EMPLOYMENT TRIBUNALS

Claimant: Miss S Byrne

Respondent: Capita Customer Management Limited

Heard at: Manchester **On:** 30,31 April 2019 and 1 May 2019

Before: Employment Judge Ross
Mrs J L Pennie
Mrs J C Fletcher

REPRESENTATION:

Claimant: Mr J Heath, Solicitor
Respondent: Mr J Heard, Counsel

RESERVED JUDGMENT

The unanimous decision of the Tribunal is:

1. The claimant's claim of unfair dismissal pursuant to section 95 and section 98 of the Employment Rights Act 1996 is well-founded and succeeds.

2. The claimant's claim that the respondent treated her unfavourably because of something arising in consequence of her disability pursuant to section 15 Equality Act 2010 when she was dismissed is well-founded and succeeds.

3. The claimant's claim for breach of contract by failing to give notice of termination (wrongful dismissal) is well-founded and succeeds.

Remedy

4. The Tribunal awards damages for wrongful dismissal in the sum of four weeks' notice of £992.

5. The Tribunal awards a sum for the loss of statutory rights of £300.

6. The Tribunal makes a compensatory award of £5,164.71

7. The Tribunal makes an award of injury to feelings (inclusive of interest) of £7,500.

REASONS

1. The claimant was employed by the respondent from 1 May 2014 until she was dismissed in her absence for failing to follow the respondent's absence reporting procedures and failing to provide a valid fit note on 17 May 2018.

2. The claimant was offered an appeal but did not do so.

3. The claimant brought a claim to this Tribunal. There was a case management hearing before Employment Judge Horne on 11 January 2019 where the issues were identified.

4. There was no dispute that the claimant was originally employed by Telefonica and was TUPE transferred to the respondent on 1 August 2016. The claimant was employed as a Retentions Upgrades and Sales Adviser.

5. During the course of her employment the claimant was referred to Occupational Health on three occasions. The most recent occasion was in January 2018.

6. There was no dispute that the claimant was a disabled person within the meaning of the Equality Act 2010 by reason of a mental impairment of anxiety, depression and social phobia.

7. The claimant was absent from work continuously from 28 October 2017 until she was dismissed. The fit notes in the bundle confirm the reason for her absence was anxiety and depression.

8. The trigger for the claimant's absence from work was a personal issue of historic sexual abuse the claimant and her sisters had suffered at the hands of a family member by marriage. The claimant and her sisters had contacted the police about the allegation.

9. The claimant informed us in evidence of how ill she was from October 2017. This is corroborated by the Occupational Health report of 17 January 2018 which refers to suicidal ideation.

10. We rely on the evidence of the Occupational Health adviser who stated the claimant "had been struggling to phone back as she finds making telephone calls

difficult". The Occupational Health report confirms that on that occasion the claimant's sister had made the call for her. The report confirmed, "the current situation is that she continues to suffer with symptoms of severe anxiety, is unable to leave the house unaccompanied, continues to suffer from poor sleep with intrusive thoughts, fatigue, her concentration and memory are affected and she is having panic attacks once or twice a week. She is unable to leave the house unaccompanied even when going shopping and has to make arrangements for her daughter to be taken to school".

11. The Occupational Health report notes that the court date in relation to the criminal case arising from the sexual abuse allegation was set for February 2018. The trial was expected to last four days and the claimant would have to attend. The Occupational Health adviser stated that the claimant had a fit note until 19 January 2018 and "based on the information provided during the consultation I feel it is likely that this fit note will be extended and it is unlikely that she will return to work before the court case has been held". The report goes on to state that, "I'm hopeful once Ms Byrne has some closure on her case and some counselling she will be able to return to work and sustain her attendance".

12. The respondent's absence management policy is at page 93 of the bundle. Under "Reporting your Absence" it states:

> "If you are ill it is important that you contact your manager as soon as possible on your first day of absence at the very least within the first half hour of your start of your working day. You must ensure that you contact your manager by telephone yourself unless there are extreme circumstances preventing this. Notification by text message or email is unacceptable. If there is no word from you your manager will try to make contact with you either by telephone or in writing. You are required to keep in regular contact and maintain a suitable level of dialogue with your line manager throughout your absence so that they are kept updated on your illness and likely return to work. If you do not follow the procedure you will be classed as absent without leave and your pay may be reduced accordingly. In addition you may be subject to disciplinary action."

13. At page 94 it states under "Absence for Seven Days":

> "If you are ill and think you are likely to be off for more than seven days you must let your line manager know and submit a doctor's fit note. During all periods of absence you are required to keep in regular contact and maintain a suitable level of dialogue with your line manager so that they are kept updated on your illness and your likely return."

