Case Number: 2500603/2017

THE EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		***Respondent***
Mrs S Pugal	**AND**	British Telecommunications Plc

JUDGMENT OF THE EMPLOYMENT TRIBUNAL
LIABILITY ONLY

Held at: North Shields

On: 18 to 21 December 2017
Deliberations: 18 & 24 January 2018

Before: Employment Judge Morris

Members: Mr M Brain
Ms M Clayton

Appearances

For the Claimant: Mr Ryan of Counsel
For the Respondent: Ms C Brown, Solicitor

RESERVED JUDGMENT

The unanimous decision of the Tribunal is as follows:-

1) The claimant's complaint under Section 111 of the Employment Rights Act 1996 that her dismissal by the respondent was unfair contrary to Section 94 of that Act, by reference to Section 98 of that Act, is well-founded.

2) The claimant's complaint that the respondent discriminated against her, contrary to Section 39 of the Equality Act 2010, in that it discriminated against her by treating her unfavourably because of something arising in consequence of her disability as described in Section 15 of that Act is not well-founded and is dismissed.

3) The claimant's complaint that, contrary to Section 21 of the Equality Act 2010, the respondent failed to comply with its duty under Section 20 of that Act to make adjustments is not well-founded and is dismissed.

4) This case will now be listed for hearing to determine remedy in respect of the above finding that the claimant's dismissal was unfair.

REASONS

Representation and Evidence

1 The claimant was represented by Mr R Ryan of Counsel who called the claimant to give evidence.

2 The respondent was represented by Ms C Brown, solicitor who called to give evidence on behalf of the respondent the following of its employees: Mr G Angus, H R Change Consultant; Ms G Lee, Sales Centre Manager; Mr T Bolton, Transition Centre Manager, Help and Welcome; Ms R Hancock, General Manager, Customer Care

3 The Tribunal also had before it a variety of documents contained in two lever arch files agreed between the parties, which were supplemented during the course of the hearing.

The Claimant's Complaints

4 The claimant had presented three complaints to the Tribunal. First, that her dismissal by the respondent had been unfair; secondly, a claim of discrimination arising from disability advanced pursuant to Section 15 of the Equality Act 2010 ("the 2010 Act"); thirdly, a claim of failure to make reasonably adjustments advanced pursuant to Sections 20, 21 and Schedule 8 of the 2010 Act.

The Issues

5 The issues arising from the above claims that fell for determination by the Tribunal are as follows:-

Unfair Dismissal

5.1 Was the claimant dismissed? The respondent accepted that she had been.

5.2 Has the respondent shown what was the reason for the claimant's dismissal? The respondent asserted capability or, in the alternative, some other substantial reason.

5.3 Was that reason a potentially fair reason within sections 98(1) or (2) of the Employment Rights 1996 (the "1996 Act")? The above reasons are potentially fair reasons.

5.4 Did the dismissing officer have a genuine belief in the lack of capability on the part of the claimant?

5.5 If so, did he, after as much investigation into the matter as was reasonable in all the circumstances of the case, have in his mind reasonable grounds upon which to found that belief?

5.6 If so, did the respondent follow a reasonable procedure in moving to dismiss the claimant when it did?

5.7 In particular, was it reasonable to hold meetings when the claimant had a broken arm?

5.8 Should the respondent reasonably have waited longer before making a decision to dismiss?

5.9 Had the respondent obtained reasonable medical evidence prior to dismissing the claimant?

5.10 Was the decision to dismiss within the band of reasonable responses particularly in light of the claimant's length of service?

Discrimination arising from disability

5.11 The respondent accepting that the claimant was disabled at all material times by reason of the impairment of dyslexia, was she treated unfavourably by the respondent by being dismissed?

5.12 Did the claimant have an inability to commit to return to work and did the claimant fail to engage in the absence procedure?

5.13 Did that inability and/or failure to engage arise in consequence of the claimant's disability?

5.14 Was the claimant dismissed because of that inability and/or failure to engage?

5.15 If so, was the dismissal a proportionate means to achieve an aim of ensuring sustainable levels of attendance and thereby maintaining an effective workforce? Was that a legitimate aim?

Failure to make reasonable adjustments

5.16 The outcome of the attendance procedure would be determined on the available medical evidence.

5.17 If so, did that PCP place the claimant at a substantial disadvantage compared to non-disabled employees?

5.18 Would obtaining such medical evidence had been a reasonable adjustment of that PCP?

5.19 Did the respondent apply a PCP to the claimant having to maintain a certain level of attendance at work to avoid dismissal? Is that the PCP?

5.20 If so, did that PCP place the claimant at a substantial disadvantage compared to non-disabled employees?

5.21 If so, would temporarily postponing the dismissal process and at least until further information was obtained and/or the claimant had exhausted her contractual sick pay entitlement and being a reasonable adjustment to that PCP?

5.22 Did the respondent apply a PCP to the claimant of not postponing a decision on her employment beyond 14 October 2016? Is that a PCP?

5.23 If so, did that PCP place the claimant at a substantial disadvantage compared to non-disabled employees?

5.24 If so would postponing the meeting on 14 October 2016 for a short period have amounted to a reasonable adjustment of that PCP?

Consideration and Findings of Fact

6. Having taken into consideration all the relevant evidence before the Tribunal (documentary and oral) and the submissions made on behalf of he parties at the hearing and in writing subsequently and the relevant statutory and case law (notwithstanding the fact that in, in pursuit of conciseness, every aspect might not be specifically mentioned below), the Tribunal records the following facts either as agreed between the parties or found by the Tribunal on the balance of probabilities.

6.1 The respondent is a large and well known business with significant resources including some 75,000 employees and a dedicated human resources staff.

6.2 The claimant commenced employment with the respondent on 27 November 1999 and latterly worked as a Customer Operative Team Adviser based at Gosforth, Newcastle upon Tyne; her team comprising some 145 employees there being some 600 employees in total at the Gosforth site. The claimant worked part-time, 17 hours a week, mainly between 5.00 pm and 9.15 pm and 3.15 pm and 7.30 pm.

6.3 Nothing untoward occurred in the early part of the claimant's employment but, from 2012, the respondent began to manage her performance formally and she was provided with coaching and other support.

6.4 It is interjected at this stage that the reason for which the claimant was ultimately dismissed was due to her extended absence from work, which

is provided for in the respondent's attendance procedure at page 70 of the bundle of documents, particularly at page 73. The reason for her dismissal was not her performance and not repeated absences from work. The Tribunal considers it appropriate, however, to record certain findings in respect of those matters of the respondent's management of the claimant's performance and the claimant's repeated absences for two reasons: first, so as to provide some context for the ultimate decision that she should be dismissed on account of her extended absence and, secondly, because the claimant asserts that one of the reasons that her absence was extended was the way in which she was managed, particularly in relation to her performance.

Performance management

6.5 In May 2013 the respondent gave consideration to issuing the claimant with a Final Formal Warning for under-performance. That was put on hold, however, pending the outcome of an investigation of the claimant having dyslexia (page 139), which was ultimately diagnosed on 14 October 2013. The possibility of such a warning not having been proceeded with, the claimant was referred to certain support mechanisms within and outwith the respondent including Enable, RehabWorks Mental Health Service and Access to Work, and recommendations made by those organisations were put in place including that the claimant should be provided with special equipment to mitigate the effects of dyslexia and allowed 30 minutes 'off-line' (i.e. not performing her role in contact with the respondent's customers) at the start of each of shift for the purposes of reading, training and coaching.

6.6 On 15 July 2013, following the completion of the Enable referral tests for dyslexia, it was decided that the claimant should not receive the Final Formal Warning but, instead, the respondent would proceed on an informal basis with her performance being monitored while she received coaching support; albeit if she did not achieve a satisfactory level of performance the respondent would consider issuing her with an Initial Formal Warning (page 157). In fact, that is what occurred when, some time later, having attended a meeting on 27 May 2015, the claimant received an Initial Formal Warning in relation to her performance on 9 June 2015 (page 237).

6.7 The Initial Formal Warning that had been given to the claimant in May 2015 in relation to her performance was reviewed on 26 October 2015 with the possibility of the claimant receiving a Final Formal Warning. Instead, the Initial Formal Warning was extended from 28 November 2015 for two weeks (page 349) and then again from 23 January 2016 for a further two weeks (page 358). Support was provided to the claimant during these extensions. The rationale that is attached to each of these letters (pages 351 and 360 respectively) sets out in comprehensive detail the support that had been given to the claimant at this time, the way in which it was considered that her performance had not improved and the points that she and her trade union representative raised in response.

