IN THE EMPLOYMENT TRIBUNAL (SCOTLAND) AT EDINBURGH

5 **Judgment of the Tribunal in Case No: S/4109283/2018 Heard at Edinburgh on the 26, 27, 28, 29 and 30th November 2018 with deliberations on 3rd December 2018**

Employment Judge: J G d'Inverno, QVRM, TD, VR, WS
Members: Mr S Gray
10 **Mr G Buchanan**

Mrs Mary Simpson (formerly Martin)	Claimant Represented by:- Mr W McParland, Solicitor
Her Majesty's Revenue and Customs (HMRC)	Respondent Represented by:- Dr A Gibson, Solicitor

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

25 The unanimous Judgment of the Employment Tribunal is that the claimant's claims are dismissed.

30 ## REASONS

1. This case was heard at Edinburgh before a full Tribunal on 26, 27, 28, 29 and 30th November 2018.

35 ### The Claims

2. In terms of her initiating Application ET1 the claimant gave notice of a complaint of:-

    - Unfair dismissal in terms of section 98(4) of the Employment Rights Act 1996 and,

    - Of discrimination because of something arising in consequence disability in terms of section 15 of the Equality Act 2010

The Response

3. In terms of Response Form ET3 the respondents resisted both claims:-

    - Asserting that the claimant was dismissed for the potentially fair reason of capability which failing some other substantial reason,

    - That the respondent's admitted dismissal of the claimant fell to be regarded as fair in terms of section 98(4) of the Employment Rights Act 1996; and,

    - Offering to prove, let it be assumed that they accepted that their dismissal of the claimant constituted unfavourable treatment for the purposes of section 15(1)(a) of the 2010 Act, that it nevertheless did not constitute discrimination by reason of it being a proportionate means of achieving a legitimate aim

4. In the course of Case Management Discussion, conducted by the Tribunal with parties and their representatives at the outset of the Hearing and the output of which was the subject of separate Interlocutory Orders dated 26th November 2018, certain matters were clarified and agreed as binding upon the Tribunal for the purposes of Hearing viz:-

    (a) That the claimant was dismissed for the potentially fair reason of capability;

(b) That although not necessarily conceding that the claimant possessed the protected characteristic of disability by reason of the particular medical condition of a slipped disc it was a matter of concession by the respondent's representative that at the material times, that is to say the period from 21st August 2017 up to and including 5th January 2018 (the date upon which the respondent's Internal Appeal Officer declined to accept an Appeal tendered by the claimant out of time), the claimant was, by reason of a combination of her various medical conditions, a person possessing the protected characteristic of disability for the purposes of sections 6 and 15 of the Equality Act 2010,

(c) Although arguing that the period of any compensatory award should be restricted to no more than six months in the event of the claim succeeding, and, notwithstanding the claimant's remaining unemployed, no issue was taken by the respondents with the steps taken by the claimant to find other employment in mitigation of her loss; and,

(d) That the facts set out at paragraph 9 to 41 inclusive of this Note of Reasons under the heading "Agreed Facts" being those set out in an Agreed Statement of Facts, as adjusted, which added to the Joint Bundle by parties' representatives at the outset of the Hearing and comprising pages 255, 257 and 258 of the Joint Bundle, were facts agreed between the parties and intended by them to be binding upon the Tribunal for the purposes of the Hearing.

Amendment of Designation

5. On the claimant's representative's Application, the respondent's representative not objecting, the claimant was granted Leave to Amend her designation so as to read "Mrs M Simpson (formerly known as Martin), 11 Edinburgh Road, Eastfield, Harthill, ML7 5PT" to reflect an earlier made change of address.

The Issues

6. It was further confirmed in the course of Case Management Discussion and recorded by the Tribunal that the Issues requiring investigation and determination at Final Hearing were:-

Unfair Dismissal

(First) Has the respondent shown a potentially fair reason for the claimant's dismissal in terms of section 98(2) of the Employment Rights Act 1996 (ultimately a matter of concession by the claimant).

(Second) If yes, and the potentially fair reason was capability, did the respondent follow a fair process in dismissing the claimant.

(Third) Did the respondent act reasonably in treating this reason as sufficient reason for the dismissal/did the decision to dismiss the claimant fall within the range of reasonable responses open to a reasonable employer and thus, did the dismissal fall to be regarded as fair or unfair in terms of section 98(4) of the 1996 Act.

Disability Discrimination

(Fourth) What was the legitimate aim of the respondents in terms of section 15 of the Equality Act 2010.

(Fifth) Has the respondent been able to show that their actings in dismissing the claimant constituted a proportionate means of achieving a legitimate aim and thus,

(Sixth) Did the respondent discriminate against the claimant in terms of section 15 of the Equality Act 2010.

Remedy

(Seventh) Let it be assumed that the respondents did unfairly dismiss the claimant, to what remedy by way of basic and compensatory awards is the claimant entitled and, if procedurally unfairly dismissed, would the claimant have been dismissed in any event had a fair procedure been followed in which case to what extent, if any, should any awards made be reduced to reflect the same.

(Eighth) In the event that the respondent did discriminate against the claimant what remedy by way of declaration and or damages for hurt to feelings is the claimant entitled.

Sources of Documentary Evidence

7. Parties lodged a Joint Bundle of Documents, which ultimately extended to some 264 pages, to a number of which reference was made in the course of evidence and submission.

Sources of Oral Evidence

8. The Tribunal heard evidence on oath or on affirmation from the following witnesses:-

For the respondent

Mrs A Brien, the claimant's Line Manager

Mrs Annette Russell, the respondent's decision taker in respect of dismissal and

Mrs Katherine Bell, the respondent's Internal Appeal Manager who declined to accept the claimant's late tendered Appeal

For the claimant

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Mrs Simpson gave evidence on her own behalf

Agreed Facts

10 9. In terms of a jointly submitted Agreed Statement the following matters of fact were agreed between the parties as matters of fact binding upon the Tribunal for the purposes of Hearing;

10. The Claimant was employed by the Respondent as a Contact Centre Adviser
15 based at the Respondent's Bathgate Contact Centre. She was Administrative Officer Grade.

11. The Claimant's start date was 12 January 2009. The Claimant was dismissed with 10 weeks notice by virtue of a decision taken on 15 December 2017 with a last day
20 of service being 23 February 2018.

12. At the time the decision to dismiss was taken the Claimant had been absent from work between 21 August 2017 and 15 December 2017 and was signed off work by her GP until 19 December 2017.

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13. On 21 August 2017 the Claimant called her manager, Ms Alison Brien, to report that she had made a GP appointment as she had a lot of pain in her leg. Later that day the Claimant called Ms Brien again to report that her GP had diagnosed her with sciatica, given her medication and made a referral for physiotherapy. The
30 Claimant advised she would be back at work as soon as possible.

14. On 23 August 2017 Ms Brien called the Claimant to see how she was feeling. The Claimant reported that the pain was getting worse, not better, that she had been

prescribed additional medication and had received a two week sick line from her GP. The Claimant submitted her sick line which stated that she was unfit to work from 23 August 2017 to 6 September 2017 due to sciatica.

15. On 25 August 2017 Ms Brien called the Claimant to see how she was feeling. The Claimant reported that the pain was not getting any better and that she was experiencing pins and needles in her foot which was causing her concern.

16. On 30 August 2017 Ms Brien called the Claimant to see how she was feeling. The Claimant reported that she had actually fallen over twice and had been to see her GP earlier than planned as a result. The Claimant said she could not see herself being well enough to come back to work that week but if she was feeling better on Friday (1 September 2017) she would come in. It was discussed that as her absence would be approaching two weeks a 14 day attendance management meeting would have to take place.

17. On 4 September 2017 Ms Brien called the Claimant. The Claimant said that it was her intention to return to work that week. It was agreed that the call would act as the 14 day attendance management meeting.

18. On 8 September 2017 the Claimant e-mailed Ms Brien. She stated that she would definitely not be in, that she had been in agony and was going to her GP. The Claimant said she was fed up and wanted to get back to work. A 28 day attendance management meeting was discussed as the Claimant would be off work for 28 days on 18 September 2017. The Claimant submitted a further sick note covering her until 22 September 2017 saying she was unfit to work because of sciatica.

19. On 13 September 2017 Ms Brien called the Claimant to see how she was feeling. The Claimant reported that nothing much had changed and that she was immobile. An OH referral was discussed and Ms Brien informed the Claimant that she had made the referral.

20. On 18 September 2017 a 28 day attendance management meeting took place at the Claimant's home between Ms Brien and the Claimant. The Claimant reported still being in a lot of pain. Adjustments that could be put in place on a return to work were discussed. The Claimant said she hoped to return to work at the end of her fit note but that would be on GP advice.

21. On 20 September 2017 Ms Brien wrote to the Claimant informing her that the Respondent would continue to support her absence as they did not have an OH report to guide the expected length of absence. The letter stated that this decision would be reconsidered if it became unlikely that the Claimant would return to work in a reasonable period of time.

22. Between 22 September 2017 and 10 October 2017 the Respondent kept in touch with the Claimant. There was little change in the Claimant's condition during this time, at times it appeared to improve only for it to worsen again, and indeed she was signed off for a further 4 weeks as unfit for work.

23. On 19 October 2017 Ms Brien met with the Claimant for a 2 month absence management meeting. At this meeting the Claimant updated Ms Brien on her medical condition and a diagnosis of a slipped disc. She also had a kidney infection for which she was prescribed antibiotics. The sciatica was still there but was improving and overshadowed by the back pain. The Claimant said that once her physio started and she got a walking aid she was hopeful of a return to work but could give no specific date. Ms Brien informed the Claimant that if a return to work in a reasonable timescale could not be achieved then the Claimant may be referred to a decision maker. Ms Brien said she had hoped to wait until she had OH advice before considering this but that she may not be able to given the length of the absence and the delays in the OH referral process.

24. On 20 October 2017 the Claimant contacted Ms Brien to update her on her GP appointment. She had been signed off sick for work until 3 November 2017 due to "Back pain without radiation NOS".

25. On 20 October 2017 Ms Brien took the decision to refer the Claimant's case to a decision maker to determine how much longer the Respondent could support the Claimant's absence. The Claimant was informed of this by letter dated 23 October 2017.

26. On 23 October 2017 the Claimant called Ms Brien to tell her that her condition had taken a turn for the worse and she had required an out of service visit from a doctor. She also said that she had been told that her earliest physio appointment would be 13 November 2017 and she had complained about that. A further 4 week sick note had been issued as the GP would not sign her off as fit until she had seen the physio. However, the Claimant phoned on 24 October 2017 to say she had got an earlier physio appointment for 27 October 2017.

