EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
MRS CAROLINE CATCHPOLE	**v**	**BILLSON OPTICIANS LIMITED**

Heard at: CAMBRIDGE EMPLOYMENT TRIBUNAL
On: 27 July 2018

Before: Employment Judge Tynan

Appearances
For the Claimant: Mr D Catchpole
For the Respondent: Mr P Jackson, Solicitor

RESERVED JUDGMENT

1. The claimant's complaint that she was unfairly dismissed by the respondent is well-founded.

2. The Tribunal makes an award of compensation of £4,437.26 to the claimant in respect of her unfair dismissal by the respondent.

REASONS

1. By a claim form received by the Employment Tribunal on 20 May 2017 the claimant claims that she was unfairly dismissed by the respondent. Section 8 of form ET1 was completed by the Claimant on the basis that her only claim was one of unfair dismissal. However, in a Schedule of Loss filed with the Employment Tribunal (pages 43 to 45 of the hearing bundle) the claimant stated that she may also seek compensation for wrongful dismissal. For the reasons set out below I do not need to consider whether the Tribunal has jurisdiction to determine any such claim as the award of compensation in respect of the claimant's unfair dismissal includes a sum in respect of her notice period.

2. The claimant was represented at Tribunal by her husband, Mr Duncan Catchpole. She gave evidence in support of her claim. For the respondent I heard evidence from Mrs June Billson. Together with her husband, she owns the respondent business.

3. The Tribunal had previously made arrangements for the claimant to give her evidence by video-link from a nearby building in order to accommodate her ongoing health issues and her anxiety at the prospect of giving evidence in the presence of the respondent. Unfortunately, as a result of technical issues, it was not possible to establish the necessary video-link on the morning of 27 July 2018. In discussion with Mr Catchpole and Mr Jackson I indicated that I was minded to adjourn the hearing to another date, albeit I would seek to re-list the hearing as a priority particularly in view of the potential impact of the ongoing proceedings on the claimant's health. However, having had an opportunity to discuss the matter with his wife, Mr Catchpole informed me that her preference was to proceed as she wished to avoid the additional stress and anxiety that any further delay would cause her and accordingly that she was willing to attend the Tribunal in person to give her evidence. I was informed that her anxieties had abated somewhat on learning who was in attendance from the respondent. Nevertheless, I discussed with Mr Catchpole whether there were adjustments that might support the claimant's participation in the proceedings. The only adjustments identified were that there should be regular breaks and that the Tribunal room itself should be arranged so that the claimant had space and did not feel hemmed-in. I suggested to Mr Catchpole that whilst I read the parties' witness statements the claimant might find it helpful to view the Tribunal room with her husband without myself or others present so that her husband could explain the layout to her and what to expect when the hearing commenced.

4. There was a single hearing bundle comprising 39 documents running to 99 pages in total. The respondent had also helpfully prepared a chronology.

5. Not least given the exceptionally warm and uncomfortable conditions at Tribunal as a result of a malfunction in the building's air-conditioning, I adjourned the proceedings at the conclusion of the parties' evidence and invited the parties' written submissions together with an updated Schedule of Loss from the claimant by 24 August. In the event the claimant filed a Schedule of Loss but no written submissions. Mr Jackson informed the Tribunal on 24 August that he was in contact with Mr Catchpole to suggest a mutual exchange of written submissions, but that as of that date he had not received any reply. Mr Jackson's submissions were filed with the Tribunal on 24 August and forwarded to me on 7 September 2018.

Background

6. An employee with the requisite qualifying period of continuous service has the right not to be unfairly dismissed by her employer (section 94 of the Employment Rights Act 1996).

7. In order to claim unfair dismissal an employee must have been dismissed. Section 95 of the Employment Rights Act 1996 sets out the circumstances in which an employee is dismissed. In broad terms, dismissal includes constructive dismissal.

8. In this case the respondent denies that the claimant was dismissed and asserts instead that claimant's employment terminated by mutual agreement on 20 January 2017. It is not in dispute that the claimant and her husband met with Mrs Billson on 20 January 2017. However, they are in dispute as to what was said in that meeting, specifically whether it was agreed that the claimant's employment should terminate. Accordingly, the events of 20 January 2017 are critically important in terms of the outcome of these proceedings. However, it is necessary to consider the events leading up to 20 January 2017 because they provide essential context and inform any decision as to what happened on 20 January 2017.

