EMPLOYMENT TRIBUNALS

Claimant: Miss Najma Naroo

Respondent: Secretary of State for Work & Pensions

Heard at: Nottingham

On: 13th and 14th February 2017 (Reading day)
15th, 16th, 17th February 2017
3rd March 2017 (In Chambers)

Before: Employment Judge Heap
Members: Mr. J Akhtar
Ms H Andrews

Representation
Claimant: Mr. A Ross - Counsel
Respondent: Mr. J Meichen - Counsel

RESERVED JUDGMENT

1. The complaint of unfair dismissal is well founded and succeeds.

2. The complaints of discrimination arising from disability are well founded and succeed.

3. The complaint of a failure to make reasonable adjustments referred to at paragraph 8a of the List of Issues is dismissed on withdrawal by the Claimant.

4. The remainder of the complaints of a failure to make reasonable adjustments fail and are dismissed.

5. The remedy to which the Claimant is entitled will be determined at a Remedy hearing on a date to be fixed by the Tribunal.

6. There will be a Preliminary hearing conducted by telephone for the purposes of case management and to make arrangements for the listing of the Remedy hearing. Notice of hearing will follow.

REASONS

BACKGROUND & THE ISSUES

1. This is a claim by Miss. Najma Naroo (hereinafter referred to as "The Claimant") against her now former employer, the Secretary of State for Work & Pensions (hereinafter referred to as "The Respondent").

2. It is a claim of unfair dismissal and also discrimination relying upon the protected characteristic of disability. It is conceded by the Respondent that the Claimant was, at all material times, a disabled person within the meaning of Section 6 Equality Act 2010 ("EqA 2010") by reason of depression; that being the condition relied upon for the purposes of the discrimination complaints. Therefore, the issue of disability is not a live one which we have had to determine in this case.

3. Turning then to the substance of the discrimination complaints, in this regard, the Claimant contends that she was treated unfavourably contrary to the Section 15 EqA 2010 for a reason related to her disability. She further contends that the Respondent had failed to make reasonable adjustments contrary to Sections 20 and 21 EqA 2010.

4. The Respondent denies that it unfairly dismissed the Claimant. It is contended in this regard that there was a potentially fair reason for dismissal by reason of capability and the Respondent acted fairly and reasonably in dismissing for that reason. It is similarly denied that the Respondent failed to make reasonable adjustments or that the Claimant was subjected to unfavourable treatment for a reason arising from her disability. If there was any unfavourable treatment, it was, the Respondent contends, justified.

5. The parties had helpfully agreed a List of Issues to be determined by the Tribunal before the commencement of the hearing. That List of Issues is appended within the Schedule to this Reserved Judgment and, we are satisfied, accurately sets out the issues that fall for consideration in this claim. We therefore do not set out here, other than in brief terms, the matters at issue between the parties and the reader is instead referred to the content of the attached Schedule.

6. However, there are two matters of particular note arising from the List of Issues which arose during the course of the hearing before us. The first of those matters relates to paragraph two of the List of Issues on the question of jurisdiction. In this regard, it was accepted by Mr. Meichen on behalf of the Respondent that the Claimant's complaints under Section 15 EqA 2010 were presented in time (arising as they do from the matter of the Claimant's dismissal and appeal against dismissal). It is only the complaints of a failure to make reasonable adjustments where it is contended by the Respondent that the Tribunal does not have jurisdiction to consider the same.

7. The second matter arising is that, in view of the evidence given by the Claimant at the hearing, she has made the sensible concession that the complaint of a failure to make reasonable adjustments referred to at paragraph 8a of the List of Issues is no longer sustainable and therefore is no longer advanced. That claim is therefore treated as being dismissed upon withdrawal and it is accordingly not a matter which we as a Tribunal have had to determine in the context of the remaining claims.

THE HEARING

8. We should perhaps here say a word about the reasons why the claim has taken so long to be determined. In this regard, the Claim Form in these proceedings was presented as long ago as 9th April 2015. The claim was originally due to be heard over a four day period in November of that year. However, in October 2015, the Claimant's solicitors made an application for a postponement of the hearing, which at that time was due to commence on 10th November 2015. That was as a result of the Claimant's ill health and the fact that medical advice received was to the effect that she would be unable to participate in a hearing at that stage. The hearing was accordingly postponed.

9. On 8th January 2016, there was a preliminary hearing for the purposes of dealing with the question of when the case might be able to be relisted in view of the Claimant's health. At that stage, the claim was relisted for hearing between 25th and 28th April 2016. The hearing took place on those dates before an Employment Tribunal chaired by Employment Judge Ahmed. However, for reasons which are given in full in an Order prepared by Employment Judge Ahmed during the course of the April 2016 hearing, that Tribunal had to recuse themselves and it was agreed that the claim would have to start afresh before a new Tribunal.

10. The matter therefore came before this Tribunal on the first available date, commencing on 13th February 2017 through to 17th February 2017. The first of those dates was a reading day, during which the Tribunal read into the witness statements and relevant documents in relation to the case.

11. Unfortunately, on the second day of the hearing there was some disruption to the smooth running of the proceedings. That resulted from the fact that one of the lay members who was allocated and had read into the case on 13th February was taken ill overnight. She was therefore unable to attend the hearing on 14th February 2017 and advised that it was unlikely that she would be able to be in a position to attend for the remainder of the duration of the hearing as listed. The remaining member, Ms Andrews, and the Employment Judge discussed that position with the parties at the outset of the hearing on 14th February. The parties were given the option of either abandoning the hearing entirely and have it relisted before either the same or a differently constituted Tribunal; continuing with a panel of two (that is the Employment Judge and Ms. Andrews) or seeking to obtain a substitute lay member and abandoning the 14th February date while that member read into the documentation to bring themselves up to speed with the proceedings.

12. The parties were in agreement that the latter was the preferable approach. An alternative member, Mr. Akhtar, therefore joined the Tribunal panel in place of the member who had been taken ill. Mr. Akhtar spent 14th February 2017 reading into the papers and no evidence was heard on that date. A day of the timetable was therefore unfortunately lost as a result of that issue.

13. Unfortunately, that was not the last of the delays to befall the hearing and which had a consequent effect on the ability of the Tribunal to conclude the case within the existing listing arrangements. On the final day, 17th February 2017, Counsel for the Respondent, Mr. Meichen, was significantly delayed as a result of difficulties with public transportation that were, we accept, entirely outside of his control. However, it did result in lost time for

what should have been the final day of the hearing and cross-examination of the Claimant. Nevertheless, we were able to conclude the Claimant's evidence on 17th February with the assistance of the parties in agreeing to a shorter lunch break and also the sensible approach taken by Mr. Meichen in relation to the scope of cross-examination questions.

14. However, we did have to pause the proceedings on a number of occasions during the course of the Claimant's evidence to accommodate necessary breaks and on the basis that she became extremely distraught on a number of occasions and had to leave the hearing room, often rather abruptly. Nevertheless, the parties and the Tribunal were able to sit later into the day so as to be able to accommodate the conclusion of the evidence. However, what could not be accommodated was the parties' submissions as there was insufficient time by the end of the final day of the hearing to allow for that to take place. With the agreement of the parties, the matter proceeded on written submissions and before taking our decision in relation to this matter we considered the submissions of the Claimant and Respondent and the replies of both thereto.

15. We should say that we did not invite or receive representations from the parties regarding the Court of Appeal's observations in relation to written submissions in **Pimlico Plumbers Ltd v Smith [2017] EWCA Civ 51** (and particularly paragraphs 119 and 147 of the same) before the decision was taken to proceed on the basis of written submissions only. However, it is perhaps unlikely that this case would fall into the category of a "complex case" as referred to at paragraph 119 of the Judgment and regrettably the issues that we have set out above had the result that even robust time management during the hearing could not assist in determining the claim in the listing afforded to us. We are obliged to both Counsel for their assistance during the course of the hearing and for their very helpful written submissions, which we considered carefully before dealing with our determination of the claim.

16. We have similarly considered carefully the documentary and witness evidence which was before us. In the latter respect, during the course of the hearing we heard evidence from the following on behalf of the Respondent:

(i) Anne Beardsley – the Claimant's former line manager;
(ii) Stuart Swift – also a former, albeit brief, line manager of the Claimant;
(iii) Jon Murphy – the line manager of Anne Beardsley;
(iv) Sue Fielding – the dismissing officer; and
(v) Bryan Cole – the appeal officer.

17. We also heard from the Claimant and from Michelle Howlett, the Claimant's former Trade Union representative, on her behalf. We also had before us an agreed bundle of documents running to 431 pages, with some additional items being inserted during the course of the hearing following discussions with the parties.

18. We have considered all of that evidence in the round before reaching our conclusions in relation to the issues in this case.

THE LAW

19. It is necessary before turning to our findings of fact, as set out below, to say a little about the law to be applied to claims of this nature.

Unfair Dismissal

20. Section 94 Employment Rights Act 1996 ("ERA 1996") creates the right not to be unfairly dismissed.

21. Section 98 deals with the general provisions with regard to fairness and provides that one of the potentially fair reasons for dismissing an employee is capability. The burden rests upon the employer to satisfy the Tribunal on that question if it is in dispute.

22. Assuming that the employer is able to do so (or if the reason is not in dispute), the all important test of reasonableness is then set out at section 98(4) ERA 1996 and provides as follows:-

> *"Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)-*
>
> *(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and*
>
> *(b) shall be determined in accordance with equity and the substantial merits of the case."*

23. Key to the consideration of fairness in the context of a capability dismissal (once it has either been established that there was a potentially fair reason to dismiss on that basis or where it is not in dispute) is the process adopted by the employer before dismissing for that reason. The relevant considerations are whether the employer:

a. Consulted with the employee concerned;

b. Undertook a proper medical investigation so as to establish the nature of the illness and its prognosis;

c. Gave consideration to other options such as redeployment, adjustments to working arrangements or ill health retirement where the employee is incapable of continuing in their current position.

24. The burden is no longer upon the Respondent alone to establish that the requirements of Section 98(4) ERA 1996 were met in respect of the dismissal. This is now a neutral burden.

25. However, we remind ourselves that an Employment Tribunal hearing a case of this nature is not permitted to substitute its judgment for that of the employer. It judges both the employer's processes and decision making by the yardstick of the reasonable employer and can only say that the dismissal was unfair if either falls outside the range of responses open to the reasonable

employer. Put another way, could it be said that no reasonable employer would have done as this employer did?

Equality Act 2010

26. The discrimination complaints brought by the Claimant are of discrimination arising from disability and of a failure to make reasonable adjustments and the relevant statutory provisions dealing with those complaints are contained within Sections 15, 20 and 21 EqA 2010.

27. Section 39 EqA 2010 provides for protection from discrimination in the work arena and provides as follows:

> *(1) An employer (A) must not discriminate against a person (B)—*
>
> *(a)in the arrangements A makes for deciding to whom to offer employment;*
>
> *(b)as to the terms on which A offers B employment;*
>
> *(c)by not offering B employment.*
>
> *(2)An employer (A) must not discriminate against an employee of A's (B)—*
>
> *(a)as to B's terms of employment;*
>
> *(b)in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;*
>
> *(c)by dismissing B;*
>
> *(d)by subjecting B to any other detriment.*
>
> *(3)An employer (A) must not victimise a person (B)—*
>
> *(a)in the arrangements A makes for deciding to whom to offer employment;*
>
> *(b)as to the terms on which A offers B employment;*
>
> *(c)by not offering B employment.*
>
> *(4)An employer (A) must not victimise an employee of A's (B)—*
>
> *(a)as to B's terms of employment;*
>
> *(b)in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for any other benefit, facility or service;*
>
> *(c)by dismissing B;*
>
> *(d)by subjecting B to any other detriment.*
>
> *(5)A duty to make reasonable adjustments applies to an employer.*
>
> *(6)Subsection (1)(b), so far as relating to sex or pregnancy and maternity, does not apply to a term that relates to pay—*
>
> *(a)unless, were B to accept the offer, an equality clause or rule would have effect in relation to the term, or*
>
> *(b)if paragraph (a) does not apply, except in so far as making an offer on terms including that term amounts to a contravention of subsection (1)(b) by virtue of section 13, 14 or 18.*

(7)In subsections (2)(c) and (4)(c), the reference to dismissing B includes a reference to the termination of B's employment—

(a)by the expiry of a period (including a period expiring by reference to an event or circumstance);

(b)by an act of B's (including giving notice) in circumstances such that B is entitled, because of A's conduct, to terminate the employment without notice.

(8)Subsection (7)(a) does not apply if, immediately after the termination, the employment is renewed on the same terms.

EHCR Code

28. When considering complaints of discrimination, a Tribunal is required to pay reference to the Equality & Human Rights Commission Code of Practice on Employment (2011) ("The Code") to the extent that any part of it appears relevant to the questions arising in the proceedings before them.

Discrimination arising from Disability

29. Section 15 deals with the question of discrimination arising from disability and provides as follows:-

"(1) A person (A) discriminates against a disabled person (B) if:-

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

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

(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability."

30. There is no requirement in a Section 15 complaint for there to be identification of a comparator. All that is required is that the Claimant is able to show unfavourable treatment, in that regard some detriment, and further that there are facts from which it can again be established that that unfavourable treatment was in consequence of something arising from disability. It is not sufficient again to show that a person is disabled and receives unfavourable treatment; that unfavourable treatment must be in consequence of something arising from the disability.

Failure to make reasonable adjustments

31. Section 20 EqA 2010 provides that:

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

(2)The duty comprises the following three requirements.

(3)The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in

relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

(4)The second requirement is a requirement, where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

(5)The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid.

