EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4120797/2018

Held in Glasgow on 15, 16 and 17 July 2019

Employment Judge R King
Members Mr. AB Grant
Mr. G Doherty

A	**Claimant** **Represented by:** **Ms L Sourbutts - Director, Cube HR Consultancy Ltd**
Her Majesty's Revenue and Customs	**Respondent** **Represented by:** **Miss A Hunter - Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Tribunal is that the claimant's claims are dismissed.

REASONS

Introduction

1. The claimant lodged claims for unfair dismissal and, in respect of her disability, claims for direct discrimination, indirect discrimination, discrimination arising from disability and a failure to make reasonable adjustments. The respondent accepts that the claimant has a disability and that it had knowledge of her disability from 17 May 2018.

Preliminary issues

E.T. Z4 (WR)

Potential conflict

2. At the outset, the employment judge informed the claimant that he was a former colleague of the respondents' solicitor, with whom he had worked in the same team, albeit in different locations. The employment judge explained to both parties that he did not consider that this would affect his ability to make an objective judgment on the evidence but that he was willing to listen to any objection from either party if they were concerned about him hearing the case. Having considered their positions, both parties confirmed that they were happy for the employment judge to hear the case.

Rule 50 application and orders

3. Prior to hearing evidence, the claimant's representative made an application that the hearing should be conducted in whole in private. She explained that the claimant's evidence would include references to horrific child abuse that she had suffered and its continuing effect on her. She believed this was relevant to the fairness of her dismissal because the respondent had failed to take that into account. She submitted that because of the sensitivity of this issue for the claimant it would not be appropriate to have the hearing in public. Although the respondent's solicitor did not accept that this issue had been a relevant consideration in the claimant's treatment, she confirmed that the respondent would have no objection to the hearing being conducted in private if a hearing in public would be disadvantageous to her.

4. The Tribunal was conscious that the starting point for consideration of any restriction on public access to hearings or publicity about proceedings is the principle of open justice, which is underpinned by the Convention right of freedom of expression, including the right to receive and impart information, set out in Article 10 of the Schedule 1 of the Human Rights Act 1998.

5. The Tribunal also considered whether the claimant's Convention rights under Schedule 1 were engaged. It concluded that the claimant's Article 6 right to a fair trial and her Article 8 right to private and family life were both engaged. The Tribunal accepted that the possibility of the incident being made public could have a chilling effect on her ability to give a full account of her evidence

or to challenge the respondent's witnesses and could potentially deprive her of a fair trial. It also accepted that she had a right to keep private the details of this distressing incident from her past.

6. The Tribunal firstly considered whether there were any measures short of hearing the whole case in public that would have adequately protected the claimant's right to a fair trial and to privacy but that also preserved the principle of open justice. As it was impossible to predict how, when and in what context the information about the incident from the claimant's past might arise in evidence or in submissions, the Tribunal concluded that there were no appropriate measures short of hearing the whole case in private that would adequately protect the claimant's Convention rights.

7. The Tribunal also concluded that a hearing in private would enable the claimant to give the fullest possible account of this incident from her past insofar as she believed it was relevant to her treatment by the respondent. It would also allow her to fully challenge the respondent's witnesses as to their treatment of her in respect of any matters in relation to which she believed this incident or its effect on her was a relevant factor. In all the circumstances, the Tribunal concluded that it would be in the interests of justice to hear the whole of the case in private.

8. The Tribunal also decided that in all the circumstances it was appropriate to anonymise the claimant's name in its listing and in any documents entered on the register or forming part of the public record and to anonymise the witnesses' names, as well as those of other individuals referred to in the evidence. Orders were therefore made in terms of rule 50(3)(a) and 50(3)(c) and the case thereafter proceeded in private and, for the purposes of the public record, under the name of A v Her Majesty's Revenue and Customs.

9. During the hearing, the respondent led evidence from B (Senior Lead, EU Exit Programme), C (Senior Delivery Manager, Benefits and Credits) and D (Head of Post Planning). The claimant gave evidence on her own behalf. The tribunal found that all the witnesses gave credible and reliable accounts of their evidence.

10. In the course of the hearing the claimant waived her legal privilege in respect of a 'without prejudice' letter she had sent the respondent on 16 May 2018, which was included in the agreed joint bundle.

Issues

11. In advance of the hearing, the parties had agreed the following list of issues:

Unfair dismissal

(i) Was the dismissal of the claimant for the potentially fair reason of capability and/or some other substantial reason, namely continuing sickness absence with no prospect of a return to work within a reasonable timescale?

(ii) Did the respondent act reasonably in all the circumstances, including the size and administrative resources of the respondent's undertaking, in treating the claimant's incapacity and/or continuing sickness absence with no prospect of a return to work within a reasonable timescale as a sufficient reason for dismissal?

(iii) Did the respondent conduct a fair procedure in dismissing the claimant?

Direct discrimination

(iv) By dismissing the claimant under its attendance management process, did the respondent treat the claimant differently to the way in which the respondent treats or would treat a comparator who was in the same, or not materially different, circumstances as the claimant?

(v) Who are the comparators upon whom the claimant relies, or does the claimant rely upon a hypothetical comparator?

(vi) Did the respondent treat the claimant less favourably than it treated or would have treated the comparators?

(vii) Subject to issue 3, what was the respondent's explanation for the treatment? Does the respondent prove a non-discriminatory reason for the treatment?

Indirect discrimination

It is accepted by the respondent that it applied its attendance management policy to the claimant and that the attendance management policy is a "provision criterion or practice" for the purposes of section 19 Equality Act 2010. It is also accepted that the respondent applies the attendance management policy to non-disabled employees, that it puts disabled employees at a particular disadvantage and the claimant at that disadvantage.

(viii) Was the application of the policy a proportionate means of achieving a legitimate aim?

Discrimination arising from disability

It is accepted that the respondent treated the claimant unfavourably because of something arising in consequence of her disability by dismissing her.

(ix) Was that treatment a proportionate means of achieving a legitimate aim?

Failure to make reasonable adjustments

The respondent has accepted that it applied its attendance management policy to the claimant. The respondent has accepted that the application of the attendance management policy puts a disabled person at a substantial disadvantage in comparison to persons who are not disabled.

(x) Did the respondent take such steps as is reasonable to have to take to avoid the disadvantage, which is identified by the claimant as her dismissal? The claimant asserts that the adjustments reasonably required were:

a. postponing the decision meeting for up to 2 months; and

b. obtaining a further occupational health report.

(xi) Were the claimant's requests reasonable adjustments in that:

a. they, or either of them, would have removed any substantial disadvantage suffered by the claimant; or

b. they, or either of them, were reasonable steps to take

Remedy

(xii) What compensation, if any, should be awarded to the claimant?

Findings in fact

12. At the outset of the hearing, the parties produced an agreed statement of facts. Having considered the agreed statement of facts and having heard the parties' evidence, the tribunal finds the following material facts to be admitted or proved.

Background

13. The claimant commenced her employment with the respondent on 18 October 1976 and her employment was terminated on 30 October 2018. At the time of her dismissal, her role was Senior Engagement Officer.

14. As part of the respondent's engagement strategy with its employees it regularly conducts staff surveys to obtain feedback about their treatment at work. The claimant's job was to analyse the results of those staff surveys and formulate strategies to improve engagement where feedback was negative. She was also a diversity champion and responsible for the promotion of diversity and inclusion in the workplace, which included conducting workshops. She shared these responsibilities with a colleague, E. She was extremely happy in her job.

The causes of the claimant's ill health

15. In or around August 2017, the claimant and her husband attended a family social event during which her stepdaughter said her children did not wish to see the claimant any longer. She was upset to be told this and it affected her profoundly, to the extent that she struggled to cope at work. She eventually

broke down while describing these events to her line manager, B, who suggested that she should take some time off as annual leave to help her deal with the situation, which she did.

16. Following her return to work the claimant informed B that she was still feeling stressed. On 16 November 2017, she completed a written stress reduction plan, on which it was recorded that she was suffering from a high level of stress, which was described as ''*personal and not work related".*

17. There was further upset for the claimant during Christmas 2017 when neither her stepson nor her stepdaughter and their families visited her, which previously they would have done. Once again, this affected the claimant deeply.

18. Although the claimant intended to return to work after the Christmas and New Year holidays on 8 January 2018, she did not feel well enough. She attended her GP who diagnosed her as suffering from an acute reaction to stress and gave her a fit note for two weeks. The causes of her stress were private reasons that were unrelated to her work. The claimant was still not well enough to return to work on the expiry of her two-week fit note and she remained off work due to stress.

Organisational restructure

19. In the middle of January 2018, a restructure took place in the respondent's business that resulted in the claimant, E and B transferring from their previous line of business, 'Customer Services Change', into a new line of business, 'Business Change Management'.

20. As a result, the specific roles all three previously carried out no longer existed. The claimant's and E's new roles were in a project team whose job is to ensure that customer service teams have the required staff, training, IT and telephony in place to deliver new customer processes.

21. However, there was an intensified demand within Business Change Management for the diversity and inclusion activities that the claimant and E were experienced in, such as conducting bullying and harassment

workshops. E therefore continued to undertake those duties in addition to his project team role. The expectation was that the claimant would also have continued with those activities when she returned to work.

