EMPLOYMENT TRIBUNALS

Claimant: **Mrs R Yunas**

Respondent: **London Borough of Hackney**

Heard at: **East London Hearing Centre**

On: **13 – 16 October 2020**

Before: **Employment Judge C Lewis**
Members: **Ms M Legg**
Mr D Ross

Representation

Claimant: Mr K Harris, Counsel

Respondent: Ms G Crew, Counsel

RESERVED JUDGMENT

The unanimous judgment of the Employment Tribunal is that:-

1. **The Claimant's claim for unfair dismissal fails and is dismissed.**

2. **The Claimant's claim for unlawful discrimination because of her disability under Section 15 of something arising in consequence of her disability fails and is dismissed;**

3. **The claims and under and Sections 20 and 21 of the Equality Act 2010 for failure to make reasonable adjustment also fails and is dismissed.**

REASONS

1 The Claimant brought claims of unfair dismissal and at a Preliminary Hearing on 14 November 2019 before Employment Judge Brook was allowed to amend her claim to include claims of disability discrimination. The issues to be decided by the Tribunal were

agreed between the parties and that list was approved by Employment Judge Russell at a Preliminary Hearing on 29 September 2020.

2 The issues to be determined by the Tribunal were as follows.

Unfair dismissal

(1) The Claimant was dismissed for capability, a potentially fair reason.

(2) Was the dismissal fair in all the circumstances under Section 98 [the Employment Rights Act 1996] including:

(a) Was it unfair to consider the Claimant's sickness absence from 2008 (when she developed a serious condition/disability) rather than from the beginning of her employment;

(b) Did the Respondent ignore comments by the OHS that the Claimant was expected to return to work and be fit to continue her role;

(c) Did the Respondent ignore comments by the Claimant in the dismissal meeting that her health was improving e.g. that she was feeling better since her medication was changed;

(d) Was it unfair to dismiss the Claimant without an up to date OH information;

(e) Was it unfair to dismiss her without trying a phased return to work combined with working from home which the Claimant requested;

(f) Was it unfair to dismiss her when she had contacted the Respondent saying she was feeling fit to return to work; and

(g) Was it unfair to dismiss her as she was treated differently to ZM who had 17 months sickness absence before her employment was terminated.

Disability Discrimination

Disability

(3) Was the Claimant disabled for the purposes of Section 6 Equality Act 2010 due to either (1) Depression or (2) Transverse Myelitis

The Respondent accepted prior to the final hearing that the Claimant was disabled as a result of both depression and transverse myelitis but disputed it had .knowledge of the disability of depression at the relevant time.

Did the Respondent have actual or constructive knowledge of the Claimant's disabilities.

Discrimination arising from disability

(4) Has the Claimant been discriminated against contrary to Section 15 of the Equality Act 2010 in that she has been treated unfavourably by being dismissed, due to sickness absence which arose as a consequence of her depression and transverse myelitis.

Reasonable adjustments

(5) Does the Respondent have a provision, criterion or practice (PCP) that:

(a) Employees must attend the Respondent's offices to carry out their work;

(b) Employees must work their contractual hours; and

(c) Employees are at risk of dismissal if they are absent from work due to sickness for an extended period.

(6) Do those PCPs put the Claimant at a substantial disadvantage in comparison to employees who are not disabled as:

(d) Due to the Claimant's depression she found it difficult to leave her home or carry out her full contractual hours; and

(e) Due to the Claimant's depression and transverse myelitis she had accumulated sufficient time off due to sickness absence to be at risk of dismissal.

(7) Would it have been a reasonable adjustment to:

(f) Allow the Claimant to work from home and work less than her full contractual hours as part of phased return to work; and

(g) Discount the Claimant's time off work due to disability when considering dismissal; and/or

(h) Discount the Claimant's time off work due to disability which was more than one year old when considering dismissal.

Remedy

(8) What remedy should the Claimant received (if any).

Evidence before the Tribunal

3 The Tribunal heard evidence from the Claimant, and Ms Carol Francis on the Claimant's behalf, and Mentha Edwards, the Claimant's line manager, David Umney who took the decision to dismiss, and Kay Brown who heard the Claimant's appeal against dismissal, for the Respondent.

4 The facts were largely undisputed and an agreed chronology was provided for the Tribunal. The Tribunal was provided with an agreed bundle of documents and page numbers in brackets are references to the pages in that bundle.

5 The Respondent relied on capability as the reason for the dismissal, a potentially fair reason under Section 98(2) of the Employment Rights Act 1996.

