The claimant presented her ET1 to the Tribunal on 25 July 2023.

36 The claimant had submitted an appeal against her dismissal, but subsequently withdrew this on 3 August 2023, which she said was following advice from her treating therapists [170].

37 The claimant had not found new employment since she had been dismissed.

Relevant law

Unfair dismissal

38 The employer must show a potentially fair reason for dismissal within section 98 of the Employment Rights Act 1996 (ERA). The respondent in the present case relies upon capability, a potentially fair reason for dismissal.

39 Section 98(4) ERA requires the Tribunal to determine whether the employer acted reasonably or unreasonably in treating that reason as sufficient reason for dismissal in accordance with equity and the substantial merits of the case.

40 In an unfair dismissal case, it is not for the Tribunal to decide whether or not the employee is capable of doing their job. Even if another employer, or indeed the Tribunal, may not have dismissed the employee, the dismissal will be fair as long as a fair procedure is followed by the employer and the dismissal falls within a "range of reasonable responses".

41 The test for the range of reasonable responses is not one of perversity - it is to be assessed by the objective standards of the reasonable employer rather than by reference to the Tribunal's own subjective views: *Post Office v Foley, HSBC Bank Plc v Madden* [2000] IRLR 827, CA. There are often a range of options available to a reasonable employer. As long as the dismissal by this employer falls within this range, the Tribunal must not substitute its own views for that of the employer, *London Ambulance Service NHS Trust v Small* [2009] IRLR 563.

42 The need to apply the objective standards of a reasonable employer, applies as much to the adequacy of an investigation as it does to other procedural and substantive aspects of the decision to dismiss, see *Sainsbury's Supermarkets Limited v Hitt* [2002] IRLR 23, CA. 27.

43 In deciding whether the dismissal was fair or unfair, the Tribunal must consider the whole of the process. If it finds that an early stage of the process was defective, the Tribunal should consider any appeal and whether the **overall** procedure adopted was fair, see *Taylor v OCS Group Limited* [2006] IRLR 613.

44 The authorities on dismissal for ill health capability give some guidance as to how the Tribunal should approach cases under s 98(4). The basic question to be determined, according to the EAT in *Spencer v Paragon Wallpapers* [1977] ICR 301 is whether, in all the circumstances, the employer **can be expected to wait any longer and if so how much longer**. The relevant circumstances, according to the EAT, include the nature of the illness, the length of the continuing absence and likely future length and the need of the employer to have done the work which the employee was engaged to do.

45 When considering whether this employer has acted as a reasonable employer might have acted, the Tribunal will take into account the steps that the employer has taken to inform itself of the true medical position by consulting with the employee and carrying out a reasonable investigation (*East Lindsey District Council v Daubney* [1977] ICR 566). See also *Lynock v Cereal Packaging Limited* [1988] IRLR 510 (EAT).

46 An employer will normally not act reasonably unless it investigates fully and fairly and hears whatever the employee wishes to say. The Tribunal will also take account of whether the employer took reasonable steps to consider suitable alternative employment.

47 In looking at all these factors specific to ill health cases, in accordance with the more general guidance above, the Tribunal must not substitute its own view and must bear in mind that the question is whether the employer adopted an approach that might have been adopted by a reasonable employer, and that not all reasonable employers will adopt the same approach.

48 If a dismissal is unfair but the appropriate steps, if taken, would not have affected the outcome, this may be reflected in the compensatory award, *Polkey v A E Dayton Services Ltd* [1987] IRLR 503, HL. This may be done either by limiting the period for which a compensatory award is made or by applying a percentage reduction to reflect the possibility of a fair dismissal in any event. The question for the Tribunal is whether this particular employer (as opposed to a hypothetical reasonable employer) would have dismissed the employee in any event had the unfairness not occurred.

Section 15 Equality Act 2010 ("EQA") – discrimination arising from disability

49 Section 15 EqA says:

> *15 (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.*

50 The elements of discrimination arising from disability can be broken down as follows:

a. **Unfavourable treatment** causing a detriment/dismissal

b. Because of **"something"**

c. Which **arises in consequence of the claimant's disability**

51 The employer will have a defence if it can show that the unfavourable treatment is a proportionate means of achieving a legitimate aim – "objective justification"; or it did not know, and could not reasonably have been expected to have known, that the employee had the disability – the "knowledge defence".

