Case No: 3307407/2018

EMPLOYMENT TRIBUNALS

Claimant **Respondent**

Ms Grace Yearwood **v The Department for Work and Pensions**

Heard at: Watford **On:** 5, 6, 7, 8, and 9 October 2020
11, 12 and 13 January 2021

Before: Employment Judge Alliott
Members: Mrs J Smith
Mr M Bhatti MBE

Appearances:

For the Claimant: Ms Margaret Hodgson (Counsel)
For the Respondent: Mr Saul Margo (Counsel)

JUDGMENT

1. The judgment of the tribunal is that:

   1.1 The claimant's claim for unfair dismissal is well founded.

   1.2 The claimant's dismissal was an act of disability discrimination.

   1.3 Reinstatement:

      1.3.1 The claimant is to be reinstated into her role as a work coach at Wood Green Job Centre and is to be treated in all respects as if she had not been dismissed.

      1.3.2 The respondent is to pay the claimant arrears of pay to cover the period from the date of her dismissal until the date of her reinstatement.

      1.3.3 The arrears of pay are to be calculated based upon the claimant's salary at the time of her dismissal (£23,400.80) including the pay increments and bonus payments that the claimant would have received had she remained in employment.

      1.3.4 The arrears of pay are to be reduced by any tax, national insurance, pension contributions and any other deductions

that would have been made if the claimant had continued in employment.

1.3.5 The arrears of pay are to be further reduced to take into account the pay in lieu of notice (£5,827.79) and the payment in lieu of annual leave (£822.36) that the claimant received in her payslip for the period 1 January 2018 – 31 January 2018.

1.3.6 The arrears of pay will also be subject to the recoupment of any relevant state benefits.

1.3.7 The claimant is to have the same right to accrual within the Civil Service Pension Scheme as if she had not been dismissed.

1.3.8 This order must be complied with by 1 February 2021.

2. Recoupment

2.1 The total monetary award is the sum payable pursuant to the Reinstatement Order plus £25,000.

2.2 The prescribed element is the sum payable pursuant to the reinstatement order.

2.3 The prescribed period is from 10 January 2018 until the conclusion of these proceedings.

2.4 The monetary award exceeds the prescribed element by £25,000.

3. The respondent is ordered to pay the claimant the sum of £25,000 for injury to feelings.

REASONS

Introduction

1. The claimant was first employed by the respondent on 1 June 1987. By 2017 the claimant's job title was Work Coach and her job involved dealing with new claims and rapid reclaim. The claimant was dismissed on 10 January 2018. At the time she had in excess of 30 years' service with the respondent and had earned seven years enhancement. As such, she had 38 years of reckonable service with the respondent. The reason given for the claimant's dismissal was capability, namely ill-health.

2. By a claim form dated 24 May 2018, the claimant brings complaints of unfair dismissal and disability discrimination.

The issues

3. The issues were recorded by Employment Judge Heal following a preliminary hearing heard on 30 November 2018. These were as follows:

"**Unfair dismissal claim**

1. The claim was presented in time, the claimant qualifies to claim unfair dismissal and she was dismissed.

2. What was the reason for the dismissal? The respondent asserts that it was capability which is a potentially fair reason for s.98(2) Employment Rights Act 1996. It must prove that this was the reason for dismissal.

3. Thereafter, the burden of proof is neutral, but it helps to know the claimant's challenges to the fairness of the dismissal in advance and they are identified as follows. She says that:

   3.1 There was an agreed date for her to return to work but then she was dismissed the day before she returned.

   3.2 She was dismissed because of her disability.

   3.3 She was dismissed because she had worked for a long time and was employed on an old contract which offered her more privileges and benefits as an employee and the respondent wanted to get rid of her.

   3.4 From 2014 onwards to when the claimant went off sick, she had objected to doing things that she was asked to do at work which she believed were not legal, in that she was asked to bring into the office lone parents who had children under the age of one and she was instructed to direct them to go back to work and she felt that that was not legal. She objected to doing that. The illegality is that it was not right to force the lone parents to go back to work.

4. On the same burden of proof did the respondent carry out as much consultation with the claimant and any medical advisers, consideration of the medical evidence and consideration of alternative roles as was reasonable in all the circumstances?

5. Was the decision to dismiss a fair sanction, that is, was it within the reasonable range of responses for a reasonable employer?

6. Does the respondent prove that there was a percentage chance of a fair dismissal in any event? If so, what is the percentage and when would dismissal have taken place?

Disability

[The issues are not recited here as this matter has been already determined]

Section 13: Direct discrimination on grounds of disability

7. Has the respondent subjected the claimant to the following treatment falling within s.39 of the Equality Act, namely:

   7.1 Not making an Occupational Health referral within 14 days of her absence on 27 September 2017. The respondent will say that it did make such a referral after the claimant gave her consent on 16 October 2017.

   7.2 Failing to take into account the recommendations of Occupational Health

dated 6 December 2017, specifically by undertaking risk assessment or case conference.

7.3 Refusing to permit the claimant to make an application for annual leave.

7.4 Giving the claimant an unreasonably onerous caseload in that the claimant was doing 20 interviews per day whereas other colleagues were doing 4-5 interviews per day.

7.5 Failing to convene a case conference in December 2017 after she had been absent for a period of three months. The respondent will say that it did convene such a conference.

7.6 Not giving the claimant a 10 day period to return to work after the case conference or an alternative reasonable timescale.

7.7 Failing to take into account that she had had no period of sickness absence since 2014, before dismissing her.

7.8 Dismissing the claimant.

8. Has the respondent treated the claimant as alleged less favourably than it treated or would have treated the comparators? The claimant relies on actual comparators (whose names or identifying details she will provide within 14 days from today) and/or hypothetical comparators.

9. If so, has the claimant proved primary facts from which the tribunal could properly and fairly conclude that the difference in treatment was because of the protected characteristic?

10. If so, what is the respondent's explanation? Does it prove a non-discriminatory reason for any proven treatment?

Is the claim in time?

11. The claim form was presented on 24 May 2018, Acas received notification on 26 March 2018 (Day A) and an EC Certificate was sent on 26 April 2018 (Day B). Accordingly, any act or omission which took place before 27 December 2017 is potentially out of time, so that the tribunal may not have jurisdiction.

12. Does the claimant prove that there was conduct extending over a period which is to be treated as done oat the end of the period? Is such conduct accordingly in time?

13. Was any complaint presented within such other period as the employment tribunal considers just and equitable?

Remedies

14. If the claimant succeeds, in whole or part, the tribunal will be concerned with issues of remedy.

15. There may fall to be considered re-instatement, re-engagement, a declaration in respect of any proven unlawful discrimination, and/or compensation for loss of earnings, injury to feelings, and/or the award of interest."