6 The Respondent accepted that the Claimant was disabled within the meaning of the Equality Act 2010 by virtue of both her transverse myelitis and her depression. That concession was made in the course of these proceedings, following disclosure by the Claimant of further information in respect of those conditions. The Respondent disputed that it had knowledge that her depression amounted to a disability at the relevant time. It accepted that it had the requisite knowledge in respect of the condition of transverse myelitis. The Respondent also submitted that the Claimant did not say to the Respondent at any point that she was disabled either at the time of her dismissal, in her appeal or in her original ET1.

7 The Respondent relied upon on two reports from the Occupational Health Service from October and December 2018 which stated that the condition of depression was not long term and that the Claimant was expected to make a full recovery, as being a reasonable basis for it to include that the Claimant was not disabled at the relevant time.

Findings of fact

8 The Claimant's employment with the Respondent commenced on 10 July 1989, she was employed as a Recovery Officer in the Revenue Service. Her duties included updating the Council Tax recovery register and dealing with all aspects of Council Tax recovery. In the period running up to her dismissal the Claimant was employed part-time on 17 ½ hours a week, it was not disputed that her role was office based.

Sickness absence history

9 In January 2009, sadly, the Claimant's father passed away and the Claimant became depressed taking time off work from February 2009 and returning to work in October 2009. It was not disputed that the Respondent and specifically Ms Edwards and Mr Umney were aware of the reason for the Claimant's absence. At the time the Respondent's Occupational Health Service confirmed the Claimant was suffering from reactionary depression due to her father's death (page 59).

10 On 12 June 2009 Ms Edwards referred to the contents of the Occupational Health report in her letter inviting the Claimant to a further Stage 2 review meeting, following a period of 60.5 days absence. That second stage absence meeting took place on 25

August 2009 with Mr Umney who confirmed the outcome in a letter dated 1 September 2009 (page 61). He informed the Claimant that he had decided to wait until he heard back from OHS and for the Claimant to see her GP before making a decision. At that time the Claimant was still off work.

11 On 16 September 2009 the second stage sickness meeting reconvened (page 68) again Mr Umney's decision was that more time should be allowed for the Claimant to attend counselling to facilitate a return to work (page 70 paragraph 7). The Claimant returned to work on 20 October 2009. On 23 December 2009 Mr Umney had another meeting with the Claimant at which he informed her that he had decided to monitor her absence for six months to see if she could maintain her attendance (page 81 final paragraph). He reserved the right to hold a reconvened stage two meeting before the six month review period ended should her attendance fall below the standard expected as set out in the Council's sickness absence triggers. A meeting was held on 23 December 2009 following the receipt of OH report dated 9 December 2009, Mr Umney noted he was pleased to note an improvement in the Claimant's health and that she had maintained her return to work.

12 On 6 October 2010 Mr Umney held a further Stage 2 Sickness Review Meeting with the Claimant after which he wrote to the Claimant confirming that her attendance had improved significantly and as a result she would revert to normal monitoring (page 83 last paragraph).

13 On 22 July 2011 the Claimant went off sick and after investigations it was discovered she was suffering from transverse myelitis, she returned to work on 1 May 2012. On 21 September 2012 a Stage 2 Sickness Review meeting took place with Mr Umney. The Claimant was unable at that stage to say whether she would be able to sustain her attendance in the future. Mr Umney decided to continue to monitor her attendance to see if it could be maintained (page 93 last paragraph). On 7 February 2013 Mr Umney undertook a further Stage 2 meeting with the Claimant and decided to continue to monitor her attendance (page 99).

14 It was agreed that the next Stage 2 Review meeting scheduled for on 24 May 2013 should be held as a paper review. Mr Umney wrote to the Claimant with the outcome of that review on 5 June 2013. He referred to an OHS report received on 11 February 2013 which made reference to adjustments and confirmed his understanding that the recommended adjustment had been made, i.e. a heater had been provided to the Claimant. Mr Umney was again unable to say whether the Claimant would be able to sustain her attendance in the future although he was encouraged that she had had no further absences: in the light of this his decision was to continue to monitor her absence and review her case again in three months, still at Level 2. The subsequent review undertaken on 1 August 2013 acknowledged that her long term sickness absence related to an underlying condition namely transverse myelitis: the number of her sickness absence days were set out with the reasons for the absence alongside. It was noted that the Claimant had had no further periods of absence since the report submitted in May 2013 and there was no reason to refer back to the OHS: the Claimant's total sickness absence over the rolling review period was going down from 22 ½ to 13 ½ days and no new periods of absence had occurred.

15 On 26 September 2013 Mr Umney decided to return the Claimant to normal

absence monitoring. He was unable to say whether the Claimant would continue to be able to sustain her attendance in the future but was encouraged she had no further sickness absence. He reserved the option to recommence action at Level 2 in the future if there were further absences (page 105).

