



# EMPLOYMENT TRIBUNALS

**Claimant:** Mrs S. Holmes

**Respondent:** DHL Services Limited

**Heard at:** Birmingham Employment Tribunal

**On:** 17 February 2020 to 21 February 2020

**Before:** Employment Judge Mark Butler  
Mr P Wilkinson  
Mr P Talbot

## Representation

Claimant: In person

Respondent: Mr C Bourne (Counsel)

# JUDGMENT

The unanimous decision of this Employment Tribunal is that:

1. The claimant was not a person with a disability within the meaning of section 6 of the Equality Act 2010 by reason of her Irritable Bowel Syndrome ('IBS') or Pernicious Anaemia. Her claims of disability discrimination are dismissed.
2. The claimant was not unfairly dismissed. Her claim for unfair dismissal fails.
3. The claim for notice period is dismissed upon withdrawal.
4. For the avoidance of doubt, all claims in this case have been dismissed.

# REASONS

## Introductory Matters

5. The claimant presented a claim form on 11 December 2018, following a period of ACAS Early conciliation from 12 October 2018 to 12 November 2018. The claimant was employed by the respondent as, at least at the time of dismissal, an Operations Manager. She had been employed since 07 March 2005, with her dismissal date recorded in the ET1 as 23 July 2018. Claims were brought for disability discrimination, unfair dismissal and notice pay.
6. The claimant withdrew her claim for notice pay by email in advance of this hearing commencing. This part of the claim is therefore dismissed on withdrawal.
7. We heard evidence from the claimant, but no further witnesses. During cross-examination of the claimant, we were taken to several inconsistencies and ambiguities in the claimant's evidence. The tribunal on this basis found that there were some issues in terms of the reliability of the claimant's evidence.
8. For the respondent we heard from three witnesses. We heard from:
  - a. Mr Hedgecock, who was the claimant's line manager from in or around March 2018.
  - b. Mr Keely, who was the senior operations manager at the employing site, and who undertook the stress risk assessment, as well as a number of Return to Work meetings with the claimant. He was also appointed the claimant's Absence Review Manager, and
  - c. Mr Cook, the appeals officer for the respondent.
9. In terms of the evidence given on behalf of the respondent, there was little in terms of challenging the witness evidence when under cross examination. In terms of the oral evidence that each did give, this was consistent with their respective witness statements.
10. We were assisted by a bundle that ran to 597 pages. Although the actual number of pages was much more than this as the bundle contained several sub-pages.
11. On the morning of the first day of the hearing we were handed additional documents from both the claimant and the respondent. The parties were each given the opportunity to explain what each respective additional set of documents were, why they were relevant and why they had not been disclosed in accordance with tribunal directions. Having heard from each party in respect of their own additional documents we decided to allow the additional documents from both the claimant and the respondent to be added to the bundles. The documents each had some relevance to the matters before us, and we were satisfied that neither party would be caused any significant, if any, prejudice through adopting this approach.
12. We were provided with an agreed list of issues, which the tribunal was grateful for.
13. The morning of the first day was spent reading in. During the afternoon of the first day and all the second day, the claimant gave evidence. The respondent's witnesses gave evidence on the third day. The fourth day was used for deliberations. Judgement was handed down orally on the morning of the fifth day.
14. The tribunal was mindful of the need for adequate and regular breaks in this

hearing. Breaks were given at regular intervals throughout the hearing.

List of Issues

15. We do not repeat all of the agreed issues in this document, but only the issues in dispute which were necessary to determine in reaching our conclusion.

*Disability discrimination*

- a. Was the claimant disabled in law by virtue of Irritable Bowel Syndrome and/or Pernicious Anaemia?
- b. Was this a disability during the relevant period, that being from 08 February 2018 until the conclusion of the appeal following dismissal

*Unfair dismissal*

- a. What was the reason for the dismissal?
- b. Was that a potentially fair reason? The respondent relies on capability.
- c. Was the respondent reasonable in dismissing for that reason, having regard to all the circumstances of the case?
- d. Was the decision to dismiss within the band of reasonable responses?
- e. Did the respondent follow a fair procedure in dismissing the claimant?
- f. If the respondent did not follow a fair procedure, can the respondent show that if it had followed a fair procedure the claimant would have been fairly dismissed in any event?

