Case Number: 3201441/2015

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EMPLOYMENT TRIBUNALS

Claimant: **Mrs E Anyanwu**

Respondent: **London Borough of Waltham Forest**

Heard at: **East London Hearing Centre** **On: 9-11 January 2017 (11 January tribunal only)**

Before: **Employment Judge Prichard** **Members: Mr L O'Callaghan Mr G Tomey**

Representation

Claimant: In person

Respondent: Ms G Rezaie (counsel, instructed by Legal Services LBWF Town Hall)

RESERVED JUDGMENT

The unanimous judgment of the Employment Tribunal is that:-

(1) The claimant was unfairly dismissed.

(2) Under the principal in *Polkey*, through section 123(1) of the Employment Rights Act 1996, there is a nil compensatory award.

(3) The claim for failure to make reasonable adjustments under section 20 of the Equality Act 2010 fails and is dismissed.

(4) The claim of discrimination because of something arising from disability under section 15 of the Equality Act 2010 fails and is dismissed.

(5) In the event the parties are unable to agree a settlement they may notify the tribunal within 4 weeks of the date of the promulgation of this judgment if they wish the matter to be re-listed for a remedy hearing.

REASONS

1 The claimant, Mrs Eugenia Anyanwu, is currently 53 years old. She lives in Barking. She worked for the respondent local authority for 12 complete years from 2 December 2002 until her dismissal. The effective date of termination was 14 July 2015 following a period of notice.

2 She was dismissed under the respondent's Managing Sickness procedure following a long period of absence from work. The claimant was diagnosed with lupus in 2008. At the time her dismissal took effect she had been absent for a period of 8 months from 18 November 2014. She brings complaints to the tribunal that her dismissal was unfair procedurally and substantively and that her dismissal and certain antecedent acts of the respondent amounted to failures to make reasonable adjustments. She also complains that her dismissal was for something arising from disability i.e. her absence from work.

3 It is accepted, rightly, that the claimant's diagnosis of lupus and the known facts surrounding her illness and its effect on her (and complications with renal failure) amounted to a disability for the purposes section 6 of the Equality Act 2010.

4 Lupus is an incurable immune system illness in which there are two major symptoms - joint and muscle pain and extreme tiredness. The full diagnosis is SLE (Systemic Lupus Erythematosus). The claimant is prescribed steroid medication Prednisolone as the primary medication and a considerable number of other non-steroid medications to deal with her systems which latterly included severe renal symptoms and hypertension. That itself, complicatedly, was partially caused by the steroids themselves. Lupus is a condition which tends to wax and wane. However at the time of the claimant's dismissal, and after it, her symptoms remained active, and she was fully unfit for work throughout.

5 The tribunal was pleased to hear that in October 2016 the claimant succeeded in finding a new job, working for the Central London Community Health Trust. She works with patients recovering from strokes who have been discharged from various North London Hospitals.

6 She is qualified as a band 6 Registered General Nurse. In 1997 she worked for a spell in Newham General Hospital prior to joining the respondent as a Deputy Manager in one of their day care facilities for adult patients with learning disabilities. As a Deputy Manager, or Trainee Assistant Manager as it might have been then, she could earn a salary commensurate with what a band 6 RGN would earn.

7 However, in 2008, following disciplinary proceedings she was subject to a disciplinary demotion to the post of Residential Social Worker - Adult Social Care Community Services. The demotion involved a loss of pay.

8 Originally the claimant was working in May Road facility in that capacity but subsequently the May Road premises were sold by the council and she and other staff moved to Markhouse Road to work there. Latterly her job title was Day Service Officer

(two grades higher than the support workers also working there).

9 The nature of the work is extremely physical and strenuous. The service users have challenging behaviours and severe needs. Many need help with toileting, and many are incontinent. There are many wheelchair users. Many have difficulty swallowing and need help eating. Some of the service users are non verbal and communication requires skill. We have also been informed by all the respondent's witnesses that a degree of consistency in staff is particularly desirable with this user group. Staff members develop a rapport with service users and gain their confidence.

10 Agency staff have been used although the use of agency staff has declined latterly to the continuing need to cut overheads, in fact later we were told that agency staff could only be used to cover actual vacancies i.e. not sickness absence. Latterly after the claimant's dismissal it became even stricter. Only one agency member of staff could be used to cover for two vacancies. That meant staffing cuts.

11 The tribunal was told certain risk assessments had been undertaken by the respondent. The claimant had been excused from any duties involving using wheelchairs out of doors off the premises, and also from using the electric hoist and slings, all of which involved high level physical exertion.

12 For much of the narrative the claimant was line managed by Ms Ajay Keesoony. Her management then passed to an agency manager Mr John Parsonage. Ultimately she was managed by Dee Tweedie. Ms Tweedie was originally a respondent to these proceedings but she was later dismissed from the proceedings, as a respondent. Waltham Forest was going to back her actions and the statutory defence was no an issue.