14. We find that the claimant was managed by Dan Ferguson, but by October 2017 she was being managed by James Stuart.

15. Although the claimant originally told Mr Stuart that she was absent from work because she was vomiting, she later conceded (to Ms Moss) that this was untrue but she was genuinely feeling nauseous. We rely on her evidence that at that stage she had not wanted to admit her mental health had deteriorated so badly. She received a letter marked "Unauthorised Absence" (page 117). We accept the claimant's

evidence that she had sent a text message on 28 October 2017 and that she sent a detailed text on 31 October 2017 explaining how she suffered with depression and anxiety. We accept her evidence to find that at this stage she was suicidal and received help from the Samaritans.

16. We find Mr Stuart responded by a letter dated 7 November 20187 (pages 120-121). He stated, "I must advise you that sending text message updates is not acceptable". He quoted the section of the policy informing the claimant she was required to keep in regular contact and maintain a suitable level of dialogue with her line manager. He did not suggest to the claimant that if the circumstances were "extreme" other arrangements could be made. Mr Stuart presented the claimant with an absence number for her to ring, "I ask that you contact the absence number as soon as possible".

17. Following this we find that the claimant's sister contacted Mr Stuart on the claimant's behalf. In his letter of 14 November 2017 (pages 125-126) Mr Stuart appeared to indicate that this was not an acceptable method of communication. He mentioned that "Lyndsey, who stated she was your sister" had been in touch. He said:

> "I would like to reiterate that as our employee we would like to receive direct contact from yourself moving forward when reporting your absence as the procedure previously highlighted."

He then reiterated:

> "I therefore ask that you make contact with me to confirm your attendance at this welfare meeting."

He stated he required a valid fit note.

18. A welfare meeting took place on 27 November 2017 (see page 128). This sets out in detail that the claimant was struggling with everyday tasks and was going to be referred to Occupational Health.

19. Despite the Occupational Health report of January 2018 indicating that the claimant had difficulty making phone calls, could not leave the house unaccompanied (even when going shopping), and had to make arrangements for her daughter to attend school with someone else, there appears to have been no suggestion that alternative arrangements for contact in "extreme circumstances" as envisaged by the respondent's policy might apply to the claimant.

20. We find that the claimant struggled to maintain regular contact with the respondent during her absence.

21. We accept the claimant's evidence that Mr Stuart required original fit notes. This is reflected in his letter of 12 December 2017 where he said:

> "As you have exceeded the self certification period you must now provide a fit note which will need to be sent for my attention, James Stuart, Tesco Mobile Capita, Chester Road, Preston Brook, Runcorn, Cheshire, WA7 3QA."

He asked if she was sending this via post to confirm the date by email. Earlier in the same letter he said:

> "I advise you you must keep up-to-date with providing fit notes to me on or before their expiry date. We discussed this could be brought to work by yourself or a friend or family, posted or contact myself to pick up from you."

22. We accept the claimant's evidence that because of the nature of her illness and the facts as stated in the Occupational Health report of January 2017 it was very difficult for her to leave the house at this stage. Therefore we find posting the fit note or taking it to the respondent was something which caused the claimant great difficulty. The claimant confirmed that the Occupational Health meeting was conducted by telephone. The claimant explained in her evidence that if a friend or family member was to take the fit note then she had to contact them and arrange for them to take it. She said she never heard anything further from the respondent about collecting fit notes and in any event it would have meant a telephone call which she found very difficult at that stage because of her illness (see the Occupational Health report).

23. We accept the claimant's evidence that Mr Stuart had indicated to the claimant that text message communication was unacceptable and a screenshot of her fit note was also unacceptable.

24. We therefore find the respondent required the original fit for work certificate and was not prepared to accept copies, neither was the respondent prepared to accept text communication. We find this unwillingness to communicate with the claimant using modern technology meant that because of the nature of her illness it was difficult for her to keep in contact with the respondent.

25. We find that in February 2018 the claimant emailed Mr Stuart to inform him, "It's been the worse few weeks of my life". She explained that the trial had been postponed at the last minute due to the defence requiring a longer trial, now listed for ten days instead of four days. She explained the trial had been postponed until 10 September 2018.

26. The claimant noted that she had financial difficulties and could they have a meeting to discuss. The text exchanges are at pages 154 and 155 of the bundle.

27. At this stage we find there were financial difficulties because the claimant had been overpaid and without communicating with her the respondent had deducted the overpayment from her SSP.

28. We find on 13 April the claimant was invited to a capability meeting on Wednesday 18 April. The notes of the meeting are at pages 197-205.

29. We find that the claimant was honest with Mrs Moss about how she was feeling. At the very outset she said, “not very good if I’m honest”. At page 201 she explained the difficulties she was continuing to have. She found it difficult, “I don’t like seeing people when I’m down, my sisters make the appointment and take me. I find it difficult to pick up the phone and I’m delaying it”.

