EMPLOYMENT TRIBUNALS

Claimant: Ms E Glasby

Respondent: Edge Hill University

Heard at: Manchester (remotely, by CVP) **On:** 27-30 April 2021
20 May 2021
(in Chambers)

Before: Employment Judge Warren
Mr S Anslow
Mrs A Jarvis

REPRESENTATION:

Claimant: In person
Respondent: Miss Barry of Counsel

JUDGMENT

The unanimous judgment of the Tribunal is that:

1. Issues numbered 7a, 7b and 7c in paragraph 9 (pages 3 and 4) of this Judgement) are out of time and it would not be just and equitable to extend time. The Tribunal has no jurisdiction to adjudicate on these 3 issues.

2. There was a failure to make a reasonable adjustment by the failure to ensure the claimant could access her work station through the doors of the Catalyst Building in it's original design, which cause her a detriment on one occasion when she attended work at an unexpected time.

The majority judgement of the Tribunal (with Judge Warren dissenting) is as follows:

3. The claim of discrimination arising from disability succeeds. The claimant's dismissal was discriminatory, as was the failure to disregard previous periods of disability related sickness absence when applying the sickness absence policy.

4. The claim of failure to make reasonable adjustments succeeds other than as dismissed in paragraph 1 above. The failures were:- failing to disregard previous periods of disability related absence when applying the sickness absence policies and preventing the claimant from purchasing additional annual leave to use for short sickness absences.

REASONS

Background

1. By an ET1 presented to the Tribunal on 27 June 2019 the claimant, Mrs Elaine Glasby, brought a claim against the respondent, Edge Hill University. The claim was for disability discrimination. It was heard remotely, which enabled the claimant (who represented her own interests) to remain in her home. The claimant is a full-time wheelchair user.

2. The claimant's employment began on 1 February 2002 and ended on 5 February 2019 when she was dismissed on the grounds of capability. Within her employment she had two separate contracts – one as Financial Administration Support and the other as Information Desk Assistant. The two roles were not linked other than by employer and were undertaken in different parts of the university. It was not in dispute that the claimant is a disabled person by reason of her lack of mobility and cancer.

Evidence

3. The Tribunal was provided with an agreed bundle of documents amounting to 256 pages. References to page numbers in this Judgment relate directly to that bundle.

4. The Tribunal was given an agreed chronology, a cast list and all witnesses had made statements. Each gave evidence and was cross examined. We applied the standard of proof ‘ the balance of probabilities’ to the shifting burden referred to below.

5. This was not a case where we found ourselves needing to prefer the evidence of one over another as the reality was that most of the evidence proved uncontroversial. The interpretation of that evidence, however, and the application of it to the law did prove controversial and has resulted in a mixed outcome.

6. There was no overall unanimous judgment. The judgment has thus been written on behalf of the lay members with their views set out in full. As the Judge I have on occasion found myself in the minority and have set out my judgment separately. The evidential test we applied was that of the balance of probabilities.

7. The case had been the subject of a case management hearing and agreed List of Issues was produced from that on 28 April 2020 by Employment Judge Aspinall. There were some gaps to be completed by both parties within that List of Issues, and a further List of Issues was produced for the hearing, inserting the answers to the outstanding questions.

8. In discussion with Employment Judge Aspinall the claimant agreed that some of the allegations were to be treated as background information. We have reached our decision on the issues eventually agreed.

List of Issues

9. The List of Issues read as follows:

Jurisdiction – Time Point

The claimant's early conciliation notification took place on 1 May 2019. The early conciliation certificate was issued on 1 June 2019. The ET1 was lodged on 27 June 2019:

(1) Did any of the claimant's complaints occur on or before 2 February 2019 and therefore outside of the primary limitation period within section 123 of the Equality Act 2010 (having regard to the extension of time for early conciliation set out in section 140B)?

(2) If so, does the complaint about to conduct extending over a period, with the end of that period being later than 2 February 2019?

(3) If the answer to (1) and/or (2) above is no, is it just and equitable to extend time in respect of the claimant's complaints?

Discrimination arising from disability

The claimant relied upon the following "something arising" from her disability namely her high level of sickness absence:

(4) Was the claimant subjected to unfavourable treatment? The claimant asserts the following unfavourable treatment:

(a) dismissing the claimant;

(b) failing to disregard previous periods of sickness absence when applying the sickness absence policy.

(5) Was the alleged unfavourable treatment because of the "something arising" from the claimant's disability?

(6) Was the alleged unfavourable treatment a proportionate means of achieving a legitimate aim? The respondent relied upon one or more of the following legitimate aims:

(a) Ensuring the appropriate service level of and, where necessary, cover, for the information desk;

(b) Ensuring the desk assistance post could carry out additional responsibilities, such as providing support to the Executive Officer in health and safety measures;

(c) Ensuring student services, particularly the money advice service, had the staffing resource required to provide support services to students of the university;

(d) To monitor, encourage and maintain acceptable levels of attendance for employees across the university to ensure that high service levels are provided across the academic and business functions of the respondent;

(e) To support employees by ensuring records of sickness absence are accurate and transparent;

(f) To ensure that all of the respondent's employees are not placed under additional burdens in terms of workload as far as possible.

Failure to make reasonable adjustments (sections 20 and 21 EqA 2010)

(7) The claimant relies upon the following Provisions, Criteria and Practices ("PCPs"):

(a) A failure to automate the internal doors in the Faculty of Education;

(b) The Faculty of Education reception desk area being cold;

(c) Lack of a height adjustable desk or appropriate workspace in G12;

(d) Student Services building doors (The Catalyst Building) being closed;

(e) Not allowing the claimant to use additional annual leave which she had purchased for short-term periods of sickness absence; and

(f) Failure to disregard previous periods of sickness absence when applying the sickness absence policy.

(8) The substantial disadvantage relied upon by the claimant was:

(a) that the claimant could not work from the office and was required to work solely from the desk in the atrium foyer reception;

(b) the claimant had to use a hot water bottle;

(9) Did such PCP put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled at any relevant time?

(10) If so, did the respondent know or could it reasonably have been expected to know that the claimant was likely to be placed at such disadvantage?

(11) If so, were there steps that were not taken that could have been taken by the respondent to avoid such disadvantage?

(12) If so, would it have been reasonable for the respondent to have taken those steps at the relevant time?

The Facts

10. These are the facts that we have found from the evidence we heard and read. We deal only with those facts which relate to the List of Issues.

11. On 1 July 2003 the claimant's employment commenced on a permanent basis as an Equal Opportunities Support Worker in Student Services. She had begun work for them originally on 1 February 2002 as a temporary employee. Initially she worked in an open plan office and access her working area through two automatic bifold doors. She had a manual height adjustable desk. She worked part time hours during term time.

12. On 1 July 2005 the claimant started to work under a separate contract for the Faculty of Education. This contract ran for 52 weeks of the year and 25 hours a week.

13. On 6 September 2005 at the behest of the respondent responsible for her administration assistance work, an ergonomic report was prepared (pages 70-76). This explained in detail the claimant's medical conditions. She had been involved in a road traffic accident in 1985 when her leg was hit by a passing car whilst she was on a motorbike. This had led to damage to her nerves and the blood supply which affected the left-hand side of her body. She had been diagnosed with reflex sympathetic dystrophy syndrome, and other conditions related to it. She experiences body cramps when she can become paralysed and less severe muscle cramps in her stomach when leaning over. She had circulation problems. She used a motorised chair on a permanent basis.

14. Six days later the respondent received funding through Access to Work totalling £800 to provide three desks for different parts of the building – in particular Access to Work believed that the claimant may have to work in the three administrative offices. It was clarified in a meeting on 16 September that she would not be required in the offices and that work would be brought to her at reception, which had been the same position as the previous postholder.

