EMPLOYMENT TRIBUNALS

Claimant: Ms J Williams

Respondent: The Commissioners for Her Majesty's Revenue and Customs

Heard via Cloud Video Platform **On:** 15, 16, 17, 18 and 19 February 2021

Before: Employment Judge Brewer

Representation

Claimant: In person
Respondent: Mr. J Feeny, Counsel, instructed by the Government Legal Department

JUDGMENT

1. The claimant's claim for unfair dismissal fails and is dismissed.

2. The claimant's claims for breach of contract fail and are dismissed.

REASONS

Introduction

1. This case was brought by the claimant against the respondent as long ago as 2018. The claimant's claims originally included claims related to disability, but these were struck out at a preliminary stage as being out of time. The claims I had to deal with were for unfair dismissal and breach of contract. In terms of evidence, I had witness statements from the claimant and one witness on her behalf, Mr. Kenneth Clarke, her former line manager. For the respondent I had witness statements from Mr. John Kenny, the dismissing officer, Mr. Stuart Murtha, appeal officer, and Ms. Helen Hennedy, HR Operations and Transformation. I had an agreed bundle running to over 1000 pages and was asked to and did consider one further document, the claimant's latest terms and conditions of employment. Finally, I have read and considered the parties written submissions as well as their oral submissions.

2. Day 1 of the hearing was a reading day. I commenced hearing the evidence on day 2. At the outset of the evidence, I explained the procedure we would be following to the claimant. I particularly explained the purpose of cross-examination. We then briefly discussed the evidence of Mr. Clarke. The claimant confirmed that she was going to call Mr. Clarke but that he was not at the hearing. I confirmed that the respondent would be going first and therefore Mr. Clarke would not be giving evidence until at least day 3. At this point Mr. Feeny for the respondent said that he would not be cross-examining Mr. Clarke and that his evidence was therefore agreed. The claimant indicated that she would still be calling him as she had some questions for Mr. Clarke. I asked her to tell me the nature of the questions and it became apparent that she wished to cross-examine him, and I explained to her that she could not cross-examine her own witness. At the beginning of day 3 the claimant said that she was no longer going to call Mr. Clarke and in effect no longer wished to rely on his evidence.
3. I have considered this at some length. The position is that the claimant adduced evidence from Mr. Clarke upon which she sought to rely in support of her claims. She exchanged a witness statement for him which I read in advance of hearing the oral evidence. The respondent agreed Mr. Clarke's evidence, they did not challenge it. There was therefore no necessity for Mr. Clarke to be called. I have therefore taken account of Mr. Clarke's evidence in reaching my decision in this matter. The evidence and submissions were concluded on day 3 of the hearing and I delivered an oral judgment on day 5. I set out below detailed reasons.

Issues

4. In the unfair dismissal claim the issues are as follows:
    a. What was the reason or principal reason for dismissal? The respondent says the reason was capability (long term absence) and the claimant does not dispute that this was the reason.
    b. If the reason was capability, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant? In particular:
        i. Did the respondent genuinely believe the claimant was no longer capable of performing her duties;
        ii. Did the respondent adequately consult the claimant;
        iii. Did the respondent carry out a reasonable investigation, including finding out about the up-to-date medical position;
        iv. Could the respondent reasonably be expected to wait longer before dismissing the claimant;
        v. Was dismissal within the range of reasonable responses;
        vi. Was the procedure overall within the range of reasonable responses?
5. There were 2 claims for breach of contract and the issues are as follows:
    a. Did the claims arise or were they outstanding when the claimant's employment ended?
    b. Did the respondent do the following:

i. Fail to pay to the claimant sick pay at pension rate after she went into nil pay after 12 months absence; and/or
ii. Fail to pay her an efficiency payment at more than 50% on termination of her employment?

c. Was either of those decisions a breach of contract?
d. If so, how much should the claimant be awarded as damages?

