



## EMPLOYMENT TRIBUNALS

**Claimant**

**Respondent**

**Miss V Kleinova**

**v**

**Higgidy Limited**

**Heard at: Havant Justice Centre**

**On: 5,6,7 and 8 January 2021**

**Before: Employment Judge Rayner**

**Mr NA Knight  
Miss J Killick**

### **Appearances**

**For the Claimant:** In person

**For the Respondent:** Mr Soanes, Solicitor

## **Reserved Judgment**

1. The claimant was fairly dismissed by the respondent by reason of capability and/or for some other substantial reason.
2. The claimants claim of unfair dismissal is dismissed.
3. The claimant was not discriminated against for a reason arising from her disability, contrary to section 15 of the Equality Act 2010;
4. The claimants claim of disability discrimination is dismissed.

## **Reasons**

### **Summary and Background**

1. The claimant worked as a kitchen assistant for the respondent from 2016 until her dismissal in 2019.
2. By a claim to the Employment Tribunal dated 1 October 2019, the claimant alleged that she has been discriminated against on grounds of disability and that she had been unfairly dismissed. She also made a claim in respect of various payments.

3. The claimant stated in her ET1 that she suffered with depression and anxiety and that she was unfairly dismissed due to ill-health. She said her health condition had been badly affected by work issues over the last 3 years. She said her treatment at work was to blame for her current poor mental health. She alleged that there had been problems in the workplace, such as discrimination, bullying, harassment, which caused or contributed to the deterioration in her mental health. She stated she felt she had been targeted by management which lead to the unfair dismissal and that she should have been supported and understood earlier in her employment and offered a different position within the company. She also alleged that the company dismissed her on *untrue facts*.
4. The respondent denied that the claimant had been unfairly dismissed. They asserted that the claimant had been dismissed for a fair reason, of medical capability, or alternatively for some other substantial reason. The respondent relied on the fact that the claimant had been signed off on sickness absence for almost 9 months at the point of her dismissal, coupled with the claimant's refusal to return to work on the Blue shift, unless another employee was moved elsewhere to work.
5. The respondents considered that they had reached a stalemate situation whereby the claimant would not be able to return to work unless the respondent made changes to the workforce on Blue Night shift. The Respondents did not consider that this was reasonable, and determined that in any event the claimant was not able or willing to return to work. The respondents concluded that there would always be barriers to the claimant returning to work and had concerns about the risk to her health if she did so. They therefore dismissed her.
6. The respondent asserted that they had followed a fair and reasonable procedure in all the circumstances.
7. The respondent did not admit that the claimant was disabled within the meaning of the Equality Act 2010 in their response.
8. However, during the course of the hearing the claimant who is a litigant in person was asked a number of questions by the Employment Tribunal Judge in respect of her medical records and in respect of various occupational health reports which had been requested by the respondents whilst the claimant was employed by them. The medical records and the occupational health reports contained various comments about the claimant's anxiety and depression and about the medical treatment of her conditions.
9. During the course of questioning the respondent representative, Mr Soanes, took instructions and conceded that the claimant was a disabled person within the meaning of the Equality Act 2010 at the material times.
10. There is no issue in this case in respect of knowledge, because the respondents accept that they knew of the claimants conditions.

11. The claimants claim of disability discrimination is one of discrimination for a reason arising from her disability. In this case the claimant was dismissed following a lengthy absence and the cause of her absence was, for the most part, her poor mental health, caused by anxiety and depression.
12. The claimant was dismissed following a welfare meeting at which her health and her potential return to work was discussed. This led to a subsequent capability hearing to consider whether the claimant would be able to return to work, and if so when, or, if the claimant was not able to return to work, whether she should be dismissed. Following that hearing the claimant was dismissed. The claimant appealed her dismissal and her appeal was also dismissed.
13. On the 3<sup>rd</sup> of January 2020, a case management hearing took place before Employment Judge Livesey, who listed the case for hearing over 4 days, at that time to take place at the end of April 2020.

14. The issues in the case were agreed as follows

**Unfair Dismissal**

- 14.1. What was the reason for dismissal? The respondent asserts that it was a reason related to capability for some other substantial reason (the claimant's stated inability to return to the red, blue or daily shift) which are potentially fair, reasons for dismissal under section 98(2) of the Employment Rights Act 1996.
- 14.2. Did the respondent hold a genuine belief in the claimant's lack of capability on reasonable grounds and following as reasonable an investigation as was warranted in the circumstances? The burden of proof is neutral here but it helps to know the claimant's challenges to the fairness of the dismissal in advance and they are identified as follows
  - 14.2.1. The claimant alleges that occupational health indicated that she would have been fit to return to work if the workplace issues were resolved. She alleged that there was a particular difficulty with a colleague, DG, who had originally worked on the red night shift. He had been moved to the blue night shift during her absence. She did not want to work on the blue shift because of his presence, and did not want to work on the red shift which she had left. She did not want to work during the day. She alleges that DG ought to have been moved from the blue night shift, to the red night shift or one of the day shifts.
- 14.3. 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? The claimant alleges that the alternative to her dismissal was the moving of DG to a different shift.
- 14.4. Did the respondent adopt a fair procedure? The claimant does not challenge a particular aspect of the procedure that was followed in the case, but she alleges that she felt her dismissal was predetermined.
- 14.5. If it did not use a fair procedure, would the claimant be fairly dismissed in any event/and or to what extent and when.

**Disability**

- 14.6. Was the claimant a disabled person within the meaning of the Equality Act 2010. Whilst this was an issue at the case management hearing and whilst it remained an issue until the start of today's hearing is not an issue for us, as the respondent conceded that the claimant was disabled by reason of depression and anxiety at the material times. There was no issue in respect of the respondents knowledge in this case.

**Section 15: discrimination for a reason arising from disability**

- 14.7. The allegation of unfavourable treatment as something arising in consequence of the claimants disability falling within section 39 Equality Act is in respect of her dismissal. No comparator is needed.
- 14.8. Can the claimant prove that the respondent dismissed her because of the something arising in consequence of the disability? At this hearing, the parties agreed that the something arising was the claimant's sickness absence.
- 14.9. Can the respondent show that the treatment was a proportionate means of achieving a legitimate aim? It relies upon the following as to the business aim or need sought to be achieved:
- 14.9.1. The need to ensure a reliable and effective service among its workforce and to the reasonable necessity for the treatment and the issue of proportionality in the light of the available evidence. The respondent argues that dismissal was a proportionate response.
- 14.10. Alternatively, can the respondent show that it did not know and could not reasonably have been expected to know that the claimant had a disability. As set out above, the respondent did not challenge the fact that it knew or ought to have known of the claimants disability

**Remedies**

- 14.11. the number of matters were set out in respect of remedy including the need to determine compensation for loss of earnings, injury to feeling award of interest.
15. Due to the Covid 19 pandemic, the final hearing was adjourned and converted to a 2<sup>nd</sup> case management preliminary hearing on 27 April 2020. At that hearing it was confirmed that the question of disability remained in issue, but all other issues in the case were confirmed as being those set out in the initial case management order of Employment Judge Livesey.