27. On 27 October 2017 Ms Brien contacted the Claimant to ask how the physio appointment had gone. The Claimant advised that the physio had recommended that she be prescribed oramorph and had given her exercises to perform.

28. On 9 November 2017 the Claimant met with the Respondent's Annette Russell for a consideration of dismissal meeting. The Claimant was accompanied by Ms Brien which she was happy with. The Claimant's absence and medical history was discussed. The Claimant was asked if she felt she may be able to return to work on 25 November 2017 as the expiry of her fit note. The Claimant said that she hoped so.

29. On 9 November 2017 Ms Brien amended her referral to OH as the Claimant's medical situation had changed since the referral had been made.

30. On 13 November 2017 the Respondent received an OH report.

31. On 15 November and 16 November Ms Brien contacted the Claimant to keep in touch. The OH report was discussed. Neither Ms Brien or the Claimant were happy with the report.

32. On 17 November 2017 Ms Russell wrote to the Claimant informing her that the Respondent would continue to support her absence but that this decision would be reconsidered if it became unlikely that the Claimant would return to work on 24 November 2017.

33. On 21 November 2017 the Claimant submitted a further 28 day sick note signing her off as unfit to work due to a slipped invertebral disc.

34. On 22 November 2017, 30 November 2017 and 6 December 2017 Ms Brien contacted the Claimant to keep in touch. A referral to a neurosurgeon was mentioned but there was no date for when an appointment would be. The Claimant reported still being in constant pain and having mobility problems.

35. On 24 November 2017 Ms Brien lodged a complaint to OH Assist in respect of the OH report received on 13 November 2017. A further referral was sought.

36. On 7 December 2017 the Respondent received an OH report. This report stated that "I do not foresee a return to work for at least 8 to 10 weeks, but this is dependent when she has a specialist appointment."

37. On 15 December 2017 Ms Russell wrote to the Claimant informing her that she had taken the decision to dismiss the Claimant with 10 weeks notice giving a last day of service of 24 February 2018. The letter set out that the Claimant had a right to appeal this decision and if she chose to do so she should write to Catherine Bell at Bathgate Contact Centre within 10 working days of receiving this written decision. The letter also stated that the Claimant may have a right to appeal to the Civil Service Appeal Board against the level of compensation awarded within 21 days of the effective date of dismissal. The recommendation by the Respondent to the Civil Service Compensation Scheme was that the Claimant be awarded 100% compensation.

38. On 19 December 2017 the Claimant submitted a further sick note to cover her to her last day of service of 24 February 2018. At the Claimant's last day of service

the Claimant had been sick absent from work and in receipt of full sick pay for 6 months.

39. On 3 January 2018 Ms Russell wrote to the Claimant informing her that she would be paid 100% compensation under the Civil Service Compensation Scheme.

40. On 5 January 2018 the Claimant e-mailed Ms Bell stating that she was submitting a late appeal. The Claimant stated that the reasons for the tardiness were that she had been misinformed on a matter that would have a massive impact on her original decision to appeal.

41. On 5 January 2018 Ms Bell e-mailed the Claimant stating that she was unable to accept the late appeal.

Findings in Fact

42. On the oral and documentary evidence presented the Tribunal made the following additional essential Findings in Fact restricted to those necessary for the determination of the Issues before it;

43. The Civil Service Compensation Scheme is an overarching scheme which had applicability across the Civil Service and it was not a scheme which was run by the respondents.

44. The notes of the "keeping in touch meetings" with the claimant, contemporaneously prepared by Mrs Brien, the claimant's Line Manager including those set out at pages 67 to 69 of the Joint Bundle, although not intended to be a verbatim record of all that was said at the meetings, are an accurate record of the material matters discussed at each of the meetings.

45. The note of the continuous absence "keeping in touch meeting" of 19th October 2017, which is copied and produced at pages 67 to 69 of the Bundle, records, in

the last paragraph on page 68, the making of the following statement by the claimant's Line Manager to the claimant:-

> "I reminded Mary that last time we met, a month ago, that if a return to work in a reasonable timescale could not be achieved, then Mary's case may be referred to a decision maker with a recommendation that her employment be ended due to continuing absence. I added that I had hoped to wait until I had Occupational Health advice before considering this but I may not be able to do this owing to the time Mary has already been off and the delays in the Occupational Health referral process, the business will need to decide whether it can sustain any further absence."

46. As of 19th October 2017, if not earlier, the claimant was on notice that the termination of her employment was a possible outcome which could result from a further extension of her period of continuous absence in circumstances where the prospect of her returning to work within a reasonable period could not be identified.

47. The claimant was aware that if and when such a referral was made it would be made by her Line Manager Mrs Brien. She was also aware, which failing ought reasonably to have been aware from what was communicated to her, that such a referral to a decision maker, if and when made would be a referral "with a recommendation that her employment be ended due to continuing absence".

48. The decision taken by the claimant's Line Manager Ms Brien being a decision to refer the circumstances of the claimant's case to a decision maker for determination of whether the respondents would continue to support the claimant's absence or alternatively would dismiss the claimant, was a decision for which, in the circumstances, fell within the band of reasonable responses available to Ms Brien and the respondents. Ms Brien's decision to refer the claimant's circumstances to a decision taker constitute a failure on the part of the respondents to follow their own procedure.

49. The claimant's Line Manager Ms Brien agreed, at the claimant's request, to attend to accompany her at the continuous absence decision meeting. She did not do so in the capacity of a representative or for the purpose of advocating the claimant's position on that basis, and after consideration of the request, she considered that she could attend in that restricted capacity and should do so because of the claimant's specific request that she do so. The claimant had the right to and had available to her should she have chosen to be accompanied by Trade Union representation for the purposes of representing her or otherwise advocating her position on making submissions on her behalf. She chose not to do so. In the circumstances her Line Manager's agreeing to the claimant's request that she accompany her to the meeting did not constitute procedural unfairness. Separately, no actual unfairness resulted from Ms Bell agreeing to the request and or from her accompanying the claimant to the meeting.

50. At the continuous absence decision meeting of 9th November 2017 the decision maker, in the context of asking the claimant if she wished to add anything to what she had already said, advised the claimant that if she did not return to work on the 25th of November 2017, that being the date by which in terms of the then operative Statement of Fitness for Work (page 84 of the Bundle) her doctor had certified she would be fit for work without a requirement for him to see her again for reassessment of her fitness, then the decision maker would need to make a further decision.

51. As at the date of the claimant's dismissal there existed on the part of the respondents a need to have someone doing the work normally carried out by the claimant who, although based in the Bathgate Contact Centre was part of a virtual Call Centre which handled calls made to central UK numbers which were relayed to it and to other Call Centres around the United Kingdom.

52. The Call Centre and their staff, including the claimant, when at work, dealt with a continuous series of calls. The claimant's absence along with other absences across the workforce of the virtual Call Centre continued to adversely impact upon the service provided to members of the public by the respondents. The number of

persons available to answer calls was reduced by sickness absence, including by the claimant's absence, and that the average call to answer time increase those employees who were available required to deal with members of the public who had had to wait for longer periods to have their calls answered and amongst whom a percentage of those holding experienced frustration which, in turn resulted in an increase in the stress experienced by employees dealing with the calls. The continuing sickness absence of the claimant along with that of other Call Centre employees, as at the date of the decision to dismiss her adversely impacted upon the respondents' ability to meet their quality control targets and to offer an effective and efficient call service to the public. It had an adverse impact on other members of staff who required to deal with the same volume of calls. At the time of the claimant's absence the respondents were not meeting the then applicable four minute target. The claimant's absence had an impact on the business as a whole. It was because of the potential for such an impact that the respondents had in place a policy to manage and deal with continuous absence among the workforce in order to manage employees' return to work where the prospect of their doing so within a reasonable period was identified and, which could lead to their dismissal in circumstances where a prospect of a return to work within a reasonable further period was not identified.

53. On receipt of the Occupational Health Report of 7th December 2017 the claimant did not request a meeting with her Line Manager or the decision maker on the basis that she took issue with the content and or conclusions of the Report and wished an opportunity to be heard further on it before a decision was taken, or at all. The claimant could have requested such a meeting or, alternatively, expressly raised such concerns in writing had she chosen to do so. She had opportunity to do so.

54. She conversationally mentioned to her Line Manager, on a date and at a time which she was unable to specify in the course of evidence, a question regarding her own understanding of the penultimate paragraph on the first page of the Report (page 114 of the Bundle) which was in the following terms:-

(a) "Besides her current medical condition, Mary reported that she has several other medical conditions which are treated appropriately, she is reviewed as required, and reports her symptoms are well managed and controlled".

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(b) On reading that paragraph she considered that the words;- "*and reports her symptoms are well managed and controlled*" would not be accurate if it was to be read as relating to her slipped disc which had formed the subject of the preceding paragraph in the Report.

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55. The claimant's Line Manager indicated to the claimant in the course of the conversation that, for her part, she read those words; "*and reports her symptoms are well managed and controlled*", as applying only to the claimant's other medical conditions which were referred to in the same sentence and paragraph and not to
15 her slipped disc. The claimant summed up in evidence the circumstance of speaking with her Line Manager about the applicability of the particular words which she had identified by stating:-

"I wanted clarification and I got it".

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56. The claimant confirmed in evidence that at the end of such conversation as she had with her Line Manager in relation to the content of the 7th December 2017 Occupational Health Report her Manager would have had no reason to believe that she had ongoing concerns about the Report or wanted her Manager, or the
25 decision taker, to take any action in relation to the Report before considering its content as part of the decision making process. The claimant could have requested a meeting to discuss the Occupational health Report had she wished to. She had the opportunity to put forward "her case" had there been any matter which she might wish taken account in the light of the Report, she had the opportunity to
30 raise that, either verbally through her Line Manager or formally in writing. She did so only to the extent of seeking clarification from her Line Manager of her reading of a particular comment in the Report.

57. The fact that the respondent did not arrange a further meeting with the claimant for the purposes of discussing the Occupational Health Report did not, in the circumstances, constitute a failure to follow a fair process. Neither, in the circumstances, did it result in substantive unfairness to the claimant.

58. The claimant enjoyed her work which played a big part in her life. Throughout her period of continuous absence she aspired to return to work.

59. During her period of continuous absence the claimant cooperated with her Line Manager in respect of keeping in touch meetings facilitating the discharge by the respondents of their obligations in that regard.

60. The respondents had raised no performance issues regarding the quality of the claimant's work when she was in attendance.

61. The claimant considered that she had a good positive attitude to her work, always seeking to do what was asked of her, all of which was reflected in the decision maker's recommendation, subsequently confirmed by the Civil Service Compensation Scheme that she would receive a level of 100% of compensation payable under the scheme.