The Law

*Disability*

16. The claimant brought a claim of disability discrimination, amongst others, against the respondent. However, this is a case where disability has not been conceded by the respondent. Therefore, in order to pursue that claim, she must first qualify as a person with a disability.
17. The burden of proof rests with the claimant to prove that she falls within the concept of being a person with a disability. It was for the claimant to bring the evidence to persuade the tribunal that she did have a disability within the meaning in the Equality Act 2010.
18. The definition of disability is as per section 6(1) of the Equality Act 2010:

“6 Disability

(1) 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.”

19. The word “substantial” for the purposes of section 6(1) is defined in section 212(1) of the Equality Act 2010 as meaning “more than minor or trivial”.
20. Schedule 1 to the Act provides additional provisions concerning the meaning of a disability. Of note is paragraph 2 of Schedule 1, which provides that the effect of an impairment is long-term if it has lasted for at least 12 months or is likely to last

for at least 12 months, and that

“If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur.”

*Unfair Dismissal*

21. The test of unfair dismissal is set out in section 98 of the Employment Rights Act 1996:

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

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

(b) that it falls within one of the potentially fair reasons laid out in that act...

22. One of the potentially fair reasons laid out in the Employment Rights Act, referred to in s.98(1)(b) is capability. Capability is defined in s.98(3) of the Employment Rights Act 1996 to include capability from a health perspective.

23. In determining fairness of the dismissal once the reason is identified, we as a tribunal have to take into account whether in the circumstances the employer acted reasonably or unreasonably in treating that reason, that being the claimant's capability from a health perspective in this case, as a sufficient reason for dismissing the employee. Further, we this decision shall be determined in accordance with equity and the substantial merits of the case.

24. We reminded ourselves that it is not for the tribunal to substitute our view as to whether we would have dismissed the claimant in the same circumstances, or not. This well trodden principle comes from **Iceland Frozen Foods Ltd v Jones [1983] ICR 17**, where it was held that:

“...in many (though not all) cases there is a "band of reasonable responses to the employee's conduct within which one employer might reasonably take one view, another quite reasonably take another; ...the function of the [Employment Tribunal] ... is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair.”

25. In other words, and as further expressed in that case, and reaffirmed by the Court of Appeal in **Post Office v Foley/HSBC v Madden [2000] ICR 1283**, we as a tribunal do not substitute our view for that of the employers. It is not for the tribunal to weigh up the circumstances and decide whether we would have dismissed in those circumstances. But we need to consider whether it was a reasonable approach by the respondent to dismiss in the circumstances before us. In other words, and it is often easier to understand the test when it is flipped on its head, with the question thus being: were these circumstances such that no reasonable employer would have dismissed the claimant? As it is only in those circumstances that the decision to dismiss would fall outside the band of reasonable responses. In deciding this we need to consider what was done to

reach the decision to dismiss. As well as, amongst other things, the procedure leading to dismissal.

26. Submissions were made by Mr Bourne on a **Polkey** reduction, should we have found against the respondent on unfair dismissal and on matters concerning time limits. However, these are not addressed in this judgment as we did not consider it to be necessary given the conclusions we have reached below.

### Findings of Fact

27. We make the following findings of fact, on the balance of probability based on all the matters we have seen, heard and read. In doing so, we do not repeat all the evidence, even where it is disputed, but confine our findings to those necessary to determine the agreed issues.
28. For the purposes of this judgment we have considered matters relating to whether the claimant had a disability within the meaning of s.6(1) of the Equality Act, before then turning to matters concerning unfair dismissal. Although, it must be appreciated that there is significant overlap between the two, and so the set of findings under each respective sub-heading may also have some importance and relevance in relation to the other matter.