Law

Unfair dismissal

6. By section 98(2)(a) of the Employment Rights Act 1996 (ERA) capability is identified as a potentially fair reason for dismissal. The key question in a long-term ill health absence dismissal is whether the ill health absence was a sufficient ground for dismissal, and key to that is the question whether the employer can be expected to wait any longer (**Spencer v Paragon Wallpapers Limited** 1977 ICR 301 and see also **S v Dundee City Council** 2014 IRLR 131)
7. A dismissal for capability incorporates the Burchell test. In **DB Schenker Rail (UK) Ltd v Doolan** 2010 EAT 0053/09/1304 the EAT held:
   "In determining whether or not the Claimant's dismissal was fair or unfair (s.98(4)) of the 1996 Act) there were, accordingly, three initial questions that the Tribunal required to address: whether the Respondent genuinely believed in their stated reason, whether it was a reason formed after a reasonable investigation and whether they had reasonable grounds on which to conclude as they did."
8. In **Pinnington v City and County of Swansea and another** EAT 0561/03, the EAT held that the range of reasonable responses test applies to both the dismissal and the procedure, including the employer informing themselves of the true medical position. Whether the employer caused an injury is not determinative of the fairness of the decision to dismiss. In **Royal Bank of Scotland v McAdie** 2008 ICR 1087 the Court of Appeal held that:
   "…*the fact that an employer has caused the incapacity in question, however culpably, cannot preclude him for ever from effecting a fair dismissal. If it were otherwise, employers would in such cases be obliged to retain on their books indefinitely employees who were incapable of any useful work…"*
9. The Court of Appeal also held in **McAdie** that the Tribunal must consider the question of reasonableness by reference to the situation as it was at the date that the decision was taken and for that reason it will usually not be necessary or appropriate for a tribunal to undertake an inquiry into the employer's responsibility for the original illness or accident.
10. A dismissal on ill health grounds requires a balance to be struck between the impact of the absence on the respondent and the impact of the dismissal on the claimant. Those factors include the nature of the illness, the impact of the absence on other staff, the likely length of the illness, the cost of the absence, the size of the employer and the unsatisfactory position of having an employee on very lengthy sick leave. Consultation with the employee is important in such cases (see **East Lindsey District Council v Daubney** 1977 ICR 566 and **Taylorplan Catering (Scotland) Limited v McInally** 1980 IRLR 53).

Breach of contract

11. A key element in both contract claims is the discretionary nature of the payments which I discuss further below.
12. The burden is on the claimant to prove that the respondent was in breach of contract. When a discretion is conferred to an employer under the contract of employment, there is an implied duty not to exercise it irrationally or perversely, (**Clark v Nomura International plc** 2000 IRLR 766). In reaching a conclusion on that, it is necessary to consider whether irrelevant matters have been considered or relevant matters have been overlooked when the respondent made the relevant decision, and if so, was the decision one which no reasonable employer could have made? This is of course the well-known Wednesbury test. In **Braganza v BP Shipping Ltd & Others** 2015 UKSC 17, the Supreme Court approved both limbs of the **Wednesbury** reasonableness test as the measure for the appropriate exercise of discretion in contracts between private parties and creates a higher threshold than mere reasonableness (see **Associated Picture Houses v Wednesbury Corporation** 1948 1 KB 223).

Findings of fact

13. I make the following findings of fact (numbers in square brackets are references to pages in the bundle).
14. The claimant had long service having been employed in the civil service for over 31 years and with the respondent since 1997. At the date of termination, the claimant was employed as a Compliance Systems Helpdesk Officer in Nottingham.
15. During 2015 and 2016 the claimant was involved in dealing with concerns raised about her performance, and the outcome of a performance review, with which she did not agree. There were also concerns about her level of sickness absence. It is clear that the claimant had concerns about how she was being managed by Natalie Carter-Bonsu, Jeanette Riley and Ben Graham. The claimant attempted to raise a grievance about historical issues, but the respondent's policy does not allow grievances to be pursued if they relate to matters outside a strict 3-month time limit [247]. The claimant felt that her direct line manager, Mr Clarke, was the only manager who had any 'empathy' for her situation (see paragraph 43, claimant's witness statement).
16. The claimant's long term sickness absence began on 6 February 2017 [230]. The reason given for the absence started was high blood pressure. An Occupational Health (OH) appointment was made for her for 14 February 2017 and the resultant OH report was provided on the same day. The report states that the high blood pressure resulted from stress in the claimant's work and non-work life and, based on what the claimant asked for, recommended a phased return on 6-hour shifts for one week [241- 242].
17. The claimant was then further signed off by her GP from 21 February 2017 to 7 March 2017 with high blood pressure [244]. She was then signed off until 29 March 2017. Her fit note says high blood pressure and low mood [248].
18. Having been absent for 28 days, the claimant was invited to an attendance management meeting with Mr. Clarke on 21 March 2017 [252]. Mr. Clarke sent the claimant a copy of the respondent's "Key information for managers and

jobholders" in relation to managing health issues [253 – 270]. The notes of that meeting are at [272]. At the beginning of the meeting the claimant says that the cause of her high blood pressure is unknown, and she was having further tests, but at the end of the meeting she says that workplace issues caused her stress, and the stress was causing her high blood pressure. It seems to me that from this point the claimant has self-diagnosed that her workplace issues were causing her stress and high blood pressure and thus were causing her to be off work.