62. The delays which occurred in there becoming available to the respondents an up-to-date relevant Occupational Health Report were not attributable to the claimant.

63. The claimant attended an appointment with a neurological specialist some time in January 2018. The specialist did not recommend surgery for the claimant's slipped disc condition. The specialist liaised with the claimant's General Practitioner in order to adjust her medication.

64. The claimant remained medically certified as not fit for work up to the 24th of May 2018. On the 19th of February 2018, although not medically fit to work, the

claimant commenced her search for alternative employment by submitting a first job application on that date.

65. The claimant had taken partial retirement approximately two years before her dismissal. She was accordingly already in receipt of the majority of her pension with the balance becoming payable to her at age 65.

66. The taking of pension under partial retirement arrangements is something that has a significant impact on an employee's entitlement to additional benefits under any other early release scheme within the Civil Service Compensation Scheme, including no fault dismissals for reasons of ill health capability.

67. The respondent's internal Attendance Management Policy and Procedure ("HR27003") provides employees who are dismissed with a right of appeal. Paragraphs 111 to 114 amongst others, copied and produced at page 166 of the Joint Bundle is in the following terms:-

> "111. There is one right of appeal at each formal decision point in the Attendance Management Procedure.
>
> 112. A job holder has ten working days from the date of receipt of the decision to submit their Appeal to the Appeal Manager. The Appeal should clearly state the grounds for the job holder's Appeal and their desired outcome.
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> 113. There are three Grounds of Appeal:
>
> > A procedural error has occurred, and/or
> >
> > The decision is not supported by the information/evidence available to the Manager or Decision Manager, and/or

New information/evidence has become available which should be taken into account when reaching a decision about dismissal/downgrading

5 114. If the Appeal does not satisfy the above Grounds of Appeal, the Appeal Manager should reject it and notify the job holder, in writing."

68. By letter dated 11th September 2017, in terms of which the claimant was invited to attend a formal attendance review meeting regarding her continuous absence, the claimant's Line Manager, Alison Brien, sent to the claimant a copy of the Attendance Management Procedure HR27003 which contains those statements, for her use.

69. The amount of compensation which the claimant would receive in consequence of her no fault dismissal was in her consideration an important matter to be weighed in the balance when deciding whether or not to challenge her dismissal by way of exercising her internal right to appeal within ten working days of receipt of the written confirmation of the decision to dismiss, as opposed to accepting the decision to dismiss by not exercising the right of appeal.

70. At the time of deciding to allow the time limit during which she could exercise her right of appeal to expire without appealing and thus deciding not to appeal, the claimant did not know what amount of compensation she would receive. While she knew that the level of compensation had been determined as 100% as opposed to some lesser percentage, the amount of compensation is dependent on the number of years' service which an employee is entitled to have taken into account under the Civil Service Compensation Scheme as at the date of termination of employment.

71. The number of years' service which an employee is entitled to have taken into account in determining their entitlement to compensation under the scheme is a matter which is significantly impacted upon by the taking of pension under partial

retirement because accrued service for that purpose is measured from the post partial retirement date.

72. Some months earlier the claimant had made enquiries of the Pensions Office, on behalf of a friend who was considering partial retirement, as to whether doing so would impact upon the number of years of service used in a compensation calculation. The individual in the Pensions Office of whom the claimant made inquiry did not know the answer to the question but in turn asked someone else who the claimant was told, hearsay, had expressed the view that it wouldn't. The claimant, for her part, was not convinced that the hearsay response which she had received was correct and told her friend, Arlene the same.

73. Separately, in an email dated 15th December 2017 Alison Brien the claimant's Line Manager expressly told the claimant that while on one view her reckonable service to date might suggest that compensation would be based upon 40 weeks of pensionable earnings, she was unsure how this would be affected by the fact that the claimant had taken early retirement and was already in receipt of some of her pension. She advised the claimant to check the position with HR and to expressly ask them for an estimate of her compensation amount.

74. As at the time of deciding not to exercise her right of appeal and to accept the decision to dismiss, the claimant did not know the amount of the compensation which she would receive in the event either of her not proceeding with an Appeal or in the event of an Appeal with which she did proceed not being upheld.

75. The claimant made an assumption that the compensation that she would receive would be based on 40 weeks of reckonable service notwithstanding the fact of her earlier taken partial retirement and further assumed, applying the multiplier of 100%, that she would therefore receive approximately £12,000 of compensation.

76. The sum of £12,000, had the claimant received it by way of compensation under the scheme, would have allowed her to pay off the balance of her mortgage and thus would have mitigated the requirement for her to remain in full time

employment. It was an important factor in her consideration and one which she weighed in the balance on the basis of assumption as opposed to actual knowledge.

5 77. In making her assumption, about the amount of compensation which she would receive, the claimant was not induced to do so as a result of any misrepresentation at the hands of the respondent that she would receive £12,000 of compensation or that the level of her reckonable service, for the purposes of calculating compensation under the scheme, would not be adversely and significantly
10 impacted by her having taken partial retirement.

78. At the time at which the claimant asserts the misrepresentation was made to her, the decision maker, Ms Russell, did not know whether or to what extent, if any, the claimant's partial retirement might adversely impact upon the amount, as opposed
15 to the percentage of compensation she would receive.

79. Separately, the claimant, in the circumstances of her own prior knowledge and of the express warning on that point contained in her Line Manager's email to her of 15th December 2017, would not have been entitled to rely upon such a
20 misrepresentation had the same been made to her.

80. She could, and should reasonably, have preserved her position until such time as she knew what the amount of compensation was to be, by exercising her right of appeal which she chose not to do.

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81. In subsequently seeking to submit a late Appeal on 5th January 2018, the claimant did so for the sole reason of having learned, as at that date, that the fact of her early retirement did significantly impact upon the calculation of the compensation to which she was entitled and would receive, and with the effect that the amount
30 was nearer £1,800 rather than £12,000.

82. But for that sole fact, none of the other matters referred to in her letter of Appeal (pages 137-138) would have caused her either to appeal within the time limit or attempt to have a late Appeal considered after the expiry of the time limit.

83. The letter of Appeal dated 5th January 2018 tendered by the claimant was, on her own evidence submitted late that is to say outwith the period of ten working days of receipt by her of the letter dated 15th December 2017 in which confirmation of the decision to dismiss her was communicated.

84. The period of ten days after which the right to Appeal is lost and which is prescribed in the respondent's procedure is a reasonable period.

85. There is no statutory prescription of the amount of time to be allowed for such Appeals. The ACAS Guide recommends that a period of five days would be reasonable. The Code of Practice itself is silent on the matter.

86. The respondent's Procedure contains no express provision for the allowance of Appeals if they are not submitted within the ten working day time limit. It contains no description or definition of exceptional circumstances in which consideration might be given to receiving an Appeal though late.

87. The respondent's Internal Appeal Manager, Mrs Bell, declined to receive the Appeal on the grounds that it had not been submitted within the time period allowed in the procedure.

88. She considered that she had no express authority to allow such an Appeal and even if it had been presented in exceptional circumstances such as to raise a question in her mind, she considered that she would have required to take advice. In the case of the claimant's late tendered Appeal she did not consider that the Grounds of Appeal set out in the letter, which she read, disclosed exceptional circumstances. She acted consistently with her previous actings in declining to accept late submitted Appeals. To do otherwise would, in her view, have set an inappropriate precedent.

89. The Appeal Manager's decision to decline to accept the Appeal, which was presented outwith the time period allowed in the procedure, was a decision which fell within the band of reasonable responses available to a reasonable employer.

90. The decision of the claimant's Line Manager, communicated to the claimant by letter dated 23rd October 2017, to refer her case to a decision maker for a decision on whether the respondent could continue to support the claimant's sickness absence or alternatively that she should be dismissed, notwithstanding the fact that there was not yet available, to her Line Manager, the reinstructed Occupational Health Report, was a decision which fell within the band of reasonable responses available to a reasonable employer in the circumstances.

91. Mrs Brien the claimant's Line Manager was not the decision taker in relation to continuing support or dismissal.

92. As at the time of deciding to make the referral, Mrs Brien reasonably believed, as in fact proved to be the case, that a decision taker to whom consideration of the matter was referred would not take the decision without first having available to him or to her, and taking account of the content of, the reinstructed Occupational Health Report.

93. In the context of the keeping in touch meetings, availability of her Line Manager to discuss and her Line Manager's discussions with her in relation to the Occupational Health Report, and the deferring by the decision maker of taking a decision until such times as she had available to her the relevant Occupational Health Report, the respondents took such steps as were sensible and reasonable according to the circumstances to consult the claimant and discuss matters with her and to inform themselves upon the true and up-to-date medical position. The claimant for her part was given the opportunity to state her case such that all that was reasonably necessary in the circumstances was done by the respondents.

94. The application by the respondents to the claimant of their Absence Management Policy and their consequential dismissal of the claimant constituted unfavourable treatment for the purposes of section 15 of the Equality Act 2010.

95. The aim, relied upon by the respondents for the purposes of section 15(1)(b) of the Equality Act 2010 was the aim of providing the public with an efficient and effective telephone call service. That aim was for the purposes of section 15(1)(b) of the 2010 Act a legitimate aim, the achievement of which required employees, employed to carry out the work for which the claimant was employed, to be in attendance at work regularly and to be in a position to take and answer telephone calls.

96. As at the date of the claimant's dismissal there was a continuous requirement within the respondents to have carried out by other employees work which the claimant was employed to do.

97. Because of the virtual nature of the Call Centre at which the claimant was employed the absence, on long term sick leave, by one employee such as the claimant and in the event the absence of the claimant adversely impacted upon the respondents' ability to achieve their legitimate aim as at the date of the claimant's dismissal the respondents were failing to achieve their quality control average length to answer call time of four minutes.

98. The freeing up of the claimant's salary, which resulted from her dismissal and which allowed for the recruitment to and employment of another contact service advisor within the virtual Call Centre. It had the potential to and did positively impact on the achievement, by the respondents, of their legitimate aim.

99. The recruitment of personnel to the virtual Call Centre was an ongoing almost continuous process across the respondents' UK organisation.

100. In the period following on from the claimant's dismissal there had been two such recruitment exercises conducted at the Bathgate Call Centre.

101. The application by the respondents to employees who are absent on long term sick leave after a continuous period of absence of 28 days including to the applicant, for the purposes of managing the employee's return to work in circumstances where there is identified the prospect of a return to work within a reasonable period; and or for the purposes of deciding, in circumstances where the prospect of a return to work within a reasonable further period is not identified, that the employee should be dismissed, and the claimant's consequential dismissal were, in the circumstances, both reasonably necessary and proportionate and constituted, for the purposes of section 15(1)(b) of the Equality Act 2010, a proportionate means of achieving a legitimate aim.