30. At page Mrs Moss agreed there was a reference to the Occupational Health report, “What I want to understand is the Occupational Health report says you’re not likely to return to work before the court case. How likely now that it’s moved to September of you returning before?” We find that the claimant replied saying she could not put a time on it. She wanted to say she would “come back next month” but could not when she was not feeling well.

31. We find that Mrs Moss inaccurate in her statement when she says that: “The claimant agreed that we could not and should not wait until the re-listed criminal trial had taken place”. The claimant made it clear that even in September she may not be well enough to come back (see page 203). She explained that the family member who had abused her brought his wife to the claimant’s place of work because she also worked there and the claimant would often see them at work at the drop off point.

32. Nevertheless the claimant was hopeful in the long-term that she might return. In answer to the question “can you hand on heart see yourself coming back?” she said, “yes, I’m not saying I’m going to wait until after the trial but I can’t say I’m ready to return to work in the next 30 days”.

33. There is a dispute about the meaning of the notes at page 205.:

34. Mrs Moss: “**Let me know by Friday, first appointment, the frequency of them etc and we can decide if we need another catch up**. **Are you in touch with James**?

35. Claimant: no

36. Mrs Moss: How **do you fell about contacting me?**

37. Claimant: Yes I will, that’s good.

38. Mrs Moss suggested the notes meant that the claimant agreed that she was happy about contacting her by that Friday i.e. two days later, about a counselling appointment, whether there had been a first appointment and the frequency of them. We find this is a misunderstanding.

39. We find that the context of the conversation was that Mrs Moss asked if the claimant was in touch with James Stuart, the manager who had been dealing with her absence and she said “no”, and Mrs Moss then asked, “how do you feel about contacting me?” and the claimant said, “yes, I will, that’s good”. We find that Mrs Moss thought this meant the claimant agreed to contact within the timescale. We find that the claimant was agreeing to contact Mrs Moss rather than James Stuart.

40. We find that Mrs Moss showed a lack of understanding of a person with mental illness in the course of this meeting. She had access to an Occupational Health report which clearly described an individual who was suicidal and who would not be able to return to work until after a court case had taken place and struggled with going out unaccompanied, making phone calls and face to face contact. The information being given to Mrs Moss by the claimant in this meeting was consistent with the OH report and there was no significant change being reported.

41. We find that on 24 April the claimant did contact Mrs Moss (see page 206). Mrs Moss denied receiving this email. We find that the claimant also contacted Mrs Moss on 18 April about payroll information, the same day as the medical capability hearing. Mrs Moss agreed that she had received the email of 18 April.p239 and indeed she replied to it.

42. Mrs Moss' explanation as to why she had not received page 206 was unclear.

43. Mrs Moss provided a screenshot at page 237 of her email inbox. When giving evidence she accepted that this was an incomplete picture. She said the screenshot was taken recently and she had changed her email address. She did not have access to her Telefonica emails, and discovered recently that it did not bring up all her old emails. She thought it was an issue with the app.

44. Although Mrs Moss said that the IT department had checked whether or not page 206 had been received, there was no IT report produced for the Tribunal in the bundle.

45. The claimant was quite sure that she had sent page 206 and it has a date and time and said she on her device it could be viewed in the "sent" box.

46. The Tribunal is satisfied that although Mrs Moss was being honest when she said she had not viewed the email of 24 April but we also find the claimant was being honest and we accepted her evidence that she had sent it.

47. Following the capability meeting on 18 April 2018 Mrs Moss sent the claimant a summary letter dated 26 April with the notes attached.(p207-9) Although she had an Occupational Health report explaining the claimant found face to face contact difficult and could not go out unaccompanied, there was no suggestion that text or email contact was acceptable, that a screenshot of the claimant's fit note was acceptable and neither was there clear indication that contact from the claimant's sister was acceptable.

48. Although at the Tribunal Mrs Moss said any form of contact would have been acceptable from the claimant, that was not clear from the letter she sent. At page 208 Mrs Moss did refer to the claimant's sister, "You advised that either yourself or your sister will make contact before the end of the end…" but she did not state that contact from the sister was acceptable. In the past when the claimant's sister had contacted Mr Stuart that had not been deemed acceptable.

49. We find the tone of the letter of 4 May 2018 is not supportive:

> "I understand that it was recommended to you by a Support Officer that you attend counselling sessions but you chose not to make an appointment."

50. There is also an error about the date of the validity of the claimant's fit note in the respondent's letters of 4 May and the letter inviting the claimant to a disciplinary meeting dated 11 May (p207,212). Although Mrs Moss could not explain where the claimant's fit note for April was (it was not in the bundle), in these letters she referred to the fit note being valid until 20 April 2018. By the time the claimant was dismissed she accepted that that was an error and the letters should have said the fit note was valid until 30 April 2018. (See letter of dismissal at p232 where Ms Moss refers to reviewing the fit notes)

51. There is no dispute that the claimant did not respond to these letters. On 11 May the claimant was invited to a disciplinary hearing (see pages 212 and 213). The claimant accepted she received that letter. She did not attend the disciplinary hearing on 16 May 2018 and she was dismissed shortly afterwards. Mrs Moss said she sent "one last email on 16 May asking for any written representations".