19. On 27 March 2017 the claimant was signed off work until 30 March 2017 [273]. It also seems that during March 2017 the claimant undertook a number of psychological therapy sessions. The discharge letter notes that the claimant told the service at the initial assessment that her main problem was a recurrent depressive disorder which resulted from work-related stress [277]. I point out that in the entire 1000 or so page bundle there is no document evidencing a diagnosis of a recurrent depressive disorder.
20. On 3 April 2017 the possibility of dealing with the claimant's perceived workplace issues by mediation was raised by Mr. Mark Murphy [281]. He expressly asked the claimant if she wanted to consider this approach to resolving her issues.
21. On 3 April 2017, at 19:21, the claimant emailed Mr. Murphy and stated that it would be impossible for her to return to work until there was an "acceptable resolution" to her outstanding concerns although she did not say what would be acceptable to her [283]. The claimant does not refer to the offer of mediation.
22. Mr. Murphy responded on 4 April [282 – 283]. He again raised the issue of mediation and confirms that the mediator would be someone independent. On the same day the claimant emailed Mr. Murphy [282]. On the issue of mediation, she said "I was not expecting you to be part of the mediation but that is no reason why it cannot be arranged by you". She did not say that she wanted there to be mediation however, in response, Mr. Murphy said that he would now ask Mr. Clarke to look at "mediation options for you" [282]. It seems at this point that although the claimant had not stated expressly that she would participate in mediation, Mr. Murphy was satisfied that mediation options could now be considered. He delegated that task to Mr. Clarke.
23. On 12 April 2017 Mr. Clarke arranged another formal attendance management meeting to take place on 19 April 2017 [289]. He reminded the claimant about the support offered via the respondent's Employee Assistance facility. The meeting took place, and the notes are at [296 – 297]. At this meeting a Stress Risk Assessment was completed. The claimant said that she was too upset and stressed to contemplate a return to work even on a phased basis, she did not feel a move to another business area would help, she also felt that a change to her hours would not assist.
24. A second OH report was received on 27 April 2017 following an OH appointment on 19 April 2017 [298 – 299]. This diagnosed the claimant as suffering "hypertension under investigation for secondary causes". The report notes that the claimant was feeling well, and her blood pressure had reduced with medication
25. On 4 May 2017 Mr. Clarke referred the claimant's case to the respondent's Reasonable Adjustment Support Team (RAST) [306 – 307]. RAST responded on 9 May 2017 [310 – 311].

26. On 11 May 2017 Mr. Clarke invited the claimant to a formal 3-month review meeting following her continued absence. The meeting was set for 24 May 2017 [316 and 317]. Me Clarke also took it upon himself to try to involve the claimant's then union, PCS, to assist her [323, 324]
27. A third OH report (22 May 2017) said that it could not be predicted when a return to work was likely and recommended "a resolution of the perceived workplace issues" [331].
28. At the attendance management review meeting on 24 May 2017, it was agreed that the claimant would return on a phased return to work following the end of her fit note which expired on 14 June 2017. However, the claimant was not well enough to return to work and was signed off again. Mr. Clarke made a second referral of the case to RAST [332 – 333]. It is noted that at the 24 May 2017 meeting the claimant's representative asked whether the claimant could work from home. Mr. Clarke rejected this at that time because he argued that if the claimant was too ill to work, she was also too ill to work from home. The claimant has interpreted this as a denial of home working per se, but I find as a fact that this is a misunderstanding on her part.
29. On 7 June the claimant was sent the outcome of the 3-month formal review. The respondent determined to continue to support the claimant's absence until the expiry of her then current fit note on the basis that a return to work was "likely" [347]
30. On 15 June 2017 Mr. Clarke considered whether the claimant would be likely to meet the criteria for ill health retirement (IHR) [352 – 353]. Using OH reports and the guidance on IHR, Mr. Clarke concluded that she would not be eligible because the general criterion is that the applicant must have suffered a permanent breakdown in health that, despite appropriate treatment, results in incapacity for employment until pension age. All of the OH reports state that the claimant would either be fit for work following appropriate treatment (see 14 February 2017 report), or not be fit for work until her perceived workplace issues were resolved.
31. On 21 June 2017, as a result of the continued absence, Mr. Clarke wrote to the claimant to advise her that her case would be passed to a "Decision Maker", Mr. James Grant, to determine whether to continue to support the absence or to dismiss the claimant [355].
32. A formal meeting took place on 11 July 2017 [notes at 369 – 376] which included Mr. Grant the Decision Maker and the claimant along with her representative. At this meeting the claimant's position was that all of her problems were work related. This was a lengthy meeting. The upshot was a decision not to dismiss the claimant [377]. Mr. James said that a written Stress Risk Assessment and Fit for Work plan would be put in place. Mr. Clarke did both of those things [389 and 396]. He also said there should be mediation, evidence as to why the absence could no longer be supported and that the claimant should continue to seek counselling and medical support. This was confirmed in a letter from Mr. James to the claimant [378].
33. Mediation as an option to deal with the claimant's historic concerns was raised again on 20 July 2017 during a keep in touch call with the claimant.
34. Mediation as an option to deal with the claimant's historic concerns was raised again by Mr. Clarke on 26 July 2017. The claimant was to discuss this option with her union representative before reverting to Mr. Clarke.
35. The claimant went into half-pay on 29 July 2017.