**The hearing**

16. The claimant appeared as a litigant in person. The respondent was represented by Mr D Soanes, solicitor.

17. The claimant called 2 witnesses, Mr Zdenek Blaha, and Mr Pedro Javier Valero Fernandez to give evidence on her behalf.
18. The respondent called Ms A West, who made the decision to dismiss with another and Mr M Campbell, managing Director of the Respondents, who heard and dismissed the claimants appeal to give evidence for them. Both Ms West and Mr Campbell gave evidence over a CVP video link. All witnesses provided written statements and gave live evidence to the tribunal.
19. The claimant does not speak English as a first language, but at no time during either the case management hearing or at any other time during the course of the hearing did the claimant suggest that she required the assistance of an interpreter, and nor did the Judge or either panel member consider it was necessary.
20. During the course of the hearing, and following a request from the claimant the Judge confirmed that she could ask for assistance from Mr Blaha, who gave evidence for her, but who is also her friend and former partner, if she was wished to do so. She agreed that she would appreciate his help, whilst ensuring that she represented herself and continued to present her own case, and he therefore assisted her by helping her to raise questions and to formulate them and by suggesting additional questions, she may wish to ask.
21. At the start of this hearing the Judge confirmed with the claimant and the respondent that the issues in the case were as set out in that case management order.
22. The question of what the claimant was relying upon, as the *something arising* from disability was also considered. In this case it appears that the *something* is the claimant's sickness absence, although during the course of the hearing it became increasingly obvious that the claimant was also concerned about the impact on her health of returning to a workplace where she was required to work in close proximity the man we refer to as DG. The Tribunal therefore also considered whether or not this was something that arose from the claimants disability and, if so, whether or not it was unfavourable treatment requiring justification by the respondents, and if so whether it was justified.

### **Findings of Fact**

23. The claimant started work for the respondent as a kitchen assistant on 18 June 2015 and remained employed until her dismissal on the 13 July 2019.
24. The claimant's contract of employment states that the company reserves the right to require her to perform other duties within any department which are reasonably comparable and consistent with her capabilities from time to time.
25. The respondent is a food manufacturer based in Shoreham on Sea, West Sussex. According to the claimant's job description, the company has about 300

employees. The Respondent operates on a 24-hour basis and has two night shifts and two day shifts.

26. The claimant opted to work on a night shift and initially worked on the red night shift. The second night shift was known as the blue night shift.
27. Sometime in 2016 the claimant informed the company that she was suffering with depression for which she was taking medication and the company became aware that the guidance from her medical practitioner was that she should not be operating the machinery because of her medication. She was therefore allocated work in the packing room.
28. The respondents usually rotate staff around various areas of the production process because some types of work, such as the packing work, are considered to be easier than other areas. The packing area was seen by the respondents as being less mentally challenging and requiring a lower level of manual handling. Work in the packing room did not require the claimant to operate machinery.
29. The claimant remained working solely in the packing area until February 2017.
30. In February 2017 the respondents commissioned and were provided with an occupational health report by Leslie Marley.
31. This report confirmed that the claimant suffered from clinical depression. The report made reference to incidents within the claimant's childhood that may have been a cause of her underlying condition. The report stated that the matter had come to a head the previous year and explained the treatment which the claimant was receiving, which included medication and talking therapies. The report also stated that certain situations at work, including conflict and arguments, could exacerbate the symptoms as these reminded the claimant of her childhood.
32. The report referred to some side effects that the claimant was experiencing, including feeling dizzy at times with a lack of concentration. The report raised some other concerns about the claimant's health and then states, *I understand that she has been working in the packing room which suits both her physical and psychological needs. Her GP appears to be issuing repeated fit notes stating that she is not to operate heavy machinery whilst on medication. Unfortunately, unless the side-effects are addressed as suggested above, this will continue.*
33. OH stated that the claimant was fit to work in the packing room, and the respondent therefore decided not to move the claimant for the time being, and she remained working in the packing room. The respondent did make clear that this would be reviewed in the future.
34. As a night worker, the claimant was obliged to fill in a night worker's health assessment form, and she filled one in on 10 July 2017. The report stated that she had lately been suffering from daily depression and anxiety with dizziness, and that

since June 2016 she had been on long term medication and receiving counselling support.

35. In September 2017 the respondents decided to seek further advice from occupational health in order to consider whether or not the claimant could at that point have been moved back to duties other than or in addition to the work in the packing room. This would have required her to undergo some additional training. The respondents would have liked to have been able to rotate all staff around so that all staff had an opportunity to work in the packing area from time to time.
36. The respondents witness, Ms Abigail West suggested in her witness statement that the fact that the claimant was working in the packing department, which was seen as easier work, was probably causing some resentment amongst other staff.
37. She explained in her oral evidence that she was aware that there was some resentment from other members of staff at that time. She also stated that, because the adjustments had been made to the claimant's work as a result of the claimant's medical needs, that she, Ms West, was not prepared to discuss the reason for the claimant's move with other staff, but that she did make sure that they knew that it was for good reasons, and that she would not tolerate any adverse comments about or impact on the claimant at all. She says, and we accept that if she became aware of any negative comments, she dealt with them. We are satisfied that she did so sensitively and appropriately.
38. Ms West did not tell the claimant at this point that she was aware of some background resentment from some members of staff. She considered that it was unnecessary since she was dealing with it and was concerned that it would upset the claimant and may adversely affect her.
39. The claimant is critical of Ms West in this respect, and says she should have been told, but we agree with Ms West that since she, Ms West, was dealing with any issues that arose, it was not necessary to tell the claimant of them and we accept that it was reasonable for her not to do so because of her concerns about upsetting the claimant unnecessarily.
40. In September 2017, the claimant was referred to the company OH advisers again. She met with Dr Samantha Phillips, an occupational health adviser with Works Wonders on 13 September 2017 for a face-to-face consultation. The subsequent report notes that the claimant was referred for advice with regards to her fitness to undertake a full role as a kitchen assistant.
41. The claimant had asked to see the report before it was released and had then agreed to it being provided to the respondents.
42. The report states that the claimant raised a number of concerns about the workplace with OH. She said she felt that there were problems with bullying and discrimination amongst some of her colleagues, and that she could feel excluded. She gave examples of colleagues speaking in Polish, which the claimant did not

understand, when they were meant to speak English at work, and of them playing Polish radio.