The respondent's attendance management procedure

22. The respondent's attendance management procedure provides as follows -

23. '*''Meetings during continuous sickness absence'*

''84. During a continuous sickness absence the manager and the jobholder will meet at:

a. an informal review – to keep in touch and explore the support needed to help the jobholder return to work

b. a formal Attendance Review Meeting – to explore the support needed, but also to consider whether the jobholder is likely to return within a reasonable time frame. A decision on whether the business can continue to support the absence may also be taken. This is a formal meeting where the jobholder has the right to be accompanied by a colleague or trade union representative.

85. These meetings should take place at the following points:

a. an informal review after 14 consecutive calendar days of sickness absence.

b. a Formal Attendance Review Meeting after 28 consecutive calendar days, another when the sickness absence has lasted two months, and every month thereafter.

…

Informal Review

87. During the informal review the manager should:

a. ask the jobholder how they are feeling and where they are in their recovery

b. discuss referring to Occupational Health of this has not already happened

c. discuss any medical advice, from example from the GP, consultant or Occupational Health

d. ask the jobholder when they think they may be able to return to work and what support they need to achieve this

e. remind the jobholder of the attendance standard expected of them. make them aware at 28 days without a return to work, they could be referred to a decision maker

f. bring the jobholder up-to-date with any key developments in their work area and/or the organisation.

…

Formal Attendance Review Meeting

88. The first Formal Attendance Review Meeting should normally take place when sickness absence reaches 28 consecutive calendar days, unless the jobholder is due to return to work in the next few days.

The actions taken in respect of Action Points or Triggers should be recorded in Online HR

89. Further Formal Attendance Review Meetings should normally be held when a jobholder has been absent for two months and then every month thereafter

The actions taken in respect of Action Points or Triggers should be recorded in Online HR

90. Annex 1 sets out the steps to follow when holding a formal meeting.

91. During the meeting the manager should:

a. undertake the same actions as in the informal review

b. discuss with the jobholder whether they are likely to return in a reasonable timescale

c. consider whether there may be underlying disability and if reasonable adjustments may be appropriate

d. consider whether the business can continue supporting their absence, explain that you may consider dismissal/downgrading if the business cannot continue to support their absence

92. If the jobholder is likely to return within a reasonable timescale and/or the business can continue to support the absence, the manager should normally arrange the next formal review with the jobholder in a month's time

93. If a return to work is not likely within a reasonable timescale and the business cannot continue to support the absence, the manager should consider whether:

a. the jobholder is likely to meet the criteria for Ill Health Retirement and if appropriate bring to the jobholder's attention, or

b. dismissal/downgrading is appropriate'

Informal attendance management meeting on 29 January 2018

24. As she had not yet returned to work, B conducted an informal review with the claimant by telephone on 29 January 2018. During their call, the claimant advised B that she was seeing her GP and undergoing counselling. However, she was not yet ready to return to work at that stage and her husband had arranged a holiday with her between 5 and 12 February 2018.

First formal attendance management meeting on 15 February 2018

25. As the claimant did not return to work following her holiday, B met with her on 15 February 2018 to conduct a first formal attendance review meeting. During their meeting, the claimant explained to B that she was still not yet ready to come back to work but that she had seen a counsellor and taken the advice of her GP to socialise with other people.

26. When asked by B if she had any adjustments in mind that would help her to return to work, the claimant answered that granting her partial retirement

would help her situation, as it would allow her to spend more time with her husband who was retired. B could not personally take a decision in relation to the claimant's partial retirement but agreed to discuss this with her own manager. In the meantime, she explained to the claimant that she was open to discussing a flexible working pattern for her if that would assist in her returning to work. However, the claimant made it clear to B that she was unable to return to work at that point in time on any basis, that she did not know when she might be able to return to work in future and that in the meantime she had a further appointment with her GP.

27. In line with the respondent's attendance management procedure, B explained to the claimant that if her absence persisted this could result in her referring her case to a decision maker to consider downgrading or dismissal if the business could no longer support her absence. In the meantime, B explained that she would arrange an Occupational Health referral in order to obtain specialist advice about managing her situation.

28. Unfortunately, the claimant's absence continued and therefore on 22 March 2018, B invited the claimant to a further formal meeting, which would take place on 10 April 2018 at the claimant's home.

Occupational Health Report dated 9 April 2018

29. In the meantime, as previously agreed with her, the claimant was referred to the respondent's occupational health advisers for advice on her condition and prognosis. Following a telephone consultation with the claimant, the respondent's medical advisers produced a report dated 9 April 2018, which included the following advice: -

*"**Response to specific questions***

In my opinion the current aim is to try and support A back to work to her substantive role and I do believe having a phased return to work will be beneficial at least for the 2 - 4 weeks. In respect to your question around ill-health retirement, I cannot comment as it is a decision for your PCSS. My anticipation is that we will be able to support A back to work although in all

reality I am unable to offer a clear prediction but would anticipate this being at least for six weeks.

General recommendations

A remains absent from work experiencing acute stress reaction attributable to home stress. Stress in itself is not a clinical illness but instead is used in general parlance to describe an adverse reaction (which can manifest as physical and / or psychological symptoms i.e. disturbed sleep, anxiety, anger etc) to particular situations due to incompatibility between the person and the situation for non-medical reasons.

….

Her home stress has had a significant impact upon her resilience and psychological vulnerability, and I cannot foresee any return to work until her resilience improves and it is very difficult to give a clear medical timescale in that regard. I would hope that as she is able to engage further in daily functional activity that they should then have a positive impact on her mental health to be able to be able to allow some re-engagement with work. I do envisage the need to have of a great (sic) return to help with her introduction to work activities and to help with her confidence and self-esteem.

…

In my opinion currently, it is likely that this employee does not meet the disability criteria of the Equality Act; however ultimately this is a legal decision and not a medical one."

The second formal attendance management meeting on 10 April 2018

30. As planned, a second formal attendance management meeting took place on 10 April 2018. During the meeting, B asked the claimant whether she thought she might be able to return to work after a further four to six weeks in line with the potential time scale indicated in the occupational health report. The claimant was unable to say if she would be able. Her health was not good, she was mentally exhausted and emotional, and she had lost weight.

Because of recent events she felt worse than the last time they had met. Her husband's son had recently cancelled plans to visit. She believed this was because of her stepdaughter's influence. As a result, she continued to struggle with her health. She saw herself returning to work, but she could not say when that would be.

31. She explained that her counsellor and the occupational health advisor had both told her that there were no adjustments the respondent could reasonably make that would allow her to return to work at that time. She agreed that this was the case. Furthermore, she did not believe she would be able to return to work when her current fit note ran out on 17 April 2018 and that any return within the next four to six weeks would need to be on a phased basis.

32. In view of the terms of the occupational health advice, B did not consider the claimant to be a disabled person for the purposes of the Equality Act 2010. However, she nevertheless had in mind that she should make any adjustments for the claimant's medical condition that would permit her to return to work, irrespective of whether she had a disability.

33. Following their meeting on 10 April 2018, B sent an e-mail to the claimant dated 17 April 2018, in the following terms: -

''I am pleased to confirm that the Department will continue to support your sickness absence based on the actions you are taking to return to full health, that you do see yourself returning to work, and there is an expectation of a return to work in 4-6 weeks, as stated in the OH report from the interview carried out on 9 April 2018.

I will review your absence regularly and may reconsider my decision at any time if it becomes unlikely that you will return to work in a reasonable period of time. Our next formal meeting will take place around 8/10 May 2018''

34. Following the 10 April 2018 meeting B kept in regular contact with the claimant by telephone. During their calls the claimant would often say that she did not feel mentally well enough to return to work and that to do so would be *''a backward step''*.

35. On 15 May 2018 B e-mailed the claimant in the following terms -

36. *''I am sorry that you are still unwell.*

By the date of our planned meeting you will have been absent for 116 calendar days, 63 working days. I would like to meet with you to discuss your progress and what we can do to help you to return to work as soon as you are able.

The meeting is on 22 May 2018 at 11:30 at your home address.

…

The Attendance Management procedure aims to help you to meet the attendance standard expected of you and I will continue to give you help and support to enable you to achieve this. However, I must remind you that your employment with the Department could be affected if your sickness absence can no longer be supported".

The incident at the claimant's home on 16 May 2018

37. On 16 May 2018, while going through personal effects at home, the claimant discovered a photograph, which triggered memories of an incident in her childhood when she had been the victim of abuse. This was the first time she had seen her abuser since she was 12 years old. As a result of seeing this photograph she felt, coupled with the other issues she had been dealing with, that she could cope no longer.

38. In the circumstances, she sent a 'without prejudice' letter to B proposing that in the best of interests of her health, she would terminate her employment in October 2018, subject to the respondent providing her with a financial settlement package.

39. The respondent ultimately rejected that proposal. In 2017 the claimant had previously told B that it was her intention to retire in October 2018, after completing 42 years' service.

The second Occupational Health report, dated 17 May 2018

40. On 17 May 2018, the claimant attended a further telephone consultation with the respondent's occupational health assessment advisers who issued a report that same day, which contained the following advice: -

"As you are aware this lady has been absent from work since January 2018 with severe symptoms of anxiety and some evident low mood. She relates this entirely to significant issues in her personal life both historical and present. In addition to this there is obviously some uncertainty about the role she will be undertaking when she returns to work but this is not a dominant factor in her absence at the present time.

...

In my opinion this lady remains unfit for work due to the severity of her ongoing symptoms. We did discuss her return to work but unfortunately she is not yet in a place where she can think rationally about returning although she does state her wish to return as soon as she is able to. She does say that things were improving for her but some further personal issues have caused a setback.

