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# EMPLOYMENT TRIBUNALS

**Claimant:** **Ms M Morley**

**Respondent:** **London Borough of Waltham Forest**

**Heard at:** **East London Hearing Centre**

**On:** **Wednesday 28 August to Friday 30 August and Tuesday 3 September to Thursday 5 & 24 September 2019 (24 September -Tribunal only)**

**Before:** **Employment Judge Prichard**

**Members:** **Mr K Rose**
**Mrs B K Saund**

**Representation**

Claimant: In person

Respondent: Mr S Harding - counsel, instructed by LBWF Legal Services
Ms F Fayemi - paralegal LBWF)

## JUDGMENT

**It is the unanimous judgment of the Employment Tribunal that:**

**(1) The claimant was fairly dismissed and therefore her claim of unfair dismissal fails and is dismissed.**

**(2) Her complaints of direct race discrimination, direct and indirect sex discrimination, and her complaints of disability discrimination (failure to make reasonable adjustments section 20 Equality Act 2010), all fail and are dismissed.**

**(3) Further, the claim of unfair dismissal was presented out of time in circumstances where it was reasonably practicable to have presented it in time (Employment Rights Act 1996 s 111), it would have been dismissed on that ground also, anyway.**

**(4) The discrimination complaints of matters, barring the appeal against dismissal, were out of time for the purposes of section 123 of the Equality Act 2010, but time was extended for this tribunal to hear those complaints on the grounds that it was just and equitable to do so.**

## REASONS

1 The claimant, Maxine Morley, is now 56 years old. She worked for Waltham Forest for just under 3 years until 19 April 2018 when she was dismissed because of her excessive sick leave, resulting in her hitting the trigger points on the respondent's Managing Sickness Absence policy. She had been given a first formal warning under the policy on 24 July 2017 which imposed special attendance requirements over the next 6 months, of which she was in breach as at January 2018.

2 The effective date of her termination was 19 April 2018. The claimant contacted ACAS on 8 August. The primary limitation period for all claims except the appeal against dismissal had expired on 18 July. The matter was in early conciliation for the usual one month until a certificate was issued on 8 September, the claimant then presented her claim form on 19 September without any further undue delay. She had not had help or advice with presenting her claim. We will deal with the time limits below.

3 The original claim was for unfair dismissal and discrimination on grounds of age, race, disability and sex. There was mention of a mileage claim but the claimant appears not to have pursued this at all either at this hearing or at a previous case management hearing when it first came to the tribunal before Judge Goodrich on 19 December 2018. Mr Harding informed the tribunal that the mileage claim had been settled so we have not touched on it at all.

4 At the case management hearing, Judge Goodrich gave a strike out warning specifically on the age discrimination complaint, on the basis that it had no reasonable prospect of success under Rule 37(1)(a) of the Employment Tribunal Rules of Procedure 2013. The claimant did not respond to that warning and therefore the claim was struck out. What remains are the other discrimination claims under the other 3 protected characteristics: race, disability, and sex.

5 The claimant worked as a Contract Monitoring Officer. This service consists of monitoring contracts that the council awards to providers, most of which involve social care of adults, children, young persons, individuals with mental health, and learning disabilities. Many of the contracts are residential facilities as well as services in the community. There are sundry public health providers including dieticians, a TB awareness service, cancer awareness, and HIV support.

6 In the claimant's team there were 5 contract monitoring officers working to 7 contract managers. They all reported initially to Mr Raja Iqbal, the Contracts and Supplier Relationship Manager. He left the council on 22 December 2018. He was

replaced by an outsider who was recruited to the post - Mandy Holland-Martin. Mr Iqbal had actually applied for that role too. It was to be a combined role over 2 teams it would have been a promotion for him if he had been successful. He currently works and is happily settled in the London Borough of Redbridge. The claimant suggested he left disgruntled as he had not been appointed, which we do not find to be the case. He has been a witness at this hearing. He was called particularly because the claimant states that if he had remained as her manager she would never have been dismissed, something which he disagrees with, although in fairness he did not say she definitely would have been dismissed. How could he?

7 Mr Iqbal issued the first formal warning on 24 July 2017 and subsequently set a date for a second formal sickness meeting on 17 January 2018, knowing then it might not be him who dealt with it. He handed over the whole process to Ms Holland-Martin who succeeded as the claimant's manager effective from 22 December.

8 As part of the handover between the 2 managers, Mr Iqbal sent Ms Holland-Martin a series of Excel spreadsheets with mini-summaries of the individual 12 members of his team. These addressed a) performance, b) sickness record, c) any special arrangements in their working patterns.

9 The claimant's profile read:

> "working pattern: full-time - usually working from home on a Monday (WFH), sickness: has been an issue is currently on the first formal stage, comments: whilst performance has improved it remains short of where her peers are. Is looking to become self-employed".

We read all these short summaries to get a rough idea of how the claimant compared to her peers, CM's Contract Managers, and CMO's Contract Monitoring Officers.

10 One of the claimant's chosen comparators within the team was Selda Bicer. She had a formal "flexible working" arrangement which is how the respondent likes to deal with staff domestic needs and family requirements. This flexible working arrangement came about because she had transferred in from another part of the council and had an existing flexible working arrangement with her previous management which was then honoured by Mr Iqbal and subsequently by Ms Holland-Martin. She came into work earlier and left earlier collecting children from school and, for example, worked from home after having done so. The rest of her profile reads differently:

> "Sickness: not an issue, comments: strong CMO, delivers high quality work and supports CMs to update templates".

11 Another factor was that Mr Iqbal said Ms Bicer always kept him informed of her whereabouts and her plans, unlike the claimant. Another difference was that she too had a working from home (WFH) day but, by contrast, she was always prepared to change that working from home day at little notice in addition to the flexible working arrangement. Having reviewed these profiles, the claimant's profile was the worst both in terms of sickness and performance.

12 The claimant was not alone in having sickness issues - Nana Sarfoi-Tawiah: "currently 3 days away from having an informal meeting, performance: very reliable and diligent. Needs to develop further relationship management skills with providers".

13 Farid Uddin, Contract Manager, was the same: "Sickness has been an issue, currently 3 sick leave days away from having an informal meeting". There were also criticisms of his performance, specifically over developing his RAG assessments (red, amber green) for some of his contracts.

14 The reference to the Managing Sickness policy triggers is at paragraph 5 of the managing sickness procedure. It is 8 working days of sickness absence in any rolling 12-month period, 3 periods of sickness absence in any 3-month period, or a pattern of sickness absence. The claimant was invited to an informal meeting on 4 November after she had 3 periods of sickness absence in a 3-month period. She was also told, because of raised sickness levels, she would be referred to occupational health. Her total sick days at that time were 69, of which 41 days were a continuous period due to lower back pain. The other absences related were headache, migraine, and stress.

15 In these tribunal proceedings the claimant advances 3 alleged disabilities: -

15.1 irritable bowel syndrome;

15.2 rhinitis;

15.3 depression.

We have seen 5 years of the claimant's GP medical records.

16 The claimant's latest period of absence, for stress, started on 18 October and continued. It was due to an incident reported in her medical record when she went to America. She goes to Florida yearly anyway, as she has family out there. She was born originally in Jamaica but has subsequently become a British Citizen. She was going to be with a man out there. It turned out when she got out there that the man she was going to be with had a wife already. His family were not supportive of her. It hit her self-esteem very badly. She started taking antidepressants of which she already had a stash at home, which she had previously been prescribed, but had stopped taking. She did not keep taking them for long.

17 After a short time, she reported that she stopped the SSRI as she felt it was making her more weepy. She told us consistently that the antidepressants made her feel dead inside. She had been prescribed Paroxetine in 2014, but since then, every time, Sertraline, at about 100mg per day (moderate dose). Her stash of SSRI's probably was Sertraline left over from the previous year, and still in date. The claimant also says it is against her culture (Jamaican) to be taking chemical medications. There is nothing exceptional about that; many people do not believe in antidepressant medication. She has since found counselling helpful.

18 The America incident led to 19 days sickness absence described as "personal life-

related stress". There was no formal documentary follow up following the 4 November informal meeting. We have seen an occupational health report for the claimant from the referral of 25 October. That report is dated 18 December 2016. The report stated:

> "Ms Morley reported that her current distress related to a very distressing relationship problem not of her making and this rekindled the post-traumatic stress disorder [sic] occasioned by her first husband's life-threatening behaviour towards her.
>
> Essentially Ms Morley went to the States on the understanding that she was going to get engaged and found that her prospective fiancé was already married. This was clearly heart breaking and she said she just "crumbled" when she got home."