(6)Where the first or third requirement relates to the provision of information, the steps which it is reasonable for A to have to take include steps for ensuring that in the circumstances concerned the information is provided in an accessible format.

(7)A person (A) who is subject to a duty to make reasonable adjustments is not (subject to express provision to the contrary) entitled to require a disabled person, in relation to whom A is required to comply with the duty, to pay to any extent A's costs of complying with the duty.

(8)A reference in section 21 or 22 or an applicable Schedule to the first, second or third requirement is to be construed in accordance with this section.

(9)In relation to the second requirement, a reference in this section or an applicable Schedule to avoiding a substantial disadvantage includes a reference to—

(a)removing the physical feature in question,

(b)altering it, or

(c)providing a reasonable means of avoiding it.

(10)A reference in this section, section 21 or 22 or an applicable Schedule (apart from paragraphs 2 to 4 of Schedule 4) to a physical feature is a reference to—

(a)a feature arising from the design or construction of a building,

(b)a feature of an approach to, exit from or access to a building,

(c)a fixture or fitting, or furniture, furnishings, materials, equipment or other chattels, in or on premises, or

(d)any other physical element or quality.

(11)A reference in this section, section 21 or 22 or an applicable Schedule to an auxiliary aid includes a reference to an auxiliary service.

(12)A reference in this section or an applicable Schedule to chattels is to be read, in relation to Scotland, as a reference to moveable property.

(13)The applicable Schedule is, in relation to the Part of this Act specified in the first column of the Table, the Schedule specified in the second column.

32. Section 21 provides that:

> *"A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.*
>
> *(2)A discriminates against a disabled person if A fails to comply with that duty in relation to that person.*
>
> *(3)A provision of an applicable Schedule which imposes a duty to comply with the first, second or third requirement applies only for the purpose of establishing whether A has contravened this Act by virtue of subsection (2); a failure to comply is, accordingly, not actionable by virtue of another provision of this Act or otherwise."*

33. It will therefore amount to discrimination for an employer to fail to comply with a duty to make reasonable adjustments imposed upon them in relation to that disabled person (paragraph 6.4 of The Code).

34. However, the duty to make reasonable adjustments will only arise where a disabled person is placed at a substantial disadvantage by:

- An employer's provision, criterion or practice ("PCP").
- A physical feature of the employer's premises.
- An employer's failure to provide an auxiliary aid.

35. Where the complaint relates to a PCP, this "should be construed widely so as to include, for example, any formal or informal policies, rules, practices, arrangements or qualifications including one-off decisions and actions" imposed by the employer (paragraph 6.10 of The Code).

36. Matters resulting from ineptitude or oversight on the part of the employer will not, however, amount to a PCP (see ***Newcastle Upon Tyne Hospitals NHS Foundation Trust v Bagley UK EAT 0417/11***).

37. The duty to make reasonable adjustments only arises insofar as an employer is required to take such steps as it is reasonable to take in order to avoid the substantial disadvantage to the disabled person. A Tribunal is required to take into account matters such as whether the adjustment would have ameliorated the disabled person's disadvantage, the cost of the adjustment in the light of the employer's financial resources, and the disruption that the adjustment would have had on the employer's activities.

FINDINGS OF FACT

38. The parties should note that we have only made findings of fact where those are required for the proper determination of this claim. We have inevitably, therefore, not made findings on each and every area where the parties are in dispute with each other if that is not necessary for the proper determination of the remaining complaints before us.

The Claimant's employment with the Respondent

39. The Claimant commenced employment with the Respondent on 12th August 1985 and continued in employment in a variety of positions until her employment came to an end on 30th January 2015 by reason of her dismissal by the Respondent. We shall come to the circumstances of that dismissal

below. However, as at the date of termination of her employment, the Claimant had some 29 years continuous service with the Respondent.

40. The Claimant joined the Respondent in what we understand to have been her first position since leaving education and, as indicated above, remained an employee of theirs for her entire working life up until her dismissal. During the 29 years that the Claimant spent working for the Respondent, she worked in a variety of roles but we refer here only to those which are material to the claim.

41. It is clear to us that the Claimant's work and her role within the Respondent was extremely important to her. Indeed, there are numerous references within the documentation to which we have been taken which demonstrate that position and that, aside from caring for her mother, the Claimant's whole life revolved around her work.

Diagnosis with depression

42. In 1998, the Claimant was diagnosed with depressive disorder. In 2010, there was a further diagnosis of recurrent depressive disorder, clinical depression and generalised anxiety disorder. As a result of that diagnosis, the Claimant was prescribed medication.

43. At the material time with which we are concerned, the Claimant had little by way of close family to support her, save for her mother, to whom we shall come in due course. She was not married and had no partner or children. She lived alone and it is clear from references to that effect in the documentation before us that other than her relationship with her mother, work was all that the Claimant had. As a result, her role was naturally extremely important to the Claimant and doubtless that forms a significant part of the reason why she had stayed in employment with the Respondent for a period of almost 30 years.

Absence history and the first Occupational Health referral

44. Despite the fact that the Claimant had a longstanding diagnosis of depression, she in fact only had three periods of absence of any note during the course of her employment with the Respondent. The final one of those periods of absence, as we shall come to, resulted in her dismissal.

45. The first period of absence that the Claimant had during the course of her employment with the Respondent was in the period 20th October 2009 to 29th March 2010. That was for a matter entirely unrelated to her disability.

46. However, the second period of the Claimant's absence, which ran from 30th September 2010 to February 2011, was as a result of her disability and diagnosis in that regard of major depression (see page 152 of the hearing bundle).

47. During the course of that second period of absence, the Respondent liaised with the Claimant's General Practitioner who made recommendations that the Claimant be permitted to continue an existing arrangement which was in place with the Respondent that she could have flexibility as to her start times in the morning. We say more on the issue of flexible start times later in this Judgment.

48. The Claimant was also referred to Occupational Health during the course of that absence and, further, after her return to work in order to deal with the question of any adjustments which might be required to support the Claimant. The referral to Occupational Health resulted in a report being generated regarding the Claimant's condition which was sent to the Respondent for consideration. That included dealing with a specific question raised by the Respondent as to whether a more structured work pattern or fixed or part-time hours would support the Claimant's needs (see page 86 of the hearing bundle). The relevant parts of the report dealing with a response to that issue said this:

> *"She says she has been in her current role since 2003 working the hours between 9.30 and 10 and finishing by 6.30 flexi hours. She feels unable to cope with heavy traffic and is unable to use public transport due to her psychological condition this is why the current flexi hours are more acceptable in managing her condition. her perception is that she feels pressured to change her hours to part time or fixed hours but this is not something she wishes to consider. Medically I can see no reason for reducing her hours to par* (sic) *time as she appears to have improved since my last assessment with her.*"

Transfer to the Finance Team

49. In September 2013, the Claimant was moved to a different team within the Respondent organisation. In this regard, she was moved to a "back office" function in the finance team. We accept this was a supportive move for the Claimant given that, in addition to difficulties set out above with regard to using public transport or driving during rush hour, the Claimant's disability also resulted in her experiencing difficulty in dealing with clients in a face to face setting. In this regard, we accept that the vast majority of the operations undertaken by the Respondent required that type of interaction. The back office work in the Finance Team, at the material time at least[1], fitted the bill in relation to the Claimant not having to have direct face to face contact and communication with members of the public.

50. The Claimant had three different line managers after her transfer to the Finance Team. She was initially managed by Kay Lawrence before being moved to a second line manager, Stuart Swift, for a relatively brief period of two months or so before she again transferred to the line management of Anne Beardsley.

51. As we have already observed above, an adjustment had been made in relation to the Claimant's working hours. This was such to determine that the Claimant was not required to come into work until a point between 10.00 a.m and 11.00 a.m each day.

52. This flexibility in arrival times was designed to support and accommodate the Claimant's difficulties in relation to using public transport or driving in rush hour to which we are already referred above. This arrangement was a somewhat fluid one in that the Claimant could arrive at any point

[1] We understand matters to have changed in this regard as things currently stand and that those within the Finance Team have duties which require face to face interactions with members of the public.

between 10.00 a.m and 11.00 a.m and therefore as early as 10.01 a.m or as late as 10.59 a.m in order to work within the parameters which had been allowed by the Respondent.

53. However, despite the fluid nature of the arrangements in that regard, we accept the evidence of both Mr. Swift and Mrs. Beardsley that it very rarely occurred that the Claimant did manage to attend within the parameters set. Whilst the Claimant had a good attendance record, particularly taking into account her health difficulties, the issue of time keeping was, we are satisfied, a significant and relatively constant problem. The evidence of both Mr. Swift and Mrs. Beardsley to this effect is supported by the contemporaneous documentation which we have before us.

54. Matters had perhaps not been assisted in this regard in that the Claimant's previous line manager, Carolyn Puzstai, had allowed the Claimant a great deal of leniency in relation to her arrival times and the adjusted time of 10.00 a.m to 11.00 a.m had not been kept to. It appears to us that Ms. Puzstai, who line managed the Claimant prior to her transfer to the Finance Team in September 2013, took something of the path of least resistance and did not challenge the Claimant about her failure to keep to the parameters which had been agreed with the Respondent. This had resulted in the Claimant often arriving for work as late as 12 noon, over a full hour after her latest starting time.

55. Although the Claimant appeared for the most part to make up her hours by working after her "normal" finishing time (and often not finishing work until 7.00 p.m. or 7.30 p.m.), we accept that the pattern that the Claimant had begun to develop in respect of arriving significantly later than she was supposed to do was a far from ideal arrangement. It also fell squarely outside the terms of the agreement which had been reached with the Respondent in respect of late starts. However, as we have already observed that was not a matter which was robustly managed – or indeed managed at all – by Carolyn Puzsai and we have no doubt that that rather relaxed approach gave the Claimant unrealistic expectations as to what was and was not acceptable in terms of her timekeeping. We equally have no doubt that when other line managers began to try and take steps to manage those matters, this led to a considerable amount of dissatisfaction on the part of the Claimant to be challenged over matters which she had previously had a blind eye turned to. It in turn led to unfair accusations by the Claimant of bullying.

56. We also accept that when the Claimant moved to the Finance Team her attendance outside the parameters of her agreed start time created much more significant operational difficulties than had been the case in her previous role. In this regard, we accept that the Claimant continued to arrive later for work and often as late as 12 noon or, indeed, past that time.

57. This, we accept, had the result of putting significant pressure on the only full time member of staff within the Finance Team who would have to cope by herself with the bulk, if not all, of the mornings work. Further difficulties were created on the basis that the Claimant would often end up working alone for protracted periods of time after normal working hours to catch up what she could in relation to the time that she had missed by her late arrival.

58. Whilst that had not been a significant issue prior to her transfer to the Finance Team, we accept that the different arrangements in place in respect of

security in relation to the finance office created an issue in this respect. In this regard, the finance office remained locked and could only be accessed by inputting a code into a security pad on the door. Not even members of the security staff would have any access to the same and the code was only known to members of the Finance Team. This created a concern with the Claimant working alone in the Finance Office after normal working hours (i.e. after 5.00 p.m.) when there was no one with her in the event of an incident. For example, if the Claimant had had a fall when alone in the locked Finance Office, this could pose a significant risk to the Claimant's health and safety. In addition, we accept that the building in which the Finance Office was located was closed at 7.00 p.m. each night and the building was secured, the lights turned off and security departed for the evening. As such, it was impossible for the Claimant to work after 7.00 p.m. in all events. If the Claimant therefore arrived at 12 noon there was no possibility of her working her allotted 7 hours and 24 minutes of working time, even without taking her lunch break into account.

59. We accept the evidence of Mr. Swift and Mrs. Beardsley that those matters gave them both cause for concern during their line management of the Claimant when they noticed the pattern of late arrivals times and then in turn later finish times to compensate, with periods of lone working. This was therefore a matter which the Respondent sought to address with the Claimant after her transfer to the Finance Team.

60. That process was begun by Kay Lawrence (the Claimant's initial line manager upon transfer to the Finance Team) who raised with the Claimant that she needed to ensure that she attended work within the parameters set by the Respondent but that if she could not do so then she needed to ensure that she telephoned in to say that she was not able to make it on time. There was, therefore, a requirement that she telephone in before 11.00 a.m. to say that she would be late.

61. Regrettably, the Claimant continued to be late for work and she did not comply with Ms. Lawrence's instruction to telephone ahead in such circumstances. The Claimant simply continued to arrive after her latest start time without notifying the Respondent that she would not be attending on time.

62. When Mr. Swift took over line management responsibility for the Claimant, we accept that this was a matter which he felt that he had to try and tackle with her. Therefore, at the time of his commencement of line management responsibility for the Claimant, Mr. Swift undertook a one-to-one meeting with her in September 2013. A note of that meeting, which we accept to be broadly accurate, appears at pages 93A of the hearing bundle. During that one-to-one, Mr. Swift raised with the Claimant requirement for her to arrive at work by no later than 11.00 a.m. and reminded her that that matter had previously been raised with her by Ms. Lawrence. The reasons for the Claimant being unable to arrive at work by 11.00 a.m were discussed and in addition to the fact that the Claimant told Mr. Swift that her medication made her drowsy in the mornings, the following was also said:

> *"Najma also visits her Mother on a nightly basis as she is suffering with cancer. Obviously this is of great concern to Najma and very distressing. Najma will on occasion stay up to 3.00am at her mother's house before travelling home to sleep."*

63. Therefore, it was clear that one of the predominant issues with the

Claimant attending work on time (within the scope of the adjusted start times) was the fact that she was staying awake into the early hours of the morning to care for her mother.