The law

Unfair dismissal

4. Ill health is a potentially fair reason for dismissal as it relates to the employee's capability of performing the work he or she was employed to do – s.98(2)(a) Employment Rights Act 1996.

5. As set out in the IDS Employment Law Handbook Unfair Dismissal at 5.15:

> "Long-term ill health
>
> "There are two key aspects to a fair dismissal for long term illness or injury involving long term absence from work. First, where an employee has been absent from work for some time, it is essential to consider whether the employer can be expected to wait longer for the employee to return – Spencer v Paragon Wallpapers Ltd [1977] ICR 301, EAT. According to the Court of Session in SV Dundee City Council [2014] IRLR 131, Court of Session (Inner House), the tribunal must expressly address this question, balancing the relevant factors in all the circumstances of the individual case. Such factors include:- whether other staff are available to carry out the absent employee's work:- the nature of the employee's illness; the likely length of his or her absence:- the cost of continuing to employ the employee:- the size of the employing organisation; and, (balanced against those considerations), the "unsatisfactory situation of having an employee on very lengthy sick leave"….
>
> Secondly, a fair procedure is essential. This requires, in particular:
>
> - Consultation with the employee.
> - A thorough medical investigation (to establish the nature of the illness or injury and its prognosis), and
> - Consideration of other options; in particular, alternative employment within the employer's business."

6. From 5.112 onwards, the IDS Employment Law Handbook on Unfair Dismissal recites factors affecting reasonableness. These include: -

> "The length of the absence, the nature of illness and likelihood of improvement. Within this consideration may be given to illness caused by the employer.
>
> The employee's length of service.
>
> Availability of temporary cover.
>
> Effect on other employees
>
> Effect on output or sales.
>
> Size of employer.
>
> Nature of employment.
>
> Availability of sick pay."

7. Was the dismissal fair applying s.98 of the Employment Rights Act 1996?

Direct discrimination

8. As per the recital in the issues.

Disability

9. Disability was dealt with at an open preliminary hearing heard on 12 August 2020 by Employment Judge Gumbiti-Zimuto. The judgment of the tribunal was that the claimant was a disabled person from November 2013. The nature of the claimant's disability was mental impairment, namely mental health issues described as work-related stress.

10. It was accepted by Mr Margo on behalf of the respondent, that the respondent knew or ought to have known at all material times that the claimant was a disabled person.

The evidence

11. We have been provided with a hearing bundle running to 835 pages.

12. In addition, we were provided with witness statements and heard oral evidence from the following: -

    a. Ms Phyllis Fealy, an Employment and Partnership Manager for the respondent.
    b. Ms Sweta Long, a Higher Executive Officer for the respondent. Ms Long was the claimant's Line Manager at the material time.
    c. Ms Nicola Mahoney, an SEO Grade member of staff for the respondent at the time of the claimant's dismissal.
    d. Ms Jessica Hodgson, A District Operations manager in North London for the respondent at the material time.
    e. The claimant.
    f. Ms Liz Maifredi, A Grade 7 (District Operations manager) for the respondent.

The facts

13. The claimant was employed by the respondent on 1 June 1987. She therefore had in excess of 30 year's service at the date of dismissal on 10 January 2018.

14. The claimant went off work due to stress at work on 27 September 2017. Between 1 April 2014 and 27 September 2017, the claimant's absence record shows that she had three half days off due to illness. We find that in the three years leading up to September 2017 the claimant had an excellent illness absence record.

15. The respondent had attendance management procedures. Under the section "The key things that you need to know" the following is recited: -

"

- Continuous Absence Process: If you are absent for a continuous period of time, of 14 days or more, your manager will arrange to meet you, preferably at your office, or at home or an alternative location, to understand what support you need to return to work at the earliest possible date.

- Back to Work plan: If you are absent continuously for 4 weeks or more your manager must work with you to develop a Back to Work plan. You may wish to share this with your GP.

- Case Conference: If you are absent from work for 3 months your manager will arrange a case conference with Occupational Health Services to discuss how to manage your absence.

- Senior Management Engagement: If you are absent form work for 6 months or more your manager will engage a more senior manager in your case."

And under "Continuous absence process"

24. If you are absent for a continuous period of time, your manager must follow the process shown in the following table:

Stage 1

14 day Informal Attendance Review

If your absence reaches 14 continuous days and you are not due to return to work in the near future, your manager will arrange an informal attendance review discussion with you.

Stage 2

28 day Formal Attendance Review Meeting

Once you have been absent for 28 continuous days, your manager will arrange a review meeting with you to discuss any support you need for your return to work. This will include you and your manager developing a Back to Work Plan. If you are unlikely to return to work within a reasonable time period, your employment with the department may end. If your circumstances mean a return to work is possible within a reasonable timescale, your manager will move to Stage 3 and continue to review your circumstances. Your manager will send you a written record of the discussion.

Stage 3

Ongoing monthly Attendance Review Meetings.

Review meetings should take place on a monthly basis except where this would clearly not be appropriate ie where you are in hospital or a hospice. Your manager will discuss with you any support you need to return to work which will include developing a Back to Work Plan or reviewing an existing plan. If at any time during the ongoing review your manager believes that your absence can no longer be supported by the department, dismissal should be considered. The department does not envisage anyone will be absent for longer than 1 year.

Stage 4

Occupational Health Case Conferences

Once you have been absent for 3 months your manager must arrange a case conference with an Occupational Health Advisor to discuss how to manage your absence. An HR expert may also attend, if required. After the case conference your manager will discuss any new actions with you and update your Back to Work Plan.

Stage 5

SCS Engagement

Once you have been absent for 6 months your manager will engage a member of the Senior Civil Service (CSC) in your case. The purpose of the engagement is to ensure that you are being given the help and support you need to return to work and that your case is being proactively managed. Engagement will continue at the 9 and 12 month stage of your absence and thereafter on a monthly basis until your case is resolved.

Stage 6

Dismissal/Demotion

If at any time during the ongoing review your manager believes that your absence can no longer be supported by the Department, dismissal should be considered. Ultimately if there is no change in your circumstances, and your manager believes that the department can no longer support your absence your case will be referred to a Decision Maker who will decide whether you should be dismissed or demoted. They will also consider any eligibility you may have to compensation. The Decision Maker will arrange a meeting with you if dismissal or demotion is being considered. They must follow the formal departmental attendance management procedures."

16. The Senior Management Engagement procedure for the Decision Maker provides as follows: -

"7.2 In deciding whether to refer a case to a decision maker for dismissal…. they may wish to consider advice from an HR expert if the case is complex….

… Dismissal is not an option if there is an outstanding… occupational health report, and reasonable adjustments should be put in place, where it is viable to do so, as an alternative to dismissal."