19 The report states she had been referred for counselling by her GP but awaits the start of it. We understand she was given counselling by the respondent at the respondent's expense. It is part of their employee benefits package that they give 6 sessions of free counselling in any 12-month period with an option to extend at manager's discretion and/or by referral.

20 It echoes a later report which states that the claimant was having problems with her workload. It stated:

> "Of symptoms in role, it is likely that with her mind, distracted by her distress, that her work may be less efficient than normal for a while and she reported symptoms which indicated that at the moment she is trying to do too much.
>
> I would therefore recommend that she takes Wednesday off for the next 6 weeks working Monday, Tuesday, Thursday and Friday and that we review her again at the end of this period to see whether her recovery has started."

21 She was not reviewed again by occupational health and we have been shown no other occupational health report. The earlier report was from Dr C Ashby, an occupational health physician, which was not insignificant to the claimant, because she stated that the later report of 18 December 2017 approximately one year later was only carried out by an occupational health "advisor", Cynthia Edah, and was therefore an inferior report which did not give a true account of her state at the time. We find that assertion surprising, and impossible to accept.

22 The claimant's complaint was that the report did not accurately record what she herself said to the advisor which we find surprising.

23 Under Mr Iqbal's management, the claimant had arranged informally that she would work from home every Monday. We note, and this is an important factor, the respondent emphasises that working from home (WFH) is very different from flexible working. Flexible working is family friendly provision which was created in Part VIIIA of the Employment Rights Act 1996. Working from home is to do with the business needs. Working from home can be approved but it is subject to cancellation or change at short notice and should not be used for fixed commitments which are not work-related, for instance childcare.

24 The claimant explained to us the significance of Mondays. Her boy is now aged

12, he has special needs and the claimant likes to speak with the teachers at the school, at least once a week, to keep up to date with her son's performance. He was at primary school at the time of these events. For that to be possible she needs to pick him up from school at 3:15. She lives in Waltham Abbey about 30 minutes' drive from work.

25 On the other days of the week she has a place in the school's after-school club for him. The after-school club is heavily subscribed, they have no ability to take children on short notice which is why she has elected to have the Monday off permanently. The problem with this arrangement was that, unlike Selda Bicer, the claimant was not able to change her commitments, if it turned out that she had an unmissable work commitment on a Monday. Nonetheless, the arrangement had the approval of Mr Iqbal, albeit unofficial.

26 Mr Iqbal was not always *laissez-faire* and mild as a manager. There is an email exchange between himself and the claimant in July 2017 when he chased up the claimant and a colleague of hers, Daniel Ekechi, to set up purchase orders. He pointed out that certain purchase orders were outstanding since April and the providers in question had chased up a number of times, and the delay was impacting on the relationship with the providers, and it was fortunate that the suppliers had not yet emailed one of the LBWF Directors to complain, but implied it was only a matter of time.

27 The claimant replied by email of the same date, and it was a long email. We accept her evidence that she can touch type. The reply was far from mild:

> "It is unreasonable to expect us to perform tasks new systems we have never used before and be able to know what to do and who to contact to resolve related issues as our manager this should be your responsibility …
>
> I feel totally micromanaged under-minded and no-one is interested in any suggestions made to enable efficiency or prevent being burn out. I feel that I do not have a work history and this is my first job even though I have over 25 years of local government experience.
>
> The council has a stress test and I would be grateful if you could arrange for me to have this test please. I would be happy to arrange a test. Please forward me the link."

She was concerned about her workload, in a word.

28 Mr Iqbal replied to that reply by inserting his comments into her email. Basically, he disagreed that it was unfair or unreasonable.

29 There were other such email exchanges between himself and her, exchanges which he found hard work, and time-consuming. He sent a link the stress analysis test. It is a word document with 25 questions to answer e.g.:

> "I feel there are not enough hours in the day / I frequently feel impatient / I have a tendency to finish sentences for other people / I often rush through reading / I find at times that I grind my teeth."

30 Of the 25 points, 1 - 3 Yes's means no stress, 4 -13 is moderate, counselling may be required, and 14 + could be at risk of stress-related illness, counselling recommended. For whatever reason, the claimant simply never completed this test despite requesting it.

31 Shortly after that, on 18 July, there was a first formal meeting under the managing sickness policy which resulted in Mr Iqbal sending out a warning. This meeting was centred round Dr Ashby's occupational health report of the previous December 2016, already referred to. There was no other later occupational health report then. The letter convening it was sent on 29 June 2017, during which time the claimant had accumulated 45 days of sick leave. Because it was compiled on the basis of the rolling year from 9 September 2016 to 29 June 2017, the earlier 41 days of sickness absence based on lower back pain had disappeared. The majority of the sick leave for the later period was the 19 days off sick after the Florida incident. There were otherwise 4 spells of absence for headache migraine, the longest of which was 9 days, 1 for unknown causes, 1 for inflammation, 1 for allergy, 1 for an eye problem, and 3 days for "insect bite/lethargy". The migraines the claimant has stated are related to her condition of rhinitis which is one of the conditions she relies upon as a disability for her disability discrimination claim (see Pa 15 above, and further comment below).

32 Following the first formal meeting, held on 18 July, Mr Iqbal issued the claimant with a written warning on 24 July. It stated:

> "You have now had 7 days of sickness over the last 6 months and I must advise you that I am issuing you with a first written warning that will remain on your file for 12 months from the date of this letter. Your sickness absence will continue to be monitored over the next 12 months with a view to seeing a substantial improvement. I am therefore issuing the following targets for your attendance at work during the next 3-month period up to 24 October 2017 no more than 2 days sick leave. During subsequent 3-month period up to 24 January no more than 2 days of sick leave."

He told the claimant:

> "If during the next 3-month period you have more than 2 days sick leave consideration will be given to moving to the final formal stage of the sickness absence management process.
>
> If you are absent from work due to sickness in excess of these targets management may consider moving to the final formal stage which could lead to your dismissal from council service for failing to provide regular and efficient service. Hopefully it will not be necessary to move to this stage and I look forward to seeing an improvement in your sickness absence record."

33 The letter of warning is a template under the policy. It appears, from careful reading of the policy, the policy does not provide for an appeal against such warning (for that is what it is), in the same way as appeal rights would be given for a disciplinary warning. As it is a template, we cannot imagine that anybody would have deleted such a right of appeal if it had ever been in the template. We thought it might be an error at first but, on reviewing the policy, it would appear not. There is no ACAS code on such a policy either.

34 A curious feature of the claimant's evidence was that she never really thought

that her employment with Waltham Forest was at risk. Why she did not is a matter of puzzlement to the tribunal. She somehow thought that the letter meant something other than it clearly stated. She apparently had complete faith that Mr Iqbal would never dismiss her.

35 Shortly after that, the claimant emailed Mr Iqbal to complain about her workload. He asked for a response to the stress test. He never received one. He was also chasing her about her lack of reporting back to him. He did not always know what she was doing. In the tribunal's view, he remained very patient with her. Nowhere in this email of 27 July does she complain about the prior attendance warning.

36 On 9 August at 12:15pm she emailed colleagues, not Mr Iqbal, stating:

> "Hi guys, I have a flat tyre and it's too late to come in so I am working from home today".

Amazingly, she later emailed her colleague Daniel to say:

> "Hi Daniel, it's not a flat tyre but the run flat technology is playing up on my car so I need to take it to my mechanic to get him to take the error message off."

You do not need to be a mechanic to know that you have a flat tyre.

37 The other thing the tribunal noted was that the claimant would often use working from home days, WFH days, to mask sickness absence, particularly in respect of her IBS. An example occurred on 13 September by email to Mr Iqbal at 9:38am:

> "Good morning Raja
>
> My belly is much better today but still not friendly enough to be with people. I will carry on with my telephone calls etc as discussed yesterday from home."

And he replied:

> "Hi Maxine
>
> I am sorry to hear that. You will need to dial in to the call later on about residential. Also, you had the flexibility to WFH yesterday which is what I usually do when someone is not fully well but would like to continue to work. However today will be your third day of WFH, therefore if you are unable to attend work tomorrow you will either need to take it as sick leave or annual leave."

38 The tribunal took the view that Mr Iqbal was a lax manager. He was indulgent. The next manager Ms Holland-Martin stated to the tribunal that the teams she inherited "lacked boundaries".

39 So, for 3 days potential sick leave, the claimant had had Tuesday and Wednesday off as well as her normal Monday WFH, all 3 days she had working from home on full salary, not impacting on her annual leave, or sick leave, or the absence triggers. However, as is clear from the exchange, this did have the informal permission from Mr Iqbal on an *ad hoc* basis. But the exchange also showed there were limits to this.