#### *Disability: Irritable Bowel Syndrome*

29. The claimant did have a physical impairment. That physical impairment was bowel discomfort. The claimant referred to this as Irritable Bowel Syndrome ('IBS'). For the sake of clarity, and as the claimant refers to this as IBS, we are adopting the term IBS for her physical impairment.
- a. Although there was no formal diagnosis of IBS from a medical practitioner, that is not conclusive on this matter. This finding was made after having considered all the evidence that we did have.
  - b. Throughout the claimant's medical records there was reference to IBS. From this we concluded that the claimant must have been attending and informing her GP of the effects that she was suffering with. This in turn led to specialist investigations being undertaken. This was to investigate whether the bowel discomfort was in fact Inflammatory Bowel Disease ('IBD'). From the tribunal's experience, this is a standard approach. IBD and IBS have similar effects. It is normal when presenting with symptoms of bowel discomfort to be referred to a specialist to have the more serious condition of IBD investigated, with a view to having that condition ruled out.
  - c. Further, there is reference to her IBS symptoms in a number of her absence records. This is present in both self-certification records and in the discussions for which we had seen written notes.
  - d. These notes and the claimant's presenting of the effects are consistent with what the claimant was telling senior managers of the respondent. Both Mr Hedgecock and Mr Keeley acknowledged that the claimant was informing them of the effects of her bowel discomfort. Mr Keeley told the tribunal that the claimant had informed him consistently about this. Although this may not have been IBS in the medical sense, we are satisfied that there was a physical impairment relating to bowel discomfort.

30. The physical impairment affecting the claimant was a long-term one. This was conceded by the respondent. And is clear from the medical evidence, and history of references to IBS.
31. The long-term physical impairment did not have a substantial adverse effect on the claimant's normal day-to-day activities.
- a. The claimant's primary evidence on the effect that IBS had on her is in witness impact statement. ...
  - b. The claimant also refers to her, on occasion, becoming unconscious due to a combination of matters, including IBS. This was also the claimant's oral evidence. However, we saw no records of this in the medical records. Although the claimant gave evidence that she never attended on her doctor as she knew the cause, we find it difficult to accept that if somebody is losing consciousness, on several occasions, that they would not attend at a doctor somewhere.
  - c. In some cases, assertions of that type are supported by witness statement of a family member, friend, neighbour or the like. Similarly, issues in the workplace, no corroborating evidence from an independent witness- such as a colleague or somebody aware of the effects. And having had legal representation at WS exchange and in the early preparations for this case, surprising no such evidence has been brought. There is a real lack of supporting evidence in respect of the impact that the impairment or impairments were having on normal day to day activities.
  - d. Only documentary evidence we do have in this case are the OH Reports. The claimant had sight of these before they were released. And she signed them to confirm that they were accurate. In effect the claimant was signing to accept that the information recorded reflected the discussion that she had had with the OH practitioner. And there is nothing on these documents that convinces us that the impairment has had a substantial adverse effect on her ability to undertake normal day to day activities.
  - e. Nor is there anything in any of the medial records that we have been taken to. The lack of reference to impact on day to day activities- consistent with the accounts of both Hedgecock and Keeley- in that they said not aware of any incidents at work. There are no recorded incidents of Miss Holmes leaving work early or disappearing from her workstation for long periods of time. The claimant's witness statement or impact statement provides no evidence on this either.
  - f. And although the claimant did give an example of an impact in the workplace in that she left a meeting to go to the toilet for a substantial period of time, that being 45 minutes, this was not enough to convince the tribunal of any substantial adverse affect on normal day to day activities.

*Disability: Pernicious Anaemia*

32. The claimant had a physical impairment of pernicious anaemia. This is supported by the diagnosis that she received on 29 August 2019, which was made by Professor Tariq Iqbal. The letter confirming this diagnosis is at pp364A and 364B of the bundle.
33. The physical impairment was likely to last longer than 12 months. The claimant was receiving medication in the form of B12 injections, which she had been

receiving since 23 February 2018. The tribunal was satisfied that this was likely to last more than 12 months.

34. The long-term physical impairment was not having a substantial adverse effect on the claimant's normal day-to-day activities. Like that with IBS above, there was no evidence brought before the tribunal by the claimant as to the impact on normal day-to-day activities. Thus, the reasoning that supported the finding above on this point applies here and is not repeated.