52. The claimant was offered an appeal but did not appeal.

53. At the Tribunal the claimant explained how unwell she was at the relevant time and felt paralysed. We understand from the claimant's perspective she had given information in her email of 24 April (p206) which the respondent had appeared to ignore.

54. We also find she had received two letters which wrongly stated her fit note was valid until 20 April when it was, on the respondent's own evidence, valid until 30 April.

55. The claimant told us that she attended the criminal trial in September but unfortunately the abuser was not convicted. In October the respondent offered a voluntary redundancy package "VER" to employees. Mrs Moss conceded that if the claimant had still been at work at that stage she would have been offered VER, and the claimant said it is an offer she would have accepted.

The Law

56. The relevant law for the unfair dismissal claim is section 95 and section 98 of the Employment Rights Act 1996 and the well-known case of **British Home Stores v Burchell [1980] ICR 303**.

57. For the disability discrimination claim section 15 Equality Act 2010 is relevant. We reminded ourselves of the explanatory notes to the Equality Act which state that section 15 is "aimed at establishing an appropriate balance between enabling a disabled person to make out a case of experiencing detriment which arises because of his or her disability, and providing an opportunity for an employer or other person to defend the treatment" (paragraph 70).

58. We reminded ourselves of **The Secretary of State for Justice & Another v Dunn EAT 0234/16** where the EAT presided over by Mrs Justice Simler, President,

identified the following four elements which must be made out for the claimant to succeed in a section 15 claim:

- There must be unfavourable treatment;
- There must be something that arises in consequence of the claimant's disability;
- The unfavourable treatment must be *because of* (i.e. caused by) the something that arises in consequence of the disability; and
- The alleged discriminator cannot show that the unfavourable treatment is a proportionate of achieving a legitimate aim.

59. We were also referred to the two step test in **Basildon & Thurrock NHS Foundation Trust v Weerasinghe [2016] ICR 305**. We were also reminded of the guidance in **Pnaiser v NHS England & Another [2016] IRLR 170**. That case reminds us that the Tribunal has to identify whether the claimant was treated unfavourably and by whom. It then has to determine what caused that treatment, focussing on the reason in the mind of the alleged discriminator, possibly requiring examination of the conscious or unconscious thought processes of that person but keeping in mind that the actual motive of the alleged discriminator in acting as he or she did is irrelevant.

Conclusions

Ordinary Unfair Dismissal

Issues

60. The first issue was for the respondent to show the reason for dismissal. The respondent said the reason was conduct. We reminded ourselves of what precisely the conduct was that the respondent relied upon. The dismissal letter dated 17 May 2018 at page 233 stated:

> "I have concluded that you have failed to adhere to our absence reporting procedures and have failed to provide a valid fit note. You have been absent without leave since 1 May 2018 and despite efforts to make contact with you you have failed to respond to any attempted contact. Therefore I have concluded your actions amount to gross misconduct…"

61. We turned to consider the respondent's policy. The relevant policy was the Capita policy. The section at page 93 in the bundle states under "Reporting your Absence":

> "If you are ill it is important you contact your manager as soon as possible on your first day of absence, at the very least within the first half hour of the start of your working day. You must ensure that you contact your manager by telephone yourself unless there are extreme circumstances preventing this. Notification by text message or email is unacceptable. If there is no word from

> you your manager will try to make contact with you either by telephone or in writing. You are required to keep in regular contact and maintain a suitable level of dialogue with your line manager throughout your absence so they are kept updated on your illness and likely return to work. If you do not follow the procedure you will be classed as absent without leave and your pay may be reduced accordingly. In addition you may be subject to disciplinary action."

62. At page 94 under "Absence from more than seven days" it states:

> "If you are ill and think you are likely to be off for more than seven days you must let your line manager know and submit a doctor's fit note."

It states:

> "During all periods of absence, you are required to keep in regular contact and maintain a suitable level of dialogue with your line manager so that they are kept updated on your illness and likely return to work."

63. It is not disputed that there was limited contact between the claimant and the respondent (see our findings of fact), although the claimant's evidence was that she had emailed the respondent on 24 April 2018.

64. The conduct for which the respondent dismissed the claimant as stated in the dismissal letter was the fact that she had failed to provide a valid fit note note from 1 May and had "failed to adhere to the absence reporting procedures". The respondent also stated:

> "I also checked your general record and performance and noted that you had also received letters for failing to follow our absence reporting procedures on 31 October 2017, 7 November 2017 and again on 12 December 2017."