36. In a telephone conversation between Mr. Clarke and the claimant on 4 August 2017 the claimant said she would have difficulty returning to work while her 2015/2016 grading issue and her 'grievance' remain outstanding [394].Mr. Clarke also discussed mediation with the claimant.
37. On 8 August 2017 Mr. Murphy set out why the respondent could no longer support the claimant's attendance [399 – 400].
38. There was a telephone discussion between Mr. Clarke and the claimant on 21 August 2017 [407].
39. Mr. Clarke discussed mediation with the claimant again on 31 August 2017.
40. On 30 September 2017 the claimant went into nil pay (the claimant having already had a period of 4 months at half pay for a previous period of absence she was now only entitled to a further 2 months at half pay which was essentially August and September 2017).
41. A final OH report was received on 8 November 2017. This stated, amongst other things, that the claimant was "unlikely to return to work" [463] and that she could not return to work without "a resolution of the ongoing issues" [464].
42. On 9 November 2017 Mr. Clarke discussed the report with the claimant over the telephone. Notes of that conversation appear at [467 – 468]. The claimant confirmed that she could not return to work while her "issues remain".
43. Given the circumstances Mr. Clarke again referred the matter to a Decision Maker. Mr. Clarke's view was that he could no longer support the claimant's continued absence [476 – 478]. The claimant was advised of this step on 13 November 2017 [481 – 482].
44. The Decision Maker in this case was Mr. John Kenny. He invited the claimant to meet him on 12 December 2017 by letter dated 1 December 2017 [517].
45. On 6 December 2017 the claimant emailed Mr. Kenny to say that she only received his letter that day and 6 days was insufficient time for her to prepare for the meeting. She also said, without further explanation, that she would not be available until after Christmas [519].
46. The meeting was rearranged for 4 January 2018 but in the event the claimant had instructed her union to make an offer of settlement. On 3 January 2018 the claimant emailed Mr. Kenny stating: "Just to confirm that due to legal advice and a course of action that I have pursued and HMRC are already aware of, I am unable to attend the meeting tomorrow until a response has been received" [552]. In short, the claimant was seeking an alternative to the process put in train by Mr. Clarke for Mr. Kenny to consider terminating the claimant's employment. That alternative appears to have been an offer of settlement.
47. Given the claimant's refusal to attend the meeting with him, Mr. Kenny wrote to the claimant on 4 January 2018 stating that he would proceed to make a decision and gave the claimant until 12 January 2018 to provide any additional or new information she wished him to take into account [570].
48. On 12 January 2018 the claimant sent an email to Mr. Kenny asking him to take into account the matters set out therein [591].
49. Mr. Kenny sought Mr. Clarke's responses to the matters raised by the claimant in her 12 January 2018 email which Mr. Clarke provided by email on 15 January 2018 [593 – 594].
50. The claimant was given a final opportunity to meet with Mr. Kenny on 6 February 2018. The claimant did not respond to this until after the date had passed [618 – 619]. By now the claimant had instructed solicitors to act for her