102. The fact that the respondents operated a generous sick pay scheme in terms of which the claimant would have continued to have access to reduced contractual sick pay up until the elapse of twelve months of continuous sickness absence did not result, of itself, in it being reasonable that the respondent should require to delay taking a decision to dismiss her until she had exhausted her sick pay entitlement.

Submissions for the Respondent

103. Under reference to:-

- **Ridge v Her Majesty's Land Registry UKEAT0485/12**
- **Wilson v The Post Office 2000 IRLR 834**

Dr Gibson, for the respondent, submitted as follows:

104. That the issue of the claimant's continuous absence for a considerable period of time combined with the absence, as at the date of the decision to dismiss, of prospect of her returning to work within a reasonable period were the matters which were in the forefront of the respondent's mind when the decision was taken.

105. These matters in Dr Gibson's submission resulted in the reason being properly viewed as one of capability as opposed to circumstances in which an employee might have recurring short frequent periods of absence which might more properly point towards a reason of conduct.

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106. That the Tribunal should hold that the claimant had been dismissed for the potentially fair reason of capability.

107. Regarding the issue of fairness Dr Gibson submitted that the consideration of the

10 relevant factors, in terms of section 98(4) pointed towards fairness.

108. The nature of the claimant's illness, namely a slipped disc, was such that she had been rendered and medically certified as incapable of carrying out any work throughout the period from 21st August 2017 up and including the Effective Date of

15 Termination of her employment on the 24th February 2018 and thereafter for a further continuous period until the 24th May 2018.

109. That was a circumstance which could not be seen as seriously disputed by the claimant given;

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(a) that she maintained and the respondent accepted, that in the period 21st August to 24th February 18 she was a person possessing the protected characteristic of disability,

25 (b) it was the claimant's contention that the medical condition giving rise to that characteristic was her slipped disc and thus, that that condition was having adverse effect on her ability to carry out day to day activities.

30 (c) Her mobility was seriously affected.

(d) She could only walk with a stick, she could only stand for periods of five minutes, she could not twist or turn.

(e) In terms of the Occupational Health Report of 7th December 2017, considered by the decision maker, the Occupational Health advice was that the practitioner could not foresee the claimant returning to work for at least eight to ten weeks and even that was dependent upon when she might see the specialist to whom she was being referred and what treatment e.g. surgery or conservative treatment the specialist recommended.

110. In Dr Gibson's submissions on an objective reading of the Occupational Health Report the claimant's return to work if at all, might be after the elapse of a further period of greater than eight to ten weeks. In the event the claimant remained medically certified as unfit to carry out any work until the 24th of May 2018 that is a further six months from the date of the Occupational Health Report. He submitted that while the claimant's aspirations to return to work could readily be accepted the reality was, and had been as at the date of the decision to dismiss her, that she was unrealistic in that aspiration. She had on a number of previous occasions indicated an intention to return to work, most recently to do so on the 24th of October 17 but in the event had been unable to do so by reason of her medical health.

111. She had assessed her own pain levels at the material time as being seven out of ten. She had stated that her medication was making her woozy. She was contending with a painful, debilitating and recurring medical condition. As at the date of the Occupational Health Assessment and as at the date of the decision to dismiss her, the prognosis for her condition and recovery was very uncertain. The prospects of her returning to work within a reasonable period were, on an objective construction of the evidence available to both decision makers including the Occupational Health Reports, slim to nil bearing in mind that the claimant's own assessment of pain levels of seven out of ten, that her medication was making her woozy, that she could only walk with the assistance of a stick, she could only stand for five minutes at a time and was unable to twist or turn; all as reflected in the Occupational Health Reports.

112. In Dr Gibson's submission, the claimant's assertions made in evidence before the Tribunal that she would have been able to return to work in a relatively short period were simply not supported by the medical evidence. He further submitted that had that been the case it had been open to the claimant to have returned to work during the period between the communication of the decision to dismiss her and the expiry of her notice period which did not end until the 24th of February 2018, but she did not do so because throughout that period she remained as unfit for work and medically certified as such.

113. Dr Gibson submitted that there was a need on the part of the respondents to have someone doing the work normally carried out by the claimant who was part of a Contact Centre which, although based in Bathgate handled calls made to central UK numbers which were relayed to it and to other call centres around the United Kingdom.

114. The Call Centre and their staff dealt with a never ending series of calls. There was, on the part of the employer, a constant and ongoing need to have somebody doing the work when the claimant was absent.

115. The claimant's absence along with other absences across the workforce continued to adversely impact upon the service provided to members of the public. The number of persons available to answer calls was reduced, and the average call answer time increased. Those employees who were available to answer calls had to deal with members of the public who had to wait holding for longer and amongst whom a percentage of those holding experienced frustration which in turn resulted in an increase in the stress experienced by employees dealing with the calls.

116. Dr Gibson invited the Tribunal to reject the claimant's representative's contention that the absence of one person in a large organisation was negligible and effectively meant that she was not missed. In his submission, because of the virtual nature of the Call Centre, any reduction in staff available to answer calls due to sickness absence across the United Kingdom on any day had a negative impact

on other members of the workforce and on the respondent's ability to meet its average call answer time targets. At the time of the claimant's absence the respondents were not meeting the then applicable four minute target. The claimant's absence had an impact on the business as a whole and that was why the respondents had in place a policy to deal with continuous absence among the workforce.

117. Dr Gibson invited the Tribunal to reject the claimant's representative's contention that the respondents had to expressly show that the claimant's absence from her duties in Bathgate on any particular day had an adverse impact on the business.

118. It was, in the virtual nature of the Call Centre and the large numbers of members of the workforce carrying out the same function i.e. within many different locations, something which would be impracticable and not possible. Nevertheless, in Dr Gibson's submission, the claimant's absence, in those circumstances did and would be seen to impact across the business.

119. In Dr Gibson's submission the claimant had been kept fully advised of the position as matters developed. Mrs Brien, her Line Manager, had been particularly diligent in keeping her up-to-date either with face to face meetings, some of which occurred in her home or, by agreement and with the claimant's consent, through the medium of telephone conversations.

120. Dr Gibson recognised that the claimant's length of service was a factor which should be taken into account by the respondents and in his submission it had been. The claimant's length of service with the respondent was nine years and while that was not an insignificant period of service, it was not what could be described as a long period of service in the Civil Service context where service of twenty years plus was not unusual.

121. The respondents, however, had to balance the claimant's length of service, amongst other things against the impact of her continuing absence on the business.

122. Regarding the length of time which the respondent might be expected to keep the claimant's job open Dr Gibson submitted that in terms of the policy the 28 day period of continuous absence was the trigger which brought about the application of the policy to a particular employee. On one view it might be argued that 28 days was sufficient time. On the other hand, in his submission each employee required to be treated as an individual and, as it had happened in the claimant's case her job had been kept open for four months prior to the decision to dismiss her was taken.

123. It was not reasonable, in the circumstances, for the respondents to be expected to keep her job open for a further indefinite period. Sickness absence as had been made clear by the respondents' witnesses on a number of occasions could not be open-ended.

124. As at the date of the decision to dismiss, the claimant had already been in a period of continuous absence of some four months. In terms of the Occupational Health Report there was no prospect of her returning to work for at least another eight to ten weeks but, again in terms of the Report depending on what treatment was ultimately recommended by a specialist for her condition, the period of absence could have been longer, perhaps as much as six months. In the event, on the 19th of December, four days after the decision to dismiss on 15th December the claimant was assessed as unfit by her doctor for a further period of two months to the 24th of February and thereafter from a further three month period to the 24th of May 2018.

125. In the period of her notice, that is up to and including the 24th of May 2018, the claimant remained medically certified as unfit for work and did not return to work during that period although there was nothing in the respondent's policy or its application which would have prevented her from doing so.

126. Dr Gibson referred the Tribunal to the opinion of the Inner House in the case of **BS v Dundee City Council 2013 Court of Session 91** and to **Spencer v Paragon**

Wallpapers Limited [1976] IRLR 373 EAT in turn referred to by the Court in the decision.

127. He submitted that in cases where an employee is dismissed on the grounds of ill health, the basic question that has to be determined when looking at the fairness of the dismissal is whether, in all the circumstances, the employer can be expected to wait any longer and, if so, how much longer? Matters to be taken into account are:-

- The nature of the illness,
- The likely length of the continuing absence,
- The need of the employer to have done the work which the employee was engaged to do and,
- The circumstances of the case.

128. In relation to the nature of the claimant's illness and the likely length of the continuing absence Dr Gibson referred to his earlier made submission; requiring the need of the employer to have done the work which the claimant was engaged to do. Dr Gibson submitted that the evidence supported a finding that there was a constant and ongoing need to have someone do the work which the claimant was engaged to do. The respondents had no opportunity to "backfill" and temporary cover was not available to them.

129. Regarding the question of whether the claimant was likely to return to work, while recognising that she had not yet exhausted her sick pay entitlement he submitted that the claimant had already had a period of six months (full sick pay) and while sick pay at a reduced rate would have continued to be available to her in the event of her employment continuing, the civil service scheme was a very generous and rarely encountered scheme and it would not, in his submission, be reasonable to expect the respondents, just because they offered a more generous sick pay scheme to an employee, to be obliged to retain them in employment for a period of up to twelve months when there was no reasonable prospect of their return.

130. Dr Gibson submitted there was an administrative cost associated with the claimant's continuing absence in that her Line Manager continued to have to devote considerable management time to managing the claimant's absence while it continued. He invited the Tribunal to reject Mr McParland's submission that that was irrelevant because the respondents had a separate obligation to pay the claimant during her notice period. The termination of the claimant's employment freed up a salary which then became available to fund the recruitment of another employee in the context of which, on Mrs Russell's evidence there was a continuous process of recruitment UK wide and since the claimant's departure two recruitment exercises at the Bathgate Call Centre. The recruitment of a member of staff to the virtual Contact Centre team had a positive impact upon the business and upon the length of the average call answer time, countering the negative impact of continuous absence. In relation to the size of the respondents' organisation Dr Gibson recognised that HMRC was a very large organisation but made the point that it was one which was accountable to the taxpayer and that the existence of a large budget was not the same as a limitless budget. The respondents required to put limits upon the amount of sickness absence within the business where employees were unable to return to work and it did not follow that just because an organisation was large that the employer should be expected to keep an employee's job open for longer than would be reasonable in the circumstances.