7.9 A decision to dismiss should not be taken lightly or as anything the than a last resort. In coming to their decision, the Decision Maker must consider the following:

- Whether everything reasonable has been done to support the employee back to work.
- Whether there is a reasonable expectation of improved and sustained attendance to a satisfactory level.
- Any mitigating circumstances eg domestic, personal, work problems,

NHS delays.

- The nature of any underlying medical condition or disability and any reasonable adjustments that have been considered, made, or not made to the working environment. Where it is viable to do so, if a reasonable adjustment can be made, with the prospect of removing some or all of the disadvantage, it **should** be put in place as an alternative to dismissal.

- Deciding what is a reasonable level of absence to support for a disability is not an exact science and dismissal decisions should not turn on a disabled employee going a day or two over their trigger point.

- Whether reasonable steps have been taken to understand the effects of the illness.

- The employee's length of service and previous attendance record.

- Whether the employee has been given every opportunity to state their views and that those views have been properly considered. "

17. Further, the following is provided in relation to dismissal: -

"7.17 The decision maker should dismiss if all of the following are satisfied:

- The business needs can no longer support the employee's absence.

- Demotion.

  - Is not an option, or;
  - Would not result in the employee returning to full and effective service, or;
  - Is not accepted by the employee,

- There are no further reasonable adjustments that can be made or further adjustments would be unlikely to change the situation greatly.

…"

18. The claimant went off sick on 27 September 2017 with headache and work-related stress. On that day the claimant had received some training.

19. Ms Sweta Long's witness statement states that, "the claimant had previously stated that I was bullying and harassing her". We were told in evidence that this allegation had been made by the claimant arising out of the training on 27 September. Ms Long told us that a letter was left on her desk by the claimant making these allegations. We were not provided with a copy of that letter and it does not appear that the allegations were escalated into a formal grievance.

20. On 27 September 2017, the respondent completed a "First Call checklist" for the claimant which indicated that the nature of the claimant's illness was "headache, work-related stress".

21. On 29 September 2017, the claimant attended work to hand in a medical certificate. The "Fit note" is dated 28 September 2017 and is from the

claimant's GP. It records that due to stress at work the claimant was not fit for work for four weeks.

22. Sweta Long was the claimant's Line Manager. She was informed of the medical certificate. Sweta Long's witness statements states: -

> "My Line Manager [Harvey Nichols] and I decided that because the claimant had previously stated that I was bullying and harassing her, another manager should deal with her during her absence."

Accordingly, Ms Phyllis Fealy was tasked with conducting the sickness absence informal and formal meetings with the claimant.

23. Ms Fealy told us in evidence that the reason she had been involved was to "distance" Ms Long from the claimant and to be impartial. However, it is plain to us that every decision was actually made by Ms Sweta Long. Ms Fealy readily accepted this and she distanced herself from all the correspondence in her name. Ms Fealy referred to herself in evidence as being no more than "a puppet". We find it surprising that a manager such as Ms Fealy should participate in a process that presents the written documentation as being from her when, in reality, it reflected the decisions being made by Ms Long who, on her own evidence, was not impartial.

24. On 12 October 2017 Ms Fealy held the Stage 1 14-day informal review. The claimant gave her consent for an OHS referral. The respondent has a pro forma stress reduction plan document and this was filled in by hand during the course of the review. The claimant explained the nature of her stress and the reasons for her absence. The claimant agreed to consider a return to work on Wednesday 1 November on part-time medical grounds.

25. Ms Fealy transferred the hand-written stress reduction plan notes into a printed version which we have in our bundle. It has to be observed that the action plan is limited in the extreme in that all that it records is, "Will consider some kind of mediation on return to work".

26. Having received the claimant's written consent, Ms Long submitted the claimant's referral to OH on 16 October 2017.

27. OH made an appointment for the claimant on 19 October 2017. This was a telephone appointment and was unsuccessful because the claimant, for whatever reasons, did not or was unable to answer the calls. A further appointment was made for a telephone consultation with OH on 2 November 2017. This was unsuccessful as the claimant was unwilling to have a telephone consultation and wanted one face to face.

28. We find that the claimant gave her consent to being referred to OH at the meeting on 12 October and the actual referral was made on 16 October. We have not actually seen any procedural requirement for the claimant to be referred to Occupational Health within 14 days of her absence. In any event, we find that the claimant was referred to OH within a reasonable period. We find that there was no failure to make an Occupational Health referral within 14 days of the claimant's absence on 27 September 2017.

29. On 23 October 2017, Ms Fealy sent a letter to the claimant inviting her to a further meeting on 31 October. This was the Stage 2, 28-day meeting. We were told that the letter is a template letter drawn from the respondent's system which explains why the logo on it is in a different (old) format to other letters. The claimant was suspicious about this but we find that it was entirely genuine. The letter was in a standard format and contains the following: -

> "However, I must remind you that your employment with the department could be affected if your sickness absence can no longer be supported."

30. On or about 26 October 2017, the claimant submitted a further fit note to the respondent. Again, it is from the claimant's GP, is dated 26 October 2017 and records that because of stress at work the claimant was not fit for work for a further four weeks.

31. On 31 October 2017 Ms Fealy held the 28-day review meeting with the claimant. We have been provided with some notes of that meeting. The claimant's health was discussed and Ms Fealy was indicating that the respondent wanted to support her back to work. A back to work plan was also discussed. Suggestions were made as to how the claimant could improve her health, for example, by ensuring a regular sleep pattern. Further, arrangements were discussed to support a possible return to work. This involved the claimant working front of house and receiving more training. The claimant could return to a new team and a new manager and the return to work could be phased with reduced hours being built back up over a period of five weeks. Ms Fealy's evidence was that the claimant agreed with all these suggestions. The claimant trusted Ms Fealy and believed she was acting in her best interests.

32. Ms Fealy wrote a letter to the claimant on 2 November 2017 summarising the meeting on 31 October 2017. The letter concludes: -

> "Following our meeting I am pleased to confirm that the department will still support your sickness absence due to stress and I will not make a referral for dismissal or demotion at this time."

33. The back to work plan that accompanied that letter is fairly rudimentary. Improving the claimant's physical and mental wellbeing and actually returning to work was largely the responsibility of the claimant. As far as the other arrangements or adjustments to facilitate the claimant's return to work are concerned, obviously enough, these could only be implemented once the claimant had physically returned to work.

34. We have seen an email dated 2 November 2017 which confirms that the claimant's caseload was reallocated to other employees.

35. On 22 November 2017, Ms Fealy sent a further letter to the claimant stating that, as the claimant had been absent for two months, so a further meeting was to be arranged on 30 November 2017. Once again, this was on the standard template letter which recites: -

> "The Attendance Management procedure aims to help you 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."