51. The claimant was notified on 5 March 2018 that her employment would be terminated, with an effective date of termination of 4 June 2018. The reason for the Claimant's dismissal was incapacity. In the view of the dismissing officer, Mr. Kenny. there was no prospect of her returning to work in a reasonable time [670 - 671]. The claimant was offered the right of appeal. As a result, Mr. Kenny was required to determine if, in the circumstances, a so-called efficiency payment should be paid to the claimant and, if so, to recommend how much by reference to guidance on percentages of the claimant's pay. However, the discretion in respect of the efficiency payment is in the hands of the respondent's HR Director who decided that in this case the appropriate percentage was 50%. This is discussed further below.
52. In the event the claimant appealed on 14 March 2018, and the appeal was heard by Mr. Stuart Murtha. Mr. Murtha considered that he needed greater details of the grounds of appeal. He was away from the office from 14 to 23 March 2018. On 23 March 2018 he emailed the claimant asking her to expand on her appeal grounds.
53. The claimant then contacted Mr. Murtha, on 26 March 2018, to ask him for further guidance on lodging an appeal. Following a delay, he provided a copy of the respondent's guidance to the claimant on 18 April 2018. At that point Mr. Murtha went out of the country until 30 April 2018.
54. Mr. Murtha next contacted the claimant on 4 May 2018 to see if she had the details he requested. The claimant responded by asking Mr. Murtha for "written confirmation from HR that this process is still valid" citing missed timescales by both Mr. Murtha and Mr. Kenny before him which, she said, "concerns me".
55. Mr. Murtha heard nothing further from the claimant so on 25 June 2018 he wrote to her setting up an appeal meeting. The claimant responded that she would prefer a telephone call, and this was arranged for, and took place, on 4 July 2018.
56. Mr. Murtha's decision was to uphold the original decision and he emailed the claimant with his decision on 6 August 2018 [863 – 864]. His rationale is found at [866, 867, 869 – 871].

Discussion and conclusion

57. I shall deal first with the claims for breach of contract.

Sick pay

58. Turning first to sick pay, the Claimant was on full pay from 7 February 2017 until 3 July 2017 [355A]. She was then moved to nil pay on 1 October 2017 [355A].
59. The Claimant's contract at page 5 provides as follows:
    a. Full pay for up to 6 months;
    b. Half pay for up to a further 6 months
    c. The above subject to an overall limit of 365 days in any 4-year period
    d. No pay for any further sickness absence "except that where you have at least two years pensionable service, we will allow you paid sickness absence at the equivalent pension rate of pay, or half-pay if this is less at your manager's discretion".

60. These provisions are in fact subject to an overriding exception in the contract which says that "you will not qualify for paid sickness absence if, exceptionally, it appears that your illness will prevent you from resuming your duties with us".
61. The contractual provisions are supplemented by guidance [960] which states that sick pay at pension rate ("SPPR") may be payable where:
    a. the employee's entitlement to sick pay has been exhausted;
    b. they have more than two years of pensionable service; and
    c. there is occupational health advice that they will return to work within a reasonable time [963].
62. I read the contractual provisions to mean that:
    a. If the employee's illness will not prevent them from resuming their duties, they would be paid the full pay and half pay sick pay amounts, but the manager has the discretion whether to pay the SPPR;
    b. If the employee's illness will prevent them from resuming their duties, then no sick pay will be paid.
    c. It seems to me self-evident that because diseases, illnesses and injuries can change and develop over time, the correct way to read the contractual provisions so that they make sense require the implication of the words "at any time" so that, for example, "if, at any time, the employee's illness will prevent them from resuming their duties, then no sick pay will be paid". In other words, the state of affairs which allows the employer to not pay sick pay may arise during an absence, it need not be the case at the outset of the absence.
63. In the present case, at the date the claimant went into nil pay the respondent reasonably concluded that there was no likelihood of the claimant returning to work. The evidence seems to me to be entirely clear, that at every turn the claimant avoided returning to work. None of her sick notes refer to any adjustments that would enable her to return, she never took up the offer to mediate and, simply put, she was of the mind-set that unless and until issues from 2015/2016 were resolved to her satisfaction, she would not be able to return. In her oral evidence, when asked what she meant by "to her satisfaction", she was unable to say. I remind myself and the claimant that the issue over her performance review in 2015/2016 had already been the subject of an appeal which had been rejected.
64. In my judgment the respondent acted in accordance with the terms of the contract and relevant policy in not providing the claimant with sick pay beyond the 365 days she had received, having taken into account relevant considerations, and there was no breach of contract.

Efficiency payment

65. Turning next to the efficiency payment, I note that it was accepted by the respondent that the system for dealing with the efficiency payment – the Civil Service Compensation Scheme (CSCS) - provides the employees with a contractual entitlement, but within that the respondent has a discretion, and therefore a contractual discretion, as to the percentage to be awarded which could in fact be nil.
66. As we know, the Claimant was paid 50% compensation under the CSCS [671]. The payment is not automatic on dismissal but "*can be considered*" where

employment is being terminated on efficiency grounds related to underlying ill-health conditions [1069].