13 As it transpired Ms Tweedie never managed the claimant while she was at work. She took over sometime on 19 November 2014, literally the day after the claimant's continuous sickness absence started. She never returned to work. Ms Tweedie knew the claimant from working together but had never line managed her.

14 The claimant had had attendance problems throughout the time she was in May Road. On her transfer to Markhouse Road her previous attendance problems did not follow her and she started there with a clean slate for attendance. That was on 17 January 2012. She had been at the informal stage of the sickness management procedure. At the time she transferred to Markhouse Road she was working part-time. That was a way she had found to reduce her sickness absence. It also helped her to manage her medical condition. To change to this part-time arrangement the claimant had completed a formal flexible working application under the statutory flexible working scheme. The application was granted on 26 November 2009.

15 The claimant states in a way we found impossible to comprehend that she was somehow pressurised into returning to full-time hours at Markhouse Road. She was unable to give any detail at all of who had put that pressure on her, or how. From her description to the tribunal it was vague and unparticularised. It was stated in the passive voice without attributing this pressure to any individual. It appeared to the tribunal she had elected to return to full-time hours. We would not be surprised at that. She herself openly told the tribunal that half time pay in that grade was hard to survive

on. The tribunal can see that if she earned £12,000 or less per annum part-time (full-time pay £20,000 per annum pro rata), it would be hard to survive on.

16 The claimant started back on full-time hours on 1 April 2012. She started having problems with her attendance almost at once. In an occupational health report dated18 June 2012, Ms Suzanne Monk the OH adviser in Medigold describes the claimant lupus condition. The summary and recommendations state:

> "1 Ms Anyanwu is fit for work. She has found that working from 9 till 5 is better than her previous early start.
>
> 2 Ms Anyanwu has lupus disease. Her prognosis is good. She has been positive in obtaining good information about her condition and is aware she must pace herself appropriately.
>
> 3 The employee's condition would be considered a disability under the Equality Act. A certain degree of increased absence might be deemed a reasonable adjustment under the discrimination section of the Equality Act by an employment tribunal. This absence would include time to attend hospital investigations and appointments. How much time can be supported would be for management to determine. [tribunal's emphasis]
>
> 4 It would appear that Mrs Anyanwu is managing her symptoms. To support her at work she may need extra time to complete tasks and support in the form of time off when she needs to attend hospital."

Those recommendations, as we have heard, were followed. None of the claimant's medical appointments - hospitals, doctors, other specialists - were counted as non-attendance for the purpose of the sickness management procedure.

17 The claimant however contends that the degree of increased absence was not reasonable and was not in accordance with the OH recommendation. From the facts that we have heard over the course of this hearing, the claimant's contention would appear to be unfounded.

18 The respondent did invoke the sickness management procedure at the set standard trigger points in the policy. However, in the outcomes of a series of hearings, the claimant's absences were treated with forbearance and leniency over a long period.

19 On 3 January 2013, the claimant commenced a period of sick leave that lasted for 66 days. She was given a sick certificate for 1 month and then another one in February for 6 weeks. She was seen by occupational health. There was another OH report from Ms Monk on 8 February. The claimant was being treated in hospital. The report at that time states:

> "Mrs Anyanwu is suffering with a severe flare up of symptoms of her lupus. She is in a lot of pain and her mobility is affected. She is under the care of specialist and her general practitioner. She was also waiting to hear if she needed an operation on her right shinbone which has problems secondary to lupus."

The claimant was under the management of Ajay Keesoony at this time.

20 Melanie Impey, was the manager at Markhouse Road until March 2014 when

the claimant had been there. She had oversight of many of the formal and informal sickness management stage meetings. As general background information she stated that within the council, her department, Social Care, had one of the highest rates of absence. Residential care had a worse rate than day care. She was under pressure to implement the absence procedures. The respondent seems to have required a threshold level of just under 4% attendance. It is expressed in different ways either through individual spells of absence or aggregate number of days every 3 or 12 months. (Structurally this scheme resembles the Bradford factor which some employers use).

21 We were therefore told, and accept, that local management- the claimant's line manager, Ajay Keesoony, and Ms Impey - had little discretion in implementing the procedure and holding the meetings at the trigger points. By contrast, they had more local discretion and autonomy in the outcomes.

22 On 14 February 2013, the claimant attended an informal meeting under the procedure. We have then seen from the records that on 8 April 2013, the claimant had a first formal meeting with Mr Keesoony. At that time Management agreed with the claimant a plan for a phased return to work. The claimant was given an attendance target: "not more than 8 days in 12 months or three periods of sickness in any three month period". This reflected the triggers set out at page 2 of the managing sickness procedure. The trigger is a trigger for a referral to occupational health.

23 At the 8 April meeting it is recorded, reliably, as we find:

> "As a way of reducing her sickness absences Eugenia could consider doing alternative/reduced hours and this could be discussed in more details if necessary at the next meeting."

A 12 week monitoring period was proposed, giving a review date of 9 July 2013.

24 Happily the review went well on 9 July. One of the comments were:

> "Eugenia says she feels better in herself and she is coping well at work."