16 The Claimant's absence record is at page 199, reference to the recorded absences was made at various points throughout the hearing, the record itself as agreed to be accurate. The record runs from 1999 to 2020 while the complete record dated back to August 1989. We were told by the Claimant, and it was not disputed, that the policy changed between 2009 and 2014 and the trigger levels were stricter after 2014 than before then.

17 It is not disputed that between the first period of depression following her father's death in 2009 and the period following her mother's death in 2018 the Claimant did not have any time off work for depression.

18 It was suggested on behalf of the Claimant and accepted by the Respondent's witnesses that apart from the entries in 2012 specifically related to transverse myelitis, further entries in 2012 referencing weakness in arms and legs, neck arm and leg problems and potentially flu symptoms and bladder infections could be related to transverse myelitis.

19 The Claimant's Counsel contended on her behalf that she had not had any time off related to transverse myelitis since January 2013 and this was not disputed. She did however have 10 days absence from 17 August 2016 to 3 September 2016 for an ingrowing toenail and 10 days absence between 9 August and 1 September 2017 following an accident at home causing a back injury.

20 It had not been suggested to the Respondent during her employment that her lower back pain or the injury suffered was as a result of her transverse myelitis, however in the course of evidence to the Tribunal the Claimant stated that her condition made her more likely to fall. The Claimant also had 35 days of absence in 2017 for lumber disc degeneration related to her accident at home.

Absence leading up to the Claimant's dismissal

21 The Claimant went off work on 23 August 2018 following her mother's death, the initial period of absence was recorded as being due to bereavement but subsequent fit notes recorded the reason for absence as depression.

22 On 8 October 2018 Ms Edwards sent a letter to the Claimant in respect of her sickness absence advising her she had hit the Council's sickness absence trigger. She had been absent for work for 21 ½ days up to 22 October 2018 and there was also a previous period of sickness absence of 42.5 days, the Claimant was therefore being referred to the Occupational Health Service and a formal sickness review meeting would be arranged. The Occupational Health Service report was completed on 16 October 2018. It reported that the Claimant was experiencing symptoms of low mood and anxiety following a recent bereavement and concluded that she was temporarily unfit and unlikely to be able to return for at least 4 – 6 weeks, it recommended a re-referral in 4 - 6 weeks.

The report's opinion/recommendations stated that it was unlikely that the disability legislation would apply to her recent symptoms as these were 'reactive to perceived life circumstances' and the symptoms were expected to improve without having an impact on her abilities to perform day-to-day activities in the long term, whilst noting that 'ultimately this is a legal and not a medical decision' (page 150). The writer was optimistic the Claimant should be able to render reliable service and attendance once symptoms were more manageable, noting however that 'the best predictor of this is the employee's record to date'. It made reference to encouraging the Claimant to have sessions of bereavement counselling and recommended a re-referral of 4–6 weeks. At this time medical certificates submitted by the Claimant were still recording her absence as due to family bereavement.

23 The next certificate dated 3 December 2018 advised that the Claimant was unfit from 26 November 2018 to 5 January 2019 due to depression/NOS. The Claimant was re-referred to OHS on 5 December and a report was completed on 13 December (pages 151 – 152). The OH Advisor stated she foresaw a return to work within 4–6 weeks, noting that the Claimant had commenced counselling with a further session to follow, she was under the care of her GP and appropriate treatment had been commenced, and that the Claimant was medically signed off until 15 January and may be fit to return to work following the expiration of the certificate. A phased return to work over 4 weeks was suggested. The following observations were also noted:

- Ms Yunas may continue to have good and bad days but is expected to fully recover and be able to render reliable service and attendance in the future.

- Ms Yunas does have an underlying medical condition which is currently well managed.

- Ms Yunas is expected to make a good recovery and will be fit to continue in her current position.

24 Ms Edwards called the Claimant on 11 January 2019 to find out how she was feeling and, she says, to agree a phased return to work from 16 January. During that conversation it was apparent that the Claimant was upset and Ms Edwards said she decided not to question her further. There is a dispute as to the context of that conversation, with the Claimant maintaining she had explained to Ms Edwards she had just returned from a visit to the cemetery which was why she was tearful. The Claimant thought that Ms Edwards should not read more significance into that.

25 Ms Edwards wrote to the Claimant on 23 January 2019 confirming their conversation, noting that the Claimant had confirmed a visit to her GP to extend her sickness absence. Ms Edwards confirmed that the Claimant was now at formal Level 2 of the sickness absence procedure, this meant that her job was at risk and Mr Umney would be writing to her to invite her to a formal Level 2 review meeting in due course. The Claimant submitted a certificate on 14 January 2019 certifying her as unfit to work from 14 January to 24 February, due to depression NOS/family bereavement. On 6 February Mr Umney wrote to the Claimant asking her to a formal Level 2 meeting. At that date the Claimant remained off sick with a total of 65.5 working days absence in the period from 23 August 2018 to 24 February 2019.