The meaning of "unfavourable treatment"

52 There is no statutory definition of "unfavourable treatment". However, the Supreme Court gave some guidance in *Williams v Trustees of Swansea University Pension and Assurance Scheme and another* [2018] UKSC 65. It requires a Tribunal to answer two simple questions of fact:

a. What was the relevant treatment?
b. Was it unfavourable to the claimant?

53 Relevant authorities considered were *Basildon and Thurrock NHS Foundation Trust v Weerasinghe*: UKEAT/0397/14/RN, *Pnaiser v NHS England & Anor* UKEAT/0137/15/LA, and *Charlesworth v Dransfields Engineering Services Ltd* UKEAT/0197/16/JOJ. There was no dispute in the present case as to unfavourable treatment of the claimant or that such treatment related to disability.

Objective Justification

54 If the employee establishes that they have been treated unfavourably because of something arising from their disability, the employer will successfully defend the claim if it can prove that the unfavourable treatment is a proportionate means of achieving a legitimate aim. If the employer cannot demonstrate a legitimate aim, it will fail.

55 *Hardy & Hansons plc v Lax* [2005] EWCA Civ 846, [2005] IRLR 726 indicates that the test for objective justification is unlike the band of reasonable responses test. The principle of proportionality requires an objective balance to be struck between the discriminatory effect of the treatment and the needs of the employer. The more serious the adverse impact, the more cogent must be the justification for it.

56 It is possible for the different tests (range of reasonable responses for unfair dismissal and the test for objective justification under section 15) to produce different results: *City of York Council v Grossett* 2018 IRLR 746 CA and *O'Brien v Bolton St Catherine's Academy* 2017 ICT 737 CA.

57 The EHRC Code of Practice provides as follows:

> *4.28 The concept of 'legitimate aim' is taken from European Union (EU) law and relevant decisions of the Court of Justice of the European Union (CJEU) – formerly the European Court of Justice (ECJ). However, it is not defined by the Act. The aim of the provision, criterion*

or practice should be legal, should not be discriminatory in itself, and must represent a real, objective consideration. The health, welfare and safety of individuals may qualify as legitimate aims provided that risks are clearly specified and supported by evidence.

4.29 Although not defined by the Act, the term 'proportionate' is taken from EU Directives and its meaning has been clarified by decisions of the CJEU (formerly the ECJ). EU law views treatment as proportionate if it is an 'appropriate and necessary' means of achieving a legitimate aim. But 'necessary' does not mean that the provision, criterion or practice is the only possible way of achieving the legitimate aim; it is sufficient that the same aim could not be achieved by less discriminatory means.

4.30 Even if the aim is a legitimate one, the means of achieving it must be proportionate. Deciding whether the means used to achieve the legitimate aim are proportionate involves a balancing exercise. An employment tribunal may wish to conduct a proper evaluation of the discriminatory effect of the provision, criterion or practice as against the employer's reasons for applying it, taking into account all the relevant facts.

The duty to make reasonable adjustments

58 Section 20 EqA provides:

(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.

(2) The duty comprises the following three requirements.

(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled 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…

59 Section 21 EqA provides that a failure to comply with the first requirement is a failure to comply with a duty to make reasonable adjustments. Schedule 8 EqA also contains provisions regarding reasonable adjustments at work.

60 *Environment Agency v Rowan* [2008] IRLR 20 is authority that the matters a Tribunal must identify in relation to a claim of discrimination on the grounds of failure to make reasonable adjustments are:

a. the provision, criterion or practice applied by or on behalf of an employer;

b. the identity of non-disabled comparators (where appropriate); and

c. the nature and extent of the substantial disadvantage suffered by the employee.

61 The requirement can involve treating a person with a disability more favourably than those who are not disabled (*Redcar and Cleveland Primary Care Trust v Lonsdale* UKEAT/0090/12).

62 In terms of knowledge of disability and reasonable adjustments, the duty only applies if the respondent: knew or could reasonably be expected to know that the claimant had the disability; and knew or could reasonably be expected to know that the claimant was likely to be placed at a substantial disadvantage compared with persons who are not disabled (that is aware of the disadvantage caused by the application of the PCP).