#### *Unfair Dismissal*

35. On the 07 March 2005 the claimant started employment with the respondent.
36. The claimant was absent from a night shift on 04 November 2015. The claimant not only fails to attend for her shift, she also fails to contact any member of management in line with their Contact Procedure. The claimant provided the respondent with a reason for her non-attendance on 05 November 2015, and that was that she was woke up by her father panicking at 19.05 because her mother collapsed, and she had her mobile turned off.
37. On 27 November 2015 the claimant attended a disciplinary hearing for having failed to follow correct DHL contact procedure. By letter dated 02 December 2015 she was informed of the outcome of the disciplinary hearing. The outcome was a written warning that was to last for 6 months. This outcome letter is at pp146(i) and (ii) of the bundle. This written warning was live from 27 November 2015 to 26 May 2016. The claimant was given the right to appeal this decision. She chose not to appeal the decision. The claimant accepted that this process and decision was fair and reasonable in the circumstances.
38. The claimant attended an Occupational Health ('OH') assessment on 11 January 2016. The report is at pp89A and 89B (and repeated 437B) of the bundle. Within this report there is reference to a need for support at work. Glenn Raybone, the OH Assessor, concludes that the claimant is fit to perform her current role. No further review is recommended. It is also recorded that the underlying cause for her absences was an ear issue and a dependency issue when her mother was rushed into hospital.
39. The claimant was absent from work on 10, 17, 22 and 23 February 2016. She failed to follow the correct notification procedure again. She was invited to a disciplinary hearing that took place on 23 June 2016. The claimant was accompanied by a Trade Union ('TU') representative, Mr Hogan. Her absences were discussed with her and her TU representative.
40. The outcome of this disciplinary hearing was sent to the claimant on 23 June 2016 (see p.146A of the bundle). The decision was to discount absence on 10 Feb 2016 due to there not having been a Return to Work ('RTW') meeting, and the dates of 22<sup>nd</sup> and 23<sup>rd</sup> were discounted as those dates "fall within a start and end period of absence". A decision was reached based on the absence of 17 February 2016 alone. Steve Brady made the decision not to proceed to a Final Written Warning, but to re-issue the written warning that was still live. The claimant accepted that this process and decision was done fairly and was a decision that was reasonable in the circumstances. This written warning was live from 23 June 2016 to 22 December 2016. The claimant was given the opportunity to appeal Mr Brady's decision, but opts not to.
41. The claimant raised a grievance by letter dated 22 August 2016 (see pp146B(i) and (ii) of the bundle). This primarily concerned allegations of a lack of support. A grievance hearing was arranged. The claimant attended the Grievance Hearing

on 9 and 22 November 2016.

42. The outcome of the Grievance Hearing was communicated to Miss Holmes by letter dated 05 December 2016. This letter is at pp146F-146H of the bundle. The claimant's grievance was partially upheld. This included remaining on a permanent night shift but within a different area, AND the respondent was to provide ongoing support as referenced in the Everwell report of 11 January 2016.
43. At some point in early January 2017, the claimant was transferred to the role of Operations Manager in a different area, that being in FA1/Northworks.
44. The claimant was absent from 31 January 2017 for 2 shifts.
45. The claimant appealed against the decision she received following her grievance. The Grievance Appeal Hearing took place on 10 February 2017. The notes of that meeting are at pp.147-154 of the bundle.
46. The claimant was absent from work on 14 February 2017 for 1 shift.
47. The claimant was absent from work on 23 and 24 March 2017 due to sickness and diarrhoea. The claimant produced a self-certificate for this absence, which is at p.166 of the bundle.
48. The claimant was sent the decision of her Appeal Hearing by letter dated 24 April 2017. This decision is at pp174-175 of the bundle. The decision was to confirm the transfer of the claimant to FA1/Northworks. However, her appeal was unsuccessful in relation to shift allowance and the wiping of her sickness records for the period 01 January 2016 to 31 January 2017.
49. The claimant was absent from work on 3 May 2017. On this occasion she failed to follow the required contact procedure. As part of the investigation into this absence the claimant completed a short statement indicating 'I agree to the contact procedure and fully understand my commitment'.
50. The claimant was absent on 14 May 2017. On this occasion she failed to follow the required contact procedure.
51. An Absence Review Meeting takes place on 15 May 2017- although in bundle 15 March. Miss Holmes and Mr Keeley were present at this meeting. The initial hearing was adjourned on the evening of 15 May 2017, and reconvened the following day, on 16 May 2017. The record of this meeting is at pp155-164 of the bundle. In deciding that the claimant had reached a trigger point in the Absence Management Policy, Mr Keeley did not take account of the claimant's absences on 17 August 2016, 15 September 2016 and 11 January 2017. However, this trigger point was reached following absences on 31 January 2017, 14 February 2017 and 23-24 March 2017. In this meeting Mr Keeley confirmed that the claimant had been given a 'clean slate' when she started working in this new area, meaning he was not taking into account absences from when she worked in another area of the company.
52. On 17 May 2017, the claimant had a session of counselling. The record of this is at p.198 of the bundle. Within this document, 7 shifts for which the claimant was late was listed. The claimant was late on these 7 occasions.
53. The claimant completed a stress risk assessment with Mr Keeley on 12 June 2017. the claimant had direct involvement in this process. She provided input. The stress risk assessment was signed by the claimant to confirm its accuracy, and that relevant matters had been covered. This can be found at pp.192-197 of the bundle.



