Case Number: 3202100/2019

EMPLOYMENT TRIBUNALS

Claimant: **Ms A Eke**

Respondent: **London Borough of Tower Hamlets**

Heard at: **East London Hearing Centre**

On: **8-11 March & 16-17 May, and**
18 May & 28 June 2022 in chambers

Before: **Employment Judge O'Brien**
Members: **Ms M Legg**
Mr P Lush

Representation:

Claimant: In person

Respondent: Ms Ahmed of Counsel

JUDGMENT

The judgment of the Tribunal is that:

1. **The claimant's complaint of unfair dismissal fails and is dismissed.**

2. **The claimant's complaint of unlawful discrimination on the grounds of disability fails and is dismissed.**

3. **The claimant's complaint of victimization fails and is dismissed.**

REASONS

1 On 4 July 2020, the claimant presented complaints of unfair dismissal and discrimination on the grounds of age, race, disability and sex. The respondent resisted the claims.

2 At a Preliminary Hearing on 24 January 2020, the Claimant confirmed that she was withdrawing her claims of age, race and sex discrimination and they were dismissed upon withdrawal. The Claimants application to reconsider that dismissal was unsuccessful.

3 The Claimant applied on 8 April 2021 to amend her claim to add complaints of Victimisation. That application was successful on reconsideration by EJ Jones.

4 The case was listed for a hearing over the four day period 8-11 March 2022; however that was reduced because of judicial availability to 3 days. The Claimant's application to postpone the hearing was refused for reasons given orally at the time and confirmed later in writing at the Claimant's request. As a result of EJ Jones's reconsideration, a further 3 days were added to the hearing over the period 16-18 May 2022.

ISSUES

5 The issues in the case are summarised in Annex A to EJ Allen's note of Preliminary Hearing on 10 December 2020 plus the following issues in terms of the amendments permitted by EJ Jones:

5.1 It is accepted that the Respondent has yet to deal with the Claimant's appeal on or around 10 December 2019 against the tier of ill health retirement pension awarded to her.

5.2 It is accepted that the Respondent is yet to undertake the statutory 18-month review of that tier.

5.3 Did either of the above constitute detrimental treatment?

5.4 Was a material reason for that treatment the fact that the Claimant submitted a claim of disability discrimination to the ET on 10 September 2019?

EVIDENCE

6 Over the course of this hearing, we heard evidence on the basis of written witness statements. The claimant gave oral evidence on her own behalf. On behalf of the respondent, we heard oral evidence from:

6.1 Rosemary Erysthee, HR Business Partner providing support to the Planning Department

6.2 Jane Jin, Planning Team for the Area East Team and the Claimants line manager

6.3 Paul Buckenham, Development Manager in the Building and Control Division

6.4 Pat Chen Head of Human Resources within the Resources Directorate

7 We also had the benefit of a bundle and supplementary bundle comprising in total of approximately 600 pages and a number of loose documents added throughout the hearing by agreement by the parties.

8 The parties made oral submissions at the conclusion of the Hearing, in Ms Ahmed's case on the basis of a written summary.

FINDINGS OF FACT

9 In order to determine the issues as agreed between the parties, we made following findings of fact, resolving any disputes on the balance of probabilities.

10 The Claimant commenced employment with the Respondent as Town Planner on 7 October 1991. Before her dismissal on 8 July 2019 she had progressed to the grade of Planning Officer 2 (PO2). In or around October 2011, the Claimant requested an upgrading to PO3 which was refused by Mr Whalley, Corporate Director on 12 October 2011.

11 In August and September 2017 she complained to her manager about issues in the workplace and her mental health began to deteriorate from October 2017 leading to periods of sickness absence. These were intermittent at first but culminated in her going absent from 12 March 2018 and not returning before her dismissal.

12 On 6 December 2017, an OH report was provided which noted that the Claimant had been absent for 3 weeks in October 17 with work related stress. The Claimant had given the OH Advisor information on the events leading to those symptoms, making allegations of unfair treatment, bullying, harassment and victimisation. The OH Advisor reported that she had referred the matter to the OH Physician.