43. The report also noted the claimant reporting symptoms of dizziness and of losing balance. The report concludes that was the claimant was fit to return to work. *She is reporting ongoing symptoms of stress and low mood. The report states. You may therefore wish to consider undertaking a stress risk assessment to determine the extent of the problem and if areas of concern are identified, to look at ways of addressing them. I would suggest you meet with Veronica to discuss and address her concerns.*
44. The report concludes that there are medical and workplace barriers to the claimant being able to undertake the full role of a kitchen assistant. Occupational Health stated that they considered it to be unlikely that the claimant would feel able to undertake her full role, unless her concerns with regards to work could be resolved, and that it was therefore difficult to give an indication of when the claimant may be able to return to her full role. The report concludes by stating that it is possible that the claimant would be considered to have a disability within the terms of the Equality Act 2010, as she had had symptoms for over 12 months and without medication, the symptoms may impact substantially on her normal activities of daily living
45. Following this report, the respondent took no steps to move the claimant back to the full role of a kitchen assistant and she remained working in the packing room.
46. The respondent accepted that they did not at this point discuss with the claimant what her concerns about the workplace were and nor did they undertake a stress risk assessment to determine the extent of any problems as suggested by the adviser.
47. Whilst, in retrospect, it may have been helpful to talk to the claimant about her concerns, there is no suggestion that at this point in time the claimant had any particular difficulties with her work in the packing room and on the basis of the information we have, she appeared relatively stable and content in her work over the next few months and there was no particular reason for the respondents to take any further steps.
48. In November 2017 the claimant suffered two bereavements of people close to her in a short space of time. She informed the respondent and told them that she had to go home to Slovakia to identify her father's body and deal with other matters. The claimant was quite naturally very shocked and upset about this, and told her employer so, whilst also saying that she was sorry for the convenience to the night shift. The claimant took time of work.
49. On 29 March 2018 and following a hearing of 25 March 2018, chaired by Darak Jarosinski, the claimant was issued with a first formal written warning in respect of her current attendance levels. Over the rolling year the claimant been absent from



work for a total of 11.5 days. These included her time dealing with the bereavement and her dealing with family matters in Slovakia.

50. The disciplinary outcome letter noted that discussion has taken place about the possibility of the claimant being trained to work in other areas of the business. Whilst the respondent appreciated the claimant had previously not felt well enough to work in other areas of production line, and whilst her GP had issued her with a number of fit notes stating this was the case, those fit notes had now lapsed and the respondent considered that therefore the claimant should now be trained to work in other areas of business. The letter stated that whilst the business took the needs of the individual into consideration, they also had to consider the needs of the whole team and therefore the claimant needed to be retrained in other areas of the Kitchen work. The letter stated that the claimant had the right appeal against the written warning.
51. Following the meeting the claimant submitted a statement of fitness to work for one month on 6 April 2018. She stated that her current fitness was not ideal for work due to regular panic attacks, anxiety was dizziness change of body temperature, irregular sleep and self-harming thoughts. The note also stated that the claimant should not work around machinery due to her medication.
52. On 10 April on receipt of the GP note and letter, Derek Jasinski, the claimant's shift manager on red nights, being concerned that the letter said the claimant must not work near heavy machinery, suggested that the claimant should move from the packing area into the washing up area, where she could work preparing and cleaning trays used for production, or that she could work on the portion scales on assembly. The claimant refused to move from packing and was then suspended on medical grounds.
53. On 11 April 2018 the claimant attended a meeting with Mr Trinder, the production manager and Julie Doherty, the company People Adviser. Following that meeting, a decision was taken to lift the medical suspension when the claimant confirmed that she had no issues working in the packing room, or near the machinery.
54. She therefore returned to work, solely in the packing area, where she remained. At the meeting, the respondent also discussed concerns that the claimant had about the other workers speaking in polish or listening to Polish radio, and it was explained to the claimant that the respondent could not guarantee who the claimant would work with, because they used agency staff as well as permanent staff.
55. On 7 May 2018 the claimant was notified that her appeal against the first written warning would take place on 14 May 2018. Part of the reason the claimant was appealing, was that she considered it unfair that the respondents had taken into account time she had of work following her bereavement.
56. Following the hearing, the respondents accepted that this period of time should not be taken into account and accepted her appeal. The first formal written warning was therefore rescinded and removed from her file.

57. Both these events indicate to us that not only did the respondent deal promptly and efficiently with formal matters of both discipline and grievance concerning the claimant, but that there was a willingness to recognise that mistakes had been made and to put right errors or mistakes.
58. In June 2018 the claimant raised a number of complaints about a range of issues with which she was concerned. Some of her complaints were about specific colleagues, some were about health and safety concerns. Some were in respect of equipment and some concerns arose from the difficulty staff were having due to the exceptionally hot weather.
59. The complaint was sent to Julie Doherty, who responded to the complaint using the letter the claimant had sent, annotating it with her replies in red ink. She provided responses where she could; set out the actions she could take in respect of some matters and asked the claimant for some further information in respect of other matters. She also indicated where she would be taking matters up with the health and safety manager and undertook to come back to the claimant when she had done so.
60. The claimant did respond to the request for further information in an email of 5 July 2018, providing a further two pages of comments. On 9 July 2018 Ms Doherty replied to the claimant in respect of the claimant's concerns about shoes and chiller jackets, telling her of the steps she had taken.
61. The last email in this chain is from the claimant to Miss Doherty. The claimant thanked Miss Doherty saying, *I would like to say again a massive thank you for your huge understanding and positive problem solutions.* She then said that she was formalising a complaint against her manager, over his disciplining her due to unexpected plans to travel abroad.
62. We consider that the claimant's thanks for Miss Doherty's understanding and positive solutions were both genuine and appropriate. We agree that Miss Doherty had dealt with a range of concerns and complaints from the claimant promptly and positively. We find that there was no need for a meeting to take place at that point. We are satisfied that the respondent looked into the matters and responded proportionately and promptly, taking action where necessary.
63. We find that the response from Julie Doherty was proportionate and reasonable; that it was a genuine attempt to address written concerns from the claimant and that the response shows that Ms Doherty took the concerns seriously.
64. Following this incident, a complaint was made about the claimant by a woman we refer to as DD, who was a team leader. The complaint was sent to Ms West and was signed by both DD and 7 members of the red night team. One of the people who signed was a male employee we refer to as DG. This was the person who the claimant later objected to working with on the Blue night shift.

65. The complaint was that the claimant showed a poor attitude towards her work, and other team members which could be categorised as bullying. Team members were refusing to work with the claimant and becoming stressed by her conduct. It was stated that the claimant was refusing to train new staff; was threatening in her vocabulary and that she had been saying derogatory things about the manager to the red team members.
66. At the point she made the complaint, DD had given in her notice and was due to leave the respondents employment shortly. The claimant, who became aware of the complaint from other employees telling her that DD had been asking others to sign the letter, was concerned that the complaint was motivated by a personal grudge against her, the claimant. The claimant was concerned that DD had been trying to whip up negative feelings against her.
67. The claimant made a complaint of her own, in response, on 20 July 2018. Her complaint was that DD had been mentally bullying her, had been showing unprofessional behaviour towards the claimant and that she was unfair, unfriendly and biased towards her. She complained about DD asking permanent members to sign a formal complaint about her; taking advantage of her position in knowledge that she would soon be leaving the company.
68. In response to questions from the panel as to whether or not Ms West, who dealt with the complaints considered whether it was possible that the complaints about the claimant arose from resentment of her working in a relatively easy area of the packing room, Ms West stated that she had considered this. Ms West also told us, and we accept, that having made some preliminary investigations she formed a view that the complaints were not being made for vexatious reasons, but that the people making them considered they had genuine complaints.
69. Without having determined whether the complaints made about the claimant were well founded or not Ms West did determine that the complaints were being made for genuine reasons, but she also decided that it was not desirable at that stage to subject the claimant to a disciplinary investigation and possible hearing. She recognised that the claimant had fragile mental health, and specifically wanted to try to find a solution which would not exacerbate the claimant's stress or anxiety, whilst easing the obvious tensions between members of staff on the red night shift.
70. She therefore decided to discuss the matter with the claimant and see whether or not the claimant would be prepared to move to the blue shift, so that she would no longer be working with the group of people who were complaining about her. She knew that DD, who had raised the complaint, would be leaving very soon, and hoped to deal with the poor relationship in the team as informally and as quickly as possible.
71. We accept that this approach was a genuine attempt by Ms West to avoid causing the claimant any further stress or anxiety. We find that at this point Ms West genuinely and reasonably considered that there might be a basis for taking