63 There must be at least a prospect that the adjustment will avoid the disadvantage (*Leeds Teaching Hospital v Foster* - UKEAT/0552/10; see also *Noor v Foreign & Commonwealth Office* UKEAT/0470/10).

64 It is important to identify the correct PCP in a sickness absence management case (*Griffiths v The Secretary of State for Work and Pensions* [2015] EWCA Civ 1265).

65 Reasonable adjustments are primarily concerned with enabling the disabled person to remain in or return to work with the employer. Matters such as consultations and trials, exploratory investigations and the like do not qualify as reasonable adjustments (*Tarbuck v Sainsbury's Supermarkets Ltd* [2006] IRLR 664 and *Environment Agency v Rowan*; *Salford NHS Primary Care Trust v Smith* UKEAT/0507/10).

Direct disability discrimination – s13 EqA

66 Section 13 EqA concerns direct discrimination and provides:

> *13 Direct discrimination*
>
> *(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.*

67 The test requires a comparison exercise in order to determine whether the treatment complained of is because of disability. The requirements of an appropriate comparator are set out in section 23 EqA. Section 23(1) provides as follows:

23 Comparison by reference to circumstances

(1) On a comparison of cases for the purposes of section 13 …there must be no material difference between the circumstances relating to each case.

68 Section 23(2) EqA provides that where the protected characteristic is disability the comparison of the circumstances relating to each case for the purposes of section 13 **include** a person's abilities.

69 The EHRC Code of Practice at para 3.23 explains that although the circumstances need not be identical, the circumstances that are relevant to the way the employee was treated must be the same or nearly the same for the employee and comparator. Where there is no appropriate actual comparator, it is incumbent on the Tribunal to consider how a hypothetical comparator would have been treated: *Balamoody v UK Central Council for Nursing, Midwifery and Health Visiting* [2002] ICR 646, CA. 228.

70 In *Bennett v MiTAC Europe Ltd* [2022] IRLR 25, EAT, HHJ Tayler explained that, since in the case of direct disability discrimination, the relevant circumstances include a person's abilities, when assessing such a claim it is necessary to compare the treatment of the claimant with an actual or hypothetical person with comparable abilities. Thus, if the consequence of a disability is a reduction in a person's ability to do a job and that reduction in ability is the reason for adverse treatment, it will not be possible to make out a claim of direct discrimination because the appropriate comparator would have the same level of ability as the disabled person. HHJ Tayler explained that this is why the separate and discrete protection for discrimination because of something arising in consequence of disability as provided for by section 15 EqA is necessary. However, if stereotypical assumptions are made about the ability and/or likely future ability of a disabled person, then that can amount to direct disability discrimination contrary to section 13.

Closing submissions

71 Both parties provided written submissions and made oral closing submissions. I made clear, before the oral closing submissions, in particular in light of having read the claimant's written submissions, that my decision would be based on (i) the relevant issues and (ii) on the evidence heard by the Tribunal and to the extent that any submissions went beyond those matters, as the claimant's did in a number of respects, I would not be taking them into account in reaching my decision.

72 The relevant submissions are **summarised** as follows.

The respondent's submissions

73 Mr Hignett submitted as follows, in summary:

75.1 The complaint of direct discrimination was based on pure assertion. There was nothing in the evidence at all that pointed to the possibility that a hypothetical comparator would have been treated any differently to the claimant. The inference to be drawn was that a non-disabled comparator would have been treated in the same way the claimant was i.e. dismissed after a 22 month wait.

75.2 The claim for reasonable adjustment discrimination:

75.2.1 failed at the first hurdle. The PCP relied upon was not proven. There was no evidence the respondent required 'a minimum level of attendance'. On the contrary, the written and oral evidence before the Tribunal indicates every case of long-term ill-health is treated on its facts.

75.2.2 The claim also fails because the adjustment contended for would not mitigate the effect of the PCP.

75.2.3 Lastly, it would not have been reasonable for the respondent to have simply "waited for the claimant's CBT treatment to work" because (i) the claimant had already had numerous talking therapies (ii) the respondent had already waited 22 months and (iii) any further proposed wait was open-ended and non-specific.

75.3 In terms of the discrimination arising from disability claim:

75.3.1 the respondent accepted that it dismissed the claimant for something which arose from her disability, namely her sickness absence. the respondent accepted that dismissing the claimant amounted to unfavourable treatment. The issue for the Tribunal was whether dismissal was a proportionate means of achieving a legitimate aim.