6.8 Although these extensions and associated support were given to the claimant, her performance still did not meet the required standards and, therefore, her then First Line Manager, Lyndsay Patten, issued her with a Final Formal Warning, which is recorded in her letter to the claimant of 24 February 2016 (page 377). At each stage in this process, and indeed other processes in which the claimant was involved, the relevant manager drew the claimant's attention to BT providing counselling through a confidential Employee Assistance Programme.

6.9 The claimant appealed against the Final Written Warning by email of 22 February 2016 addressed to Mr Alex Gordon who was the HR Case Handler (page 381). In that email the claimant stated that she did not wish her appeal to be dealt with by the Centre Manager, Gemma Lee. As she had not explained her reasons for that, however, Mr Gordon decided that Ms Lee should indeed hear the appeal, which took place on 15 March 2016 (page 391). The outcome was that the Final Formal Warning under the respondent's Performance Management Procedure should be upheld. The claimant was advised of this by letter of 11 April 2016 (page 395) attached to which was a rationale for the appeal decision.

6.10 By May 2016, insufficient improvement had been made in the claimant's performance and, on 11 May 2016, Ms Lee wrote to her inviting her to a Resolution Meeting on 18 May 2016 (page 404). One outcome of the Resolution Meeting could have been the claimant's demotion or dismissal. There then followed a discussion between Ms Lee and the claimant's trade union representative, the outcome of which was that the meeting scheduled for 18 May did not proceed. Rather, the then existing performance plan (page 414) was extended for four weeks from 21 May to 18 June 2016 for the claimant to "demonstrate your capability and through a continuation of the additional support being provided aid you to be successful with your current role" (page 406).

6.11 Ms Lee also agreed to refer the claimant to Occupational Health ("OH") to ensure that she had received all the support that was available to her.

6.12 Having received the performance plan the claimant wrote to Ms Patten on 20 May (page 408) asking for a one to one meeting with her to discuss ten numbered questions that are set out in her email of that date. Unfortunately, for part of the four-week extension period of the performance plan, Ms Patten was on annual leave and Mr Ben McFarlane covered her role. He had previously provided the claimant with the performance plan and discussed it with her, particularly what she was to achieve in the coming weeks. The claimant was not comfortable about Mr McFarlane's involvement as he was permanently employed as an adviser on the same level as she was and was only 'acting up' on account of Ms Patten being on holiday.

6.13 Meanwhile, the claimant's performance continued to be monitored but she still failed to achieve what was required of her. Page 419 shows that in

each of the three weeks of the four-week extension period the claimant's achievement overall was, "fail". The last entry date on that monitoring form is 7 June 2016 and the claimant commenced sickness absence the following day, 8 June 2016, from which she did not return before being dismissed.

6.14 The Tribunal makes no criticism of the respondent's handling of the claimant's performance issues, which it considers was measured and appropriate.

Absence management: repeated absence

6.15 In parallel with the performance management process, considered above, the respondent was monitoring and looking into the claimant's absences.

6.16 Between June 2008 and September 2015, the claimant had been absent from work on twelve occasions. Eight of those absences were due to issues relating to her throat, nausea/vomiting, injury and diarrhoea, one in June 2010 due to depression/mental illness and four subsequently due to stress/anxiety (page 78). These absences were managed in accordance with the respondent's attendance procedure for Repeated Absence (page 73).

6.17 In that connection, the claimant was referred to OH on 17 August 2015. The OH report (page 326) is dated 18 August 2015 and records, amongst other things, the claimant is struggling at work since moving to her most recent role, "personal stressors due to loss in the family and relatives being unwell"; the claimant suffering from dyslexia and that "decompensated psychological symptoms can have a further detrimental effect on dyslexia symptoms". In answers to certain specific questions that had been asked in the referral to OH, the report explains that the claimant "tends to struggle with multi-tasking as well as spelling and writing. This means that she is likely to require a longer time carrying out certain aspects of her job especially those that require either reading to writing."; that the current management process "should be concluded as soon as possible"; that any meetings in that regard should "be conducted in a non-confrontational manner". It is recorded that the claimant, on balance, "is likely to struggle with set targets and deadlines" and that "the possibility of sustaining her in alternative roles should also be discussed"; that "dyslexia is likely to affect some aspects of her performance, and this may be over long-term"; that as she "suffers from chronic and long term condition it may continue to affect some aspects of her performance over long-term". A recommendation is made that a referral to a counselling service should be considered; it is suggested that "over the next two to three months, flexibility should be exercised with regards to targets and deadlines". It is recorded that, on balance, the claimant "is likely to suffer from some limitations compared with her unaffected peers and is therefore likely to require some long-term adjustments in terms of target setting".

6.18 On 4 September 2015 the claimant's First Line Manager, Heather Wood, wrote to her (page 330) recording, among other things, that during an informal discussion on 24 March 2015 it was explained to the claimant that her level of attendance was a cause for concern and that in the event of a further absence she would need to consider issuing an Initial Formal Warning. She invited the claimant to attend a meeting on 10 September 2015 at which her attendance record would be discussed. Ms Wood then left the respondent's employment so it was Mr Angus who took over the conduct of that meeting, albeit re-arranged to 17 September 2015 (page 331) due to the unavailability of the claimant's trade union representative on the earlier date.

6.19 Mr Angus noted that between March 2015 and September 2015, the claimant had been absent on four occasions totalling 22.5 days. Three of the four absences related to throat problems and one related to stress/anxiety. He also noted that she had been accessing the support of a psychologist through RehabWorks Mental Health Service to which he had referred her in 2013. Mr Angus considered the OH report (page 326) and the stress from which the claimant was said to be suffering, which was said to be due to a combination of personal matters outside of work and the performance process that was being undertaken at work. Mr Angus noted that the OH report referred to adjustments that could be considered in relation to the claimant's dyslexia in order to minimise its potential impact on her performance and that a report from Enable (page 144) of 4 June 2013 also made recommendations in this regard. The Tribunal accepts Mr Angus' evidence that the recommendations that could be reasonably implemented were implemented by the respondent including her receiving 30 minutes 'off line' as described above.

6.20 Mr Angus was conscious of the need for employees of the respondent to provide sustained service and of the impact that repeated absence would have on that, particularly the effect on the respondent's customers. The Tribunal accepts the evidence of Mr Angus and the respondent's other witnesses as to the impact the claimant's absences had on the respondent's business, including customers and her colleagues. He also noted that the claimant had missed a telephone call with the RehabWorks psychologist and an OH appointment.

6.21 On 23 September 2015 Mr Angus wrote to the claimant (page 334) issuing her with an Initial Formal Warning because her current level of attendance was not meeting the standards that the respondent could continue to support. His reasons were set out in a rationale attached to his letter (page 336). Mr Angus explained that the claimant needed to improve her attendance and that it would be monitored for a period of six months. He explained the next stage in the process if her attendance did not improve to a satisfactory level, which was to consider whether a Final Formal Warning should be issued, and that, ultimately, unsatisfactory attendance could lead to termination of her employment. He offered the claimant an appeal, which she did not exercise.

6.22 Once more, the Tribunal makes no criticism of the respondent's handling of the claimant's repeated absences in which it followed its Attendance Procedure.

Absence management: extended absence

6.23 In May 2016, the claimant again reported feeling stressed at work and was referred to OH. A telephone assessment was undertaken on 19 May. The OH report is dated 20 May 2016 (page 410). Amongst other things, it is recorded: by way of background the claimant had "indicated to management that she is suffering from stress-related symptoms triggered by issues in her personal life and her perception of issues at work; that she is "currently on a performance improvement plan and she is also being managed under ….. processes for her level of sickness absence"; that had "caused her additional stress and anxiety", which she had discussed with management; that she "feels that she has not been given the opportunity to recover from her stress-related ill health and feels that the recommendations made in the last Occupational Health report have not been fully supported". The claimant' s dyslexia and having undergone CBT through RehabWorks, which she found supportive, were also recorded along with her having undergone a BT Enable Assessment, having adjustments in her place at work to support her including Dragon software, two monitors and additional read time at the start of her shift. As to the future it is recorded that the claimant "is suffering from anxiety and low mood which is affecting her motivation, concentration and confidence and is impacting on her performance at work" but that once perceived workplace issues could be resolved any impact on her performance would hopefully improve, albeit that dyslexia may have a long-term impact on performance which should be taken into account when setting performance targets. The hope was expressed that "with appropriate support the claimant would be able to offer reliable service and attendance into the future". Finally it is concluded, "At this time I would consider that there is no clinical merit in Occupational Health reviewing Miss Pugal and I have not arranged a formal review. I would also suggest that there is no benefit in obtaining any medical reports at this time as I do not feel that this would significantly add to my understanding of this case or the advice provided".