disciplinary action against the claimant and that she did not wish to subject the claimant to that type of procedure.

72. Ms West therefore met the claimant and asked her if she would be willing to move to the blue night shift as a solution. We find that it is right that this was the respondents preferred outcome, but we also find that this was not imposed on the claimant because she agreed to the move. We do accept that the claimant may well have felt that she had no choice, but she did agree.
73. We were all impressed by the evidence given by Ms West in this respect and find that she dealt with the matter in a compassionate way, seeking to avoid increasing the tension between staff and instead finding a solution which allowed the claimant to move to a different shift avoiding, she hoped, any additional stress for the claimant.
74. The claimant did move to the blue night shift and the move appeared to be positive for the claimant, insofar as the claimant was happy with the people she was working with and the work she was doing.
75. However, on 26 September 2018 the claimant wrote to the respondent to update them regarding her current mental well-being. Whilst she stated that her depression had been rising and that she had been struggling emotionally on a daily basis, she also said the blue night shift was *one of the best and the teamwork is massive. I enjoy being on this shift.* She went on, *my current mental well-being is so poor as not safe to be at work at the moment I have had a telephone interview with my GP and ask help from her to deal with the current situation. She advised me to be off work until I get better. She said I am not safe to be in the work environment.* The claimant was signed off work at that point and did not return to work prior to being dismissed by the respondent.
76. On 27 September 2018 the claimant wrote to Julie Doherty, in response to an email from Julie stating that the claimant had been booked off work. The claimant stated *thankyou for your prompt response. I appreciate your time and understanding. I'm very sorry for inconvenience, but it is very difficult to deal with my problems again but I must say that my blue shift is amazing and I love being and working with those people. Cornell is the best manager ever! My section leader Jose is very supportive and friendly she goes on to say, my dose has been recently increased to a hundred milligrams and I am finally starting my physiotherapy .* She states that she will have her first appointment in October 2018 in Brighton. She also referred to starting physiotherapy.
77. Whilst the respondent had not taken up the suggestion made in September 2017 by an earlier occupational health practitioner to carry out a stress assessment test with the claimant, we find that there had been no particular reason since then for the respondents to consider that the claimant's underlying stress and anxiety was being exacerbated or indeed caused by anything happening at work. Whilst the claimant's health remained fragile the workplace had been supportive of her by ensuring that she remained in the packing department and by dealing with the

various concerns that she had raised promptly and appropriately, with Ms West dealing with the complaints about the claimant in a way specifically to avoid any extra stress for the claimant. Although the respondent did not at any point during her employment formally recognise she was a disabled person within the meaning of the Equality Act, we find that they did nonetheless make reasonable adjustments for her, by taking the various steps which are set out above.

78. The claimant appeared to be contented with her work on the blue shift, and whilst she had raised concerns about DD, DD had at that point left the organisation.
79. Once the claimant was signed off sick by her GP in September 2018 with anxiety and depression, she was referred to occupational health again.
80. On 5 October 2018 Ms West replied to the claimant's latest fitness note suggesting that she arrange to meet the claimant off-site. Despite attempts by both Ms West and the claimant to find a suitable date, no meetings did take place until the welfare meeting the following year. This was due to delays for understandable reasons on both sides, and we make no criticism of either the claimant or Ms West.
81. The respondent asked for a further Occupational Health report and the claimant met with Pippa Crouch, Occupational Health adviser on 9 November 2018. Ms Crouch produced her occupational health report the same day.
82. In her report she stated that the claimant was suffering a major depressive disorder, also known as reactive depression with high levels of anxiety. She described the impact on the claimant and described the discussion she had had with the claimant about triggers which impacted upon her, and the treatment she was receiving. She stated that she considered that the claimant was receiving the appropriate level of support. She also stated that she had discussed the claimant returning to work, and that the claimant believed that it was unlikely that she could return due to her current health.
83. Ms Crouch considered that there remained some functional capacity considerations and that, at the point of the report, there was likely to be a significant and sustained impact on her ability to function on a daily basis. Within a workplace setting, she was likely to experience impaired cognitive function and an impact on her concentration, with her being more withdrawn and less engaged than usual.
84. The respondent had asked Ms Crouch three specific questions as follows;
  - 84.1. When did she [the claimant] feel able to recommence being trained? This is a significant requirement of her role.
  - 84.2. What further adjustments does she feel we should consider? She was unhappy with Red Night shift so we moved her, but this has not helped?
  - 84.3. Would Veronica consider a redeployment to days [the day shift] to help her health?

85. Ms Crouch responded to each question with the same response that, *at present Miss Kleinova is unfit for work.*
86. Miss Kleinova was critical of the report, and told us that she had said many things at the meeting which were not reflected in the report.
87. We consider that the report is a sensible and helpful report, and accept that it will not have covered everything that was said by the claimant. What it did do was to advise the respondents that, as of November 2018, the claimant remained unfit for work. The claimant herself, from the advice given, was not going to be able at that point in time, to return to the work place, in Ms Crouch's opinion, for the foreseeable future.
88. The claimant was in receipt of statutory sick pay, and she remained on sick leave. Despite a prognosis that the claimant was unlikely to return to work in the foreseeable future and despite there being no suggestions for any adjustments or other steps that may be taken to assist her, the respondent took no further action at this point under its absence policy, deciding instead to leave the claimant alone, so that she could recover her health. We find that Ms West considered that this was the best thing to do and that she hoped that , at some point the claimant would be able to return to work. The Claimant remained on sick leave and the respondent did not insist on any other meetings but left her to recover.
89. The claimant saw the report before it was sent to the respondents and she asked Ms Crouch to include a specific comment in the report. Whilst Ms Crouch declined to include it in her report, she did include it in her covering letter to the respondents.
90. The claimants comment was *I would only point out that company has a massive impact on my current absence due to long-term problems in the production like discrimination, bullying, unfairness, mistreating unprofessional ETC . They should take that responsibility and admit they have done nothing to sort it out, and so that they have a major number of leavers.*
91. We find that Ms West who gave evidence and Ms Doherty, whose emails to the claimant we have seen, both had addressed any specific concerns that had been raised by the claimant and others about the workplace. In the absence of any specific complaint about an individual or an event, there was nothing to investigate.
92. The claimant clearly did consider that the workplace was partly responsible for her ill health, and she may well have been right. However, the respondent had specifically asked OH what if anything they could do to, and what if any adjustments they might be able to make, to enable the claimant to return to work, and neither OH, nor the claimant had suggested that there was anything they could do.
93. We find that the claimant was less able to work in a high-pressured environment because of her mental health disability, and that the workplace was one where