65. The Tribunal is satisfied that the respondent was relying on conduct as the reason for dismissal.

66. The Tribunal then turned to consider whether the respondent had a genuine belief based on reasonable grounds following a reasonable investigation of the claimant's failure to provide a fit note and failure to keep in touch.

67. The Tribunal accepts Mrs Moss' evidence that she did not believe she had received the claimant's email of 24 April.She therefore believed she had received no contact from the claimant since 18 April.

68. Mrs Moss believed the claimant had been uncertified since 1 May 2018.

69. The Tribunal turned to consider whether Ms Moss had a genuine belief based on reasonable grounds of the claimant's conduct, namely failure to adhere to absence reporting procedures and failed to provide a valid fit note.

70. In the letter of dismissal, the Tribunal finds Mrs Moss was, in addition to the failure to keep in touch after 18 April 2018, also relying on the claimant's failure to be

in contact from 31 October 2017, 7 November 2017 and 12 December 2017. Although Mrs Moss indicated in her statement that she had not taken these matters into account it is puzzling to the Tribunal she included them in her letter. The Tribunal is not satisfied that this information was presented as background information only. The next paragraph in the dismissal letter states:

> "You were not in attendance for me to take into account any other evidence or information nor have you provided any representations providing any explanations."

71. It is implicit that Mrs Moss was referring to the October, November and December instances as well as the most recent instance following the 26 April 2018 meeting.

72. Mrs Moss admitted to the Employment Tribunal that these three instances of an alleged failure to follow the absence reporting procedures on 31 October, 7 November and 12 December 2017 were not investigated by her. She also confirmed in evidence when taken to the letters about those alleged breaches of the absence reporting procedures that they did not amount to a disciplinary sanction.

73. Given the Tribunal finds that Mrs Moss took into account the allegations about the claimant's earlier failures to keep in touch when she had no grounds to do so because they were not investigated by her and did not amount to disciplinary warnings or other sanctions, we are not satisfied she had reasonable grounds for her belief that the claimant had failed to keep in touch with the respondent.

74. Accordingly the Tribunal is not satisfied that Mrs Moss had a genuine belief based on reasonable grounds for the conduct relied upon.

75. However, in case the Tribunal is wrong about that it has gone on to consider the next issue which is band of reasonable responses of a reasonable employer.

76. The claimant was dismissed. The respondent is a very large undertaking with an active HR department. Mrs Moss gave no indication that she took into account that the claimant was mentally ill at the relevant time. She agreed she had an Occupational Health report before her. That Occupational Health report specifically stated that the claimant was disabled and clearly identified the problems the claimant had, for example leaving the house, a difficulty with face to face contract, a difficulty with making telephone calls, suffering from severe anxiety, unable to leave the house unaccompanied, having panic attacks and suicidal ideation. She is said to be suffering from anxiety and depression described as "severe anxiety and social phobia".

77. Secondly, Mrs Moss failed to consider a lesser sanction. The Tribunal is not satisfied she considered any lesser sanction such as a warning or a final written warning.

78. It is unclear what weight, if any, Mrs Moss gave to the claimant's entirely unblemished record.

79. The Tribunal finds that the dismissal letter appears to be a template letter which is in part inaccurate. There is no dispute that the claimant was in a no pay situation at the time her employment was terminated. The letter says:

> "Please note that as you were absent without authorisation between 1 May 2018 and 16 May 2018 this period will be unpaid."

80. The Tribunal has also taken into account that the respondent's disciplinary policy gives examples of gross misconduct. However, the type of behaviour for which the respondent found the claimant responsible, namely to provide an up-to-date fit note and failure to adhere to the respondent's absence management procedure, was not reflected in the list of gross misconduct. By contrast, the nature of the conduct is reflected in the less serious misconduct list, namely absenteeism and/or "absence from work without a valid reason" or "disregard of specific procedures".

81. The Tribunal reminds itself that it is not for us to substitute our own view. It is whether a reasonable employer of this size and undertaking could have dismissed this claimant for this conduct.

82. The Tribunal is not satisfied that a reasonable employer of this size and undertaking could have dismissed a mentally ill claimant suffering from severe anxiety and social phobia who had difficulty making contact with individuals, particularly by telephone or face to face, who had an unblemished record for a failure to keep in touch over a relatively short period of time, namely from 18 April 2018. Accordingly the Tribunal finds dismissal was outside the band of reasonable responses of a reasonable employer.

Wrongful Dismissal

83. The issue for the Tribunal is whether or not the claimant committed a repudiatory breach of contract entitling the respondent to terminate her employment.

84. The claimant was dismissed for not supplying an up-to-date fit note and not being in contact after a meeting on 18 April 2018.