Response to specific questions

- ***What is preventing the jobholder from returning to work?***

  A is prevented from returning to work solely because of her severe symptoms of anxiety and low mood. This leaves her unable to bring herself to attend work and undertake any duties. This does not appear to be in any way connected to the proposed job role change.

- ***Is there any adjustments HMRC can make to facilitate a return to work?***

  The present time there are no adjustments which would facilitate a return to work, A just feels she needs to improve her mental health which is significantly affected at this time.

- ***Can you provide an expected return to work?***

  Unfortunately, it is not possible to provide an anticipated return to work date in this case. However, I think this is highly unlikely in the course of the next two months and would suggest that she is referred back to occupational health towards the end of this time so that we can review the situation when hopefully she will be significantly better than she currently is.

  In the longer term, provided she is able to improve her anxiety and low mood, I can see no reason why she should not return to work and undertake her duties.

  In my opinion, it is likely her condition would meet the requirements of the Equality Act 2010. However, ultimately this is a legal and not a medical decision."

Third formal attendance management meeting on 22 May 2018

41. On 22 May 2018, B held a third formal attendance management meeting with the claimant. During this meeting the claimant was very emotional. She told B that her recent call with the occupational health adviser had upset her because the adviser did not have access to her previous records, so she had to explain the reasons for her absence. She also told B that shortly before this call, while going through personal belongings at home, she had found a photograph from her past, which had caused her distress. She did not provide B with any details of the photograph or the reason it had caused her distress.

42. So far as the claimant's ability to return to work was concerned, she told B that she did not know whether she would be able to return to work when her current fit note ran out on 14 June and she did not believe there were any adjustments the respondent could reasonably make that would enable her to return to work. She agreed with the medical diagnosis that she was continuing to suffer from an acute reaction to stress and that the added pressure of work would not be helpful to her state of health.

43. In response, B advised the claimant that it was difficult for her to find reasons for the department to support her absence in circumstances where there appeared to be no end to her absence in sight and there were no adjustments that would enable a return to work on any basis.

44. The claimant advised B that she wanted to return to work and that she did expect to return to work eventually, as did her GP. However, in the meantime her house sale, which was due to complete on 20 June 2018, was now her focus. In addition, she explained that she had to secure temporary accommodation as she was going to be unable to move in to the new house that she had bought, until some time after the sale was due to complete.

45. At the end of the meeting, B advised the claimant that she would have to decide if she believed the respondent could continue to support her absence any longer or, alternatively, if she should refer her case to a decision-making manager who would have the final say as to whether her absence could be supported, or her employment should be terminated.

46. After the 22 May 2018 meeting B returned to her office and took stock of all the evidence. She considered whether the claimant would realistically be able to come back to work in the foreseeable future and, if not, what the next steps ought to be. She noted that the respondent's internal guidance is that a sickness absence case should be referred to a decision maker after three months sickness absence, whereas in this case the claimant had by then already been off for over four months.

47. B took into consideration that there had been no significant improvement in the claimant's condition since her absence had begun on 8 January 2018 and that there were no reasonable adjustments that could be put in place to enable her to return to work. She had also conducted job searches for any other suitable roles that she might have been able to return to, but without success. Furthermore, it appeared to B from their meetings that the claimant was now enjoying her 'retired lifestyle' and not giving any genuine thought to returning to work.

48. By now B had already discussed with her manager the possibility of the claimant being granted partial retirement, but she had been advised that this was not possible as there was no business requirement for a part time employee within her new team. In any event, the claimant had not made an application for partial retirement at any stage during her absence.

49. In reaching her decision to refer the claimant's case to a decision maker, B also took account of the ongoing operational impact of the claimant's ongoing absence on colleagues. Even though there had been an organisational restructure in January 2018, which meant the claimant and E' specific roles no longer existed, there had nevertheless been an ongoing demand within their new line of business in Business Change Management for the people engagement activities that the claimant had previously been involved in, such as bullying and harassment workshops.

50. This had placed additional stress on E who had to work late in the evenings, sometimes until 10 or 11pm, in order to cope with the workload that ordinarily the claimant would have shared with him. In addition, the project team that she would have had joined in January was extremely busy and her absence was having an impact on its performance, in circumstances where she could not be replaced on its headcount while she was on sickness absence.

51. B also took account of the generally high levels of sickness absence within the respondent's business, which have an overall adverse impact on the respondent's efficiency and ultimately its reputation in the eyes of the public as an organisation funded by the public purse.

52. Furthermore, by this stage of the claimant's absence, B was spending up to 20% of her time at work monitoring and managing her absence, which was disproportionate to the time she was spending on other aspects of her role.

53. In all the circumstances, she concluded that there was no prospect of the claimant returning to work in the foreseeable future, that the business could no longer support her absence and that her case should be referred to a decision maker.

54. B wrote to the claimant on 30 May 2018 in the following terms:

"We met on 22 May 2018 to discuss your case. We discussed the following:

- *Your continued sickness absence and the reasons why you do not feel fit for work; you feel the added pressure of work on top of how you feel now will not improve your health at all.*
- *Reasonable adjustments; there is nothing more that you, your GP or occupational health can recommend HMRC puts into place to secure a return to work.*
- *Returning to work; how you are unable to provide a return to work date and that you are unlikely to return to work when your current fit note runs out.*
- *Other factors contributing to your inability to return to work – including your imminent house move and the need to find living accommodation quickly.*

I have considered all the facts and I have decided to refer your case to F who will decide whether you should be dismissed or downgraded, or whether your sickness absence level can continue to be supported at this time.

F will write to you to invite you to a meeting to discuss this."

55. Although B's letter of 30 May 2018 said the claimant's case would be referred to F, the claimant requested that a female decision maker deal with her case. Her case was therefore referred to C, Senior Delivery Manager who was based in Sunderland. In due course B provided C with all the relevant paperwork from the stages of the attendance management procedure that she had managed, including all e-mails, meeting notes, medical reports and notes of 'keeping in touch' discussions between her and the claimant since her absence began on 8 January 2018.

56. Despite the gravity of the situation for the claimant, no handover meeting or telephone discussion ever took place between B and C. Prior to her role in

the claimant's dismissal C had never met the claimant and was hitherto unaware of her and the circumstances of her absence.

C's decision to dismiss the claimant

57. On 12 June 2018, C wrote to the claimant, inviting her to a formal meeting in terms of the respondent's attendance management procedure to consider dismissal or downgrading. In her letter, C explained that the purpose of their meeting was to allow her to *"consider whether you should be dismissed or downgraded, or whether your sickness levels should continue to be supported at this time".* C proposed that the meeting should take place on 27 June 2018 at the claimant's home and confirmed that she had the right to be accompanied at the meeting by a trade union official or a work colleague.

58. On 19 June 2018, the claimant wrote to C requesting a postponement of the meeting for one to two months. In her letter, she explained that on 27 June she would be in the middle of her planned house move and in temporary accommodation until she moved into her new property. The claimant's letter also stated that: -

''I believe that once the house move is completed my stress and anxiety levels will reduce and I may be in a position to consider a return to work.

My request to postpone the meeting until such a time as the house move is complete is a reasonable request''

She also asserted that she did not consider a five-month absence to be a significant period of time, considering her almost 42 years of service.

59. Having taken advice from HR, C wrote to the claimant on 26 June 2018 informing her that she was happy to reschedule the date of the proposed meeting but that she did not consider it reasonable to postpone the meeting for one to two months, as had been requested. She was conscious that decision stage meetings under the respondent's attendance management procedure would normally take place within 5 days of the decision maker's letter. She therefore suggested that the meeting should be rescheduled for Tuesday 10 July 2018 at Queensway House, East Kilbride.

60. On 2 July 2018, the claimant wrote again to C, in the following terms: -

'Dear C,

Thanks for your letter. I have had the opportunity to take further advice. I am disappointed that you are not willing to give me further time to recover from my illness before making any decisions. Given the potential magnitude of the outcome I think it is entirely reasonable for me to request a 1-2 month extension before you decide my fate.

In this time the stress factors should have been removed and I am confident that I would be fit to return to work. I would ask for a further meeting / call with Occupational Health as I am sure they will confirm this to you and I believe a further medical opinion is required before you make any decisions"

61. On receipt of the claimant's letter of 2 July 2018, C spoke to her HR adviser who advised her that it was not reasonable for her to delay her decision for one to two months in these circumstances and where the cause of the absence was not work-related stress.

62. C therefore emailed the claimant at her work e-mail address on 6 July to say that: -

''I am unable to agree an extension of 1-2 months as I do not believe it to be a reasonable request for any business. Therefore, could you please confirm whether or not you intend attending the scheduled meeting on Tuesday 10 July?''

63. As she had not heard from the claimant by 10 July 2018, C emailed the claimant again, this time to her home e-mail address, in the following terms:-

''As I have not received a response to my e-mail on Friday 6 July I am sending this to your private e-mail address.

I am giving you the opportunity within 5 working days, if you are unable to do this then I will make the decision based on the information I have"

64. On 11 July 2018, the claimant's GP issued her with a fit note for two months, which she provided to B who in turn informed C of its duration. Hitherto, all the claimant's fit notes had been for no longer than four weeks.

65. On 13 July 2018, the claimant emailed C advising that she had not received her 6 July e-mail until 10 July 2018 and asking for a face-to-face meeting and for a female note taker to be present *''in view of some extremely sensitive issues that may come up''.* She also asked if her husband could accompany her, as he had done at previous meetings under the attendance management procedure.