40 Again, on 26 September, she sent an email to her team, copying it this time to Mr Iqbal, saying:

> "Good morning all I'm not feeling well and will not be in today"

and that was taken as one of 2 days sick leave for irritable bowel syndrome. Subsequently, she wrote to the same people again on Thursday 28 September to say:

> "Hi all I'm feeling better today but will work from home and will be in the office tomorrow".

It was not a request for leave, and this is what Ms Holland-Martin struggled with. It was simply informing them what she was doing. The claimant did not seem to think that working from home was a privilege or a concession but an entitlement.

41 There is no doubt that the claimant enjoyed working from home. She could get up later and work in her pyjamas and not have to travel to work. It might have been different if the claimant was coping well with her workload, but there were concerns as already stated, strong concerns, about her struggling with her workload.

42 Again, on 1 November, Mr Iqbal had to write to the whole team to inform them that:

> "Just a quick update to let you know Maxine is unwell today and Farid has had to take leave at short notice".

That was the first of 3 days sickness absence with headache/migraine which the claimant took as sickness absence.

43 So, Mr Iqbal had to take some action. He stated in an email on 1 November:

> "Hi Maxine
>
> Hope you are well. I think it would be good to have a catch up since you've been off work for 3 days recently. As you are aware you're at the first formal stage of the HR sickness management process and you were set a target of no more than 4 days sick leave every 6-month period. Please see attached letter..."

…. forwarding the original formal meeting of 24 July.

> "I think it is prudent to me for 2 reasons (1) if you take more than one further day of sick leave between now and 24 January you're likely to move to the formal stage of the sickness management process, (2) historically you've had sick leave over the late autumn early winter months so there is a risk if this occurs again this year you may find yourself on the formal stage of the process. I'll book some time in your diary."

44 There was a meeting on 10 November addressing performance issues. On that day he told the claimant that he had made an OH referral. Her appointment was on 22 November. Subsequently, Medigold Occupational Health Service contacted him. It states that she had not attended her appointment, that she arrived half an hour late

and they wanted a new appointment.

45 Waltham Forest has a policy which allows 5 half days per annum for family /childcare commitments.

46 On 24 November the claimant took half a day on that basis but was allowed to work from home for the other half of the day which seemed to us to be Mr Iqbal being indulgent compared to similar issues with Farid Uddin (who had a sick wife). Farid Uddin's position was complicated when his wife was ill because he had a new-born, so he had to take over much of the childcare from his wife.

47 When he took 2 days off to look after her that was 4 of his 5 half days spent. As he is a comparator for the purposes of the discrimination claim, that does not help the claimant.

48 The claimant's occupational health appointment was rescheduled for 4 December which involved a clash with an important work commitment. This was a team meeting and Mr Iqbal was complaining that this was the second team meeting she had missed in succession but he said:

> "Please go ahead as plan since any change now would incur a further cost. Thanks".

49 On 5 December the claimant wrote to inform him that she was unable to complete her monitoring visit of that morning because her IBS had flared up so she went back home. Mr Iqbal replied asking her if she was going to take it as sick leave and if not, he would be grateful if she could complete her overdue reports. Apparently, she worked from home on the 5th because the following day, 6 December, was recorded as sick leave – 1-day sick leave with irritable bowel syndrome.

50 On 12 December Mr Iqbal sent the claimant a first formal stage follow-up meeting invitation which was set for Wednesday 17 January 2018. Of course, Mr Iqbal was aware that at that stage he would have left the council and he asked the claimant to let Ms Holland-Martin know if she could not make it. That letter was on 12 December. Most of the council's letters are emailed or emailed and posted. The letter was dated 12 December. It is likely that would come to the claimant's attention. The following morning, she emailed Mr Iqbal on Wednesday 13 December, to say:

> "Good morning Raja
>
> My cooker is not working and I'm waiting for the engineer who is due between 11 and 2 today so I will work from home instead."

51 Again, it was put as a statement rather than a request. Mr Iqbal had to notify the rest of the team.

52 On 14 December, not long before Mr Iqbal was due to leave on the 22nd, the claimant wrote a very long letter of complaint to Mr Iqbal cc'ing it to Debbie Richards HR and to Mandy-Holland Martin, the incoming manager. She starts in her customary tone of indignation, after he had put a commitment into her Outlook diary:

> "Hi Raja
>
> I think it is grossly unreasonable for you to expect me to start this piece of work knowing that I discussed with you on Friday that I still had 2 homecare providers to visit and also 2 reports that were outstanding at the time. You were also aware that I ended up with 2 homecare visit more than everyone else as my colleagues had a number of cancelled visits."

This was about a visit to Salisbury Road, a residential facility for learning disabled residents.

53 He replied defending his request as reasonable, and stating:

> "I am afraid that if you don't conduct these visits I'll need to consider viewing it as you disregarding a reasonable management instruction and as such will need to discuss the matter further with Mandy and HR."

To which she replied vehemently and moralistically:

> "Once again I hope that you have the confidence and trust in me to complete the visits once I've completed my final report. Sadly, we are now half way through the day and my time has been spent on these emails instead."

There was truth in that. The claimant's emails were long, forcing Mr Iqbal to have to write long and detailed replies. But she was only concerned about herself, not him, or others in the team.

54 Mr Iqbal said that, yes, visits, do get cancelled but that he considered that the work allocation was a fair allocation between team members and that over the long-term course of one year the workload was even. Sometimes people can get slacker periods when an instant appointment is cancelled but the appointments do not remain cancelled, they are rescheduled and then it results in an uneven workflow. The contract managing team as a whole has to manage the team workload around annual leave, working from home, and flexible working.

55 There was a certain amount of correspondence between Ms Holland-Martin and Mr Iqbal before handover. We have already quoted the profiles of the CMs and CMOs above.

56 The occupational health report from second appointment of 12 December 2017 arrived on 18 December 2017. It was sent to Mr Iqbal.

57 The claimant states that it seriously understated her medical conditions which we find surprising as already stated above. Dealing with her medical factors it states:

> "Ms Morley confirmed the job details. She advised me that she sometimes suffers with rhinitis and during severe symptoms this triggers headaches, migraines and also some sinus problems. She advised me this has led to some time off from work 3 days absence. However following medication therapy as advised by her GP her symptoms appeared to have resolved themselves.
>
> During consultation we discussed her irritable bowel syndrome which she advised me was

> diagnosed 20 years ago and her symptoms are normally triggered by severe stress. However, her IBS symptoms appear well controlled."

It mentioned a haematology clinic, which has not been the subject of any consideration at this hearing or in these proceedings. The report answered specific questions which look, more or less, off the peg questions on the referral template. It mentioned that the rhinitis appeared to have resolved with medication, and:

> "Based on this and in my opinion Ms Morley appears capable to undertake her full duties."

58 Then the paragraph that has been the subject of most scrutiny at this hearing was:

> "At the present time Ms Morley voiced she perceived to be struggling with her workload. Based on this information I would advise regular weekly management reviews for the next 4 weeks in order to ensure that workload is manageable and achievable."

59 The next paragraph was: "What effect does it have on the employee's working life?"

> "Ms Morley's symptoms appear well-managed. However, with triggers of the rhinitis condition as mentioned above, her symptoms are associated with headaches, migraine symptoms, runny nose and sneezing. At the present time her symptoms appear to have resolved themselves with medication. However, there is a possibility that her symptoms may reoccur during changes in the weather conditions".

And further:

> "… At the present time I have not arranged a routine review with Ms Morley to occupational health …"

60 Just before Mr Iqbal left, the claimant sent a message to the team, Ms Holland-Martin and Mr Iqbal:

> "Hi all, I would like to share with you the good news that I became a grandmother again to my third granddaughter yesterday. My daughter Anika and baby are doing well.
>
> I am looking after Caleb and my older granddaughters and will be working from home today and tomorrow."

61 The tribunal observes, though we did not question the claimant closely on this, it is one thing when Caleb comes home from school and probably goes up to his room to watch TV or to do gaming; it is another thing if she has 2 granddaughters to look after. Exactly how much work she can do when she is looking after 2 grandchildren is questionable.

62 Ms Holland-Martin expressed no disapproval, maybe because she herself had a temperature of 102° and was unlikely to see the team before the Christmas break. She in fact returned to work Thursday 28 December. Bank holiday Monday was 1 January. Staff were expected back on Tuesday 2nd.