75.3.2 It was clear that what occupied the mind of Mr Barton at the capability hearing on 12 July 2023 was the claimant's absence from work over 22 months and her inability to give a clear timeframe for when she would be able to return to work. This is a reason related to the claimant's capability and is a potentially fair reason for dismissal.

75.3.3 The tests for what constituted a fair dismissal and the justification test in s15 discrimination are different. Further, it was possible for the different tests to produce different results, *City of York Council v Grossett* 2018 IRLR 746 CA. However, *Grossett* concerned misconduct. As observed in *O'Brien v Bolton St Catherine's Academy* 2017 ICT 737 CA the two tests ought not to produce different results in the

context of a decision relating to the dismissal for long term sickness.

75.3.4 The overlap between the two tests necessarily meant that the same primary facts will be relevant to both tests. There was also plainly a link between the law of reasonable adjustments and the justification defence in s 15(1)(b). If an employer has complied with its duty to make reasonable adjustments or there are no adjustments that the employer could have made, that is a relevant factor to be taken into account in determining objective justification.

75.4 The factors relied upon by the respondent in seeking to show that the decision to dismiss was both fair and objectively justified were as follows. Consistent with the approach in *Hardys & Hansons plc v Lax* [2005] IRLR 726, CA at [31], [32], the Tribunal must consider all the factors and weigh them all in the balance in determining proportionality:

75.4.1 the claimant's absence was significant. the claimant had been absent from work for 22 months/ 341 working days between 15 September 2021 and 12 July 2023 [239].

75.4.2 the claimant's absence had and continued to have an impact on the respondent's operation in that for the duration of it, the respondent was forced to supply a replacement supervisor as cover using its resources from other stores, thereby impacting those stores resources (written and oral evidence of Mr Barton).

75.4.3 the respondent had sought to maintain a dialogue with the claimant throughout the period of absence. The evidence indicated attempts to arrange welfare meetings on average every 8 weeks. A significant number of welfare meetings did not take place due to the claimant's health. A smaller number did not take place due to the availability of the claimant's support worker.

75.4.4 the respondent had sought to inform itself as to the state of the claimant's health and the medical position. It took advice from occupational health in April 2022 [77], October 2022 [104] and in March 2023 [140 – 141]. The essence of the advice was consistent, namely that the claimant was not fit to return to work due to her various impairments and their effect and would not be fit until she had completed CBT Therapy. The OH advice was relevant and current at the time the decision to dismiss was taken. There was no obvious case for obtaining a fresh report prior to dismissing the claimant.

75.4.5 In line with its Attendance Policy, the respondent held two capability hearings (17 January 2023 and 12 July 2023) to consider the question of whether the claimant's employment should be maintained. The notes of those meetings were before the Tribunal and demonstrate the claimant was given a fair opportunity to say all that she wanted to say.

75.4.6 At the capability hearing on 17 January 2023 the claimant anticipated a return to work after CBT in Feb/ March 2023. Mr Barton agreed to wait until then [135]. However, this date for a proposed return came and went.

75.4.7 At the point the decision to dismiss was taken on 12 July 2023, the claimant had been continuously absent for 22 months, she remained unfit for work and it was not known when she would be fit to return to work and there was no clear date for her return to work ("potentially after a few sessions, maybe looking at setting a date to return," [161]).

75.4.8 Prior to the decision being taken to terminate her employment, the claimant had been appropriately warned that her continued employment was being considered, warned that termination was a possibility and advised of her statutory rights [127, 157].

75.4.9 In reaching his decision Mr Barton considered three alternatives to dismissal. Namely (i) adjourning the hearing to a new date (ii) redeploying her and (iii) a phased return to work. Re-deployment was not an option because the claimant was too unwell for any work. A phased return to work was only an option once the claimant was well enough to return to work. Adjourning the hearing to a new date was considered too uncertain.

75.4.10 It would not have been reasonable to have waited until the claimant underwent further CBT because the claimant had been undergoing talking therapies since 2021; she had had several courses of CBT already and these had not caused her to return to work. Additionally, the claimant was not able to offer clarity on when she would return to work if the respondent waited.

75.4.11 As agreed by the claimant in her evidence there were no further adjustments that the respondent could have made that would have enabled the claimant to return to work in July 2023.