66. A further exchange of emails took place and the meeting was eventually rescheduled for 18 July 2018. In advance of the meeting, the respondent refused the claimant's request that her husband should accompany her to the meeting because this was not permitted under its attendance management policy. It was therefore agreed that a colleague, G, would accompany her. The respondent however agreed with the claimant's request that the note taker at the meeting should be female.

The decision meeting on 18 July 2018

67. A decision stage meeting in terms of the respondent's attendance management procedure took place on 18 July as planned. Present at the meeting were C, H (note taker), the claimant and G.

68. At the outset, C asked the claimant what, if anything, the respondent could do to support her return to work and whether she could provide a return to work date. The claimant explained that family reasons were causing her stress and that she was not yet ready to work. In addition, she had found her recent house move stressful, which had made her *'spiral backwards'*, as she felt she had lost control. She advised C that her GP had been concerned that a return to work now may cause her '*'to suffer a step backwards''*

69. The claimant told C that she had been receiving help from her GP and her counsellor and she had just finished a course of medication for stress. She

had most recently seen her GP on 11 July, and he had provided her with a fit note for two months.

70. The claimant summarised the reasons for her absence; there had been a family related incident the previous Christmas which had caused her stress and upset, her subsequent house move had also been stressful and she had most recently, while clearing out her house, found a photograph that had triggered certain historical memories. She did not go into any detail about those historical memories other than letting C know that they were traumatic and deeply upsetting for her. She became visibly upset during this part of the meeting, which was halted temporarily while she composed herself.

71. After a short break, the claimant explained that she had gone through an unhappy and stressful time but that once she had completed her house move and sorted out her personal life that would help her enormously. She was hopeful that this would happen over the next eight weeks at which point she felt she would be ready to return to work.

72. In response to C's question about reasonable adjustments, the claimant's only suggestion was that the respondent should allow her a further eight weeks before taking a decision on her future as her house move would be completed by then and she would be ready to return to work.

73. Following the meeting, C considered all the material relevant to her decision. In her view, the claimant had failed to give a definitive indication of a return to work. She believed that at its highest, the claimant was indicating that she would "potentially" return to work in two months, provided the house move was successful. In all the circumstances, she did not consider that the claimant was offering a definitive return to work.

74. In all the circumstances, C's decision was that the claimant's employment should be terminated. She did not consider that it was reasonable to wait for a further two months to see if the claimant was fit to return to work by then. The business was no longer able to support her absence indefinitely without a reasonable prospect of a return to work and she did not consider that such a prospect existed.

75. Although the claimant had not requested it at their meeting, C did consider whether a further occupational health report should be obtained. Having done so, she did not believe that it was necessary to obtain a further report in circumstances where the last one was dated 17 May 2018 and there was no suggestion of any change in her medical condition since then. Her house move was ongoing at the time of the 17 May 2018 report, so the claimant's reference to that did not represent a change in circumstances justifying obtaining a new report. As far as she was concerned, the medical evidence was sufficiently up to date.

76. In reaching her decision, C considered all the information available, including the occupational health reports and GP fit notes. She concluded that the medical evidence did not support a return to work on any basis and that there were no reasonable adjustments that could be put in place to enable that to happen. She understood the claimant's position to be that she 'may' be able to return to work in two months' time, but not that she 'would' be able to return. Ultimately, she concluded that there was no evidence that suggested that the claimant was likely to return to work in the foreseeable future.

77. In those circumstances, she concluded that as the claimant had already been absent due to illness since 8 January 2018 it was not reasonable for the respondent to keep her job open any longer and therefore her decision was that she would be dismissed.

78. At the time of her decision, C did not believe that the claimant was a disabled person in terms of the Equality Act 2010 because she considered that the medical advice on that question had been conflicting. She did however consider the claimant's case on the basis that she was prepared to make adjustments for the claimant's medical condition as described in the medical reports, irrespective of whether she had a disability.

79. In reaching her decision, C took account of the operational impact of the claimant's sickness absence. She concluded that there would have been an impact on those colleagues who would have had to pick up her work as she would not be replaced during her absence. As a result, there would have

been a potential impact on customer service. She was also mindful of the respondent's high levels of sickness absence throughout its organisation, which were detrimental to the respondent's performance, productivity and reputation and that the claimant's absence was contributing to those high levels of sickness absence.

80. C did not make any specific enquiry about the impact of the claimant's absence on colleagues or customer service. She reached her conclusion in that regard based on her knowledge of the business generally and of the impact of sickness absence within the respondent's organisation. She was also satisfied that B would not have referred the case to a decision maker unless there had been an unsustainable operational impact.

81. C did not give any particular weight to the claimant's previous 42 years' service. In her view the respondent's policy on sickness absence had to be applied equally to any employee in her situation. In common with B, C also believed that the claimant was, by then, living and enjoying the 'retired lifestyle'.

82. C wrote to the claimant on 25 July 2018 confirming that:

"I have carefully considered all the information including:

- *Occupational and GP advice*
- *Your representations*
- *The support you have received to help you meet the attendance standards.*

After considering all the relevant factors, I have decided to terminate your employment with HMRC because you have failed to maintain an acceptable level of attendance and have been unable to return to work within a timescale that I consider reasonable.

I considered downgrading/alternative employment before reaching this decision but do not believe this would affect your ability to return to work in a reasonable timescale."

83. Although she had considered downgrading, C did not believe this would have secured a successful return to work in all the circumstances. On the evidence available to her, she concluded there was nothing the respondent could reasonably do in order to enable the claimant to return to work in a different role or at a lower grade, so commanding was her medical condition.

84. In her letter, C informed the claimant that she would be dismissed with thirteen weeks' notice and that her last day of service would be 30 October 2018. C also explained her right of appeal against her dismissal, in which case she should write to D within ten working days of receiving the dismissal decision.

The appeal against dismissal

85. In due course, the claimant exercised her right of appeal by submitting a letter of appeal dated 7 August 2018 to D. In her appeal she requested that the appeal be dealt with in her absence because she was still so upset about the decision to dismiss her.

86. D's approach to the appeal was not to reconsider the entire case but to consider the appeal based on the three available grounds set out in the respondent's procedure, which are as follows: -

"123. There are three grounds of appeal:

a) a procedural error has occurred, and/or

b) the decision is not supported by the information/evidence available to the manager or Decision maker, and/or

c) new information/evidence has become available which should be taken into account when reaching a decision about dismissal/downgrading.

124. If the appeal doesn't satisfy the above grounds of Appeal, the appeal manager should reject it and notify the jobholder in writing."

87. D therefore considered all the points raised in the claimant's appeal letter that she believed fell within the allowable grounds of appeal. As a result, she did not deal with any of the points in the claimant's appeal letter that she

interpreted as unrelated to the appeal. Such unrelated points included those matters she interpreted as relevant only to the financial consequences of dismissal as set out in the respondent's *'Compensation for Dismissal'* scheme, but not to the merits of the appeal itself.

88. In the first place D considered the claimant's assertion that C should have obtained up to date medical evidence before dismissing her. She accepted that it was important to obtain up to date medical evidence before deciding to dismiss on grounds of long-term sickness absence. However, as far as she was concerned there had been no significant change in the claimant's medical condition or any new condition since the last occupational health report on 17 May 2018. She therefore saw no reason why C should have obtained a further medical report before making her decision.

89. D acknowledged that the latest medical report had advised that the claimant was likely to have a disability in terms of the Equality Act 2010. While the earlier report had said the claimant was unlikely to have a disability, D was nevertheless satisfied that her sickness absence had always been managed in accordance with the respondent's obligations towards her as a disabled person because her medical condition and its symptoms had always been taken fully into account. D noted that the only other adjustment the claimant had requested had been for C to delay the decision stage meeting by a further two months, but she agreed that C had been entitled to reject that request as an unreasonable one in the circumstances.

90. Unlike C, D took the claimant's lengthy service with the respondent into account in her deliberations. However, she weighed that up in the balance with the fact that she had also been off for a considerable period of time with no reasonable end in sight, during which the respondent had waited patiently and longer than normally required before it referred her case to a decision maker and ultimately dismissed her. D noted that at the time of her dismissal the claimant had been off work for almost eight months with no reasonable end in sight in circumstances where there were no reasonable adjustments that would allow her to return to work on any basis.

91. In common with C, D believed that there was no reasonable prospect of the claimant returning to work in the foreseeable future. In D's view, at its highest, the claimant's position was that she might be able to return to work after her house move. However, she concluded that it was not reasonable to wait and see in circumstances where she had already been absent since 8 January 2018 and there was no evidence of any improvement in her health that suggested she would likely be able to return at that point.

92. Having considered all the evidence in the case, D concluded that during the claimant's lengthy absence the respondent had regularly kept in touch with her, obtained medical advice, considered any adjustments that would allow a return to work and had generally taken all steps that it could to support her to return to work but yet she had still been unable to offer a return to work in a reasonable timescale.

93. As far as D was concerned, no new evidence had been put forward by the claimant in her letter of appeal that gave her cause to believe she would be able to return to work in a reasonable timescale. In all the circumstances, she agreed that C's decision had been fair, reasonable and consistent with the respondent's handling of other similar cases. She concluded that the business had been supportive of the claimant, which had been reflected in the way that the case had been handled and the length of time that it had taken before it had been referred to a decision maker.

94. D also concluded that while C had not considered the claimant to be a disabled person she had nevertheless acted 'in the spirit' of the Equality Act 2010 in her handling of her case and in the decision that she had reached to dismiss her.