63 On 3 January the claimant emailed Ms Holland-Martin, subject heading -

Working from Home:

> "Hi Mandy
>
> I hope you had a lovely Christmas and New Year. I am due to be in the office today but I have to work from home as I mistakenly thought my son was back at school today and overlooked that it was inset day, so I have no childcare.
>
> Thanks"

64 As will be plain from the correspondence cited above, the claimant then had a rude shock. Ms Holland-Martin replied:

> "Hi Maxine
>
> I'm very disappointed you have presented me with a *fait accompli* in an effort to resolve your situation. Homeworking is to be discussed with line managers and is agreed in advance with specific targeted pieces of work to be achieved. It is not to be used as an alternative for childcare arrangements. However, I do appreciate that the unexpected may at times crop up and flexibility is needed within the workplace but these would be discussed with line managers and decisions made from an informed position rather than decided upon by individual workers.
>
> Please can you advise me what activity you had planned for today which will have to be rescheduled due to having to work at home. Did you have any visits planned, provider conversations etc.
>
> I am going to be writing to the whole team around the expectations of homeworking arrangements, flexi-days, the utilisation of annual leave, as I feel it is something that appears to be a little misunderstood by the team generally.
>
> Given that we have now received a copy of your OH assessment I had planned on having a face to face discussion about how I can support you with your workload and how I can proactively work with you, however I will defer these discussions with you until you return to the office tomorrow."

65 Her email was formidable. She sent it at 4pm that day. Before sending she took HR advice from Mr Marsden who informed her that emergency childcare is governed by the council's policy. It falls under the category of special leave. He also said that in the first instance employees should use their annual leave to cover emergency childcare but special leave could be granted paid at half pay hence the 5 half days already mentioned. It is possible she took advice from John Marsden before emailing the whole team with this formidable communication.

66 Her team, we note, was larger than Mr Iqbal's had been. She inherited another team which had moved into the contract management directorate under Darren Newman, her manager. It had transferred in for about 6 weeks prior. For 3 weeks Mr Newman had been managing the new transferee team prior to his leaving for a long holiday in India where he was from 5 to 27 December, returning to work on 28 December, when he met Ms Holland-Martin again. There were now 23 members in the new team.

67 Ms Holland-Martin stated that even the new teams, and not just Mr Iqbal's team,

"lacked boundaries". That was her evidence to the tribunal. Mr Newman had not really had a chance in the 3 weeks he had had them before going on leave to manage them. Ms Holland-Martin inherited all 23 team members to directly manage. Hers was a more senior role to that which Mr Iqbal had. He only managed half that number - 12. The team merged with the Brokerage team which deals with the awarding of contracts.

68 We heard that the Brokerage team never work from home. That is because they handled extremely sensitive information about identified vulnerable service users, and also because they handled highly sensitive commercial information about pricing.

69 The formidable team email was 2 pages closely-typed. The subject head was:

> "Important communication leave, flexi, homeworking, special leave and sickness policy pay and benefits procedures".

The subheading in the body was:

> "WARNING A LONG COMMUNICATION – PLEASE DO NOT DISMISS YOU MUST READ!"

70 It was arranged under separate headings: (1) annual leave, (2) flexible work approach, (3) homeworking, (4) special leave and (5) sickness. It was a bracing self-introduction. It might have come better as a face-to-face team meeting, but everyone has their way of managing. It was broad-ranging.

71 The 3 headings which affect this case are homeworking, special leave, and sickness. The sickness heading really deals with reporting rather than the counting of sick-leave days and the council's Managing Sickness policy. Employees were to telephone on a day of sickness. Texts and emails would not be accepted. Telephone calls had to be by 8:30am on the day the sickness occurred.

72 She stated of special leave etc. [This was the advice that she had received from John Marsden of HR]:

> "However, in ALL cases, I would expect a conversation to take place between the staff requesting special leave and the line manager to take place."

This was probably a thinly-veiled allusion to her earlier email to the claimant. The long team email did not mention any names.

73 Moving to homeworking she stated:

> "This is always at the manager's discretion. This is not a given arrangement. It is expected that homeworking is requested in advance with line managers and working towards identified pieces of work and commitment to targets to be achieved are agreed upon request."

It states:

> "Homeworking may be withdrawn from staff. This may be for a number of reasons such as assisting in managing difficult working relationships, as a supportive measure to meet targets, to drive up performance, to ensure staff understand capacity issues within the team giving an office presence."

This foreshadowed the line she was to take with the claimant the next day. It appears she had already decided on it at this stage.

74 At the meeting on 4 January Ms Holland-Martin had the Occupational Health report of Cynthia Edah, Occupational Health Advisor. This was the report with which the claimant took issue at this hearing, stating it did not give an accurate summary of the assessment carried out on 12 December. The report is dated 18 December 2017. In it Ms Edah stated:

> "at the present time Ms Morley voiced she perceived to be struggling with her current workload based on this information I would advise regular weekly management reviews for the next four weeks in order to ensure that workload is manageable and achievable."

75 The report's conclusions were:

> "From my assessment and based upon information provided by Ms Morley I would advise that she remains fit for work."

And then

> "Ms Morley's symptoms appeal well managed. However, with triggers of the rhinitis condition and as mentioned above her symptoms are associated with headaches, migraine symptoms, runny nose and sneezing. At the present time her symptoms appear to have resolved themselves with medication therapy. However, there is a possibility that her symptoms may reoccur during changes in the weather conditions."

And then

> "the triggers to her IBS symptoms she advised me that her IBS systems appear well managed. However, she voiced difficulty controlling her IBS symptoms during severe stress symptoms hence my advice that she undergoes regular reviews with management for the next 4 weeks as she perceived work overload to be her presenting stress triggers."

And

> "at the present time I have not arranged a routine review with Ms Morley to the Occupational Health. However, should her symptoms persist or management have concerns please do not hesitate ….."

76 Effectively the claimant was discharged from the Occupational Health Service. one can understand why Ms Holland-Martin felt this report imposed some duty on her to undertake a review of the claimant's working arrangements and workload with her to avoid a repeat of earlier symptoms which had now apparently resolved themselves.

77 It seemed to the tribunal that Ms Holland-Martin had planned to do what she in fact ended up doing which was to stop the claimant working from home to keep her under closer supervision in the office so that she could observe how the claimant's

workload was being dealt with. She thought that the claimant would be supported in this by more active regular oversight and supervision.

78 Coming to the morning of 4 January this day the claimant did return to work and she was very excited to come back because she was a grandmother again. Her daughter had given birth to what was the claimant's third grandchild and she was sharing pictures of her grandchild round the office from her phone.

79 She also approached Ms Holland-Martin telling her that she was blessed to have this grandchild and that she had been a much longed-for baby, and it had been a difficult journey. Ms Holland-Martin shared with the claimant that she had had some challenging life experiences herself that she had had five miscarriages and that her first husband had died of a brain haemorrhage, leaving her as a single parent at the age of 29, that she had 4 children, and that her 24 year old son was autistic. The two of them had, according to Ms Holland-Marti, had a friendly and supportive two-way discussion about their own life journeys. The claimant shared with Ms Holland-Martin that she was a single parent, that her husband left her after a difficult marriage, she had an older daughter from this first marriage, but had another child with another partner some years later (Caleb). It was a private one-to-one conversation. It appeared to Ms Holland-Martin to be welcome to the claimant. Ms Holland-Martin considered she was being empathetic and supportive. She wanted to appear approachable and supportive to this team member who came to her with a troubled history.

80 That was in the morning, in the afternoon they had a more formal one-to-one this was the meeting that had been arranged in the last paragraph of her email to the claimant of the previous day. She had stated:

> "Given that we have now received a copy of your OH assessment I had planned on having a face-to-face discussion about how I can support you with your workload and how I can proactively work with you, however, I will defer these discussions with you until you return to the office tomorrow".

81 The meeting was in the afternoon. The claimant started the meeting by agreeing with the content of the report which is curious as she later radically disagreed with it, both at work and during these tribunal proceedings. We find as a fact that Ms Holland-Martin minuted these minutes live, by touch typing as she went along. The claimant's account of her having a laptop in the meeting was inconsistent. At one stage she agreed that Ms Holland-Martin had a laptop but typed nothing, and later stated that she did not even have a laptop with her at all. The length and detail of these notes tends to support Ms Holland-Martin's account. The minutes start:

> "The OT [Ms Holland-Martin constantly and wrongly refers to OH as OT] report states that MM is fit for work and MM confirmed she did not doubt this. Recommendations from the OT assessment were to meet regularly for a period of four weeks to assist the workload MHM what day would be best to set these frequent meetings and MM suggested Fridays as it was quieter in the office and more is achieved."