26 On 26 January the Claimant emailed Ms Edwards and asked her if there was an option to work from home saying she was finding it difficult to leave her house as she was suffering from anxiety. Ms Edwards replied on 28 January saying it was possible as a temporary measure as part of her phased return to work but the Claimant would need to attend the office to be set up for home working. The Claimant replied the same day *"please let me know what arrangements I will need to take to work from home."* No action was taken by Ms Edwards in response to this email. The Claimant sent an email to Ms Pellow on 4 March, again with no response.

27 On 27 February 2019 the Claimant attended a Formal Level 2 absence meeting. The report prepared by Ms Edwards for that meeting is at pages 125 – 133. In that report Ms Edwards set out the level of absences with dates and reasons, what had been done in respect of the sickness absence procedure, Level 2 meetings and reviews, Occupational Health referrals and an assessment of the impact on the service as a result of the Claimant's absence. Her recommendation was simply that the matter go forward to a Level 2 review.

28 The Claimant attended the meeting with Ms Francis. At the meeting she explained that she was finding it difficult to go out due to anxiety and that homeworking would help. She felt that Ms Pellow and Ms Edwards were dismissive of the suggestion of homeworking and putting up barriers to that suggestion which she did not think was reasonable of them. The Claimant made reference to the counselling sessions and increasing her medication to help with her anxiety and when pressed said she thought she would be able to attend work after four weeks. At the outset of the meeting she handed a further GP's certificate which covered her for the next four weeks. She said she thought she would be able to improve her attendance in future but did not want to come back before she was ready as that would only mean she would go off again. The minutes record that Ms Pellow's response in respect of homeworking was that she thought that might be isolating. Mr Umney said that he would need to take advice from the GP or Occupational Health Service that homeworking would be suitable, if that move was to be followed.

29 The Claimant did not want to specify at that meeting what medication she was taking but confirmed that her GP could be consulted, nothing appears to turn on that point. It was agreed by the Respondent's witnesses that following that meeting no action was taken to investigate homeworking further or make a referral to OHS or the Claimant's GP. The Respondent's witnesses accepted that homeworking was something that was possible to arrange and that it fell within the policy of the London Borough of Hackney to make arrangements where suitable and appropriate and that it could have been a reasonable adjustment in this case.

30 It was suggested on behalf of the Respondent that the Claimant did not pursue the homeworking request and also that it was not possible to pursue that until she had a certificate saying she was fit to attend work. However, Ms Edwards accepted in her evidence that she had received the email from the Claimant on 28 January asking her what steps she needed to make arrangements to work from home and that she had done nothing in response and that the Claimant had really left the ball in her court. The Claimant explained if she had been told she needed to go back to her GP to get a certificate to say she could return to work for the purposes of a meeting to set up homeworking she would have gone to her GP and in all likelihood that would have been

forthcoming. We accept that is what was likely to have happened had the Claimant been told that this was required.

31 There was no clear explanation from Ms Edwards why she did not pursue the option of homeworking at the point that the Claimant requested it on 28 January other than that by that point the Level 2 Review meeting had already been set in train.

32 Mr Umney was clear that he considered first whether to keep the Claimant's job open and only if he was going to keep it open would he then need to look into the options for homeworking or phased return, not the other way around. He also accepted in answer to questions from the Tribunal that had he understood the Claimant to have a disability he may well have had to consider the question of adjustments before deciding whether to keep the job open. He explained his reasons for looking at the overall picture of the absences first before deciding whether to make arrangements in respect of the continued employment of the Claimant. Those reasons are set out in his witness statement at paragraphs 37 to 40, we accept those reasons were genuine .

33 Mr Umney made the decision to terminate the Claimant's employment and he set out his reasons in a letter dated 19 March. We accept that was the date on which he completed the letter and sent it on to HR. That letter was not sent out to the Claimant until 20 March 2019. Before the letter was sent to the Claimant, she texted Ms Edwards to inform her that she was looking to come back to work on or from 27 March 2019. That message was sent at 12.43 on 20 March and Ms Edwards confirmed that she would have received it at some point that day; on receipt she contacted HR for advice and spoke to Ms Pellow who told her not to do anything about it as the dismissal letter had already gone out. The dismissal letter was sent by email to the Claimant at 17.37 on 20 March 2019. We were told that it was also sent out by post the same day. Regardless of the exact point and time of day on 20th March on which that letter was sent out we accept Mr Umney's evidence that he had reached his decision and completed his decision letter on 19 March 2019. That letter is at pages 164 – 172. The notes of the Level 2 review meeting are at pages 172a – 172c.