Findings

9. The respondent is a small family run optician's business founded in the 1930s. It operates from six premises in East Anglia and employs approximately 19 staff.

10. The claimant worked for the respondent for over 16 years, initially as a pre-reg dispensing optician and then, on qualification, as a dispensing optician. She was originally based at its Haverhill branch before moving to the Sawston branch following her marriage to Mr Catchpole. In or around 2009 the claimant started working part-time. This coincided with their starting a family.

11. In their respective witness statements, and in their evidence at Tribunal, the parties directed various criticisms at one another. It is perhaps inevitable in a working relationship that lasted over 16 years that there will have been frustrations and even resentments on either side. It is largely unnecessary, though in any event, given the limited evidence available to me, not possible for me to come to any settled view as to whether their respective criticisms are well-founded. However, in this judgment I shall deal with certain comments and criticisms that have been directed at Mr Catchpole. What is not in dispute is that the claimant worked for the respondent for over 16 years. She had an unblemished disciplinary record. She took, as was her right, two periods of maternity leave, but otherwise had no significant absences from work until May 2016 when she was signed off work with a depressive illness. She then remained off work

until her employment terminated. It was not the first period of ill-health suffered by the Respondent. Whilst pregnant with her second child in 2012 she suffered from peri-natal depression which she managed through cognitive behavioural therapy.

12. The claimant returned to work following her maternity leave in April 2014. Following her return, she felt that her workload had increased as a result of staff shortages at the respondent. She was, of course, returning to work following a difficult pregnancy and a period away from the workplace. In or around April 2016 there were further changes as the Respondent sought to encourage its staff to focus on sales in addition to the patient care and customer service aspects of their roles. As the claimant acknowledges in her statement, and stated in her evidence at Tribunal, she was not entirely comfortable with the new way of doing things. The change in role (if indeed it amounted to such) did not suit her character or skill-set. However, there was no evidence before me to suggest that the respondent was making unreasonable demands of the claimant or its other staff. Be that as it may, the respondent is unfair to characterise the claimant's difficulties in adjusting as reflective of her being "out of touch with the world of work" (paragraph 46 of Mr Jackson's written submissions).

13. By April 2016 the claimant was increasingly stressed and anxious and on one occasion suffered a panic attack at work. On 19 May 2016 a friend intervened and the following day the claimant saw her GP and was signed off work. The Fit Note refers to the claimant as having a depressive illness caused by work-related stress. In my experience it is common for a Fit Note to cite work-related stress as the reason why an employee may be unfit to work. That does not of itself imply any culpability on the part of the employer. In an email to Mrs Billson dated 20 May 2016 the claimant referred to "having a few issues with my depression/anxiety in the last few weeks". Those comments by the claimant may suggest an underlying condition or a propensity on her part to anxiety and depression albeit that was, on this occasion, triggered or exacerbated by work-related stressors.

14. On 20 July 2016 the claimant emailed Mrs Billson to update her. She wrote:

"*I have finally been given a diagnosis. I have bi-polar disorder…. it has been there for quite a while but it had been building up since Christmas."*

Her comments again suggest an underlying health condition with no direct connection to Mr Billson (as the claimant suggests in her statement) or to Mr Catchpole (as Mrs Billson suggests in her statement).

15. In her evidence Mrs Billson states that she was mindful of the claimant's work-related stress and therefore kept contact with the claimant to a minimum during her sickness absence in order to allow a lengthy period for the claimant's recovery. Whilst I accept that the respondent is a small family run business and that for much of the period in question Mrs Billson did not have the benefit of professional HR advice, the fact is that from 20

May 2016 until the end of 2016 the respondent had limited contact with the claimant. It wrote to her on 1 July 2016 regarding pension auto-enrolment. Otherwise, the evidence available to me in the hearing bundle, namely emails from the claimant to Mrs Billson dated 20 May, 27 May, 26 July and 1 November 2016, and a letter dated 30 November 2016, confirm that any contact was initiated by the claimant. However, the respondent did arrange a meeting with the claimant on 12 October 2016 to discuss her continued absence from work. By then the claimant had been absent from work for 21 weeks and was approaching the point at which she would no longer be eligible for statutory sick pay.