36. On or about 27 November 2017 the claimant submitted a further fit note. Once again, this was from her GP and indicated that because of stress at work the claimant was not fit for work. In the comments section the following is recorded: "Return to work 11/01/2018". The fit note was operative from 27 November 2017 to 10 January 2018.

37. On 30 November 2017 Ms Fealy held the meeting with the claimant. We have been provided with the notes of that meeting. The claimant's health was discussed and Ms Fealy was encouraging the claimant to return to work, suggesting 11 December 2017 as a possibility. The claimant agreed to think about this and Ms Fealy said she would call on the next Monday to find out what she had decided.

38. On or about 4 December 2017, Ms Fealy telephoned the claimant who indicated that she was not ready to return to work on 11 December 2017. It would appear that she was suggesting 15 January 2018 as a return date. (The claimant did not work on Fridays and the 15th was the next Monday).

39. On 6 December 2017, the claimant went for a face to face consultation with OH Assist. The resultant report contains the following:

> "Current capacity for work
>
> This lady claims that she wants to return to work and would like to continue to work until retirement age. She feels that if she returns to work now when she has problems with memory and concentration and feeling vulnerable, her performance may be affected.
>
> In my clinical opinion from what she reported and based on my observations, she is not yet ready to return to work. She would benefit from medication and if prescribed this can take 2-4 weeks to take effect. Self-help strategies to build resilience would also be beneficial. Her motivation to put self-help strategies are currently affected, and I am hoping medication can help. I would also recommend that management agree periodic contact with her.
>
> The overarching issue here which hinders her progress and is presenting as a barrier for her return to work, as she claims is a series of work-related issues and claims. This needs to be addressed and a solution found so she can return to work and work effectively."

40. The report later goes on as follows: -

> "Current outlook
>
> The outlook can be favourable if issues she perceives in the workplace can be tackled and resolved and therefore ill-health retirement is not a consideration at present.
>
> …

> I am hoping medication, therapy and self-help strategies can help her recover and return to work and work effectively. Much will also depend on her taking advice that she has been provided with today regarding self-help strategies.
>
> I am hoping that this would be achievable within the next 4-6 weeks and if this transpires not to be the case, I would recommend that management raise another referral to OH for further advice."

41. The report also contains the following: -

> "Disability Advice
>
> My interpretation of the relevant UK legislation is that Ms Grace Yearwood's stress and depression is likely to be considered a disability because it:
>
> - Has lasted longer than 12 months
> - - is having an impact on her ability to undertake normal daily activities
> - - is likely to recur (can be exacerbated by stress)"

42. In the report, in answer to manager questions, it is stated: "She is currently unfit for work."

43. On 6 December 2017, Ms Long received an OH portal notification that the claimant's OH report was available. On 7 December 2017, Ms Long says that she reviewed the claimant's OH report.

44. Ms Long's witness statement states as follows: -

> "After reviewing the OH report I discussed the claimant's case with my manager, Harvey Nichols and my Grade 7, Paula Heffernan. Both agreed with my decision to refer the claimant to a decision maker and recommend that she should be dismissed."

45. We find it unsatisfactory that Ms Long, with the apparent approval of her line manager and grade 7 manager, should not only refer the claimant to a decision maker but recommend dismissal. Such a recommendation is not provided for in the attendance policy and is surprising given that we consider that good practice should be that the investigator should not recommend or prejudice the outcome of a capability hearing. (See the ACAS Investigations Guide)

46. Further, we find that the Grade 7 manager, Paula Heffernan's endorsement of this course of action to be at variance with a document she countersigned on 10 January 2018 wherein it is recorded:

> "I am satisfied that Grace has attempted to do all that was in her own control to attempt to return to work and that she is attempting to try to improve her health and manage her stress. This is backed up by evidence of OHS reports and medical certificate."

47. That document is a compensation certificate for employees dismissed for unsatisfactory attendance/poor performance. No doubt, having decided to dismiss the claimant, Ms Heffernan was seeking to justify 100% compensation. However, that document, in our judgment, does provide insight into the real reason why the claimant was dismissed.

48. The document states:-

> "Although there have been attempts to support Grace with her learning and development by her line manager, there has been no improvement in her performance."

And

> "Grace's general attitude to work is below the level expected and relationship with previous line managers and colleagues is strained."

49. The clear impression we gained from the evidence of all the respondent's witnesses was that they were all seeking to justify their decision effectively on the basis that, as Ms Maifredi put it, they thought that even if the claimant returned she would be unable to sustain an acceptable level of attendance. Ms Maifredi referred to the changing nature of the claimant's job in that new benefits and new ways of working were being introduced and referred to the claimant having difficulty retaining information which caused her to find the role very stressful. Ms Maifredi told us that she did not get the sense that the stress would be resolved.

50. We have been shown examples of the claimant receiving extensive training during the course of 2017. Further, the claimant raised allegations of bullying and harassment against her line manager, Ms Long. However, in our judgment, these issues do not form part of the case before us. The claimant was not being managed for performance issues but was being dealt with under the attendance policy. The claimant has been found to be a disabled person at all material times and that the respondent was or could reasonably be expected to have known this.

51. We find that the real reason that Ms Long and her senior managers decided to recommend the claimant for dismissal was because she was perceived to be a difficult employee who, from their perspective, was struggling to adapt to new working practices and who had gone off sick with stress at work as a result. We find that her sickness absence was used as a pretext to dismiss her.

52. Thus, it is the respondent's case and we find that Ms Long made the decision to refer the claimant to a decision maker and to recommend that the claimant should be dismissed on 7 December 2017. The 7 December 2017 is only 10 weeks and 1 day after 27 September.

53. On 7 December Ms Long requested Ms Fealy write a letter to the claimant and the referral letter to Ms Nicola Mahoney. We have seen a letter dated 7 December 2017 to the claimant from Ms Fealy. This summarises what had been discussed at the meeting on 30 November 2017. The letter records that in the telephone call on 4 December the claimant had asked about whether she could have annual leave, special leave or flexi leave between then and when she was aiming to return to work on or about 15 January 2018.

54. The claimant's evidence was to the effect that the suggestion she request annual leave came from Ms Fealy. The claimant's request was that she take one-week annual leave, one-week flexi leave and one-week unpaid leave. Ms Long explains that she refused these leave requests as they were made late, covered the Christmas period and to have agreed them might have disadvantaged other employees.

55. The issue concerning requests for annual leave is somewhat confusing given the claimant had a doctor's fit note covering her sickness absence until 10 January 2018. We cannot really understand why the claimant would have made an application for leave when she was in receipt of full sick pay until 10 January 2018. We find that the probability is that the claimant was prompted by Ms Fealy to apply for leave as a way of placating her employer as she would then not be recorded as being in receipt of sick pay. Thus, it is, and we find as a matter of fact, that the respondent did refuse the claimant's request for leave.