67. The respondent's evidence, which I accept, was that the 50% figure was reached taking into account the claimant's efforts to return to work, in line with the guidance [1076] which states that 50% will be awarded where the employee:
    a. Has co-operated a "fair amount" with measures to improve attendance;
    b. Has kept in touch;
    c. Has a positive attitude and shown a fair amount of commitment to their work;
    d. Has shown a fair amount of desire to try to return to work;
    e. Has sought and co-operated with a fair number of attempts to make reasonable adjustments; and
    f. Has co-operated with OH and followed a fair amount of their advice.
68. The explanation of the 50% figure in the 5 March 2018 letter shows that the Respondent followed their policy [671 and 1076]. The Respondent justified this figure because [671]:
    a. The Claimant had not accepted offers of mediation;
    b. The Claimant had not used the Workplace Wellness service;
    c. There was evidence that the Claimant had not made consistent lifestyle changes that might have helped.
69. I accept the claimant's point that the wellness service was not a service she sought to take advantage of because, first, a previous experience with them had not been positive and in relation to her lifestyle, she had made some changes. She was getting advice about her psychological state elsewhere. However, even accepting that, it is undeniable that the claimant in fact showed no interest in mediation which in my judgment is key. In her evidence the claimant said that she did not consider that the respondent was genuine in its wish to deal with her historic concerns despite the numerous offers of mediation. She said that she had reached this conclusion because the matter had been delegated to Mr. Clarke to deal with. She did not say, but I infer from her evidence, that she considered him to be too junior. The claimant's concerns were about more senior managers. I pointed out that all Mr. Clarke was asked to do was arrange the mediation and that it would be undertaken by an independent mediator as Mr. Murphy had set out. In her oral evidence that claimant accepted this but still said that she did not trust the respondent. The claimant also said that only mediation was offered, and no other options were given to her. Given that the claimant had historic concerns about 2 or 3 senior managers, it was inevitable that, whether through a grievance process, mediation or some other procedure, very similar steps would have to be taken. The concerns would be aired, information gathered, relevant people spoken to and decisions made. In the circumstances it was difficult to see what other options the respondent could have identified which would have been significantly different to a mediation process. When pressed, the claimant in effect said that she would have expected some acknowledgement that she had been bullied and had suffered at the hands of senior management. The claimant did not accept that those managers may have a very different perspective and given that the claimant's initial preferred process was to raise a grievance, where no pre-judgment about the complaints is made, it was difficult to understand why she was now seeking something akin to an admission of

guilt before agreeing any procedure being put in train to help resolve those issues. The claimant simply did not, and in my judgment cannot, accept that one outcome of the grievance process, had it gone ahead, might have been a finding that she had not been bullied.

70. The decision to put the claimant's compensation in the 50% band was based on reasoned conclusions and relevant evidence including OH reports, the claimant's submissions and the views of her line manager Mr. Clarke. It was presented in a clear and reasoned document. The claimant has provided no evidence from which I could conclude that the decision was either irrational or perverse, or in breach of the implied term of trust and confidence. In the circumstances I find that the respondent was not in breach of contract in applying a 50% limit on the efficiency payment.

Unfair dismissal

71. I turn then to the unfair dismissal claim.
72. It was not in dispute that the reason for dismissal was the claimant's long term sickness absence. Indeed, I agree with Mr. Feeny's submission that the only issue in dispute is whether or not the decision to dismiss was reasonable.
73. The key question is whether, at the date of the decision to dismiss, there was no reasonable prospect of the claimant returning to work.
74. Both Mr. Kenny and Mr. Murtha missed deadlines set out in the procedure they were following. However, it is trite law in the current context to say that procedural irregularities do not of themselves render a dismissal unfair any more than following a procedure to the letter makes a dismissal fair. What matters is whether what was done was reasonable, was within the band of reasonable responses.
75. Turning first to the process leading to Mr. Clarke's second referral to a Decision Maker, in my judgment, Mr. Clarke had spent a great deal of time consulting with and supporting the claimant. There were numerous telephone calls and regular meetings. There were regular referrals to OH, the sharing of reports and the seeking of input from the respondent at every stage. I commend Mr. Clarke for his patient management of what was clearly a difficult situation.
76. Turning to the role of Mr. Kenny, once he had got to grips with the papers, he invited the claimant to a meeting to discuss the case. This was done on 1 December 2017. It was the claimant who declined to attend and who said, without explanation, that she would not be available until after Christmas. Given that, in my judgment Mr. Kenny acted reasonably in seeking a meeting on 4 January 2018. The claimant left it until 3 January 2018 to say she would not attend. The reason was that she was seeking a settlement rather than go through the dismissal process.
77. Perhaps through an abundance of caution Mr. Kenny gave the claimant ample opportunity to provide written submissions and 2 further offers of a meeting. When the claimant did provide written submissions Mr. Kenny quite properly sought the views of Mr. Clarke, the manager most involved in managing the claimant's absence. Once Mr. Kenny had sufficient information to make a decision and he had offered the claimant a final chance for a meeting, it took him around 3 weeks to come to a detailed, reasoned decision. If the claimant complains about that she is in effect complaining about not being dismissed sooner than was the case.