16. There is a short note of the 12 October 2016 meeting at page 82 of the hearing bundle. I note that the claimant is described in the meeting note as having been tearful during the meeting. It is not apparent on the face of the note, but the meeting was also attended by Abigail Preston, who had recently joined the respondent. Mrs Billson did not inform the claimant in advance of the meeting that Ms Preston would be attending. I accept that the claimant was perhaps caught off-guard by this and that she felt uncomfortable discussing her ongoing mental health issues in front of someone she did not know. The meeting note documents that the claimant informed Mrs Billson that she was unfit to return to work and did not know when she would be fit to return. The note goes on to record that Mrs Billson "asked her to have a bit of a think about where we may or may not be and stressed that there was no pressure on her." Whilst I accept that Mrs Billson genuinely wished to avoid putting the claimant under pressure, I consider that it was by then in Mrs Billson's mind whether the claimant could in fact return to her job.

17. The claimant and Mrs Billson agreed on 12 October 2016 to meet again on 2 November 2016 to review the situation.

18. On 1 November 2016 the claimant was signed off work for a further three weeks and emailed Mrs Billson requesting that they postpone their meeting the following day. She said she felt unable to come in to see Mrs Billson, though also cited Ms Preston's presence on 12 October 2016 during what she felt was a "private and delicate meeting". She went on to say that she was seeking advice from the Richmond Fellowship, one of the largest voluntary sector providers of mental health support in England.

19. On 20 November 2016 the claimant wrote to the respondent, addressing her letter to both Mrs and Mr Billson. The letter stated clearly that it concerned the claimant's planned return to work and that it had been written with support from the Richmond Fellowship. It identified three issues as having caused a build-up of work related stress: the change to her role; her work load; and unsatisfactory relationships and a lack of support within the workplace. As regards this latter issue she wrote:

"I have found it very upsetting that, despite my many years of service with the company, I was not contacted by my employers for 10 weeks after I went off sick, and even then it was me who initiated contact. I received no

enquiry about my health and wellbeing. This led me to believe that I was not a valued team member. This lack of support has not helped my wanting to return, it has compounded my lack of confidence and made me very concerned about returning to work."

20. There were various emails between the claimant and Mrs Billson in December 2016 which suggest that the claimant was apprehensive as to how Mr and Mrs Billson might respond to her letter. In fact, her letter seems to have gone astray with the result that it was not seen by Mrs Billson until on or around 14 December 2016. In the meantime, they had arranged to meet on 20 January 2017. I note that Mrs Billson did not put the claimant under any pressure to meet. On the contrary, on 6 December 2016 she wrote:

"*Just wondering if we could reschedule our meeting.*

I realise you are probably busy with Christmas prep but let me know a time when you feel would be convenient/comfortable for you.

Wait to hear from you".

21. Following a further exchange of emails, the claimant suggested they meet on 20 January 2017. On 8 January 2017 Mrs Billson wrote to the claimant:

"E*xcellent, Friday 20th it is and venue Sawston.*

Look forward to seeing you both then."

Her tone was friendly and accommodating. Mrs Billson had by then seen the claimant's letter of 20 November 2016.

22. Over this period (it is not entirely clear when, as the letter is undated) Mrs Billson wrote to the Claimant to confirm that her statutory sick pay had come to an end.

The meeting on 20 January 2017

23. That brings me to the meeting on 20 January 2017. Having regard to the 12 October 2016 meeting minutes, it was originally intended as a meeting to review the claimant's health and ongoing absence from work, albeit the meeting took place over two months later than planned. Having further regard to the claimant's letter of 30 November 2016, the claimant evidently envisaged the meeting would be to discuss her return to work, though in the context that she had identified three issues as potentially impeding her return.