56. The letter to the claimant dated 7 December 2017 concludes as follows: -

> "As per previous conversation I stated that the department would review your absence and if it becomes unlikely that you will return to work in a reasonable period of time, I may review the position again.
>
> I have considered all the facts and have decided to refer your case to Nicola Mahoney who will decide whether you should be dismissed or demoted, or whether your sickness absence level can continue to be supported at this time. "

57. Also on 7 December Ms Long instructed Ms Fealy to write a referral letter to Ms Mahoney. We have two versions of the letter to Ms Mahoney, one dated 7 December 2017 and one dated 13 December 2017. In all probability the letter dated 7 December 2017 was a draft and the letter dated 13 December 2017 was the one actually sent.

58. The letter of referral to Ms Mahoney was accompanied by a three-page report. Although this presents as being prepared by Ms Fealy, Ms Fealy indicated that it was a document made jointly with Ms Long. Apart from reviewing the content of interviews Ms Fealy had had with the claimant, the substance of that report is Ms Long's. The report begins: -

> "Long-term absence cannot continue to be supported for the following reasons."

59. The report cites extracts from the OHS report, so clearly that had been considered. The report concludes as follows: -

> "We now have a return to work date for 10 January 18 (stated on the Med Cert although Grace doesn't work Fridays and has agreed a return to work on the following Monday would be better for her.) Up until now, although Grace has said that work is the contributory factor to her stress, and a number of actions have been put in place to address this, she continues to state that she has not been able to return to work because of stress of work.
>
> Having failed to follow through with a return to work following agreed actions

> that would support this, I am referring to the decision maker because Grace has not taken the opportunity to attempt a return. At her last meeting she stated that she is trying to "disconnect" from work as thinking about work makes her feel stressed. Based on this I feel there is no reasonable expectation of recovery in the near future."

60. The delay between the two versions of the letters may be explained by the fact that Ms Long wanted to take advice from HR. She states that on 12 December she spoke with an HR consultant at the Civil Service HR. HR sent a confirmation of the key points of discussion on 12 December 2017 to Ms Long. This document concludes: -

> "As I advised it is risky to refer the matter to the DM [decision maker] at this stage as the three-month OHS case conference has not yet been booked but also due to the fact that the last OHS report has given an indication that the MOS [member of staff] may possibly return to work in 4 to 6 weeks. It would be safer to wait until at least then and after the current sick note expires before making a decision to refer to the decision maker. If an OHS conference has been held, the MOS does not return in 4 to 6 weeks and if the MOS still does not take up any of the recommendations offered and there is not another specific return to work date given then a decision to refer to the decision maker may be made on a much firmer footing."

61. Notwithstanding the clear and, in our judgment, obviously correct advice from HR, Ms Long nevertheless referred the claimant's case to the decision maker stating: -

> "I recommend that Grace is dismissed. She has been given adequate guidance, support and time to improve her attendance, but she has not shown that there is any reasonable prospect of achieving the required level of attendance within a reasonable timescale."

62. Although signed by Ms Fealy, that letter is manifestly reflecting the decision and views of Ms Long.

63. Ms Long's evidence as to why she came to this decision is as follows: -

> "The reason for my recommendation that the claimant should be dismissed was that she had been given adequate guidance, support and time to improve her attendance but had not shown that there was any reasonable prospect of achieving the required level of attendance within a reasonable timescale. I based this decision on the claimant's sickness record, the OH report, the adjustments that Phyllis Fealy had offered to enable the claimant to return to work, the back to work plan that Phyllis Fealy had discussed with the claimant to enable her to return to work and the fact that the claimant had indicated that she would return to work on 10 January 2018 or shortly afterwards. As the claimant had failed to follow through with her return to work on the expiration of her medical certificate following agreed actions that would support her to do so, I did not consider that the claimant had taken every opportunity to attempt to return to work and I did not think there was any reasonable expectation of recovery in the near future."

64. We have considered each of the factors cited by Ms Long in support of her decision.

65. We agree that the claimant had been given some guidance and support to

improve her attendance. We find that the claimant had not been given adequate time to demonstrate her return to work. Her sick note covered the period to 10 January 2018 and the claimant was consistently stating that she would return on 11/15 January 2018. We find it inconceivable that any reasonable manager could have concluded that there was no reasonable prospect of the claimant achieving the required level of attendance within the reasonable timescale of one month.

66. Ms Long states that she based this decision on the claimant's sickness record, which, as we have already observed, was, for the three years leading up to these events, excellent. Ms long expressly says that she did not take into account the half day absences that had been recorded against the claimant in early 2017. By extension she should not have taken into account any other unrecorded absences that she has eluded to.

67. The OH report does not in any way support Ms Long's decision. She deliberately ignored it. She seeks to justify this by suggesting that the advice was only guidance and it was her decision whether or not to recommend the claimant should be dismissed. The adjustments that Phyllis Fealy had offered to enable the claimant to return to work could only have become operational once the claimant had actually managed to return to work. That was going to take place on 11 January 2018. Similarly, the back to work plan that had been discussed and the fact that the claimant had indicated she would return to work on 11 January or shortly thereafter all indicate that the claimant would be able to return to work within a reasonable timescale. Further, her decision flew in the face of the clear advice from HR.

68. The respondent seeks to support the decision making reliant upon the attendance management procedures at Stage 2 and Stage 3 which reserve the right for the respondent to dismiss an employee if she is unlikely to return to work within a reasonable time and/or if the manager believes that her absence can no longer be supported by the department.

69. In our judgment, the right of the respondent to dismiss at Stage 2 and/or Stage 3 of the process or indeed at any stage of the process, has to be considered within the overall framework of the procedure. The procedure clearly contemplates a 14-day review, a 28-day review, thereafter monthly meetings, a referral at 3 months to OH and a case conference. Senior civil service member engagement would happen at the 6 month point and dismissal would only arise at Stage 6 which could be after 12 months absence on sick leave. Further, the respondent paid full sick pay for 6 months and half pay for the second 6 months. In our judgment, given that framework, it must only be in wholly exceptional circumstances that the respondent could conclude that an employee was unlikely to return to work within a reasonable time and that the respondent could no longer support that individual after only 15 weeks sickness absence. That is especially so when the sickness absence is disability related. In our judgment such an exceptional circumstance would be when it was unarguable that the absentee was very unlikely to return to work within a reasonable time. Reference is made at Stage 3 to "being in hospital or a hospice". It is stated that the Department does not envisage anyone being supported for longer than 1 year. In this case the claimant was scheduled to return after just

over 3 months' absence which we find in the circumstances to be a reasonable time.

70. We have examined the decision to recommend dismissal against the respondent's criteria for making such a decision to dismiss.