64. It is clear from the note of the meeting that Mr. Swift was supportive and, indeed, set out his own personal experiences with regard to the passing away of his father. He offered an ear to the Claimant in the event that she needed to discuss matters further and referred to her attention to detail making her an "ideal candidate" for working in the Finance Team.

65. However, for the reasons that we have already given Mr. Swift nevertheless did need to address the continuing problems surrounding the Claimant's timekeeping. We are satisfied that he did so in any entirely reasonable manner. In this regard, whilst making it clear that the Claimant did need to start complying with the agreed times set for the commencement of work, Mr. Swift provided some leeway. He set out that for the duration of the week in which the meeting took place, the Claimant would need to arrive by no later than 11.15 a.m; the following week by no later than 11.10 a.m start and then by 11.00 a.m the week after that.

66. We accept the evidence of Mr. Swift that unfortunately matters did not improve in relation to the Claimant's timekeeping and she continued to arrive for work well after 11.00 a.m. on a regular basis. The matter was therefore, and perfectly reasonably, raised again by Mr. Swift during the Claimant's mid year review at the end of October 2013. The notes of that meeting are contained in the hearing bundle at pages 93B and 93C and, again, we accept that those are broadly accurate as to the matters discussed.

67. It was again explained to the Claimant by Mr. Swift that her role in the Finance Team required her to be in work by no later than 11.00 a.m. The Claimant objected to that position. She referred to Mr. Swift being unreasonable and demanding too much from her and made reference to Carolyn Puzstai having allowed her to come into work at 12.00 noon.

68. Mr. Swift explained that the role in Finance could not accommodate such a late start but that an Occupational Health referral could be undertaken when the Claimant was transferred to the line management of Anne Beardsley (which was at that time due imminently) to see if a 12.00 o'clock start time needed to be considered. That change of line manager was to take place in November 2013.

69. In consequence, the Claimant accused Mr. Swift of bullying her. We have no doubt whatsoever that that was not the case and that that was an entirely unfair categorisation of the events of the meeting. All that Mr. Swift had attempted to do was to arrange for the Claimant to comply with the requirement to attend work within the parameters of the agreement that she had with the Respondent. That cannot possibly be construed as bullying and it is clear to us from the notes of the meeting that Mr. Swift was firm but entirely fair with the Claimant. Unfortunately, as we shall come to, later attempts by Mrs. Beardsley to improve the Claimant's timekeeping also led to her being the subject of unfair accusations of bullying as a result.

70. Similarly, we accept Mr. Swift's evidence (as set out in his note of the October 2013 meeting) that he had earlier experienced difficulties with the Claimant's behaviour towards him after he had counselled her about the need to improve her timekeeping and that the Claimant had started to ignore him

and had turned away from him when he entered the Finance Office.

71. Again, as we shall also come to later, those experiences were also ones shared by Mrs. Beardsley when she raised concerns over the Claimant's timekeeping at a later date.

Change of line manager to Anne Beardsley

72. In November 2013 the Claimant had a further change of line management and was at this point transferred to be managed by Anne Beardsley. That followed a restructure of the Finance Team.

73. We accept that part of the reason for assigning the Claimant to Mrs. Beardsley after the restructure was on the basis that the Claimant was perceived, in our view not entirely unreasonably, as being a person who was difficult to manage. That was not only in relation to matters of timekeeping, but also in relation to the Claimant's attitude when she was challenged in circumstances that she perceived as being unnecessary. We have already highlighted in this regard her attitude to Mr. Swift in the October 2013 meeting. Mrs. Beardsley had a track record of being able to successfully manage more challenging members of staff and, thus, she was considered an ideal line manager for the Claimant.

74. We should observe that the Claimant's somewhat challenging demeanour was in fact also demonstrated during the course of the hearing before us where the Claimant exhibited somewhat confrontational behaviour during her evidence, including in fact at one point towards the Tribunal when faced with a proposal which she did not appear to care for. We were satisfied from the evidence before us that both Mr. Swift and Mrs. Beardsley genuinely sought to do their best and that there was nothing at all in the accusations of bullying that the Claimant levelled at them.

75. The Claimant had previously made accusations of bullying against at least two line managers prior to Mrs. Beardsley (Mr. Swift and an earlier line manager by the name of Annette) and in the case of both Mrs. Beardsley and Mr. Swift those accusations were, we are satisfied, entirely unfounded and unfair.

76. In contrast to the Claimant's evidence as to her views of Mr. Smith and also Mrs. Beardsley, the Claimant spoke in relatively glowing terms in respect of Ms. Puztsai. We do not consider that it is simply coincidence that Ms. Puztsai appeared to us to have somewhat left the Claimant to her own devices and failed to implement any proper management of her timekeeping issues. Against that background, we do not doubt that it was difficult for the Claimant to acknowledge and accept that the Respondent could and should be troubled about the issues relating to her timekeeping as she had been implicitly allowed to arrive as late as she wanted when under the management of Ms. Puztsai who took the path of least resistance. That rather laissez faire line management in our view gave the Claimant an expectation that there should be no issue with regard to arrival times and she thus reacted unreasonably when those matters were raised with her after her transfer to the Finance Team.

77. As we shall come to in due course, the timekeeping issues were also ones that Mrs. Beardsley attempted to address with the Claimant and ones which, in turn, saw the Claimant also begin to exhibit challenging behaviour

and accuse her of bullying. That was, of course, the same pattern which had manifested itself with Mr. Swift.

78. However, as we have already touched upon we are satisfied that the Claimant had been assigned to be line managed by Mrs. Beardsely following the restructure, in part given that she had a track record of being able to successfully manage challenging members of staff.

The second Occupational Health referral

79. Upon taking over line management responsibility for the Claimant, Mrs. Beardsley arranged for a referral to Occupational Health to be undertaken. That referral was designed to consider whether the arrangements of a later start time between 10.00 a.m and 11.00 a.m continued to be suitable and also accorded with the Respondent's policy to obtain up to date medical advice in the case of employees with continuing health issues. In fact, so as to not single out the Claimant Mrs. Beardsley arranged for Occupational Health assessments to be undertaken in relation not only to the Claimant but also for her other direct report.

80. The referral generated a report from Occupational Health which set out the following relevant advice in respect of the Claimant:

> "…
>
> *Miss Naroo is currently at work and is capable of full duties.*
>
> *The employee in my opinion is fit for her work role.*
>
> *Management may wish to enter into a constructive dialogue in regards to her start/finish times and suggest ways of adaptations as she cares for her Mother outside of work until the early hours of each morning on a continuous basis at this time.*
>
> *If the employee is a lone worker than I would ensure that a lone worker risk assessment has been undertaken and awareness by the employee of what to do in an emergency situations is made available.*
>
> *In my opinion sustaining the work place is aiding the employee to cope with her home stress factors at this time and support should continue.*
>
> *…*"

81. The report further opined that the adjustments in place at that time in relation to start and finish times remained acceptable but that management should undertake a constructive meeting with the Claimant in relation to those matters. That was in response to a specific question from Mrs. Beardsley in her referral regarding that issue.

82. As set out above, there is a reference within the Occupational Health report to the situation with the Claimant's mother. In this regard, it appears to us that the main difficulty that the Claimant had in keeping to the agreed start time of between 10.00 a.m and 11.00 a.m was not because of public transport or driving in the rush hour (both of those matters being ones that the flexibility on start times had been designed to avoid) but in fact was because she was at that time caring for her mother who was suffering from cancer. The Claimant

would often stay with her mother at her mother's home until the early hours of the morning, sometimes until 3.00 a.m. and as a result of that, she naturally had some degree of difficulty in arriving on time for work even within the relatively relaxed parameters agreed with the Respondent. We accept that in the back office environment of the Finance Team that caused the Respondent significant difficulties for the reasons that we have already set out above.

The meeting of 5th February 2014 and disciplinary proceedings

83. Unfortunately, under the line management of Mrs. Beardsley matters did not improve in relation to the Claimant keeping to the agreement to attend work by 11.00 a.m. at the latest.

84. We accept that efforts had been made on an informal footing to deal with that issue by Ms. Lawrence, Mr. Swift and Mrs. Beardsley but none were able to ensure a consistent and regular pattern of attendance from the Claimant at the agreed start times.

85. Mrs. Beardsley therefore held a meeting with the Claimant on 5th February 2014 in respect of those matters and made it clear to the Claimant that further episodes of lateness may result in disciplinary action being invoked. Given what had gone before, that was a reasonable and necessary step to take given the circumstances. The notes of that meeting appear at page 95F of the hearing bundle and we accept that those set out a broadly accurate record of the discussion that Mrs. Beardsley had with the Claimant.

86. Unfortunately, that did not do anything to improve the situation and the Claimant continued to arrive late for work. This therefore, and perhaps somewhat unsurprisingly, led to a disciplinary meeting taking place with the Claimant on 21st February 2014.

87. During that meeting, Mrs. Beardsley referred to the fact that the Claimant had come in on that particular day at 12 noon and that taking into account lunch breaks, the Claimant was only averaging 6 - 6½ hours of working time per day. The Claimant was required to complete 7 hours and 24 minutes of working time per day and Mrs. Beardsley was therefore concerned that even when undertaking work after her normal hours, the Claimant was not fulfilling her contractual requirements.

88. The Claimant expressed that she would try to be in work at 11.00 a.m the following Monday. Mrs. Beardsley asked the Claimant if she wanted to consider taking some carer's leave, given that the main issue was in respect of caring for her mother which impacted on her ability to arrive on time in the way that we have observed above. The Claimant declined that on the basis that such leave would be unpaid. We accept, however, that that proposal was designed to be a supportive one to try and assist the Claimant.

89. At the conclusion of that disciplinary process, the Claimant was issued with a first written warning for lateness which took effect on 27th February 2014. The Claimant appealed against that decision but that appeal was not upheld.

90. Rather oddly, shortly before the Claimant's appeal in that regard, the Respondent wrote to her congratulating her on what was referred to as an "exemplary record of attendance" for that year. This reflected that the Claimant had not had any absence during the course of that year, which

indeed she had not. However, it was perhaps a matter which in the Claimant's eyes justified her dissatisfaction about the decisions of Mrs. Beardsley to implement disciplinary action with regard to the matter of time keeping given that it seems to us that in the Claimant's mind the issue of timekeeping and attendance were interwoven with each other.

91. Despite the first written warning, again matters did not improve. On 13th May 2014, the Claimant and Mrs. Beardsley had a one-to-one meeting where issues of timekeeping were again discussed.

92. Following that meeting, Mrs. Beardsley wrote to the Claimant by email (page 98A of the hearing bundle) to say this:

> "*Further to our 1-2-1 meeting today we talked about your counsellor attending a meeting with me you and Rachel Strong*[2]*, but they are unable to commit to this at this time, so we talked about you improving your time keeping as I am concerned that you are not doing 7 hrs. 24 mines* (sic) *each day and are getting further behind on your flexi.*
> *I want to clarify with you that from tomorrow 14.5.14. I expect you to make a significant improvement in your time keeping by being in work at your agreed time of between 10am and 11am.*
> *We will review this again after 2 weeks, and as discussed if there is no improvement I would need to consider escalation and moving onto the next stage of the disciplinary process.*"

93. We do not consider in view of the fact that the Claimant's timekeeping was still not seeing her attend work by her agreed start time, that that was an unreasonable step for Mrs Beardsley to have taken. However, suffice it to say it did not go down well with the Claimant.

94. By that stage, we accept that tensions between them were frayed to say the very least and we accept that the Claimant was largely ignoring Mrs. Beardsley when she was in the Finance Office and also seeking to engage her colleague in negative discussions regarding Mrs. Beardsley. That was clearly inappropriate and the Claimant's actions in ignoring Mrs. Beardsley were a further manifestation of the approach that she had previously adopted when dealing with Mr. Swift.

<u>The events of 20th May 2014</u>

95. However, matters escalated on 20th May 2014 when Mrs. Beardsley had cause to speak to the Claimant about a complaint which had been received regarding the way in which the Claimant had spoken to a colleague on the telephone. We accept that the record of what occurred on that occasion as set out at page 98B of the hearing bundle was broadly accurate in that the Claimant had stormed through the finance office door uttering an expletive about the complaint regarding her behaviour. Mrs. Beardsley had approached the Claimant and asked her to cease her behaviour as it was inappropriate. Mrs. Beardsley also made further enquiry to try to ascertain what had occurred during the telephone call in question.

96. However, following Mrs. Beardsley's exit from the finance office, the Claimant had said words to the effect of "*I hate the fucking fat bitch*". That had been a reference to Mrs. Beardsley. That comment was reported by Barbara

[2] Rachel Strong being the Claimant's then trade union representative

Elmer, the Claimant's colleague, to Mrs. Beardsley. As a result of that and the Claimant's general behaviour towards Mrs. Beardsley, she contacted Human Resources who advised her to issue a grievance against the Claimant. We would observe that that would appear to us to be a strange way of dealing with matters as it would appear to be more appropriate simply to have dealt with that by way of a disciplinary process rather than to suggest the instigation by a line manager of a grievance against the individual that they were supposed to be managing. Nonetheless, the grievance was taken out by Mrs. Beardsley against the Claimant arising from the events of 20th May 2014 as had been suggested by Human Resources.

97. We do not make any criticism of Mrs. Beardsley for that position given that that is what was recommended by Human Resources and clearly the Claimant's behaviour in respect of such matters had been manifestly inappropriate. Despite what can only be termed as an extremely uncomfortable working relationship by that time, the Claimant nevertheless remained under the line management of Mrs. Beardsley.