there were daily stress factors, such as a need for speed on the production lines, a noisy working environment, and working conditions such as changes in temperature. A busy noisy food production factory is likely to be stressful for these reasons, and the allocation of the claimant to the packing room only, had been a sensible and effective way of removing some of the stressors from the claimant. However, by November 2018, the respondents were concerned that even that was not going to be sufficient to enable the claimant to return to work until her mental health improved. These concerns were supported by advice from OH.

94. During the course of the hearing, the claimant raised concerns that the respondent had not done enough whilst she was absent on sick leave to keep in touch with her.
95. The respondent did not agree. Firstly, Ms West explained that there was some concern that they should not contact the claimant too often because the purpose of her sickness absence was to allow her to recover. We accept that there was a genuine and well-founded concern that constant contact with the claimant could be seen by her and experienced by her as an unwanted intrusion.
96. Secondly, we accept the respondents evidence that in fact, they did contact the claimant on a number of occasions, particularly from January 2019, in order to try to arrange a meeting with the claimant. Ms West was willing to meet the claimant at a venue away from the respondent's workplace and several attempts were made to find a suitable venue and date which would suit both the claimant and Ms West. Both Ms West and the claimant delayed meeting on occasions for good cause, and we find the only reason that the meeting did not take place before the welfare meeting in March was that it had not been possible to arrange one, and that this was for genuine understandable reasons.
97. During the course of the hearing we were referred to some further emails from both the claimant and the respondents in respect of the question of contact. We find that the claimant was wrong to say that there had been no contact, and no proper attempts to keep in touch with her. We find that the emails showed that reasonable attempts were made by both the claimant and the respondent.
98. We find that whilst the claimant may now consider that there should have been more done to support her, at the time, her emails show that she was happy with the level of contact and support from the respondents.
99. We find that the respondents support for the claimant was appropriate and reasonable in the circumstances.
100. In any event, the respondent and the claimant did agree that the meeting would be helpful, and the respondent suggested that the meeting take the form of a welfare meeting.
101. Prior to the meeting taking place, the respondent commissioned a further occupational health report and referred the claimant to Ms Crouch again. The

claimant met with Ms Crouch on 27 March 2019 and Ms Crouch wrote her report on the same day.

102. In that report, Ms Crouch notes that since the last meeting the claimant had developed a chesty non-productive cough, which was being kept under review by the claimants primary care team. She states in her report, that this was unlikely to be due to any work issues, due to her continued absence, and was more likely to have been attributable to a cold or virus.
103. She said that during the assessment she held a frank and open conversation with the claimant about returning to the workplace. She recorded that there appeared to be several barriers which would need to be addressed before a return to work could take place. She states that she discussed with the claimant three potential scenarios as follows
- 103.1. A return to work on day shift. The claimant felt that this would not be a viable option for her, due to the financial and travel implications. We note that the day shift was paid at a lower rate than the night shift.
- 103.2. A return to work on the blue night shift. One of the people who had signed a letter of complaint about her had been moved onto the blue night shift whilst the claimant was absent. This would need to be taken into consideration as she was not comfortable working on the same shift as him. She said this was one of the reasons she was moved on to the alternate blue shift. This was a reference to DG.
- 103.3. A move back to the red night shift would not be viable as she felt she was happier on the blue night shift and had settled onto a shift.
104. In addition, Ms Crouch discussed with the claimant that there had been a significant amount of change in the respondents staff whilst she had been absent on sickness absence. They also discussed the financial impact of the claimant remaining absent on sick leave. The claimant was in receipt of statutory sick pay, which was due to end on 10 April 2019.
105. Ms Crouch then stated that in her opinion, the claimant was likely to be medically fit for work. Although the claimant stated that she remained depressed if the workplace factors could not be resolved. The factors that the claimant was referring to were first, that the claimant felt that the respondent had caused or contributed to her ill health and wanted them to recognise and be accountable for it. Secondly, the claimant reported various issues which she disagreed with in terms of policy and process, and thirdly, the claimant had felt unsupported during the sickness absence;
106. In conclusion, and in response to a specific question *does Veronika feel any closer to being able to return to work and whether there is anything else Higgedy can do to support her* Pippa Crouch responded: *at present Miss Kleinova is unfit for work in my opinion and will remain so until the workplace issues have been resolved. Based on the assessments today these issues are complex and entrenched and I believe it is unlikely that a resolution will be found and a return to work will occur due to this... In summary, Ms Kleinova has been absent from the*



*business for a prolonged period of time and there appears to be multifactorial and entrenched issues which are currently preventing a return to the workplace; whilst some of these are medically related the main issues appear to pertain to her perceptions of the workplace. I advise meeting the HR to further explore these to determine if a resolution can be determined, if not, then return to the workplace is highly improbable in my opinion.*

107. On 23 May 2019 the claimant met with Ms West, now Head of People, for a welfare meeting. This was an informal meeting and did not form part of the capability process, but was an opportunity for the claimant and the respondent to fully and frankly discuss how if at all, the claimant could return to work.
108. A full note was taken of the meeting, and whilst the claimant does not accept the notes as wholly accurate, she did accept that they are broadly reflective of the matters discussed.
109. The meeting started with the respondent setting out the reason for the meeting, noting that the claimant had been off work for 9 months and that in the most recent occupational health report concern that been raised about the likelihood of her returning to work for the respondents.
110. The claimant was asked whether she was planning return to work, and what the respondents could do to support her.
111. In the course of that meeting the claimant made reference to her horrible chesty cough and stated that she had been planning to come back after to Christmas, but that it was this cough prevented her from doing so.
112. She also confirmed that she did not wish to return to a day shift or be moved to a day shift and that she was happy working on nights. She confirmed that she did not feel that she could work with DG as he was one of the people who had signed a document complaining about her work.
113. Ms West also discussed the claimant's concern that the claimant felt that the respondents had contributed to her mental illness. The claimant said there had been lots of issues that she had raised, and nothing had been done about them. The claimant also suggested that she did not feel that she had been supported sufficiently whilst on sick.
114. Ms West acknowledged that the claimant felt that her views had been ignored and apologised the way she felt, and she also stated that she was sorry the claimant felt unsupported. She explained that too much contact with an employee who was off sick might be seen as having a negative impact on them.
115. We find that the discussion was a full and fair one and that the claimant had every opportunity to raise her concerns and that they were listened to by Ms West.