95. In her appeal letter the claimant disputed the accuracy of the notes taken by the respondent at the decision meeting on 18 July 2018. She did not accept that the respondent's record was accurate when it stated that:-

96. ''*... MM explained she had already began to feel better however since the house move had been agreed, this had made her spiral backwards, feeling*

as though she had lost all control. Her GP has raised concern that he is fearful returning to work now may cause her to suffer a step backwards"

97. The claimant asserted that the true position was that she had told C that her GP had recognised that moving house was a stressful time and that she did not want her to take a step back, which was why the two month fit note had been issued.

98. D did not consider this was a fundamental discrepancy, if indeed it was inaccurate. Her concern was that irrespective of what was actually said by the claimant, the fact was that on 11 July 2018 the claimant's GP had issued her with a fit note for two months, which indicated that there had been no improvement in her health and that she was still unfit to return to work for that further period. In D's opinion this was the key factor that C had, rightly, taken into account.

99. D also took into account that the claimant's absence would have an operational impact and that the respondent was unable to recruit to cover her role while she was still employed and on her team's headcount. In that regard she relied largely on the fact that B had referred the case to a decision maker in the first place and that one of the reasons she would have done so was that her absence had become operationally unsustainable by that point.

100. Having considered matters, D wrote to the claimant on 30 August 2018 rejecting her appeal against dismissal and detailing her deliberations. D summarised her rationale for her decision as follows: -

"*Appeal summary*

- *Have procedures been followed correctly? (if irregularities are identified, what weight do they carry)*

  In reaching her decision, the DM followed the correct procedures. She held a formal meeting, consulted the relevant guidance and considered the evidence presented to her. She did consult CSHR when considering the request from the jobholder to delay the formal DM meeting for 4-8 weeks. The DM did not feel this request was

reasonable but did delay the meeting by a couple of weeks to accommodate the jobholder to organise suitable representations.

- *Were the facts and evidence properly considered? (is there any aspect of the formal decision which indicates that facts and evidence were not properly considered and/or an inappropriate weight was applied to any evidence)*

  The DM may have considered seeking further OH advice given the last report was dated May 18. However, there had been no significant change in the jobholder's condition and no further reasonable adjustments had been suggested to aid a successful RTW. The report dated May 18 advised the jobholder would likely be covered under the Equality Act and the DM made her decision in line with this.

- *Was there any new evidence presented? (not known or available at the time of the formal decision)*

  No new evidence was presented at appeal stage other than the jobholder stating she believe she could return to work once her house move was complete.

- *Was the decision consistent? (was the decision taken consistent with HMRC policies and/or similar decisions taken in similar cases previously)*

  The DM did try and seek a reasonable RTW date from the jobholder. The DM was asked about any reasonable adjustments that could be offered to secure a reasonable RTW date. The DM did consider the request to delay the formal meeting for 1-2 months but decided that this was not reasonable.

  I do think the decision was consistent with HMRC policies as this is the evidence throughout the deliberations and DM letter.

- *Was the decision proportionate? (was the decision taken fair and reasonable in the circumstances)*

Given the evidence presented, I feel that the decision taken was fair and reasonable in the circumstances. The jobholder had been absent since 08/01/18. Guidance relating to continuous improvement advises consideration should be given to refer to a DM at month 3. The jobholder's manager had attempted to secure a RTW date and explore any adjustments that could be offered to support this.

A definite RTW was not provided to the DM despite the jobholder being absent for 8 months. There were also no further reasonable adjustments that were suggested."

101. Since the claimant's dismissal, she has made some attempts to find alternative employment, but has limited herself to temporary positions, as she does not feel it is fair on employers to apply for a permanent role in her circumstances. As a result, since her dismissal, she has applied for only one job that she considers to be suitable and she remains out of work as at the dates of the hearing.

Submissions

Submissions for the respondent

Unfair dismissal

102. On behalf of the respondent, it was submitted that the claimant was dismissed because of her continuing sickness absence in circumstances where there was no prospect of return within a reasonable timescale. As the issue at the forefront of the respondent's mind when dismissing had been the claimant's health the principal reason for dismissal was related to her capability. However, if the tribunal found the issue at the forefront of the respondent's mind had been the absence itself then it should find that the claimant was dismissed for some other substantial reason.

103. In either event, the dismissal was for a potentially fair reason and the respondents had acted reasonably in treating that as a sufficient reason for dismissal. The essential question for the tribunal was whether the respondent could be expected to keep the claimant's job open any longer.

The respondent had considered relevant factors when dismissing the claimant: the nature of her illness, the prospects of her returning to work and the likely recurrence of her illness, the need to have someone doing the work she was employed to do, the effect of her absence on the rest of the workforce, the extent to which she was made aware of the possibility of dismissal, her length of service, the availability of temporary cover, the sick pay position and the administrative cost associated with her absence.

104. While C had not considered the claimant to have a disability at the time when she made her decision to dismiss, she had nevertheless considered all of the same matters that she would have been required to take into account had she believed the claimant to be disabled and ultimately her actions had been in the 'spirit' of the Equality Act. In the course of the hearing, C had not been challenged that her decision would have been any different had she considered the claimant to be disabled.

105. While the respondent was undeniably a large organisation, there were limits on the amount of time that it could tolerate its employees being off sick without any prospect of return within a reasonable timescale and it did not have temporary cover for her absence. Her absence also contributed to the high levels of sickness absence within HMRC, which ultimately affected the delivery of service to the taxpayer, with resultant reputational impact on the organisation.

106. By reference to **DB Shenker Rail (UK) Ltd v Doolan 2010 UKEAT/0053/09** it was submitted that the Tribunal should not substitute its own opinion in a case of this nature involving dismissal of a long standing employee, but should recognise that there will be a range of reasonable responses and that a dismissal should not be held to be unfair unless it falls outside that range. In all the circumstances, the respondent had acted reasonably and within the band of reasonable responses in treating the claimant's capability and/or some other substantial reason as a sufficient reason for dismissing her.

107. As to whether the respondent had conducted a fair procedure, it was submitted that prior to the claimant's dismissal, the respondent had followed

its attendance management policy, ascertained the up to date medical position, consulted fully with the claimant and considered alternative employment, albeit the claimant had ultimately not been fit and well enough to return to work in any capacity at any time during her absence.

108. The respondent had met the test in BHS v Burchell. It had a genuine belief that the claimant's ill health was the reason for dismissal, it had reasonable grounds for that belief, and it had carried out a reasonable investigation.

109. The claimant's sickness absence for over six months with no prospect of return to work within at least eight weeks was a sufficient reason for the respondent to dismiss her. Any reasonable employer in the respondent's position would have acted reasonably in dismissing an employee with notice in those circumstances.

110. Reference was made to ***Spencer v Paragon Wallpapers Limited 1977 ICR 301*** in respect of the balancing exercise that an employer should conduct to determine whether in the circumstances it could be expected to wait any longer and if so, how much longer. The respondent had not dismissed the claimant at the first possible opportunity. Within the respondent's organisation, dismissal was normally considered after a three-month absence. The claimant had been supported for a further three and a half months before the decision to dismiss was taken. The respondent could not reasonably have been expected to wait a further eight weeks from July 2018 to see if the claimant's condition would in fact improve and if she would thereafter return to work after a further unknown period in circumstances where she had already been off for nearly seven months.

111. The respondent's conclusion was that in all the circumstances, it had dismissed the claimant for a potentially fair reason, it had acted reasonably in making that decision and it had followed a fair procedure.

Disability discrimination

112. In respect of the claim for direct discrimination under section 13 of the Equality Act 2010, it was submitted that the claimant had not put forward any evidence

to support a case of direct discrimination. She had failed to identify a comparator or a hypothetical comparator who was or would have been treated differently to the claimant. The respondent would have treated a non-disabled employee who was absent from work due to illness for the same length of time and who had no prospect of a return to work in a reasonable timescale in the same way as the respondent treated the claimant. Indeed, when taking the decision to dismiss, the decision maker had not considered the claimant was disabled.

113. In respect of the indirect discrimination claim, the respondent conceded that it had applied its absence management policy to the claimant and that this was a "provision criterion or practice" for the purposes of section 19 of the Equality Act 2010. It was also conceded that the respondent applied that policy to non-disabled employees, that it put disabled employees at a particular disadvantage relative to non-disabled employees and that it put the claimant at that disadvantage.

114. It submitted however that the application of the policy was a proportionate means of achieving a legitimate aim, that aim being to provide the public with an efficient and effective service for taxpayers. In order to achieve that aim, the respondent required employees to attend work regularly and carry out their full-time duties. The dismissal of the claimant was proportionate given the length of her absence, the nature and extent of her condition and the fact that at the time of her dismissal, there was no real prospect of a return to work within a reasonable timeframe.

115. In respect of the claim for discrimination arising from disability in terms of section 15 of the Equality Act 2010, the respondent accepted that it had treated the claimant unfavourably because of something arising in consequence of her disability because it had dismissed her for a disability related absence. However, dismissal had been a proportionate means of achieving a legitimate aim for the same reasons it relied upon in respect of the claim for indirect discrimination.

116. With regard to the claim that the respondent had failed to make reasonable adjustments, the respondent accepted that its attendance management policy put disabled persons at a substantial disadvantage in comparison to persons who are not disabled. However, it submitted there had been no failure to make reasonable adjustments to remove the substantial disadvantage of the application of the attendance management policy to the claimant.