82 Then came the more challenging part:

> "MHM advised that HR recommended removing home working from MM in order for appropriate support to be given by MHM so MM can feel supported by other members of the team by working in a team environment. MM to be office based 100 percent of the time when not undertaking monitoring of providers. MHM advised MM needs to be office based when writing up reports and managing emails rather than WFH during the four weeks of assessing and supporting workload as outlined in the OT ……..
>
> Immediately MM challenges this stating she feels that MHM was being unfair by withdrawing this as everyone else worked from home – MHM clarified that this is not granted to all staff MM said that all staff who raised this as a request had been permitted to work from home and MHM again clarified that not everyone had been permitted to WFH – annual leave had been suggested on occasions and others had just been declined and some not offered this benefit. MM said she feels that homeworking is beneficial for her as it helps her cope with her stress levels and that MHM would not be in the office for 100 percent of the time to oversee MM. MM went on to say that she felt that when working from home you can start later as you do not have the time travelling to work and you can work in PJs which is comfortable. MM said she feels that she needs to challenge this decision. She feels that this is penalising her and that this is not supportive MM has worked for LBWF for 2.5 years and now the benefit of WFH is being taken away."

83 So, the relationship between Ms Holland-Martin and the claimant got off to an exceedingly bad start with this. Later the claimant clearly explained the arrangement she had in place for Mondays (which was described above) around the afterschool club provision, pre-booked for the other days of the week. At this stage the claimant asked according to the minutes:

> "… how will you pick up these arrangements? MHM said that it was not for her to advise on that but for MM to find a suitable solution to her child's needs and suggested afterschool clubs, child minding arrangements etc… MM felt MHM was being unfair, MHM reminded MM that childcare is not a rationale for WFH".

Later Ms Holland-Martin stated that she found it very difficult that the claimant was somehow expecting her as a manager to arrange the claimant's personal childcare, but that was what the claimant seemed to expect.

84 The tribunal has been critical of Ms Holland-Martin in the way she raised this with the claimant. She was within her rights as a manager but as a question of ordinary consultation she might perhaps have initially suggested it to the claimant as an option. It struck the tribunal as a potential fair comment that because the claimant had presented her with a *"fait accompli"* on 3 January, she, in turn, presented the claimant with one the next day.

85 There was also some softening of Ms Holland-Martin's evidence. The minutes suggested that this was mandated by HR but that was not exactly so. The claimant herself checked with HR - John Marsden - who stated that HR had just presented Ms Holland-Martin with a range of options only one of which was instant withdrawal of WFH. The minutes suggest that this was being done with "guidance" from HR rather than a recommendation.

86 A background difficulty was that the claimant, for personal reasons, had an

aversion to childminders, because she had in the past encountered an abusive childminder. It occurred to the tribunal that she could have asked a fellow parent, the parent of one of her son's friends. However, the claimant stated that in the past her daughter had been picked up by a neighbour, and when she saw her father's car outside the house ran across the road got run over and was in hospital for six weeks. Therefore, she would not ask a friend or neighbour.

87 The discussion then entered an unhealthy spiral when the claimant said she was a single parent and that Ms Holland-Martin did not understand. That was not a clever thing to say under the circumstances because she already knew from the morning conversation that Ms Holland-Martin been a lone parent as well, at the age of 29. Eventually the claimant simply stated she did not want the meeting to continue and asked for it to stop. Ms Holland-Martin reiterated that working from home was effective from next Monday. The meeting had lasted one hour.

88 Following that, the claimant reacted badly. She wrote an email to Ms Holland-Martin early on 5 January saying:

> "Hi Mandy, I rang you on both numbers that you gave to staff however neither are set up to receive messages. I was ringing to let you know that I've been left very disturbed following the occurrence of yesterday's meeting and did not sleep at all last night and I am not in a good place at this present time…. I will write to you separately outlining the effects on me."

The claimant stayed off work sick on that day.

89 Ms Holland-Martin replied by giving her mobile number. The following Monday 8 January the claimant telephoned Ms Holland-Martin at 9.00am advising she would not be in the office all week:

> "MHM asked if this was sickness, MHM asked MM to keep her informed and wished her better soon."

90 The fact is that the claimant never returned to work again. Ms Holland-Martin emailed the team to say that the claimant would not be in all week. Ms Holland-Martin had put a first weekly meeting headed "Maxine and MHM supported management – work catch up Friday 12th". The outlook diary shows the status of this meeting as to be MM had "not yet responded".

91 The following Monday the claimant had not telephoned in. They left it that she would be off for that previous week so Ms Holland-Martin telephoned her and got no answer and had to leave a message:

> "Hi Maxine, I've not heard from you regarding and I am following up your sickness from last week and Friday before I would like to hear from you about your return to work please can you contact me and update me or send me a message and I will return your call. I hope you are improving and I look forward to hearing from you. Thanks Mandy."

The first Med3 medical certificate we saw is dated 16 January 2018 certifying the

claimant as unfit for work for two weeks from 16 – 30 January. The stated diagnosis was "stress at work".

92 The claimant raised a comprehensive grievance by letter to Ms Holland-Martin by email on 24 January 2018. There were arious headings (1) health and safety at work/work life balance (2) bullying victimisation, aggressive behaviour and emotional abuse (3) breach of data protection (4) Equality Act 2010 and Race Equality Act 2001. The reference to the so-called Race Equality Act 2001 appears to be a reference to the equality duty which came out of the McPherson report following the murder of Stephen Lawrence. Under the last heading the claimant included race discrimination, sex discrimination, age discrimination (because she is 54 years), and human rights for which heading she stated:

> "In unleashing so many of your personal tragedies and then using them to validate how strong resilient and organised you are, and implying I am not, is a violation of my human rights."

93 This reflected a concern that went over into the grievance hearing, that Mandy Holland-Martin should not have shared so much biographical detail (although her intention was never, as the claimant suggested it was, to belittle the claimant's problems). The claimant's grievance was taken forward as what is known in Waltham Forest as a "fairness at work" allegation. The next Med3 was for 28 days from 31 January to 27 February 2018 – the diagnosis: "Low mood/stress at work".

94 Following that on 12 February 2018 Ms Holland-Martin made a reference to occupational health. This was a routine reference in view of the claimant's continuing absence, with this diagnosis. The referral which was sent to the claimant states:

> "As you are aware you were due to attend a meeting arranged by Raja Iqbal to discuss managing your sickness – first formal stage follow up meeting was on 17 January. However, due to you being absent from work due to sickness on that day, this meeting did not take place … you have now had 31 days of sickness up to and including 30 January.
>
> I also advised you I would be referring you to Occupational Health. I will be asking if you have an underlying health issue that affects your attendance at work and if I need to consider any reasonable adjustments to consider this.
>
> Please find attached the medical consent form that you should return to me by Monday 19 February 2018."

95 As it turned out there never was a second occupational health report. The explanation was finally provided by Mr Harding in fact. The council had been having problems with employees attending occupational health referrals, seeing a copy of the report, and then not giving their consent for their managers to see it, thereby frustrating the whole purpose of the process for management to get a sound medically well-informed view of their employees' health and prognoses, with a view to returning to work, with or without adjustments. That is how the system is meant to work. So, the consent form that the claimant was being asked to sign was consent in advance to the

report, whatever it said, being disclosed to management. That was the general policy and the tribunal accepts that statement of the situation. In fact, the claimant never returned the consent form, therefore there was no other Occupational Health assessment and the last assessment of 18 December 2017 was the only one available when it came to considering the question of dismissal under the sickness absence management procedure.

96 The next Med3 was for two weeks from 27 February 2018 to 12 March 2018, diagnosis was "stress". The first meeting of the fairness at work investigation took place on 28 February the investigator was Alan Hiscutt who was a witness to this tribunal hearing. He worked for the respondent as Strategic Commissioner for Learning Disabilities. He no longer works with them but attended today from Brighton. This was minuted by a dedicated note-taker. The next Med3 was from 12 March 2018 to 27 March 2018 - "stress at work".

97 This last one expired on 27 March. By email of 26 March the claimant stated:

> "Hi Mandy, I am returning to work on Wednesday 28 March and would be grateful if you could arrange for an occupational health review as recommended by my GP. Please see copy of certificate I sent to you on 19 March."

It is true that the last Med3 had stated in the box for employer's agreement:

> "Awaiting outcome of a hearing and would benefit from review by Occupational Health."

98 The previous one had been a conditional sick note for 2 weeks from 27 February to 12 March saying: "may be fit for work taking account of the following advice" and it ticked a phased return to work stated: "aim to start a phased return on 5 March to have from 27 to 5 off". That was dated 27 February but the claimant never did return to work this time. This time, the claimant positively stated that she was returning to work and therefore on 27 March Tuesday Ms Holland-Martin emailed the whole team to say:

> "Just to update you Maxine will be returning to work tomorrow. Please can you give her a warm welcome back and make her feel comfortable upon her return…."