Specifically:

> "Eugenia can assess her inability to push wheelchairs in the building and she is able to let others know if she encounters any difficulties. Eugenia has been made aware of the need to comply with the sickness procedure and should her sickness absences increase this would lead to a review of her formal stage under the managing sickness procedure."

No absences were recorded during the monitoring period.

25 It is a fact that the claimant never requested part-time hours even though her management was suggesting it. However, over this period it seems she coped on full-time hours.

26 Problems did not occur until the following year when she suffered a far more protracted flare up of her condition. She had some relatively short absences: 13 September 1 day; 28 October 2 days; 18 November 2 days, so this was not continuous absence. None of these absences gave rise to another occupational health referral.

However, on 5 February 2014, a first formal sickness review took place. The absences all seemed to be lupus related i.e. inflammation, joint pains and swollen face. These were known symptoms of the claimant's condition. Sometimes her face was so swollen that she had difficulty speaking.

27 It was decided at this meeting to review the first formal stage. This is understandably relied upon by the respondent as demonstrating leniency. Management would have been within their rights under the procedure to move more formally to the next stage. It also, to the tribunal, demonstrates a reasonable adjustment for the purposes of these proceedings. It showed tolerance of an increased level of absence which the claimant accuses the respondent of not allowing. It was formally stated at that meeting:

> "Sunita (HR) noted that Eugenia's sickness was not being managed at the next level rather her previous first formal stage was being reviewed."

And:

> "Five days absence during original first formal has not triggered an OH appointment because Eugenia's illness is being managed properly not beneficial to refer to OH."

And:

> "Sunita reiterated sickness policy around notification of absence which Eugenia confirmed her understanding of."

28 The last entry was the first reference to what has been another theme in this case - namely the need to report absences properly. The claimant's consistently erratic compliance with reporting requirements was becoming a concern.

29 The notification requirements are at page 4 of the procedure. The requirements in the first week of an absence are strictly prescribed:

> "Absence longer than 8 days
> Agree with your manager how you will maintain contact. Ideally you should contact your manager weekly to report on your health and expected date of return."

As we shall describe the reporting requirement was the source of a running argument between Ms Tweedie and the claimant during her lengthy and final sickness absence.

30 Following the 8 February 2014 first formal review the claimant had some absences from work. Ultimately the absences were not great and on this occasion Ms Impey made a managerial decision not to activate the next stage. There is a formal sheet for this step known as a "Deferred Action Form" or DAF and Ms Impey filled it out and signed it on 7 May 2014 stating:

> "Current stage in managing sickness procedure: Eugenia has exceeded the target set at the first formal stage meeting on 5 February 2014 by half a day (two days sick leave absence within the next 12 weeks).
>
> Reasons for deferred action: Eugenia's marginal failure to achieve the target and her underlying medical condition. Date decision to be reviewed within three months of last agreed DAF (30 July 2014)."

31 The form is not countersigned by the claimant. It is probable that the claimant was not asked to sign it. She told the tribunal she had never seen the form. It is possible that, as it was a question of no adverse action, it was not so necessary for the claimant to be shown and to sign the form. It is not an important issue.

32 Following that, on 18 November the claimant attended a disciplinary hearing with Ms Impey. It does not appear that the claimant was represented. She was offered representation but declined.

33 The terms of reference as described by Ms Impey were:

> "EA took authorised annual leave from the 19th September to the 6th October. She was expected back to work on 7th October but failed to attend or report her absence. However she did attend a hospital appointment on the 7th October at 2:15. She then failed to return on the 8th, 9th and 10 October. She did not report her absence during this period and thereby failed to follow reporting procedure. Her line manager became concerned and tried to contact her but was unable to do so due to her mobile line being unavailable. EA returned to work on Monday the 13th October 2014 and was asked why she had been absent and why she did not make contact and report her absence."

34 Ms Impey explained to the tribunal further to these terms of reference that when the claimant had returned on 13 October she had not told anyone in advance that she was returning on 13 October and that nobody there knew whether to expect her back or not.

35 The tribunal has to add from our own experience that the dates of this hearing were altered put forward by one day to Monday 9 January. This was confirmed as acceptable by the respondent. The claimant never confirmed or made any contact and as of Monday morning nobody knew whether to expect the claimant to attend or not. She attended. The tribunal needs to mention this as it is exactly the same as what previously happened at her work.

36 At the disciplinary hearing on 18 November 2014 the claimant produced a strange Med 3 certificate, apparently signed by her regular GP. The sick note states the period of sickness from 8 October to 11 October 2014 which is from Wednesday to Saturday but the sick note was not signed and dated until 11 November the following month. It was a backdated certificate. There are some GPs who would not issue such a certificate. The date of assessment is given as 11 November 2014, a month after the alleged sickness absence. The diagnosis is extraordinary. It states: "Generally unwell". It did not create a good impression at work.