117. The claimant had argued that the respondent failed in its duty to take reasonable adjustments by:

(1) not postponing the decision meeting for up to two months; and

(2) failing to obtain a further occupational health report at the point of dismissal.

118. In the first place, it was submitted that the alleged failure to obtain a further occupational health report could not be considered to be an adjustment to the procedure and therefore should not be viewed as a failure to make a reasonable adjustment.

119. In any event, the respondent did not unreasonably fail to obtain an up to date medical report. The report relied upon was dated 17 May 2018. The respondent had reasonably concluded that there was no need for a further medical report to be obtained because there was no evidence that there had been any significant change in the claimant's condition since 17 May 2018. Furthermore, obtaining a further medical report would not have alleviated the disadvantage by preventing the claimant's dismissal.

120. Even though C had not considered the claimant to be disabled, she did consider the claimant's 19 June 2018 request to postpone the decision for one to two months and in fact the meeting did not take place until 18 July 2018. Objectively viewed, there had been a reasonable adjustment as requested.

121. A two month postponement would not have prevented the claimant's dismissal as she remained absent from work without a return to work date beyond the expiry of the two month postponement requested on 19 June 2018

until the termination of her employment at the end of October 2018 and had submitted fit notes from her GP until then.

Remedy

122. Regarding financial loss, it was clear that the claimant's true intention was to retire in October 2018 in any event and she had suffered no financial loss in the circumstances. In any event, the claimant had entirely failed to mitigate her loss in circumstances where she had refused to apply for permanent roles and had only applied for temporary jobs and, as a result, had applied for only one job in the nine months since her employment ended. She had therefore unreasonably limited the scope of her job search and had failed to mitigate her loss. Should she succeed in her claim, any compensation should be significantly reduced.

123. It was submitted that should the tribunal find that there was an unfair dismissal because of a procedural failure, a ***Polkey*** reduction should be applied to the extent that any award should be limited to the eight weeks that the respondent should have waited before taking the decision to dismiss her, any award being at the applicable rate of sick pay at the time.

124. In respect of injury to feelings, it was submitted that no evidence had been led about the impact of dismissal upon the claimant beyond that she was "gutted" at the decision. There was no evidence before the tribunal that would justify the making of an award higher than the first half of the lower band of Vento.

Claimant's submissions

Unfair dismissal

125. On behalf of the claimant, it was submitted that the respondent had not acted reasonably in all the circumstances in treating the claimant's incapacity and/or continuous sickness absence with no prospect of a return to work within a reasonable timescale as a sufficient reason for dismissal.

126. Prior to her dismissal, she had started to feel better, as evidenced by her medical records and her correspondence with the respondent. Her request

to delay the decision until after her house move had been a reasonable one, particularly considering her forty-two years' service, and the respondent had failed to obtain an up to date professional medical opinion.

127. The outcome had been predetermined, which was apparent from the dates of the dismissal documentation, the decision maker's lack of knowledge of the claimant's full case and the extremely short length of time that the decision meeting had taken. The claimant's change in circumstances had not been considered, reasonable adjustments were not taken seriously, and the rejection of those adjustments was not justified. In all the circumstances, the claimant had been unfairly dismissed.

128. The claimant was in a department of 550 people at the time when she went off sick and during her absence, she moved into a department containing an additional 1,500 employees. The respondent's decision maker did not investigate the actual operational impact of her absence and nor did the appeal authority. There was no financial burden on the respondent of the claimant's absence and the operational burden was not explored. There had been insufficient reasons for the dismissal.

129. While the claimant accepted the respondent had conducted a fair procedure it had failed to make reasonable adjustments and had not justified its decision to dismiss her. The appeal chair had also failed to consider new evidence and failed to consider all the points of the claimant's appeal, in breach of its own policy.

Disability discrimination

130. The respondent had directly discriminated against the claimant in breach of section 13 of the Equality Act 2010. The respondent had treated the claimant less favourably than it would have treated others without a disability. Had the claimant not had a disability, she would have been present at work and not subject to the respondent's absence management process. The claimant relied on a hypothetical comparator, namely an employee without a disability. The hypothetical comparator without a disability would not have been dismissed, as they would not have been absent.

131. In respect of the indirect discrimination claim, the claimant noted that the respondent had conceded that its application of its absence management policy was a "provision criterion or practice" for the purposes of section 19 of the Equality Act 2010 and that it put disabled employees at a particular disadvantage compared to non-disabled persons and also put the claimant at a disadvantage.

132. The application of the policy was not a proportionate means of achieving a legitimate aim. Both the decision maker and the appeal manager had failed to ascertain any financial or operational impact that the claimant's continued absence was having.

133. In respect of the claim of discrimination arising from disability in breach of section 15 of the Equality Act 2010, the respondent had treated the claimant unfavourably because of something arising in consequence of her disability by dismissing her. That had not been a proportionate means of achieving a legitimate aim in circumstances where there had been not been any attempt to ascertain any financial or operational impact that the claimant's continued absence was having by either the dismissing or the appeal manager.

134. In respect of the claim for a failure to make reasonable adjustments, the claimant referred to the respondent's concession that its application of its attendance management policy put the claimant at a substantial disadvantage in comparison with persons who are not disabled.

135. The respondent had failed to make reasonable adjustments. Specifically, it had failed to postpone the decision meeting for up to two months and it had failed to obtain a further OH report in circumstances where the last OH report was dated 17 May 2018. These adjustments were reasonable and would have removed any substantial disadvantage because had the decision been postponed, the claimant believed she would have completed her house move and been able to return to work, therefore removing the disadvantage of her dismissal. These were reasonable steps to take because there would have been no financial or operational impact on the respondent.

Remedy

136. In relation to financial loss, the claimant had suffered financial loss as a result of the respondent's decision to dismiss her and her job search had so far proven unsuccessful. But for her dismissal, the claimant had intended to continue to work until May/June 2020 in order to support her son through his Masters degree at university and had therefore incurred wage loss.

137. In addition to wage loss, she had also suffered a loss of pension contributions.

138. In respect of injury to feelings, it was submitted that there should be an award of injury to feelings for discrimination, such award taking account of the fact that the claimant had been forced to share her historic abuse issues with colleagues in circumstances where she had previously only shared those with her husband.

Relevant law

Unfair dismissal

139. Section 94 of the Employment Rights Act 1996 ("ERA 1996") provides the claimant with the right not to be unfairly dismissed by the respondent. It is for the respondent to prove the reason for the dismissal and that it is a potentially fair reason in terms of section 98 of the ERA 1996. At this first stage of enquiry, the respondent does not have to prove that the reason did justify the dismissal, merely that it was capable of doing so.

140. If the reason for dismissal was potentially fair, the tribunal must determine, in accordance with equity and the substantial merits of the case, whether the dismissal was fair or unfair under section 98 (4) ERA 1996. This depends on whether in the circumstances (including the size and administrative resource of the respondent's undertaking) the respondent acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee. In the second stage of enquiry, the onus of proof is neutral.

141. In determining whether the respondent acted reasonably or unreasonably, the tribunal must not substitute its own view as to what it would have done in the

circumstances. Instead the tribunal must determine the range of reasonable responses open to an employer acting reasonably in the circumstances and determine whether the respondent's response fell within that range. The respondent's response can only be considered unreasonable if no employer acting reasonably would have responded in that way. The range of reasonable responses test applies both to the procedure adopted by the respondent and the fairness of its decision to dismiss - ***Iceland Frozen Foods Limited v Jones 1983 ICR 17 EAT.***

142. In ***DB Schenker Rail (UK) Limited v Dylan 2010 UKEAT/0053/09,*** the EAT found that the Burchell test applies to ill health dismissals, since the employer must show that:

(1) it had a genuine belief that ill health was the reason for dismissal;

(2) it had reasonable grounds for that belief;

(3) it carried out a reasonable investigation.

143. In cases of long-term absence where is an underlying health condition, an employer will require to understand the underlying health condition and prognosis and to consider whether the employee is suffering from a disability, in which case the duty to make reasonable adjustments would be triggered.

144. In cases of long-term absence, fairness dictates that an employer should:

- ascertain the up to date medical condition position;
- consult with the employee;
- consider the availability of alternative employment;
- consider whether it can be expected to keep an employee's job open any longer. How much longer an employer may be reasonably expected to wait will be a fact sensitive question based on the nature and content of the employee's job and the nature and length of the illness.

145. In ***BS v Dundee City Council 2013 CSIH 91***, the Court of Session found that the following factors may be relevant to how long an employee may be expected to wait:

(1) Availability of temporary cover (including its cost);

(2) The fact that the employee has exhausted his/her sick pay;

(3) The administrative costs that might be incurred by keeping the employee on the books;

(4) The size of the organisation.

146. In ***O'Brien v Bolton St Catherine's Academy 2017 EWCA Civ 145,*** Underhill LJ made some observations in relation to ill health dismissals in respect of the question of how long an employer can be expected to wait:

*"The argument "give me a little more time and I am sure I will recover" is easy to advance, but a time comes when an employer is entitled to some finality. That is all the more so where the employee has not been as cooperative as the employer had been entitled to expect about providing an up to date prognosis" (*Paragraph 36)

"In principle, the severity of the impact on the employer of the continuing absence of an employee who is on long term sickness absence must be a significant element in the balance that determines the point at which their dismissal becomes justified, and it is not unreasonable for a tribunal to expect some evidence on that subject. What kind of evidence is appropriate will depend on the case. Often, no doubt, it will be so obvious that the impact is very severe that a general statement to that effect will suffice; but sometimes it will be less evident, and the employer will need to give more particularised evidence of the kinds of difficulty that the absence is causing." (Paragraph 45).