15. Later, radiant heaters were installed, and the claimant's desk in reception was raised. The claimant was supplied with a headset to use for answering the phones. The claimant became unwell and signed off from work on 7 November 2012.

16. On 26 March 2013, following a home visit on 12 March 2012, an Occupational Health physician report was concluded.

17. Between 19 March and 1 July 2014 the claimant was absent from work due to reflex sympathetic dystrophy syndrome. This was for 105 days. She was seen by the Occupational Health department on 3 September 2014. She was found to be fit for duties with a recommendation of a risk assessment to improve her working environment and enhanced disability access.

18. Between 1 October 2015 and 8 November 2015 the claimant was absent from work due to thrombosis for 39 days. This was unrelated to her disability.

19. Between 28 April and 29 April 2016 the claimant was absent from work due to a shoulder injury, unrelated to her disability.

20. Between 13 June and 17 June 2016 the claimant was absent from work due to a seizure, for five days.

21. Between 30 August and 4 September 2016 the claimant was absent from work with a urinary tract infection for six days.

22. On 15 September 2016 there was a sickness review meeting leading to a stage three absence review on 15 September 2016. (Outcome at pages 105-107).

23. The respondent had 2 sickness absence policies – one for short term amd intermittent absences, and a second for loing term absences. There is further detail later in these reasons.

24. The claimant was advised that absence from work between 1 October 2015 and 8 November 2015, which totalled more than 15 working days, involved stage one of the intermittent/short-term policy for sickness absence. The next absence, from 28 April 2016 to 29 April 2016, resulted in stage two being met. Her absence from 13 June 2016 to 17 June 2016 led to stage three being met. It was pointed out to the claimant that a subsequent absence from 30 August 2016 to 4 September 2016 should have invoked stage four of the intermittent/short-term procedure. It had been decided, however, that she would remain at stage three of the intermittent/short-term procedure for a rolling 12 months until 5 September 2017. The claimant was advised that any subsequent absence in the following 12 months would be reviewed under stage four of the intermittent/short-term procedure. This was described as a reasonable adjustment to ensure that a stage three formal meeting could take place, for her benefit.

25. The claimant had been to see Occupational Health services and was expecting a report shortly. She was advised there would be a review meeting with both of her managers (one for each contract) in December 2016. It was made clear that any further absence within 12 months from the last day of her most recent absence (i.e. 4 September 2016) would be reviewed in line with stage four of the intermittent/short-term absence procedure, and the potential implications of this were discussed with her, including the possibility of dismissal. It was also explained that the university would consider the full context of the absences that had led to this stage and any relevant supporting evidence.

26. Between 4 January and 22 January 2017 the claimant was absent from work with gastroenteritis for 19 days.

27. On 13 March 2017 a further Occupational Health report was prepared. The claimant had attended on 10 March 2017. At that point she was certified fit for work for full duties and she advised the Occupational Health physician, Dr Shah, that she had adjustments at work including an adjustable desk, radiant heaters and had been provided with an electric wheelchair. She described her managers and colleagues as supportive and she did not require any new adjustments at work. It was pointed out that it was possible that she could have a flare up of her medical conditions and if they were severe enough, she might require time off work in the future. Her medical conditions were ongoing and unlikely to improve, in the doctor's opinion. Her four periods of sickness in the past 12 months were related to her ongoing medical conditions.

28. On 5 April 2017 there was a further sickness review meeting which led to a stage four absence review. This occurred with her manager, Mr Jones, and Ms Walker, an HR adviser as notetaker. The claimant was accompanied by her work colleague, Carl Simmons. Her history was mentioned again. It was noted that she was sick from 30 August 2016 to 4 September 2016, which should have led to a stage four review. However, the decision was made as a reasonable adjustment to hold her to stage three. Her sickness from 4 January 2017 to 22 January 2017 then invoked stage four again. At that stage they discussed her current health and wellbeing and asked if there were any additional reasonable adjustments the university could provide to support her. The claimant confirmed that she was happy with the level of support she was receiving and would let them know if there was something more they could offer. It was pointed out that they had amended her work type and duties, made adjustments to her working environment and provided portable heating. She had been allowed to take flexitime to cover from sickness but this was unlikely to continue because it did not give a true picture of sickness absence. They discussed wellbeing support available to the claimant to help prevent and mitigate the effects of her condition and to help prevent further absences, and it was noted that the most recent Occupational Health report said she was fit for duty with full duties and did not require any new adjustments. It was suggested to her that her working time of 36 weeks could be spread in a different pattern across the year in order to give her shorter periods of working time to assist in managing her attendance. It was suggested that her normal work pattern of two hours a day over five days could be undertaken in more hours on fewer days, still totalling ten hours a week. The claimant was asked to consider that option.

29. The decision was taken that the claimant was not going to be recommended for termination of contract and that she would be held at stage four again as a further reasonable adjustment. She was made aware that should there be any further absence within the following 12 month period from the last date of her most recent absence it would be reviewed in line with stage four of the intermittent short-term absence procedure, and the potential implications of that were explained to her, in particular the possibility of dismissal (pages 112-113).

30. On 7 November 2017 the claimant self-referred to Occupational Health. She said that this was due to work-related stress. She had described that she had the two part-time roles within the university and that she had no problem with her role in

Student Services. She was due to have a new line manager in the Faculty of Education and that she had previously suffered work-related stress issues when she had worked for that manager in 2013. She explained that there were currently no significant non work-related stressors. It was recommended that she have a workplace stress risk assessment. It was further recommended that the management put together an action plan to manage the issues that the claimant had highlighted. She felt that the new manager did not understand what adjustments are considered reasonable in relation to her chronic medical conditions. She was anxious to prevent possible absence from work with stress. She considered that her physical condition had deteriorated and was therefore referred to the Occupational Health physician for an assessment. This was provided on 15 December 2017 (pages 125-126). The consultation was undertaken by telephone. She had been off work from 1 December 2017 after having found a lump in her breast. She had a seizure during the investigative process at the hospital and was admitted to hospital for observation. At that stage she did not have the results of the tests on the lump.

31. The same Occupational Health physician, Dr Shah, undertook a further telephone consultation with the claimant on 23 January 2018. She had by then been diagnosed with breast cancer and had been off work since 1 December 2017. She had surgery on 8 January 2018 and was having staff counselling. She was experiencing stress about her condition but did not mention any problems at work and she did not know if the planned changes in line management would go ahead of not. She was unfit for work until completion of her treatment for breast cancer.

32. There was evidence that in February and March 2018 there was great difficulty within the faculty arranging cover when the member of staff due to cover the desk normally undertaken by the claimant either took a lunch break or had other responsibilities that caused her to leave the information desk ‘unmanned’ (pages 129-139). These covered the period from April to June 2018.

33. On 4 July 2018 Mr Jones, the claimant's line manager in the Faculty of Education (the 25 hour a week contract), made a further referral to Occupational Health. The claimant planned to return to work on 10 July and he wanted to know what reasonable adjustments could be considered, whether there was an underlying health problem that could affect her attendance, and whether sickness absence was likely to continue, recur or affect future attendance.

34. On 7 August 2018 the claimant was seen by Dr Shah. The claimant had not then returned to work but hoped to do so within the following four weeks. It was considered that she would benefit from a phased return over two weeks if feasible. She wanted to use annual leave to prolong her phased return over a four week period, and the doctor noted that this would require a management decision. She would commence her post in Student Services in early September and had asked for a mini fan and a track ball because she could no longer use a mouse. It was noted that this equipment was going to be ordered for her. She did not at that stage require any further restrictions at work. The requests for cover to enable the current occupant of the claimant's position to have a lunch break, continued as evidenced in a series of emails.