71. We find that everything reasonable had not been done to support the employee back to work. She was indicating she was going to return to work on 11 January 2018 and the decision was made prior to her being able to do so.

72. We find that there was a reasonable expectation of improved and sustained attendance to a satisfactory level. The claimant had agreed to the adjustments being proposed and a change of manager and temporary front of house work would obviously have removed much of her stresses.

73. The mitigating circumstances are self-evident. In 2017 the claimant was 59 years old and had worked all her working life within the civil service. Obtaining an alternative job having been dismissed would have posed significant problems to her.

74. The nature of the claimant's disability was that she suffered from the mental impairment of stress at work. Reasonable adjustments had been considered and offered but the claimant had not had the opportunity of demonstrating satisfactory attendance once they were operational. Put another way, the reasonable adjustments proposed had not actually been put in place as they could only be put in place once the claimant returned to work.

75. Whilst it is said that what is a reasonable level of absence to support for a disability is not an exact science, in our judgment to withdraw support after 15 weeks absence related to the disability is unreasonable. In coming to that judgment, we are not substituting our view for the view of management. In our judgment such a conclusion is wholly outside any reasonable band of managerial responses.

76. Reasonable steps had been taken to understand the effects of the illness by referral to OHS and HR. Unfortunately, those steps had been wholly ignored.

77. The claimant's length of service is 30 years plus and her recent previous attendance records was excellent.

78. In our judgment the reference to the decision maker with a recommendation for dismissal should not have been made under the respondent's own procedures as dismissal was not an option because there was an outstanding OH report with reasonable adjustments which should have been put in place as an alternative to dismissal. Further, that when taking into account the respondent's own criteria for dismissal, every indicator pointed against dismissal.

79. Ms Nicola Mahoney's involvement in this case began with the referral to her as a decision maker. As recorded, the letter of referral came with the report. This begins:-

> "Because of the relationship breakdown between Grace and her manager, it was decided that Phyllis Fealy would conduct all informal and formal interviews and complete all subsequent write ups only. Sweta was available to address any enquiries and support Grace with actions if required."

80. It is apparent from Ms Mahoney's witness statement that she took Ms Fealy's documents at face value and was unaware that Ms Long was actually making the decisions.

81. On 18 December 2017 the claimant was invited by Ms Mahoney to attend a meeting on 3 January "to discuss your sickness absence and the circumstances of your case".

82. The meeting was held on 3 January 2018. We have the notes of the meeting. The meeting apparently began by the claimant being asked if she would accept demotion or ill-health retirement which might suggest that the decision to dismiss her had already been taken. The reasons for the claimant's stress at work were discussed and the meeting concluded with the following exchanges:-

> "NM: What is stopping you from coming back to work?
> G: I have a GP's certificate until the 10/01/18 I am happy to come back to work on 11/01/18 I was told I will be line managed by Anif and will be doing floor walking.
> NM: You're happy to return to Wood Green as a floor walker under Anif.
> G: Yes I am better but not out of the woods, but I should not have been treated like this.
> NM: Are you trying to self manage your mental health.
> G: Yes, I am going gym and church and have improved.
> NM: What coping mechanism will you do when you go back to work?
> G: Go to church.
> NM: What reasonable adjustment do you need?
> G: If I can come in for half a day and start later in the morning, my sleeping is messed up due to the medication I am using.
> NM: That can happen but only for a period of time. Based on the reasonable adjustment are you looking to resume work on 11/01/18?
> G: Yes, by the grace of God."

83. On 5 January 2018 Ms Mahoney had a discussion with HR. On that date HR sent an email to her as follows:-

> "Summary of query: You are the DM for a continuous absence case. The member of staff is off with depression and work related stress and has been since September 2017. They are currently on no live warnings but do have a history of absences due to the condition. OHS advice has been sought and acted upon. You have held the DM meeting and the member of staff has advised that they intend to work on 11 Jan 2018. You wished to discuss the case before making your decision.
>
> Summary of discussion: We had a lengthy discussion about the case, and although the final decision is yours, from the information you provided I advise that there would appear to be a significant risk of dismissing the member of staff when there is an imminent intended date of return. To defer your decision until 11th so that you can confirm if the member of staff has returned to work, would be a more reasonable and proportionate response, and would be acting within the

> intent of the managing attendance policy:"

84. Once again, in our judgment, that is manifestly correct advice.

85. On 10 January 2018 the claimant put in a grievance against Ms Long. As a result, Ms Mahoney had a further discussion with HR. A further email was sent to her as follows:-

> "Summary of query: You are the decision maker in an attendance management case, considering dismissal.
>
> Summary of discussion: You intend to make your decision to dismiss today. There has been mention of the employee returning 11.1.18 and you previously discussed this with another consultant, who advised there are significant risks associated with the dismissal. This remains the case therefore you should fully document to your rationale. We also discussed the employee appears to have lodged/intends to lodge a grievance alleging harassment and bullying from their line manager. You do not have receipt of the grievance but believe the employee has been into the office to compose the grievance. If the employee is alleging harassment and bullying as the reason for their absence, you should consider this using normal grievance procedures. Consideration of a dismissal again, poses significant risk. You will also be advising the employee their date of dismissal will be the date they intend to return to work."

86. Once again, sound advice from HR.

87. Ms Mahoney decided to dismiss the claimant and the dismissal letter is dated 10 January 2018. This recites that Ms Mahoney has carefully considered the following:

> "
>
> - Your most recent occupational health services advice report
> - Your representations at our meeting
> - Your attendance management file
> - Your stress risk assessment conducted 12.10.17
> - Your keeping in touch meetings with Phyllis Fealy and the reasonable adjustments offered to support your return back to work."

88. If Ms Mahoney did carefully consider them then she clearly just ignored them.

89. The decision making letter states:-

> "I have found that you have not made every effort to return to work. On your 28 day review (31.10.2017), and the two month review (30.11.2017) you were offered on occasions, different roles and a different manager with a view to help support you with a return to work. You declined both these offers."

90. This conclusion is completely wrong. The claimant agreed with all suggestions put to her. It is correct to say that the claimant did not return to work with these adjustments as prompted by the respondent but we find that, given that the claimant was signed off work by her GP until 10 January 2018, that failure to return to work was fully medically justified.

91. The decision letter goes on to state:

> "I am also confident that you have been offered various adjustments that could have supported an earlier return to work."

92. In our judgment, that is an assertion that the claimant should have returned to work at a time when she was signed off work by her doctor. That is, in our judgment, unreasonable.

93. The decision letter goes on to state:-

> "After considering all the relevant factors, I have decided that your employment with DWP must be terminated because you have been unable to return to work within a timescale that I consider reasonable."

94. In our judgment this decision was unfair.

    94.1 Ms Mahoney did not consider the respondent's criteria for making such a decision. We have already considered those in the context of the referral to her by Ms Long. By a parity of reasoning we find that had she addressed those issues then she could not have decided to dismiss.