37 Following the disciplinary hearing over a month later, the claimant was given a final written warning for unauthorised leave and failure to follow the reporting procedure. The duration was 18 months; the claimant did not appeal against that final written warning.

38 The following day after the disciplinary hearing (although the claimant was not told any outcome then), the claimant had commenced a period of sick leave from which she never returned. It appears she went to her GP. It was known that she was going to her GP following the disciplinary hearing. There is a sick certificate from the same

doctor who assessed his patient on 18 November 2014 and gave a two week sick certificate to 2 December. The diagnosis this time was hypertension. The claimant had already told those at the disciplinary hearing that she had a GP appointment that afternoon and would have to leave at 2:15pm.

39 Following that sick certificate, there was then another sick certificate, this time for over a month from 2 December to 5 January. The next one ran from 6 January to 3 February and the next was on 4 February for a 3-month period. The 2 December diagnosis was hypertension again. However on 8 January the diagnosis was acute renal failure. That was1month and that was followed by 3 month certificate for acute renal failure. The claimant was in hospital. The final sick certificate gave a diagnosis of renal failure/anaemia under hospital treatment.

40 On 31 December 2014, the claimant was admitted to hospital. She was discharged on 5 January. Unsurprisingly there was then a referral to occupational health where she was seen on 12 January. A very full report was presented after that, this time by Dr Ashby OHP. The OHP concluded:

> "Ms Anyanwu will be very unlucky if it is not possible to bring her lupus under control and so the balance of probabilities is that she will be able to return to giving regular and effective service in her substantive post in due course but it is difficult to say at this stage how long the present level of incapacity will last. It is unusual for hypertension to be so uncontrollable that it interferes with work although it can do so. She will need regular medication throughout her life but the normal expectation is that she should be able to continue working at 247 with her lupus providing it doesn't settle down as expected. At the moment there is nothing the employer can do to assist Ms Anyanwu to return to work until her treating doctors got control of her illness. She is well enough to return to work. She is likely to require a graduated hours scheme but it is too early to devise a plan at this stage because what is required will depend on how well she recovers from this acute episode."

More of the tribunal's attention has been drawn by both parties to paragraph 8 of the recommendations:

> "What is reasonable in law does not necessarily depend upon the needs of the employee but also on the ability of the employer to accommodate those needs so what is reasonable has to be a managerial decision and is not a medical one. The need for redeployment has to be a managerial decision and will become appropriate if it is no longer possible for the employer to accommodate the employee's needs in the substantive post. The need for redeployment is therefore a managerial decision but we can advise as to whether there are medical grounds for considering redeployment etc."

41 The problem, as we shall describe it, is that the claimant was uninformative about exactly what her needs were. In fairness to her it may be because, as the physician said, there was nothing the employer could do to assist her to return at that moment and she was still at that that same stage some 6 weeks later when a final formal meeting was held on 9 March 2015. The OHP had also said:

> "I would recommend that we review Ms Anyanwu in 6 to 8 weeks time when hopefully we will be able to give you more definitive advice concerning her return to work."

In fact the final stage hearing took place in 6 to 8 weeks time.

42 Ms Tweedie prepared a management report for submission to the hearing,

much of which consisted of repetition of the occupational health report which she presented to the hearing. It gave the history of the illness and it was very full. Together with the appendices it ran to 95 pages with all the Med3 certificates, earlier informal formal meetings, the deferred action, the risk assessments, and 3 job descriptions at the claimant's various workplaces - Trumpington Road, May Road and Markhouse Road. As Deputy Manager of the home Ms Tweedie formally invited the claimant to that meeting by a letter of 24 February 2015. With the letter the claimant was provided with a full copy of the management report and the appendices, and a copy of the full procedure and she stated:

> "The possible outcomes of this meeting may be, as a last resort, a final written warning, transfer, demotion, or dismissal from the Council's service."

43 It is important to note that other evidence in the form of a report was requested from the claimant's GP. It was to be sent to occupational health. The claimant would have to fill out a formal Access to Medical Reports Act 1988 authority for them to obtain these. It is known there is a large amount of hard information on the NHS database, including, as we later sa, consultant letters. As later became apparent the request for reports from the GP had been delayed and it looks as though the fault lay with Occupational Health - Medigold.

44 The final stage hearing was conducted by Ms Claire Bendall. She was the Head of Provision and Independence in Social Care and she was Ms Impey's line manager. She knew of the claimant and had met her before on a visit to the unit. She did not know her well and she was not acquainted with all the facts of this case although she must have heard of the case at some stage in the course of Ms Impey's supervision. This was a noteworthy and extreme case.

45 The claimant was represented at that hearing by Eze Ogua. Eze Ogua was a personal friend of the claimant. The respondent's management had no objection to the claimant bringing a personal friend who was neither a colleague nor a trade union representative. It was clearly stated at the hearing that:

> "Eugenia's absence impedes the daily running in the health and safety of the service users and staff team. We cannot recruit into her position during her absences. This puts staff under pressure during Eugenia's long periods of sickness absence resulting in an increase in workload putting them at risk of stress and possible sickness absences."