The third Occupational Health referral

98. Mrs. Beardsley completed a further referral for the Claimant to Occupational Health on 13th June 2014 and as such another report was generated dealing with the position on her health at that time.

99. That report provided that the Claimant was fit to perform her normal hours (that is 7 hours and 24 minutes, commencing work between 10.00 a.m and 11.00 a.m.) and also her normal duties. The referral had asked specific questions in respect of the Claimant's working hours and capacity to complete those hours and the report dealt with those questions as follows:

> "***Response to Specific Questions:***
> ***Question:*** *"Will Najma be able to complete 7hours 24 mins a day and attend within the adjusted time given of between 10am-11am"*
> ***Answer:*** *She admits she has been late at time and states this has been due to the work stress that has impacted upon her mood which has affected her ability to make it on time. I suggest she is supported in work positively in order to promote a stability to her symptoms.*
> ***Question:*** *"Would a more structured work pattern of fixed or part-time hours suit Najma's needs better."*
> ***Answer:*** *She is fit to perform her current normal hours as this will help her manage her symptoms better."*

100. On 15th July 2014, the Claimant's Nurse Consultant in Psychological Therapies, Anne Garland, wrote to the Respondent complaining about the way in which she perceived the Claimant had been treated and requesting a meeting. It has to be said that the letter is perhaps not written in particularly helpful terms. Nevertheless, the Respondent's Dawn Lawrenson, Customer Services Operations Manager, arranged to meet with the Claimant and Anne Garland as had been proposed. That meeting was scheduled for 12th August 2014. Unfortunately, the meeting did not progress on the basis that the Claimant's trade union representative had also attended and Dawn Lawrenson did not consider that to be appropriate. It is difficult to see why that objection occurred but, in short, the meeting did not take place. There were difficulties in seeking to rearrange the meeting and the same never in fact took place.

Disciplinary proceedings against the Claimant

101. Following on from the Claimant's behaviour on 20th May 2014 and the grievance lodged by Mrs. Beardsley, a disciplinary investigation was launched by the Respondent and an officer by the name of Gaynor Rossiter was assigned to deal with that particular investigation. We do not doubt that those matters came as a shock to the Claimant as despite the clear inappropriateness of her actions on 20th May 2014, again there had been something of a failure to manage earlier manifestations of inappropriate behaviours towards Mr. Swift and also Ms. Beardsley. She had not previously been taken to task to any proper degree for her behaviour and, akin to the timekeeping issue, when those matters were dealt with on a formal footing the Claimant did not accept her shortcomings.

102. At a later date, a further strand was added to the disciplinary investigation relating to the Claimant's timekeeping. In this regard, Gaynor Rossiter wrote to the Claimant on 23rd July 2014 indicating that she would also now be investigating the issue of the Claimant's lateness and she wished to meet with the Claimant in order to progress an investigation in respect of that matter. That was therefore added to the existing investigation as to the events of 20th May 2014, although it is unclear as to who directed Gaynor Rossiter to add those matters to the scope of her investigation and the witnesses that we have heard during the course of this hearing have not been able to assist us on that particular point.

103. However, given that by that stage the Claimant's continuing failure to attend for work within the agreed parameters of her amended start times had been going on for some 10 months during her time within the Finance Department, we do not consider it unreasonable that those were matters which needed to be escalated. That is particularly the case in view of the fact that the first written warning issued to the Claimant had not had the desired effect of improving her timekeeping issues and she had previously been informed that any further failure to attend on time may result in further disciplinary action being taken.

104. The investigation meeting took place with Gaynor Rossiter on 7th August 2014 and it progressed later to a disciplinary process, details of which we shall come in due course, which culminated in a final written warning being given to the Claimant.

The Claimant's ill health absence

105. On 13th August 2014, the Claimant began a period of ill health absence with depression and anxiety. She was issued with a statement of fitness for work ("Fit Note") by her General Practitioner for a period of two months (see page 109 of the hearing bundle).

106. The Respondent's Absence Management Policy dictates that after a period of 14 days absence, there should be a review meeting. The relevant part of the Absence Management Policy in this regard says this (page 297 - 298 of the hearing bundle):

> "***Continuous Absence Process***

23. You are required to keep in touch with your manager throughout your absence.

24 If you are absent for a continuous period of time, your manager must follow the process shown in the following table:

Stage 1 *14 day informal Attendance Review Discussion* *14 day Formal Attendance Review*	*If your absence reaches 14 continuous days and you are not due to return to work in the near future, your manager will arrange an informal attendance review discussion with your. This discussion is to keep you up to date with work issues, to discuss if you need any support or adjustments to return to work and how long you are likely to be absence. After the review you must agree regular keep in touch meetings with your manager and tell them immediately if there is any change to your medical condition.* *A Formal Review Meeting may be arranged but only where you are in a Final Written Warning Review Period of Final Warning Sustained Improvement Period and there is justification for not supporting a period of continuous absence. Referral to a Decision Maker needs to be taken in these cases before the absence becomes long term at 28 days.*
Stage 2 *28 day Formal Attendance Review Meeting*	*Once you have been absent for 28 continuous days, your manager will arrange a review meeting with you to discuss any support you need for your return to work. This will include you and your manager developing a Fit for Work Plan. If you are unlikely to return to work within a reasonable time period, your employment with the Department may end. If your circumstances mean a return to work is possible within a reasonable timescale, your manager will move to stage 3 and continue to review your circumstances. Your manager will send you a written record of the discussion.*
Stage 3 *Ongoing monthly Attendance Review Meetings*	*Review meetings should take place on a monthly basis except where this would clearly not be appropriate i.e. where you are in hospital or a hospice. Your manager will discuss with you any support you need to return to work which will include developing a Fit for Work Plan or reviewing an existing plan, If at any time during the ongoing review your manager believes that your absence can on longer be supported by the Department, dismissal should be considered. The Department does not envisage anyone will be absent for longer than 1 year.*
Stage 4 *Occupational Health Case Conference*	*Once you have been absent for 3 months your manager must arrange a case conference with an occupational health adviser to discuss how to manage your absence. An HR Expert may also attend, if required. After the case conference your manager will discuss any new actions with you and*

	update your Fit for Work Plan.
Stage 5 *SCS Engagement*	*Once you have been absent for 6 months your manager will engage a member of the Senior Civil Service (SCS) in your case. The purpose of the engagement is to ensure that you are being given the help and support you need to return to work and that your case is being proactively managed. Engagement will continue at the 9 and 12 month stages of your absence and thereafter on a monthly basis until your case is resolved.*
Stage 6 *Dismissal/Demotion*	*If at any time during the ongoing review your manager believes that your absence can no longer be supported by the Department, dismissal should be considered. Ultimately if there is no change in your circumstances and your manager believes the Department can no longer support your absence your case will be referred to a Decision Maker who will decide whether you should be dismissed or demoted. They will also consider any eligibility you may have to compensation. The Decision Maker will arrange a meeting with you if dismissal or demotion is being considered. They must follow the formal Departmental Attendance Management procedures.*

107. The 14 day review fell to be dealt with by Anne Beardsley given that she remained the Claimant's line manager in spite of the fact that she had initiated grievance proceedings against the Claimant. We accept that the note of Anne Beardsley's discussions with the Claimant are as reflected in her note at page 117 of the hearing bundle and the relevant parts were then communicated to Human Resources with whom by that stage Anne Beardsley was actively engaged in relation to the circumstances of managing the Claimant.

108. The 14 day review took place over the telephone and during that conversation Anne Beardsley asked for the Claimant's consent to make a further referral to Occupational Health. The Claimant indicated in response that she could not see any point in doing that when she previously only had a referral in June 2014, less than two months earlier. Mrs. Beardsley pointed out that since that time, the Claimant's health had deteriorated - a not unnatural conclusion given that she was now absent on the grounds of ill health - but the Claimant did not agree at that stage to undertake a further referral to Occupational Health.

109. The Claimant explained that she was due to see her General Practitioner on 10th September 2014 and it was indicated by Mrs. Beardsley that she would continue to maintain telephone contact on a weekly basis to discuss progress with regard to the Claimant's health.

The 28 day review meeting

110. On 3rd September 2014, Mrs. Beardsley wrote to the Claimant seeking to arrange a meeting for a 28 day review given that the Claimant continued to remain absent on the grounds of ill health. This was Stage 2 of the Sickness Absence Management Policy referred to above.

111. The initial review meeting, which had been to take place on 11th September 2014, had to be rescheduled on the basis that the Claimant had an

urgent dentist appointment as a result of ongoing problems which she had been experiencing in that regard. The meeting was therefore re-arranged by Anne Beardsley for 15th September 2014.

112. It is common ground that the Claimant did not attend that re-arranged 28 day review meeting. However, we are entirely satisfied that that was due to issues which had occurred in respect of advice given to the Claimant by her trade union representative. In this regard, the Claimant's trade union representative had suggested to the Claimant that the 28 day review could be dealt with over the telephone rather than by way of her attending a face to face meeting.

113. We accept the Claimant's evidence that as far as she was concerned, matters were left that her trade union representative would get in touch with the Respondent to see if the meeting could proceed in that way. That was therefore the reason for her failure to attend the 28 day review meeting as arranged by the Respondent.

114. The Claimant's then trade union representative, Karl Jack, did in fact write to Anne Beardsley by email after the meeting to confirm that it was his error that had led to the Claimant's non-attendance and asking that that error not be held against her. In this regard, Mr. Jack emailed Anne Beardsley on 17th September 2014 to say the following (page 140 of the hearing bundle):

> "*...*
>
> *I spoke to Najma today regarding missing her 28 day review and she states it was due to the fact that I told her that the 28 day review could be done over the phone, which I now know that it's something that has sometimes been done in the Benefit Centre and not Jobcentres so the fault for Najma not attending the review in* (sic) *mind and therefore I don't feel that this should in anyway go against the decision made in regard of her Attendance Management. She would have attended the 28 day review otherwise and I hope this can be taken as supporting evidence."*

115. The Claimant's evidence before us, however, was to the effect that she was ready, willing and able to attend the meeting and the only issue had been in relation to the difficulties arising from crossed wires and her Trade Union representative's failure to promptly contact the Respondent about rearranging the meeting. We accept her evidence that it was those crossed wires that led to the Claimant not attending the meeting and that this was not any deliberate action on her part to delay or otherwise fail to comply with the Absence Management Policy.

116. In the meantime, Anne Beardsley had continued to liaise with Human Resources who provided advice in relation to the Claimant's absence and matters generally. A note of a case conference which took place in that regard was sent by HR to Anne Beardsley on 5th September 2014 (page 121 - 123 of the hearing bundle). The relevant portions of the note and advice from HR said this:

> ...
>
> *You would need a strong rationale when referring the case to a Decision Maker under the Attendance Management Procedures, particularly at the 28 day stage. However, if the individual is not engaging in the Attendance Management process, where steps*

have been taken to support a return to work, and the individual does not return within a reasonable time frame, then the business would be in a stronger position to refer the case to a Decision Maker.

..."

117. The reference to non-engagement was a reference to the Claimant's indication that she did not consider that a further Occupational Health referral would be helpful. We do not consider that it was reasonable to categorise that comment as a refusal to engage in the absence management process, particularly as the Claimant readily agreed to a further Occupational Health assessment at a later date.

118. The advice from Human Resources, therefore, as to requiring a "strong rationale" for referral to a Decision Maker (i.e. escalation to Stage 6 of the Absence Management Procedure for consideration for dismissal) was given against the background of the belief that the Claimant was refusing to cooperate in the process, something that Mrs. Beardsley would have been aware was not entirely accurate. We would therefore have expected in view of that background and the advice from Human Resources, that Mrs. Beardsley would have exercised considerable caution in determining whether an escalation to Stage 6 of the process was appropriate. We shall return to that again below.

119. Human Resources also provided advice at a later stage to Mrs. Beardsley regarding re-arranging the 28 day review meeting which the Claimant had not attended on 15th September. In this regard, Anne Beardsley also had further discussions with Human Resources on 18th September 2014 after the receipt of the email from the Claimant's trade union representative, Karl Jack, to which we have referred above.

120. The advice received from Human Resources in this regard features at page 143 of the hearing bundle and the relevant part reads as follows:

"*...*

We discussed what action should now be taken, I advised that you could continued with the original course i.e. referral to the DM[3] *or you could offer a final chance to the employee to attend the meeting. This may be more reasonable in the circumstances as the employee is facing dismissal and this demonstrates how reasonable the Department has been in its treatment of the employee. There is no requirement to give the employee five days notice of the revised meeting date, it would be sufficient to agree a date by phone and confirm in writing. It should be made clear that this is the final opportunity for the employee to attend.*

..."

121. It should be noted in that regard that it was the understanding of Human Resources when giving that advice that the review meeting had already been re-arranged on two earlier occasions. In fact, it had only been rearranged once in view of the Claimant's dental appointment.

[3] "DM" is a reference to "Decision Maker".

122. However, as we shall come to below Anne Beardsley did not heed the recommendations made by Human Resources to rearrange the meeting and to give the Claimant a further opportunity to attend the 28 day review meeting.

Referral to a Decision Maker

123. In this regard, and despite the fact that Anne Beardsley was made aware by Karl Jack that the fault in the Claimant not attending the 28 day review meeting was his, Mrs. Beardsley elected not to re-arrange the meeting.

124. Instead, she made the decision to refer the Claimant's circumstances to a Decision Maker under Stage 6 of the Absence Management Procedure to take a view on whether the Claimant should be dismissed on capability grounds.

125. We find that to have been a very surprising step to have taken for a number of reasons and one that we are satisfied given the circumstances fell outside the band of reasonable responses open to a reasonable employer.