131. In relation to substantive fairness, Dr Gibson invited the Tribunal to hold, in all the circumstances of the particular case, that a reasonable employer acting reasonably could have determined to dismiss the claimant and the respondents had done so and, *per contra,* that it could not be said that no reasonable employer would have declined to do so. Accordingly, in his submission, the decision to dismiss was one which fell within the band of reasonable responses available to the respondents at the material time and that the dismissal accordingly fell to be regarded as substantively fair in terms of section 98(4) of the Employment Rights Act 1996.

132. At the time of the claimant's dismissal, the up-to-date Occupational Health Report confirmed that the claimant was experiencing pain levels of seven out of ten, that

her medication was making her woozy, that she could only walk with a stick, that she could only stand for five minutes and that she could not twist or turn and that the Occupational Health practitioner could not foresee the claimant returning to work for at least a further period of eight to ten weeks and possibly longer.

133. That there was within the respondents' business a constant and ongoing need to have someone doing the work which the claimant was engaged to do.

134. Because of the virtual nature of the Contact Centre in which the claimant was employed her absence, in common with that of other employees, on continuous sickness absence across the UK workforce, had a direct impact upon the average time taken to answer a telephone call made by members of the public (Average Call Answer Time) and upon other members of the workforce who had to deal with callers who experienced frustration through having to wait longer for their call to be answered, something which could be stressful for some employees.

135. The termination of the claimant's employment released the resource of a salary which could be ulitised in the recruitment of an additional member of staff to the virtual Call Centre.

136. There were across the United Kingdom constant recruiting exercises being carried out by the respondents.

137. There had been in the Bathgate Depot, since the date of the claimant's dismissal two recruitment exercises.

Regarding Procedural Fairness

138. Dr Gibson invited the Tribunal to hold that a fair procedure had been followed by the respondents; that they had followed their own procedure and that that procedure was one which was fair. Dealing in anticipation with what he understood were to be the points founded upon on behalf of the claimant he submitted as follows:-

139. Regarding the referral by the claimant's Line Manager of the claimant's circumstances to a decision maker for consideration of whether the business would continue to support the claimant's absences or that the claimant's employment should be terminated at a time when she did not yet have an up-to-date Occupational Health Report, Dr Gibson submitted that the claimant's Line Manager was entitled to make such a referral at any point after 28 days of continuous absence; and for her to do so after a considerable lengthier period could not be said to be procedurally unfair.

140. Separately, as was made clear by Mrs Brien when she advised the claimant of the referral, she proceeded on the basis that the Occupational Health Report would be available to the decision maker before the decision maker took any decision to dismiss. No unfairness had resulted to the claimant because that was what had in fact occurred. It was the decision maker and not the person making the referral who required to take reasonable steps to inform themselves that the claimant's medical condition. The decision maker, having on an initial consideration decided that the business could continue to support the absence, subject to her returning to work on the date which she had indicated, thereafter and following the claimant's non-return to work, had deferred that further consideration and subsequent decision until she had available to her the Occupational Health Report of 7th December.

141. In relation to the claimant's Line Manager accompanying her as her chosen "companion" at the formal decision making absence meeting, Dr Gibson submitted that this should not be regarded as unfair and in fact had resulted in no unfairness to the claimant for a number of reasons:-

(a) The claimant's Line Manager had accompanied her specifically at the claimant's request.

(b) Although she herself had some initial reservations about doing so, on balance she had decided to accede to the claimant's request

because her function was to be only that of companion. Specifically she was not there in the role of advocate or to otherwise make representations on the claimant's behalf.

(c) The claimant had the right and had access to trade union representation at the meeting had she chosen, but she chose not to ask for such representation.

(d) The decision maker raised the issue specifically with the claimant at the outset of the meeting and the claimant was recorded as having indicated that she had no difficulty with her Line Manager being her companion and indeed had asked her to be.

(e) In the event nothing turned on the fact that the claimant selected her Line Manager to be her companion at the meeting.

142. Regarding the fact that the respondent's decision maker had not held a further meeting with the claimant, after receiving the Occupational Health Report and prior to reaching her decision, Dr Gibson submitted that this did not constitute procedural unfairness. There was no requirement to hold a further meeting, *per se*, in the absence of a request or any particular reason for doing so.

(a) The claimant had received the Occupational Health Report at the same time or prior to it being released to the respondent. She had not raised any points regarding it or taken issue with anything that was said in it with the decision maker. She had opportunity to do so via a conversation which she asserts she had with her Line Manager during which she had asked her Line Manager for her view as to whether the remarks made in the report about her medication related to her other medical conditions or to her slipped disc. She had as she put it herself in evidence wanted to get clarification of that matter and she got it. She had accepted in evidence that at the end of such conversation as she had with her Line Manager about the report, her Line Manager would

not have been left with the impression that she had concerns about it or disagreed with point of substance within it.

143. Regarding the respondent's Appeal Manager declining to accept an Appeal tendered by the claimant out of time, Dr Gibson submitted that this did not constitute procedural unfairness, in the circumstances.

(a) The policy and the procedure were clear as to the limit on the right of appeal, that is to say it existed for a period of ten working days from after receipt by the claimant of written confirmation of the decision to dismiss. The letter confirming dismissal clearly set that out, there was no ambiguity. The claimant was fully aware of the time limit and the claimant accepted that the Appeal which she sought to submit was late. She knew that when she had received the letter and she knew in consequence that that the Appeal was late; something which she acknowledged in her letter of 05th January 2018 with which she covered the grounds of appeal.

(b) The procedure allowed for ten working days within which to lodge an Appeal while there was no statutory definition of a reasonable period for internal appeals including in the ACAS Code of Practice, the ACAS Guide recommends to employers a period of five days as a reasonable period. In those circumstances he submitted that the ten working days allowed by the respondent could not be objectively or reasonably regarded as unfair.

(c) The principal, indeed the only reason, for her deciding to submit an Appeal having previously consciously allowed the time limit to expire, was because she was dissatisfied with the amount of compensation which she finally realised she was to receive under the Civil Service Compensation Scheme.

(d) There was no provision within the procedure for late appeals and, while it might be accepted that there may be exceptional circumstances in which it might be reasonable to consider an Appeal though late, the circumstances presented by the claimant were not exceptional circumstances in the view of the Appeal Officer. That view was a view which she was reasonably entitled to take.

(e) The respondent's Appeal Manager Mrs Bell was entitled to refuse the Appeal on the grounds that it had not been submitted within the time period allowed under the procedure. The policy and procedure make no provision for late appeals.

(f) Her decision to decline to consider the Appeal was one which fell within the band of reasonable responses. She did not consider that she was at liberty or had the authority to set an arbitrary precedent of allowing appeals to proceed other than possibly in exceptional circumstances which she was very clear in evidence the circumstances presented by the claimant were not.

144. In Dr Gibson's submission the claimant was not really aggrieved about any aspect of the decision to dismiss but rather about the amount of compensation that she was to receive. That he submitted was clear from the terms of that tendered letter and grounds of appeal.

145. The other matters to which she referred in her tendered Appeal grounds were not matters which had caused her to lodge an Appeal. At a time when she was under a misunderstanding as to the amount of compensation which she might receive. She had consciously decided not to appeal within the permitted period in relation to any of those other matters and had not.

146. Any misunderstanding and or lack of knowledge about the amount of compensation she was to receive was not caused by the respondents but rather arose on the claimant's own part. Likewise, her decision to give up her right of

appeal by not appealing within the time limit based and upon an assumption on her part about the amount of compensation she was likely to receive, was entirely her own decision and was one which she took notwithstanding her Line Manager's advice that she should appeal in order to preserve her position.

147. Whatever might be said about whether the claimant ought reasonably to have had within her possession accurate information about the amount of compensation she was to receive, she did not need to give up her right of appeal in the absence of that knowledge or information. She could have lodged an Appeal in order to preserve her position and ought to have done so if the other matters which she subsequently said she wished to found upon were really matters upon which she wished to challenge the decision to dismiss.

148. Separately, and in any event, the question of compensation was one entirely separate from the decision to dismiss. It was not one that fell within the jurisdiction of the Appeal Manager who would have been powerless to adjust the amount of compensation. A separate right of appeal lay in respect of the level and in Dr Gibson's submission on a proper construction of the wording of the scheme also in respect of the amount of compensation, to the Civil Service Appeal Board. On any view, it was a matter which *per se*, would fall outwith the scope of the late tendered Appeal, had it been submitted timeously.

149. The claimant had confirmed in evidence that the sole reason for her seeking to submit a late appeal was the difference in the compensation which she had assumed she might receive and that which she was actually to receive.

150. In summary Dr Gibson invited the Tribunal to hold that the dismissal was, in all the circumstances in the case, procedurally fair for the purposes of section 98(4) of the Employment Rights Act 1996.

151. In the alternative, let it be assumed that the Tribunal held that a fair procedure had not been followed, Dr Gibson submitted that the circumstances were such that the claimant was likely to have been dismissed in any event had a fair procedure been

followed. He considered the percentage chance of dismissal to be high and submitted that any relevant award should be reduced accordingly.

Remedy

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152. The amount of the appropriate basic award, in the event of a finding of unfair dismissal, was a matter of agreement between the parties. In relation to compensatory award, let it be assumed that the Tribunal were to hold the dismissal unfair, Dr Gibson submitted that it would not be just and equitable in the
10 circumstances to make a compensatory award of in excess of 26 weeks loss of wages. To do so, in the circumstances, would be to hold the respondents liable for the claimant's continuing loss beyond a point at which it was reasonable to do so. The claimant had continued to be certified medically unfit for work beyond the date of her dismissal up to at least the 24th of May 2018. Her loss in those
15 circumstances resulted not from the respondent's actions but rather from her ill health.

Discrimination

20 153. In relation to the section 15 EqA 2010 discrimination claim Dr Gibson conceded that the application by the respondents to the claimant of the PCP, which was their continuous absence management policy, in circumstances where it ultimately resulted in her dismissal, amounted to treating the claimant unfavourably because of something arising in consequence of disability for the purposes of section 15 of
25 the Equality Act 2010. He invited the Tribunal to hold however, in terms of section 15(1)(b) of the 2010 Act, that the respondent had shown, in the circumstances and on the evidence presented, that the treatment was a proportionate means of achieving a legitimate aim and thus, did not amount to discrimination in terms of section 15 of the 2010 Act.