46 At the stage of this hearing overall at Markhouse Road the claimant had attended for only 70% of the working days during her period there. There were 147 days sick-leave in total. She had now exhausted full sick pay and was on half pay. The claimant described how she had attended on the 18 November 2013 with a swollen face and neck because: "If I phoned from home nobody would believe me."

47 It was pointed out by Ms Tweedie the claimant had been given the option of going part-time permanently with a view to accommodating appointments and medical treatment. These appointments were never recorded as sickness absence. In a passage which has been referred to and emphasised by the respondent she was asked by Gavin Baxter HR adviser to Ms Bendall:

> "If you were to go part time in terms of providing a service because we know at present the view

> of occupational health that you are unable to come back to work and the GP has signed you off until May. From what we know there is no prospect to return before April. Do you feel you will be able to achieve the targets with working part time?"

The claimant:

> "I've done it before but anything can happen to people. I was admitted to hospital."

Baxter:

> "In terms of lupus is it something where you would find it difficult to do a physical role as opposed to an office base role?"

The claimant:

> "It can affect anything"

Baxter:

> "So would affect any role?"

The claimant:

> "Yes"

48 Despite the respondent's interpretation in context of these proceedings the tribunal can see in the context that she is describing logically it is quite right. If a person is in hospital they are not fit to go to work and it matters not what work they do. It can affect any role. Her most severe flare ups would inevitably incapacitate her even if they gave the claimant an office based role.

49 The immediate outcome of the hearing was that Ms Bendall would notify the claimant by letter of her decision. It appears that afternoon Mr Baxter drafted a request to Occupational Health. There were three specific questions:-

1. Whether hypertension was caused by stress.

2. What the recent reduction in steroid dosage meant in terms of the claimant's well-being.

3. The claimant said she was likely to be off for the next 2 to 3 months what was the likely impression that a return was possible and he continued:

> "he requested that a GP consultant report be requested and we explained to Eugenia that we would be asking this, if this can be provided to occupational health to aid in responding to our question".

50 By email of 17 March Dr Ashby replied directly to Mr Baxter saying that stress itself was unlikely to cause an elevation of blood pressure. An individual was more likely to exhibit a more reactive rise as an underlying constitutional vulnerability to hypertension and:

> "One of the recognised effects of lupus is to cause renal damage with a resultant impairment of blood pressure control. Additionally one of the recognised side effects of steroid medication is to cause an elevation of blood pressure while taking it.
>
> The purpose of the statement concerning steroid effect was to advise that although she may be feeling better when I saw her, this would not necessarily accurately represent the true activity of the condition as the steroid effect would mask the true status of the condition at that time. The normal protocol is to introduce other medication under the cover of steroids and the result of that other medication can only be assessed as the steroid medication is reduced which is why I suggested a review 6 to 8 weeks after I saw the employee.
>
> The prognosis guesstimate that I made at the time was based on my experience in rheumatology … and depended upon the non-steroid medication being effective. If the medication were to be effective then a return to work would have been a reasonable expectation by this time. If it was not being effective then the employee could still be ill and unfit for work … As I do not know how the employee is at this time I would need to know the employer's assessment of the current situation so that I can advise the GP of current concerns when requesting his report."

51 As late as 20 March after Mr Baxter had chased up the GP report the Medigold administrator stated:

> "I cannot see that a report has been registered. Would you like me to write to Mr [sic] Anyanwu to obtain up to date Access to Medical Records consent and write to his GP."

52 On 24 March Mr Baxter informed Claire Bendall by email that it looked like the GP report had not been requested. Mr Baxter then wrote to Medigold saying:

> "Could the request for further information from the GP be sent, and if possible by tomorrow. We are putting a deadline from our end to get it back by the 7th April 2015."

Then on 26 March Claire Bendall wrote to the claimant to explain the delay. What she did not say is that the report had only just been requested. It states:

> "This report has been requested with a deadline from the GP to send it to Medigold by 7th April 2015 … If there is no report provided by the deadline then I need to make my decision based on the evidence presented.
>
> I urge you to encourage your GP to return the report within the timescale. I will make my decision within 5 days of the deadline and will let you know the outcome by 13th April."

53 In fact on 27 March, the following day, the claimant was sent by post a request for an Access to Medical Reports Consent Form which she was asked to complete and return to Medigold as soon as possible.

54 In a subsequent letter of 10 April Ms Bendall wrote again to the claimant to give her a progress update saying that:

> "No report had yet been provided by the deadline of 7th April. As there is no report provided by the deadline then I need to make my decision based on the evidence presented. This will take further time as I need to take careful consideration of the evidence presented. I will let you know the outcome by the 17th April."

55 We have finally seen that Medigold did not write to Dr Sharma at the

Whitehouse surgery in Barking, the claimant's GP until 14 April 2015, a week after the deadline. On that same date Mr Baxter enquired from Medigold as to whether any contact was received from the GP. Extraordinarily Medigold replied:

> "On the 15th April we have not had the GP report back as of yet. Our GP chase up department will continue to chase this weekly [sic] till it is received."