126. Firstly, it was abundantly clear from the Human Resources advice that Anne Beardsley had received on 5th September 2014 that she would need a "strong rationale" for referring the Claimant to a Decision Maker at the 28 day stage.

127. We are satisfied that Anne Beardsley had no such "strong rationale" at that stage (or, indeed, at any other). Escalation to Stage 6 of the Absence Management Procedure required that there had been "no change" in the Claimant's circumstances and that the Department could no longer support the absence. At that stage, the Claimant had only been absent for a period of 28 days suffering from the effects of a mental health impairment. Her previous absence history, had that been consulted, clearly demonstrated that she had recovered adequately from an earlier period of absence for the same condition within a reasonable period and had continued to render effective attendance – so much so that she had been congratulated on the same by the Respondent as we have already set out above.

128. Moreover, there was no basis on which it could be reasonably concluded that there had been "no change" in the Claimant's circumstances. She had presented an initial Fit Note for a period of two months and Mrs. Beardsley had not even awaited the expiration of the same before concluding that the Claimant should be moved to the final stage of the process. There was, particularly in view of the nature of mental health conditions, scant if any time to see any change during a period of only 28 days absence.

129. In addition, there is no evidence at all before us that the Claimant's absence could not longer be supported by the Respondent. Other than the unsupported assertion of Mrs. Beardsley, Mr. Murphy and Mrs. Fielding (all of which we considered to be somewhat self-serving) there is nothing at all to begin to suggest that that was genuinely the case. No contemporaneous documentary evidence exists to support such a contention nor is the suggestion, as we shall come to, supported by anything of substance within the referral to the Decision Maker or the decision of Sue Fielding when occupying that role.

130. We find it very difficult to believe that an organisation with the size and administrative resources that the Respondent has could not support the

absence of one of its members of staff for a period in excess of 28 days. Indeed, one can imagine that a person with a badly broken limb or who was recovering from an operation might well be absent in excess of that and we find it very difficult to see that appropriate arrangements for cover could not be made in such circumstances. That is perhaps all the more difficult to fathom when one takes into account the fact that the Claimant had almost 30 years service at the point that the decision to refer her to the Decision Maker was taken. Her absence at this stage was a drop in the ocean in regards to her overall service for the Respondent.

131. Finally, as we have already set out above, Mrs. Beardsley had received advice from Human Resources that it would be more reasonable to rearrange the 28 day review meeting but she failed to follow that advice. We did not consider her explanations that she had considered her letter made it clear that the Claimant should attend to be reasonable given the crossed wires that it was apparent had occurred from the email from Karl Jack.

132. Anne Beardsley was of course well aware that the situation of the Claimant's non-attendance had been caused by the misunderstanding between herself and her trade union representative. The email of 17th September from Karl Jack took full responsibility for that position. Given that issue, we find it extremely difficult to understand why the meeting was not rearranged so as to give the Claimant the opportunity to participate. It could not reasonably be said that the Claimant was failing to engage with the Absence Management Policy given the foregoing and the clear indication from Mr. Jack in the final sentence of his email that she was prepared to attend a meeting. The 28 day meeting should, in our view, have been re-arranged in accordance with the Human Resources recommendation given to Mrs. Beardsley.

133. However, as we have already observed that was not done and Mrs. Beardsley instead moved to the final phase of the Absence Management Policy. That was not, in our view, a reasonable step for the Respondent to have taken at this stage for the reasons that we have already given.

134. However, following discussion with her line manager, Jon Murphy, and his own line manager, Dawn Lawrenson, it was determined by Mrs. Beardsley that the Claimant would be referred to a Decision Maker at Stage 6 of the process.

135. In this regard, on 16th September 2014, Anne Beardsley wrote to the Claimant in the following terms (see page 137 of the hearing bundle):

> "*...*
>
> *As you were unable to attended* (sic) *the meeting booked for Thursday 11th September 2014 and the rearranged one for Monday 15th September 2014. This letter tells you what happens next.*
>
> *As your health appears not to be improving and and* (sic) *did not agree to be referred to the Occupational Health Service this means that decisions will be made without current Occupational Health advice. If you have any comments, please make them in writing within 10 working days of receiving this letter.*
>
> *I have considered all the facts and have decided to refer your case to Sue Fielding who will decide whether you should be dismissed or*

demoted, or whether your sickness absence level can continue to be supported at this time.

Sue Fielding will write to you to invite you to a meeting to discuss this.

..."

The fourth Occupational Health referral

136. Upon receipt of the aforementioned letter, the Claimant contacted Anne Beardsley and explained that she would in fact consent to an Occupational Health referral. We have no doubt at all that the contents of the letter came as a shock to the Claimant and that she had not previously appreciated the need for further Occupational Health input. Certainly, it was not at any point previously made clear to the Claimant that her failure to agree could be construed to be a failure to engage in the Absence Management Process.

137. Thereafter, a further referral to Occupational Health took place on 17th September 2014 (see page 141 - 142 of the hearing bundle). Specific advice was requested by Anne Beardsley as when the Claimant would be able to work with the public and when she would be able to attend work between the hours of 9 am and 5 pm. That was perhaps a curious inclusion within the referral given that the adjustments that the Claimant avoid direct contact with the public and also that she was able to have a later start in the mornings were ones that had been in place for some time. It seems to us that the focus on this referral should have been squarely upon the Claimant's then state of ill health absence and what her prognosis for a return to work was likely to be.

138. The report generated by that further referral, which is clearly described as an interim report, was sent to Mrs Beardsley on 19th September 2014. The report recorded that the Claimant had been assessed as severely depressed, distressed and in despair. The relevant sections of the report said this (see page 146 of the hearing bundle):

"*...*

Ms Naroo remains unfit to return to work at present due to her current level of depressive illness and the resulting effect on her normal behavioural and cognitive functions. I am unable to advise on a likely return to work date at present. She perceives that her barrier to her return to work is a lack of management support and understanding of the effects and impact of her mental health condition. In time it will be strongly advised there is an impartial constructive discussion to address her perceived work related issues. She is however in no portion to engage with management at present (sic)*.*

Outlook

Ms Naroo's depressive illness is a long term condition; however it is apparent that due to perceived work related matters she has had increased difficulty to manage her condition effectively. Due to the nature of her health condition she has a fragile emotional wellbeing

which makes her prone to having severe bouts of aggravated depressions if placed under stress and pressure. Her condition is likely to remain as such for the foreseeable future; therefore there is notable importance for management to have a good level of understanding of her health condition and to establish appropriate support measures to communicate and interact with her in a manner where she perceives she is not under threat so that no to trigger or aggravate her condition.

To be able to advise management more appropriately about her long term prognosis and fitness and capabilities and how to support her at work with her health condition I am writing to her mental health specialist to obtain a medical report. Once we receive this we will review it with her before advising you further.

..."

139. The interim report therefore made it clear that the Occupational Health physician was unable to specify a return to work date at that stage but that they were to seek input from her "mental health specialist", which transpired to be from her Nurse Consultant, Anne Garland. In this regard, after the report had been sent to the Respondent, Occupational Health wrote to the Claimant to ask for her consent to obtain a medical report from her doctor/specialist. The Claimant completed the necessary consent forms and returned that to Occupational Health accordingly. However, as we shall come to, there appear to have been delays not of the Claimant's making in processing the request for information from Anne Garland.

140. Despite the fact that it was clear that further information was to be sought and the reference to the Occupational Health report being an interim one, the referral to a Decision Maker nevertheless pressed ahead.

<u>The involvement of Sue Fielding as Decision Maker and the completion of Appendix 14</u>

141. Therefore, the referral to a Decision Maker was not held in abeyance pending a final Occupational Health report and a pack of documents was put together for the referral under Stage 6 to take place.

142. The Decision Maker appointed by Human Resources to consider the position at Stage 6 of the Absence Management Procedure was Sue Fielding, a Senior Operations Leader.

143. Rather surprisingly, we did not have details before us of the full pack of documents which were sent to Sue Fielding by Anne Beardsley as part of the referral process. Those did not appear separately within the hearing bundle as is in our experience normally the case and given the passage of time, it was understandably difficult for Sue Fielding to recall precisely what had been received in this regard. We as a Tribunal are therefore somewhat in the dark as to exactly what documents and information Sue Fielding had before her when she made her decision to dismiss the Claimant, details of which we shall come to in due course.

144. However, once appointed as Decision Maker, Sue Fielding wrote to the Claimant by way of a letter of 29th September 2014 to invite her to a meeting to discuss her sickness absence. That was later rearranged due

to a further dental appointment of the Claimant to 9th October 2014 (see page 157 of the hearing bundle).

145. Prior to dealing with that invitation, however, it had come to the attention of Sue Fielding that Appendix 14 of the Absence Management Policy, which was the referral form to a Decision Maker for unsatisfactory attendance, had not been completed. At the time that came to light, Anne Beardsley was away on leave. Sue Fielding therefore contacted Anne Beardsley's line manager, Jon Murphy, with regard to the missing documentation. As we understand it, Appendix 14 is the only narrative which accompanies the referral to a Decision Maker and is designed to set out the rationale as to why the referrer has determined that moving to Stage 6 of the process is appropriate.

146. Upon the issue of Appendix 14 being missing being raised with him, Mr. Murphy determined that he would complete the same himself in the absence of Mrs. Beardsley. Again, that was perhaps a somewhat curious decision in the circumstances given his limited involvement in the process at that time. There is nothing before us to suggest that Mrs. Beardsley was to be absent for a protracted period and that matters could not have waited until her return.

147. Nevertheless, Mr. Murphy determined that he would complete Appendix 14 on Mrs. Beardsley's behalf. Whilst Mr. Murphy had had some previous discussions in relation to the circumstances of the Claimant's absence with Anne Beardsley, he had not, however, been significantly involved in matters. Despite that, his completion of Appendix 14 made it clear that he recommended the Claimant's dismissal. This was despite the fact that at that stage he had not even in possession of the bundle of documents which had been sent by Mrs. Beardsley a few days previously nor had he reviewed the circumstances of the matter for himself. He was therefore somewhat working from his limited recollection and, as we shall come to, there were significant errors in his completion of Appendix 14.

148. The relevant portions of the completed Appendix 14 said this (see page 161 of the hearing bundle):

> *...*
>
> *The required standards of attendance have been clearly laid down in letters and reports sent to the employee. I have discussed Najma's failure to meet the required standards with CS HR casework / CSOM / HRBP and now make the following recommendation.*
>
> *I recommend that Najms* (sic) *is dismissed. They have been given adequate guidance, support and time to improve their attendance, but have not shown that there is any reasonable prospect of achieving the required level of attendance within a reasonable timescale.*
>
> *...*"

149. Appendix 14 was sent by Mr. Murphy on 3rd October 2014 a few days, as we understand it, after the initial pack of documents had been sent to Sue Fielding by Anne Beardsley.

150. The content of that referral is in our view somewhat surprising. Firstly, it refers to the required standards of attendance being clearly laid down in letters and reports sent to the Claimant. There had in fact been nothing of that nature sent to the Claimant at any time. She had been off for a relatively short period of time and she had not been given adequate guidance, support and time to improve her attendance as Appendix 14 suggested. In fact by the time of this referral, she had not even got to the end of her first Fit Note. Moreover, there was nothing at all before Mr. Murphy to demonstrate that the Claimant had not shown any reasonable prospect of achieving the required level of attendance within a reasonable timescale. As above, the Claimant had only by this stage been absent on the grounds of ill health for just over 7 weeks.

151. Moreover, Appendix 14 contained nothing to suggest that the Claimant's absence could no longer be supported as was required for a referral at Stage 6 of the Absence Management Policy (see paragraph 106 above).

The Capability hearing

152. As set out above, Ms. Fielding invited the Claimant to a Capability hearing to discuss her absence in her role as Decision Maker.

153. The Capability hearing took place on 9th October 2014. Notes of that meeting, which we accept to be broadly accurate, are contained at pages 164 to 169 of the bundle. The Claimant was supported by Michelle Howlett, her then Trade Union representative, at the hearing.

154. During the course of the hearing, the prospect of a return to work for the Claimant was discussed. The Claimant indicated that at that stage she was not well enough to return to work and that she would require a Fit Note for a further eight week period. However, she indicated a desire to be back to work for Christmas and to have a fresh start for the New Year. She further indicated that her psychotherapist would be writing to the Respondent.

155. Ms. Fielding did not make a decision at the Capability hearing but adjourned the same in order to make further enquiries.

156. Subsequently, on 14th October 2014, the Claimant was issued with a further Fit Note for a period of two months with severe depression and anxiety. That Fit Note was provided to the Respondent in accordance with absence reporting requirements.

The outcome of the disciplinary process

157. In the meantime, the disciplinary investigation which had been taking place with Gaynor Rossiter had continued and matters had been passed to a more senior member of staff, Karen Lambert, as a decision maker in relation to that process. The disciplinary proceedings were carried on in tandem with the capability process that was being dealt with by Sue Fielding. However, as we shall come to there was little if any communication between the two decision makers.

158. As we have already observed, Karen Lambert was tasked with dealing not only with the events of 20th May 2014 but also the issues of timekeeping

which had, of course, been added to Gaynor Rossiter's initial investigation as set out above.

159. Karen Lambert wrote to the Claimant on 15th October 2014 to arrange a meeting on 24th October 2014 to deal with the disciplinary case against her. The Claimant attended the disciplinary hearing; the outcome of which was to issue her with a final written warning.