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154. He submitted and invited the Tribunal to hold, that the legitimate aim of the respondents was to provide the public with an efficient and effective telephone call service which involved the respondents seeking to achieve the answering of

telephone calls within a minimum number of minutes – "average time to answer call". The achievement of the legitimate aim required employees to attend work regularly and to be in a position to take and answer telephone calls. Where employees were unable to do so after a continuous period of absence and in circumstances where there was not identified a date by which there was the prospect of them returning to work within a further reasonable period, dismissal constituted a proportionate means of achieving that legitimate aim, freeing up as it did salary resource to fund the recruitment of further call answering resources to the virtual Call Centre.

155. He submitted that to show that its actions were proportionate a respondent does not need to show that it had no alternative course of action. Rather they must demonstrate that the measures taken were "reasonably necessary" in order to achieve the legitimate aim.

156. He submitted that in the particular circumstances there was not available to the respondents a less "potentially discriminatory" means to achieve the same objective. Simply delaying taking a decision on whether the business could afford to further sustain the claimant's continued absence or alternatively that the claimant's absence should continue to be supported for an indeterminate further period, as appeared to be being suggested by Mr McParland, would not support the achievement of the legitimate aim (objective) but rather, would undermine it.

157. He submitted that it was for the Tribunal to objectively balance the discriminatory effects of the respondent's actions and the reasonable needs of the respondent with the detrimental effect on the disadvantaged group and on the claimant, in order to determine whether the treatment in question constituted a proportionate means of achieving the legitimate aim in the particular circumstances. He reminded the Tribunal that the question of proportionality is a fact sensitive issue. He invited the Tribunal to find, having first done so, that the application of the policy to the claimant in the circumstances constituted a proportionate means of achieving the legitimate aim and thus to hold that the respondents had not discriminated against the claimant in terms of section 15 of the 2010 Act.

158. In the alternative, and in respect of remedy, let it be assumed that the Tribunal held that the respondents had failed to objectively justify the treatment, Dr Gibson submitted that the claim was one which should sound in damages for injury to feelings only in an amount located towards the bottom of the first, that is the lowest, band of the revised *Vento* scale.

159. While Dr Gibson accepted that the Tribunal had heard at considerable length from the claimant as to the impact of the circumstances with which she was contending impact upon her, these resulted from and were caused not by the respondent's application to her of the PCP, which was their continuous absence management policy, but rather, by the various illnesses with which she was contending. Indeed, in Dr Gibson's submission the application of the policy to the claimant, and in particular the assiduous and detailed efforts made by the claimant's Line Manager Mrs Bell to support the claimant and keep in touch with her, if anything, had served to ameliorate the injury to feeling which she was suffering.

160. While accepting that the shock of dismissal was something which would have had some impact upon the claimant, the injuries to the claimant's feelings arising from the loss of the amenity and society of her fellow workers, for example, and the worry about her mortgage, were all things which flowed from her illnesses and her inability to return to work. The respondents could not be said to have prevented the claimant from returning to work at any point prior to the Effective Date of Termination of her employment on 24th February 2018. The reverse was the case in that they had considered with the claimant and had identified potential adjustments to be put in place to assist her recovery on return to work and would have allowed the claimant to return to work at any point during her notice period. The claimant, however, was prevented from doing so due to her ill health. Beyond the date of the Effective Date of Termination of her employment the claimant had continued to be unfit to work until the 24th of May 2018 during which period she continued to be medically certified as unfit to undertake any work. While on the claimant's evidence she had made job applications before 24th of May 2018, on the evidence before the Tribunal and notwithstanding what Dr Gibson indicated was a

laudable aspiration to return to work, it was not clear whether she was or was not medically fit to return even after 24th May 2018. Separately, and in any event, Dr Gibson submitted that matters relating to the claimant's mortgage were too remote, in the legal sense of that term, and should not be taken into account for the purposes of assessing damages.

161. For all these reasons, in the event that the Tribunal should find discrimination established Dr Gibson submitted that the award should be one falling within the first half of the lowest band of the revised *Vento* scale.

Submissions for the Claimant

162. By way of opening submission Mr McParland asked the Tribunal to bear in mind certain general matters:-

(a) That the claimant had enjoyed her work. It formed a big part of her life and she had throughout the process been extremely keen to get back to work.

(b) That when on sick leave she cooperated fully with her Manager, keeping regular contact, and that she had complied with the respondent's relevant procedures and processes with the sole exception of not submitting her Appeal against dismissal timeously.

(c) That the respondents had focused no performance issues with the claimant's work when she was at work. She, the claimant, considered that she had a good positive attitude to work, seeking to do all that was asked of her, none of which had been challenged or contradicted by the respondents and which, in Mr McParland's submission was reflected in the fact that her Managers had recommended that she, in relation to the level of compensation, that she be awarded 100% compensation under the scheme.

(d) That the delays which had occurred in relation to the obtaining by the respondents of an up-to-date relevant Occupational Health Report and in relation to the claimant obtaining NHS appointments were not attributable to the claimant.

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163. Mr McParland invited the Tribunal on the evidence presented to make the following material Findings in Fact;-

164. That the claimant had never been expressly informed by her Line Manager Ms Brien that she had recommended that the claimant be dismissed.

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165. That the claimant had spoken by telephone with Annette Russell the Dismissing Officer, on 15th December 2017 and that in the course of that conversation Annette Russell had told the claimant that "she would be entitled to 100% of compensation".

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166. That on the 27th of December 2017 in a second telephone conversation with Annette Russell Annette Russell had told her that 100% of compensation would be equivalent to approximately 40 weeks below.

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167. That the claimant should be regarded as having been fit for work on the 19th of February 2018 because at or about that time she began to make her first application for a job notwithstanding the fact that her doctor continued to certify her as unfit for work until at least the 24th of May 2018.

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168. Under reference to the case of **Georgina O'Brien v Bolton St Catherine's Academy [2017] EWCA Civ 145** at page 14 para 53 of the Judgment delivered by Underhill LJ, he reminded the Tribunal that in cases of dismissal for capability (ill health) a finding that her dismissal was disproportionate for the purposes of a section 15 Equality Act 2010 complaint of discrimination may also mean that it was not reasonable for the purposes of section 98(4) of the Employment Rights Act 1996. Underhill LJ had gone on to say at lines 3 to 11 of paragraph 54:-

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"*…. I accept that the language in which the two tests is expressed is different and that in the public law context a "reasonable review" may be significantly less stringent than a proportionality assessment (though the nature and extent of the difference remains much debated). But it would be a pity if there were any real distinction in the context of dismissal for long term sickness where the employee is disabled within the meaning of the 2010 Act. The law is complicated enough without parties and Tribunals having routinely to judge the dismissal of such an employee by one standard for the purpose of an unfair dismissal claim by a different standard for the purpose of discrimination law ….*"

169. In Mr McParland's submission when considering whether the respondent in this case had acted reasonably in deciding to dismiss the claimant a number of factors required to be considered:-

(a) The nature of the claimant's illness, in this case a complex health case in respect of which the respondent could not appreciate the nature of the illness unless and until they had all up-to-date information.

(b) That accordingly the respondents should not have dismissed the claimant until they had received a specialist report.

(c) That they should have in effect reset the dial on the claimant's absences to nil as at the decision point.

(d) That there was no need for the employer, who employed some 83,000 people in various capacities, to have someone carrying out the work which the claimant was employed to carry out.

(e) That the evidence before the Tribunal as to the impact of the claimant's particular absence on the respondents was insufficient in that regard.

(f) That the company could be expected to keep the claimant's job open for a longer period than they had done and in particular should have kept it open until the claimant had exhausted all of her sick pay entitlement that is for a total period of 12 months.

(g) While accepting that there was no requirement on an employer to keep a job open indefinitely, he submitted that these employers should have kept the claimant's job open for a reasonable period of time and that in the particular circumstances taking the decision to dismiss when they did, was not reasonable.

170. Under reference to the terms of section 98(4) of the ERA 1996 he emphasised the need to weigh in the balance the size of administrative resources on the employer's undertaking in determining whether the employer acted reasonably.

171. Mr McParland submitted that in terms of the respondent's policy the claimant's Line Manager should have delayed in making a referral to a decision maker for a decision as to whether the claimant's continuing sickness absence should be supported or alternatively whether she should be dismissed on grounds of capability until after the Occupational Health Report of 7th December had been received. In not doing so, he submitted, the respondents fell to be regarded as acting unreasonably.

172. He noted that Ms Brien had recorded among the factors be considered by her in deciding to make the reference when she did, that the claimant would, on the one hand, submit a further Fit Note at the end of a current two week period of sickness absence and, on the other, that she had met with the claimant the previous week and that although the claimant "hoped and wants to return she has no firm date for physiotherapy to start and doesn't know what effect that would have on her yet. She could give no firm agreement that she would return to work within two weeks".

173. In relation to the section 15 complaint Mr McParland submitted that it was patently the case that the decision to dismiss the claimant and the application to her by the respondents of their absence management policy which had led to it, were decisions which amounted to treating her unfavourably because of something, namely absences, arising in consequence of her disability, but that the respondent could not show, on the evidence, that that treatment was a proportionate means of achieving a legitimate aim and that accordingly, in the circumstances, he submitted the treatment amounted to discrimination in terms of section 15 of the 2010 Act.

174. In Mr McParland's submission the claimant's Line Manager in deciding, when she did, to refer the claimant's circumstances to a decision maker at the point in time placed too much reliance upon the fact that the claimant was unable to provide, as at that date, a firm date for return to work. In his submission the respondents breached their own policy by making a referral to a decision maker before the claimant's Line Manager, who made that referral, was in possession of an Occupational Health Report.

175. Regarding the dismissal itself the decision maker had again, in Mr McParland's submission, placed too much reliance on the fact that there was not in existence, at the point in time when the decision to dismiss was made, a clear return to work date, when it was obvious to the respondents that the reason for the claimant's absence was her ill health.

176. The respondents, in taking the decision to dismiss, had not given enough weight to the claimant's own views. They had not arranged to hold a further meeting with the claimant to discuss the Occupational Health Report and to ascertain what the claimant's views were in the light of the Report`. The decision maker in Mr McParland's submission was obliged to consult with the claimant rather than just rely upon the terms of the Report.

177. In determining whether the respondent could show that the treatment of dismissing the claimant was a proportionate means of achieving a legitimate aim, the starting point, in Mr McParland's submission, was that the HMRC was a large organisation.

178. In deciding to dismiss the claimant the respondents had had available to them a less discriminatory way of achieving their aims which would have been to wait.

5 179. In Mr McParland's submission the respondent had not adduced evidence that the claimant's dismissal had contributed to the achievement of their stated legitimate aim. He invited the Tribunal to accept the claimant's evidence in this regard to the effect that there had been no recruitment since her dismissal.