34 In his decision letter Mr Umney set out that he took into account all the information that had been presented on the Claimant's absences, that he looked at the sickness absence as a whole and considered the impact this had on the service. He had conducted a review of the Claimant's sickness absence from 2008, the level of support and interventions afforded to the Claimant over that period and the impact this had on her being able to carry out her full contractual duties without any detriment to her health and ability to sustain her attendance at work. He then set out his conclusions: firstly, based on the information before him he had concluded that taking account of the Claimant's record of attendance and the advice from OHS, he concluded that she would be unable to undertake her full range of contractual duties without detriment to her health; secondly, that in respect of her ability to significantly improve and sustain her attendance in the future, she had had 65.5 working days absence from 23 August 2018 to 24 February 2019 and was still off work, that reviewing her record back to 2008 she had a total of 378.5 working days absence, there was a record of periods of long term sickness absence and her current fitness to work statement extended her absence to at least 25 March 2019. He took into account the fact that the above totals reflected the contracted hours at 17.5 per week and this was a high level of absence which had a detrimental effect on the work of the section [based on the evidence set out in Ms Edward's report]. He looked at OHS's

reports and noted that they had stated that the best predictor of future sickness absence is the employee's past absence record. The Claimant had not been able to give any assurance at the review meeting that she could improve and sustain her attendance. He was faced with a report from the Occupational Health Service in December indicating the Claimant might be expected to return on 15 January, which was followed by further sickness certificates from the Claimant extending from January into February up to the date of the meeting, and then at the meeting a sickness certificate for a further 4 weeks with no clear end in sight. He concluded that given the evidence of her attendance record she would not be able to improve and sustain her attendance in the foreseeable future.

35 In considering whether it was appropriate to give further time and support, he took into account the support already given by the Occupational Health Service, the access to Employee's Assistance programme, work station assessment, HR guidance, return to work interviews and the time already given to improve health and attendance at work. Taking into account the period from 2008 he concluded it was not appropriate to allow further time beyond what had already been afforded; he set out the impact the Claimant's absence had had on the Revenue Service targets for processing work for customers and meeting the Council's service commitments. He considered her high levels of absence had a direct impact on the service and could not be sustained. He concluded that whilst he was sympathetic to her circumstances he could not overlook that she had been absent from work for 378.5 working days since September 2008, including 65.5 days over the last 12 months and was still absent from work.

36 The Claimant appealed that decision on 2 April 2019 (page 173) included in her grounds of appeal was a complaint that she had been treated inconsistently when compared to ZM.

37 The appeal hearing took place on 14 May 2019 and was heard by Ms Brown the notes of that meeting are at page 204 – 212.

38 As part of her appeal the Claimant relied on the text she had sent to Ms Edwards on 20 March 2019. She confirmed that she had intended to return to work on 27 March and asked for her record over the entirety of her employment, that is back to 1989, to be taken into account on the basis that it was unfair simply to look at her record back to 2008.

39 The Claimant also alleged that Mr Umney had been selective in a number of point he had referred to from the OHS reports. The first report had indicated that she was not fit to return to work but that she should be able to render reliable service and attendance once her symptoms were more manageable, and the second stated that she may be fit for work after 15 January 2019 and that she was expected to recover and render reliable service and attendance in the future - recommending a phased return to work over four weeks. .

40 Ms Brown's understood from those OHS reports that the Claimant's recent symptoms were reactions to life events and the Claimant was expected to recover, that they were not long term effects and therefore the Claimant was not covered by disability legislation, i.e the Equality Act 2010. Overall Ms Brown's assessment of the Claimant's level of absence was that it was not sustainable and that Mr Umney had been very generous in his treatment of her in the past and had afforded her every opportunity but there was a point beyond which he could not be expected to tolerate any further absence.

In Ms Brown's view it was not determinative that the Claimant had indicated that she would be able to return on 27 March. Mr Umney was also looking at the likelihood of future reliable service being provided and she did not find there was a contradiction with the Occupational Health Service report, which indicated that there would be reliable service, when taken together with the overall record of the Claimant's sickness absence. Looking at, as she was requested to do by the Claimant, the entirety of the Claimant's employment she considered that the Claimant had a particularly poor record of sickness absence: even discounting the 124.5 days absence due to bereavement, the Claimant still had 439 days of absence for other reasons, much of which occurred when she was working part-time so therefore indicating longer durations of absence; the target under the Council's procedures was 8 working days absence in a rolling 12 months period. Ms Brown asked Mr Umney why he had not decided to terminate the Claimant's employment earlier. She noted the impact the absence was having on the service and that the Claimant could not see this was a major issue. It was not possible to recruit to cover the Claimant's absence due to the uncertainty of when she would return to work and for the same reason agency or temp staff could not be used to cover her absence. She considered that there was an impact on the service of recovering Council Tax due to the Council which had a knock on effect on the services to customers; and also in respect of dealing with queries and enquiries etc within the department and a longer wait for customers to be dealt with. Ms Edwards had also pointed to the impact on colleagues of heavier workloads and lack of flexibility in their arrangements for taking their own time off as a result of the Claimant's absence. She considered that overall the decision to dismiss was a reasonable one.