75.4.12 In all the circumstances the respondent could not reasonably be expected to wait any longer.

76 Mr Hignett disputed the claimant's submission that the decision to dismiss was predetermined. He said the Tribunal had heard from Mr Barton and that he went into the meeting with an open mind with a number of possible options. He took HR advice and reached his decision on the facts.

77 He said that the claimant had attempted to characterise the wait for further CBT as "a few more weeks" but she was not able to say when she could come back or provide the level of certainty the respondent was entitled to call for. She showed no appreciation of difficulties from the respondent's perspective. She maintained that all would be well after CBT and kept moving the goalposts.

The claimant's submissions

78 The claimant submitted as follows (in summary) insofar as relevant to the issues:

78.1 She said that she had joined Iceland in December 2007, and consistently demonstrated high performance, excellent attendance, and a willingness to exceed expectations.

78.2 She said she maintained an impeccable record with no disciplinary actions or performance concerns before the onset of her health conditions.

78.3 The dismissal hearing was poorly managed, rushed, and failed to explore reasonable adjustments.

78.4 Her concerns were ignored, and the outcome appeared predetermined, as evidenced by the premature posting of her job role online and comments made by my store manager.

78.5 She said that redeployment would have been a fair option for both parties. She was not given time to get up to date medical notes or allow a few extra weeks to complete CBT sessions.

78.6 She did not have the opportunity to do face-to-face CBT sessions but rather was only able to do telephone sessions. There was no evidence to suggest that she would be permanently unable to perform her role. She would have been able to return with proper support.

78.7 The dismissal process lacked fairness and transparency. The hearing was poorly conducted, and there was no genuine consideration of her circumstances or potential for adjustments.

78.8 The decision to dismiss her, despite ongoing medical treatment and a recent OH referral, was unjust and premature.

78.9 She said she believed the decision to dismiss her was predetermined as evidence of an advertisement for her role and removal from schedules was evident.

78.10 She did not have any absences for the first 11 years of her employment. Her long-term absence was directly linked to her epilepsy. Mr Barton said that she was not offered adjustments or redeployment as he felt this was unnecessary.

78.11 The respondent had failed to fulfil its duty of care and obligations under the EqA by neglecting to provide reasonable adjustments and conducting an unfair dismissal process.

78.12 The dismissal process reflected a dismissive attitude toward the claimant's rights as a disabled employee.

78.13 She said that the evidence and legal arguments presented demonstrated that her dismissal was both unfair and discriminatory. She urged the tribunal to consider the lack of reasonable adjustments, the flawed dismissal process, and the respondent's overall disregard for her rights as a disabled employee.

78.14 She said she felt that she had lost everything and had been punished. She had loved her job and how she had been treated had knocked her confidence.

Conclusions

79 Applying the relevant law summarised above, my conclusions were as follows on the various claims.

Unfair dismissal

80 I found that the respondent had established that claimant was plainly dismissed by reason of her capability/ill health, namely a *potentially* fair reason for dismissal.

81 I then considered whether the dismissal was fair within the meaning of section 98(4) ERA. I reminded myself that a Tribunal must not substitute its own decision for the employer's decision as to whether or not it would have dismissed the claimant in the employer's shoes. The legal test is the broader, and more generous test for employers, of whether the employer's processes and decisions were within a "range of reasonable responses".

82 In terms of the key issues arising, applying the relevant law summarised above, I found as follows:

82.1 The respondent's investigation of the claimant's position, in terms of her long-term ill health, **was** within the range of reasonable responses. It met with the claimant on a number of occasions during her absence and in those meetings, the notes of which were in the bundle, she had sufficient opportunity to, and did, explain about her health situation to the respondent.

82.2 The respondent also obtained medical advice from its OH advisers about the claimant's health, prognosis and fitness for work. There were three reports. The respondent was sufficiently informed of the medical position when it made its decision to dismiss the claimant. There was no obvious basis or need for it to have obtained a further fourth OH report prior to dismissal, because the claimant's health remained substantially the same as at the time of the previous OH report in March 2023.