13 The OH Physician wrote a report that was not submitted in evidence but is referenced in a response by Jane Jin that suggests the Claimant's behaviour was uncharacteristic and causing very significant concern to management and the Claimant's peers. On 5 January 18 the Claimant had advised Ms Jin of psychiatric problems. Ms Jin requested a face to face or telephone conference with the OH Physician, Dr Sperber.

14 On 7 February 2018, Dr Sperber met with the Claimant to discuss the benefit of referral to an independent psychiatrist. She agreed.

15 An appointment took place on 12 April 2018 with a psychiatrist (Dr Henrietta Bowden Jones). By 26 April, Dr Sperber had received a detailed report from the psychiatrist saying that the Claimant was suffering with a psychiatric condition which was yet to be managed effectively. Although having been treated with medication since February 18, she had continued to describe psychotic symptoms and was experiencing significant side effects related to the medication. Dr Sperber assessed her as unfit for work.

16 On 11 April 2018, the Claimant had submitted a grievance complaining about her lack of career progression, the instigation of formal sickness review against her and an allegation of invasion of her privacy. That grievance was acknowledged on 18 April 2018 by Paul Buckenham together with a request that they meet to discuss a resolution to her complaint. There were dates put forward for a meeting for week commencing 30 April and then 20 June 2018 when a sickness review was taking place. Neither were able to take place. An attempt was made to reschedule the meeting but the Claimant's health had deteriorated such that the meeting did not take place and on 29 June 2018 the Claimant asked for her grievance to be placed 'in abeyance until further notice'.

17 On 4 May 18, the Claimant was notified of a formal sickness review meeting to take place on 21 May 2018. It was rearranged twice at the Claimant's request and took place on 20 June 18. At the review meeting, amongst other things it was noted that she had an appointment with her health practitioner on 3 July 18, following which she would then meet again with OH before the review being reconvened.

18 On 6 July 2018, Mr Buckenham notified the Claimant that there was no provision within the Council's procedure for placing a grievance in abeyance and that he considered it inappropriate to leave the matter open ended as it affected the member of staff named in the grievance. He notified the Claimant that he intended to close the matter and notified both her and the named member of staff of the extent of his investigations and reassured the Claimant that this would not prevent her from raising a new grievance in the future if she so wished.

19 On 11 July 18 Kridos Pavlou, the Claimants Trade Union Representative, emailed Mr Buckenham, having been contacted by the Claimant about Mr Buckenham's letter of 6 July. He told Mr Buckenham that it had been on his advice, following a reading of her psychiatric report, that her complaint was withdrawn. He said that he believed it would have a serious detrimental impact on her health if management insisted on investigating the complaint. Mr Pavlou asked for confirmation that no further action would be taken on the complaint. Mr Buckenham replied on the same day confirming that the Claimant had asked for the grievance to be 'held in abeyance', that he did not think that would be appropriate and that for that reason, he had notified the Claimant that her grievance was 'closed for now'. Mr Pavlou replied saying that he thought it was 'right for all parties that the grievance is closed'.

20 We accept the Claimant's evidence that this exchange took place without her knowledge. On 12 July 18, Mr Buckenham wrote again to the Claimant referring to his letter of 6 July. In respect of the grievance, he said 'I can confirm that I have now closed your formal grievance and will not be pursuing any further investigations. This will not prevent you from raising these matters in the future if you wish to do so'. He did, however, draw the Claimant's attention to a matter he had discovered during his initial investigation, a potential overpayment of salary which it subsequently transpired amounted to a sum of approximately £4,000.

21 The Claimant wrote to Mr Buckenham on at least two occasions requesting for her grievance to be held in abeyance and also challenging the suggestion that she had been overpaid. Whilst Mr Buckenham did correspond further with regard to the overpayment, he did not respond further on the grievance as it had been closed at the representative's request.

22 There was a further meeting between the Claimant and OH on 22 August 18 and a report dated 28 August 18 stated in summary that 'although Ms Eke is still struggling with troublesome symptoms, she is now under specialist care and is making satisfactory progress'. 'It can be hoped that she will be able to make a successful and sustained return to work in due course'. Consequently, on 17 September 18, the Claimant was invited to a further absence review meeting on 28 September 2018. The meeting was rescheduled at the Claimant's request to 5 October 18.