160. We have not, however, seen a copy of that final written warning issued by Karen Lambert nor has she given evidence before us. Whilst we therefore know that she was tasked with considering both the matter of timekeeping and the events of 20th May 2014, it is not clear what allegations she upheld against the Claimant or what part those matters played in her decision. That is to say, it is not clear whether the final written warning was in relation to matters both of timekeeping and conduct and, if it was, what weight each of those were given in the context of the disciplinary sanction imposed.

161. What is clear, however, as we shall come to is that assuming that the final written warning was imposed, in part at least, for the timekeeping issues this had the result that the Claimant was penalised twice for those matters given that, as we shall deal with below, they also formed part of the rationale of Ms. Fielding for dismissing the Claimant.

Events after the capability hearing

162. During the ongoing period of the Claimant's ill health absence, she continued to have "keeping in touch" contact with the Respondent. Those discussions were conducted by way of telephone calls between the Claimant and Anne Beardsley (see particularly pages 174 - 175 of the bundle).

163. However, after the Claimant raised an issue about those matters continuing to the dealt with by Anne Beardsley, alternative arrangements were made and in particular Caroline Puzstai took the lead on those calls in place of Mrs Beardsley and contact was thereafter maintained in that way. We are satisfied in this regard that as soon as the Claimant raised this as an issue, alternative keeping in touch arrangements were put in place by the Respondent.

164. Despite the fact that Anne Beardsley thereafter had no involvement in relation to the Claimant's ongoing absence, she was still logged as the contact with Occupational Health from whom she continued to receive alerts as to matters relating to their involvement with the Claimant. Mrs. Beardsley received one such notification on 16th October 2014 (see page 177 of the hearing bundle) to indicate that Occupational Health had attempted to contact the Claimant to arrange an appointment but had been unable to do so because she was unwilling to participate. That was information that was passed by Mrs. Beardsley to Sue Fielding.

165. In fact, we are satisfied that all that had been said in that regard to Occupational Health by the Claimant was that she was aware that her Nurse Consultant would be writing to the Respondent (as per the interim Occupational Health report) and that she believed that input from either that individual or her General Practitioner would be more preferable given that they were more familiar with her condition. We accept that the Claimant did not at any point refuse to attend an Occupational Health appointment and neither Mrs. Beardsley nor Ms. Fielding made any enquires of Occupational Health to

find out the circumstances of the suggested unwillingness to participate.

166. Moreover and more importantly, this was not a matter which Sue Fielding at any stage raised with the Claimant. It was simply taken at face value that the Claimant was unwilling to participate which, in fact, we are satisfied that she was not. As we shall come to, Mr. Murphy did make some enquiries but the Claimant was never informed by Ms. Fielding that she had taken the view that she was not willing to cooperate.

167. Indeed, when one looks now at the log kept by Occupational Health as to events relating to their interaction with the Claimant, it is far from clear that that provides an accurate picture.

168. At a similar time, Sue Fielding wrote to Anne Beardsley by email and asked if she had discussed ill health retirement with the Claimant. She also queried why an Occupational Health appointment was being rescheduled given that she had seen the aforementioned note of 16th October. It is perhaps somewhat concerning in that regard that Sue Fielding did not have more of a grip on those matters given that she was the Decision Maker in respect of the Claimant's ill health absence.

169. However, upon receipt of her enquiries, Anne Beardsley responded to Ms. Fielding say this (see page 176 of the hearing bundle):

> "*Sue*
>
> *I did not discuss ill health retirement as I did not see her, I had all the guidance ready printed for her to discuss at the 28 day but it never happened.*
>
> *The ATOS appt* (sic) *is because the initial report was an interim report because they wanted more information from her medical support team which she agreed to, but ATOS cannot get any more information so they wanted to a face to face appointment with Najma with one of their psychologists it is this appointment they are trying to book.*"

170. As we have observed, that was not at any stage verified as being accurate by Sue Fielding and matters were never raised with the Claimant by her as part of the process.

171. Instead, in response Sue Fielding directed Anne Beardsley to make a referral to Occupational Health to consider ill health retirement and she subsequently contacted the Claimant to advise that until the outcome of the disciplinary case had been dealt with by Karen Lambert, she would not be in a position to make a determination on the capability issue.

172. As we have already observed, that disciplinary case later resulted in a final written warning being issued to the Claimant.

173. The issue with regard to ill health retirement was raised by Human Resources with Occupational Health (see pages 179 to 182 of the hearing bundle) but no application for ill health retirement was made as the Claimant did not want to countenance such an application.

174. Sue Fielding also received an update from Jon Murphy who, in the absence of Anne Beardsley, had undertaken one of the keeping in touch discussions prior to that Carolyn Puzstai taking over that mantle. The relevant parts of that update from Mr. Murphy said as follows (see page 186 of the hearing bundle):

> "*What you need to be aware of is that she has sent in another med cert which should be received tomorrow for a further 2 months.*
>
> *She stated in her conversation with me that she wants to return to work & has said to her Doctor that sometime near Christmas might be the right time.*
>
> *Her GP has booked to see her in another month for a check up.*
>
> *She has explained she did receive a call from ATOS but did not consent to a F2F appointment with one of their medical practitioners as she feels the information required should be obtained from her current medical support team. (They rang her as she was leaving her home for her meeting with you).*"

175. On Friday 24th October 2014, the Claimant received an undated letter from Occupational Health Assist, which said as follows (see page 195 of the hearing bundle):

> "*Following a recent occupational health referral made by your employer, Department for Work and Pensions, OH Assist has approached Dr Garland for a medical report.*[4]
>
> *This will ensure that any advice we provide to your employer will be as accurate and comprehensive as possible.*
>
> *You have previously recorded your formal consent for this.*"

176. That letter and the date, which the Claimant records as having received on 24th October correlates with an entry on the Occupational Health assist log (which appears at page 182 of the hearing bundle) whereby it was indicated that further medical evidence was required from a medial professional who held information about the Claimant. The appointment which had been sought to be arranged with the Claimant was accordingly indicated to be cancelled by Occupational Health, presumably as further information was being sought from Anne Garland. It is common ground that that information was never considered by Sue Fielding prior to making her decision in relation to the Claimant's circumstances. She was not, therefore, aware that Occupational Health had only taken steps in late October 2014 to request information about the Claimant's condition from Anne Garland. That was despite the Claimant having returned the consent form for that to have taken place some weeks previously.

177. Instead, and without further reference to Occupational Health or awaiting a final report from them, Sue Fielding made a decision in relation to the capability issues surrounding the Claimant and on 31st October 2014 she elected to dismiss the Claimant. That was without any further discussion with the Claimant regarding her circumstances at that time or any proper reflection

[4] This is a reference to Anne Garland – who is not a Doctor but a Nurse Consultant.

as to when the Claimant may be able to return to work.

178. Having taken that decision, Sue Fielding wrote to the Claimant to notify her that she was being dismissed. The relevant parts of the letter in this regard said this (see page 209 of the hearing bundle):

> "*I have carefully considered all the information including*
>
> - *Occupational Health advice and advice from your Psychologist*
>
> - *your representations at the meeting on 9 October including factors outside of the workplace which are having an impact on your own health condition*
>
> - *the support you have received at work including the reasonable adjustments put in place to allow you to start/finish work at a later time to avoid crowds, provision of a parking space and a back of house role to avoid dealing with the public in a public facing organisation.*
>
> *After considering all the relevant factors, I have decided that your employment with DWP must be terminated because you have been unable to return to work within a timescale that I consider reasonable.*"

179. It should be noted that Sue Fielding did not take into account the Claimant's absence history. Had she done so, she would have noted that the Claimant had previously had a spell of ill health absence by reason of depression but had recovered from that relatively swiftly, taking into account the nature of a mental health condition, in a period of four months and had thereafter returned to work to be given commendations for excellent attendance by the Respondent.

180. Sue Fielding did not set out what timescale she did consider that it would have been reasonable for the Claimant to have been able to return to work within and it is noteworthy that by this stage the Claimant had only been absent for just over 11 weeks. That was considerably less than her previous period of ill health absence which, apparently, had not caused the Respondent any issue in terms of the reasonableness of the timescale nor the inability to support the absence. We find it very difficult to fathom why this period of ill health absence was any different such as to necessitate the termination of the Claimant's employment. The Respondent's evidence has not allayed our concerns and there was no further rationale for the decision given by Sue Fielding which might have assisted us in that regard.

181. We consider the decision to terminate employment at that stage to be a surprising one given the circumstances. To begin with, by the time this decision was made, there had been no final report received from Occupational Health. With reasonable enquiry, Sue Fielding could and should have been aware that Occupational Health were still seeking a medical report from Anne Garland. This had never been chased directly by the Respondent or any update requested by Sue Fielding as to the whereabouts of a final report (as opposed to the interim one that she had) before making her determination.

182. Moreover, it was a decision that in our view fell outside the band of reasonable responses. The Claimant had 30 years service with the

Respondent at the time that the decision was made. She had only been absent for a period of less than three months when the decision to terminate her employment was taken. She had indicated at the meeting of 9th October that she hoped to be able to return to work before Christmas and it had been reiterated by Jon Murphy (at page 186 of the hearing bundle) that the Claimant had an appointment with her General Practitioner to discuss that very matter which was due to take place only a short time after the decision to dismiss was taken. Ms. Fielding did not consider allowing the Claimant that extra period of time to see if she would be fit to return to work and at that stage, there was insufficient medical evidence or other indicators to allow Ms. Fielding to form the view that the Claimant was not going to return to work within a reasonable period.

183. The decision to dismiss the Claimant also failed to comply with the requirements of the Respondent's own Absence Management Policy with regard to a rationale for the decision to dismiss. In this regard, the Absence Management Policy, where there is to be a decision to dismiss, requires the following (see page 319 of the hearing bundle):

> " ***Decision is Dismissal***
>
> *7.17 The decision maker should dismiss if all of the following are satisfied:*
>
> - *The business needs can no longer support the employee's absence*
> - *Demotion*
> - *Is not an option, or;*
> - *Would not result in the employee returning to full and effective service, or;*
> - *Is not accepted by the employee.*
> - *There are no further reasonable adjustments that can be made or further adjustments would be unlikely to change the situation greatly*
> - *An application to the Civil Service Pension Scheme for Ill Health Retirement would not be appropriate. More information on Ill Health Retirement can be found in the Retirement Procedures.*
>
> *7.18 If the decision maker decides to dismiss, they may consider 1 of 3 types of dismissal:*
> - *Dismissal without compensation*
> - *Dismissal with partial compensation*
> - *Dismissal with full compensation*
>
> *7.19 When deciding whether to pay compensation, and if paid, on the level of the award, the Decision Maker must refer to the guidance on Compensation on Dismissal for Inefficiency and record their decision on the Decision Record Form.*
>
> *7.20 The Decision Maker must discuss their decision with the Complex Case Advisory Service before communicating it to the employee.*
>
> *7.21 The employee should be given notice. In relation to this, the*

Decision Maker must decide whether it is appropriate for the employee to be offered Pay Instead of Notice (PINP).

7.22 The factors that influence the decision to dismiss must be outline in writing. Where a decision is taken that a long-term absence cannot continue to be supported, the manager must explain why this is so, for example:

- *Cost - e.g. of the employee's sick pay, of covering the absence (e.g. temporary promotion, overtime;) of the manager's/administrative time.*
- *Effect on colleagues.*
- *Impact on service delivery*
- *No reasonable expectation of recovery in the near future.*"

184. There was no evidence at the time – or indeed before us – that the Claimant's absence could not be supported (that being the requirement at paragraph 7.17). In addition, no reasonable adjustments to support the Claimant in a return to work from her depression had been considered. All that had been noted were adjustments that were already historically in place.

185. Moreover, as we have already observed there was nothing before Ms. Fielding at the time to support any contention that there was no reasonable expectation of recovery in the near future. We have to say that it appears to us that Ms. Fielding did little or nothing to properly investigate the Claimant's absence and consider if a return to work would be feasible and, if so, when. The brevity of her decision belies our concern that she simply viewed the dismissal process as a "rubber stamping" exercise from the referral that had been made to her in Appendix 14. As we have already observed, the content of Appendix 14 was clearly far from accurate.

186. On 4th November 2014, having by that stage received the request from Occupational Health for what appears to us to be the first time, Anne Garland wrote her report regarding the Claimant's condition (see page 220 to 222 of the hearing bundle). Whilst this report did not provide details of the timescales in which the Claimant may be expected to recover and return to work, we have not seen a copy of the letter which was sent by Occupational Health to Anne Garland and therefore have no way of knowing if that question was actually asked. However, whatever the position, by the time the Claimant was dismissed, Sue Fielding was not in possession of any final Occupational Health medical report.

187. Perhaps unsurprisingly, the Claimant appealed against her dismissal on 17th November 2014 (see pages 225 to 229 of the hearing bundle). Particularly, she raised the fact that dismissal had taken place whilst a report was pending from Occupational Health about her prognosis and likely return to work date and the fact that the dismissal letter referred to Sue Fielding having considered advice from her psychologist, which she referred to as being untrue. In fact, it transpired from her evidence before us that what Sue Fielding had referred to in this regard was a letter provided to her at the meeting of 9th October by the Claimant. This was a letter from Anne Garland from several years previously (when the Claimant had had her earlier spell of ill health absence suffering from depression) which had set out details of coping strategies that the Claimant may be able to utilise for a return to work at that time. It was clearly nothing at all to do with the spell of absence for which the Claimant was dismissed.

188. In all events, it is clear that Sue Fielding never considered the Claimant's attendance record and the reason for previous absences and therefore did not take into account the fact that the Claimant had previously recovered in a relatively short period of time from a spell of severe depression at an earlier stage.