78. In my view Mr. Kenny had a lot to consider and in the circumstances he acted reasonably in taking time to ensure that he reached what he felt was the correct decision. The information Mr. Kenny had amounted to the following:
    a. The claimant had been off sick for over a year at the point where Mr Kenny contemplated dismissal in February 2018 [625];
    b. The OH reports showed that there was no prospect of any return to work by the time of the final report of 8 November 2017 [241- 242, 330-331 and 463];
    c. The respondent's procedure requires that medical evidence be no more than 3 months old at the date of the decision. I accept that the November report was issued just over 3 months before Mr Kenny made his decision. However, there was no evidence or any suggestion from the claimant that the medical position had changed in that period;
    d. The claimant's line managers, Mr. Murphy and Mr. Clarke, had identified that the only way forward was to resolve the claimant's issues with management, but it is noteworthy that the claimant was no longer being managed by the same people [593];
    e. The claimant did not pursue mediation despite having been presented with a number opportunities to do so. In her oral evidence the claimant said that at no point did she tell the respondent that she would not undertake mediation. This is true, but equally, at no point did she indicate that she would mediate, and at the hearing she developed a theme based on Mr. Murphy delegating arranging mediation to Mr. Clarke being junior to the managers she was complaining about and stating that the respondent was going to use mediation to close her down not to deal with her concerns. This was never raised at the time; it appears in no contemporaneous document and in my judgment amounts to an *ex post facto* justification for the claimant not taking up any of the various offers to mediate made by the respondent;
    f. In her written submissions to Mr. Kenny [618-619], the Claimant did not identify any practical step which may have led to her health improving, concluding her email by instead suggesting that Mr Kenny contact her solicitors to deal with the settlement proposal;
    g. The respondent's rationale for being unable to sustain support for the absence [399 – 400].
79. Mr. Kenny's evidence, which I accept, was that his decision was based on the length of the absence and the clear evidence that a return to work was unlikely based both on the medical evidence and what the claimant herself indicated. The claimant's position, it seems to me, hardened somewhat at the hearing when she said in evidence that, in effect, in her mind, the respondent had to accept that the claimant had legitimate concerns in order to get her back to work, indeed, before she would undertake any process such as mediation, which may explain why she did not feel the need to agree to mediate.
80. The claimant appealed on 14 March 2018. Her appeal was determined by Mr. Murtha following a lengthy telephone hearing on 6 August 2018. There is a lengthy period between the lodging of the appeal and its determination, but in reality, between Mr. Murtha receiving the appeal and 25 June 2018, much of the time was taken up with Mr. Murtha waiting for the claimant to clarify her appeal grounds. At the point he contacted the claimant on 25 June 2018 matters moved swiftly. A meeting was arranged and held over the phone on 4

July 2018. Lengthy notes were made and from those a decision was reached within around 4 weeks.

81. The grounds of appeal, and what in my judgment the evidence shows is as follows:
    a. Mr. Kenny did not adhere to the timescales in the procedure. This was accepted by Mr. Kenny and Mr. Murtha, but as I have set out above the reasons for the delay were explained, were reasonable in the circumstances and the claimant did not adduce any evidence, and I can find none, to show that the delay adversely affected the decision;
    b. Mr. Kenny did not consider any medical evidence. Clearly he did consider all of the medical evidence available to him as he addressed it in his outcome, most particularly the November 2017 OH report. The claimant has never suggested that the medical evidence was insufficient or wrong;
    c. Mr. Kenny did not take into account that the claimant's ongoing issues were work-related. If the claimant was referring to her absence, there really was no evidence, and by the time of the hearing there still is no evidence that the claimant's stress is work-related. I accept that the OH reports refer to work related stress as do some of the fit notes, but this is a theme which has developed over time. Initially there was a mix of work and non-work reasons but as time wore on the non-work reasons were no longer referred to and the work-related theme became set in stone notwithstanding that the claimant was no longer attending work. If the claimant was referring to the alleged bullying, that had not been determined and in any event would not prevent a dismissal being fair (see **McAdie** above);
    d. Mr. Kenny did not consider the claimant's disabilities. It is unclear what the claimant meant by this, but Mr. Kenny was aware of the matters in the OH reports and the fit notes all refer to stress, so it is difficult to see how this conclusion was reached by the claimant;
    e. Mr. Kenny did not tackle the bullying and harassment. He did not, but that was not his role. He had to consider the likelihood of a return to work and looking at the evidence he concluded it was unlikely in part because efforts to deal with the relationship issues, the alleged bullying, through mediation, were not taken up by the claimant;
    f. Mr. Kenny did not consider the claimant's outstanding claim to the Civil Service Injury Benefit Scheme. It is correct that he did not but how could he? He was charged with making a decision based on Mr. Clarke's referral which included reasons why the absence could no longer be supported. The only way he could take account of the application for Injury Benefit was to wait an indeterminate period of time for an outcome in circumstances where the absence was already over 12 months;
    g. Mr. Kenny did not provide feedback of a meeting with HR. This seems to me to be wholly immaterial to Mr. Kenny's decision;
    h. Mr. Kenny did not wait for a response to the offer of settlement. Again, this was not the role Mr. Kenny had. He was asked to and did consider dismissal, not whether to reach a settlement with solicitors;
    i. Mr. Kenny was biased and subjective. As Mr. Murtha points out, the claimant suggested that her comments on mediation and references from OH reports were taken out of context. It is entirely clear that they