82.3 I then turned to Mr Barton's decision to dismiss the claimant, and whether this was within the range of reasonable responses, in all the circumstances and based on the information which was before it. I considered that some employers likely would have dismissed the claimant based upon her sickness absence much **earlier** in time than this respondent did – they would not have waited for 22 months, particularly given the significant periods of absence before the most recent 22-month period. Other employers, having waited as long as this respondent had, may have decided to wait until the further CBT had been completed before reaching any final decision. The range of reasonable responses test allows for scope as to what may be a reasonable response by an employer in the particular circumstances of a case and a Tribunal is not permitted to substitute its own decision as to what it would have done.

82.4 In terms of the actual decision arrived at by Mr Barton, I considered that the following factors were key:

82.4.1 the claimant's absence history and in particular the length of the claimant's, 22-month absence between 2021 and 2023;

82.4.2 the lack of any material progress or clarity in terms of a realistic date for a return to work. For the avoidance of doubt, the respondent did **not** need to be satisfied that the claimant was "permanently unable" to perform her role, as the claimant had submitted;

82.4.3 possible future return dates had been mentioned on a number of occasions during the earlier meetings and reports, but none had materialised;

82.4.4 during the claimant's absence, CBT therapy had already been undertaken by her without this bringing about a return to work;

82.4.5 there were no apparent adjustments which could be made in July 2023 which would enable the claimant to return to work; and

82.4.6 the claimant's role as a supervisor in the store had remained vacant during her absence and was being covered by staff from other stores – this had created operational pressures for the respondent.

83 I concluded that Mr Barton's decision to dismiss the claimant was one which fell **within** the permissible range of reasonable responses – the decision that the respondent could not wait any longer in the circumstances for the claimant to return to work was within that range. The fact of the claimant's relatively long length of service, of 16 years, did not take the decision outside the range of reasonable responses.

84 I also considered whether any failure to offer the claimant an alternative role took the decision outside the range of reasonable responses, in the circumstances. I concluded that it did not. The claimant was unfit for **any** role up to and including her dismissal and remained signed off as such by her GP. There had been consideration at various points in time of a possible phased return to her supervisor role if her health improved. There had been no suggestion made by the claimant, her support worker who attended meetings with her, by her doctor or by the respondent's OH advisers, that the claimant would have been able to return to work sooner if she were offered a different role, such as a demotion to the role of customer assistant, rather than dismissal.

85 I accepted that Mr Barton **did** *consider* the possibility of other roles at the time he made his decision to dismiss - he did not discuss this possibility with the claimant because she was unfit for any work. As such, any failure by the respondent to offer the claimant an alternative role did not render the dismissal unfair - it was reasonable in the circumstances for the respondent not to do so. It had considered and, in the circumstances, reasonably discounted the possibility of alternative work.

86 Having concluded that respondent's procedure and decision to dismiss the claimant were within the range of reasonable responses, the unfair dismissal claim therefore failed.

Discrimination arising from disability/section 15

87 The claimant was dismissed due to long term sickness absence. This was unfavourable treatment. Her long-term sickness absence arose from her

disability and so the unfavourable treatment was for a reason connected to the claimant's disability. This was not in dispute.

88 The remaining and key question was whether that treatment was objectively justified, namely whether it was a proportionate means of achieving a legitimate aim.

89 The respondent relied upon the aim of maintaining its workforce at work. I concluded that the underlying aim **was** clearly a legitimate one for an employer to have.

90 Furthermore, in the particular circumstances of the present case, the means taken by the respondent to achieve it i.e. the claimant's dismissal because of her lengthy sickness absence, were a proportionate means of achieving that aim in the circumstances. In particular, in the course of balancing the impact of the treatment of the claimant (dismissal) against the aim and needs of the respondent, the following matters were relevant (and these reasons overlap with the unfair dismissal claim):

90.1 The respondent needed to fill the claimant's role in the store, which it had been covering with supervisors from other stores. Her ongoing absence created operational pressures.

90.2 The length of absence to the date of dismissal was substantial – 22 months.

90.3 There was further CBT treatment ahead, but the previous CBT had not resulted in the claimant being able to return to work.

90.4 It was unclear at the time of dismissal how long the further CBT would take to complete, particularly given that the claimant was starting the process with a "trainee" therapist.

90.5 It was also unclear whether she would recover sufficiently to be able to return to work, given the history.

90.6 The respondent had declined to dismiss the claimant at the previous capability hearing in January 2023, when dismissal had been a potential outcome, but no return to work had occurred in the subsequent six months.