6.24 There is a conflict in the evidence of the parties as to whether the adjustments recommended by OH were implemented. The evidence of Ms Lee is fully set out in this regard at paragraphs 23 to 26 inclusive of her witness statement, which she maintained during cross-examination. Generally speaking, she was of the opinion that all that the respondent could reasonably do had been done. The claimant's position in this regard is set out at paragraph 4 of the Particulars of Claim attached to her Claim Form (ET1) (page 15) and in the Diary Notes (pages 467 and 468) that the claimant submitted in relation to the Resolution Meeting that was initially scheduled for 30 August 2016 – see below. Her position can be summarised as being that not all of the adjustments were implemented and those that were, were not implemented consistently. Ms Hancock's

evidence on this point (which she gave orally in answer to a question from the Tribunal as opposed to in her witness statement) broadly supports the evidence of Ms Lee to the effect that everything that could reasonably be attended to had been, in terms, for example, of time being given to the claimant, appropriate referrals being made to support organisations, training being provided, the respondent's procedures being followed in terms of formal letters and trade union representation, etc. Considering the evidence in this case as a whole, bearing in mind that performance was not the reason for the dismissal and that the statutory duty upon an employer is to make such adjustments as are "reasonable", the Tribunal is satisfied that the respondent did indeed do what was reasonable to implement the suggestions and proposals made by OH and the other supporting organisations to which the claimant was referred both in relation to her work station and the performance of her work.

6.25 Given the claimant's absence from 7 June 2016 a home visit was organised in accordance with the respondent's attendance procedures. This took place on 27 June 2016 when Ms Patten and Rav Ture visited the claimant (page 423). The claimant explained that the barrier preventing her return to work was the pressure and stress of doing things wrong and that she could not identify any support or equipment that would assist her. She confirmed that all the equipment she had was fine. She was offered a one week phased return to work and a site visit. Importantly, the claimant could not say when she would return to work due to her anxiety.

6.26 The claimant's absence was of concern to the respondent and Ms Lee wrote to her on 1 July 2016 (page 428(d)) inviting the claimant to meet with her on 11 July at 5.00 pm. The claimant replied on 4 July saying that she would attend the meeting if she was fit and well and had returned back to work. That was not quite the point. Ms Lee therefore wrote to her again on 5 July (page 428(b)) requiring the claimant's attendance. The date of the meeting then had to be moved and she wrote on 9 July (page 428(a)) offering either 12 or 13 July. This meeting, a Second Line Manager Review meeting, duly took place on 13 July 2016 (page 429), the claimant was accompanied by her trade union representative. Amongst other things recorded, the claimant raised a concern that she had not received a response from Ms Patten to the issues she had raised in her email of 20 May (page 408 – see above), which Ms Lee agreed to look into; the only thing outstanding from the OH report was a Stream (Stress Risk Assessment), which Ms Lee explained needed to be completed on line by the claimant for Ms Patten to review and discuss with her, which the claimant could only do after she had returned to work; the claimant stated that she felt unsupported but there was no evidence about that; Ms Lee identified that a barrier to return was her relationship with Ms Patten and agreed to look into a meeting to overcome that; she also agreed to look into follow up from coaching sessions; Ms Lee went through all the OH advice and she gave the claimant the explanations referred to above and asked the claimant to think about the root cause of her absence and update Mr Lee Reid (the Attendance Manager who was liaising with the

claimant) in due course so that he could support her on return; the claimant was unable to confirm a date by which she felt she could return to work. Ms Lee made notes during the meeting that she left with the claimant to read in her own time and make any comments that she wished to make. Ms Lee confirmed this in an email of 25 July 2016 (page 438(a)) seeking confirmation that they were an accurate reflection of the meeting and asking if there was anything she wished to add but no reply was received from the claimant.

6.27 As to the claimant's concern that Ms Patten had not replied to her email of 20 May 2016, Ms Lee (having looked into this as she had offered) noted that Ms Patten had actually replied on 7 June (page 438(c)) giving what the Tribunal considers to be reasonable responses to each of the 10 points that the claimant had made in that email of 20 May. Under cover of her email of 25 July 2016 (page 439), Ms Lee sent the claimant a further copy of Ms Patten's email. Ms Lee also invited the claimant to review the content and confirm her availability to meet with Ms Patten to sit down and talk through her points as the claimant had requested. She offered either the following day (Tuesday 26 July) or Wednesday (25 July). The claimant's evidence was that Ms Patten's response of 7 June had somehow been directed into her Junk email inbox (although the respondent questioned that given that other emails from Ms Patten had been received by the claimant). If that is what occurred the Tribunal is satisfied that no blame can be attributed to Ms Patten who had replied fairly promptly especially given that she was on holiday for part of the intervening period. The claimant replied to Ms Lee on 26 July 2016 (page 445) thanking her for "the time and support are willing to provide me" and, while appreciating having a meeting with Ms Patten to discuss her points and the OH report, requested the postponement of that meeting as she did not feel that she was in the right frame of mind to do that at the time, until after she had met with her doctor; in respect of which she had an appointment on 1 August 2016. Ms Lee agreed to this postponement by email of 27 July (page 446).

6.28 As the claimant remained away from work, Ms Lee wrote to her on 10 August 2016 requesting that she attend a meeting on 22 August at 1.00 pm due to concerns about her continued absence and raising the possibility of medical retirement or dismissal (page 452). She said that if the claimant did not wish to have a personal discussion she could submit her written views instead.

6.29 Unbeknown to Ms Lee, the claimant was due to have an operation on 10 August as she had been involved in a road traffic accident while driving on 1 August 2016, and had broken her arm. She had been offered a follow up appointment at the hospital at 11.00 am on 22 August, that being the day upon which Ms Lee had invited her to attend a meeting with her. In these circumstances the claimant replied to Ms Lee on 15 August saying that she could not therefore attend the meeting on 22 August (page 457). Ms Lee noted that the hospital appointment was at 11.00 am on 22 August and as the meeting was scheduled for 5.00 pm wrote to the claimant on

16 August suggesting that she could actually attend or, alternatively, Ms Lee could offer 23 August at 4.30 pm (page 457). The claimant responded on 17 August that she had a follow up meeting with her GP on 18 August to review matters and would contact Ms Lee thereafter. Her email (page 457) contains the following sentence. "You say I am suffering "low mood" but that has been taken over by later fit notes that refer to depression and work related stress, for which I am taking medication and receiving counselling. This combined with my broken arm puts me in no fit state until at least the end of August 2016, to be able to discuss sensibly outstanding issues, without further upset or being unable to do myself justices".

6.30 On 18 August the claimant's GP wrote to the respondent stating that she had assessed that claimant and "in view of her current ill health she is not well enough to attend meetings at work while on sick leave" (page 455). The claimant wrote similarly to Ms Lee on 19 August advising her that her doctor had said she was not fit to attend any meeting during the period of her present fit note (page 456). That fit note ran to 29 August 2016 so, on 22 August, Ms Lee wrote to the claimant confirming that she had rescheduled their proposed meeting to 30 August at 4.00 pm (page 456). Her email largely restated her letter of 10 August including that the meeting was to discuss the claimant's "situation and address any issues that she may wish to be taken into consideration and review the support offered and any additional required to aid her return to work", and that the claimant had the option of submitting written views or having a personal discussion with her.

6.31 On 27 August the claimant submitted a further fit note stating that she would not be fit for work for a two week period from 24 August to 7 September (page 82). In the email to which the claimant attached the fit note (page 459) she asked Ms Lee to advise her of a proposed new date for the meeting. Ms Lee considered all the circumstances including that the claimant had not indicated when she would be able to attend a meeting and the fact that although the GP had said that the claimant would not be able to attend a meeting she had not suggested that the claimant could not provide written representations or give instructions to a trade union representative to attend on her behalf. Ms Lee then wrote to the claimant by email of 29 August to confirm that the meeting had been rearranged to 30 August as had been indicated in her email of 22 August (page 460). In Ms Lee's opinion the claimant would be able to provide written representations given that she had engaged without apparent difficulty in the fairly rapid email correspondence between them.

6.32 In response to Ms Lee's email of 29 August, the claimant wrote the following day stating that she had been upset and had not slept, was "constantly in tear and feel too sick to eat". She added that she did want to meet Ms Lee when she was well and asked whether she still intended to go ahead with today's meeting (page 462). Ms Lee responded 12 minutes later stating that having taken everything into account she had made the decision to proceed with the meeting on that day, 30 August.