10 180. In order to be proportionate the treatment must be both reasonably necessary and proportionate. There was a need on the part of the Tribunal to balance the discriminatory effect upon the claimant with the reasonable needs of the employer.

181. When carrying out the balancing act Mr McParland submitted that the Tribunal
15 should consider that there was no evidence before it of an adverse impact upon the respondents arising from the claimant's absence. He invited the Tribunal to reject Dr Gibson's proposition that that adverse impact was implicit in the fact that the respondents operated a virtual call centre and that they were not meeting their average call response target of 4 minutes. He submitted that the Tribunal should
20 consider that the respondents required to produce documentary evidence on those matters and in particular of an adverse impact upon their reasonable business needs associated with the claimant's particular continuing absence.

182. While Annette Russell had concluded that the respondents could not continue to
25 support the claimant's absence, the record of her decision set out at pages 122 to 126 of the Bundle disclosed that her focus was substantially upon the needs of the employer and not upon the impact of the decision upon the claimant. Her decision record did not make clear or explain the weight which was given to the various factors which she took into account. In these circumstances Mr McParland
30 submitted that the decision to dismiss was one which fell outwith the band of reasonable responses and was separately discriminatory.

183. In relation to the rejection of her late Appeal, Mr McParland submitted that the decision by the Appeal Officer not to consider the Appeal, because it was out of time, was something which tainted the dismissal with unfairness the same because the claimant had decided not to appeal within the time period allowed because she was in error as to the fact that the calculation of her entitlement to compensation would be based upon 40 weeks' pay and that in consequence she would receive about £12,000. Mr McParland acknowledged that the claimant had departed in oral evidence from the position given notice of in her pleadings namely that her Line Manager Ms Brien had told her that the calculation would be based on 40 weeks' pay. She had, however, insisted in evidence on the alternative position that Annette Russell, the decision maker, had told her in a follow up telephone conversation to that in which she communicated oral confirmation of her dismissal, that the calculation of her compensation would be based upon 40 weeks' pay. He submitted that Ms Russell, while not accepting in evidence that she had made such a statement, put her position as one of having no recollection of making such a statement, whereas the claimant's position was that she had. He urged the Tribunal to accept the claimant's evidence in this regard and to hold that her conscious decision not to appeal within the time limit was one directly induced by the statement which had been made to her by Ms Russell and which had effectively prevented her from appealing. The same because she did not learn of the true position, namely that the compensation that she would receive would be nearer £1,800 because she had already taken partial retirement, until after the time limit had expired.

184. In Mr McParland's submission the Appeal Officer Kate Bell had closed her mind to the possibility of allowing the Appeal to be received although late and she had done so for no reason other than the fact that the respondent's policy made no provision for the right of appeal to be exercised outwith the 10 day specified time limit.

185. Mr McParland submitted that all reasonable employers would, in the circumstances focused by the claimant's Grounds of Appeal, allowed her Appeal to be heard. He submitted that Mrs Kerr's decision to reject the Appeal because it was out of time

was an arbitrary decision and that no reasonable employer would have refused to allow a late Appeal in circumstances which could be said to have had some impact on or prevented the employee from appealing.

186. Ms Bell's position that she had no discretion under a policy to allow late Appeals was in Mr McParland's submission a position adopted arbitrarily.

187. Mr McParland returned to the issue of failing to meet with the claimant post receipt, by the decision maker, of the Occupational Health Report of 7th December 18, and reminded the Tribunal of the Judgment of the Employment Appeal Tribunal in **East Lindsay District Council v Daubney** and in particular what was said by the EAT in the anti-penultimate paragraph of the Judgment:-

> "*Unless there are wholly exceptional circumstances, before an employee is dismissed on the ground of ill health it is necessary that he should be consulted and the matter discussed with him, and that in one way or another steps be taken by the employer to discover the true medical position. We do not propose to lay down detailed principles to be applied in such cases, for what will be necessary in one case may not be appropriate in another. But if in every case employers take such steps as are sensible according to the circumstances to consult the employee and to discuss the matter with him, and to inform themselves upon the true medical position, it will be found in practice that all that is necessary has been done. Discussions and consultation will often bring to light facts and circumstances of which the employers were unaware, and which will throw new light on the problem. Or the employee may wish to seek medical advice on his own account. Which, brought to the notice of the employers' medical advisers, will cause them to change their opinion. There are many possibilities. Only one thing is certain, and that is that if the employee is not consulted and given an opportunity to state his case, an injustice may be done.*"

188. Under reference to **East Lindsay District Council v Daubney** Mr McParland invited the Tribunal to hold that the fact that the respondent did not proactively organise a further meeting with the claimant, following their receipt and receipt by the claimant of the Occupational Health Report of 7th December 17 and prior to deciding to dismiss, was analogous with a situation in which the employee was not consulted or given an opportunity to state her case.

189. In relation to remedy Mr McParland referred the Tribunal to and founded upon the Schedule of Loss lodged in the Joint Bundle which, with the exception of the quantification of damages for injury to feeling, he advised was otherwise in broad terms the subject of agreement between the parties.

190. In relation to injury to feeling, Mr McParland submitted that in the event that the Tribunal found that discrimination had occurred, on the circumstances presented an award in the middle band of *Vento*, that is of between £8,000 and £25,000, would be appropriate. In consequence of the alleged discriminatory decision to dismiss her, the claimant had been unable to discharge the capital balance of her mortgage on the one hand and had found herself without employment on the other.

Discussion and Disposal

191. On the evidence presented on the Findings in Fact which it has made, the Tribunal unanimously found that the decision to dismiss the claimant was one which fell within the band of reasonable responses available to the respondents. While recognising that another employer might have decided to continue to support the claimant's absence for a further indeterminate period and, standing the claimant's notice entitlement beyond the period of six months despite there being no identified prospective return to work date, the Tribunal was unable to hold that all reasonable employers would have done so in the circumstances and *per contra* that no reasonable employer would have decided to dismiss in the circumstances in which the decision maker Annette Russell so decided. The Tribunal unanimously found that the decision to dismiss the claimant fell to be regarded as fair in terms of section 98(4) of the Employment Rights Act 1996. In so doing the Tribunal

preferred the submissions of Dr Gibson to those of Mr McParland. In relation to the material Findings in Fact which it has made on matters in contention between the parties and to the application of the law upon those, the Tribunal did not consider that the respondents had breached their own policy in the claimant's Line Manager Ms Brien deciding to refer the circumstances of the claimant's case to a decision maker at the point which she did so. The same notwithstanding the fact that she did not yet have in her possession an up-to-date Occupational Health Report. Ms Brien was not the decision maker in relation to dismissal or continued support of absence and she was reasonably entitled, as the Tribunal has found, to expect that the decision maker would inform his or herself about the claimant's up-to-date medical position, as at the date of taking that decision; that is to say and as in fact turned out to be the case, that the decision maker would not take the decision until they had had sight of and considered clarified any aspect if necessary of the up-to-date Occupational Health Report.

192. The Tribunal was satisfied, and on the evidence and has found in fact that as of the 19th of October 2017, if not earlier, the claimant was on notice that the termination of her employment was a possible outcome which could result from a further extension of her period of continuous absence in circumstances where the prospect of her returning to work within a reasonable period could not be identified. The Tribunal did not consider, in the circumstances, that the fact that the decision maker had not proactively arranged a further meeting with the claimant to discuss the Occupational Health Report once received and prior to taking the decision to dismiss, constituted, per se, a failure to consult on the part of the respondent. The Occupational Health Report of 7th December 2017 was available to the claimant prior to being made available to the respondent's decision maker. The claimant did not request a meeting with her Line Manager or with the decision maker on the basis that she took issue with the content and or the conclusions of the Report or wished an opportunity to be heard further on it before a decision was taken. The claimant could have requested such a meeting or, alternatively, expressly raised such concerns in writing had she chose to do so. In the words of the EAT in **East Lindsay District Council v Daubney** she had "an opportunity to state her case". The fact that she did not request such a meeting was one explained by her in

terms of her own evidence. She had touched upon the content of the report conversationally with her Line Manager Ms Bell and in that discussion had only mentioned that a question had arisen in her own mind as to her own understanding of the penultimate paragraph on the first page of the Report (page 114 of the Bundle). She considered that the words "*and reports her symptoms are well managed and controlled*" would not be accurate if it was intended by the author of the Report to be read as relating to her slipped disc which had formed the subject of the preceding Report. She asked her Line Manager, Ms Brien, what she thought the paragraph referred to. Ms Brien had replied by expressing the view that, for her part, she read the particular words as clearly referring only to the claimant's other medical conditions which were also referred to in the same sentence and paragraph and not specifically to the claimant's slipped disc. The Tribunal, for its part considered that to be an objective and proper reading of the reference subjecting the words used to the normal rules of construction and according them their normal English language meaning. The claimant summed up that exchange and her own view of the Report, in evidence, by stating that in speaking with her Line Manager about the Report and the applicability of the particular words which she had identified, by stating that she had "*wanted clarification and I got it*". She confirmed in evidence that at the end of that exchange with her Line Manager, Ms Brien would have had no reason to believe that she, the claimant, had any ongoing concerns about the Report, wanted to discuss its terms further, or wanted her Manager or the decision taker to take any action in relation to the Report before considering its content as part of the decision making process.

193. The Tribunal accepted Dr Gibson's submission that upon its proper construction the Report identified that there was no reasonable prospect of the claimant returning to work for a further period of at least six to eight weeks and that the period could be longer depending on when the claimant obtained a specialist appointment and yet again depending upon what treatment, if any, the specialist recommended. The respondents were entitled to rely upon the Occupational Health Report and were not required to look behind it in the absence of any obvious error appearing on its face. While recognising that another employer in

other circumstances might have decided to defer a decision to dismiss for a further period of time, in the hope that the specialist once consulted might be in a position to identify a return to work within a reasonable period, the Tribunal unanimously considered that the respondents were not obliged to do so nor did they consider that no reasonable employer, acting reasonably in the circumstances, would have failed to do so.

194. While recognising that the position adopted by the claimant throughout was that of communicating a desire to return to work and while accepting the sincerity of that aspiration, the Tribunal considered that the respondents were reasonably entitled to conclude, on the medical facts and other facts available to them at the time, and notwithstanding the claimant's laudable aspiration, that the claimant was unlikely to return to work in the foreseeable future, as in fact turned out to be the case, and might therefore reasonably be dismissed on account of ill health. While recognising that the claimant's nine years of service was by no means insignificant, the Tribunal further considered that the respondents were entitled to take the view, when weighed in the balance that it did not justify the decision to continue to support the claimant's absence for a further indeterminate period of time, particularly so in the context of civil service where, as Dr Gibson submitted, length of service of 20 years or more is by no means unusual.