35. The claimant returned to work on 1 September 2018. By then she had been away from work for eight months.

36. On 20 September 2018 the claimant emailed Phillipa Dunning to say she would not be able to come in due to being unable to wear her prosthesis (this was as a result of her mastectomy) because it was rubbing. She believed that it was the doors into Student Services which were causing the problem. She subsequently accepted that that was not the case – there was no evidence that the doors were causing the problem.

37. On 26 September 2018 Mr Jones wrote to the claimant to confirm the outcome of the sickness review meeting that had taken place with her on 14 August 2018. It was pointed out to the claimant that she had already had a stage four meeting for long-term absence (not short-term/intermittent) and so the meeting was being convened. It had been postponed from 10 July as she had still been unable to attend at that stage. They discussed the Occupational Health appointment that she had attended on 7 August 2018, and she confirmed that she had received counselling from the counselling service. He arranged to order the track ball mouse and a desk fan. He confirmed there would be a risk assessment carried out in relation to stationery related tasks (these being heavy). They agreed to reconvene. It was pointed out to the claimant that there was an impact of her absence on the business – the cover that had to be found for the team, the impact on colleagues; roles and the responsibilities of the health and safety role which she had been expected to take up. Work had been delayed in the Student Services role which caused an impact on the service. They discussed arrangements for her phased return and the incorporation of her annual leave that would be carried over, this would take place over six weeks and they would finalise the detail on her return. She confirmed that she was increasing her physical activities, including playing badminton, and hoped to swim again soon. She asked if she could use annual leave to cover her sickness absences, and it was confirmed with her that as part of her phased return and ongoing employment they were prepared to implement a plan of flexibility which would include carrying over annual leave and a reduction in hours.

38. Mr Jones refused the claimant's request that she be allowed to take annual leave when she was unwell. He said this because of her high level of sickness absence, currently and historically, and because it masked sickness and they wanted to be able to support her with Occupational Health. It was agreed that they would re-discuss the handling of the stationery requests and orders when she returned to work. The claimant confirmed she did not need any additional support or further measures at that stage, and they talked about the next stage of the absence policy and continued absence which would have led to stage five of the long-term sickness policy, but as she had returned to work on 1 September 2018 this was not required. It was also confirmed, however, that Mr Jones would need to arrange to reconvene the stage four intermittent sickness policy formal meeting that she had been held at as a reasonable adjustment in April 2017. Because she had been off sick again from 19 September and she was on a phased return plan, he had not had the opportunity to do so. The claimant was reminded that it was part of his and Ms Dunning's role as line managers to consider the impact of any further absence on the students and university staff, and to consider her ability to maintain regular attendance at work, executing her duties in her roles. A review of her absence history would form part of that consideration. The potential implications of her absence could include the possibility of a recommendation by him for her employment to be terminated.

39. Two days later, on 28 September 2018, the claimant wrote to Ms Dunning asking for changes to her workplace arrangements. She had noted that her track ball and desk fan had been supplied in the Faculty of Education but not in Student Services. Fortunately, she had taken her own in from home and it had now been resolved. She asked that as a reasonable adjustment any previous or future absences relating to either of her disabilities be disregarded in relation to sickness monitoring and recording.

40. On the third week of her phased return the claimant noted that when her department were moving into a brand new building, known as The Catalyst, the doors into the Student Services were too heavy. She believed that having to pull them open had caused inflammation and pain around her operation site of the mastectomy. In her evidence she confirmed that none of the doctors supported her belief. She asked that the doors into the Student Services area in the new building be made to open using a touchpad, as had been done in the Faculty of Education, and she reminded Ms Dunning of her responsibilities under the Equality Act 2010.

41. Dr Shah had a further telephone conference with the claimant on 10 October 2018. He found himself unable to predict her prognosis: that she could have a recurrence of her condition in the future, and if it was severe enough she may require time off work. He noted what the claimant had told him about the doors to The Catalyst building but did not comment on whether the link that she had made at that stage between the swelling and the doors was credible or even likely.

42. A further Occupational Health referral was made by Mr Jones on 28 September 2018 (pages 166-172). That recorded the fact that Mr Jones had agreed to align the claimant's working days in Student Services with his working days in his department. It further recorded the fact that the claimant had contacted him on 19 September 2018 to indicate she was unwell because of the side effects of medication and her prosthesis rubbing. On 20 September 2018 Mr Jones had been contacted by the claimant to say that she was finding the doors heavy and could not access her work area (this was in the new building). Mr Jones immediately arranged for the doors to be propped open for her two hour shifts each day when she was going to be in the building until an automated control could be fitted. On one occasion the claimant arrived earlier than the start of her normal shift and was unable to gain entry until somebody let her in. The claimant informed Mr Jones that an Occupational Health referral was being made by the Faculty of Education. It was agreed that Mr Jones would liaise with her line manager there to ensure support needs were assessed for both areas of her work. A new desk had been provided and shelving in the filing cabinet checked to ensure it was accessible for the claimant. Mr Jones noted that the claimant had been seen playing badminton with another member of staff and was concerned to establish whether this had contributed to her pain or soreness. It was noted that she was at stage four of the intermittent absence stages, and at stage four of the long-term absence stages (pages 170-172).

43. The claimant was away from work on 19 and 20 September 2018. She contacted Mr Jones on 2 October 2018 asking to use her annual leave to cover 19 and 20 September. Mr Jones replied on 4 October 2018 confirming that annual leave could not be used because it masked sickness absence, and it is difficult then to provide the correct level of support. On this occasion, however, he was willing to

approve the annual leave for her absence on 19 and 20 September, as part of her phased return and as a reasonable adjustment under the circumstances. The claimant thanked him in an email on 10 October 2018. Ms Dunning, however, then replied to the claimant indicating that the days had been entered as sickness on her personnel record with Ms Dunning. Because she worked term-time only in Student Services there was no option to cover with annual leave (her annual leave was taken out of term). On this occasion, however, Ms Dunning allowed the claimant to add the hours onto her term-time total hours contract and remove them from the sick record as part of her phased return and as a reasonable adjustment under the circumstances.

44. The result of the request for a further Occupational Health physician report was supplied on 30 October 2018 by Dr Shah. The claimant had been off work since 19 September 2018 on sickness absence but had worked some days in between. She had been seen by her specialist in early October and had been advised that she has fat necrosis. She was now able to wear her prosthesis but it still caused rubbing, but she said that she needed to get used to it, using a track ball instead of a mouse to avoid rubbing. She was planning to return to work on 1 November 2018 and did not require any new adjustments at work. Any flare-up of her condition, if severe enough, may require further time from work. She was having appropriate ongoing treatment and was in remission from her cancer. Dr Shah said it was not possible to say whether or now much of any specific activity had contributed to her symptoms and triggered her recent sickness absence. Generally, the advice would be that she used her arms as much as possible and within her limits so that she remained as fit and healthy as possible and regular exercise was recommended (page 175).

45. The claimant returned to work at the beginning of November 2018 and had a discussion with Ms Dunning in a return to work interview. It was noted that the last day of her absence had been 31 October, that she had been off because of inflammation and swelling, that she had received feedback from Occupational Health, that Ms Dunning considered there should be an immediate work environment assessment and risk assessment, that the claimant was using flexitime and a phased return to work with a light workload to be extended for the first weeks bac. Her end of year review would be moved to May 2019 and she was going to take up swimming again. The only reasonable adjustment referred to therein was to consider the use of a shredder because the claimant had difficulty emptying it due to the position of the equipment, but it was noted that no other adjustments were needed.

46. On the same day Mr Jones undertook a return to work discussion in relation to her contract in his department. The reason for absence there was given as complications postsurgery. Again, Occupational Health were to be asked to undertake a risk assessment. There were adjustments put in place in terms of a phased return to work, and it was noted the claimant would use annual leave for her next doctor's appointment on 9 November 2018. It was also noted that Occupational Health had recommended exercise.