147. As with mitigating factors in misconduct cases, length of service should be weighed in the balance when an employer is deciding to dismiss and failure to give any weight to length of service may render a dismissal unfair.

148. An employer should also consider whether there is any suitable alternative employment available for the employee before taking a decision to dismiss. An employer may be under a duty to modify some requirements of an employee's job both as a matter of reasonableness for the purposes of unfair dismissal law and because of its duty to make reasonable adjustments under disability discrimination legislation if the employee is disabled.

Disability discrimination

149. Section 13 of the Equality Act 2010 provides: -

> "13 Direct discrimination
>
> (1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."

150. An employee claiming direct discrimination must show that they have been treated less favourably than a real or hypothetical comparator whose circumstances are not materially different to theirs – section 23 (1) of the Equality Act 2010. Where the claimant is disabled, the comparator may be non-disabled or have a different disability to that of the claimant. The relevant "circumstances" that the claimant and comparator must share are those which the employer took into account in deciding to treat the claimant as it did.

Discrimination arising from disability

151. Section 15 of the Equality Act 2010 provides that: -

> "15 Discrimination arising from disability
>
> (1) A person (A) discriminates against a disabled person (B) if -
>
> (a) A treats B unfavourably because of something arising in consequence of B's disability, and
>
> (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

152. In ***Basildon & Thurrock NHS Foundation Trust v Weerasinghe UKEAT/0397/14,*** Mr Justice Langstaff held that there were two distinct steps for the test to be applied by tribunals in determining whether discrimination arising from disability has occurred:

(1) Did the claimant's disability cause, have the consequence of, or result in "something"?

(2) Did the employer treat the claimant unfavourably because of that "something"?

153. In ***Pnaiser v NHS England & another 2016 IRLR 170***, the EAT summarised the proper approach to claims for discrimination arising from disability as follows:

(1) The tribunal must identify whether the claimant was treated unfavourably and by whom.

(2) It then has to determine what caused that treatment, focusing on the reason in the mind of the alleged discriminator, possibly requiring examination of the conscious or unconscious thought process of that person, but keeping in mind that the motive of the alleged discriminator in acting as he or she did is irrelevant. The tribunal must then determine whether the reason was *"something arising in consequence of the claimant's disability"*, which would describe a range of causal links. That stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.

154. The knowledge required is of the disability; not knowledge that the "something" leading to the unfavourable treatment was a consequence of the disability.

155. An employer cannot be liable for discrimination arising from disability under the Equality Act 2010 unless it knew (or should have known) about the claimant's disability. In claims of "unfavourable" treatment, no comparator is required.

Indirect discrimination

156. Section 19 of the Equality Act 2010 provides that: -

"19 Indirect discrimination

(1) A person (A) discriminates against another (B) if A applies to B a provision criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.

(2) For the purposes of subsection (1) a provision criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if –

(a) A applies, or would apply, it to persons with whom B does not share the characteristic

(b) It puts, or would put persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it.

(c) It puts, or would put, B at that disadvantage and

(d) A cannot show it to be a proportionate means of achieving a legitimate aim. ''

The concept of the provision criterion or practice (PCP) is fairly wide and there does not need for a formal policy to be in place for an employee to bring an indirect discrimination claim in respect of a management decision that it affect them. The test for indirect discrimination requires a claimant to show that the PCP puts (or would put) persons with whom they share a protected characteristic at a particular disadvantage when compared with others.

157. Section 6 (3) of the Equality Act 2010 provides that:-

"in relation to the protected characteristic of disability –

(a) a reference to a person who has a particular protected characteristic is a reference to a person who has a particular disability;

(b) a reference to persons who share a protected characteristic is a reference to persons who have the same disability"

158. Therefore, for indirect discrimination purposes, the *"particular disadvantage"* must affect those who share the claimant's disability. Any comparative disadvantage that would be suffered by those with the claimant's particular disability as a result of the PCP must be measured against actual or hypothetical persons whose circumstances are not materially different. Section 19 of the Equality Act 2010 does not require an employer to know about an employee's disability to indirectly discriminate. The disadvantage experienced by the employee and those sharing the employee's particular disability has to flow from the PCP.

159. There will be no indirect discrimination if the employer's actions are objectively justified. To establish justification, an employee will need to show that there is a legitimate aim (a real business need) and that the PCP is proportionate to that aim in the sense that it is reasonably necessary in order to achieve that aim and there are no less discriminatory means available. The employer must therefore go further than merely showing that it behaved reasonably, although it is not necessary to show that there were no other options open to it.

Failure to make reasonable adjustments

160. Section 20 of the Equality Act 2010 provides as follows:-

"20 Duty to make adjustments

(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.

(2) The duty comprises the following three requirements.

(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage."

161. Section 20 of schedule 8 to the Equality Act 2010 provides that the duty to make reasonable adjustments will not arise unless the employer knows or ought reasonably to have known of the disabled person's disability and that the disabled person is likely to be placed at a disadvantage.

162. In ***Environment Agency v Rowan 2008 IRLR 20,*** Langstaff LJ said that an employment tribunal considering a reasonable adjustment claim must identify (1) the provision, criterion or practice applied by or on behalf of an employer, or the relevant physical features of the premises; (2) the identity of non-disabled comparators; and (3) the nature and extent of the substantial disadvantage suffered by the claimant in comparison to the non-disabled comparators.

163. In assessing what adjustments are reasonable, the focus must be on the practical result of the steps which the employer can take, not on the thought processes of the employer when considering what steps to take.

164. The EHRC code states that the "provision criterion or practice" (PCP) in section 20(3) of the Equality Act 2010, which is also used in indirect discrimination cases "should be construed widely so as to include, for example, any formal or informal policies, rules, practices, arrangements or qualifications including one off decisions and actions".

165. Whether any potential adjustments are required will depend on whether they are reasonable in the circumstances. An employer will not breach the duty to make reasonable adjustments unless it fails to make an adjustment that is "reasonable". This is a fact sensitive question.

166. In ***Smith v Churchills Stairlifts PLC 2006 IRLR 41***, the Court of Appeal heard that the test of reasonableness is objective and to be determined by the

tribunal. There is no objective justification defence available in respect of an employer's failure to make reasonable adjustments. The proposed adjustments were either reasonable or they were not. The EHRC court lists as factors which might be taken into account, the following: -

- the extent to which the adjustment would have eliminated the disadvantage;
- the extent to which the adjustment was practicable;
- the financial and other costs of making the adjustment, and the extent to which the step would have disrupted the employer's activities;
- the financial and other resources available to the employer;
- the availability of the external financial or other assistance;
- the nature of the employee's activities and the size of the undertaking;
- where the adjustment would be taken in relation to a private household and the extent to which the step would disrupt that household or any office residence.

167. Ultimately however the test of "reasonableness" of any step an employer may have to take is an objective one and will depend on the circumstances of the case.

Discussion and decision

Unfair dismissal

168. The Tribunal accepted that the respondent had the claimant's health at the front of its mind when it dismissed her. It therefore dismissed her for a reason related to her capability, which is a potentially fair reason.

169. The Tribunal was satisfied that the respondent had consulted with the employee fully and regularly from the beginning of her absence on 8 January 2018 until her dismissal. Initially, B managed her absence with compassion and with patience. She waited until the claimant had been absent for five

months before she referred her case to a decision maker. She did so in circumstances where the respondent will normally refer a long-term absence case to a decision maker after three months absence. She consulted with the claimant about the reasons for her absence and she obtained medical reports. She carried out as much investigation as she reasonably could in relation to the reason for the claimant's absence and any steps she could take to enable her to return. She investigated the possibility of alternative roles that the claimant might be able to return to. However, the claimant was unable to offer a return to work on any basis.

170. In all the circumstances, B was fully entitled to refer the case to a decision maker when she did so, at which point there was no foreseeable end in sight to the claimant's absence. By that stage B was legitimately concerned about the continuing operational impact of the claimant's absence, as well as the disproportionate amount of management time she personally was devoting to it.

171. The Tribunal found that C acted reasonably and within the band of reasonable responses available to her in response to the claimant's 19 June 2018 request to delay the decision stage hearing for up to two months. C was reasonably entitled to insist that the decision meeting should take place on 18 July 2018. The respondent had already delayed the referral of her case to a decision maker by two months longer than its normal practice and the claimant provided no reasonable justification to delay the decision any longer. It had already waited over six months before considering dismissal when its normal practice, albeit not one set out in any written policy, was to consider dismissal after an absence of three months.

172. The Tribunal found that the respondent took reasonable steps to ascertain the claimant's medical position prior to dismissing her. It consulted with her regularly about her health during her absence and it obtained two reports from its occupational health advisers. The Tribunal accepted the respondent's submission that it was not reasonably required to obtain further medical advice about the claimant's health at the time of dismissal in July 2018. The latest medical report available to it was dated 17 May 2018 and there was no

indication that the claimant's medical condition had altered since then. Indeed just before the 18 July 2018 decision meeting the claimant had submitted a further two-month fit note.

173. The Tribunal found that C consulted fully with the claimant at the decision stage meeting on 18 July 2018 about the stress related reason for her continuing absence, the underlying reasons for it, any steps that the respondent could take to enable her return to work and the prospects of her returning to work within a reasonable timescale.