41 The Claimant had raised a point about the delay in receiving a letter from Mr Umney however Ms Brown was satisfied that this had been flagged up by him at the original hearing, due to it coinciding with the period of issuing Council Tax bills to 120,000 Council Tax payers and in Ms Brown's view no unfairness resulted. Ms Brown took into account the new evidence presented by the Claimant in respect of her previous sickness record; she considered that this showed the Claimant's absence to be worse than had previously been understood. The Claimant had 480 days sickness absence but looking further back to July 1989 she in fact had 563.5 working days absence; Ms Brown considered that was an indication it was likely that she would have further absence in the future, which would not be sustainable. Ms Brown did not think it reasonable to expect the Council to undertake a further period of review as this itself would have an impact on the service: if the Claimant were absent there would be a further burden on the service in her absence; it would take possibly one to two months to conduct the review, including referral to Occupational Health, and then refer back to a review meeting before a decision could be made in respect of terminating the Claimant's employment; in her view it was simply not reasonable to expect the Council to sustain that level of interruption to its service.

Submissions

42 Both Counsel provided written submissions and supplemented those orally. Ms Crew referred to the following authorities **Iceland Frozen Food Ltd v Jones [1983] ICR 17; East Lindsey District Council v Daubney [1977] ICR 566; Lynock v Serial Packing Ltd [1988] 670; McAdie v Royal Bank of Scotland [2008] ICR 1087**; in respect of the dismissal; **Gallop v Newport City Council [2013] EWCA Civ 1583** (that was reasonable to rely on the advice of OH where that is reasoned advice); **City of York v Grosset (**in respect of the Respondent's knowledge of the relevant disability);

Environment Agency v Rowan [2008] IRLR 20 (reasonable adjustments); **NCH Scotland v McHugh (**that the duty only arises once the Claimant is fit to return to work); **Doran v Department for Work and Pensions** (the duty to make reasonable adjustments had not been triggered when there was no prospective return to work date in sight); **London Underground Ltd v Vuoto EAT/0123/09**.

43 Mr Harris on behalf of the Claimant relied on the case of **O'Brien v Bolton St Catherine's Academy [2017] IRLR at para 40**. It is a composite decision of the dismissal and the appeal which the Respondent is required to justify for both unfair dismissal and discrimination and the appeal panel must take into account new evidence; he also referred as to **East Lindsey District Council v Daubney; Gallop** and **A v Z [2019] IRLR 952** (whether the employer had the requisite knowledge); **Griffiths v Secretary of State for Work and Pensions [2016] IRLR paragraph 47** and **Pnaiser v NHS England [2016] IRLR paragraph 31**.

44 The relevant legal principles to be drawn from the authorities was not disputed.

45 We reminded ourselves of the provisions of Section 98(4) of the Employment Rights Act 1996; sections 15, 20 and 21 of the Equality Act 2010; Schedule 1 and paragraph 20 of Schedule 8 of the Equality Act 2010.

Conclusions

46 We find that the reason for the dismissal was capability, a potentially fair reason under Section 98(2). Mr Umney made his decision on 19 March 2019 following the meeting on 27 February. We are satisfied that he took the two Occupational Health Service reports into account. Mr Umney acknowledged that they indicated that once the Claimant had made a recovery from the condition of depression she would be able to provide good service; they indicated that it was not likely to be a long term condition and was reactive to life events. However, he also took into account what was said in the report about past service being the best indication of likely future service. Whilst we find that there may be room for more than one interpretation as to what was meant by that, we do not find that it was outside the range of reasonable responses for him to read that in the way in which he did, namely, that the Claimant's prior absence record indicated she would be unlikely to maintain good attendance levels, and in reaching his assessment in that context we find that it was reasonable for him to look not just at the absences related to depression. In reaching his decision he had made plain that part of his assessment would be whether the Claimant would be able to provide satisfactory service in the future.

47 Mr Umney acknowledged that the Claimant had asked about homeworking but he considered that he needed to make the overall decision first before considering homeworking, looking at the question in the round, we are satisfied that was a reasonable approach for him to take.