47. On 20 November 2018, 13 days later, the claimant was once again absent from work due to pain. The last date of absence was 30 November 2018. The reason for absence was given in the return to work discussion on 7 December with

Mr Jones as being severe pain, and that the illness was not work related. It was noted that it could reoccur and that there was to be a further risk assessment undertaken. It was noted that there were not at that stage any adjustments to be added and that she should not over-exert herself.

48. The claimant was called to a formal stage four intermittent/short-term absence meeting on 14 December 2018. Both Ms Dunning and Mr Jones were present at the meeting along with an HR adviser, Nicola Walker. The claimant attended with her union representative, Sam Armstrong. It was noted that the claimant had been held at stage four in April 2017 as a reasonable adjustment. Each absence was reviewed and discussed. The claimant at that stage said that one of the absences had been caused by the injury sustained when using the heavy door. She conceded in cross examination that in fact that may not have been the case. It was noted the claimant had returned to work again on 3 December 2018 and she was feeling well. It was also noted that the most recent absence for severe pain was not due to work, the claimant simply woke up with it.

49. It was agreed that they would look at a workstation assessment for the claimant in the Faculty of Education. The claimant also noted that she had been able to work later if she had been late in in the morning, and that she had been able to take holidays to cover sickness. Ms Dunning noted that she had continued to do that in the last couple of years. Ms Dunning also said that working later was not feasible in the current climate and she would take those points away and review them. She felt the ad hoc arrangement was harder to manage.

50. The claimant had been working hours to suit, to the concern of Mr Jones, and in particular the claimant pointed out that her husband did not have transport so she would stay later (up to 7.30pm) and then go and pick her husband up. The claimant was attending later because she was bringing her daughter to the university (the daughter was a student). Ms Dunning believed that the reason for the reasonable adjustment to let the claimant start later was because of her disability, whereas in fact the claimant confirmed it was due to her daughter coming in and that is why she started at 10.00am.

51. The impact of the claimant's absences were discussed by Mr Jones because they had had to put in a rota for others to cover the claimant's work. Somebody else had been appointed but half of the role was to cover health and safety, and she had not managed to get that work done because she was covering the claimant's role in reception. Ms Dunning made the point that they carry forward a backlog of work but they had really struggled this year and she did not have anyone to pass it to. She had been unable to complete the audit. She did not feel it could be sustained. There was a backlog of filing and a backlog for auditing.

52. The claimant confirmed that she did not have any future doctor’s appointments and there was nothing else stopping her from coming into work. It was noted that she had help from two members of staff dealing with the stationery, and she still felt able to do both of her roles. The claimant confirmed that she did not feel it necessary to go to see Dr Shah again and other wellbeing options were discussed. The claimant also confirmed that the issue with the doors had been resolved (page 184). The claimant was reminded that they may have to consider termination of her employment.

53. On 31 January 2019 a report was prepared by Ms Dunning and Mr Jones with a recommendation for termination due to absence. It was noted that between 11 February 2002 and 30 November 2018 the claimant had taken 1187 days of absence. The claimant had been held at intermittent policy stage three as a reasonable adjustment in September 2016, and at intermittent policy stage four as a reasonable adjustment in March 2017. She had been given special paid leave days. The support that had been offered to her was listed (page 190). It was noted that the claimant had requested two adjustments – the first being to continue to be allowed to use annual or flexi leave instead of recording absence as a period of sickness. Previously, the university had supported the claimant with allowing the use of such leave in place of recording as a period of sickness absence, however it was noted in the March 2017 stage four meeting that this would not be allowed going forward as it masked the absences and therefore made it difficult to provide the correct level of support. She also asked, in September 2018, that previous and future absences relating to either of her disabilities be disregarded in relation to sickness monitoring and recording.

54. It was confirmed with the claimant that any requests for reasonable adjustments would be discussed in the pending stage four absence meeting, but after consulting Human Resources it was agreed that this was not a reasonable adjustment because the university absence policy applied to all absences and was designed to support employees who were absent due to health problems regardless of the nature of the specific medical condition, and this had been confirmed with the claimant in the stage four absence meeting. It was noted that the current position at the time of the recommendation being made that Occupational Health considered that the claimant could have a flare-up of her condition in the future and if it was severe enough may require time from work. The claimant did not require any new adjustments at work. The claimant had been offered the opportunity of adjusting her weekly working pattern and consolidating her hours in Student Services to enable her attendance, but she had indicated that would not be helpful in managing her attendance and had only been helpful when her daughter had been coming into the university at similar times. The claimant was told the option was still available to her. It was noted that the claimant had said no further support of adjustments were required.

55. The conclusions in the report were that the level of absence was unsustainable. There had been a substantial increase in pressure on both the Faculty of Education information desk and the Student Services as a result of the claimant's continued absence. Within the Faculty of Education, the absence of the claimant provided a strain on the other information desk colleagues and other professional support colleagues. The other two colleagues undertook additional responsibilities as part of their time on the information desk, for example health and safety and the processing of student travel expenses, and they had been unable to complete their tasks because of covering the desk in the sessions where the claimant would have been in attendance. Within Student Services a proportion of the work that should have been completed had been completed by two student information officers. This was over 100 hours of scanning, shredding and filing. The two officers who had picked this backlog were no longer available in the team and not a resource that could be drawn on in the future. A manager had had to carry out the additional checks on student support fund application forms, normally completed by the claimant, adding to the manager’s workload. In order to catch up from 2017

to 2018 Student Services would have to recruit and train temporary staff to complete the work, and also to clear the backlog of work that had accrued in 2018 and 2019. The money advice service was unable to sustain further delays to compliance and audit checks. They were recruiting temporary staff to undertake those tasks. There continued to be an impact on the team.

56. The claimant had incurred 49 separate instances of absence totalling 1187 days (three years and three months). The absences had occurred every year except one (in 2011) of her 16 years 11 months' employment. It equated to a career average of approximately 70 sickness absence days per year and over the last five years the average number of sickness absence days per year had increased to 99 absence days per year on average. Such a persistent high level of absence over a significant period indicated that the claimant was unable to attain a satisfactory level of attendance despite the ongoing support, interventions and reasonable adjustments that had been implemented, and so a recommendation for termination of employment on the grounds of poor attendance was tabled for consideration.

57. On 5 February 2019 the claimant was advised that her employment would terminate with effect from 5 February 2019 on the grounds of attendance. She was to be given 12 weeks' pay in lieu of notice and payment for any outstanding holidays.

58. On 14 February 2019 the claimant appealed the decision to Mr Passey, Senior Human resource Adviser.

59. On the last day of work when the claimant received her dismissal letter, there was something of a minor upset when she was asked to leave the university. The claimant wrote to the university asking that she be allowed back on campus, and the response was that she could.

60. An appeal hearing was held on 14 March 2019 by Mr Igoe. The claimant was again supported by her union representative, Mr L Welsh. Mr Igoe confirmed that he had looked at the recommendation for termination submitted by Mr Jones and Ms Dunning, he had looked at the Occupational Health reports from 2012 onwards, the letter of dismissal, her appeal letter, the university's absence policies and procedures and the representations that were made during the hearing, and additional documentation submitted to him after the hearing. This information was the formal absence review meeting invite letter dated 10 December 2018, the appointment letter to the pain clinic and an email confirming that the claimant was starting counselling in April.