85. Firstly, we find that the claimant was in contact with the respondent. Although we accept Mrs Moss' evidence that she could not trace receiving the email from the claimant dated 24 April 2018, the Tribunal is satisfied it was sent. Mrs Moss provided a screenshot of her inbox (see page 237). The email the claimant says she sent on 24 April does not appear there, but neither does an email at page 2399 sent on 18 April 2018 which Mrs Moss accepts she did receive.

86. Mrs Moss explained that there were problems with IT. She explained that the screenshot of her inbox at page 237 was not showing emails re-routed from a previous email address.

87. Although Mrs Moss said that IT had checked whether or not the claimant's 24 April email had been received, there was no report produced from the IT department to give an explanation of this.

88. Therefore having found that the claimant was in contact with the respondent after the meeting on 18 April the Tribunal is not satisfied there was a failure to be in touch.

89. Furthermore, the Tribunal has taken into account that requiring the claimant to be in contact within two days of the meeting, given the nature of the claimant's illness and the likely lengthy waiting list for counselling treatment, was wholly unrealistic.

90. The Tribunal takes into account the fact that the claimant is a disabled person and that her failures to be in contact with the respondent were not intentional but were linked to her illness.

91. The Tribunal accepts the claimant's evidence that she was mentally ill with anxiety and depression and social phobia. She struggled with face to face and telephone conversations. She explained to the Tribunal she needed her father to accompany her to her GP Practice and there was a problem in early May because her father was away on honeymoon following his marriage which caused a problem in obtaining an up to date fit note.

92. For all these reasons the Tribunal is not satisfied there was conduct amounting to a repudiatory breach of contract by the claimant's failure to supply an up-to-date fit note from 30 April 2018 (the invitation to disciplinary hearing wrongly refers to 20 April 2018 as being the date the fit note expired) and the failure to be in touch with the respondent in accordance with their absence management policy after 24 April. Accordingly the claimant's claim for wrongful dismissal succeeds and she is entitled to damages equivalent to notice pay as agreed between the parties.

Section 15 Equality Act 2010

93. The issues are:

(1) What is the unfavourable treatment?

(2) What is the “something” arising in consequence of disability?

(3) Does the “something” arise in “consequence” of disability?

(4) Is it a proportionate means of achieving a legitimate aim?

94. There is no dispute in this case that the unfavourable treatment was the claimant's dismissal. At the case management hearing before Employment Judge Horne the “something” which arose in consequence of disability was identified as the “failure to comply with the respondent’s sickness reporting procedure”. The other reason the claimant was dismissed was failure to provide a fit note from 1-17 May,so we find the second “something” was a failure to supply a fit note for 1-17 May.

95. The Tribunal must then ask itself whether these two “somethings” arose in consequence of the claimant's disability.

96. The respondent says plainly not. The respondent relies on the fact that the claimant said on several occasions in reply to questions put to her during cross examination that the reason she had not complied with the sickness absence policy was unrelated to her disability.

97. However, the Tribunal finds that that is not the end of the matter. The test is not that simple. The Tribunal reminds itself of all the factual circumstances in this case.

98. The Tribunal turns to the second "something" namely the failure to supply a fit note from 1-17 May 2018. The Tribunal finds that the reason the claimant did not supply a fit note from 30 April 2018 was her evidence to the Tribunal that she needed her father to accompany her to the GP. Her father was unavailable because he had recently married and was on honeymoon. Why did the claimant need her father to accompany her? As identified in the respondent's medical report from Occupational Health, the claimant has a severe anxiety and social phobia and could not leave the house unaccompanied.

99. The Tribunal is therefore satisfied that the failure to supply an up to date fit note was because of something arising in consequence of disability.

100. The other "something" was the failure to contact the respondent after the meeting on 18 April 2018 in accordance with their sickness absence reporting procedure.

101. Firstly, the Tribunal puts to one side that it has found there was contact from the claimant (see the email of 24 April – page 206) because the respondent relies on the fact it did not receive that email when it dismissed the claimant.

102. Was the "something" ie the failure to make contact- arising in consequence of the claimant's disability? We find despite the claimant's replies to counsel in cross examination, the answer is yes. The claimant's failure to contact the respondent after 24 April 2018 was because of something arising in consequence of the claimant's disability. We rely on the evidence of the claimant in her statement and the Occupational Health report that she suffered from symptoms of severe anxiety and depression and social phobia. This mental illness made making contact for the claimant very difficult.

103. The Tribunal has taken into account that the respondent's absence management policy -see p93- makes it clear that text and email contact to report absence is unacceptable. We find this was reiterated in the letters from Mr Stuart to the claimant which stated she should telephone the respondent. P120. The respondent never made it explicit to the claimant that she could get in touch with the respondent via a family member acting on her behalf. Mr Stuart's letter makes it clear that that is not acceptable. We refer to his letter of 14 November where he has referred to her sister being in contact and then said, "I would like to reiterate that as our employee we would like to receive direct contact from yourself moving forward". P125.