54. On 14 June 2017, the stress risk assessment action plan was sent to the claimant. As part of this plan, actions were expressed, which included: a recommendation that the claimant attends board review meetings, and that she has weekly 1 to 1 meetings with a senior manager. The claimant never did have a 1 to 1 meeting with a senior manager. This was consistent from the oral evidence we heard from both the claimant and Mr Keeley. Further, the claimant did not attend the board review meetings regularly. Mr Keeley had overall responsibility for ensuring that the stress risk assessment actions were implemented. However, he took no further action to action the plan, despite having knowledge of failings, in particular in relation to weekly 1 to 1 meetings.
55. An OH appointment was made for the claimant to attend at OH on 15 June 2017. However, she did not attend this appointment. She did not notify employer or OH that she was not attending this appointment (see pp202-203 of the bundle).
56. Over 21 and 22 June 2017, the claimant was absent for one day. The claimant self-certified her sickness (see p.206 of the bundle). A RTW interview was completed on 23 June 2017 (see p207 of the bundle). This recorded the reason for the claimant's absence as being 'Heavy Menstrual Bleeding causing IBS flare up' It further references that the claimant was in severe pain and passed out.
57. The OH appointment was rescheduled to take place on 11 July 2017. The claimant did not attend this rescheduled appointment. Nor did the claimant notify her employer or OH that she was not attending.
58. On 29 August 2017, the claimant was absent from work again.
59. The OH appointment was again re-arranged, this time to take place on 13 September 2017. The claimant attended this appointment, the record of which is at pp217-218 of the bundle. The Oh Practitioner concluded that the claimant was fit for work in her current role with no restrictions or modifications. That she was unlikely to have a physical or mental impairment. And recorded that Miss Holmes told him that 'her stress levels have improved since the stress risk assessment was performed'. No further review was arranged, and the referral was closed. The claimant provided the necessary information to the OH assessor in order for the report to be completed. She had the opportunity to ensure that all relevant matters were discussed and recorded.
60. On 14 September 2017, the claimant was absent from work. The self-certificate for this absence is at p.220 of the bundle. This was a 1 day absence. The claimant wrote: "Passed out during bowel movement (severe IBS symptom). A RTW interview for her absences took place on 15 September 2017, a record of which is at p221 of the bundle.
61. The claimant attended an Absence Review Meeting with Mr Keeley on 22 September 2017. A record of which is at pp223-232 of the bundle. This records that Mr Keeley informed the claimant that she had reached a trigger point under the absence policy, due to absences on 22 June, 29 August and 14 September 2017. The claimant does not raise adjustments during this meeting. Nor does she explain how her conditions are having a significant impact upon her. Due to a lack of understanding of what was the cause of the claimant's absences, Mr Keeley requested medical evidence from the claimant. This Absence Review Meeting is adjourned, and reconvened on 10 October 2017 to conclude the meeting.
62. The outcome letter for the 22 September 2017 Absence Review Meeting is dated 17 October 2017 (at p.233 of the bundle). The decision reached was to issue the claimant a stage 2, First Written Warning. This warning was live for 12 months, across the period 10 October 2017 to 9 October 2018. As part of that letter the

claimant was warned that improvement was required with immediate effect and that there was to be no further absence during the live period. The claimant was given a right to appeal this decision, however, she elected not to appeal. The claimant saw no need to appeal either the process or the decision.