174. C was reasonably entitled to dismiss the claimant following the decision stage meeting on 18 July 2018. It was reasonable for her to conclude that the claimant's position, at its highest, was that she would *'potentially'* be able to return to work after a further two months when she had moved into her new home.

175. By 18 July 2018 the claimant had been absent for over six months because of acute stress. Based on the medical evidence and the claimant's own account of her condition, her health had not improved at all during her absence and she had, on 11 July, submitted a further fit note for two months. In all the circumstances it was reasonable for C to conclude that the claimant was not making a definitive offer of a return to work in a further two months time and that any return was not reasonably foreseeable.

176. In reaching her decision C had considered any steps available to the respondent that would enable the claimant to return to work and had reasonably concluded that there was nothing that could reasonably be done to achieve that. She took into account that neither the claimant, nor the respondent's occupational health advisers had suggested any steps that would enable the claimant to return to work on any basis. In all the circumstances C acted reasonably when she found that the commanding nature of the claimant's condition was such that she was unable to return to work on any basis within an acceptable timescale and the respondent could wait no longer.

177. In reaching its decision to dismiss, the respondent was entitled to take account of the operational impact of the claimant's absence. While neither C nor D made their own personal inquiries about the impact, they both relied reasonably on the fact that B would not have referred the claimant's case to a decision maker unless her absence was no longer operationally sustainable. The respondent was also entitled to take into account the contributory effect of the claimant's absence on customer service in the context of high levels of sickness absence within the respondent's organisation generally.

178. The Tribunal was satisfied that D conducted the appeal against dismissal fairly and in line with the respondent's appeal procedure in its attendance management procedure. In common with C, she considered all of the available evidence and reasonably concluded that there were no adjustments that would enable the claimant to return to work and no foreseeable end in sight to the claimant's absence, which had become operationally unsustainable. D considered the claimant's long service, but in all the circumstances concluded reasonably that it did not tip the balance in favour of allowing her more time to recover her health before taking a decision on her future employment.

179. The Tribunal considered the claimant's criticism of D's handling of the appeal and, specifically, her criticism that D had not dealt with her appeal point challenging the accuracy of the meeting notes. The tribunal decided that the accuracy of the meeting notes was immaterial to the outcome in circumstances where D had reasonably concluded on the basis of material medical evidence that the claimant was unlikely to return to work in two months time.

180. The tribunal considered it significant that if the claimant's 19 June request to delay the decision by two months had been granted, the fact that she had been issued with a two month fit note on 11 July indicated that she would still have been unable to return at the end of those two months.

181. The tribunal was also satisfied that the respondent had acted in a procedurally fair way in its handling of the claimant's dismissal. It had consulted with her

throughout her absence and it had also followed its attendance management procedure throughout. The claimant had been made aware of the possibility of dismissal from an early stage in her absence and she had been afforded a reasonable opportunity at dismissal stage and at her subsequent appeal to persuade the respondent's managers that she should not be dismissed.

182. Ultimately, the Tribunal was satisfied that the respondent had carried out a thorough investigation into the reasons for the claimant's absence. When it dismissed her it had a genuine belief on reasonable grounds that she was absent because of her ill health and there was no indication that her health was likely to improve within a reasonable time. It was entitled to conclude that there was no reasonable end in sight to her absence and no steps available to it that would enable her to return to work, such was the commanding nature of her ill health on her ability to return.

183. In all the circumstances the Tribunal found that the respondent acted within the band of reasonable responses available to it when it dismissed the claimant and that her dismissal was fair. Her unfair dismissal claim is therefore dismissed.

Direct discrimination

184. The Tribunal concluded that here was no basis whatsoever for the claimant's claim for direct discrimination. The claimant produced no evidence that she had been treated less favourably than an actual non-disabled comparator in the same or not materially different circumstances. She also failed to provide any evidence that suggested she would have bene treated less favourably than a non-disabled hypothetical comparator.

185. The respondent's unchallenged evidence was that a routine long-term absence case would normally be referred to a decision maker within three months of the beginning of the absence, whereas the claimant's case was referred to a decision maker after almost five months' absence. The evidence therefore showed that the claimant had in fact been treated more favourably than a non-disabled employee with a long-term absence was or would have been treated.

186. In the circumstances, the Tribunal found that, in dismissing the claimant, the respondent did not, because of her disability, treat her less favourably than it treated or would have treated a non-disabled person who was in the same or not materially different circumstances to her. The respondent did not directly discriminate against the claimant.

Indirect discrimination

187. The respondent accepted for the purposes of the indirect discrimination claim that its absence management policy was a relevant 'provision criterion or practice' that it applied to the claimant. It also accepted that it applies that policy to non-disabled employees, that it puts disabled employees at a particular disadvantage when compared to non-disabled employees and that it put the claimant at that disadvantage.

188. The Tribunal proceeded on the basis that the particular disadvantage suffered by disabled employees and by the claimant was that they were more likely to be dismissed under the policy because of sickness absence. The question for the Tribunal to determine therefore is whether the application of the policy to the claimant and her resultant dismissal under the policy was a proportionate means of achieving a legitimate aim?

189. The Tribunal accepted that the respondent had established a legitimate aim, namely the aim to provide the public with an efficient and effective service for taxpayers. It also accepted that in order to achieve that aim the respondent required employees to attend work regularly and carry out their duties.

190. The Tribunal recognised the seriousness of dismissal and that the respondent's decision would undoubtedly have had an impact on the claimant. However, it also took into account that in May 2018 the claimant had indicated to the respondent a willingness to terminate her employment in October 2018 and that her managers had both concluded that prior to her dismissal she was already enjoying a 'retired lifestyle'.

191. Weighing that in the balance with the operational impact of her absence, the Tribunal found the respondent acted proportionately in view of the nature of

the claimant's stress related illness, the length and impact of her absence, the fact there were no reasonable adjustments available and because at the time of her dismissal there was no reasonable prospect of a return to work.

192. The Tribunal therefore also accepted the respondent's submission that its application of the policy to the claimant and its ultimate decision to dismiss the claimant under the policy were proportionate means of achieving that aim.

Discrimination arising from disability

193. The tribunal was satisfied that the claimant had established that by virtue of her dismissal she had been treated unfavourably for a reason related to her disability.

194. In this context the Tribunal again recognised the seriousness of dismissal and that the respondent's decision would undoubtedly have had an impact on the claimant. However, it again also took into account that in May 2018 the claimant had indicated to the respondent a willingness to terminate her employment in October 2018 and that her managers had both concluded that prior to her dismissal she was already enjoying a 'retired lifestyle'.

195. Weighing that in the balance with the operational impact of her absence, the Tribunal again found that the respondent acted proportionately by applying its attendance management procedure to the claimant and by dismissing her because of the nature of her stress related illness, the length and impact of her absence, the fact there were no reasonable adjustments available and because at the time of her dismissal, there was no reasonable prospect of a return to work.

196. The Tribunal therefore found that the respondent's decision to dismiss the claimant because of her disability related absence was a proportionate means of achieving its legitimate aim; namely the aim to provide the public with an efficient and effective service for taxpayers.

Reasonable adjustments

197. Finally, the tribunal had to consider whether there had been a failure to make reasonable adjustments in respect of the claimant's claim that (1) the respondent should have postponed the decision meeting for up to two months and (2) it should have obtained a further occupational health report before making a decision on her future employment.

198. The respondent had accepted for the purposes of the reasonable adjustments claim that its absence management policy was a relevant provision criterion or practice and that it had placed the claimant at a substantial disadvantage relative to persons who are not disabled. The Tribunal proceeded on the basis that the substantial disadvantage suffered by the claimant was that she was more likely than non-disabled persons to be dismissed under the policy because of sickness absence.

199. The question for the tribunal was therefore whether the respondent had failed to make reasonable adjustments when it refused to postpone the decision stage meeting for two months and when it failed to obtain a further medical report before making a decision on the claimant's future employment.

200. The Tribunal finds that the respondent did not fail to make reasonable adjustments. In the first place, C acted reasonably in response to the claimant's 19 June 2018 request to delay the decision stage hearing for up to two months. C was reasonably entitled to insist that the decision meeting should take place on 18 July 2018. The respondent had already delayed the referral of her case to a decision maker by almost two months longer than its normal practice and the claimant provided no reasonable justification to delay the decision any longer. It had already waited over six months before considering dismissal when its normal practice was to consider dismissal after an absence of three months.

201. The fact that the claimant submitted a two month fit note on 11 July also indicated that even if a two month delay had been allowed on 19 June 2018 the claimant would not have been ready to return to work at the end of that

period. Therefore such a delay would not have removed the disadvantage of dismissal in any event.

202. The Tribunal accepted that obtaining medical advice might be a reasonable adjustment in certain circumstances, but that in these circumstances, the respondent was not under a duty to make that adjustment. The medical evidence available to the decision maker and to the appeal manager was dated 17 May 2018. By the time of the decision meeting and the appeal, there was no evidence that there had been a material change in the claimant's condition since that report was produced. Indeed the 11 July fit note indicated that her medical condition remained the same.

203. In the circumstances, there was no reason to obtain a further medical report and it would have served no reasonable purpose. The respondent did not fail in its duty to make reasonable adjustments by virtue of its decision not to obtain further medical evidence before making a decision on the claimant's future employment.

204. The Tribunal therefore finds that the respondent did not discriminate against the claimant in breach of the Equality Act 2010 as alleged and her claims in that regard are dismissed.

Employment Judge: R King
Date of Judgement: 21 October 2019

Entered in Register,
Copied to Parties: 21 October 2019