24. The respondent's notes of the January meeting are at pages 91 and 92 of the hearing bundle. Ms Preston was unable to attend the meeting to take

notes. The claimant was accompanied by Mr Catchpole. In the course of her evidence, Mrs Billson confirmed that the meeting notes had in fact been prepared by her in the knowledge of these Tribunal proceedings (which were issued in May 2017) and "probably written to get my statement sorted". The claimant's position is that they are therefore entirely self-serving. They are certainly not a contemporaneous record of the meeting. In reality they are Mrs Billson's statement as to what happened at that meeting and I approach them on that basis. However, I note that they record that Mrs Billson was shocked at the claimant's appearance as she "looked worse than previously and was physically shaking". Further, that when Mrs Billson made a pleasant comment she describes the claimant as follows:

"*… was not verbally responsive and didn't make eye contact. She may have given a small smile but did not lift her head which made JB feel awkward and unsure of who she should be addressing. JB felt like she was unable to have a conversation as open an honestly as she had first thought as CC was clearly finding the situation distressing*."

25. I pause here to observe that the respondent has made what I consider to be a number of ill-advised and unfounded attacks upon the claimant's husband in the course of these proceedings. In her statement Mrs Billson describes Mr Catchpole as someone who appeared to control and dominate his wife; she refers to the claimant being under the influence and "support" of her husband (from which I infer that she does not in fact regard him as being a supportive presence in his wife's life); and at paragraph 21 of her statement she states:

"*We do have a continuing concern about Caroline's well-being and the way she appears to be in the control of her husband. He regularly appeared to express his own views and suggested that these are the views of his wife. During the meeting on 20 January 2017 Mr Catchpole attempted to put his arm around his wife who did not respond. The situation was extremely awkward. Mr Catchpole would speak to me and on occasion look down to his wife to see if she was going to respond. She never did. Caroline spent the meeting with her head down and her hands in her lap. It seemed that Mr Catchpole was controlling his wife's thoughts and opinions. There is understandable speculation about the real source of Caroline's psychological problems which only became prominent following her marriage. My senior colleague and I believe that Duncan Catchpole is an arrogant and controlling bully whose effect on his wife has been noticeable in recent years as she has suffered mental health issues*."

Putting aside how Mrs Billson might be in a position to assert that the claimant's thoughts and opinions were being controlled by her husband, I do not accept Mrs Billson's testimony or the respondent's case in this regard, which are repeated in Mr Jackson's written submissions. The allegations in relation to Mr catchpole are unsubstantiated by the evidence before me and are certainly not supported by how he conducted himself at Tribunal.

26. Given the allegations noted above and Mr Jackson's various submissions in relation to Mr Catchpole, it is surprising that Mr Jackson accuses the claimant of 'mud-slinging'. To the extent there has been 'mud-slinging' in this case, I regret to say it is the respondent that has been doing the 'slinging'.

27. I note that in paragraph 31 of her statement Mrs Billson refers to Mr Catchpole's "aggressively litigious approach" in these proceedings (of which I saw no evidence) as potentially justifying the respondent's lack of contact with the claimant during her sickness absence. Mrs Billson's observation is misconceived given that Mr Catchpole's alleged conduct of these proceedings could have no possible bearing upon how respondent managed the claimant's sickness absence in the months prior to these proceedings.

28. If Mr Catchpole was the malign presence and influence that Mrs Billson suggests, then I am at a loss to understand why she agreed that he should accompany his wife to the meeting on 20 January 2017 or, perhaps more significantly, on what basis she could be satisfied that the claimant was free from his alleged influence and control and able to come to any decision regarding her continued employment. Mrs Billson could not in my view have concluded that the claimant was agreeing to her employment ending if in fact she had long-standing concerns that the claimant was under Mr Catchpole's influence and control, and in particular if she believed that he was controlling his wife's thoughts and opinions on 20 January 2017. Be that as it may, the respondent's allegations in relation to Mr Catchpole are unfounded. Nevertheless, I take note that it is Mrs Billson's own evidence that during the meeting on 20 January 2017 the claimant was visibly unwell and physically shaking, verbally unresponsive, distressed and that she sat with her head bowed and did not make eye contact. Those observations are all consistent with the claimant being severely depressed. Furthermore, Mrs Billson was specifically informed by the Catchpoles at the outset of the meeting that they felt the NHS had failed the claimant and that she was awaiting a private appointment with a psychiatrist, in other words that the claimant's mental health needs were not being addressed.