63. On the 26 and 27 October 2017, the claimant was absent from work. She gave the reasons for this absence as severe vomiting and passing out of consciousness. Which she linked to her IBS. The RTW meeting took place on 30 October 2017, (see pp.236-237 of the bundle). In the action to be taken box it states "I will request a physician's report". No such report was requested.
64. On 07 November 2017, the claimant was absent from work again. At her RTW meeting, which took place on 08 November 2017, the reason given was severe sickness, due to IBS and menstrual cycle.
65. Following the claimant's latest absences, she was invited to another Absence Review Meeting. This Absence Review Meeting was rearranged a couple of times due to work pressures and was eventually arranged for 12 December 2017. However, this was further postponed as the claimant turned up to work late on that day.
66. The Absence Review Meeting took place on 13 December 2017, the notes for this are at pp248-259 of the bundle. The outcome of Absence Review Meeting was sent to the claimant by letter dated 04 January 2018. This recorded the decision as stage 3- Final Written Warning. This warning was live for 12 months, through the period of 13 December 2017 to 12 December 2018.
67. On 04 and 05 January 2018, the claimant was absent from work. The reasons given were stomach and violent vomiting. The RTW meeting for this absence took place on 08 January 2018.
68. On 17 January 2018, the claimant appeals against the issuance of a final written warning. This appeal was made on two grounds: first, the process, as the claimant was not given the required 48 hours' notice of the reconvened hearing, and secondly, that the respondent had failed to implement the stress risk assessment action points.
69. The claimant was absent from work for 2 days on 18-19 January 2018. The reasons recorded for this absence was: Throat and chest medication. Sickness due to antibiotics. A RTW meeting was held on 22 January 2018.
70. The claimant's Appeal Hearing in respect of her appeal against the Final Written Warning began on 25 January 2018. This was adjourned to undertake further investigation, in particular to try to get GP reports.
71. The claimant attended OH on 08 February 2018, the record was at pp290-291 of the bundle. On the OH report it is noted that the claimant has had a long history of abdominal symptoms, and further records that "Ms Holmes does not have any other significant health conditions that could affect her ability to work". On the OH report it recommends a management meeting. But there is little else recommended in terms of actions needed from an OH perspective, following having reviewed the claimant and consulted with her. The claimant did not challenge the accuracy of this report.
72. On the 26 February 2018, the claimant was absent from. A RTW meeting took place on 27 February 2018.
73. On 12 March 2018, Dr Gupta, one of the OH assessors who had assessed the claimant, requested information from the claimant's GP.

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74. On 14 March 2018, the claimant was absent from work. A RTW meeting took place on 15 March 2018. Within the record of this meeting it was confirmed that a trigger point for absence had been reached, and that these absences would need to be considered at an Absence Review Meeting (see pp.300-301 of the bundle).
75. On 19- 22 March 2018, the claimant was absent from work. A RTW meeting took place on 23 March 2018 (see p.303 of the bundle).
76. On 30 March 2018, the claimant was again absent from work. A RTW meeting took place on 9 April 2018 (see p.307 of the bundle).
77. On 23-27 April 2018, the claimant was absent from work. She gave the reason to the respondent as being due to an infected bowel due to IBS contraindication, although there is no record of such an infection in the claimant's medical records. A RTW meeting was held on 30 April 2018 (see p.312 of the bundle).
78. On 11 May 2018 the outcome of the claimant's appeal was communicated to the her. This was to confirm the final written warning (see p.316 of the bundle).
79. On 16 May 2018, the claimant's GP responded to the request for information from OH, or more particularly Dr Gupa. In this response, it is stated that the claimant has had IBS since 2012, that stress impacts upon this, but there was no clear indication of impact or effect on the claimant, or disadvantages that this physical impairment causes her (see p.320 of the bundle).
80. The claimant was absent on 16 May 2018. A RTW meeting took place on 17 May 2018.
81. The claimant had a further 4 day absence from 05 June 2018. A RTW was held on 11 June 2018 (see p.326 of the bundle).
82. On the 25 June 2018, the claimant was absent from work for 6 days. A RTW meeting was held 03 July 2018.
83. From 05 July – 12 July 2018, the claimant was absent from work. On this occasion she produced a sick note (see p.335 of the bundle).
84. Following the claimant's latest work absences, she received an invite to an Absence Review Meeting dated 17 July 2018. Within this letter, she was warned of the possibility of dismissal.
85. The Absence Review Meeting took place on 19 July 2018. This was adjourned that day, having heard the case, to make a decision. The notes of the hearing are at pp348-350 of the bundle.
86. On 23 July 2018, the Absence Review Meeting was reconvened. Mr Sparkes reached the decision to dismiss the claimant. In reaching this decision, Mr Sparkes:
  - a. Took account of history of warnings/disciplinarys relating to absences, non-reporting
  - b. Identified absences that were IBS related and discounted those
  - c. Did not take account absences that had already been discounted
87. On the 14 August 2018, the claimant's GP provided a further update to the OH assessor, Dr Gupta. In this, it is confirmed that the claimant was receiving b12 injections and that she was being referred to gastroenterology. However, within this update, there was no indication of the effects of the condition on the claimant.