90.7 There were no reasonable adjustments which could have been made at the time, July 2023, to enable the claimant to have returned to work. There was in particular no evidence before the respondent or before the Tribunal that the claimant would have been able to return to work if she had been offered a different role with the respondent, such as a demotion to the role of customer assistant, rather than dismissal. As noted earlier, Mr Barton did consider the possibility of

other roles but discounted these as the claimant was unfit for any work.

91 In the circumstances, I was satisfied that dismissal was a proportionate response.

92 The claim for discrimination arising from disability therefore failed because the unfavourable treatment of the claimant by the respondent in connection with her disability was objectively justified in the circumstances.

Reasonable adjustments

93 The claimant's case as agreed in the issues was that she was placed at a substantial disadvantage due to her disabilities by a relevant provision criterion or practice (PCP) of the respondent requiring a minimum level of attendance on the part of its employees.

94 I accepted the respondent's submissions that there was no evidence of such a general PCP in place, or of what any "minimum level" of attendance was. Certainly there was nothing in its attendance management policy or in any other documents or evidence before the Tribunal to suggest that it had any specified or required minimum level of attendance; rather the respondent appears to have treated long term absence cases based on their individual circumstances, as in the claimant's case.

95 In the event that I had found that the respondent had applied a PCP of maintaining a certain level of attendance amongst its employees, for completeness I went on to consider whether or not it would have been a reasonable adjustment for the respondent to have awaited the outcome of the further CBT course which the claimant was due to commence, before deciding on her future employment. That was the potential adjustment which had been agreed in the issues.

96 As noted earlier, whilst some employers in these circumstances may have chosen to wait for their employee course of further treatment, and others may have already dismissed the claimant by this stage, I concluded that this respondent did **not** fail to make reasonable adjustments by dismissing the claimant before she undertook the further CBT, for the following reasons (which overlap with the section 15 claim and the unfair dismissal claim):

96.1 The respondent needed to fill the claimant's role in the store, which it had been covering with supervisors from other stores and this had created operational pressures.

96.2 The length of absence to date was very substantial – 22 months in the most recent period. Prior to this the claimant also had other lengthy periods of sickness absence in 2019 and 2020

96.3 It was evident that the respondent had considered the potential dismissal of the claimant at the earlier January 2023 capability hearing, but did not dismiss the claimant, who was completing an earlier CBT course, at that time. In the six months which followed that earlier hearing, the claimant had still not been able to return to work.

96.4 Various possible return dates had been mentioned earlier in the attendance management process and none had materialised.

96.5 Whilst there was a prospect that further CBT from July 2023 *might* have improved the claimant sufficiently to return to work, the chance of the potential adjustment reducing or eliminating the disadvantage is only one of a number of factors for a Tribunal to consider, in terms of the reasonableness of that adjustment.

96.6 The various talking therapies attempted by the claimant during the recent 22-month period of absence, including previous CBT, had **not** brought about sufficient improvement to allow her to return to work.

96.7 It was also unclear how long the further CBT would take to complete, particularly given that the claimant was starting the process with a "trainee" therapist – the number of sessions needed and whether further sessions would be needed with a qualified therapist was unknown at the point when the claimant was dismissed. There would have been various further uncertainties ahead for the respondent had it not dismissed the claimant.

97 The claim for reasonable adjustments failed. The identified PCP was not in place but in any event, it would not have been a reasonable adjustment in the circumstances for the respondent to have awaited the outcome of the further CBT before dismissing the claimant.

98 I had already considered and addressed the possibility of a further adjustment, by way of the possible redeployment of the claimant instead of dismissing her, within the scope of the section 15 claim above. This was in the context of whether or not the dismissal was objectively justified. For the reasons set out at paragraph 90.7 above, as well as the lack of any clearly identified PCP, any complaint of a failure to make reasonable adjustments, based on possible redeployment of the claimant in July 2023 rather than dismissal, would also have failed.

Direct disability discrimination

99 The question arising here was whether the claimant had been treated less favourably, by being dismissed, than someone else without the claimant's disability but whose relevant circumstances were otherwise materially the same?

100 There was no actual comparator identified in materially the same circumstances as the claimant. For this claim to succeed, the claimant therefore needed to be able to point to a hypothetical comparator with the same material circumstances, i.e. lengthy sickness absence and a prognosis such that there was a lack of any clear date for a likely return to work, but without her particular disabilities. The claimant would then need to show (by way of a prima facie case) that such an employee would have been treated more favourably by the respondent in those circumstances.