189. The Claimant also referred in her appeal against her dismissal to the fact that it had been incorrect and against the Absence Management Policy to refer her case to a decision maker at 28 days.

190. She also said this about the decision (see page 228 of the hearing bundle):

> "*I was asked in October about my return to work date and giving a time of 2 months later can hardly be called unreasonable. It would have taken my total absence to 5 months which is perfectly in line with the severity of my illness and the time for my treatment to take affect* (sic)*. My return would have been expedited if managers had worked with me to resolve issues at work.*"

191. The Claimant was invited to an appeal meeting by way of a letter dated 20th November 2014 from Bryan Cole, who had by that stage been appointed as appeal manager. The appeal hearing was to take place on 4th December 2014. At a similar time, the Claimant also appealed against her final written warning as issued by Karen Lambert.

192. The dismissal appeal meeting was later postponed at the request of the Claimant's Trade Union representative due to the Claimant's ill health. We have no doubt whatsoever, however, that her condition was exacerbated by her dismissal from a role that she had held for a period of nigh on 30 years and which was essentially one of the biggest parts, if not the biggest part, of her life. We accept the evidence of Michelle Howlett in this regard as to how she saw a marked deterioration in the Claimant's condition after she was dismissed.

193. The appeal meeting took place on 8th December 2014. Again, the Claimant was accompanied by Michelle Howlett in her capacity as the Claimant's Trade Union representative. During the meeting, Mr. Cole asked the Claimant when she would be able to return to work. The Claimant, rather optimistically to say the very least, indicated that she would return the following day. It is clear that she would have remained far too unwell to do so but that we consider is a manifestation of the level of desperation that the Claimant felt in relation to the loss of the position which she had held for the last 30 years.

194. Representations were made on her behalf, however, that she would be able tor return to work based upon medical advice and that there had been a deterioration in her condition since her dismissal.

195. It should be noted that Mr. Cole had not seen the Claimant at any stage prior to her being dismissed. However, it is clear from the evidence which was given to us by Mr. Cole during the course of the hearing that he had based his assessment as to the Claimant's capability on his own judgment. In this regard, he clearly took his lead as to the Claimant's ability to return to work, and thus the fairness of her dismissal, from her presentation at the appeal hearing. He did not source any further medical guidance on the point

or consider properly the issues raised by the Claimant's Trade Union representative as to the effect her dismissal had had upon her ill health. In our view, that was a fundamental error in Mr. Cole's reasoning, particularly in view of the fact that he himself has no medical background and therefore had no ability to make any judgment about the Claimant's prognosis either before or after her dismissal. It would have been more appropriate for him to make those investigations of medical practitioners, as indeed Michelle Howlett had suggested during the appeal process.

196. In fact, the only enquiries which Mr. Cole did carry out were to make enquiries of Sue Fielding as to her rationale. In this regard, he wrote to Sue Fielding by e-mail on 10 December 2014 to ask the following (see page 271 of the hearing bundle):

> "*As part of my decision making process I need to ask you a question regarding the medical report received on issued on the 19th of September 2014 from Houssein Peerally Occupational Health Adviser. In the report Mr Houssein advises that he has written out to Ms Naroo's mental health specialist to obtain a medical report and when received will discuss with Ms Naroo and advise accordingly. Can you advise why you did not wait for this additional medical information prior to making your decision please.*"

197. Sue Fielding replied as follows (see page 270 of the hearing bundle):

> "*As I recall the advice from Mr Houssein Peerally declared her unfit for work. There was no indication from the OH Assist report the mental health specialist report would have changed anything. We had put in place a range of reasonable adjustments based on previous advice from Ms Naroo's mental health specialist and OH Assist reports and Ms Naroo was struggling to deliver her role in spite of the adjustments already made.*
>
> *In my opinion the business had made as many adjustments as possible to meet the needs of Ms Naroo and I decided that the business could no longer support the absence.*"

198. There are a number of issues in relation to that particular rationale. Firstly, it was not accurate at all to say there was no indication from the Occupational Health interim report that the specialist report would have changed anything. In this regard, it was clear from the interim report that they were awaiting that information and input prior to providing the Respondent with a final report. As we have already observed, that final report was in fact never received prior to the dismissal of the Claimant.

199. Secondly, the reference to reasonable adjustments was not a matter which was designed to deal with the Claimant's ill health absence. Those had been historic matters which had been in place for some considerable time and were to do with the Claimant's inability to have face to face contact with the public and use public transport/travel in rush hour. It is clear to us from the evidence of Sue Fielding that she conflated the issues of timekeeping with the matter of the ill health absence and that the timekeeping issues played a significant part of her decision to dismiss the Claimant for capability reasons. That was fundamentally unfair, not least as a result of the fact that the Claimant was never informed that her timekeeping issues were being

considered as part of the capability case against her and therefore never had the opportunity to address those matters.

200. Moreover, and perhaps more importantly than that, the Claimant faced something of "double jeopardy" on that issue given that the timekeeping issues were a matter which proceeded through the disciplinary process for which the Claimant was issued with a final written warning. Clearly to deal with them both in a capability and a disciplinary context was manifestly unfair and the timekeeping issue should not have formed part of the decision of Sue Fielding in relation to the scope of the capability hearing which she was tasked with dealing. It appears to us, however, that she was unable to separate the two issues and allowed the timekeeping issue to infect her decision with regard to the Claimant's ill health absence.

201. It is also clear to us from the evidence before us that Sue Fielding did not consider other steps which could be taken, such as waiting for the medical advice and deferring the Claimant's dismissal pending at the very least the Christmas period to see if she was fit to return to work as she had represented that she hoped to be. Moreover, there is absolutely nothing to which we have been taken to support the assessment of Sue Fielding that the business could no longer support the Claimant's absence. Indeed, the business had previously supported a longer period of absence and there is nothing at all to demonstrate any substantial difficulties - or indeed difficulties at all - which the Respondent was experiencing as a result of the Claimant's ill health absence and a suggestion that they could not continue to do without her in this regarding pending her recovery. We are satisfied from the evidence before us, including that given by Ms. Fielding and the documentation before us at the hearing, that a considerable part of her decision related to the timekeeping matters. It should not have – that was not her role to determine but Karen Lamberts. Aside from the Claimant being punished twice for the same "crime", the Claimant was never told that this issue was being considered by Ms. Fielding and therefore never had the opportunity to make representations upon it.

202. Other than the limited information sought from Ms. Fielding, Mr. Cole did not undertake any further enquiries but instead determined the Claimant's appeal on 17th December 2014. He rejected it and upheld the decision to dismiss.

203. Mr. Cole's evidence before us was that he had before him when making his decision the further report from Anne Garland dated 4th November 2014 and had determined that that did not alter the position as he understood it to be with the Claimant's ill health.

204. However, what is clear is that there was no further referral back to Occupational Health to deal with a final report and instead, as we have already observed, Mr. Cole appeared to simply use his own judgment as to the Claimant's presentation at the appeal hearing as a benchmark for determining whether or not it had been accurate for Sue Fielding to determine that there was no prospect of a return to work within a reasonable period. However, he failed to take into account the clear impact that the Claimant's dismissal had upon her and the representation to that effect made by Michelle Howlett on her behalf at the 9th October 2014 meeting with regard to that aspect of his decision.

205. On 17th December 2014, Mr. Cole wrote to the Claimant in relatively

brief terms when one considers the issues raised by her in her appeal letter. In this regard, Mr. Cole said this (see page 278 to 279 of the hearing bundle):

> "*I am writing to let you know the outcome of your appeal against dismissal.*
>
> *Your appeal was not upheld and the original decision of 31 October 2014 taken by the decision maker stands.*
>
> *In making my decision I have taken into account the issues you raised in your appeal letter/e-mail dated 13 November 2014.*
>
> *Whilst you have stated that your medical condition was made worse by stress at work it is clear that you had additional pressures outside of work which may have impacted on your condition. You have stated that an informal meeting was schedule to discuss your reasonable adjustments but the manager cancelled the meeting when you arrived with a TU representative. Whilst I accept that the guidance states that a TU representative (at manager discretion) can be present it would have been reasonable for you to mention your plans prior to the meeting. In addition, your TU rep should have arranged for another date to be arranged.*
>
> *I am satisfied that DWP put a significant amount of reasonable adjustments in place to support you over the years:*
> - *To allow you to start work between 10.00am and 11.00am*
> - *Provide a car park place within the office car park - spaces are/were very limited*
> - *Developed a role that had no contact with the public - note that Job Centre Plus us a customer facing role/organisation*
> - *Not required to go into public areas*
> - *Provided a specialist chair, keyboard and mouse.*
>
> *It is clear that considerable changes were in place to support you in the workplace.*
>
> *Your manager is obliged to keep in touch with you whilst you are not attending work due to sick absence. I note that you state in your letter of appeal that as a result of your TU representative requesting that a different manager performed this role this was put in place.*
>
> *I am satisfied that you would have been made aware of the need for another up to date OHS report and that you and TU support in place to advise you accordingly.*
>
> *It is clear that the issue of ill health medical retirement was discussed with you on many occasions. In addition when I asked you about this you repeatedly stated that you were not interested in ill health medical retirement. Sue Fielding ensured that Jon Murphy discussed this with you prior to her making a decision. Jon Murphy has advised that you were very clear in stating that you would not consider ill health retirement which supports what you told me.*
>
> *Regarding the issue of ATOS outstanding advice I have received documentation from OH Assist that they tried on several occasions*

to progress the issue of further medical advice but you were unwilling to cooperate. In addition, the decision maker (Sue Fielding) was satisfied that the OHS reports she had and the range of reasonable adjustments put in place to support you (and a return to work) that the business could no longer support any further absence without a prospect of a return to work.

I covered my role as an independent decision maker at our meeting on 8 December 2014.

Despite many attempts by managers to discuss your work issues with you it is evident that this has not been possible.

This decision is final."

206. Whilst therefore dealing with some of the issues which had been raised in the Claimant's letter of appeal, what Mr. Cole failed to do was to get to the nub of what the issue was, i.e. whether the decision to dismiss the Claimant had been reasonable having regard to the information that was before Sue Fielding at the time. He failed to grapple with the medical issues in doing that and further failed to discuss at any stage the issue of the Claimant's alleged unwillingness to cooperate with Occupational Health. In point of fact, as we have already observed, those matters were far from accurate. He simply set out what the opinion of Sue Fielding was from her email at page 270 of the hearing bundle. He failed to make any determination about whether the conclusion that she had reached was in fact fair and reasonable. Indeed, as we have observed, what Sue Fielding said at page 270 of the hearing bundle was not in fact what Occupational Health had reported. Mr. Cole failed to investigate that or the circumstances of the Claimant's alleged non-cooperation. Again, this was perhaps little more than a rubber stamping exercise.

207. We were not satisfied that Mr. Cole had proper regard to the process adopted in relation to this case and particularly failed to deal with the Claimant's point that she should not have been referred to a decision maker at the 28 day stage. There is no evidence that Mr. Cole took into account the requirements of the Absence Management Policy and whether those had been satisfied nor is there any indication that he took into account the reasonableness of the approach to medical evidence that was before Sue Fielding or whether it was correct and reasonable for her to say that the Claimant's absence could no longer be supported. There was, in fact, not one shred of evidence in that regard, either at the appeal stage or in fact before this Tribunal, to suggest that that was an accurate reflection of the picture which resulted from the Claimant's, by that time relatively short, period of ill health absence when having regard to her overall length of service and the nature of her condition.

208. It appears to us more likely that Mr. Cole simply made an assessment of his own based upon the Claimant's presentation at the appeal hearing without taking into account his lack of medical expertise to do so and, further, the fact that it had been made abundantly clear to him by Michelle Howlett that the Claimant's condition had deteriorated markedly since her dismissal. Mr. Cole had never seen the Claimant before her dismissal and was not placed to make an accurate assessment. He could and should have referred matters back for medical advice but he did not do so. That was a significant failing in

his dealings with the matter and he failed to engage with the nub of the appeal concentrating on instead the superficial issues.

209. The Claimant's period of notice with the Respondent expired on 30th January 2015, that being the effective date of termination of employment, and she subsequently issued the proceedings that are now before us for determination.

CONCLUSIONS

210. Insofar as we have not already done so, we set out our conclusions in respect of the complaints brought by the Claimant against the Respondent here.

Unfair dismissal

211. We begin with the claim of unfair dismissal. It is conceded by the Claimant that there was a potentially fair reason to dismiss her by reason of capability and therefore that is not a determination that we are required to make. We move therefore to consider whether the Respondent acted fairly and reasonably in treating capability as a reason for dismissal. We are entirely satisfied that they did not.