29. In all the circumstances I am in no doubt that the claimant did not agree during the meeting on 20 January 2017 that her employment with the respondent should terminate. She barely spoke during the meeting, but sat instead with her head down and her hands in her lap. She was distressed, unresponsive and avoided eye contact. Further, I do not accept that Mr Catchpole was authorised by the claimant to or, more importantly, that he did in fact agree to his wife's employment terminating. I accept that whilst he acknowledged that his wife's ongoing absence was impacting the respondent neither he nor the claimant attended the meeting with the expectation or intention, nor did they leave the meeting with the understanding, that the claimant's employment had terminated or would terminate. Instead, it was discussed whether as part of a phased return

the claimant might, at least initially, return in a position with fewer responsibilities.

30. Mrs Billson's own note of 20 January 2017 meeting, prepared as I say many months after the event, indicates that, having exchanged limited pleasantries and made limited enquiries about the claimant's health, she moved fairly swiftly on to the issue that was exercising her mind, namely that the respondent was having to engage locums to cover the claimant's absence, and that the respondent regarded this as an expensive and unsatisfactory arrangement. Mrs Billson's evidence is that the respondent had incurred locum costs of approximately £13,000. This cost would have been off-set by not having to pay the claimant's salary. Nevertheless, I find that Mrs Billson went to the meeting on 20 January 2017 with it firmly in her mind that the claimant could not continue in the respondent's employment and that she wished to regularise the arrangements in respect of the replacement cover for the claimant. However, she failed to communicate any of this to the claimant in advance of the meeting with the result that the claimant did not know that the meeting on 20 January 2017 would be to discuss whether she could continue in the respondent's employment.

31. Mrs Billson is a successful business woman. The firm impression I formed of her from the way in which she gave her evidence at Tribunal is that she is determined and single-minded. For example, when I asked her about the claimant's letter of 30 November 2016 she was dismissive of its contents and stated that there was no basis to the letter. I conclude that her intention by 20 January 2017 was that the claimant's employment should be brought to an end. In my view her determination to secure this outcome has clouded her view and recollection, and allowed her to convince herself that because it was the outcome she wished to secure it was somehow agreed to by the claimant.

32. For completeness, I reject the respondent's submission that the claimant and her husband have sought "*to concoct an alternative reality based on an illogical and twisted version of what Mr Catchpole said at the meeting on 20 January 2017.*" On the contrary I prefer the claimant's account of the meeting.

33. One issue that I have given some thought to is the claimant's failure to submit a further Fit Note following the meeting on 20 January 2017, and whether her failure to do so corroborates Mrs Billson's evidence that she agreed to her employment terminating by mutual agreement. In fact, the claimant failed to submit to submit Fit Notes for October, December 2016 and January 2017, in which case I do not attach any particular significance to her ongoing failure to do so or that it evidences her agreement to her employment terminating.

34. On 10 February, namely 20 days after their meeting, Mrs Billson wrote to the claimant:

"*Further to my meeting with yourself and Duncan on Friday 20 January I should like to confirm that content.*

We agree that your position as a dispensing optician with Billson Opticians should be terminated as of that date."

35. For the reasons above I find that there was no such agreement and that the letter of 10 February 2017 therefore constituted notice of termination of employment, such termination being with immediate effect.

36. On 19 February 2017 Mr Catchpole wrote to Mrs Billson challenging that the letter accurately reflected what had been discussed. Notwithstanding it took the respondent 20 days to write to the claimant, and even then, in the fairly cursory terms, the respondent seeks to attach significance to the fact it took Mr Catchpole 9 days to respond to Mrs Billson's letter of 10 February 2017. I do not consider 9 days to be a material delay, particularly in circumstances where the claimant remained unwell and was not in a position to return to work.

37. In his letter of 19 February 2017, Mr Catchpole wrote:

"*Most importantly that Caroline does not wish to terminate her position as dispensing optician at Billson Opticians*."

He went on to state that it would be:

"…*a few more months before Caroline has recovered to the extent that she will be able to return to work*".

His letter concluded:

"*She has been loyal to your company for many years and will do so for many years to come once she is recovered from her current period off ill-health*" (page 94 of the hearing bundle).