116. The occupational health report was discussed and the claimant was then asked what she felt the solution was.
117. The claimant stated that she was surprised to hear that DG had moved shift and that she knew why he had been moved. It was evident that DG being on the Blue shift was an issue for the claimant.
118. Following further discussion about the claimant's cough and causes of the claimant's illness and the claimant's current health Ms West asked the claimant about moving forward. She said *what would the dream outcome be?*
119. We find that Ms West wanted to find a way to bring the claimant back to work, and was willing to consider any reasonable options, or changes. She therefore talked further about DG and asked the claimant if she thought she would be able to work with him moving forward. The claimant's response was that he shouldn't be working at the respondents. The claimant said *I don't want him on my shift, that is a problem.*
120. Ms West explained that DG had been moved on to blue shift and that the claimant could nonetheless go back to work there, but the claimant did not consider that she could go back to work on a shift with DG.
121. At the end of the meeting Ms West was clear that the claimant would not return to the red shift ; would not move to the day shift and was not prepared to work on a shift with DG. This was a stalemate. The claimant stated that she wanted to return to work, but was not prepared to consider any of the options available for doing so.
122. She therefore explained to the claimant that they would now have to be a formal capability hearing.
123. The claimant remained on sickness absence and was invited to a capability meeting, by letter dated 23 May 2019. The capability hearing took place on 30 May 2019.
124. The meeting was attended by the claimant; Ms West, Mr Greg Trinder and a note taker. Ms West and Mr Trinder were the decision makers.
125. Ms West set out in some detail the chronology of the claimant's employment with the respondent and the various issues that arisen, including a chronology of her ill-health and the adjustments the respondents had made for her and her current sickness absence.
126. During the course of the meeting there was a full discussion about where the claimant might be able to work and the reasons for her move from the red night shift in September 2018, 8 months previously, to the blue night shift.

127. From the notes of that meeting, we find that the claimant was resistant to returning to work at all because she was concerned about people's behaviour. She said because of her experiences on the red shift she had lost her confidence and when she saw somebody being aggressive, it *brings it all back*. We find that this was a change from what had been said to the OH, or reported by the OH, or what the claimant had said to Ms West at the welfare meeting. The claimant was now suggesting that she could not return to work at all, because she was concerned that something would happen and her health would suffer.
128. We find that the respondent was justifiably concerned that the claimant did not wish to return to work because she was concerned that the workplace and her interactions at work could lead to a further deterioration in her mental health. We find that she may well have been justified in being concerned, but we also find that the respondent had taken all reasonable steps to assist the claimant in returning to work.
129. By April 2019 the claimant's views about the problems in the respondent's workplace were firmly entrenched. She blamed the respondents for the deterioration of her mental health, and she considered that any concerns she had raised had not been dealt with.
130. We find that the respondents had dealt sensitively and appropriately with any and all concerns or complaints that the claimant had ever raised. The difficulty, we find was not that the respondents had failed to deal with the claimant's concerns, but that they had not dealt with them in the way that the claimant, in retrospect, considered that they ought to have done. At the time the claimant expressed herself content to move to the blue shift, for example, and stated that she was happy with her manager. In retrospect with meeting with her employer's she raised a concern that her manager had on one occasion shouted at her when she returned from a break.
131. Although she had not had any issues with Mr DG herself, and although the only apparent issue was that he had signed a complaint letter against her, the claimant perceived and feared that she *may* be the subject of aggressive behaviour and therefore was adamant that she would not work on the same shift as him.
132. We find that the respondents were not to blame for the deterioration in the claimant's mental health, although we do find that the workplace and the claimant's interactions with others, exacerbated her poor mental health. This is a fact, but it is not a failing of the respondents, but a result of the nature of the work and the inherently demanding nature of the workplace itself.
133. Ms West expressed her concerns that given the claimant's concerns about the workplace, if she were to return to work, there must be a concern that her health would be damaged again. Mr Trinder also expressed his concerns about her resilience levels. He said that there always seemed to be something or someone to trigger the condition. His concern was how the claimant could possibly be in a

position in the near future to overcome the many issues she had raised as barriers. The claimant was asked whether there was anything the respondents had missed, misunderstood or misrepresented. She said, *now I'm sounding like I'm quite picky about where I want to be that there would be problems with DG and he would damage my well-being. He started that problem between us.*

134. She was asked whether she thought that working at Higgedy on blue nights would further damage her well-being and she replied, *yes it would put me back to my negative thoughts.*

135. Following the end of the meeting the claimant was dismissed and received a letter on 31 May 2019, setting out the reason for the dismissal. The respondents stated in the letter that having considered the full circumstances of the case, they had decided that having unsuccessfully explored all other options, such as the possible redeployment of the claimant, they could not continue to sustain the potential risk to claimant's health by having her return to work. They also considered that they were not in a position to sustain the high level of absence. They expressed sympathy with the claimant's position but considered that there were no further adjustments which they could make and that there was no other role that she could be redeployed into. Therefore, it was felt there was no alternative but to dismiss the claimant for capability. The claimant was informed of her right to appeal.

136. We find firstly that the matters set out were the true reasons for the claimants dismissal and were potentially fair reasons.

137. We find that the respondents decision to dismiss for capability was made following consideration of whether or not DG could in fact be moved. He was asked but he was not prepared to move to day shifts, because of the pay differences, and the respondent was not willing to move him back to the Red night shift because of the reasons for the move away in the first place.

138. We have considered whether or not this was an adjustment which the respondents ought to have made, both in the context of the claim of unfair dismissal, and as part of the consideration of the justification for dismissal.

139. The respondent's explanation to the claimant and their explanation to us is that DG had been moved from the red shift to the blue shift in order to remove him from a difficult situation with a fellow worker. The move followed a disciplinary investigation and a final written warning being issued to DG. This matter had occurred whilst the claimant was absent on sick leave and had not concerned her in any way.

140. We do not accept the claimant's characterisation of the situation as the respondent making a choice between her and DG.

141. We accept that the respondent did consider whether or not it would be possible to move DG just as they considered with the claimant whether it would be possible for the claimant to be redeployed. The situation in May 2019, was that DG had been moved whilst the claimant was absent on long-term sick and was now settled and working on the blue shift. The respondents had had no reason to consider that this might pose any problem for the claimant until she raised it at a welfare meeting.
142. In the respondent's view, DG could not be required to move to the day shift, since this would inevitably involve a reduction in pay. They decided that it was not appropriate for him to return to the red shift because of the conflict with a member of staff. There had been significant change in staff on that shift whilst the claimant was absent, but the claimant was still unwilling to return to the red shift either.
143. The claimant had not had any particular problem with DG whilst working. Her concerns were that he had signed a letter of complaint against her, and that she knew that he had been moved because of his behaviour to another female employee.
144. The claimant would not have been working alongside DG, or even near him, because he worked in the ovens area and the claimant did not.