61. Mr Igoe concluded that a fair process had been followed and that there had been an increase in the claimant's level of absence. He noted that the Occupational Health physician believed she may may need more time off work in the future, and that the university did not have capacity to accommodate such high levels of absence in any area of the institution in the current economic climate. He was aware that a backlog had caused serious audit and compliance concerns and that the need to train new members of staff to cover the backlog had a major impact on the wider team and their ability to deliver good customer service. He was aware that the claimant's poor levels of attendance had placed considerable strain on the professional support team in the Faculty of Education which impacted on their ability to deliver a high quality and timely service for students and staff (page 207). He

considered that the detrimental impact of the claimant's current levels of attendance made on both areas of the business was clearly not sustainable. He pointed out that there was no automatic right for disability related absences to be discounted for the purpose of a sickness absence policy as a reasonable adjustment. He noted that there had been a number of referrals to Occupational Health and a comprehensive list of adjustments made to help the claimant to improve her absence levels, including contributing towards the cost of a new wheelchair and arranging for her to have a height adjustable desk, and further including phased returns and flexible working. His conclusion was that the decision to terminate the claimant's employment was fair and reasonable and that no new evidence had been brought to light during the appeal which would have had a material impact on the original outcome. For the reasons that he set out, the claimant's appeal was unsuccessful.

The university policies on sickness absence

62. These were set out at page 68(a) to 68(o) of the bundle. In particular there were two sections – section 10 dealing with intermittent and short-term absence, and section 11 talking about long-term absence.

Short-term absence

63. There is a section dealing with reasonable adjustments which describes reasonable adjustments as including, for instance, a phased return to work, a permanent or temporary adjustment to working hours or pattern subject to business needs, new or modifications to existing equipment or tools and physical adaptions including ground floor office accommodation. It states that reasonable adjustments for employees who are disabled would be considered in accordance with the current equality legislation. The phased return to work is set out at paragraph 7 (page 68(f)). When a member of staff returns from a continuous period of eight weeks or more sick leave a phased return may be considered. It is usual that for the first two weeks of the phased return it will be paid at the employee's normal salary level. In the first week they will work two days and three days in the second week (pro rata for part-time employees). Should a phased return of more than two weeks be recommended annual leave may be used to accommodate the remainder of the phased return or unpaid leave may be taken if annual leave has been exhausted. On return from sick leave a line manager will meet with the individual informally to discuss their absence. At various stages there will be formal absence review meetings.

64. Paragraph 10 (page 68(g)) states that when a member of staff reaches a sickness absence trigger level (three occasions or 15 working days) the stage process will be invoked on their next absence. Any subsequent absence (irrelevant of length) within the next 12 months will lead to the next stage of the policy. Cases of individuals whose absence appear to form a pattern within any timescales and/or evidence of trigger avoidance and/or persistent high levels of absence will be subject to a wider absence review to fully consider attendance levels and further action may be taken where appropriate.

65. The stage process, intermittent and short-term absence, is set out at pages 68(h):

- Stage One – four occasions of absence or 16 working days in a 12 month period. The manager is then to organise a supportive Occupational Health referral if appropriate. On return from each absence the manager will meet informally with their member of staff to discuss the absence, any support that could be provided and any measures they are taking to improve attendance.

- Stage Two – any subsequent absence. The manager is then to organise a supportive Occupational Health referral, if appropriate (and in fact should do so at both stage three and four). The same process is followed in the return to work discussion.

There then follows stages three and four, which are formal as opposed to informal:

- Stage Three – reached by any subsequent absence due to sickness, and the manager will convene a formal absence review meeting. The member of staff now has the right to be accompanied and HR will be present.

- Stage Four – reached by any subsequent absence. For this the manager will convene a formal meeting with the employee, who has the right to be accompanied, and HR will attend to provide guidance.

66. Appendix 1 to the policy at paragraph 13 sets out the potential termination of employment on the grounds of attendance. This may be considered at stage four of the intermediate procedure and at stage six of the long-term procedure, or in other exceptional circumstances. It explains that the manager will follow a formal absence review meeting and review of the most recent report from Occupational Health, consider the support provided, mitigating personal circumstances, ongoing medical condition or treatment. In the case of long-term ill health the prognosis and potential for future recovery, any adjustments that have been made; Occupational Health recommendations; the impact of the absence on the team students, customer and cost; the business and operational needs and the efforts made by the employee to improve their health and attendance, and may consider the progress of an application for ill health retirement and the pattern of attendance whilst employed at the university. The manager will then prepare a report for consideration by a Pro Vice Chancellor who will determine whether termination is appropriate, and the employee will then be advised in writing of the decision, the date of termination and the right of appeal.

Long-term absence

67. This is set out at page 68(l). This has six stages:

- Stage One – this is reached at a 28 day length of absence. Throughout the period the manager and member of staff maintain regular contact to discuss support and at four weeks the manager may make a referral to Occupational Health.

- Stage Two – this is triggered at six weeks of absence, when the manager will convene an informal meeting with the employee. At both of these the manager is to organise an Occupational Health referral.

- Stage Three (formal stage) – this is triggered at 13 weeks of absence, when the manager will convene a formal meeting with the employee, who has the right to be accompanied and HR will attend.

- Stage Four – triggered at 26 weeks, when the manager will convene a formal meeting with the employee, who has the right to be accompanied and HR will attend. There may be an Occupational Health referral dependent on the employee's progress.

- Stage Five – this is triggered at 39 weeks, when the same conditions apply as at stage four.

- Stage Six – this is triggered at 12 months. Again there will be a formal meeting with the same terms as stages four and five, but if there is no improvement in health there may be a recommendation for termination.

68. The Tribunal did note that following the claimant's diagnosis and treatment for breast cancer she described herself as forgetful because of the treatment.

69. The Tribunal further noted that in the claimant's absence on sickness leave the respondent had built a new centre, The Catalyst. The claimant's department had moved into it but before it was built Ms Dunning and the claimant had discussed the need for accessible toilets and a kitchen to facilitate her access to work. Nobody appears to have considered the access needs of a wheelchair user into the building, whether her or any other, to the extent that on her return to work she found herself unable to access her workstation as it was beyond heavy double doors (as was the toilet). The claimant did not however complain until 20 September, at which point it was immediately agreed that the doors would be held open.

70. The Tribunal further noted in the claimant's evidence that she did not disclose any of her mental health issues to the respondent in case they turned them against her and placed her at a further disadvantage.

71. The evidence from the respondent was that they had looked into putting automatic openers and closers on the new doors in The Catalyst building but had found eventually that the building was structurally unable to take them. Apparently, the entrance to the claimant's work area had a particularly high ceiling and the doors were very large.

The Law

72. In **Environment Agency v Rowan [2008] IRLR 20** the Employment Appeal Tribunal ("EAT") stated that when considering a failure to comply with a similar duty under the Disability Discrimination Act 1995, the Tribunal must identify:

(a) the provision, criterion or practice applied by or on behalf of the employee;

(b) the physical feature of premises occupied by the employer;

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

(d) the nature and extent of the substantial disadvantage suffered by the claimant which may require a consideration of the cumulative effect of (a) and (b) above.

The burden of proof

73. It is for the claimant who complains of discrimination to prove on the balance of probabilities, facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination against the claimant which is unlawful. These are referred to as "such facts". If the claimant does not prove such facts the claim fails.

74. It is important to bear in mind when deciding whether the claimant has proved such facts that it is unusual to find direct evidence of discrimination. Few employers would be prepared to admit such discrimination, even to themselves.

75. In deciding whether the claimant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the Tribunal will therefore usually depend on what inference it is proper to draw from the primary facts found by the Tribunal.

76. It is important to notice the word "could". At this stage the Tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an unlawful discrimination. At this stage the Tribunal is looking at the primary facts provided by the claimant to see what inference of secondary fact could be drawn from them. The Tribunal must assume at this stage that there is no adequate explanation for those facts. These inferences can include inferences that may be drawn from any failure to comply with a relevant Code of Practice. It is also necessary for the Tribunal to consider not simply each particular allegation but also to stand back to look at the totality of the circumstances to consider whether, taken together, they may represent an ongoing regime of discrimination.