were not. The claimant is properly characterized as never having taken up an offer of mediation and the OH reports are fairly consistent: that she would be unlikely to return to work while she considers she has unresolved issues;

j. The respondent failed to support the claimant in dealing with the issues which had caused her to be absent from work. Accepting for the sake of argument that the claimant's absence was for work-related reasons, which I stress I have no evidence of, the reality is that she describes Mr. Clarke, her immediate line manager as having empathy with her situation, it is evident from their email, exchanges that they were on good terms and Mr. Clarke was in my judgment very supportive. The offers of mediation, in circumstances where the grievance procedure was not available and where the claimant had already appealed one decision to which she objected seem to me to be supportive measures. There was regular keeping in touch meetings or discussions, formal reviews and no lack of people engaging in this process. The respondent was slow to dismiss, the first Decision Maker determining not to dismiss. In my judgment the respondent supported the claimant throughout;
k. The final point was the reduced efficiency payment. This was an appeal against dismissal, Mr. Kenny did not take the decision to award 50% and thus he could not consider this matter.

82. The claimant's witness statement runs to some 90 paragraphs. The statement does not start to deal with the absence which led to the dismissal until around paragraph 41. The themes are that the claimant was being asked to return to work with her issues unresolved, and procedural issues. The criticisms of the decision to dismiss are largely the matters raise by the claimant in her appeal which I have dealt with above.
83. In her oral evidence I note the following:
    a. She confirmed she had been offered mediation and she had not taken it up;
    b. She rejected suggestions by Mr. Kenny for a phased return, or a business move. As to the business move, the claimant said that it would be difficult to start again with strangers. However, she also could not work with those she believes bullied her in the past. In that context it is difficult to see how she ever believed she could get back to work;
    c. She agreed that at no point was it clear from the medical evidence that a firm return date was available;
    d. She was convinced that Mr. Clarke had ruled out homeworking even when it was pointed out to her that he simply said an employee who is not fit to work should not be working from home, they should not be working at all;
    e. The claimant agreed that Mr. Clarke had produced a Stress Reduction Plan and a Fit for Work Plan;
    f. She agreed that in relation to mediation the ball was in her court as she was to discuss it with her union and let Mr. Clarke know if she wanted it to go ahead. She never did.
84. As I mentioned above, at the hearing the claimant said that she had a very low belief that mediation would work, and she felt "they" were trying to "shut things down" but she did not say who or why. Given the efforts the respondent was making to try to get the claimant to mediate it is impossible to see how she

came to this conclusion and in my judgment, faced with difficult cross-examination questions the claimant was trying to justify her failure to mediate. There is not a single piece of evidence in a large bundle or in the claimant's witness statement to suggest she had a low belief in mediation or that the respondent was trying to shut the matter down. It makes no sense for the respondent to offer mediate so many times if what they really wanted to do was sweep matters under the carpet.

85. As to the claimant's other complaint that she was offered no other option than mediation, she could not identify what possible other options there might be or even what another option might consist of.
86. In my judgment the respondent reasonably consulted the claimant, had up to date medical evidence on which to base a decision and made strenuous efforts to get the claimant back to work both through mediation and the offering of a phased return, reduced hours and/or a business move. Based on the information provided to Mr. Kenny he acted reasonably in concluding that the respondent could not wait any longer for the claimant to return to work given the length of the absence and no reasonable prospect of a return even in the medium term. In all the circumstances I find the dismissal fair.

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Employment Judge Brewer

Date: 19 February 2021

JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE

Note
Written reasons will not be provided unless a written request is presented by either party within 14 days of the sending of this written record of the decision.

Public access to employment tribunal decisions
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