She also wrote a welcoming email to the claimant

> "Hi Maxine, thanks for your email below and we look forward to welcome you back to the team. Unfortunately, I am tied up all day in meetings and will be on leave effective Thursday and into the next week. Therefore, I have asked Debbie Richards to undertake your return to work interview on Tuesday 3 April in my absence. I will send a meeting in to invite to this effect... I will of course arrange for you to have an Occupational Health assessment but will require you to complete the consent form. I will send this to you separately."

99 Further to this account, apparently the consent form was sent to the claimant in the post recorded delivery and it needed signing for. Ultimately it was returned to the respondent as not collected. The claimant's evidence was that she never had the red

delivery failure notice posted through her letter box. On balance we find her evidence hard to accept. It is more likely that she knew what the consent form involved. She would not have a right to withhold any report from management. The meeting which so traumatised her on 4 January had been occasioned by Ms Holland-Martin and an occupational health report.

100 When the 28 March came around, at 9.05am the claimant telephoned Ms Holland-Martin. As minuted, her note says:

> "MM telephone MHM to advice she is not returning to work as she is still unwell. MHM asked if she was still off for the same reason as before or whether it was something else. MM confirmed it was still the same reason. MHM asked if she was self-certifying or whether she was going to her GP. MM advised that she had been to her GP and said she would like an OH assessment they were unable to do this with her and they recommended she contact her employer for this as per her Doctor's note. MM advised that she had tried to self-refer it to the OH assessment as she was known to them but they could not do this and said it needed to be from her manager. MHM advised MM that she had responded to her email of 26/3/18 from MM where she request an OH assessment and that she had responded to both her personal email account and her work email account".

101 The next step was an admirably comprehensive fairness at work outcome report dated 29 March 2018.

102 Mr Hiscutt recommended an action plan. He also recommended that MHM apologise to MM for sharing her personal information with MM and that MM kindly accept the apology. His recommendations were:

(1) Refusing the request for financial compensation for distress.

(2) He recommended that the claimant's request for her WFH to be reinstated be not upheld.

(3) Request for financial assistance from the council towards private counselling was not upheld and the claimant had counselling already on employee benefits and she should talk to her GP.

(4) The claimant's request for redeployment be not upheld.

(5) Mediation is scheduled between MM and MHM and as above MHM to apologise for sharing personal information and MM to accept.

103 His findings were:

(1) Complaint about suspension of WFH not upheld.

(2) Complaint about location of the meeting on 4 January was upheld. This was the claimant's complaint about: "data protection - you chose to hold a

> confidential meeting which left me in tears in committee room which is a public space. You appeared unconcerned that other people were leaving and entering the room, throughout the entire meeting including when I became emotionally distressed".

(3) Complaint about MHM's possession of a paper copy of an Occupational Health report is not upheld. (this referred to a rather ridiculous contention made by the claimant that because the report had been requested by Raja Iqbal (a manager she liked), that the successor manager Ms Holland-Martin should not have had a copy of it. That was a strange concept).

(4) Complaint that MHM was aggressive and intimidating towards MM is not upheld due to insufficient evidence.

(5) The complaint that MHM deliberately intended to cause MM distress is not upheld.

(6) The complaint that MHM's behaviour contravened the council's equal opportunities policy and MM's human rights, is not upheld.

104 Following the interchange between Ms Holland-Martin and the claimant the claimant obtained a further Med3 certificate on 28 March, for 2 weeks to 13 April, diagnosis "stress at work – will need Occupational Health review". We note that this Med3 was issued retrospectively on 4 April which was in the middle of that 2-week period. we are surprised and we did not think that it was possible to have a retrospective Med3 certificate.

105 Although the claimant was pressing for the occupational health report through her GP, she never signed the employer's consent form. It appears from her grievance complaint at para 103(3) above that the claimant did not want Ms Holland-Martin to get a copy of any OH report of hers. So, there was an impasse here.

106 By a letter of 6 April, the claimant was asked to attend a final formal sickness hearing. By email of 9 April from the claimant to Ms Holland-Martin and John Marsden the claimant said:

> "Hi Mandy, I'm attaching a medical certificate from my GP requesting a referral to Occupational Health. I would be grateful if arrangements were made for a referral to Occupation Health. This is the second time that the GP has requested it [true]
>
> I note from your correspondence that OH referral request form was sent to me but was returned to you by the post office. I would like this email to be used as permission from me to you or my new manager Joy to refer me to Occupational Health. Alternatively, the form can be sent to me by email rather than via the post which will only cause further delay. I would also like to comment that I have never been asked by Raja to complete a permission form in the past."

107 We have explained above why that had not been done in the past, but now it was. Joy Thorpe came in as a new manager essentially replacing Mr Iqbal who had

left. It had never been the intention that his post should be deleted. That was why Ms Holland-Martin ended up managing the two teams as described above, on an interim basis.

108 The final formal sickness absence meeting went ahead on 12 April. It was conducted by Darren Newman who was the Assistant Director of Commissioning, Ms Holland-Martin's manager. The claimant attended with her Unison advisor Terrie Sutton. John Marsden also attended from HR, and Khalada Uddin, Senior HR Adviser. The vexed meeting of 4 January was discussed. Ms Holland-Martin was there as a material witness. She was asked:

> "KU: Was there any support requested from the employee? MHM: Not at the meeting. KU: The workloads were they discussed here? MHM not at this meeting but at other meetings, Maxine discussed with her line manager relationship with peers and expectations. There may have been one or two additional visits but the visits were fairly distributed with the same timeframes. Maxine was given additional time to complete reports and this was raised by the line manager."

109 In summing up Terrie Sutton said on the claimant's behalf that on two occasions the GP had requested OH referrals and also that the respondent knew that MM had not received the medical consent form. Despite initial sympathy with the claimant about this, we remind ourselves that this meeting was really the meeting that should have taken place on 17 January 2018 but which did not take place because the claimant was off sick. Therefore, the whole of the last period of sickness with stress at work was not counted into this. The claimant had already hit the triggers in December 2017, hence the letter from Mr Iqbal then. That was the basis of this hearing, and ultimately of the claimant's dismissal. The letter of 24 July 2017 had said special attendance targets, and it was a trigger in itself. The general attendance triggers for the sickness absence management process to start, did not apply any more. They had been superseded by the special attendance requirements in the warning letter of 24 July 2017.

110 Following that, by a letter a week later, on 19 April 2018, the claimant was advised of the decision to dismiss her. The dismissal was based upon the first formal sickness meeting and the warning issued on 24 July 2017. The claimant had in fact met the attendance target on the first six-month period but had exceeded the limits on the second six-month period from October 2017 to April 2018. Management took account of the previous Occupational Health report of 18 December it was up to date relative to the situation they were considering. However, the up to date situation did contribute to the reasoning behind the dismissal. Mr Newman stated: "You have not confirmed a likely return to work date and you stated at your hearing that you are still finding it hard to sleep and having nightmares and you are struggling with work".

111 The stress toolkit sent to her by Mr Iqbal had never been completed despite the fact that the claimant had more than 3 months on continuous sick leave specifically diagnosed with stress. The council had supported the claimant with 2 x 6 counselling sessions in 2016 and 2017.

112 The letter records:

> "You confirmed you had been taking antidepressants for the last three months but recent have stopped taking these as they made you feel dead inside and unable to function properly."

113 This, incidentally, was put to the claimant at this tribunal hearing as it did not tally with other statements she had made elsewhere about whether she was taking antidepressants or not. It was another inconsistency which did not commend the claimant to us as a reliable witness.

114 Another reason for the claimant's dismissal was that she had given notice to management of her intention to return to work on 28 March. Arrangements had been put in place however the claimant failed to attend as planned and cancelled on the morning she was due in.

115 Mr Newman found that management had adhered to the council's sickness absence procedure. He also stated:

> "Your trade union representative had made a request for redeployment to another service however the level and frequency of your previous sickness absence and the continued uncertainty regarding your current state of health would in my view present same difficulties in service delivery for another team".

116 Accordingly, the claimant was given 4 weeks' notice under her contract of employment. She had been there for a year short of 3 years but this was a contractual entitlement. It was more than the statutory minimum.

117 The claimant appealed on 1 May. The headings were:

(1) Breach of procedure.

(2) Breach of the facts of the case.

(3) Action too severe.

(4) Other substantial reason (Ms Holland-Martin determined to dismiss me by any means).