77. Where the claimant has proved facts from which inferences could be drawn that the respondent has treated the claimant less favourably on the proscribed grounds, then the burden of proof shifts to the respondent and it is for the respondent then to prove that it did not commit, or as the case may be is not to be treated as having committed, the act.

78. To discharge that burden it is necessary for the respondent to prove on the balance of probabilities that the treatment was in no sense whatsoever on the proscribed ground. This requires a Tribunal to assess not merely whether the respondent has proved an explanation for such facts but further that it is adequate to discharge the burden of proof on the balance of probabilities that the proscribed ground was not a ground for the treatment in question.

79. Since the facts necessary to prove an explanation will normally be in the possession of the respondent, a Tribunal will normally expect cogent evidence to discharge that burden of proof.

Just and equitable extensions to the time for presenting the claim form

80. The case of **CF Robertson v Bexley Community Centre CA2003 IRLR 434** provides a short checklist which is of assistance in considering just and equitable extensions. The Tribunal should look at the following:

(1) The length and reasons for the delay;

(2) The extent to which the cogency of the evidence is likely to be affected;

(3) The extent to which the respondent has cooperated with any requests for information;

(4) The promptness with which the claimant has acted once he or she knew of the facts giving rise to the cause of action;

(5) The steps taken by the claimant to obtain appropriate legal advice once the possibility of taking action was known;

(6) The balance of prejudice.

Parties' Submissions

Claimant Submissions

81. The claimant reminded us that her first paid employment was in 1985 with the university whilst she was a student. She was already at that stage, following a motorbike accident, in a wheelchair. She initially worked for ten hours a week and then applied for a job with 25 hours a week in further education in Student Services. She initially had problems in both posts because of a lack of proper facilities, and she pointed out that she used her own coping strategies. She reminded the Tribunal that the respondent accepted the claimant was a disabled person because of her syndrome and breast cancer. The syndrome she knew from her first employment in 2002, and that even from the early days she did not have an adjustable desk that could be raised – it took 17 months for that to be undertaken. She had heaters placed under her desk but they could get too hot, and later radiant heaters were fitted.

82. The fire doors in the Department of Further Education corridors were only made accessible to the claimant 12 years later, after an assistance dog had been trapped in the double doors. They were then held permanently open, unless a fire alarm was activated. Her colleagues who worked on the front desk in G12 were able to go into the back office. Because the claimant was told her work was exclusively on the reception desk, she was unable to access the back office. She could not get into the café in the Further Education Department and she had to wear warm clothes and thermal underwear because of the low temperature in the reception area.

83. The Student Services moved in 2019 into The Catalyst building but the building itself ignored her condition because she was unable to open the doors into her desk. She found this out when she returned to work in September 2018 and she initially had to ask someone to open the doors for her. On 19 September the claimant advised her manager of the problem. She was worried about losing her job. She could get in through the main entrance of the building but she could not open any of the internal doors, and she was the only complainant at that stage and the only wheelchair user.

84. An agreement was reached on 20 September as a short-term measure that the doors would be open and wedged when the claimant was expected to be present in the building. If she arrived early, as she did on one occasion, she had to wait for somebody to let her in. She had not had access issues in the building until then. There was no discussion about it when the building was being developed, and yet it was known that she was a full-time wheelchair user. It should have been resolved at the planning and design stage when access to the kitchen and toilets was discussed with her. She did not even consider this to be a reasonable adjustment but a necessity because she could not reach her desk.

85. The claimant then dealt with the termination of her employment and asked for the mitigating circumstances to be taken into consideration. The dismissal procedure made no consideration of the fact that the claimant had had cancer, and it was well documented that she had recurrent urinary infections because of her other condition. The claimant told the Tribunal that she did try to be independent, and having to ask a colleague to open the door into her offices was a huge disadvantage. There had been workstation assessments which had established that the information desk did get extremely cold and it was very draughty (the main doors opened externally).

86. The claimant then turned to the issue of using her annual leave as a reasonable adjustment for her disability. She had been able to do this in the past under previous line managers, but the facility was removed in 2017 because it masked her sickness. She indicated that she was not ill, she was disabled, and she did not think it was the right thing to do as using annual leave at times when her disability caused her to be ill was the right thing to do, so that she could manage her own disability. The claimant pointed out that she had been held at stage four of the short-term sickness policy in the past as a reasonable adjustment and it was unclear to her as to why they did not consider doing this again.

87. The claimant believed that she had been working in places which were too cold for her and that this had been ongoing from 2005, and she believed it had caused numerous absences which subsequently led to her losing her job. Reasonable adjustments which were suggested by experts took a long time to implement, and alterations that were made for students ultimately discriminated against the claimant. The new building, The Catalyst building, should have been planned to be wheelchair accessible from the outset, not just for her.

<u>Respondent's submissions</u>

88. The respondent pointed out that a number of historic issues were background only and the fact that if the respondent had acted at the outset there would not have been so many absences was not in fact on the List of Issues.

The time issues – section 123 Equality Act 2010

89. There were a number of complaints which were potentially out of time. Acts which were prior to 2 February 2019 were out of time, and the question was whether there was conduct extending over a period. The Tribunal was reminded that failure to complete an action occurs when the person decided on it. We were reminded of the case of **Hendricks v The Commissioner of Police of the Metropolis CA 27 November 2002**. The question is whether there was an act extending over a period, or a succession of unconnected or isolated specific acts which would each carry their own time limit. The respondent pointed out that the test for extending the time limit would be whether or not it would be just and equitable to do so. The claimant has not given a reason why it would be just and equitable to do so, and it was noted that up to the point of her dismissal and appeal the claimant was represented by her union.

90. The respondent then went on to discuss section 15 of the Equality Act 2010 and pointed out that the claimant did not claim unfair dismissal and therefore there was a different approach to be taken. The issue was whether the claimant had been dismissed in consequence of her disability, and if she had whether the respondent could justify the dismissal by arguing that it was a proportionate means of achieving a legitimate aim. The respondent quoted the case of **HM Prison v Johnson [2007] IRLR 951 EAT**:

> "A finding of disability related discrimination under the Disability Discrimination Act 1995 (now the Equality Act 2010) requires that the employee's disability must be the reason or part of the reason for the employer's treating of the employee. An employer's inadequate response to a problem caused by a disabled person's disability is not of itself discrimination, although it may be a breach of the duty to make reasonable adjustments.
>
> In considering whether an employer is in breach of its duty to make reasonable adjustments it is necessary to identify with some particularity what steps it is that the employer is said to have failed to take. Unless that is done the kind of assessment of reasonableness required is not possible."

91. In **Tarbuck v Sainsbury's Supermarkets Ltd [2006] EAT**, the EAT found that the failure to consult with an employee concerning reasonable adjustments is not of itself a breach of duty under the then Disability Discrimination Act 1995. The case further confirmed that an objective approached needed to be taken. In relation to justification, an employer bears the burden of proof.

92. The case of **Homer v The Chief Constable of West Yorkshire Police** in the Supreme Couse (Lady Hale's Judgment at paragraph 20) states:

> "A provision, criterion or practice is justified if the employer can show that it is a proportionate means of achieving a legitimate aim. The range of aims (which can justify indirect discrimination on any ground) is wider than the aims

> which can, in the case of age discrimination, justify direct discrimination. It is not limited to the social policy or other objectives derives from article 6(1), 4(1), and 2(5) of the Directive, but can encompass a real need on the part of the employer's business."

93. Lady Hale quotes Mummery LJ in **R (Elias)v Secretary of State of Defence [2006] EWCA Civ 1293**:

> "The objective of the measure in question must correspond to a real need and the means used must be appropriate with a view to achieving the objective and be necessary to that end. So it is necessary to weigh the need against the seriousness of the detriment to the disadvantaged group."