101 There was simply no evidence before the Tribunal to suggest that such a hypothetical comparator would have been treated more favourably by the respondent. It was clear that any employee with an equivalent lengthy sickness record and lack of any clear prognosis for a return to work (but without the claimant's particular disability) would **also** have been dismissed by this respondent, as the claimant was.

102 There was no less favourable treatment and so the claim for direct disability discrimination therefore also failed.

Conclusion

103 For the reasons set out above, the claimant's claims for unfair dismissal and disability discrimination failed and were dismissed.

Employment Judge Cuthbert

Date: 29 January 2025

REASONS SENT TO THE PARTIES ON
07 February 2025 By Mr J McCormick

FOR THE TRIBUNAL OFFICE

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

Appendix – Issues

Unfair dismissal

1.1 Was the claimant dismissed? Admitted

1.2 What was the reason for dismissal? The respondent asserts that it was a reason related to capability which is a potentially fair reason for dismissal under s. 98 (2) of the Employment Rights Act 1996.

1.3 Did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant? The Tribunal will
usually decide, in particular, whether:

1.3.1 The respondent genuinely believed the claimant was no longer capable of performing their duties;
1.3.2 The respondent adequately consulted the claimant;
1.3.3 The respondent carried out a reasonable investigation, including finding out about the up-to-date medical position;
1.3.4 Whether the respondent could reasonably be expected to wait longer before dismissing the claimant;
1.3.5 Dismissal was within the range of reasonable responses.
1.3.6 The respondent took sufficient account of the claimant's long and dedicated service including running a store for 15 days without a day off, when the claimant was a trainee and without an increase in pay at the end of 2019.

1.4 Was the decision to dismiss a fair sanction, that is, was it within the range of reasonable responses open to a reasonable employer when faced with these facts?

1.5 Did the respondent adopt a fair procedure?

1.6 If it did not use a fair procedure, would the claimant have been fairly dismissed in any event and/or to what extent and when?

2. Disability

[Admitted subsequent to the PH]

3. Direct disability discrimination {Equality Act 2010 section 13)

3.1 Did the respondent do the following things:
3.1.1 Dismiss the claimant.

3.2 Was that less favourable treatment? The Tribunal will have to decide whether the claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and those of the claimant. If there was nobody in the same circumstances as the claimant, the Tribunal will decide whether they were treated worse than someone else would have been treated. The claimant has not named anyone in particular who they say was treated better than they were and therefore relies upon a hypothetical comparator.

3.3 If so, was it because of disability?

3.4 Is the respondent able to prove a reason for the treatment occurred for a non-discriminatory reason not connected to disability?

4. Discrimination arising from disability (Equality Act 2010 section 15)

4.1 Did the respondent treat the claimant unfavourably by:
4.1.1 dismissing her.

4.2 Did the following things arise in consequence of the claimant's disability? The claimant's absence.

4.3 Was the unfavourable treatment because of any of that things? (Did the respondent dismiss the claimant because of that sickness absence)?

4.4 Was the treatment a proportionate means of achieving a legitimate aim? The respondent says that its aims were:
4.4.1 Maintaining the workforce at work;

The Tribunal will decide in particular:
4.5.1 Was the treatment an appropriate and reasonably necessary way to achieve those aims;
4.5.2 Could something less discriminatory have been done instead;
4.5.3 How should the needs of the claimant and the respondent be balanced?

4.6 Did the respondent know or could it reasonably have been expected to know that the claimant had the disability? From what date?

Reasonable Adjustments (Equality Act 2010 ss. 20 & 21)

5.1 A"PCP' is a provision, criterion or practice. Did the respondent have the following PCP:
5.1.1 Requiring a minimum level of attendance;

5.2 Did the PCP put the claimant at a substantial disadvantage compared to someone without the claimant's disability, in that the claimant was unable to work and so was dismissed?

5.3 What steps (the 'adjustments') could have been taken to avoid the disadvantage? The claimant suggests:
5.3.1 Allow time for the claimant's CBT treatment to work.

5.4 Was it reasonable for the respondent to have to take those steps and when?

5.5 Did the respondent fail to take those steps?