### **The Relevant Legal Principles**

#### **Unfair Dismissal.**

145. The respondent asserts that the claimant was dismissed for a reason related to capability or for some other substantial reason.
146. The question for the tribunal unfair dismissal claim, is
- 146.1. whether the reason asserted by the respondent is the real reason for the dismissal, and if it is,
  - 146.2. whether it is a potentially fair reason and if it is
  - 146.3. whether the employer acted reasonably or unreasonably as treating the reason as a sufficient reason to dismiss, taking into account all the circumstances including the size and administrative resources of the employer's undertaking. This is to be judged in accordance with the equity and the substantial merits of the case.
147. One question which the Employment Tribunal must ask is whether the decision to dismiss was within the range of reasonable responses open to a respondent of the size and administrative resources of this respondent.
148. We remind ourselves that in unfair dismissal case the role of the employment tribunal is to assess the respondent's decision-making and not to consider what we might have done in those circumstances. An employment tribunal must not

substitute its own view of what may have been reasonable for that of the respondents.

149. The question for the tribunal is, did the respondent genuinely and reasonably believe that the claimant was incapable of doing the work of the kind she was employed to do in that she did not have the health, aptitude, physical or mental ability to do her job?
150. In assessing whether or not the decision to dismiss was within a band of reasonable responses, we must consider whether or not the respondent had obtained proper medical evidence; whether or not the respondent had consulted with the claimant and, whether such consultation was adequate and whether the respondent could have been expected to wait any longer before dismissing the claimant. See for example *Spencer v Paragon Wallpapers Ltd* 1977 ICR 301, EAT.
151. When considering whether an employer should be required to wait longer before dismissing the tribunal can take account of the range of factors, including but not limited to
  - a. whether other staff are available to carry out the absent employee's work
  - b. the nature of the employee's illness
  - c. the likely length of his or her absence
  - d. the cost of continuing to employ the employee
  - e. the size of the employing organisation; and
  - f. (balanced against those considerations), the unsatisfactory situation of having an employee on very lengthy sick leave.
152. In order to be reasonable, dismissal should only take place after a fair process. This will involve consultation with the claimant for a medical investigation to consider both the nature of the illness or injury and its prognosis, and consideration of any other options including suitable alternative employment within the employer's business for example.
153. In this case, because the respondents concede that the claimant was disabled by reason of her mental health impairment at the material times, the employer also needed to consider any additional obligations they may have had under the Equality Act 2010 (EqA). In its guide, Acas recommends that employers 'take a more sympathetic and considerate approach, particularly if the employee is disabled and where reasonable adjustments at the workplace might enable them to return to work'
154. Proper consultation with the employee should include discussions at the start of the illness, and periodically throughout its duration, and informing the employee if the stage when dismissal may be considered is approaching; personal contact with the employee; consideration of the medical evidence ;consideration of the employee's opinion on her condition; consideration of what can be done to get the employee back to work; consideration of offering alternative employment, if

any, in the employer's business and consideration of an employee's entitlement to enhanced ill-health benefits, if available.  
( See Mr Justice Phillipsin *East Lindsey District Council v Daubney* 1977 ICR 566, EAT for example)

155. Section 15 EqA, 'Discrimination arising from disability', provides that a person (A) discriminates against a disabled person (B) if:

A treats B unfavourably because of something arising in consequence of B's disability, and

A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

156. Section 15(2) goes on to state that '[S.15(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.' In other words, if the employer can establish that it was unaware — and could not reasonably have been expected to know — that the claimant was disabled, it cannot be held liable for discrimination arising from disability. In this case the respondent accepts that it had constructive knowledge of the claimant's disability. The respondent also accept that the claimant has been subject to unfavourable treatment by being dismissed.

157. In *Secretary of State for Justice and anor v Dunn* EAT 0234/16 the EAT (presided over by Mrs Justice Simler, President) identified the following four elements that must be made out in order for the claimant to succeed in a S.15 claim:

- a. there must be *unfavourable treatment*
- b. there must be *something* that arises in consequence of the claimant's disability
- c. the unfavourable treatment must be *because of* (i.e. caused by) the something that arises in consequence of the disability, and
- d. the alleged discriminator cannot show that the unfavourable treatment is a *proportionate means of achieving a legitimate aim*.

158. The discriminatory treatment must be as a result of something arising in consequence of the claimant's disability, not the claimant's disability itself. Or to put it another way, there must be something that led to the unfavourable treatment and this 'something' must have a connection to the claimant's disability.

159. In *Pnaiser v NHS England and anor* 2016 IRLR 170, EAT, Mrs Justice Simler considered the authorities, and summarised the proper approach to establishing causation under S.15. First, the tribunal has to identify whether the claimant was treated unfavourably and by whom. It then has to determine what caused that treatment — focusing on the reason in the mind of the alleged discriminator, possibly requiring examination of the conscious or unconscious thought processes of that person, but keeping in mind that the actual motive of

the alleged discriminator in acting as he or she did is irrelevant. The tribunal must then determine whether the reason was 'something arising in consequence of the claimant's disability', which could describe a range of causal links. This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.

160. Section 136 EqA essentially provides that once a claimant has proved facts from which an employment tribunal could decide that an unlawful act of discrimination has taken place, the burden of proof 'shifts' to the respondent to prove a non-discriminatory explanation. In the context of a S.15 claim, in order to prove a prima facie case of discrimination and shift the burden to the employer to disprove his or her case, the claimant will need to show
  - a. that he or she has been subjected to unfavourable treatment
  - b. that he or she is disabled and that the employer had actual or constructive knowledge of this
  - c. a link between the disability and the 'something' that is said to be the ground for the unfavourable treatment
  - d. some evidence from which it could be inferred that the 'something' was the reason for the treatment.
  
161. If the prima facie case is established and the burden then shifts, the employer can defeat the claim by proving either
  - a. that the reason or reasons for the unfavourable treatment was/were not in fact the 'something' that is relied upon as arising in consequence of the claimant's disability, or
  - b. that the treatment, although meted out because of something arising in consequence of the disability, was justified as a proportionate means of achieving a legitimate aim.
  
162. In order to prove an objective justification, the aim pursued by the respondent should be legal, should not be discriminatory in itself and must represent a real, objective consideration. As to proportionality, the measure adopted by the employer does not have to be the only possible way of achieving the legitimate aim, but the treatment will not be proportionate if less discriminatory measures could have been taken to achieve the same objective (see para 4.31 The EHRC Employment Code sets out guidance).

## **Conclusions**

163. In the context of unfair dismissal, we conclude that the decision not to require DG to move shift was within the range of reasonable responses open to this employer. The respondent did consider the matter and determined that it was not appropriate or practical.
  
164. In addition, the respondent was not satisfied that even if they did move DG, that the claimant would, or could return to work in the foreseeable future, given her statements about her concerns about the impact of the workplace on her health.