94. It is not enough that a reasonable employer might think the criterion justified. The Tribunal itself has to weigh the real needs of the undertaking, against the discriminatory effects of the requirement. The Tribunal must find therefore that it is appropriate and reasonably necessary to dismiss to achieve the reasonable aim.

95. The respondent accepts that the dismissal relates to the claimant's disability – her sickness absence is what triggered dismissal. The defence therefore is triggered.

Reasonable Adjustments – section 39 Equality Act 2010 (with reference to sections 20 and 21 and schedule 8)

96. This applies only if the employer knew that the employee had a disability, and the issue is whether they then knew that it was likely that the claimant would be placed at a disadvantage because of the PCP.

97. The case of **Environment Agency v Rowan [2007] UKEAT0060** states:

> "An Employment Tribunal cannot properly make findings of a failure to make reasonable adjustments under the then sections 3A(2) and 4A(1) without going through the following process. The Employment Tribunal must identify:
>
> (a) the provision, criterion or practice applied by or on behalf of the employer; or
>
> (b) the physical feature of the premises occupied by the employer; or
>
> (c) the identity of non-disabled comparators (where appropriate); and
>
> (d) the nature and extent of the substantial disadvantage suffered by the claimant.
>
> The identification of the substantial disadvantage suffered by the claimant may involve the consideration of the cumulative effect of both the provision, criterion or practice applied by or on behalf of the employer, and the physical feature of a premises, so it is necessary to look at the overall picture."

98. In the case of **Royal Bank of Scotland v Ashton UKEAT/0542/09/LA**, the Employment Tribunal were overturned by the EAT, who found that they had chosen

an employee as the non-disabled comparator, but she was in fact disabled, and even if she had been properly regarded as non-disabled, she was not in the same circumstances as the claimant. The very fact that the respondent had given the claimant the advantage which was not given to non-disabled people, of having her trigger points flexed so that she received more time absent without discipline and therefore more pay during periods of absence than a non-disabled person, meant that there was no failure to make reasonable adjustments. The test of reasonableness is objective, and the circumstances include adjustments which will avoid disadvantage.

99. The case of **Griffiths v The Secretary of State for Work and Pensions [2016] IRLR 216** was an appeal against an EAT decision which upheld the Employment Tribunal's decision dismissing the claimant's claim of breach of the respondent's duty to make reasonable adjustments for the claimant's disability. One of the claimant's arguments in this case had been that it would have been a reasonable adjustment to disregard a period of absence under the attendance policy, and secondly it would have been a reasonable adjustment to increase the number of days' absence which would activate the usual attendance policy provisions in the future. The Court of Appeal dismissed her appeal against the dismissal of that, but also said as follows:

> "Both the majority of the ET and the EAT were wrong to hold that the section 20 duty was not engaged simply because the policy applied equally to everybody. The duty arises once there is evidence that the arrangements place the disabled person at a substantial disadvantage because of her disability."

100. The court then dismissed the appeal on the single ground that the Employment Tribunal was entitled to hold that the proposed adjustments were not steps which the employer could reasonably be expected to undertake.

Discussion

101. In this case it was the respondent's position that in dismissing the claimant by failing to disregard her sickness absence the claimant's argument was flawed. Her dismissal did relate to her disability, but the claim was misconceived because she asserted that it was unfavourable treatment. The respondent argues that this part of the claim is out of time because the request by the claimant to adjust the periods in the sickness absence policy was made by letter of 26 September. She received an answer on 14 December that such absences would not be disregarded. She was aware then and made no further request and time ran from 14 December. The respondent had told the claimant that they did not consider this would be a reasonable adjustment. At that stage she was represented by the union. If the Tribunal is against the respondent in this regard, then the respondent would add that it was a proportionate means of achieving the legitimate aims of the respondent. The fact that the dismissal was related to the disability is agreed.

<u>Was it a proportionate means of achieving a legitimate aim?</u>

102. The facts are complicated because the claimant had two roles. In particular, the impact was on the Student Services role undertaken by the claimant between

10.00am and 12.00pm and the information desk in the afternoon. Ms Dunning's statement was important in this regard because she pointed out the impact on the team. They had a backlog of work: others were assisting but their own work was suffering. Boxes of filing were stacking up and there was a backlog which was needed to be cleared for audit purposes. The claimant did not challenge this in cross examining Ms Dunning.

103. Mr Jones set out the impact as well. Ms Gilroy was unable to undertake her health and safety duties and she had not been appointed to cover the claimant's role. Health and safety work was simply not being done. The legitimate aims of the business were to ensure an appropriate service for the students and staff, to ensure that the desk assistant could provide support for health and safety and to ensure that Student Services had the staff resources it needed to prevent there being a delay in the workload. It was also a legitimate aim to maintain acceptable levels of attendance and to support the claimant to ensure accurate records were maintained.

104. The claimant wanted to take additional annual leave to use this as sickness absence. A decision was taken on this in April 2017. This was not an ongoing issue and was out of time. The true picture of absence was masked, and the respondent could not provide support and a return to work discussion, and it was therefore totally inappropriate. It is a matter of public policy that staff are encouraged to use their annual leave to their benefit for rest and relaxation. Further, to ensure that employees are not placed under additional burdens of pressure which the claimant's absence caused.

Was the dismissal proportionate?

105. All of the above were legitimate aims and the respondent did not dismiss at the first opportunity. Page 187 of the bundle sets out the absence history. The claimant was held both at stage four and stage three in September 2016, although she triggered stage four, but it was agreed she would initially be held at three. The absence from January 2017 was the second time at stage four and the claimant was held there twice.

106. The claimant had a diagnosis of breast cancer in December 2017 but that was not the end of the story. The claimant returned to work on a phased return over six weeks following her treatment. For the first three weeks she worked two days a week. This was supported by the employer, but the claimant then went sick again on 19-21 September. An adjustment on this occasion was made to use the phased return to work so as not to mark her as absent. She then had 36 days' leave of sickness which was not work-related and a further seven days – this was disability related but not due to her breast cancer. The Occupational Health advice (page 174) was that there would be flare-ups likely. On 30 October (her last absence) this was not related to cancer.

107. The claimant agreed on her return to work interview that she was likely to have further flare-ups. She had a return to work interview in August 2018 and at that stage was not suggesting any further adjustments (pages 149-150). The picture was that there was nothing practically needed to get her back to work. The respondent then decided not to hold her at stage four, and it was proportionate to make a decision to dismiss.

108. The report prepared by the two line managers was very detailed, they followed the policy, and it was reviewed by Mr Allanson. The claimant has not challenged the detail. She did however appeal her dismissal, but her appeal letter does not suggest there were any procedural irregularities and she was at that stage represented by her union. She did not challenge at that stage the impact on the service, simply the fact that she should have been allowed to use annual leave for disability absence. The report made it clear that this was a proportionate means of achieving a legitimate aim. There was no evidence of an improving picture and it was not improving in reality.

Reasonable Adjustments

109. The internal doors were no longer an issue from 2017. The complaint in relation to them in substantially out of time by two years. They were dealt with in 2017. The claimant's real complaint was that the door leading to the G12 office caused her a substantial disadvantage.

110. In her return to work interview earlier in September the claimant and managers accepted that she was not required to use the back office (her role was to remain in the foyer/reception). The claimant complained of the cold in the foyer area. The respondent is struggling to see where this fits within section 20. It was a physical feature of the building, but she was not saying it was cold all the time. Reasonable steps were taken to avoid the disadvantage by providing her with radiant heaters and a portable heater at her feet. The claimant never suggested any alternative. There was nothing else the respondent could have done. The claimant had to be in the foyer. The respondent had taken all reasonable steps to keep her warm and she did not suffer any substantial disadvantage. She did take steps for herself, which she explained to Occupational Health e.g. a hot water bottle on her knee.