48 We find that it was reasonable for Mr Umney to take into account the previous support that had been provided and the numerous level 2 review meetings that he had conducted with the Claimant over the previous ten years. He also took into account the unusually high amount of reviews and meetings which he found was reflective of a long series of absences, although through no fault of the Claimant's. He reached an assessment that he could not be satisfied that there would not be further similar episodes

of absence in the future. We are not here to substitute our view for that of the Respondent and we are satisfied that was a reasonable view for him to take and within the range open to a reasonable employer.

49 Mr Umney told us that he might have looked at the question differently had he considered the Claimant to have a disability. However at that point he did not consider that she had a disability and he was relying on the OHS advice in that regard. We will come back to that question under our findings under disability. We address in turn the questions raised on the list of issues in respect of the fairness or otherwise of the dismissal.

a. *Was it unfair to consider the Claimant's sickness absence from 2008 rather than from the beginning of her employment*?

50 It was submitted on behalf of the Claimant that the Respondent ought to have removed from consideration any absence related to depression and those attributable to transverse myelitis; unfortunately, that still left a significant number and volume of absences - above the level which would trigger the Respondent's sickness absence process. When the Claimant's absence level from the beginning of her employment was considered by Ms Brown it made things worse rather than better. There were absences going back to the first year of her employment which were not obviously related to any disability and which she did not point to as being connected to any disability. The exercise for Mr Umney and Ms Brown was looking forward as well as back. We do not find that it was unreasonable (that is, outside the range of responses open to a reasonable employer) to consider her absences from 2008.

b. *Did the Respondent ignore comments from OHS that the Claimant was expected to return to work and be fit to continue her role?*

51 We are satisfied having heard from Mr Umney and having pressed him on this point that he did not ignore those comments he took them into account but he also considered that based on her previous sickness record it was likely the Claimant would be off again in the foreseeable future for some other unrelated reason.

c. *Did the Respondent ignore comments by the Claimant in the dismissal meeting that her health was improving e.g. that she was feeling better since her medication was changed?*

52 We do not find that Mr Umney ignored those comments. However he was not satisfied, for the reasons set out above, that there was a clear indication at that meeting as to a return to work date and he was looking at the overall picture in reaching the decision as to whether to keep the job open.

d. *Was it unfair to dismiss the Claimant without up to date OH information*

53 The OH information was some three months old by the time the decision was reached in March 2-19. However we do not think that it was unreasonable for Mr Umney to proceed on the basis of the information before him; he had two reports both indicating very similar information as to the cause of the absence. The first report stated it was too

soon to give an indication as to when the Claimant would return to work and the second foreseeing that she might return in January, that had not proven to be the case. It was possible that a further OHS report may provide another estimate as to when she might return but we are satisfied that as far as Mr Umney was concerned that would not have been determinative for him, he was looking beyond the Claimant's immediate return to work and at whether she could maintain satisfactory attendance in the future. We are satisfied that was a reasonable approach for him to take and was not outside the band open to a reasonable employer.

e. Was it unfair to dismiss her without trying a phased return to work combined with working from home which the Claimant requested?

54 In the circumstances we are satisfied that Mr Umney's decision was a reasonable one, judged against the range of reasonable responses. It was a response that was open to a reasonable employer. He was not looking only at the question of when the Claimant would return to work but whether once she returned she would then maintain satisfactory levels of attendance for an acceptable period of time.

f. Was it unfair to dismiss her when she had contacted the Respondent saying she was feeling fit to return to work

55 We find this was within the band of reasonable responses, accepting as we do Mr Umney's evidence as to what he took into account and the basis of his reasoning. He had in mind the likelihood of the Claimant providing reliable service in the future and not being faced with a further sickness absence going forward and further Level 2 review meetings; noting that the Claimant had by this point already been subject of 9 Level 2 meetings in the course of three separate cycles of attendance/ sickness absence procedure.

g. Was it unfair to dismiss her as she was treated differently to ZM

56 We do not find ZM's circumstances to be sufficiently similar to those of the Claimant for her to be a suitable comparator. We accept the Respondent's evidence as to the differences in their situations. In ZM's case she was off sick as a result of a breakdown in the relationship with her manager; the manager had moved from the particular part of the Council where that employee was engaged and an interim manager was in place; there were discussions with the employee in an attempt to get her back to work; and when those did not bear fruit, an attempt to seek a resolution which ended in a compromise agreement; all of which were specific to the individual circumstances. ZM was someone who had not had a record of sickness absence in the past and had one continuous period of sickness absence as a result of the breakdown of the employment relationship with her manager.