(5) Conflict of interest and prejudice. (The claimant objected to Darren Newman hearing it, as he had had involvement in the decision to withdraw WFH).

118 The claimant's fairness at work appeal was conducted by Modester Anucha who was the Divisional Director of Housing Solutions, a wholly different directorate. She did not uphold a single one of the claimant's grounds of appeal. This outcome was notified on 18 June 2018, after the claimant been dismissed.

119 The appeal against the dismissal was conducted by Jonathan Martin the

Director of Investment and Delivery, a wholly different directorate. The outcome letter and was probably sent on 8 August 2019 although the letter itself was dated 8 July (which had to be wrong). At the appeal stage the claimant had been represented by Mel Ramsey of Unison whom the claimant described as inexperienced and ineffectual. He was the one she blamed for misinforming her about the tribunal time limits, and who told her that there was no hurry, as the appeal was still pending, and that she could wait until she had the appeal outcome.

120 The tribunal has serious reservations about accepting the truth of that account. Any accredited union representative who had had had any degree of training at all would surely have been told about the tribunal time limits. It is so well-known that employees are late, and then look for scapegoats.

121 In the appeal against dismissal, Mr Martin was at pains to emphasise the separateness of the FAW investigation and the dismissal appeal outcome. The respondent had deliberately done that so as not to roll up the two processes together, as the claimant had shown a determination to air her grievances against Ms Holland-Martin in any context. The fact was, the claimant had been in breach of the attendance targets before Ms Holland-Martin took over as her manager on the 22 December as already explained.

122 Mr Martin did not uphold the complaint that there was a conflict of interest with Darren Newman. He also stated that there were no obvious material changes which would justify a further occupational health report. The claimant had had repeated sickness absence, and repeatedly breached attendance targets that had been set for her. Mr Martin did not attend this tribunal hearing but his statement was put before the tribunal and we took it into consideration. In context, we saw no particular reason to doubt its content, just because the claimant has not been permitted to challenge him in cross-examination.

123 He refers to how the claimant:

> "… constantly tried to steer appeal hearing to her fairness at work complaint concerning this. This was not relevant. The two processes were kept strictly separate, but I did give the claimant some leeway and allowed her to refer to this at the hearing."

He further stated at the hearing the claimant referred to frequent difficulties in her personal life and mentioned traumatic life events. He noted she had been provided with counselling by the respondent, and this had not appeared to be effective in reducing sickness absence. The claimant appeared to be struggling with non-work issues which were not susceptible to management intervention.

<u>Conclusions - jurisdictional time limits</u>

124 I deal first with the time points. It will be clear from our judgment above that we have dismissed the unfair dismissal complaint (a) on its merits and (b) because it was out of time. There is no "discretion" in section 111 of the Employment Rights Act 1996,

to extend time. The determination depends on upon a dispassionate factual enquiry as to whether presentation in time was "not reasonably practicable". There is copious case law on employees receiving bad advice, whether it be professional or non-professional. A classic example is Riley -v- Tesco Stores Ltd & Greater London CAB Service [1980] IRLR, 103, CA (CAB advisor). About the only time has been extended is if advice comes from the tribunal office itself. However, from our experience having sat for many years, the tribunal staff are briefed not to give any advice to any prospective claimants about anything. They do not want to be blamed for late claims.

125 We decided the unfair dismissal case on the merits, as well as on the jurisdictional time point. Unusually this case came to a final hearing without the question of the unfair dismissal claim being out of time having been formally judicially considered. It seems to have slipped through the tribunal net.

126 The exception proves the rule. Even if we found in the claimant's favour which we are unlikely to that the claimant was misadvised by Mel Ramsey that would not have made it not reasonably practicable to have presented the claim before she did. Hence our finding.

127 In connection with the timeliness of the unfair dismissal claim the respondent's counsel referred to *Dedman v British Building & Engineering Appliances Ltd* [1974] ICR 53,CA*, Palmer & Saunders v Southend-on-Sea Borough Council* [1984] IRLR 119, CA*, Marks & Spencer Plc v Williams Ryan* [2005] IRLR 562, CA, and *DHL Supply Chain v Fazackerley* UKEAT/0019/18. This last refers specifically to awaiting the outcome of an appeal before an unfair dismissal claim.

128 Discrimination claims are different and that consideration is under Section 123 of the Equality Act 2010 where the tribunal may extend time where it is "just and equitable". Clearly the rejection of the claimant's appeal was in time relative to the presentation of the claim but the reference to ACAS was made on 8 August 10 days after the appeal. So was the outcome of the grievance the FAW process on 18 June but the dismissal itself was not nor was the FAW outcome of 29 March. However, the tribunal are influenced by the case of *Chohan v Derby Law Centre* [2004] IRLR, 685, EAT which is why we have considered that it was, on balance, just and equitable under Section 123 to consider the claimant's discrimination complaints notwithstanding that they do not appear superficially to have great merit despite *Hutchison v Westwood Television* Ltd [1977] IRLR, 69, EAT.

129 The claimant provided a Unison time line. She has a current complaint against Unison and has since changed her union. The rational of *Chohan* is that refusing an extension of time when a claimant may have been misadvised could be seen as handing a respondent a windfall. An enquiry into reasonable practicability under Section 111 of the ERA is completely divorced from the merits of the case, unlike the just and equitable discretion.

Unfair Dismissal

130 Having heard the case in its entirety we have to decide if the respondent's decision to dismiss the claimant was a reasonable decision under Section 98(4) and a potentially fair reason under Section 98(2) of the era of the Employment Rights Act 1996. It was clearly, under s 98(2)(a), a reason relating "to the capability or qualifications of the employees for performing work of the kind which he was employed by the employer to do". This is the section generally relied upon when an employee is dismissed for poor attendance due to sickness. Sometimes if it is a dismissal done under a sickness absence management policy, it can also be a dismissal for "some other substantial reason" under s 98(1)(b). There can be no doubt that the claimant's poor attendance was the actual reason and that is the reason relied on by the respondent in these proceedings. We reject the claimant's suggestion that it was Ms Holland-Martin's intention to be rid of the claimant by any means, which we find far-fetched.

131 Was it reasonable? In our view the respondent was patient to the point of indulgent with the claimant's objectively dreadful attendance record. This started long before January 2018 as has been emphasised above.

132 An up to date occupational health report would in our view have added nothing in these circumstances. We are uncertain as to how ill the claimant actually was in the last four months of her employment from January to April 2018. Stress at work is not a diagnosis, medically speaking, although it finds its way onto Med3 certificates as a diagnosis with depressing frequency. This absence seemed to be a reaction related to withdrawal of the claimant's working from home arrangements which completely upset her life. And the claimant found it unbearable after that point to be managed by Ms Holland-Martin.

133 As the respondent has commented more than once, current events tapped into previous traumatic life events affecting her which caused a reaction which the respondent and this tribunal considered disproportionate to the management measures. We consider that the claimant misconstrued reasonable, if firm, management action. It was simply unacceptable to the claimant and she reacted, as we saw, very badly indeed.

134 Dismissal under that procedure, as prescribed by that procedure, and following that procedure, was eminently well within the range of reasonable responses under Section 98(4). The claim for unfair dismissal is therefore dismissed.

Equality Act 2010 discrimination claims

135 We come now to the discrimination claims. Perhaps we can move from there to say that the FAW process was conscientiously and well-handled throughout. The tribunal was quite impressed by the obvious number of management hours that were invested in the original grievance hearing and the grievance FAW appeal. It leaves almost no room to infer any sort of discrimination on the grounds of race, sex or disability applied.

Direct race discrimination

136 The claimant is of Jamaican heritage. For her direct discrimination complaint, she compares herself to Selda Bicer a white Turkish woman. We have already dealt above with Ms Bicer's situation which was discernibly different from her own. Under Section 23 of the Equality Act 2010 ("Comparison by reference to circumstances")

> 23(1) "On a comparison of cases for the purposes of section 13 [direct] … or 19 [indirect discrimination] there must be no material difference between the circumstances relating to each case".

137 In this case there were substantially different circumstances (a) Ms Bicer was high performing CMO (b) she had an extant formal flexible working arrangement under part VIIIA of the Employment Rights Act 1996.

138 There is no *prima facie* case of discrimination. The tribunal cannot find any facts from which to construct a hypothetical comparator in the claimant's case, either. We noted above and from the mini summaries of Mr Iqbal that the claimant was the most problematic and weakest member of the team.