38. The claimant has not in fact returned to work as a dispensing optician and does not intend to. Whilst she may have concluded, as Mr Catchpole suggested in a subsequent letter to Mrs Billson dated 18 April 2017, that she would not wish to return to work for the respondent, her evidence at Tribunal is that she will have started a new job as an assistant at a pre-school nursery in September this year. Although she applied for the job in April this year and attended a two day paediatric first aid course on 22 and 23 July in order to take up the role, I am satisfied that she herself identified in or around April this year that she would only be sufficiently recovered to return to work in the autumn, and even then, only in a positon which she has identified as less stressful than her role as a dispensing optician.

Mr Jackson's written submissions

39. I have referred already to Mr Jackson's written submissions.

40. I have given careful consideration to the submissions. In places they are emotive and tendentious. They indicate a lack of objectivity on Mr Jackson's part, which is consistent with how he conducted his cross-examination of the claimant at certain points during the hearing. The submissions may be contrasted with Mr Catchpole's more measured approach. In the course of the hearing on 27 July 2018 it was necessary for me to speak to Mr Jackson about his inappropriate choice of language when cross-examining the claimant. Nevertheless, even away from the heat, discomfort and immediacy of the Tribunal, he has thought fit to make the following submissions:

"It was as if the Claimant could not be bothered and did not care about her job. Depression, including severe depression is relatively common. That is what we are considering – not what has traditionally been considered mental illness in terms of inability. It is unusual for depression to become a reason for failure over several months for an employee even to send in a fit note, particularly when supported by their spouse. In this instance it seems consistent with a poor and rebellious attitude marked by excuses."

"…the Claimant and her husband have sought to dramatise and exaggerate the situation."

"The reality was that she and her husband were taking advantage of the Respondent by her not returning to work and not submitting fit notes."

"To make something out of the small business opportunity, Mr Catchpole started on what has been a lengthy and tedious line of whingeing and attempts to construct a case including the accusatory "apathy demonstrated towards her".

" …It demonstrates the real nature of the Respondent and vividly contrasts with the scheming, dishonest and vindictive way that Mr and Mrs Catchpole have chosen to repay this kindness. Instead of recognising how she was well treated the Claimant has turned on the Respondent and Mrs Billson and tried to make money out of this situation…"

"From the Claimant's witness statement, we can see a prima donna element in that the Claimant, without any knowledge of how June Billson was otherwise occupied assumed that the world needed to revolve around her."

" …she simply dragged out the process to milk the situation for all it was worth."

"She knew she was not going to return but possibly just wanted to hang on for convenience, because she was reluctant to make any effort to find another job, or because she needed some psychological security blanket. No business needs people like this."

41. Mr Jackson's various submissions above are ill-advised and unfounded. Certain of his submissions do not reflect Mrs Billson's evidence or the respondent's case as set out in its Form ET3. For example, Mrs Billson accepted that the claimant was very unwell. She did not suggest that the claimant's health issues were a cover for a poor and rebellious attitude marked by excuses, nor did she suggest that the claimant was dramatising or exaggerating the situation.

42. For the avoidance of doubt, I find that from approximately Christmas 2015 until spring this year the claimant suffered a period of severe depression which had a significant adverse impact on her health and wellbeing and rendered her incapable of working. I reject the submission that she or her husband have sought to dramatise or exaggerate the situation. Likewise, I have no hesitation in rejecting the suggestion that the claimant's lengthy absence and her failure on occasion to submit Fit Notes was reflective of an attitudinal issue on her part or that she was scheming, dishonest and vindictive or greedy. She is, in my view, none of those things.

The claimant's alleged misconduct

43. I deal briefly with the allegation at paragraphs 40 to 42 of Mrs Billson's statement, namely that the claimant would have been dismissed for misconduct in any event. She accuses the claimant of dishonesty in relation to stock, rudeness and poor handling of customers. The evidence in support of her allegations is a single sheet of paper at page 99 of the bundle. That document has no bearing in relation to the claimant's alleged rudeness and poor handling of customers, of which there is no further evidence in the hearing bundle or in Mrs Billson's statement.