She reiterated that should the claimant feel that she was unfit to attend in person she was "happy for you to submit your views in writing, which would need to be received by 16:00 today".

6.33 The claimant replied by email timed at 16:06 that day, 30 August (page 461). She recorded her shock that Ms Lee had decided to proceed with the meeting knowing that she was not fit to attend in person or put together specific written representations. She continued, "All I can do is provide the diary notes I have been keeping". Although the respondent's witnesses did not see this exchange as such, the Tribunal is satisfied that, in the context of Ms Lee having stated in both her initial letter of 10 August and the replacement letter of 22 August that the claimant had the option of attending a meeting or submitting written representations, there is a clear link between the claimant's reference to her inability, due to her not being fit, to put together specific written representations and her remark, "All I can do is provide the diary notes I have been keeping". This point is returned to later in these Reasons. The claimant's email continued by asserting that Ms Lee had caused the continued absence by her "hectoring and bullying" and that now led her "to present a grievance" for Ms Lee's "handing of all these matters in a bullying and harassing way, ignoring medical opinion and my interests".

6.34 The diary notes to which the claimant referred (page 463) comprise seven pages in which the claimant articulates her perception of her circumstances and her relationship with the respondent. By reference to the sub-headings in that document alone, she sets out "Medical Matters", "Performance Management" and "Support", particularly in relation to her return to work. As mentioned above, the respondent's managers failed to recognise that these written representations were provided by the claimant in response to Ms Lee's suggestion that she could make such representations rather than attend a meeting in person. Worse than that, the phrase in the claimant's email that Ms Lee's conduct had led to her presenting "a grievance" caused the respondent's managers to hive off these written representations to be dealt with in accordance with the respondent's grievance procedure by its HR Department rather than factoring them into their consideration of the claimant's absence and the reasons therefor in accordance with the attendance procedure.

6.35 Given the claimant's reference to raising a grievance against Ms Lee, she wrote to her later that same day of 30 August stating that it would be best to have an independent review of the claimant's absence case therefore she had, "asked for the case to be reassigned to Toby Bolton. Toby will consider the points raised and make a decision communicating this to you with the next 5-7 days" (page 470). As to the reference in point 38 of the diary notes to the claimant wishing to raise a formal grievance, Ms Lee suggested that she contact HR services who would support her with that request.

6.36 Early in September, Mr Bolton reviewed the paperwork that had been presented to him for the purposes of making a decision and discussed the

case with Mr Alex Gordon in the HR department and Mr Lee Reid the Attendance Manager, both of whom had been involved with this case, who provided him with advice. His evidence was that one of them (Mr Bolton could not recall whether it was Mr Gordon or him) had tried to call the claimant, but had not received any response. On reviewing the papers, Mr Bolton noted that the claimant had not attended the meeting arranged by Ms Lee on 30 August and that also, in his opinion, she had not submitted any written representation. In his view she was fit enough to provide written representations even if she was not fit enough to attend the meeting. From the papers he noticed the following: the performance process that had been undergone with the claimant; the home visit that had been conducted on 27 June; the Second Line Manager Review of 13 July 2016; the OH report; the adjustments that had been made and support that had been provided by the respondent and external organisations; and the series of fit notes the claimant had provided. In that regard he noted that the claimant had submitted her most recent fit note dated 6 September 2016 for a further four weeks and that there was no indication that she would be fit to return in the foreseeable future having provided a series of fit notes for two weeks' and four weeks' absence. He anticipated that given the absence history further fit notes would continue to be provided. He had little confidence that the claimant would commit to a return to work and, in his view, adjourning his decision with a view to reconvening the meeting when she was fit to attend would result in delaying indefinitely. In all the circumstances he considered that there was enough information upon which to base his decision and he did not believe it was necessary for him to write to her GP. His evidence was that he was "comfortable that she had the right to appeal my decision and therefore it would not be unfair to go ahead".

6.37 Mr Bolton decided to dismiss the claimant. He made that decision on 9 September 2016 (page 487). Drafting the rationale for that decision, during the course of which he had input from HR, took some time after that date and the claimant was not advised of his decision until he wrote to her on 14 October 2016 (page 482). A key paragraph in that letter reads as follows:

> "Since you did not advise me of any points you wished to be considered I have had to make my decision on the information I have available. Based on this information, I have now concluded that it would not be reasonable to keep your job open any longer. I have therefore authorised the termination of your employment on the grounds of impaired capability due to ill health, in accordance with the Attendance Procedure."

6.38 Mr Bolton attached his rationale for the decision and gave the claimant 12 weeks' notice to take effect from 18 October 2016 meaning that her last day of employment would be 2 January 2017. Mr Bolton decided to deliver the letter personally to the claimant, which he did although not actually seeing the claimant at the time.

6.39 Mr Bolton's decision offered the claimant a right of appeal, which she exercised by email of 19 October 2016 (page 488) setting out five main grounds that she reserved the right to add to following consultation with her GP and legal advisers. Briefly those grounds were:

(a) The decision had been taken without complete and appropriate medical evidence and a likely return date.

(b) Her condition had been exacerbated by the ill-treatment she had received from the respondent, particularly the lack of support and the matters raised in her grievance (not yet resolved) with the result that her absence lengthened and the respondent took advantage of that to dismiss her.

(c) It was unfair to proceed in her absence where her GP had certified she was not fit to attend the meeting.

(d) She was a long-standing employee and deserved better, particularly in deferring the decision until she was fit to attend the meeting.

(e) She was entitled to protection from disability discrimination and the respondent had a duty to consider reasonable adjustments, and the decision breached those obligations and that duty.

6.40 Mrs Hancock was to have conduct of the appeal meeting. She wrote to the claimant on 27 October 2016 inviting her to attend a meeting on 4 November. She asked the claimant to confirm that she would be attending or would submit views in writing (page 490). The claimant replied on 31 October (page 492) indicating that she would not attend the appeal meeting and, amongst other things, asked that she be provided with the bundle of documents that would be used at the appeal and details of the representations that had been made by the dismissing manager to her grounds of appeal. She attached a copy of a letter from Dr Duncan dated 21 October that confirmed that the claimant was medically unfit to attend the meeting on 30 August and concluded "Given her current state of recovery I would recommend a period of phased return if possible from next month." (page 495).

6.41 On 30 October the claimant had submitted a further fit note to the effect that she was not fit for work for four weeks from 26 October to 23 November 2016.

6.42 On 2 November (page 499), Ms Hancock replied to the claimant's email of 31 October. She did not directly respond to the points the claimant had raised but explained her role and that she had a copy of Mr Bolton's rationale for his decision. The claimant responded on 4 November that simply reviewing the rationale was inadequate without considering the documents that were underlying it, and suggested that Ms Hancock had already made up her mind. Ms Hancock replied on 7 November seeking to explain her position and asking what the claimant would like her to

consider and to identify the documents that she wanted to see. The claimant replied on 12 November reiterating that reviewing the rationale for the decision to dismiss meant that Ms Hancock was not looking behind the decision, particularly to make sure that all of the relevant documents had been considered and that it was not appropriate for her to ask the claimant to identify documents thereby ignoring her request to specify the complete bundle that was considered as part of the decision. She added that there had been no investigation of her grievance which would have been possible even if she was not available to attend any meetings (page 497).

6.43 The claimant did not attend the appeal meeting on 4 November 2016 but in light of the claimant's email of 12 November Ms Hancock decided that she would prefer to have a meeting in order to address the claimant's concerns. She wrote to the claimant accordingly on 21 November explaining this and stating that the meeting would take place on 5 December 2016. She asked the claimant to confirm her attendance or that she would be submitting her views in writing. On 29 November, the claimant replied stating that she had submitted her latest fit note and that she would submit written reasons. She attached a letter from her GP stating that the claimant was not yet well enough to attend an appeal meeting in person. The fit note was from 23 November to 4 January 2017. It marked the option "you may be fit for work taking account of the following advice" and indicated that the claimant might benefit from a phased return to work "subject to appeal outcome".

6.44 The claimant submitted her written reasons on 5 December (page 508). In summary they are as follows:

(a) The decision to dismiss was taken before the respondent had ascertained the true medical picture and it had now emerged that she would be fit to return to work once the appeal procedure was exhausted.

(b) The respondent's conduct had both contributed to and exacerbated her ill-health. In this regard she cited lack of support from the respondent during her absence; the cause of her stress being Ms Lee's aggressive performance management; the recommendations in the OH report of 20 May 2016 had not been implemented; the respondent's conduct had increased her absence period and then used that to dismiss her.