So Gavin Baxter writes back on 16 April to Medigold:

> "Can you confirm when the first request was sent along with any other chases … this is related to a case under our sickness procedure and the stage has been reached that will decide if her employment continues."

And on 17 April Medigold respond:

> "Hi Gavin
>
> The first request was sent on 3 April. The first chase took place yesterday."

56 This, in the tribunal's view, is inconsistent with the copy request from Medigold stamped as received by the surgery on 15 April (p.187 of the bundle). It is unlikely that there was any request on 3 April and they had not contained the medical records consent form. In fact it looks like the 3 April was the date that they received the consent form and then it looks like Occupational Health took a further 11 days to sent this request to the doctor surgery saying:

> "I enclose the signed consent form under the Access to Medical Reports Act. Our expectation is that we will receive the report within 7 seven days of prepayment."

57 As a matter of history the tribunal now knows that the GP, Dr Sharma, did not send a response to Medigold until 27 May 2015 so it looks as if delay may well have been within the GP surgery too.

58 The tribunal is further confused that the attachments to the GP report, which are the most important thing, were apparently printed on 20 April 2015; it happened between 20 April 2015 to 27 May 2015 and that seems consistent with the request letter received in the surgery on 15 April. It took Dr Sharma a month to get a letter to Medigold attaching the record. The records give a long list of medication prescribed, dates on which they were prescribed and there were 4 consultant letters. 3 from Renal Rheumatology in Barking Queens Hospital.

59 They were all up to date. The letters from Royal London nephrology were 27 February 2015, 1 April 2015, 17 April 2015. In fact the later one appears not to have been received by the doctor's surgery until 23 April so perhaps that must have been printed after 20 April. The letter from Queens Hospital was dated 8 October 2014.

60 Dr Sharma's report dated 27 May does not actually provide any helpful information in itself. It is the attachments to the report i.e. the consultant letters and lists of medication that gave the informative detail.

61 It has been argued by the respondent that nothing in the information that was eventually sent would have made the medical outlook any way better than it was at the

time Ms Bendall eventually made her decision in April.

62 A letter of termination was sent to the claimant on 20 April 2015. The claimant was given the necessary notice. Her last day of service was 14 July 2015. Having been on half-rate sick-pay she was reinstated to full pay for the duration of her notice period. Ms Bendall repeated the facts that were given in the Tweedie report quoting the GP's report she says:

> "I did attempt to get a further report from your GP via the occupational health service and as I have explained earlier unfortunately this was not forthcoming so I concluded based on the evidence presented that you are not able to offer a regular and efficient service. You have a total of 147 working days sickness absence since working at Markhouse Road and this is an indication you are not able to offer a regular and efficient service."

The claimant was told:

> "You have the right to appeal against my decision. If you wish to do so you should complete the appeal form enclosed … send it to Waltham Forest Town Hall … within 10 working days of the date of this letter."

63 Despite the respondent's contention that the claimant actually did receive this letter in the course of the post, the tribunal find on the balance of probabilities that the claimant did not receive this letter. It is accepted as fact the claimant telephoned the respondent on 2 June 2015 when, as it happened, she had a GP appointment. We have seen a Med 3 certificate dated 2 June which is for 12 weeks duration, it is from a different doctor at the same surgery. It was actually the same one who gave the previous sick certificate on 4 February 2015.

64 Much has been made at this hearing of the fact that a 3-month certificate from 4 February leaves approximately a 1-month gap from 5 May to 2 June. The claimant was inconsistent in her explanation of this. At first she stated that they must have mislaid a one month certificate and then at other times she suggested that there was actually no gap at all. It seems to the tribunal that a 1-month certificate sandwiched between 2x3-month/12 week certificates is an unlikely sick note to be issued and consider that the claimant may have misunderstood how a month should be counted and thought that she was covered for the whole of May. That is the more likely explanation.

65 The claimant did not know that she had been dismissed. The respondent accordingly did not chase up the claimant which they would otherwise have done to explain that her sick note had expired or was about to expire and therefore she told the tribunal it was only on 2 June when she telephoned about the sick note that she was then told her employment had been terminated on 20 April which came as a surprise to her. We accept this account of the claimant and it is corroborated by an email she sent from her private email account on 2 June. She stated:

> "Hi Claire
>
> I phoned Markhouse Road to inform them my sick note finishes on 1 June that I have an appointment on 2 June. My GP was informed by the manager Saima she was the new manager who had taken over from Ms Impey but I have been dismissed by you. I was off sick with high blood pressure and that news made it worse. I have not received the minutes of my meeting

> held on 9 March with you neither did I receive any form of dismissal letter. Your last correspondence with me was your letter dated 10 April postmark 15 April received on 17 April.