88. During August 2018, the claimant appealed the decision to dismiss, citing that discrimination/victimisation resulted in an unfair dismissal. The claimant felt that dismissal had taken place without taking in to account all relevant and up to date medical information.
89. On 31 August 2018, the claimant's appeal against dismissal was heard by Mr Cook. The claimant's TU rep, Mr Hogan, was in attendance.
90. On 04 September 2018, Mr Cook, by email, asked the claimant whether she could provide additional medical documentation to help with his decision making. None of which was provided
91. On 07 September 2018, the outcome of the claimant's appeal was sent to the claimant. The decision was to uphold the decision to dismiss her. This outcome of appeal letter is at pp381-383 of the bundle. This decision was following having reviewed the claimant's history and having given the claimant the opportunity to inform him of any relevant matters.

### Conclusions

92. The claimant did not discharge the burden on her to establish that either of her impairments were a disability pursuant to section 6 of the Equality Act 2010. There was a lack of reference or evidence available to the tribunal as to the impact that either impairment had had on her normal day to day activities. Consequently, her claims for disability discrimination fail, and are dismissed.
93. The reason for the claimant's dismissal was capability. This was a capability dismissal due to numerous absences for ill health.
94. Important factors that we took into account when reaching a conclusion on whether the claimant was unfairly dismissed, included:
  - a. The regular investigations undertaken by the employer through RTW meetings and Absence Review Meetings (some of which were adjourned with a view to gathering further evidence);
  - b. the discounting of various absences that were considered to be related to IBS;
  - c. the involvement of the claimant throughout all of the process and the opportunity she had to raise issues and to confirm or reute accuracy of records;
  - d. the opportunity given to the claimant to improve across the affected period;
  - e. the attempts made by the respondent to identify issues though stress risk assessment, and to support through an action plan;
  - f. the fact that the respondent regularly requested medical information from the claimant in a bid to understand any underlying causes of her absences;
  - g. the length of period over which sporadic and unpredictable absences were taking place;
  - h. the fact that the claimant is in a management role, and as such absences have a clear impact on operations;
  - i. the number of absences that had no reasons or explanation as to why the

claimant was absent; and

j. the quantity of absences across the period in question:

95. The decision to dismiss the claimant in these circumstances was a decision that was a reasonable decision for the employer to take. It falls within the Band of Reasonable Responses.

96. For the avoidance of doubt, the respondent investigated, warned, gave the claimant the opportunity to explain and improve, absences were discounted where the respondent considered this to be appropriate (and this included absences that did not need to be discounted), in particular where they had a link with IBS, the respondent held a suitable appeal in reasonable time, and that was held by an independent manager with no connection to the case to that date, and somebody who took account of all the relevant information, the respondent throughout listened to the claimant and even gave her further opportunity to provide additional information. The tribunal on all of this considered this decision to dismiss to be a fair decision for the respondent to make in these circumstances. And the procedure leading to that decision, and subsequent to that decision was fair.

97. A such, the claim for unfair dismissal fails.

Employment Judge **Mark Butler**

Date\_05 March 2020\_

Notes

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

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