(c) The dismissal was unfair: the respondent had failed to consult with her and had made a decision in her absence. Had arrangements been made to allow her to make representations, the respondent would have been fully informed.

(d) Her 17 years' of good service should have been taken into consideration.

(e) As she is a disabled person, the respondent had a duty to make reasonable adjustments but had neglected that duty, which would have allowed her performance to improve and could have avoided her dismissal.

6.45 On 28 December 2016, Ms Hancock wrote to the claimant informing her that she had decided that the decision to dismiss should stand and, therefore, her appeal was declined (page 511). Ms Hancock attached her rationale for her decision (page 512) in which, amongst other things, she responded to each of the claimant's grounds of appeal. In summary (drawing from the rationale and Ms Hancock's evidence at the hearing), she considered as follows:

(a) The claimant had been given a number of opportunities to state her case by attending a hearing, written submissions or union representation and the respondent had received clinician's advice in the OH report of May 2016. It would not have been reasonable to delay any longer in circumstances where a return date had not been confirmed. A letter from the claimant's GP of 21 October suggested that she would be fit for a phased return after one month but on 24 November the claimant had provided a fit note of a further six weeks. The claimant believed that that was evidence that she was fit to return in 6 weeks but there was no confirmed return to work date and the fit notes, previously for 2 or 4 weeks had been extended to 6 weeks.

(b) The claimant had been offered a meeting with Ms Patten to resolve issues, which she had not taken up, and had received a home visit on 27 June 2016. She had access to the Employee Assistance Programme, which offers a free counselling service, and had received CBT via RehabWorks and support for her dyslexia with an Enable referral, Dragon dictation software and text read and write installed on her PC, her own headset, coloured overlays and additional breaks of 30 minutes at the beginning of shift to be able to read emails, briefs etc. or complete coaching or mandatory training. Although the claimant had stated that the recommendations in the OH report of May 2016 had not been implemented she did not specify anything relating to her dyslexia and there was nothing that was not in place that would support the claimant to attend if it was in place. She could not identify the root cause of her stress and anxiety and therefore it was not possible to suggest additional support.

(c) A number of options had been given to the claimant to make representations. An extension to the end of August was given and an independent hearing manager, Mr Bolton, was assigned. He had had up to date OH advice and a further referral was not required.

(d) Mr Bolton had considered the claimant's lengthy service but had concluded that, despite that, based on her prolonged absence and not having made a commitment to return to work, dismissal was appropriate.

(e) The respondent had provided the claimant with a number of reasonable adjustments relating to her dyslexia and had provided equipment and additional time to reflect her condition.

6.46 Thus the claimant's dismissal became effective on 2 January 2017.

Submissions

7 After the evidence had been concluded, the parties' representatives made brief oral submissions that they subsequently supplemented with comprehensive skeleton arguments, which painstakingly addressed in detail the matters that had been identified as the issues in this case in the context of relevant statutory and case law. It is not necessary for the Tribunal to set out those submissions in detail here because they are a matter of record and the salient points will be obvious from the findings and conclusions below. Suffice it to say that the Tribunal fully considered all the submissions made, together with the case law referred to, and the parties can be assured that they were all taken into account in coming to our decisions.

The law

8 The principal statutory provisions that are relevant to the issues in this case are as follows:

8.1 Unfair dismissal - Employment Rights Act 1996

"94 The right.

(1) An employee has the right not to be unfairly dismissed by his employer."

"98 General.

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it—

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

(b) relates to the conduct of the employee,

(c) is that the employee was redundant, or

(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

(3) In subsection (2)(a)—

(a)"capability", in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and

(b) "qualifications", in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.

(4) 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."

8.2 Discrimination arising from disability- Equality Act 2010

15 Discrimination arising from disability

(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.

8.3 Failure to make adjustments - Equality Act 2010

20 Duty to make adjustments

(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

21 Failure to comply with duty

(1) 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.

Application of the facts and the law to determine the issues

9. The above are the salient facts and submissions relevant to and upon which the Tribunal based its Judgment having considered those facts and submissions in the light of the relevant law and the case precedents in this area of law.

Unfair dismissal

10 The Tribunal first considered the claimant's complaint that her dismissal by the respondent was unfair, the issues in respect of which (arising from the relevant statutory and case law) that are relevant to the determination of this case are summarised at paragraph 5 of these reasons. In this regard we considered and applied section 98 of the 1996 Act and the relevant precedents in this area of law as more fully set out below.

11 The first questions for the Tribunal to consider are what was the reason for the dismissal of the claimant and was that a potentially fair reason within sections 98(1) and (2) of the 1996 Act? It is for the respondent to show the reason for the dismissal and that that reason is a potentially fair reason for dismissal. By reference to the long-established guidance in Abernethy v Mott Hay and Anderson [1974] IRLR 213, the reason is the facts and beliefs known to and held by the respondent at the time of its dismissal of the claimant.

12 On the evidence before it, especially given the extended absence from work of the claimant in the context of the respondent's Attendance Procedure, the Tribunal is satisfied that the respondent has discharged the burden of proof to show that the reason for the claimant's dismissal was related to capability, that being a potentially fair reason. The respondent relied, in the alternative, on there being some other substantial reason for the claimant's dismissal (namely the failure to comply with its attendance requirements and to maintain a satisfactory level of attendance) but that was not the reason expressed in either the dismissal letter or the appeal outcome letter.

13 Having thus been satisfied as to the reason for the dismissal, the Tribunal moved on to consider whether the dismissal of the claimant was fair or unfair under section 98(4) of the 1996 Act, which requires consideration of whether the respondent acted reasonably in dismissing the claimant for the reason of capability. In this regard we reminded ourselves of the following important considerations:

13.1 neither party now has a burden of proof in this respect;

13.2 our focus is to assess the reasonableness of the respondent and not the unfairness or injustice to the claimant, although not completely ignoring the latter;

13.3 the decision in Polkey v AE Dayton Services Ltd [1988] ICR 142 firmly establishes procedural fairness as an integral part of the issue of reasonableness, which applies equally in cases of ill health dismissal such as this, including as to the procedure an employer has followed regarding such matters as consultation with the employee and obtaining up-to-date medical advice, both of which elements we address below;

13.4 our consideration of whether the claimant's dismissal was fair or unfair is a single issue involving the substantive and procedural elements of the dismissal decision;

13.5 the 'range of reasonable responses test' (referred to in the guidance in Iceland Frozen Foods Limited -v- Jones [1982] IRLR 439 and Post Office v Foley [2000] IRLR 827), which will apply to our decision as to whether the decision of the respondent to dismiss the claimant fell within the band of reasonable responses of a reasonable employer acting reasonably, applies equally to the procedure that was followed in reaching that decision: see, in the context of an ill health dismissal, Pinnington v City and County of Swansea EAT 0561/03, applying J Sainsbury plc v Hitt [2003] ICR 111.

14 Regarding the general consideration of fairness, the Tribunal records that it brought into consideration of the issues considered below and its ultimate decision regarding the fairness of the claimant's dismissal, relevant factors including the impact of the claimant's absence on her colleagues and the service provided by the respondent to its customers (in respect of which we repeat that we accept the evidence of the respondent's witnesses); for that reason it has a formal, structured Attendance Policy and Procedure, which it applies in circumstances such as this; the size of the respondent (that being a specific element in section 98(4)); the fact that the claimant was contractually entitled to 6 months' full pay and 6 months' half pay if absent from work due to sickness; and her having had 17 years' employment with the respondent.

15 The Tribunal acknowledges that while East Lindsay District Council v Daubney [1977] IRLR 181 is accepted as being a leading authority on medical investigation in the context of a fair capability dismissal, the well-established principles in British Home Stores Limited -v- Burchell [1978] IRLR 379 (albeit there in the context of a conduct dismissal) that were more recently endorsed in the decision of the Court of Appeal in Graham v The Secretary of State for Work and Pensions (Job Centre Plus) [2012] EWCA Civ 903 apply equally in the case of a dismissal for ill-health: see DB Schenker (UK) Ltd v Doolan [2010] UKEAT/0053/09. We have brought each of those principles into account in making our decision. Thus an important consideration (which, unlike in Burchell, the Court of Appeal in Graham takes as the first consideration) is whether the respondent carried out an investigation into the claimant's absence that was reasonable in the circumstances of the case.

16 Against the above structural background, therefore, the first element or question that the Tribunal considered is whether at the stage that Mr Bolton came to his decision to dismiss the claimant he had carried out as much investigation into the matter as was reasonable in all the circumstances of the case. In this respect as in others, the Tribunal has had regard to all the evidence and the submissions that have been put before it but there are three particular issues that were focused on by the parties during the course of the hearing, which it is appropriate to deal with in some detail.