66 She sent this by email. Unfortunately she spelt Claire Bendall's surname wrong and therefore that never reached Claire Bendall but Saima Mehmood was correctly spelt as was Sunita Sharma from HR. In the event Saima Mehmood informed Claire Bendall of this email that the claimant had not received. Documents were sent out by recorded delivery. The original mailing had not been done by recorded delivery but by normal post. It might have been sent by email as well but the claimant, for reasons the tribunal finds odd, refused to let her employer have her personal email address. This may have due to the running argument she said she had with Ms Tweedie about reporting her absence.

67 The reporting issues are not important in this case. The tribunal do not believe Ms Tweedie wanted her to report every week. The claimant eventually said she would only report in if a new sick note was being issued. Considering the sick notes were of 3 months duration, there was no contact with management at all. We saw 2 file notes made by Ms Tweedie dated 21 January and 4 February 2015 recording the detail of conversations she had succeeded in having with the claimant on the telephone in the course of which the claimant had said that her health was none of the respondent's business. (That was a remarkable statement in the context of this dispute).

68 At this hearing Ms Bendall informed the tribunal that if she had been aware how late the request had been made for the GP letter she would certainly have extended the deadline and waited to get the GP letter.

69 The claimant did not appeal against her dismissal. She told the tribunal in person and in her witness statement that she could not appeal by the time she received the copy letter of dismissal the 10 days for appealing had elapsed.

70 In response to tribunal questioning of Ms Bendall stated that if the claimant had said that she had only received the dismissal letter 6 weeks after it had been sent she would have allowed the appeal to proceed. it is 99.9% likely that the council would have allowed the claimant to pursue her appeal out of time. That is not a surprising piece of evidence. Any employer would have allowed it.

71 The tribunal noted that if the claimant had appealed at that stage the GP report and attachments would have been available for consideration by any appeal panel. It is also very likely that the appeal panel would have upheld the original decision in view of the information in the GP report.

Unfair Dismissal

72 On all this evidence the tribunal has to say whether this dismissal was fair or unfair. We have little hesitation in coming to the conclusion that the dismissal was procedurally unfair.

73 The tribunal has equally little hesitation in finding that it was substantively fair at the time the decision was taken. On her own admission Ms Bendall stated that she should have waited and that she did not know the full situation. In the tribunal's view she could have found out what the true situation was. The documents were all there

with the respondent. The situation seems to have been well known by her HR adviser Gavin Baxter, and also Medigold, although even within Medigold the right hand did not seem to know what the left hand was doing.

74 For some reason she seems to have considered it important to set a deadline and move this forward fast. The tribunal does not really understand where that urgency came from given the long history of this case.

75 This is a classic *Polkey* situation. *Polkey* only affects the compensatory award. It takes effect under section 123(1) of the Employment Rights Act. It is a refinement on the words "just and equitable":

> "the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the claimant"

That is why the tribunal has considered it would not be just and equitable to make any compensatory award.

76 The respondent had already been forbearing with the claimant's long absences which were proving extremely hard for this stretched team at Markhouse Road to deal with. The information that was not available would have made no difference at all to the substantive decision that Ms Bendall in fact made on the lack of information.

77 This hearing is only to determine liability. We would have found it difficult to determine the amount of compensatory award.

78 On 1 April 2015, the Day Service Operators and the Support Workers were merged. The Day Service Work Officers went down from SC5 to SC4 and the Support Workers came up from SC3 to SC4. Pay protection was given to day support officers who were effectively downgraded with 6 months pay protection. The salary is variously stated as being £24,027 per annum or £21,552 per annum. Some of the later payslips mentioned protected salary. (This made it impossible to calculate the basic award properly).

79 Further, the figures given in the claimant's schedule of loss do not seem to be correct. On salary the gross weekly is given as £421.65. If £21,552 is the correct annual salary, the weekly amount would be £414.46 per week. If the salary was £25,027 the weekly figure would be £462.06. The calculation in the schedule of loss is also wrong because if you work out the dates employment and termination set against the claimant's birthday she should in fact have two complete years at the lower rate. They have used the multiplier of 18. The tribunal think the correct multiplier is 17 - 10 at the higher rate 2 at the lower rate = £24,027.

80 Further, the tribunal would not make an award for loss of statutory rights. That award is inappropriate in a case where there is no compensatory award and the tribunal judgment is that the claimant would have fairly lost those rights in any event.

81 *Polkey* deductions usually arise in redundancy cases where there is no basic award because it is the same as the redundancy payment which has already been made but this is purely an unfair dismissal case and therefore the claimant is entitled to

a basic award.

82 Accordingly as she has been successful then she would be entitled to a refund of her £1,200 that she has paid in tribunal fees. She received no remission of fees.

Discrimination

83 The claimant has also made a discrimination claim. The tribunal had to remind itself that she had made such a claim because it seems to have been largely overlooked by the claimant at this hearing.

84 The claimant to the respondent's and the tribunal's surprise was unrepresented at this hearing. She had been represented at a previous hearing in June 2016 when this hearing was due to commence. The tribunal was improperly constituted with a mistaken apprehension that she had withdrawn all her disability discrimination claims not just the direct discrimination claim. She was only told quite late that the claimant would not be represented. The case had been previously completely prepared so all the witness statements had been drafted and exchanged, the bundle had been fully compiled, no extra work was necessary in the intervening months before this final hearing.