    94.2 The decision was based on a wrong conclusion that the claimant had declined offers of help to support her to return to work.

    94.3 The decision flew in the face of clear advice from HR and the OH report.

    94.4 The decision to dismiss was totally outside the band of reasonable responses of a reasonable employer.

95 We find in fact that the decision to dismiss had been made by senior management on 7 December 2017 and that Ms Mahoney was merely going through the motions to carry out their recommendation.

96 Our conclusion in this respect is bolstered by the reference in the claimant's appeal letter to the fact that when she went in to work on 9 January 2018 her colleagues were surprised to see her attend the office and commented by saying "Oh we were told you had been sacked".

97 Following the decision to dismiss, Ms Mahoney filled in an Attendance Management Decision Maker's Record of Decision. This answers the question "Have all reasonable adjustments been made?" with a Yes. This is obviously wrong. Yet again the assertion is made that the claimant made no reasonable attempts to return to work in circumstances where, in our judgment, such a conclusion was not warranted as she was signed off work at the time.

98 On 18 January 2018 the claimant appealed against her dismissal.

99 The claimant attended an appeal meeting on 21 February 2018. Ms Maifredi was the senior manager conducting the appeal hearing. The claimant was accompanied by a Trade Union representative. Again the claimant went into her various complaints about Sweta Long in the context of what was causing her stress at work. It is noticeable that the claimant was stating that she got good support from Phyllis (Fealy) – at that stage she was still unaware that Ms Fealy was de facto executing the requirements of Ms Long. During the appeal the claimant complained that she was being required to return to work before the end of her sick note, that she was asking for the OHS issues to be addressed, that she was feeling much better now and would be able to take on the floor walker role and that she had been treated unfairly. She reiterated that other staff were aware of her being dismissed prior to the claimant being notified. In our judgment the claimant was articulating in her own way the very real procedural and substantive defects that we have found in her dismissal.

100 Ms Maifredi decided not to uphold the claimant's appeal and the claimant was notified of this on 5 March 2018. The appeal decision letter looks as if parts of it have been cut and pasted from the dismissal letter, including the decision itself which recites:-

> "After considering all the evidence I have decided not to uphold your appeal as you have been unable to return to work within a timescale that I consider reasonable. I am satisfied that DWP has supported your absence for a period significantly longer than recommended by Occupational Health specialists. Furthermore I have seen insufficient evidence that you have made efforts to support your return back to work."

101 That conclusion flies in the fact of the facts as we find them, namely that:-

101.1 The claimant was going to return to work the day after or on her next shift after she was dismissed.

101.2 The DWP had not supported the claimant's absence for a period significantly longer than recommended by Occupational Health specialists.

101.3 The claimant had not returned to work as she was signed off by her doctor at all relevant times. Further the conclusion that she had made insufficient efforts to return to work flies in the face of the conclusion of Paula Heffernan that she had attempted to do all that was in her own control to attempt to return to work.

102 As already recited, it became apparent to us that the real reason the claimant was dismissed and her appeal was turned down was because of perceived difficulties she was having in undertaking her job. Ms Maifredi told us "she was struggling to do the role". Further, Ms Maifredi told us "at no time did it feel like she was going to be in the right frame of mind. Even if she did return, then her health would mean that she would not maintain a reasonable level of attendance."

Conclusions

103 We find that the principal reason for the claimant's dismissal was that she was perceived to be a difficult employee, struggling with her role, not adapting with the benefit of training and had raised a grievance with her line manager. These are all issues that we would expect to be dealt with by way of performance management and not by way of sickness attendance. We find that the sickness attendance procedure was used as a pretext to get rid of the claimant.

104 Whilst capability in terms of performance is a potentially fair reason, we have found that this was not the basis of the dismissal. Accordingly we find that the dismissal was both procedurally and substantively unfair.

105 We find that the claimant should not have been referred to a decision maker for dismissal at the point where she was as the threshold for dismissal had not been crossed at that stage. We find that the decision to dismiss was contrary to the respondent's own attendance management criteria and ignored the clear recommendations of OH and HR.

106 We find that the respondent could have been expected to wait longer for the employee to return to work, as she was intending to return to work. Other staff were available to carry out the claimant's work in her absence and had been tasked to do so. The nature of the claimant's illness was disability related. The likely length of her absence was short in that she was due to return to work. There will have been a cost of continuing to employ the employee but we take into account that the DWP is a sizeable organisation. It will always be unsatisfactory to have an employee on sick leave, but in our judgment the point had not been reached where managing her out of the organization was justified.

107 The respondent did consider other options but failed to allow sufficient time for them to be put into place.

108 The length of the absence of the claimant was, within the context of the respondent's Management for Attendance Policy, short. The nature of the illness was mental impairment described as work related stress. Whilst we accept that that is an illness that is difficult to manage, the fact is that the claimant was intending to return to work. Secondly, it was an illness that arose in the context of the workplace. The claimant was a very longstanding employee. The issue of temporary cover/effect on other employees/effect on output we do not consider arises in this case at this stage due to the size of the respondent. Clearly sick pay was available.

109 We have found that there was an agreed date for the claimant to return and she was dismissed the day before she was scheduled to return. We have found that the claimant was dismissed because of her disability. We do not find that the claimant was dismissed because she had worked a long time and was employed on an old contract. Further we do not find that the claimant's dismissal was specifically related to her complaints about work she considered to be not legal. In a general sense we do find that the

perception of the claimant's ability to do her role was a factor in her dismissal.

110 The respondent did consult but we have found totally ignored correct advice.

111 Accordingly, we find that the decision to dismiss the claimant was unfair.

112 We now turn to consider disability.

113 In closing submissions Mr Margo stressed that the case he had to face was one of direct discrimination and that he resisted any attempt to formulate the case as a s.15 Equality Act 2010 Disability Discrimination. In her written closing submissions Ms Hodgson on behalf of the claimant had raised this as a potential way of putting her case. We agree with Mr Margo that it is too late to reformulate the claimant's case and we have dealt with this case on the basis of the issues as long identified and plainly put as direct discrimination.

114 Mr Margo stressed to us that for a claim for direct discrimination to be made out it is necessary for us to find that the claimant has been treated less favourably than a comparator and that care should be taken in identifying the relevant comparator. He drew our attention to the case of Mervyn v BW Controls Ltd [2020] ICR and drew a distinction between the condition itself (in this case stress at work) and the effect of the condition (in this case the claimant having difficulty undertaking her role and being absent for ill health).

115 We have considered the issue of a comparator. We do not consider any of the actual comparators advanced by the claimant to be appropriate as there are material differences in their circumstances.