165. We conclude that the respondent had a genuine reason for dismissing the claimant, and their decision to do so was reached after allowing the claimant a considerable period of time off, after consulting with OH on several recent occasions, after meeting and consulting with the claimant in a welfare meeting and only after the final capability hearing, where the claimant had every opportunity to discuss her concerns about the workplace and about her health and her potential return to work.
166. We conclude that the claimant had every opportunity to make any suggestions for her return to work; was told that she could be accompanied by a work colleague or TU rep, and told us that she knew that the outcome was likely to be her dismissal. She had a right of appeal and the appeal hearing was also a full and fair hearing. The claimant makes no criticism of it.
167. We find that the conclusion that the claimant would not be able to return to work within any foreseeable time, even if DG were moved, was reached after there had been a full discussion and a genuine attempt to find a way to bring the claimant back to work, by considering any and all reasonable adjustments or accommodations. The respondent was faced with an employee who did not want to return to work, because she was concerned that the work place may impact negatively on her health. No suggestions, other than the removal of DG, were made by her, that would have meant that she would feel able and willing to return to work at all.
168. We also conclude that the respondent had made adequate investigations into the claimants health throughout her employment and before the final capability hearing, and that the decision they reached that she was unlikely to return to work in the foreseeable future, coupled with concerns that to do so may pose a risk to her health was a genuine and reasonable in the circumstances.
169. We find that at the appeal Mr Campbell considered all the matters afresh and that, had he found any way of bringing the claimant back to work, he would have done so.
170. We conclude that the dismissal only took place as a last resort after a full and fair process, and that the decision to dismiss the claimant was within the range of reasonable responses.
171. Turning to the section 15 EA 2010 claim, we have considered whether or not the presence of DG on the blue shift and the claimants refusal to work with him was something which arose in consequence of her disability and further, if it was, whether the respondent's dismissal of her for in part, refusing to work with him was unfavourable treatment.
172. We conclude that the claimant's reason for not wanting to work with DG was that she had a concern that he would behave aggressively towards her and that

this would impact upon her mental health. Whilst she had not experienced him behaving aggressively she believed that the reason for his disciplinary sanction was that he had been aggressive to others. On the basis of the evidence we have seen this was not wholly unreasonable.

173. We conclude that the presence of DG on the blue shift was a real barrier to the claimant returning to work and that her concerns, fear or perception arose from her disability in that it was a result of her anxiety.
174. The decision to dismiss the claimant was unfavourable treatment, and was in part at least, because the claimant felt unable to return to work on a shift with DG. The unfavourable treatment was therefore linked to something arising from her disability.
175. We also conclude that the other reason for her dismissal, which was her long term sickness absence, and the lack of any alternative, or the stalemate position the respondents found themselves in, arose from the claimants disability. Her disability was the cause or reason both for her absence from work, and for the difficulty she faced in returning to work.
176. The dismissal was unfavourable treatment which arose from her disability.
177. We then considered whether or not the Respondent had justified the termination of the claimant's employment, by proving a legitimate aim, and by showing that dismissal was a proportionate means of achieving those aims. We conclude that the respondent did have a legitimate aim, as pleaded, of *the need to ensure a reliable and effective service among its workforce*.
178. Was the dismissal of the claimant a proportionate means of achieving that aim? We conclude that it was for the following reasons.
179. First, the respondent had waited for a significant period of time before considering the dismissal of the claimant.
180. Secondly the respondent had investigated the reasons for the claimant's absences with OH on several occasions before deciding to have a welfare meeting and then to proceed to a capability hearing. They considered the cause of the claimants absences, whether any adjustments were possible and whether the claimant was likely to be able to return to work. They also considered the possible adverse impact on her of returning to work.
181. In particular, they considered whether, in the circumstances, it would be possible to move DG and whether there was any proportionate action that they could take to resolve the situation.
182. We conclude that the decision not to move DG was proportionate given their reason for moving him in the first place, the length of the claimant's absence, the changes in work force and the claimant's own reasons for not wanting to

work with DG. We consider that the respondent was entitled to consider that the claimants reasons for not wanting to work on the same shift as DG were outweighed by their reasons for keeping him there.

183. The respondent was wholly justified in declining to insist that DG move from the blue shift. We accept that even if it had been possible (and we accept the respondents position that they did not consider that it was) for DG to move that the respondent was not satisfied that the claimant would in any event return to work.
184. The claimant has been critical of the respondents for not considering whether or not there was an alternative job that she could have done within an administrative capacity. She has not provided any evidence that there was in fact a vacancy which she could have done at the time, but rather states that there were always vacancies and that the respondent should have looked for one for her.
185. The claimant may well have additional skills and abilities which would be suitable to an administrative role, but she was employed by the respondents as a kitchen assistant and it was within the kitchen that the respondents were primarily obliged to consider possible alternative work . Since the claimant did not raise the possibility of other work, it was not unreasonable for them not to consider it.
186. We conclude that the reason the claimant was dismissed was firstly because of her long-term sickness absence. It was reasonable for the respondent to consider dismissing her following 9 months sickness absence. The respondent discussed the matter with the claimant at a welfare meeting, following receipt of an up-to-date occupational health report. Neither the claimant nor the occupational health practitioner gave any real indication that the claimant wanted or intended to return to work within the near future.
187. We find that the respondents took reasonable steps at all stages to accommodate the claimant and to make adjustments to the workplace because of her fragile mental health. We find that in the welfare meeting and in the final capabilities hearing, the respondents considered every possibility for bringing the claimant back.
188. The reason why the claimant did not return to work, was that the claimant herself was fearful of the workplace and was unable to accept or contemplate a return to work on the blue night shift when she had previously been happy and confident in management. The respondent could not reasonably be expected in the circumstances that existed to move DG and the claimant was not prepared to return whilst he remained on shift.
189. We find that this was a stalemate position and that the respondents formed a view that the only option open to them was to terminate the claimant's

employment. This was within the range of reasonable responses as stated above and was proportionate.

190. It follows that we conclude that the dismissal was a fair dismissal.
191. It also follows that we conclude that the claimants complaint under section 15 Equality Act 2010 must fail. Whilst the claimant was treated unfavourably in that she was dismissed and the reason for the dismissal, which was her sickness absence and her refusal to return to work on the blue shift with DG arguably arose from her disability, we conclude that the dismissal was a proportionate means of achieving a legitimate aim.

**Employment Judge Rayner**

Dated: 29 January 2021

Sent to the parties: 29 January 2021

FOR THE TRIBUNAL OFFICE

Notes

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

Note: online publication of judgments and reasons

The ET is required to maintain a register of all judgments and written reasons. The register must be accessible to the public. It has recently been moved online. All judgments and reasons since February 2017 are now available at:  
<https://www.gov.uk/employment-tribunal-decisions>.

The ET has no power to refuse to place a judgment or reasons on the online register, or to remove a judgment or reasons from the register once they have been placed there. If you consider that these documents should be anonymised in any way prior to publication, you will need to apply to the ET for an order to that effect under Rule 50 of the ET's Rules of Procedure. Such an application would need to be copied to all other parties for comment and it would be carefully scrutinised by a judge (where appropriate, with panel members) before deciding whether (and to what extent) anonymity should be granted to a party or a witness