Medical opinion

17 The first is whether Mr Bolton and later Ms Hancock were sufficiently aware of the true medical position in relation to the claimant. The importance of this is reinforced by the fact that for some 40 years the decision in Daubney has held good that other than in wholly exceptional circumstances, "steps should be taken by the employer to discover the true medical position".

18 In this case, Mr Bolton and Ms Hancock had the medical certificates, which were not particularly enlightening, and the OH reports, the most recent of which is dated 20 May 2016 (page 410). That was only a few weeks before the claimant's absence began and some four months before the date upon which the decision to dismiss the claimant was made. The report records that the claimant has dyslexia and "is experiencing symptoms of anxiety and low mood" and concludes, "At this time I would consider that there is no clinical merit in Occupational Health reviewing Miss Pugal and I have not arranged a formal review. I would also suggest that there is no benefit in obtaining any medical reports at this time as I do not feel this would significantly add to my understanding of this case or the advice provided." (page 412).

19 Both Mr Bolton and Ms Hancock were of the opinion that this report was sufficiently proximate to the decision to dismiss. That, in isolation, is not necessarily unreasonable given that only some four months had passed since it was written but the more pertinent question is not the recency of the report but whether it was current. They thought it was. At the stage at which the decision to dismiss was taken, however, the mental health of the claimant had deteriorated as is clear from the email she sent to Ms Lee on 17 August 2016 in which she wrote, "You say I am suffering from "low mood" but that has been overtaken by later fit notes that refer to depression and work related stress, for which I am taking medication and receiving counselling" and, as she added, she had suffered a broken arm (page 457). As the claimant states, the fit notes that she was submitting at this time do refer to stress and depression and, by the time of the appeal the fit note dated 23 November 2016 refers to "Work related stress and depression". The Tribunal is satisfied that it is also of significance that at the time of her dismissal was being considered the claimant was absent from work, whereas at the time that the OH report was written she was well enough to attend work and undertake her responsibilities.

20 The Tribunal is satisfied that those differences were such that, rather than relying heavily upon the conclusion of the OH report of 20 May 2016 that there was "no

clinical merit in Occupational Health reviewing Miss Pugal" and the suggestion, "there is no benefit in obtaining any medical reports at this time", as the respondent's managers did, a reasonable employer acting reasonably would have made a further reference to OH in such changed circumstances. The Tribunal is alert to the fact that it must not substitute its own decision for that of the respondent. We have not done that. We are satisfied that in these circumstances, a reasonable employer acting reasonably would not have proceeded to dismiss without seeking an up-to-date medical opinion and it was not within the band of reasonable responses for the respondent not to have done so. As it is put in the decision in Daubney, at the time of the dismissal decision, "steps should be taken by the employer to discover the true medical position".

Consultation with the claimant

21 The second issue is that it is well-established that there should be consultation with an employee before deciding to dismiss. That is very important in relation to all dismissals but perhaps especially so in cases of ill-health. We are again guided by the decision in Daubney: "Unless there are wholly exceptional circumstances, before an employee is dismissed on grounds of ill-health, it is necessary that he should be consulted and the matter discussed with him …", "If the employee is not consulted and given an opportunity to state his case, an injustice may be done". Similarly, in Spencer v Paragon Wallpapers [1976] IRLR 373 it is stated, "Usually what is required is a discussion of the position between the employer and the employee so that the situation can be weighed up, bearing in mind the employer's need for work to be done and the employee's need for time to recover his health".

22 In this case, there was correspondence, as detailed above, between Ms Lee and the claimant relating to the Resolution Meeting that was originally scheduled for 22 August 2016. That correspondence came to an end with Ms Lee's email of 30 August, which marked the conclusion of the written communication from the respondent to the claimant before the decision to dismiss was made by Mr Bolton who neither wrote to her nor spoke to her before making his decision. Indeed it seems from the third sentence of Ms Lee's email of 30 August that that was what the respondent always intended as she states, "Toby will consider the points raised and make a decision communicating this to you within the next 5-7 days." (page 470) There is no suggestion there of a further meeting or any other contact between Mr Bolton and the claimant before a decision is made.

23 The Tribunal was faced with a conflict of evidence on whether the respondent attempted to contact the claimant. Mr Bolton's evidence was that someone had tried but he could not recall whether that had been him, Mr Reid or Mr Gordon, or whether the contact had been by telephone or text message and, if by telephone, whether a voicemail message had been left. The claimant's evidence was clear that she had not received any telephone contact including by text or voicemail. Given Mr Bolton's uncertainty, we prefer the claimant's evidence.

24 What is clear is that Mr Bolton did not write to the claimant in a way that, in the experience of the Tribunal, would be typical in a case such as this of offering a meeting and, if the claimant was unable to attend, offering alternatives such as

meeting off-site including at the claimant's home, or her submitting written representations or representations being made by a representative on her behalf. The Tribunal accepts that an employee cannot be allowed to frustrate a reasonable process by refusing to attend a meeting and the time will come when the employer cannot be expected to wait any longer to accommodate personal attendance but that is why, in a typical case, a reasonable employer would offer the alternatives referred to above so as to give the employee "an opportunity to state his case" failing which "an injustice may be done": see Daubney. In contrast, Mr Bolton proceeded without any contact or discussion with the claimant whatsoever. The Tribunal is satisfied that a reasonable employer acting reasonably would not have done that. It is somewhat ironic that Mr Bolton took the trouble to hand-deliver his decision letter to the claimant but did not take equivalent steps to attempt to speak to her before making his decision. Neither is the Tribunal satisfied that the approach that Mr Bolton explains at paragraph 10 of his witness statement (which he confirmed orally in evidence), "I was comfortable that she had the right to appeal my decision and therefore it would not be unfair to go ahead", was appropriate or an approach that a reasonable employer would have taken.

25 Thus, as he said himself, Mr Bolton proceeded to dismiss the claimant solely on the basis of the papers before him, which in itself can make a dismissal unfair (see Post Office v Stones EAT 390/80), and advice that he received from colleagues but without any personal contact with the claimant and, importantly, without considering the written representations that she had submitted to Ms Lee to which we return below. This was Mr Bolton's evidence before the Tribunal and accords with his comment in his decision letter, "Since you did not advise me of any points you wished to be considered I have had to make my decision on the information I have available".

26 At the appeal stage, Ms Hancock wrote to the claimant on 27 October 2016 (page 490) asking her to confirm that she would attend the appeal meeting or submit her views in writing. The claimant replied on 31 October (page 492) referring to her GP's advice that the meeting would put her back in her recovery and, therefore, she would not attend. On 21 November, Ms Hancock wrote again to the claimant (page 501) saying that she would prefer to meet her to address her concerns and proposed a meeting on 5 December at noon. Ms Hancock asked the claimant to confirm her attendance or that she would submit written representations and commented that if the claimant did neither she would assume she no longer wished to appeal and as such "close the case down with no further action". The claimant, with her GP's support, (pages 504 and 505) responded that she would submit reasons by that date, which she did setting out five grounds of appeal which Ms Hancock duly considered.

27 At an early stage in the development of the law of unfair dismissal it was said that a procedural flaw at the dismissal stage could be corrected at the appeal stage. That has developed, however, to the current approach of considering the totality of the process followed by the employer: Taylor v OCS Group Limited [2006] IRLR 613 and in Graham, "An ET must focus its attention on the fairness of the conduct of the employer at the time of the investigation and dismissal (or any internal appeal process) …".

28 As outlined above, the Tribunal is not satisfied that when Mr Bolton took his decision to dismiss the claimant he was sufficiently aware of the claimant's position. By the conclusion of the appeal process, however, the respondent, in the shape of Ms Hancock, was better informed of the claimant's position as she had set that out in her five grounds of appeal, which Ms Hancock had considered and the Tribunal is satisfied that Ms Hancock, having sought to have a meeting with the claimant which the claimant declined, did not act unreasonably in proceeding to make her appeal decision with reference to the written representations the claimant had made. Without more, the appeal process during the course of which Ms Hancock considered and responded to the claimant's five grounds of appeal might have persuaded the Tribunal as to the fairness of the conduct of the process by the respondent overall: i.e. Ms Hancock being thus informed of and having considered the claimant's position might have addressed the fact that Mr Bolton made his decision without having had discussions or other contact with the claimant and so as to appreciate her position. But there is an outstanding issue, to which we come below, that the Tribunal considers is significant and does not allow for that finding.