44. It is not clear on the face of the document at page 99 of the hearing bundle how it evidences dishonesty in relation to stock, and Mrs Billson's witness statement does not assist further in this regard. In her statement she says that the claimant breached staff rules by taking spectacles and contact lenses for which she did not pay and which fell outside the allowance for staff. However, no further particulars or evidence are provided. Mr Jackson endeavoured to address this significant evidential gap when re-examining Mrs Billson. Even then Mrs Billson's evidence was limited and somewhat unspecific. Ultimately, there is no or insufficient evidence before me from which I can properly conclude that there was any wrongdoing on the part of the claimant, or that the respondent might have had grounds to terminate the claimant's employment for misconduct.

Law and conclusions

45. Section 98(4) of the Employment Rights Act 1996 provides:

"…the determination of the question whether a 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."

46. The claimant has not brought a claim under the Equality Act 2010 and as such I am not required to decide whether the claimant was disabled and, if she was, whether the respondent was under a duty to make reasonable adjustments in her working arrangements.

47. In cases of long term absence from work, a fair procedure is key to a fair dismissal. That requires, as a minimum, consultation with the employee and in many cases, will involve medical investigation to establish the nature of the illness, its effects and any prognosis. A fair procedure may also involve consideration of other options short of dismissal, including re-deployment. Because formal warnings are not appropriate in cases of long term sickness absence, consultation assumes particular importance.

48. In this case the respondent's chosen approach was to avoid contacting the claimant. Mrs Billson came to the meeting of 20 January 2017 with the view that the respondent could not continue to employ the claimant. However, she had only limited information as to the claimant's situation following their meeting on 20 October 2016. By 20 January 2017 she had not sought any further medical information or advice in relation to the claimant. Indeed, as at 20 January 2017 she did not even have the benefit of a current Fit Note to inform her thinking. She observed that the claimant was unwell, physically shaking and unable to maintain eye contact. To a reasonably well informed observed that may have indicated that the claimant remained depressed.

49. In *East Lyndsay District Council v Daubney 1977 ICR 566* Mr Justice Philipps said:

"*Only one thing is certain, that is that if the employee is not consulted, and given an opportunity to state his case, an injustice may be done".*

50. Meaningful consultation is an essential step in ensuring that a fair balance is struck between an employer's needs for the work to be done against an employee's need for time to recover. In my judgment there was very limited meaningful consultation with the claimant who came to the meeting

on 20 January 2017 believing that it was to discuss her return to work and without being made aware in advance that the respondent in fact had in mind whether her employment could continue. The respondent's failure in this regard was exacerbated by its further failure to inform itself of the claimant's medical situation and its limited contact with the claimant whilst she was absent. There is no evidence that the respondent enquired of the claimant what form of communication she preferred or indeed if she wished not to be contacted at all. Mrs Billson approached the situation on the basis that she knew best. By contrast, I note Mr Justice Philipps' further comment in *Daubney* that "*in one way or another steps should be taken by the employer to discover the true medical position"* prior to any dismissal.

51. In my judgment the respondent acted unreasonably in treating the claimant's incapacity and resulting absence from work as sufficient reason for dismissing the claimant. In summary, it failed to warn the claimant that her continued employment was under consideration, it failed to consult with her and it failed to take reasonable steps to discover the true medical position before dismissing the claimant. In my judgment therefore, it unfairly dismissed her.

Remedy

Basic Award

52. The claimant was dismissed by the respondent on 10 February 2018. Even allowing for the fact that the claimant was legally entitled to 12 weeks' notice to terminate her employment, the claimant had been continuously employed for 16 years at her effective date of termination of employment. She was 39 years old when she was dismissed. Her gross weekly pay at the date of her dismissal was £236.25 (or £1,023.75 per month). She is therefore entitled to a basic award of £3,780.

Compensatory Award

53. Pursuant to section 123(1) of the Employment Rights Act 1996, where a Tribunal upholds a complaint of unfair dismissal it may award such compensation as it considers just and equitable in the circumstances, having regard to the loss sustained by the claimant in consequence of the dismissal. In accordance with the well established principles in *Polkey v AE Dayton Services Limited 1988 ICR 142* the Tribunal may make a just and equitable reduction in any compensation award under Section 123(1) to reflect the likelihood that the employee would still have been dismissed in any event had a fair procedure been followed.