212. In this regard, we have taken into account the following matters of concern in respect of the processes that led to the dismissal and the decision to dismiss itself:

(i) The failure of Mrs. Beardsley to reschedule the 28 day meeting – as we have already observed the advice from Human Resources was to reschedule in order to give the Claimant an opportunity to attend. That advice was ignored despite the fact that Mrs. Beardsley was well aware that the failure to attend the meeting had been as a result of advice received from Mr. Jack and the Claimant was willing to attend a rescheduled meeting;

(ii) The decision to escalate the Claimant to Stage 6 of the Absence Management Process after an absence of only 28 days and in circumstances where, for the reasons that we have already set out above, the criteria for invoking Stage 6 were not met. That was also a decision which flew in the face of the advice from Human Resources for a "strong rationale" for the referral at that juncture;

(iii) The fact that the whole basis of the referral was based on erroneous information contained in Appendix 14. That document was not completed by Mrs. Beardsley as the referrer but by Mr. Swift who had had no real involvement in matters and the accuracy of the content was not checked or question by Ms. Fielding as Decision Maker;

(iv) The failure of both Mrs. Beardsley and Ms. Fielding to consult with and have regard to the nature of the Claimant's illness and her absence history. Indeed, her absence history demonstrated successful recovery from an earlier period of related ill health absence within a reasonable time frame;

(v) The failure of both Mrs. Beardsley and Ms. Fielding to have proper

regard to the Claimant's overall period of employment with the Respondent – a period just shy of 30 years at the time of her dismissal – when considering the question of whether permitting a further time for her to return to work was reasonable;

(vi) The failure of Mrs. Beardsley and Ms. Fielding to await final medical advice from Occupational Health and to instead dismiss the Claimant on the basis of an interim medical report when it was clear that further medical advice was to be sought before a final report was prepared. An interim report had been received from Occupational Health making it clear that once input from the Claimant's specialist had been obtained, Occupational Health would be able to provide further guidance. Despite that and the fact that there was therefore clearly information which continued to be outstanding in respect of the Claimant, the Respondent pressed ahead with referral to a Decision Maker and Sue Fielding compounded matters by dismissing without that final report still being to hand. Given the requirements of the Absence Management Policy, that we would observe was also outside the terms of that policy itself and also lacked the strong rationale referred to in the correspondence from Human Resources for referring the Claimant to a Decision Maker at that juncture. Neither Mrs. Beardsley not Ms. Fielding dealt properly with those matters;

(vii) Moreover, there was a distinct failure by Ms. Fielding to gather her own information about the Claimant's ability to return to work and it is notable in this regard that she did not ask one medical professional that question. She could have asked Anne Garland; the Claimant's General Practitioner (who has provided a similar opinion during her earlier spell or disability related absence); Occupational Health and the Claimant's psychologist. She asked none on them. That was despite the clear indication from the Claimant that she hoped to return at Christmas time – only a short further period away – but no medical professional was asked about the viability of that;

(viii) The fact that the decision taken by Sue Fielding was clearly influenced by the Claimant's timekeeping issues. However, the Claimant was sanctioned twice in that regard given that those matters had already been dealt with by Karen Lambert as part of the disciplinary proceedings against her. They should therefore not have formed part of the capability process which should have related only to the Claimant's ill health absence and the prospect of a return to work;

(ix) The fact that escalation to Stage 6 of the Absence Management Procedure and dismissal at that stage required the Respondent to no longer be able to sustain the Claimant's absence. There is no evidence at all that that was the case and that the Claimant's absence could not be further supported for a reasonable period – as indeed it had been previously – and particularly having regard to the size and resources of the Respondent.

213. In our view, all of those decisions and steps fell outside the band of reasonable responses open to a reasonable employer. There was no reasonable evidence, including medical evidence, before the Respondent at

the time that the decision to dismiss was taken which supported the contention now advanced that the Claimant could not return to work within a reasonable period and/or that her absence could not longer be supported by the Respondent. That is all the more so when one considers the size and resources of the Respondent. On the evidence at the time, quite simply the Respondent could not have held a reasonable belief that the Claimant's ill health absence necessitated or justified the sanction of dismissal.

214. None of those matters which we have identified as causing unfairness were rectified at the appeal stage and, in fact, the unfairness was compounded by Mr. Cole substituting his views as to the Claimant's fitness to attend work at that stage for any proper medical evidence. He sought no clarification and relied on his own medically unqualified assessment. He also appeared to us to pay little or no attention to the representations made by Ms. Howlett that the Claimant's health had deteriorated considerably since her dismissal – a matter which was hardly unexpected given the Claimant's length of service; the fact that the Respondent had been her only employer since leaving education and the fact that her job was a huge part of her life.

215. The Respondent is a very large organisation with considerable resources. However, those resources were not always utilised to best effect or due regard paid to the recommendations of those such as Human Resources and Occupational Health for the reasons that we have already set out above.

216. We are satisfied that the decision to dismiss the Claimant was therefore entirely outside the band of reasonable responses open to a reasonable employer. We are therefore equally satisfied for the reasons that we have given that the Respondent did not act fairly and reasonably in treating capability as a fair reason for dismissal and it therefore follows that the Claimant's complaint of unfair dismissal is therefore well founded and succeeds.

217. However, we have gone on to consider whether the Claimant's employment would have been terminated in all events had a fair process been followed. We are not satisfied that it was inevitable as the Respondent contends that the Claimant would have been dismissed. Whilst the Respondent points to the fact that the Claimant continued to present Fit Notes during the course of her notice period and has been very ill with depression for much of these proceedings, we accept that her condition has been very significantly affected by her dismissal. That, as we have already observed, was somewhat inevitable. Her work was her life and after almost 30 years it was taken away from her in circumstances that the Claimant clearly found impossible to understand and accept. We have accepted the evidence of Michelle Howlett that the Claimant deteriorated significantly after her dismissal and the fact that she remains unwell to date, given the impact of the dismissal and the effect on these proceedings upon her, is not a matter which we consider lends itself to any firm conclusion that the Claimant would have continued to be absent if she had not been dismissed. Indeed, she had recovered well from a previous period of absence of some 144 days on the grounds of depression to give excellent attendance as her commendations from the Respondent made clear. She was also having medical intervention, including Cognitive Behavioural Therapy which may well in our view have assisted her recovery.

218. However, that being said we recognise that the Claimant was ill. At the time of the final Occupational Health referral she was obviously very unwell as

the narrative of the report which we have set out above makes clear. Unlike her earlier period of ill health absence from depression she had a number of considerable stressors in her life, not least the fact that her mother, whom she clearly adored, was terminally ill. We accept, therefore, that this is not a case where we can say that there was every prospect of the Claimant returning to work before such time passed that her absence could no longer be sustained. Given the circumstances, we consider that it was more likely than not that she would have continued to be absent and would have eventually have been, fairly, dismissed. We consider that likelihood to be at 25% and that there was therefore a 25% chance that the Claimant would have continued to be absent and would have been fairly dismissed at a point in the future. We put matters no higher than that as we consider it, for the reasons that we have already given, more likely than not that the Claimant would have been able to return to work.

219. We should say that we have also considered if the Claimant would have been dismissed, if she had returned to work, as a result of continuing to breach the required standards of timekeeping. We can make no finding that she would have been on the basis that we have not seen the final written warning imposed by Karen Lambert and therefore do not know what, if anything, was said within that warning about the escalation of further action if there were any further periods of lateness or, indeed, what part of the final written warning related to the matter of lateness and what related to the events of 20th May 2014.

220. We turn then to the complaints of a failure to make reasonable adjustments. We shall deal with each of those separate complaints in turn:

(i) The decision of Anne Beardsley to refer to the Claimant to a Decision Maker on 16th September 2014

221. The substantial disadvantage relied upon by the Claimant is that she did not have the opportunity to explain the effect of her disability and state how long she thought that she may be absent before being referred for a decision (paragraph 50 of Mr. Ross' written submissions).

222. However, we accept the submissions of Mr. Meichen on this issue that paragraph 20(3) EQA 2010 requires puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled. We accept that the referral to a Decision Maker would have placed anyone who was not disabled at precisely the same disadvantage on the basis that they too would not have had the opportunity to make the representations upon which the Claimant relies. There is, therefore, no comparative disadvantage and the duty to make reasonable adjustments was accordingly not triggered.

223. This element of the claim therefore fails and is dismissed.

(ii) Anne Beardsley's decision not to postpone the referral to a Decision Maker following the provision of additional information from the Claimant's representative (Karl Jack) on 17th September 2014

224. The Claimant relies here again on the same substantial disadvantage and for the same reasons as we have dismissed the complaint set out immediately above, we again accept the submissions of Mr. Meichen that there is no disadvantage when compared with a non-disabled person.

225. Therefore this element of the claim also fails and is dismissed

(iii) The decision to allow Anne Beardsley to be the Claimant's keeping in touch ("KIT") officer when their relationship had deteriorated significantly

226. We do not accept that this requirement put the Claimant at any disadvantage at all as she alleges. Whilst the relations between the Claimant and Anne Beardsley were no doubt difficult, the Claimant had no difficulty we accept communicating with Anne Beardsley and, indeed, telephoned her for discussion on occasion outside the requirements of the KIT discussions. Her evidence before us was that she was ready, willing and able to attend a face to face 28 day review meeting and there is nothing at all to suggest that relations were any easier at that stage than they were for the ongoing KIT discussions.

227. Moreover, even if there had been any substantial disadvantage, the Respondent was not aware of it until the Claimant raised the fact that she wanted a new KIT officer. The moment that she did so, the Respondent allocated Carolyn Puzstai who the Claimant got on very well with. Accordingly, it cannot be said that there was a failure to make a reasonable adjustment in such circumstances.

(iv) The practice of running disciplinary and capability proceedings in parallel

228. We accept again the submissions of Mr. Meichen in relation to this aspect of the claim in that the Claimant has adduced nothing at all to demonstrate that she was disadvantaged on account of her disability by the disciplinary and capability proceedings running in tandem with each other. Whilst there were clear deficiencies in the process – not least the failure of the officers dealing with the matters to communicate with one another about the scope of their determinations – that was not a matter which would not equally have disadvantaged a non-disabled person.

229. We accept Mr. Meichen's submission that the Claimant made it clear in her evidence that she understood the processes and it was equally clear that she had participated in both. We are not satisfied at all that there was any substantial disadvantage and, therefore, the duty to make reasonable adjustments was not triggered.

230. It follows that this aspect of the claim also therefore fails and is dismissed.

(v) The failure to review the impact of the disciplinary process on the Claimant's mental state

231. We are satisfied that, aside from the fact that it is somewhat questionable whether this aspect of the claim has a properly identified PCP, there is nothing at all to suggest that there was an adverse impact upon the Claimant to any degree more than would have been the case with a non-disabled comparator. Again, the same issues apply as in relation to the dismissal of complaint (iv) above.

232. Therefore, and for the same reasons, we dismiss this aspect of the claim.

233. Given the conclusions that we have reached on the complaint of a failure to make reasonable adjustments, it has not been necessary for us to deal with the question of jurisdiction. Had we had to do so, however, then in brief terms we would have extended time for those complaints on the basis that it was very clear that the Claimant was ill in the aftermath of her dismissal and we accepted the evidence of Michelle Howlett as to the difficulties that she had obtaining instructions from her. Any delays that were as a result of Ms. Howlett's involvement or from the solicitors appointed thereafter to assist the Claimant would not be matters to be visited upon her in terms of just and equitable considerations. Moreover, other than having to defend the claim, there is nothing which we have seen which could be said to prejudice the Respondent. It has garnered its evidence well in respect of these complaints, both in terms of witnesses and contemporaneous documents. As such, we would have extended time on just and equitable grounds. We deal with such matters only in very brief terms here, however, given that we have dismissed the complaints of a failure to make reasonable adjustments on their merits.

234. Finally then, we turn to the complaint of discrimination arising from disability.

235. The unfavourable treatment relied upon by the Claimant in the context of these complaints is her dismissal and the failure to uphold her appeal against dismissal. The Respondent does not seek to argue that those matters would not amount to unfavourable treatment (see paragraph 42 of the Respondent's written submissions).

236. Equally, the Respondent also accepts that the treatment arose from the Claimant's ill health absence and, therefore in consequence of her disability.

237. The only real question in these circumstances is whether the treatment afforded to the Claimant in this regard was a proportionate means of achieving a legitimate aim. The legitimate aim relied upon by the Respondent is attaining a balance between supporting the return to work of employees who have or are suffering from ill health and ensuring the efficient operation of the Department and the best use of public funds. We have no hesitation in concluding that that was a legitimate aim and we agree with the assessment of Mr. Meichen at paragraph 43 of his written submissions that this part of the claim turns on the issue of proportionality.

238. Having considered and balanced the positions of the parties carefully, we are not satisfied that the actions of the Respondent were proportionate in achieving the aim relied upon. There were in these circumstances less discriminatory ways of achieving the same objective (paragraph 4.31 of the Code). As we have already observed, the Respondent did not have any rationale for concluding at the time that the Claimant was dismissed that her absence could not longer be supported nor that she was incapable of returning to work within a reasonable period of time. They did not follow their own Absence Management Policy, either at the point of referring to a Decision Maker nor when taking the decision to dismiss. The dismissal of the Claimant at the point that her employment was terminated could not be said to strike a reasonable and proportionate balance between supporting those who are absent on the grounds of ill health and ensuring the efficient operation of the Department. There was no persuasive evidence at the point of dismissal that the Claimant would not recover, as she had in the past, so as to involve herself in that operation.

239. Moreover, the Claimant was not supported at all in the process in any meaningful way. She was not given adequate time to recover; her representations about her return to work were not taken into account nor was the point properly medically investigated. The Respondent has not remotely persuaded us that it was reasonably necessary to have dismissed the Claimant at the stage that it did and, particularly taking into account all of the relevant circumstances such as the Claimant's representations; her length of service and her past medical and attendance history. Put simply, that dismissal came far too soon and without proper consideration of the medical position. Dismissal at that stage (and in turn rejection of the appeal against dismissal) was not a proportionate means of achieving the legitimate aim relied on and there were far less discriminatory means of dealing with that with regard to awaiting medical investigation and supporting the Claimant in a return to work. We would reiterate here many of the failings that led to the finding that the Claimant's dismissal was unfair as also being ones relevant to the question of proportionality in this case.

240. Accordingly, we have no hesitation in the circumstances in determining that the Claimant's complaints of discrimination arising from disability are well founded and should succeed.

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Employment Judge Heap

Date: 16th May 2017

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

17 May 2017

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FOR THE TRIBUNAL OFFICE