The claimant's representations – her "grievance"

29 That outstanding issue is the third of the three issues referred to above, which relates to the grievance that the claimant had sought to raise against Ms Lee. As indicated above, Ms Lee had decided to proceed to a Resolution Meeting and ultimately wrote to the claimant on 10 August to that effect. In that letter she offered a meeting or the claimant could submit representations. As also indicated above the claimant wrote to Ms Lee on 30 August. In that email she referred to the options of a meeting or putting together written representations and having explained that she was unwell stated, "All I can do is provide the diary notes I have been keeping." (page 461). She then attached to that email a document headed "Ongoing Diary Notes Made By Sapna Pugal In 2016 And Grievance About Gemma Lee" (pages 463 to 469). The Tribunal is satisfied, therefore, that it was the claimant's intention that those diary notes should stand as her written representations to be taken into consideration as part of the Resolution Meeting process and should have been brought into account by the respondent's managers. That is plain from the progression of the claimant's email (i.e. first referring to the option of submitting written representations and then proceeding to refer to the diary notes) but is also clear from the content of the diary notes where the claimant explains her absence.

30 Mr Bolton's evidence in regard to whether he did take account of these diary notes was again unclear and changed from the evidence he gave one day to the evidence he gave the next, and was therefore unreliable. On the first of two days when Mr Bolton was giving evidence he was asked whether he felt it was his responsibility to deal with the grievance issues the claimant had raised and he clearly answered, "No". In contrast, in evidence the following day Mr Bolton said that he did take the grievance into account but that is not borne out by the sentence in his decision letter, "Since you did not advise me of any points you wished to be considered I have had to make my decision on the information I have available". The Tribunal is satisfied that Mr Bolton did not take the

claimant's representations into account and, further, that he should have done given his confirmation in answer to questions that the document, "all relates to attendance management", which was what the claimant was complaining about. By way of explanation he said that it had been passed on to HR although he conceded that it was not a completely separate issue, "Not at all, it was part of the same case". Indeed, he accepted that in the document the claimant was making "representations relating to the decision to dismiss her on capability grounds".

31 In light of these comments, the Tribunal is satisfied that this reasoning on behalf of the respondent that HR would deal with the grievance and, that being so, the representations made by the claimant were not to be factored into the consideration of her extended absence is flawed. These were representations that the claimant was making regarding attendance management, which she had been asked by Ms Lee to submit as part of the Resolution Meeting process and the Tribunal is not satisfied that sufficient attention, if any, was given to them.

32 Ms Hancock too adopted the same approach that the claimant's grievance should not form part of her consideration of the appeal. Although she accepted that "there was some crossover" she was adamant that the two processes, the management of the claimant's absence and her grievance, were to be dealt with separately. It was put to her that the first page of the diary notes sets out medical matters relevant to the decision to dismiss and that there was crossover between the grievance and the attendance management, which she accepted. Similarly, the second page of the diary notes sets out matters relating to performance management and that again there was crossover. Ms Hancock also accepted that commenting, "This is the very issue". Despite that she did not give consideration to the claimant's representations in the diary notes as part of the appeal process but considered the appeal, "on the basis of the documents that led up to the decision and the decision". She added that she had read the claimant's document but considered "it was right not to become too involved".

33 The Tribunal is satisfied that the approach on behalf of the respondent that was taken by both Mr Bolton and Ms Hancock that the written representations that the claimant had submitted to Ms Lee, which she referred to as her diary notes, should not be brought into account in relation to the decisions to dismiss her and not allow her appeal is not an approach that a reasonable employer acting reasonably would have adopted; and it was not within the band of reasonable responses for the respondent's managers to have adopted the approach that they did. It is repeated that in the claimant's email of 30 August she refers to having been given the option of submitting written representations and then that she is providing the diary notes that she has been keeping. The Tribunal is satisfied that a reasonable employer would have considered those representations and not hive the document off into a different process merely because the claimant used the word "grievance". Indeed, when Mr Bolton was asked by a member of the Tribunal whether, if the claimant had not used the word "grievance" he would have considered the points she had made in her diary notes he answered, "Yes, 100%". The evidence of the respondent's witnesses was that once the claimant's representations had been identified as a grievance it was channelled into HR deal with. The Tribunal is satisfied that despite the

claimant's use of the word "grievance" the content of her diary notes was such that it was not reasonable that her written representations were not considered as part of the dismissal process. A reasonable employer acting reasonably would have considered the representations the claimant was making in those notes.

34 The Tribunal records for completeness the both Mr Bolton and Ms Hancock referred to the claimant having decided not to pursue her grievance but even if that were to be true (and on the basis of the email correspondence the Tribunal is not satisfied that it is) that is not the point. The point is that the claimant submitted her written representations for the purposes of the Resolution Meeting and they were not taken into account by either Mr Bolton or Ms Hancock.

35 In summary of the above three issues, therefore:

35.1 the Tribunal is not satisfied that at the time the decision to dismiss the claimant was made or the appeal determined, the respondent had done what a reasonable employer would have been expected to do to "discover the true medical position" (Daubney) in relation to the claimant; and

35.2 Mr Bolton made his decision without having contacted the claimant and therefore not knowing her position and, although by the time the process concluded with the determination of the appeal her position was better understood by Ms Hancock, neither of the respondent's managers properly considered or brought into account in making their respective decisions the representations that the claimant had made in her diary notes, and thus the claimant was not properly "given an opportunity to state" her case (Daubney).

36 For the above two reasons, therefore, the Tribunal is not satisfied that at the time of the decision to dismiss or the determination of the appeal, the respondent had carried out as much investigation into the circumstances of the claimant's absence and her health as was reasonable in the circumstances of the case. In short, the Tribunal is satisfied that a reasonable employer would have obtained an up-to-date medical report and taken into consideration the claimant's representations as contained in her diary notes, and it was not within the band of reasonable responses for the respondent to have done neither.

37 This being so, the Tribunal is satisfied that the claimant's complaint that her dismissal by the respondent was unfair is well-founded.

38 In these circumstances, it is strictly unnecessary for the Tribunal to address other issues set out above in relation to the claim of unfair dismissal. It does so for completeness but, given the above finding, need not do so at any length. Referring to the paragraph numbers of the issues set out above, the Tribunal is satisfied as follows:

5.6 the essentials of the procedure followed by the respondent in moving to dismiss the claimant were reasonable and accorded with its own Attendance Procedure but the failure to obtain an up-to-

date medical report and to give due weight to the representations of the claimant made the procedure unreasonable;

5.7 it was not unreasonable to seek hold meetings when the claimant had a broken arm, there being no medical evidence in that regard;

5.8 it is not so much a matter of whether the respondent should have waited longer before making a decision to dismiss (as the Tribunal is satisfied that such a decision could have been made within the same or a similar timescale if an up-to-date medical report had been available) but, in the circumstances, the respondent ought to have waited a little longer to obtain such a report as a reasonable employer would have done;

5.10 given the procedural failings identified above, the decision to dismiss the claimant was not within the band of reasonable responses.

39 The hearing of the claimant's claims was limited to liability. Nevertheless, given that the above finding of unfair dismissal arises from the Tribunal not being satisfied as to the process applied by the respondent, we have considered the parameters of our likely approach to remedy.

40 In so doing the Tribunal has noted that the previous bright line distinction as to whether 'the Polkey principle' applies to 'substantive' as well as to 'procedural' unfairness is no longer supported in the light of decisions such as O'Donoghue v Redcar and Cleveland Borough Council [2001] IRLR 615 CA and Contract Bottling Ltd v Cave [2015] ICR 146. We have also had regard to decisions such as Software 2000 Ltd v Andrews [2007] ICR 825 and, more specifically in relation to a dismissal for ill-health, Slaughter v C Brewer and Sons Ltd [1990] ICR 730 in which it is stated, "… there may have been insufficient medical evidence, hence unfairness, but the subsequent investigation would have shown that the dismissal was inevitable. In such a case a positive view might be that such an investigation would have taken some days or weeks and that compensation should cover that period".