195. Regarding the issue of the respondent's Appeal Manager declining to receive the claimant's Appeal when tendered outwith the ten day period provided for in the respondent's policy for the submission of an Appeal, the Tribunal unanimously considered that that decision fell within the band of reasonable responses available to the Appeal Officer and rejected Mr McParland's submission that the decision had been taken on a purely arbitrary basis. The Appeal Officer, Ms Bell, explained her reasons for deciding, as she did, to reject the Appeal as out of time, both in her letter communicating that fact to the claimant and in her evidence before the Tribunal which evidence the Tribunal accepted as both reliable and credible. As explained by her, she did not consider that she had any discretion, under the policy, to admit a late Appeal as the policy contained no provision for acceptance of late Appeals and to do so, in the absence of exceptional circumstances, would

be to set an inadvisable precedent. Her practice she confirmed had consistently been one of rejecting late Appeals. She did not consider that the circumstances presented by the claimant in her tendered Grounds of Appeal amounted to exceptional circumstances although she did, as a matter of fact take time to ask
5 Annette Russell if she accepted that on or about the 27th of December she had advised the claimant that her compensation would be calculated on 40 weeks' wages based upon her nine years of service and noted Annette Russell's position that she did not.

10 196. The Tribunal did not consider that the evidence before it supported a Finding in Fact that Annette Russell had made such a misrepresentation to the claimant and while the claimant's position in her pleadings and before the Tribunal had initially been that her Manager Ms Brien had made the same misrepresentation to her, she ultimately departed from that position in cross examination.

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197. In her evidence before the Tribunal, the claimant could not be specific about when the alleged misrepresentation was made. Neither was she consistent in her accounts of what words were said to have been spoken. While giving weight to Mr McParland's submission that the high point of Ms Russell's evidence was that
20 she could not recall making such a statement, the Tribunal did not consider that that impacted adversely upon her credibility. The Tribunal considered that the reliability of her evidence was strengthened by the finding in fact made by it, that she did not at the material time in fact know whether and to what extent the claimant's having taken partial retirement would have upon the amount, as
25 opposed to the percentage, of compensation she would receive. The Tribunal believe Ms Russell in this regard and accepted her evidence.

198. In her tendered Grounds of Appeal, following the assertion that the Dismissing Officer had made the representation, the claimant states "I had already been
30 advised of this". It was initially explained by her in evidence being a reference to Miss Brien having told her so. That position however the claimant ultimately accepted before the Tribunal was one entirely without foundation. It was clear upon the face of the email that the claimant founded upon in this regard that the

very reverse had been the position and that her Line Manager, Ms Brien, had gone to the extent of expressly cautioning her against concluding that her payment would be unaffected by the fact that she had already taken partial retirement and further had expressly advised her that she should herself take steps to check the actual position before taking any decision. Ms Brien had also expressly advised the claimant, given the lack of clarity at that point of time, that she should appeal the dismissal decision in order to preserve her position. That that was the reality of the claimant's interaction with her Line Manager was one which she ultimately accepted in the course of evidence relying then solely upon the assertion that the Dismissing Officer had made such a misrepresentation. As already indicated the Tribunal did not consider that the evidence supported the making of such a Finding in Fact and unanimously considered that the respondent's decision to accept the positions of Ms Brien and Ms Russell, which was to the effect that they did not so misrepresent matters, was one which at the time at which it was taken, fell within the band of reasonable responses available to them. Separately, had the Tribunal made such a Finding it would not follow, in the circumstances that it had in effect prevented the claimant from marking an Appeal. Nor, did the Tribunal consider that the claimant would have been entitled to rely upon such a representation given the state of her own knowledge arising, as it did in the circumstances of inquiries made directly by her of the Pensions Office in respect of a colleague in a similar circumstance in the preceding year.

199. It was the claimant's evidence and the Tribunal accepted the same, that the amount of compensation which she would receive was an important factor to be weighed by her in deciding whether or not to exercise her right to appeal against the decision to dismiss her. The claimant, however, decided to give up her right to appeal without knowing what the actual position was but rather did so while proceeding upon an assumption, as it happened an erroneous assumption, on her part that the amount of her compensation would be unaffected by the fact that she had taken partial retirement. There was nothing in the circumstances with which she was presented which compelled her to take that course of action. She could and, in her own interests ought reasonably to, have exercised her right of appeal in order to preserve her position pending clarification of the compensation issue.

200. The Tribunal unanimously were of the view that in, in determining to reject the claimant's tendered Appeal as out of time, the Appeal Officer did not fail to follow a fair procedure.

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201. The Tribunal accepted the submission made by Dr Gibson under reference to the Inner House of the Court of Session in **BS v Dundee City Council** and to the decision of the EAT in **Spencer v Paragon Wallpapers Limited** in turn referred to by the Court. That submission was to the effect that the basic question that has to be determined when looking at the fairness of the dismissal, in cases where an employee is dismissed on the grounds of ill health, is whether, in all the circumstances, the employer can be expected to wait any longer and, if so, how much longer and that the matters to be taken into account include the nature of the illness, the likely length of the continuing absence, the need of the employer to have done the work which the employee was engaged to do and the circumstances of the case.

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202. On the evidence presented and as reflected in the Findings in Fact which it has made, the Tribunal unanimously considered that the respondents had taken those factors into account in reaching the decision to dismiss. The first three factors were not matters truly in contention between the parties. The fourth factor, however, was one very much at large before the Tribunal.

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203. Mr McParland, for his part, submitted that the evidence before the Tribunal was insufficient to establish that there was a continuing need on the part of the respondents to have done the work which the claimant was engaged to do. He submitted that the respondents required to show expressly the detrimental impact of the claimant's particular absences upon their business operations. Dr Gibson, for his part, submitted that standing the virtual nature of the call centre operated by the respondents in which the claimant, in common with many other employees across the country was employed to work, and the fact that the respondents were failing to meet their average length of time to answer targets combined to justify such a Finding in Fact. The Tribunal accepted Dr Gibson's submissions in this

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regard and has found in fact, on the evidence presented that there was a continuing need on the part of the respondents to have done the work which the claimant was engaged to do and that the claimant's continuing sickness absence, along with that of other employees employed to do the same work, did adversely impact and at the time of the decision to dismiss was adversely impacting upon the respondent's ability to meet their set performance quality indicators in terms of providing service to the public. The claimant's dismissal had the effect of freeing up a salary which the respondents were able to deploy in the employment of another worker allocated to the virtual call centre. The Tribunal accepted the Dismissing Officer's evidence which was to the effect that the recruitment of staff, to amongst others the virtual call centre function, was a continuous process across the respondent's organisation and that in the relevant period there had been two recruitment exercises carried out at the Bathgate Contact Centre.

204. In relation to the complaint of discrimination, the Tribunal accepted that the respondent's dismissal of the claimant for reason of ill health capability amounted to unfavourable treatment for the purposes of section 15 of the Equality Act 2010. In relation to justification the Tribunal unanimously preferred the submissions of Dr Gibson to those of Mr McParland. The Tribunal was satisfied on the evidence that the respondent's aim of providing the public with an efficient and effective telephone call service was a legitimate aim for the purposes of section 15 of the 2010 Act being an aim the achievement of which required employees, employed to carry out that work, to be in attendance at work regularly and to be in a position to take and answer telephone calls. The Tribunal was further satisfied that where employees were unable to do so, after a continuous period of absence and in circumstances where there was not identified a date by which there was the prospect of them returning to work within a further reasonable period, their dismissal could, and in the instant case of the claimant's dismissal did, constitute a proportionate means of achieving that legitimate aim, freeing up as it did salary resource to fund the recruitment of further call answering personnel to the virtual call centre. In reaching that conclusion the Tribunal sought to balance the reasonable needs of the employer on the one hand against the discriminatory effect of applying their absence management policy to and the consequential

dismissal of the claimant. The Tribunal was not persuaded by Mr McParland's submission that there was available to the respondent a less discriminatory means of achieving their legitimate aim the same being to defer the decision to dismiss the claimant for a further indefinite period of time and to continue to support her meantime. The Tribunal accepted Dr Gibson's submission in that regard that such a course of action would not result in the achievement of the legitimate aim but rather would, in the circumstances, undermine it.

205. While the Tribunal accepted that the respondents were a large organisation with a large budget, they also accepted the evidence of the respondent's Dismissing Officer and the correlative submission of Dr Gibson which was to the effect that the fact that the respondents being a large organisation resulted in them having a large budget did not mean that they had the latitude to exceed that budget. *Per contra* they were accountable to the public purse. A large budget did not mean an infinite budget and that while the claimant was one individual she was also one of a number of individuals working within the virtual call centre whose long term sickness absence could be seen to adversely impact upon the achievement of the legitimate aim, a proposition which the Tribunal unanimously accepted. The Tribunal held that the respondent had shown that the application of their sickness absence management policy to the claimant and her ultimate consequential dismissal, was a proportionate means of achieving a legitimate aim. The Tribunal accordingly held that discrimination, in terms of section 15 of the Equality Act 2010, had not been established by the claimant and that the complaint of section 15 EqA 2010 discrimination falls to be dismissed.

206. In summary, the Tribunal unanimously disposed of the issues before it for determination at Hearing as follows:-

(First) That the respondent had shown a potentially fair reason for the claimant's dismissal in terms of section 98(2) of the Employment Rights Act 1996, the same being the reason of capability;

(Second) In dismissing the claimant the respondent followed a fair process.

(Third) The respondent acted reasonably in treating the established reason as a sufficient reason for dismissal, that the respondent's decision to dismiss the claimant fell within the band of reasonable responses open to a reasonable employer and that the dismissal fell to be regarded as fair in terms of section 98(4) of the Employment Rights Act 1996.

Disability Discrimination

(Fourth) The legitimate aim of the respondents, relied upon by them for the purposes of section 15 of the Equality Act 2010 was the aim of providing the public with an efficient and effective telephone call service which aim was, in the circumstances presented, a legitimate aim within the meaning of section 15 of the 2010 Act.

(Fifth) The respondent had been able to show that their actings, in applying their sickness absence policy to, amongst others, the claimant and the claimant's consequential dismissal constituted, in the circumstances, a proportionate means of achieving a legitimate aim; and thus,

(Sixth) The respondent did not discriminate against the claimant in terms of section 15 of the Equality Act 2010.

(Seventh) The complaints of unfair dismissal and discrimination because of something arising in consequence of disability are in consequence dismissed.

Employment Judge: Joseph J D'Inverno
Date of Judgement: 28 February 2019
Entered in register: 28 February 2019
And copied to parties

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