111. The respondent became aware of the problem with the new double doors in The Catalyst Building in September 2018, particularly on 20 September when the claimant made her first complaint. The respondent could see there was a substantial disadvantage in the claimant not being able to open the double doors using her wheelchair. They took reasonable steps to address the issue immediately in that the doors were propped open at times when the claimant, it was anticipated, would need to gain entry i.e. just before and just after each of her shifts. The claimant accepted in the December meeting (page 184) that the door issue had been resolved. Subsequently the respondent learned that the doors could not be automated. The claimant did not, in her List of Issues, indicate that she required extended access but raised this in her evidence.

Not allowing the claimant to use annual leave

112. This provision, criterion or practice did not apply to Student Services, only the information desk.

113. The claimant was able to buy up to ten days extra annual leave, but her absences were way in excess of that so it would not have helped the claimant. Reasonable steps were taken by obtaining Occupational Health advice and by making adjustments.

114. It was reasonable to dismiss. The claimant's sickness had to be managed in accordance with policy. She was held at various points in her absences and Occupational Health recommendations were complied with. Not all of her absences were disability related. The claimant admitted that being held at stage three and at stage four was helpful. The respondent said that these were reasonable adjustments.

Conclusions

115. The drafting of these conclusions has not been straightforward. As a panel of three we have sometimes not agreed with each other, and configurations have reached majority decisions.

116. The Judge and lay members did not make unanimous findings with regard to the List of Issues, and we have indicated the views of each where appropriate.

Jurisdiction – The Time Point

117. It was agreed by all parties that if any of the claimant's complaints occurred on or before 2 February 2019 they would be outside of the primary limitation period within section 123 of the Equality Act 2010. Regard was had to the extension of time for early conciliation set out in section 140B.

118. We found the following allegations to be out of time (predominantly within the allegations of failure to make reasonable adjustments):

(1) The failure to automate the internal doors in the Faculty of Education;

(2) The Faculty of Education reception desk area being cold; and

(3) Lack of a height adjustable desk or appropriate workspace in G12.

119. These claims were all out of time. The panel was unanimous in this regard. All of them occurred long before 2 February 2019. They were individual allegations not amounting to conduct extending over a period that ended later than 2 February 2019, and the claimant had confirmed (within the limitation period) in a meeting with her two line managers that she did not require any further adjustments.

120. The issues set out at 7(a), (b) and (c) are thus out of time. We do not find it would have been just and equitable to extend time in respect of the claimant's complaints. The claimant had many meetings with her line managers about both her disabilities, her absence and her illnesses. She had every opportunity to raise these complaints at a much earlier date and did not do so.

Discrimination arising from disability

Was the claimant subjected to unfavourable treatment, particular in being dismissed and by the respondent failing to disregard previous periods of sickness absence when applying the sickness absence policy?

121. On the face of it the dismissal is unfavourable treatment. The issue is whether it arose from the claimant's disability. Should the respondent have

disregarded previous periods of sickness absence when applying the sickness absence policy – in particular in relation to sickness absence linked to the claimant's disability? We noted the following occasions where the sickness absence policy was not applied to the letter:

(1) In October 2014 the claimant was held at stage 3 as an adjustment.

(2) In September 2016 the claimant was held back again at stage 3.

(3) In August and September 2016 the claimant was held at stage 3 again having actually triggered stage 4.

(4) In January 2017 the claimant git stage 4 again but was not at that stage dismissed.

(5) The claimant was off work for a long period, having had a mastectomy, and then two shorter periods because of pain and swelling at the site of the operation. Between 20 November to 30 November the claimant had severe pain with no obvious cause and the doctors advised the respondent that this could reoccur.

(6) In September 2018 the claimant asked that any previous or future absence relating to her disability be disregarded for monitoring purposes. She was advised that this was not a reasonable adjustment because the absence policy applied to all absences for all staff. This was at a stage 4 meeting.

(7) On 30 October the dismissing officer was advised by Occupational Health that the claimant may well have further flare-ups and if severe enough may require time off from work. At this stage the claimant confirmed that she did not have any requirement for further physical adjustments to her workplace.

122. We found credible evidence from the respondent that absence of the claimant did cause problems for the information desk and the Faculty of Education. Both were unable to provide complete cover without disadvantage to others, in the claimant's absence. In her role with the Faculty of Education things such as filing and updating records were substantially behind after her absences. With regard to the information desk, health and safety matters were not completed because of the member of staff having to cover the information desk rather than doing her other tasks. In addition, it was not always possible to provide complete cover throughout the working day, which was required on the information desk.

123. Our conclusion was that there were persistent high levels of absence which, despite the interventions of the respondent and reasonable adjustments, showed no significant or sustained improvement. Mrs Jarvis considered it unreasonable to disregard all of the previous absences. However, she noted that there had been a period of 22 months with no issues: the claimant's cancer was in remission and if the time she had taken out for disability absences was excluded from the calculation, there would have been 11 days' absence which would not have triggered a stage 4 policy meeting. She considered that the reposdent employer should have treated it

more sympathetically than they did. Manifestly she felt that the claimant suffered unfavourable treatment because it led to her dismissal. Mr Anslow agreed with Mrs Jarvis.

124. Judge Warren, however, considered that there were two absence policies – short-term absence and long-term absence. The policies were applied in accordance with their terms and whilst the employer did take all of the absences into consideration, they also exercised discretion at preventing the claimant from reaching a stage 4 dismissal on at least three earlier occasions.

125. Having accepted that there was unfavourable treatment in both the dismissal (and in the case of the lay members, with disregarding previous periods of sickness absence), and having accepted unanimously that the aims ((a)-(e)) were legitimate, the issue then relates to whether the unfavourable treatment was a proportionate means of achieving them.

126. It should be noted that subparagraph 6(f) of the List of Issues lists an aim which the respondent said was legitimate, to ensure that all of the respondent's employees are not placed under additional burdens in terms of workload as far as possible. Mr Anslow and Mrs Jarvis did not accept the evidence of the respondent that staff were placed under additional burdens believing that the respondent had looked back at the situation and created the evidence to suit the circumstances. Judge Warren, in the minority, accepted the evidence of the respondent, that they were placed under additional burdens – it was inevitable in the absence of the claimant that others would have to cover her work.

127. Mr Anslow and Mrs Jarvis agreed that from the claimant's original disability, her pattern of attendance had improved. It was significant that she was then diagnosed with cancer and required treatment for it. They considered that the period of absence for the cancer should have been discounted because the claimant was now in remission – in effect that period of treatment was over. Mr Anslow considered it disproportionate to apply 'achieving the legitimate aims' in such a way as they did with a disabled person. He felt the claimant should have been given a final warning. Mrs Jarvis agreed with Mr Anslow.

128. The Judge disagreed with them both, considering that everything that could be done to keep the claimant at work had been done, and that the last Occupational Health report indicated that the claimant could have further episodes of pain which could lead to absence. When balancing that against the legitimate aims of the university it left the respondent in a position of vulnerability as an employer as they had no idea what would happen in the future. There was credible evidence of considerable inconvenience to both departments and employees which had already led to difficulty in the university achieving their legitimate aims.

Dismissal

129. Mr Anslow and Mrs Jarvis considered that because the respondent did not exclude periods of absence due to disability it was not proportionate to dismiss. Judge Warren considered that the legitimate aims of the university were proved to her satisfaction. The only possible way of achieving those aims with some degree of certainty, bearing in mind the extensive history of absence, and the impact the

claimant's absence had had on the two departments. The doctor's assertion following her last period of absence that she could be subject to recurring pain and further absence, led to the dismissal being inevitable and proportionate.

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Employment Judge Warren

Date: 10 October 2022

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON 11 OCTOBER 2022

FOR THE TRIBUNAL OFFICE