41 Although the Tribunal is satisfied that an up-to-date medical report from OH should have been obtained in respect of the claimant, given her medical position at the time (including as she advised the respondent's managers in email correspondence and as referred to in the fit notes from her GP that she was submitting to the respondent), it is further satisfied that such a report would have confirmed that the claimant continued to be unwell and was unlikely to return to work within what the respondent would consider, applying its Attendance Policy, was a reasonable period of time; and it is considered to be unlikely that a firm date for the claimant's return to work would have been given. As such, the dismissal process would still have been commenced, albeit slightly later than it was given that it might have taken time, which the Tribunal considers to be at most one month, to obtain the report. Notwithstanding our finding that the representations of the claimant as contained in her diary notes should have been brought into account by Mr Bolton and Ms Hancock, given the content of those

notes (which the Tribunal has considered carefully against the evidence of the respondent's witnesses), the Tribunal is satisfied that, even had they been taken into account by those managers, the decision that the claimant should be dismissed on grounds of capability due to her extended absence, in accordance with the respondent's Attendance Policy and Procedure, would have remained the same. Further, that if such a medical report have been obtained and the claimant's representations had been brought into account, that dismissal would have been a fair dismissal.

42 Taking the above considerations together, therefore, and applying the principles contained in Polkey, the Tribunal is satisfied that compensation in respect of the claimant's unfair dismissal (if that is the remedy for which she opts) is likely to be limited to a maximum of a basic award and an award in respect of the loss of her statutory rights plus an amount reflecting net pay and any other elements of contractual remuneration for a period of one month. That would accord with the provision in section 123(1) of the 1996 Act that "the amount of the compensatory award shall be such amount as the Tribunal considers just and equitable in all the circumstances" and reflect the element of section 98(4) of that Act that the question of whether the dismissal is fair or unfair, "shall be determined in accordance with equity and the substantial merits of the case".

Discrimination arising from disability

43 Moving on to the complaints made by the claimant in reliance upon the 2010 Act, the Tribunal reminded itself that the accepted disability of the claimant is dyslexia. The Tribunal is satisfied that her absence that led to her dismissal was caused primarily by what is variously described as stress, anxiety or depression together with a broken arm.

44 The claimant's evidence was that when she was at work and subject to the performance management process, the stress of that (and certain domestic issues at the time) could make her dyslexia and its effect on her work worse. That is supported by the OH report and is accepted by the Tribunal. Her evidence was not, however, (and the Tribunal does not find) that it was her dyslexia or any worsening of her dyslexia as a result of her stress that caused her to be absent from work and therefore subject to the extended absence procedure of the respondent. In this regard the Tribunal has noted and considered the submission of the claimant's representative by reference to the decision in Ward v Secretary of State for Work & Pensions [2013] UKEAT/0271/12 but distinguishes that the authority on the basis that in that case the employee's disability of irritable bowel syndrome was made worse by stress, and pursuit of the employer's attendance process would cause stress which would in turn have an adverse impact on his IBS and accordingly on his attendance. In this case, however, while it is accepted that stress could adversely impact on the claimant's disability of dyslexia, it was not dyslexia that was having an effect on her attendance.

45 In connection with this aspect of the claimant's claims, the Tribunal adopted the approach as set out in Pnaiser v NHS England and another [2016] IRLR 170 which, so far as is relevant to this case, is as follows:

"(a) A Tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises.

(b) The Tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, ….

(c) Motives are irrelevant. …..

(d) The Tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is "something arising in consequence of B's disability". That expression 'arising in consequence of' could describe a range of causal links. …..

(i) As Langstaff P held in Weerasinghe, it does not matter precisely in which order these questions are addressed. Depending on the facts, a Tribunal might ask why A treated the claimant in the unfavourable way alleged in order to answer the question whether it was because of "something arising in consequence of the claimant's disability". Alternatively, it might ask whether the disability has a particular consequence for a claimant that leads to 'something' that caused the unfavourable treatment."

46 Addressing the above points and using the above notation:

(a) The Tribunal is first satisfied that the claimant was treated unfavourably in that she was dismissed and, therefore, the people by whom she was treated unfavourably are primarily Mr Bolton and Ms Hancock.

(b) The reason for that treatment was the claimant's extended absence from work due to her mental health issues (variously described as being stress, depression, low mood, and anxiety) and a broken arm with no clear prospect of a return to work. In this connection the claimant's best position is that in her letter of 21 October 2016, Dr Duncan, the claimant's GP, stated, "I would recommend a period of phased return if possible from next month". The Tribunal is satisfied, however, that that was far from what the respondent's witnesses referred to as "cementing" a date for a return to work. On the contrary it is a recommendation for a phased return "if possible" from next month.

The claimant then submitted a further fit note (page 86), which although stating that she may be fit for work at the end of the period to which it relates specifies a period of six weeks' absence, which compares with the previous medical certificates that related to shorter periods of either two or four weeks' absence.

Addressing, for completeness, the issues at paragraphs 5.12 and 5.13 above, the claimant was unable to commit to return to work but she did engage in the absence procedure to the extent of submitting her detailed

diary notes at the resolution stage and grounds of appeal at the appeal stage. That inability or any failure to engage did not, however, arise in consequence of the claimant's dyslexia. Given these findings it is unnecessary to address the issues at paragraphs 5.14. and 5.15.

(d) Finally, it is therefore clear that the reason for the unfavourable treatment (i.e. the claimant's dismissal in the above circumstances) was not something arising in consequence of the claimant's disability (i.e. her dyslexia): see Basildon & Thurrock NHS Foundation Trust v Weerasinghe UKEAT/0397/14/RN.

47 In light of this finding, it is clear that the claimant's complaint that the respondent discriminated against her, contrary to Section 39 of the 2010 Act, in that it discriminated against her by treating her unfavourably because of something arising in consequence of her disability as described in Section 15 of that Act is not well-founded and is dismissed.

Failure to make reasonable adjustments

48 In connection with this complaint, the Tribunal reminded itself that it first must identify the provision, criterion or practice (PCP) that the respondent is said to have applied: Environment Agency v Rowan [2008] IRLR 20. These are set out at paragraphs 5.16 to 5.24 above.

49 First, the Tribunal does not accept that the PCPs at paragraphs 5.16 or 5.22 are PCPs at all. Rather, they are decisions made by the respondent's managers that focused expressly upon the claimant and her individual circumstances: namely to determine the outcome of the attendance procedure on the available medical evidence and not postpone the dismissal decision beyond 14 October 2016. Neither of those decisions is a PCP that the respondent applied to all or even part of its workforce. It follows that the Tribunal need not consider the questions set out at paragraphs 5.17, 5.18, 5.23 and 5.24, which fall away.

50 The respondent expecting its employees "to maintain a certain level of attendance at work" as is set out at paragraph 5.19 is a PCP, which the respondent did apply to the claimant. It is not strictly accurate, however, to state that that PCP required attendance "to avoid dismissal". It is more accurate that a certain level of attendance was required to avoid an employee being managed in accordance with the respondent's Attendance Procedure.

51 Turning to the question in paragraph 5.20, on the face of it, it might be said (as the claimant's representative submits) that such a PCP disadvantages disabled employees generally compared to non-disabled employees because of the fact that they are at greater risk of absence due to ill health: Griffiths v Secretary of State for Work and Pensions [2016] IRLR 216. Applying that approach in this case, however, is flawed because the ill-health and the absence must be linked to the disability, which in this case they were not. As set out more fully above, the ill-health and absence were related to the claimant's mental health condition and her broken arm; her disability is dyslexia and it was not her dyslexia or any worsening of her dyslexia as a result of her stress that caused her to be absent

from work and therefore subject to the extended absence procedure of the respondent. The Tribunal need not, therefore, consider the question set out at paragraph 5.21.

52 In the above circumstances, the claimant's complaint that, contrary to Section 21 of the 2010 Act, the respondent failed to comply with its duty under Section 20 of that Act to make adjustments is not well-founded and is dismissed.

Jurisdiction

53 There is one final matter that is raised in the submissions made on behalf of the respondent, building upon arguments advanced in its Response (ET3). That is that the Tribunal does not have jurisdiction to make findings in relation to alleged acts or omissions that took place prior to 1 January 2017. The Tribunal is satisfied that that submission is not well-founded.

54 As will be clear from the above findings relating to such matters as the appellant being subject to the respondent's performance management and repeated absence procedures from 2012 onwards, both of which led into the extended absence procedure, the Tribunal is satisfied that the matters of which the claimant complains fall within section 123(3)(a) of the 2010 Act (i.e. "conduct extending over a period is to be treated as done at the end of the period") and that the end of that period fell within three months of the date upon which the claimant lodged her complaint with the Tribunal as is required by section123(1)(a) of that Act. Accordingly, the Tribunal had jurisdiction to consider these matters.

Remedy

55 This case will now be listed for one-day hearing to determine remedy, in respect of the finding that the claimant's dismissal was unfair. The Tribunal Office will write to the parties to make the necessary arrangements.

EMPLOYMENT JUDGE MORRIS
JUDGMENT SIGNED BY EMPLOYMENT
JUDGE ON 9 February 2018