104. Mrs Moss in her outcome letter following the meeting on 18 April 2018 refers to the claimant's sister but does not expressly state that contact from her sister instead of from the claimant is acceptable. Neither does she say that communication via text or email is acceptable. In the past the claimant had been told that that was not acceptable. P207-8.

105. Although the Tribunal was told by Mrs Moss in cross examination that any contact from the claimant would have been acceptable, we find Mrs Moss did not make that clear to the claimant at the time.

106. We find the claimant's failure to contact Mrs Moss in accordance with the sickness absence reporting policy was something arising in consequence of the claimant's disability. The Occupational Health report made it clear the claimant was suffering from severe anxiety and depression and social phobia which made contacting individuals face to face or on the telephone difficult. We are therefore satisfied that the failure to contact the respondent was a "something" which arose in consequence of the claimant's disability.

107. We turn to the last issue: was dismissal a proportionate means of achieving a legitimate aim? We find the answer to this question is clearly no. At the case management hearing the respondent identified the legitimate aim as compliance with their procedure. Dismissing the claimant did not ensure compliance with their sickness absence reporting procedure.

108. A lower level of sanction such as a warning might have encouraged compliance with the procedure. More likely, clearly explaining to the claimant that a screenshot of her fit note and/or her sister being authorised to contact the respondent on behalf of the claimant for a limited period of time and/or informing the claimant she could contact the respondent by text/email might have been a proportionate means of achieving a legitimate aim. Moving quickly to dismissal a mentally ill claimant with an unblemished record was not a proportionate means of achieving their legitimate aim of compliance with their absence management reporting procedure or requirement to provide an up to date fit note. Accordingly, the claimant's claim succeeds.

Remedy

Polkey

109. The Tribunal reminds itself of the principle in **Polkey v A E Dayton Services Limited [1988] ICR 142**. It also reminds itself of the principles in **Software 2000 Limited v Andrews & others [2007] ICR 825**. In assessing compensation for unfair dismissal, we have taken into account that this claimant had been absent from work with mental health issues before and returned to work (2015). We have taken into account that the claimant, we find, was motivated to return to work once the criminal trial had taken place (see Occupational Health report January 2018). We have taken into account that the Occupational Health advisor considered the claimant would be able to return to work when the trial in the criminal matter was over (originally that trial was due to be heard in February but it was postponed to September 2018).

110. The Tribunal has taken into account that if Mrs Moss had actually seen the email of 24 April at 206 she stated that there would have been no penalty for the claimant at all because she would have complied with the request to make contact.

111. The Tribunal has taken into account that at the time of the dismissal the claimant had exhausted her entitlement to sick pay but remained "on the books".

112. The Tribunal has to do the best it can with the information it has.

113. Where an employee has been absent from work for a lengthy period due to health reasons it is possible for an employer to dismiss for a fair reason namely for capability.

114. The Tribunal relies on its industrial experience to find that this is unlikely where there is a motivated employee and an Occupational Health report stating that there is a particular event which, once it is over, means a claimant's return to work is likely i.e.in this case the criminal trial. (This is different to a situation where a claimant has been absent from work for a lengthy period and there is no determining event).

115. Taking all this information into account the Tribunal finds it likely that if the respondent had dealt with the claimant in a fair and non-discriminatory fashion she would not have been dismissed for failing to contact Mrs Moss and failing to provide an up-to-date fit note. We find she would have remained employed in a "no pay" situation until the criminal trial took place in September 2018.

116. We rely on the evidence of both the claimant and the respondent that the respondent conducted a voluntary redundancy programme in October 2018. We rely on the claimant's evidence that if she had still been employed at that time she would have applied for voluntary early redundancy "VER". We rely on Mrs Moss's evidence, which she gave very fairly, that if the claimant had applied, she would have been accepted for VER.

117. We therefore find that if the claimant had not been unfairly dismissed she would have remained on the books in a no pay situation and would have been accepted for voluntary early redundancy in October 2018. She would have received the redundancy package as identified in the Schedule of Loss. We accept the claimant's evidence that she was below the tax threshold and so the bonus payment would have been paid to her without deduction for tax. Accordingly, the redundancy payment is £3,884.71 plus a bonus of £1,280 making a total of £5,164.71.

118. The Tribunal considers it just and equitable to make an award of £300 for loss of statutory rights, a figure which is close to the claimant's weekly pay.

Contributory Fault

119. The Tribunal turns to consider whether there was culpable or blameworthy conduct in this case.

120. The Tribunal has not made a basic award in this case because it has granted the claimant a voluntary redundancy payment and to award both would amount to double recovery.

121. The Tribunal is not satisfied there is blameworthy or culpable conduct in this case. If an individual is not mentally ill it may be that failure to provide a fit note and failure to keep in contact after 24 April could amount to culpable or blameworthy conduct. However, this claimant was mentally ill. She remains heavily medicated and has undergone counselling. The Occupational Health report identifies she suffers from anxiety, depression and social phobia.