23 At this meeting, as with the previous meeting, the Claimant was accompanied by her Trade Union representative. The possibility of a return to work was discussed, although the Claimant did not believe she would feel well enough to return in December 2018. She wanted instead a review of the position once she had seen her psychiatrist the next day. Mr Pavlou suggested that a meeting could take place outside the formal process to discuss suitable work options for the Claimant.

24 That meeting took place on 6 November 18. The Trade Union representative suggested a return to a less demanding role on a lower pay grade. Mr Buckenham noted the Claimant's previous concerns on career progression. The Claimant indicated she would be fine subject to finding something interesting. The Claimant's suggestion of working remotely was not accepted by Ms Jin.

25 On 15 January 19, the formal sickness review meeting was reconvened. The Claimant did not feel well enough to return to work and was referred back to OH for an appointment on 4 February 19. The outcome of the OH appointment was reported to Ms Jin in a letter dated 18 February 19 which said amongst other things that the Claimant was not fit to engage in any work and that it was difficult to suggest that she would be fit to return to work in the near future. She was not believed fit to continue in her current post. The OH physician said, 'She has advised me that she would feel her symptoms of stress would be heightened if she were to be dismissed from her work but would understand if she were retired on the grounds of ill health. On this basis it may be that pursuing ill health retirement application may be the more appropriate way forward'. The OH doctor noted that they had discussed the content of the report with the Claimant and that she had agreed to release the health information it contained.

26 On 6 March 19, Mr Pavlou emailed Ms Jin and Mr Buckenham, apologising for the delay in his correspondence. He had met with the Claimant the previous day, remarked that all parties were aware of her ongoing condition and said, 'I think it would be in the best interests of Angelina and the Service if we negotiated a Compromise Agreement that allowed her to exit the organisation in a managed way'.

27 In the time between Mr Pavlou's proposal and her response, Ms Jin sought OH confirmation as to whether the Council should pursue ill health retirement, what the appropriate ill-health retirement tier would be and also whether medical redeployment was appropriate. Occupational Health confirmed their view that ill health retirement was appropriate. although they could not advise on the tier, and that medical redeployment was currently inappropriate.

28 After discussing the proposal with Mr Buckenham and Ms Erysthee (HR), in an email dated 5 April 19 to Mr Pavlou, Ms Jin said 'we are going to be guided by the OH and look at ill health retirement for Angelina'.

29 On 7 May 19 the Claimant met with Ms Jin and Ms Erysthee, accompanied by Mr Pavlou, for a final absence review meeting. She was told the Council was looking at ill health retirement as recommended by OH and that a referral had been made for an independent assessor to review her for ill health retirement. At the meeting, the Claimant signed a consent form for the consultant to access her medical records from her GP and any specialist under whose care she was. The letter of 13 May 19 confirming the outcome of that meeting concluded 'once the Council receives the outcome of your formal ill health retirement assessment, the Council will be in touch further to formalise the final stages of this sickness review.'

30 The review was undertaken on or around 11 June 19 by Dr Bastock, who completed the form confirming that the Claimant met the criteria for a Tier 3 ill health retirement pension. In particular, it was confirmed that she suffered from a condition that rendered her permanently incapable of discharging efficiently the duties of her employment and was not at that point immediately capable of undertaking any gainful employment.

31 On 21 June 19, Ms Erysthee notified the Claimant that her application for ill health retirement had been agreed and that she had been granted tier 3 benefits. She notified the Claimant that there was a statutory duty to review the tier after 18 months in payment, of the intention to pay her 12 weeks' pay in lieu of notice and that she had 10 working days from the date of the letter to appeal against the decision to grant her ill health retirement.

32 The letter incorrectly notified the Claimant that her last day of service was 11 June 19. It now seems to be agreed between the parties that the last day of employment was 8 July 19, which was the deadline set for her to appeal against dismissal. The error was subsequently corrected in a letter dated 12 July 19. Ultimately the claimant suffered no disadvantage through this initial confusion on the date of termination.

33 On 28 June 19, the Claimant asked for an extension to the appeal deadline and also raised again the issue of her earlier unresolved grievance. On 3 July 19, Ms Erysthee replied and told the Claimant she could simply register her intention to appeal by the deadline and submit details later. Ms Erysthee attached a copy of Mr Buckenham's letter regarding the closure of the grievance.