54. This is a case in which it is not in my judgment too speculative an exercise to determine what would or could have happened. On the contrary I am certain, drawing upon common sense, experience and justice, that the

claimant would have been dismissed had a fair procedure been followed. I consider that she would very likely have been dismissed by the end of February 2017, but in any event certainly in the course of 2017, had the respondent informed her that her employment was under consideration and taken greater care to consult with her and to secure even a short report from her GP.

55. The fact is that the claimant has only very recently recovered her health sufficiently to return to what she has identified as a less stressful job. Through her husband the claimant accepted (page 94 of the hearing bundle) that her absence was impacting the respondent's business. I am satisfied that there was a financial impact as well as an impact on the claimant's colleagues and on customer service levels. As at 19 February 2017 the claimant's husband was saying that the claimant would still require a few more months to recover. In the event it has taken the claimant a further 19 months from the date that letter was written to return to work. I accept that by early 2017 the respondent could not reasonably have been expected to wait any longer. It is a relatively small business. The position on 19 February 2017 was that the claimant had been absent from work for 9 months and might be (but equally might not be) fit to return to work in a few months' time. Even then it was uncertain that she would return, as events have in fact borne out. The respondent was entitled to have regard to the fact that a Fit Note in 2016 which suggested a phased return had been replaced with a Fit Note stating that the claimant was unfit to work and further, notwithstanding the claimant's understandable desire in November 2016 to return to work, that by 19 February 2017 Mr Catchpole recognised this was still at least a few months away. On the basis that she would in my view inevitably have been dismissed by the respondent had it followed a fair procedure, I make no award of compensation for loss of earnings as a result of her unfair dismissal.

56. However, I do need to consider whether the claimant has been denied notice pay in consequence of her unfair dismissal. As at 10 February 2017 the claimant had exhausted her right to statutory sick pay. However, she was employed under terms and conditions of employment which conferred a right to statutory notice in the event of termination of employment. Where contractual notice does not exceed statutory notice, and in circumstances where the employee is incapable of working because of sickness or injury, section 88(1) (b) of the Employment Rights Act 1996 confers on an employee the right to remuneration for their normal working hours during that period of incapacity during their notice period.

57. The claimant had 16 years' continuous service as at 10 February 2017. Her statutory entitlement was to 12 weeks' notice of termination. She was terminated with immediate effect in circumstances where she was entitled to notice terminating her employment. The claimant's remuneration for her normal working hours during her notice period would have been £2,659.32 (12 weeks notice @ £221.61 per week). She was paid £2,361.81 in lieu of notice. In the circumstances I shall award her the sum of £297.51 as compensation in this regard.

58. I shall additionally award the claimant the sum of £300 as compensation for the loss of her statutory rights, taking the total award of compensation to £597.51.

59. I make no award to the claimant under section 38 of the Employment Act 2002. Having regard to section 38(3) of that Act I am not satisfied that at the date these proceedings were begun the respondent was in breach of section 1(1) of the Employment Rights Act 1996. Whether or not the claimant was issued with a statement of terms and conditions of employment on joining the respondent, she had been issued with a statement by February 2014, namely before these proceedings were begun.

60. Finally, pursuant to section 207A of the Trade Union & Labour Relations (Consolidation) Act 1992 and section 124A of the Employment Rights Act 1996 I shall increase the compensatory award by 10% to reflect the respondent's unreasonable failure to follow the ACAS Code of Practice on Disciplinary and Grievance Procedures, which applied in this matter. The respondent went beyond the requirements of the Code in allowing the claimant to be accompanied by her husband on 20 January 2017, but otherwise failed to follow the Code in its handling of the claimant's dismissal. The claimant was not informed in writing in advance that her employment was at risk and she was not offered any right of appeal, even once it was apparent that she disputed her termination. Allowing for the fact the respondent is a small organisation, I nevertheless consider that its failure to afford the claimant these basic protections in the ACAS Code was unreasonable. The compensatory award shall therefore be increased to £657.26.

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Employment Judge Tynan

Date: ……05.10.18……..

Sent to the parties on: .05.10.18.....

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For the Tribunal Office