116 Accordingly, we have relied upon a hypothetical comparator. We note that the hypothetical comparator does not have to be an exact clone of the claimant. To an extent, constructing a hypothetical comparator in a disability case poses potential problems. The closer the hypothetical comparator is to the claimant in terms of abilities the closer one gets to describing a comparator who is disabled.

117 That said, we have taken the hypothetical comparator as suggested by Mr Margo. This is as follows:-

> "Someone who:
>
> (a) suffered from ill health caused by issues in the workplace;
> (b) was off work due to ill health caused by those issues for the same period of time as the claimant at the point of dismissal (or longer);
> (c) who did not suffer from the claimant's disability; and
> (d) to whom adjustments had been offered in order to remove those workplace issues."

118 To that hypothetical comparator we might add:-

"(e) who had agreed to the adjustments: and

(f) who had said that they would return to work on 11 January 2018."

119 The claimant has been found to have a mental impairment, namely stress at work, and that she is disabled. In this case we consider that the effects of the disability cannot be divorced from the disability itself. It has been the respondent's case that the decision to dismiss was on the grounds that the respondent had a perception that even if the claimant did return to work then she would not be able to achieve an acceptable level of attendance due to her stress at work. We have found that the real reason for dismissal was that the claimant was perceived to be unable to do her role due to her stress at work. In our judgment both reasons are directly because of the claimant's disability.

120 We have considered the hypothetical comparator. In our judgment it is inconceivable that a non-disabled comparator in the circumstances described would have been dismissed. A non-disabled comparator would have been allowed to return to work in order to see if the adjustments allowed for the long-term resumption of his/her employment were effective.

121 Accordingly, we find that the dismissal was less favourable treatment because of the claimant's disability.

122 Against that background we deal with the individual items of alleged less favourable treatment identified in the issues.

123 As a matter of fact an occupational health referral was not made within 14 days of the claimant's absence on 27 September 2017. We have seen nothing that requires such a referral, but in any event we find that a referral was made within a reasonable time. We do not find that this was less favourable treatment.

124 We find that the respondent did fail to take into account the recommendations of OH dated 6 December 2017. We find that this was less favourable treatment in that it tracked into the unfair and discriminatory decision to dismiss the claimant.

125 On the wording of the issue, there was no refusal to permit the claimant to make an application for annual leave as she did so. However, assuming that the wording is a bit loose, we find that she was refused but that this was not less favourable treatment on the grounds of her disability.

126 Whilst references have been made in the documents and in the claimant's witness statement to her claim that she had an unreasonably onerous caseload, we have also seen reference to an analysis of her caseload which shows that she was by no means the busiest individual. We do not find that this alleged treatment has been proved by the claimant.

127 As a matter of fact there was no three month case conference in December 2017. The respondent's assertion that it did convene such a conference is wrong as it accepts that it didn't, citing the reason being that by then it had already referred the claimant to the decision maker. As such as a matter of

fact there was no failure even though we have found that the reference to the decision maker should not have happened and that, accordingly, the three month case conference should have taken place.

128 There is no formal requirement that the claimant was given a ten day period to return to work after the case conference. Accordingly we do not find that this alleged treatment has been established.

129 We have found that the respondent did not take into account properly the fact that the claimant had had no period of sickness absence since 2014. As such this failure is made out and we find that it is less favourable treatment on the grounds of the claimant's disability in that it tracks into the unfair and discriminatory dismissal.

130 In our judgment issues of contribution in relation to ill-health dismissal do not arise. Lastly, we do not find that there has been any failure to comply with the ACAS Code of Conduct on Disciplinary and Grievance Procedures.

Remedy

131 Having announced our decision on unfair dismissal and disability discrimination, the respondent offered reinstatement. Accordingly an order for reinstatement will be made.

Injury to feelings

132 As per Prison Service & ors v Johnson [1997] ICR 275 EAT we have taken into account the following general principles that underly awards for injury to feelings:

- Awards for injury to feelings are designed to compensate the injured party fully but not to punish the guilty party
- An award should not be inflated by feelings of indignation at the guilty party's conduct
- Awards should not be so low as to diminish respect for the policy of the discrimination legislation. On the other hand, awards should not be so excessive that they might be regarded as untaxed riches
- Awards should be broadly similar to the range of awards in personal injury cases
- Tribunals should bear in mind the value in everyday life of the sum they are contemplating, and
- Tribunals should bear in mind the need for public respect for the level of the awards made.

133 Obviously enough we have the Vento guidelines as adjusted.

134 We find that the claimant has suffered very considerable injury to her feelings. Mr Margo ventured that an appropriate award would be in Band 2, towards the lower end. Ms Hodgson submitted that Band 3 was appropriate.

135 In her remedies statement the claimant has sought to include complaints

concerning events going back years. We have disregarded this as it does not form part of the case before us. The discriminatory conduct began with Ms Feeley acting as a puppet for Ms Long and ran effectively from December to dismissal in January and the rejection of the claimant's appeal in March 2018. The ramifications of her treatment have continued to date, in excess of three years.

136 We do not consider that this case falls into the top Band 3 of the Vento guidelines. This is not a case where there has been a lengthy campaign of discriminatory harassment.

137 We consider that this is a serious case that falls within the middle Band 2. The aggravating factors that we have taken into account are as follows:-

137.1 This has happened to the claimant before. The respondent dismissed the claimant and was ordered to re-engage her in 2008.

137.2 There was management collusion in presenting Ms Feeley as impartial when she was not.

137.3 The attendance management procedure was used as a pretext to get rid of her.

137.4 Management decision making ignored the claimant's own procedures, the OH recommendations and advice from HR.

137.5 The treatment resulted in the claimant's dismissal after 30 years' service.

137.6 The loss of her job has had a profound effect on the claimant. She tells us that she was unable to claim state benefits and has not obtained an alternative job. She has had to borrow from friends and family, is in debt, has lost her accommodation, is on a credit blacklist and has had her bank account closed. She told us that she has had to rely on food banks. This has gone on for three years since dismissal and we find will have caused her significant injury to her feelings.

138 In arriving at the sum to be awarded we have referenced the claimant's annual salary which at the material time was £23,400. We consider that a fair, reasonable and just figure for compensation is the sum of £25,000.

139 Such a figure is towards the top end of the mid band of the Vento guidelines.

140 We have measured our award broadly against personal injury cases and accept that the sum we have arrived at is, for example, in excess of that which would be awarded for the total or partial loss of an index finger. Nevertheless, within the Vento guidelines, we consider that this is an appropriate award. Further, we accept that £25,000 is a very large amount of money but nevertheless consider that it is a fair reflection of the injury to feelings sustained by the claimant.

_____
Employment Judge Alliott

Date: ……26.03.2021…….

Judgment sent to the parties on
29.03.2021
.....

….....
For the Tribunal office