34 On 4 July 19, the Claimant responded asking for an extension of the appeal deadline to 16 July 19, in order to get further details of the Tier 3 award, and also asking for the Respondent's suggestions on how she could 'get closure on the grievance issues'. Ms Erysthee responded on 5 July 19 declining to extend the appeal deadline and reiterating that the Claimant could register her intent to appeal and then forward her grounds for appeal. She gave the contact for the Pensions Department, said the following 'if you decide you no longer wish to pursue ill health retirement, they would continue with the sickness procedure and the next stage of the procedure will be consideration for dismissal'. She attached the letter from OH and the ill health retirement certificate. Finally. she informed the claimant that her grievance had been closed.

35 We accept as a matter of fact that, had the claimant declined ill health retirement, she would have been dismissed with pay in lieu of notice in any event.

36 The claimant responded on 8 July 19 stating she would have no objection in principle to the tier offered for ill health retirement and, following discussion with Mr Kridos, she was unlikely to appeal this. However, she maintained that she wished to address her grievance as part of a severance agreement. Ms Erysthee's response the following day thanked the claimant for her confirmation that she would not be appealing against the Tier 3 award and stated that she was unclear what the claimant meant about severance agreement: because the claimant's employment would be terminated on ill health retirement, her payments on termination would comprise, pay in lieu of notice, outstanding annual leave and commencement of pension payments.

37 The 10-day deadline for appeal against termination of employment due to incapacity, such as following a recommendation of ill health retirement, is prescribed by the Respondent's sickness management procedure. Whilst Ms Erysthee seems to have believed that this was also the deadline to appeal against the tier, this was not the case. The applicable period was 6 months from the date of notification of benefits, as made clear by Mr Dean to the claimant on 16 November 19. On 27 August 19, the Tier 3 benefits were explained to the Claimant by Mr Jandu, Pensions Officer.

38 On 31 October 19, the claimant wrote to Mr Dean signalling her intention to appeal against the award of tier 3, stating she believed she should have been awarded tier 2 and asking for further information on the basis for the award and procedure for challenging it. This information was provided later the same day by Mr Dean. In cross-examination the claimant accepted Mr Dean had been helpful to her.

39 The claimant appealed in accordance with the procedure on 11 December 19.

40 By this time, the person to whom she had addressed the complaint, who in addition to being Divisional Director of HR & OD was also a Trustee of the Pension Fund, was undergoing treatment for bladder cancer and was absent until March 20, although she did some work intermittently. Therefore, the individual did not immediately respond to the appeal although she did, when the claimant emailed on 30 January 20 chasing it, acknowledge the appeal in an email of 4 February 2020 and state it was being dealt with.

41 The claimant chased again on 5 March 20, having received no further update. She stated that if there was no response within 14 days, she would escalate her complaint to Stage 2 of the Dispute Resolution Procedure. No response was forthcoming and the claimant submitted her Stage 2 appeal on 19 March 20 to Neville Murton, Corporate Director of Resources. The claimant sent this by post the same day. She received no response and so emailed Mr Murton on 7 April 20 to which she received an automatic reply stating that Mr Murton was working remotely and heavily involved in the Covid response. He stated he was reviewing emails but prioritising key requests. We accept it is unlikely he would have seen the Stage 2 letter because it was posted to the office. Consequently, the claimant sent her Stage 2 complaint again on 26 April 20 in largely identical terms, save for reference to a failure to reply to her first letter.

42 At this point HR was very much involved with matters connected to the pandemic including ensuring essential service provision and dealing with considerable staffing issues arising out of the pandemic. The Respondent accepts the claimant's appeal should have been given attention but regrettably it was overlooked.

43 By June 20 however, the Pensions Team had contacted the Respondent's OH Provider, HML, with a view to progressing the appeal.

44 HML then wrote to the Pension Officer, Harjit Jandu, on 23 June 20 to advise that they did not see any benefit of progressing the appeal of the Tier at that point as it could take longer than 6 months to do so and would clash with the Tier 3 review. HML were incorrect in their email of 23 June 20 when they advised Mr Jandu that the review of the tier would be December 20. In fact, the review ought to have taken place in February 21, which is 18 months after the claimant's pension had been in payment. However, no one at the Respondent appears to have noticed this error or disagreed at the time.