85 The claimant never, as the tribunal had advised her, attended a hearing just to watch what happens and how the procedure works. She was therefore obviously completely at sea and ill-prepared when she attended the hearing on Monday; her bundle was in disarray although she had all the ingredients. She had no witness statement. She did not seem to be making any notes at any stage. The tribunal effectively conducted her case for her on the basis of a draft list of questions she had sent to her previous solicitors for comments on the respondent's witness statements after they had been exchanged. There was an email dated 25 May 2016 in the run up to the last hearing.

86 On some aspects of both discrimination claims there has been quite literally no evidence - zero - either in the witness statement or in oral evidence. The main thrust of the claim is that the statement in the earlier quoted occupational health report about:

> "a degree of increased absence might be deemed a reasonable adjustment this absence would include time off to attend hospital investigations and appointments to support her at work. She may need extra time to complete tasks."

All these adjustments were made. It is abundantly clear the respondent made these adjustments.

87 On the alleged PCP of requiring day service officers to supervise and manage staff we heard nothing at all. Nor did the tribunal hear anything at all about the claimant being "compelled" to carry out her work duties in pain.

88 The claimant may be confusing that the respondent went through the sickness management procedure formally sticking strictly to the trigger stages. Actual outcomes after hearings were considerably more favourable and lenient than they might have been.

89 The respondent was striving throughout the final stage hearing to determine what the claimant's needs were. The claimant, not that she was necessarily being uncooperative, was stuck for ideas, given her chronic illness and the fact she was in a prolonged acute phase of her lupus condition. It was good to hear now that the phase finished sometime around August 2015 and now she is so much better that she is able to work full-time for another employer.

90 The claimant relies upon section 15 of the Equality Act 2010. The claimant's absence arose from her disability. The respondent contends that their response to her absence a proportionate means of achieving the legitimate aim of managing the team within Markhouse Road. They held the claimant's job open for long periods, even after an absence of 4 months when there was no prospect of an imminent return and the subsequent GP report did not offer hope either. The policy could, in our view, consistently with the section 20 and section 15 duties have been taken to the final stage sooner than it was. That is one reason the tribunal makes a nil compensatory award in the unfair dismissal claim.

91 The claimant did not make any mention of the disciplinary final written warning that she was subject to. Had she done so in the context of discrimination we would have no hesitation in saying that that unauthorised absence and failure to notify was wholly unrelated to anything at all to do with the claimant's disability. It was a separate issue.

92 We have been told no detail of the claimant being forced to carry out duties which would aggravate her symptoms. The tribunal has neither heard nor read evidence of the claimant's complaint about having to contribute to written reports. We cannot understand why such a requirement / PCP would put the claimant at a disadvantage given her lupus symptoms.

93 This was a case of total incapacity for work while it lasted. Latterly, at this hearing for the first time, the claimant stated that it would have been a reasonable adjustment to redeploy her to an office role. However, the logic of her position on 9 March was that she was unable to work and that it would affect her in any role. That was quite correct at that time. She could not have attended work in any role whatsoever. The claimant's perception was strange. She somehow persuaded herself that the respondent did not think her illness was genuine or as bad as people said. We have found that not to be true. No-one has doubted the seriousness of her illness. Similarly no-one has doubted her ability to work well in the team when she was fit for work. There has been no hint of criticism of her work.

94 At this hearing the claimant came across as muddle-headed and generally overwhelmed by the task of representing herself. She told the tribunal openly that it was getting her down and depressing her. At one stage the tribunal had to remind her that it was her claim despite the fact that it was conducted on her behalf by the tribunal, largely.

95 It was kind of the claimant to express gratitude to the tribunal for the help that she had been given in ordering her bundle and helping her conduct this hearing over 2 days.

96 Ms Rezaie made the submission that the ACAS Code of Practice does not apply to a dismissal for performance for a dismissal under the final stage of a sickness management procedure. In the tribunal's view that submission is well-founded. The Code of Practice does not apply to redundancy cases either. It applies to misconduct cases that are dealt with under the disciplinary procedure. It was not a disciplinary dismissal. No complaint has been made about the disciplinary final written warning so there can be no question of any increases or reduction under section 207A Trade Union and Labour Relations Act 1992.

97 If the Code of Practice had applied the respondent would have argued that there could be a reduction for the claimant's failure to even attempt to appeal. The claimant was not under an absolute duty to appeal. Appeal was only an option. That is why the tribunal ultimately still found that this was an unfair dismissal. It might have been turned into a fair dismissal if there had been a later appeal hearing which had obtained the GP's evidence. The factor that made this procedurally unfair was the failure to obtain the GP evidence when it was expected and when the respondent was at fault for not obtaining - waiting for that evidence before any final decision was made.

Employment Judge Prichard

01 March 2017