139 The claimant did not pursue claims of victimisation and harassment relating to race discrimination.

Direct sex discrimination

140 The claimant cites Mr Farid Uddin as a comparator whose wife was chronically unwell. She had also just given birth to a baby boy. He therefore had to take time off to look after their first child. Mr Uddin was a manager also. As stated above, in the Iqbal summaries, he was 3 sick leave days away from having an informal meeting under the policy. His portfolio had been changed and he had relationship issues. These were nothing like the concerns against the claimant who had been "short of where her peers are".

141 When we see how the claimant was given copious days working from home e.g. for someone to repair her cooker, quite apart from masking IBS sickness, this fails hopelessly under s 23 EQA. The circumstances were radically different.

Indirect sex discrimination

142 Indirect sex discrimination may have had more promise in that it related to the care of a young child. However, as the Mr Uddin example shows, women do not have the monopoly of caring for young children. and the claimant's putting that the claim was confusing but it is perfectly possible that a single father (or the father with an invalid wife) would not have been put at equal disadvantage. There is no statistical evidence. Mr Harding helpfully referred to *Shackletons Garden Centre Ltd v Lowe UKEAT/0161/10* for the concept of a "self-inflicted detriment". It bears on the present case because the tribunal was unimpressed by all the claimant's reasons for saying

that she could not use child minder, a fellow parent, a neighbour to cover the Monday when she would not have been available to pick her son up from school. We understand that she needed to see the teacher because her son had special needs but some other arrangement could have been found to deal with that, rather than incorporating it into a WFH Monday routine, which doubled as seeing the teacher and collecting her son in a late lunch hour.

143 We accept that although it was harsh compared to Mr Iqbal, who had tolerated the WFH and this arrangement for a long time, it was still, for the purposes of s 19 EqA, "a proportionate means of achieving a legitimate aim", for Ms Holland-Martin to withdraw WFH.

144 Further, we were referred to *Hacking & Paterson v Wilson UKEATS/0054/09* which reflects on changing society over years. In the past it had been taken almost as a matter of judicial notice that women were put at a disproportionate or particular disadvantage for the purposes of s 19(2)(b) EqA. However, now when there are so many arrangements out there to help with childcare, and so many more men have become involved in the care of their children, and it is not that unusual for women to be the main earners in their families and for the man to undertake the majority of the childcare, society has changed and some statistical evidence is needed to establish that a woman is at a disadvantage..

Disability Discrimination

We come to the disability discrimination. This has another layer of controversy. As stated above, the claimant is relying upon three alleged disabilities. The question of whether these amount to qualifying disabilities under s 6 of the Equality Act 2010 is for this tribunal to decide. For the purposes of Section 6

> "A person (P) has a disability if –
> (a) P has a physical or mental impairment, and
> (b) The impairment has a substantial and long term adverse effect on P's ability to carry out normal day to day activities".

145 Under the Equality Act 2010 (Disability) Regulations 2010, Regulation 4 provides:

> "(1) for the purposes of the act the following conditions are to be treated as not amounting to impairments:

(There then follows a list including: pyromania, kleptomania, physical or sexual abuse, exhibitionism, and voyeurism, to illustrate the type of conditions we are talking about).

> "(2) … for the purposes of the Act the condition known as seasonal allergic rhinitis shall be treated as not amounting to an impairment"

146 Everything that the claimant has described has been a usual incident of the condition, including her migraines. The occupational health report stated that her susceptibility would vary with weather conditions. (Seasonal allergic rhinitis is better known as hayfever). That appears to be a hard statement of law it has never been

stated by any doctor either in the claimant's medical record or in an occupational health report to amount to a disability.

147 In the claimant's own medical record her own doctor stated in her medical record in September 2015: "History: has had allergic reaction and unfit to work allergic rhinitis clinically: is this *déja vu* phenomenon as tired on holidays and cannot face work".

148 Following that on 2 October: "History: still not well, insomnia, anxiety, shivering, chest area, is she unwell with stress and anxiety as clinically I felt work is issue and using sinus's issue as lame excuse". That was a remarkable entry from a patient's own doctor. This had been early on where the claimant had only just started work for Waltham Forest. When analysed the rhinitis absences do not make a substantial difference to the days off sick which actually caused the triggers to be exceeded and the respondent could hardly have been accused of knowing that this was a disability if the law states categorically that it is not for the purposes of the Act.

149 As far as the Irritable Bowel Syndrome, IBS goes the respondent has admitted that this was a disability, and they knew about it. The medical advice said it was all under control. In the past she had been allowed to work from home when she had flare ups. There was an embarrassment factor also. Mr Iqbal had been extremely accommodating but that did not stop him from issuing the warning letter on 24 July 2017. The Occupational Health report stated that the IBS was well controlled so this was not a determinative factor in the respondent's treatment of the claimant.

150 As far as depression goes the closest we have to a diagnostic statement in the Med3 certificates "low mood". "Stress at work" is not depression we have stated above. We do not accept that the claimant had a mental illness, or in the words of s 6 EqA, a "mental impairment". She had a very extreme emotional reaction to what she perceived to be bullying and intimidation by management and the disruption of her Monday school routine.

151 So as far this goes the only qualifying disability we accept is the one that the respondent has accepted - Irritable Bowel Syndrome, IBS for which the respondent in the past has made several *ad hoc* reasonable adjustments, like Mr Iqbal allowing the claimant to work from home. We do not forget that the respondent was dealing with a situation that had happened under Mr Iqbal's management, not under Ms Holland-Martin because. As soon as she first met Ms Holland-Martin face-to-face, on 4 January 2018, that was the first and last day she spent under her management.

152 Under s 20 EqA 2010, the relevant provision, criterion or practice is requiring a certain level of attendance before triggering the sickness absence policy. We remind ourselves that the triggers under the procedure were 8 working days sickness in any 12-month period, or 3 periods of sickness in any 3-month period, or a "pattern" of sickness absence. In the event the claimant had 43 days sickness before the first informal review on 4 November 2016 and a further 40 days sickness second informal sickness review, and 7 further days trigger the formal process and at that time the aggregate total was 90 days. How was the respondent supposed to make

"reasonable" adjustments to absorb that amount of sickness absence? The claim is quite hopeless.

153 Next the claimant is making a s 20 reasonable adjustments claim over the withdrawal of Monday WFH. If the PCP is a need to attend the office on a Monday, it is impossible to see that this put the claimant at any specific disadvantage because of her IBS. She might have IBS on a Tuesday. The claim is misconceived. It is a legal category error. The whole focus of the withdrawal of the WFH on 4 January was the withdrawal of the fixed Monday WFH to accommodate a domestic school arrangement. The withdrawal of WFH was not a once for all blanket withdrawal of WFH, but the withdrawal of the Monday WFH as it was being used to accommodate a fixed domestic routine, and for a review of the claimant's workload in the office, for a review period.

154 If the PCP is put as a ban on any WFH at all (which it was not) Mr Iqbal's treatment frequent allowing of WFH days to deal with IBS itself could hardly be said to be "reasonable" it was more indulgent than reasonable.

155 There were no recorded incidents of IBS following the 4 January meeting where WFH was removed. The claimant being allowed to work on Mondays from home was a particular routine to accommodate the claimant's own domestic arrangements entirely unrelated to the disability IBS. The claim cannot possibly succeed.

156 The claimant is claiming that the failure to obtain an occupational health report after January 2018 was itself failure to make reasonable adjustment at (a) the claimant failed to return the consent form (b) as was found the claimant was principally dismissed for pre-January 2018 absences which were covered by the report of 18 December 2017 (with which the claimant disagreed), from Ms Cynthia Edah, the OH advisor. It is worth reiterating, as above, that the claimant was clearly reluctant for any occupational health to be seen by Ms Holland-Martin.

157 The rejection of the claimant's appeal against her dismissal cannot conceivably amount to a failure to make a reasonable adjustment given the extreme extent of her sickness absence historically, and her current inability to provide a current date of return to work.

158 Finally, the claimant claims that the respondent failed to make a reasonable adjustment by not keeping in touch with her. However, the claimant agrees that the last person she wanted to hear from was her manager. She suggested that perhaps Mr Marsden, whom she found quite sympathetic, should have done so. Contact was made, we are talking about a period prior to Ms Holland-Martin's management when there was plenty of communication. This was the era when she was leniently treated and enjoyed a good working relationship with her manager.

159 Coming now to the dismissal was that an act of direct disability discrimination relating to her IBS? Has the claimant shown that any person with as much sick leave as she had at the end of 2017 would not have been dismissed. In the tribunal's view, no possible claim for direct discrimination, on any ground, in respect of the dismissal

could succeed. Her historic level of absence was extreme and it was not that substantially contributed to by her IBS.

160 For all those reasons the claimant's claims all failed and are all dismissed.

Employment Judge Prichard

15 October 2019