45 The claimant emailed Mr Jandu 17 January 21, noting that she had still not received an outcome from her appeal and asking for an update on the statutory review which she also believed was to take place in December 20. The claimant chased a response to this email on 17 January 2 but received none.

46 On 23 February 21, HR contacted the Pensions Team to clarify how to progress the review which was by that time due. There appears no response at that point. and it was only on 16 July 21 that Mr Jandu emailed HML to chase both the appeal and the review of the

Tier. On 19 July 21 HML confirmed that they had forwarded the matter to their clinical team and would be back in touch when they have received a response.

47 On 6 October 21, the Claimant's solicitor chased the outcome of her review and appeal by email to HR. There was a response the same day from HR saying that they were awaiting advice.

48 There appears to have been a change of portal system at HML and the claimant's documents were resubmitted on the new portal in Oct 21 by the Pension Officer. It was confirmed that at that time, HML had not commenced the review.

49 In November 21, HML contacted the Claimant to sign a fresh consent form to allow them to obtain a report from her GP. She did not initially do so as she had already signed a consent form in May 19; however, she eventually provided a fresh consent form on 16 February 22 and HML asked for a GP report on the same day. On 2 March HML chased the GP surgery who said they had not received the consent form and it was resent the same or next day.

50 On 21 March 22, the GP requested payment for the report by cheque. HML's process specified payment by bank transfer and so HML contacted the GP asking for bank details. Bank details were provided and payment was made on 4 April 22; however, the GP surgery notified the following day that payment had not been received. The surgery then confirmed on 7 April 22 that they had provided incorrect bank details to HML. Before HML would make a second payment they required a refund of the first payment. That was done on 12 May 22 and a further payment was made to the correct account on 16 May 22. HML was still awaiting the report as at the final date of this hearing.

THE LAW

Unfair Dismissal

51 Pursuant to s94 of the Employment Rights Act 1996 (ERA), an employee is entitled not to be unfairly dismissed by his employer.

52 Section 98 ERA provides:

> (1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—
>
> (a) the reason (or, if more than one, the principal reason) for the dismissal, and
> (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
>
> (2) A reason falls within this subsection if it—
>
> (a) relates to the capability of the employee,
> …
>
> (4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

> (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
>
> (b) shall be determined in accordance with equity and the substantial merits of the case.
>
> …

53 It is for the employer to prove its reason for dismissing the claimant and that it is a potentially fair reason. Thereafter, the Tribunal will determine the question of fairness pursuant to s98(4) ERA with no burden of proof on either party.

54 'A reason for the dismissal of an employee is a set of facts known to the employer, or it may be beliefs held by him, which cause him to dismiss the employee.' (**Abernethy v Mott, Hay and Anderson [1974] IRLR 213**).

55 The question in each respect, and in respect of the sanction of dismissal, is whether the employer acted within the range of reasonable responses (**Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23**); the Tribunal must not substitute its own view of what the employer should have done (**Iceland Frozen Foods Ltd v Jones [1983] ICR 17**). The dismissal process must be considered in its entirety. To that end, a defective appeal might in all the circumstances render unfair a dismissal which to that point had fallen within the range of reasonable responses (**West Midlands Co-operative Society v Tipton [1986] AC 536**); alternatively, the appeal might cure a dismissal which to that point had been unfair (**Taylor v OCS Group Ltd [2006] ICR 1602**).

56 Pursuant to s118 ERA, where a tribunal makes an award for unfair dismissal it shall comprise a basic award and a compensatory award.

57 The Tribunal may nevertheless reduce both basic and compensatory awards to reflect the employee's culpable and blameworthy conduct. In respect of the compensatory award, the conduct must have caused or contributed to the dismissal (s123(6) ERA), and in respect of the basic award the conduct must have occurred prior to dismissal or notice of dismissal (if given) and it must be just and equitable to make a consequential reduction (s122(2) ERA). In Nelson v BBC (No.2) [1979] I.R.L.R. 346, the Court of Appeal clarified that blameworthy conduct could also include conduct that was 'perverse or foolish', 'bloody-minded' or merely 'unreasonable in all the circumstances'.

58 If an employee is unfairly dismissed by reason of a procedural defect, the Tribunal may make a reduction in compensatory award to reflect the chance that he would have been dismissed in any event, pursuant to s123(1) ERA and Polkey v AE Dayton Services Ltd.