122. We accept the claimant's evidence that she did seek advice but we find it is unclear how it relates directly to her dismissal. Her “timeline” notes at page 234 do not appear to refer directly to her dismissal but instead to matters which pre-dated that time.

123. The Tribunal did not ask the claimant about the nature of the advice she had received because of the issue of privilege.

124. The Tribunal is not satisfied that there was any culpability on the part of the claimant when she failed to provide a fit note and failed to keep in touch after 24 April. In the absence of culpability and having regard to the nature of the claimant's mental illness the Tribunal is satisfied it is not just and equitable to make any deduction for contributory fault.

Reduction for failure to follow the ACAS Code of Practice

125. There is no dispute that despite being offered an appeal in her dismissal letter the claimant did not progress an appeal.

126. When considering whether or not to make a deduction in compensation the Tribunal reminds itself that there is a three stage process to this. Firstly, we must consider whether there was a failure to follow procedure. We find that the claimant failed to follow the Code because she failed to progress an appeal.

127. The next question is whether the claimant acted unreasonably in failing to follow the procedure. Usually a claimant failing to appeal will have acted unreasonably. However, in the context of the claimant suffering from a serious mental illness, even in circumstances where she appears to have obtained some advice, the Tribunal is not satisfied that the claimant has acted unreasonably. In reaching this finding the Tribunal has taken into account the claimant’s evidence that when she received the letter of dismissal she did not share it with anyone not even her father.

128. However, in case we are wrong about that and the claimant has been unreasonable in failing to appeal the Tribunal turns to the third issue: is it just and equitable to reduce the claimant's compensation? The Tribunal finds it is not, given that the claimant was suffering from a serious mental illness at the relevant time. The Tribunal has taken into account that the mental illness had an impact on her behaviour.

Injury to Feelings

129. The Tribunal reminds itself that there is no claim for personal injury in this case. There is no suggestion that the claimant's anxiety/depression/social phobia was caused by the respondent. There is no claim for aggravation of the claimant's personal injury. There is no dispute that many complex life events have caused the claimant to become mentally ill. There is no need for the Tribunal to list those factors because they are clear, both in the Occupational Health report of January 2018 and are noted in the notes of the discussion of the respondent with the claimant in April 2018.

130. Therefore this case is an award for injury to feelings only. The Tribunal reminds itself of the relevant **Vento** guidelines. The Tribunal reminds itself that compensation is awarded on tortious principles. The Tribunal must assess compensation for the injured feelings the claimant had flowing from the discriminatory treatment. The Tribunal must "take the victim as we find her". The claimant was a very vulnerable individual at the relevant time by nature of the mental illness from which she was suffering. We find she was very distressed by the loss of her job because she had hoped to return to work once the criminal trial was over. We have taken into account she had returned to work before after a period of sick leave and that she had enjoyed her job. Mrs Moss recalled the claimant as "a vibrant and lively member of the team and a team player" before her absence. We find the loss of a job is a very serious matter.

131. Taking the factors into account and noting that there is no separate claim for personal injury, noting the great distress suffered by the claimant when the respondent dismissed her at a time when she was already extremely vulnerable, we find an appropriate award is towards the top of the lowest Vento band, namely an award of £7,500 inclusive of interest.

132. Finally we turn to compensation for the wrongful dismissal claim. It was not disputed that the claimant was entitled to a period of four weeks' notice which the parties had agreed at £992.

133. The total award to the claimant is £5,164.71 plus £300 plus £992 plus £7,500 = £13,956.71.

Employment Judge Ross

Date 14 May 2019

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON

22 May 2019

FOR THE TRIBUNAL OFFICE

NOTICE

THE EMPLOYMENT TRIBUNALS (INTEREST) ORDER 1990

Tribunal case number: **2416236/2018**

Name of case: **Miss SM Byrne** v **Capita Customer Management Limited**

The Employment Tribunals (Interest) Order 1990 provides that sums of money payable as a result of a judgment of an Employment Tribunal (excluding sums representing costs or expenses), shall carry interest where the full amount is not paid within 14 days after the day that the document containing the tribunal's written judgment is recorded as having been sent to parties. That day is known as "*the relevant decision day*". The date from which interest starts to accrue is called "*the calculation day*" and is the day immediately following the relevant decision day.

The rate of interest payable is that specified in section 17 of the Judgments Act 1838 on the relevant decision day. This is known as "the stipulated rate of interest" and the rate applicable in your case is set out below.

The following information in respect of this case is provided by the Secretary of the Tribunals in accordance with the requirements of Article 12 of the Order:-

"the relevant decision day" is: **22 May 2019**

"the calculation day" is: **23 May 2019**

"the stipulated rate of interest" is: **8%**

For the Employment Tribunal Office