57 The Claimant was not dismissed because she had one lengthy period of absence, she was dismissed because she had numerous periods of absence -some of which were lengthy others were shorter but still significant over a long period of time; the time period initially under consideration was 10 years and then at the appeal stage at the Claimant's request, the entirety of her employment.

Disability

58 Disability was conceded by the Respondents. The Respondent accepts that it knew about the transverse myelitis but disputes that it had knowledge that the Claimant's depression amounted to a disability. The Claimant was diagnosed with reactive depression on two separate occasions; after the first episode the Occupational Health Service reported that she had made a good recovery and on the second occasion some years later the OHS reported that she would recover [within 12 months] and that it was unlikely to be long term.

59 Ms Crew submitted that it was reasonable for the Respondent to rely on the reasoned OHS reports. She relied on **Gallop** which distinguished between relying on a reasoned and unreasoned report. Mr Harris submitted that it was not reasonable, given what the Respondent knew about the Claimant's condition, for it to rely on the OHS report which specifically left the question of whether the Claimant's condition was a disability to management and in fact said it was a legal question not a medical question. There were two separate incidents of depression neither of which lasted 12 months but it was for the same condition and both were for a significant period and the Respondent stated they did not believe that the Claimant would be able to render reliable service on her return. Mr Harris pointed to Mr Umney and Ms Brown's evidence that they were aware that depression could be a disability. Although Mr Umney told the Tribunal that he had not been aware at the time he made the decision but now acknowledged that it could. Mr Harris' submission was that taken together these separate pieces of information ought to suggest to the Respondent that the Claimant was disabled at least by the time of the dismissal and the appeal should have considered and referred back to OHS the question of whether she was disabled by which time the OHS would most likely have concluded she was; he submitted that therefore the Respondent should be found to have knowledge or constructive knowledge of the Claimant's disability.

60 We had before us evidence contained in the Claimant's in her disability impact statement [page 246 – 249 of the bundle] about the ongoing nature of the Claimant's depression and medication prescribed in the intervening period between her two bereavements. It was not suggested that this information was provided to the Respondent or to its Occupational Health Service at the time. No link had been made by the Claimant previously between the two episodes of depression; they were both diagnosed separately as reactive depression, in reaction to life events: the Respondent was aware of two separate incidents of depression each of less than 12 months' duration, with some 9 years in between.

61 We had in mind the guidance in **A v Z** and in **Gallop v Newport City Council** at paragraph 36.**Gallop** sets out that the required knowledge, whether actual or constructive, is of the facts constituting the employee's disability as identified [then in Section 11 of the DDA] those facts can be regarded as having three elements to them, namely (a) physical or mental impairment which has (b) a substantial and long term adverse effect on (c) his ability to carry normal day-to-day duties. Whether those elements are satisfied in any case depends also on the clarification as to their sense provided by Schedule 1. The clarification provided by Schedule 1 of what is now the Equality Act 2010 includes clarification as to the effect of recurring conditions.

62 We are satisfied that the Respondent was not aware the effects of the depression were likely to recur after the first episode, nor was it aware that it was an ongoing condition. The OHS report indicated that the Claimant had previously fully recovered and

was likely to fully recover on this occasion to a reactive depression, and that its effect was not likely to be long term. We do not find the Respondent had actual or constructive knowledge of the elements giving rise to the Claimant meeting the definition of disability.

63 We do not find that it was unreasonable for Mr Umney to rely upon the Occupational Health Service reports in the circumstances, despite the caveat. We find that it was a reasoned report; OHS did not suggest that there was any cause for further investigation. We have found that the Respondent did not know, and could not reasonably have been expected to know, that the Claimant's condition, that is the depression relied upon, amounted to a disability at the relevant time.

64 Schedule 8, paragraph 20 of the Equality Act 2010 provides that lack of knowledge of disability is a defence to Section 20 and 21, in that the Respondent is not subject to a duty to make reasonable adjustments where it does not know, and could not reasonably be expected to know, that that an interested disabled person (its employee) has a disability and is likely to be placed at a disadvantage by the PCP. Section 15(2) of the Act provides that lack of knowledge is also a defence to a claim under section 15.

65 We find that the claims under Section 15 and Section 20 and 21 therefore fail.

66 We are in any event satisfied, that even if the absences identified as arising from or related to depression and transverse myelitis were taken out of account this would not reduce the total absences to a level that would answer the Respondent's legitimate concerns. Claimant's Counsel sought to describe her absence record apart from, or taking out of account, her disability related absences as otherwise being good but we accept that the Respondent had a proper (or sound) basis for considering it as being poor

67 The claims for unfair dismissal and disability discrimination fail and are dismissed.

Employment Judge C Lewis
Date: 12 January 2021