Unlawful Discrimination/Victimisation

59 Pursuant to s13(1) EA, a person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others. Disability is such a protected characteristic.

60 Section 6 of the Equality Act 2010 (EA) defines disability as a physical or mental impairment which has a substantial and long-term adverse effect on a person's ability to carry out normal day-to-day activities. An effect of an impairment is long-term if it has lasted for or is likely to last for at least 12 months or is likely to last the rest of the affected person's life. If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is treated as continuing to have an effect if the effect is likely to recur. The effect of medication is to be disregarded when assessing the effects of an impairment.

61 Section 15(1) EA provides that a person (A) discriminates against a disabled person (B) if (a) A treats B unfavourably because of something arising in consequence of B's disability, and A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

62 Pursuant to s20 EA, where, in particular, a provision, criterion or practice of the employer and/or a physical feature of the workplace, places a disabled person at a substantial disadvantage in comparison with persons who are not disabled then the employer is under a duty to take such steps as it is reasonable to have to take to avoid the disadvantage. However, an employer does not contravene the duty to make reasonable adjustments if he did not know and could not reasonably have known that the employee was disabled and about the substantial disadvantage.

63 Consideration of whether the duty arises will require asking the following (applying Environment Agency v Rowan [2008] IRLR 20 (modified to apply to the EA):

63.1 whether there is a provision, criterion or practice applied by or on behalf of an employer; or

63.2 whether there was a physical feature of premises occupied by the employer; or

63.3 whether there was a need for an auxiliary aid;

63.4 the identity of the non-disabled comparators (where appropriate); and

63.5 the nature and extent of the substantial disadvantage in relation to a relevant matter suffered by the employee.

64 Section 27(1) of the Equality Act 2010 (EA) provides that:

> (1) A person (A) victimises another person (B) if A subjects B to a detriment because—
>
> (a) B does a protected act, or
> (b) A believes that B has done, or may do, a protected act.

65 Bringing proceedings under the Act and making an allegation (whether or not express) that a person has contravened the Act are both protected acts (s27(2) EA).

66 Pursuant to section 136 EA, if there are facts from which the Tribunal could decide in the absence of any other explanation that a person contravened the provision of the Act, the Tribunal must hold that the contravention occurred unless the employer can show to the contrary.

67 The leading case on the approach to be taken by Tribunals in discrimination cases remains **Igen Ltd v Wong [2005] IRLR 258**. In particular, it is important to bear in mind that employers would rarely be prepared to admit such discrimination, even to themselves, and that in deciding whether a claimant has proved a prima facie case, the Tribunal's analysis would usually depend on what inferences it is proper to draw from the primary facts found by the tribunal.

68 It is now settled law that the claimant must prove facts from which a tribunal could conclude in the absence of an innocent explanation that discrimination and/or victimisation (as the case may be) had happened before the burden shifts to the respondent to provide an innocent expiration for the acts in question (**Adoyele v City Link [2018] IRLR 114**).

69 Considerable guidance has been given by the appellate courts to Employment Tribunal's on the circumstances in which it would and would not be appropriate to draw inferences in discrimination cases.

70 It is insufficient for the claimant to show merely a difference in characteristic and a difference in treatment; there must be 'something more' for the burden to shift (**Madarassy v Nomura International plc [2007] IRLR 246**). Similarly, unfair or unreasonable treatment of itself is insufficient to shift the burden of proof onto the respondent **Bahl v Law Society [2003] IRLR 640** per Elias J at para 100, approved by the Court of Appeal at **[2004] IRLR 799**).

CONCLUSIONS

Unfair Dismissal

71 We find that the Claimant was dismissed because she was unfit to continue in her employment and had accepted ill health retirement. That is a potentially fair reason for dismissal.

72 The Claimant accepted that she was unable to return to work having been absent for over a year and also indicated that she did not intend to appeal against the offer of ill health retirement.

73 The Claimant says the Respondent acted unreasonable for the following reasons: it did not inform and consult with her about the options available to her; she did not have a reasonable opportunity to appeal against the decision to terminate her employment; and, the Respondent provided insufficient information about the assessment of her ill health pension award.

74 In respect of each of these we find as follows.

75 The Respondent did make clear that the only viable option beyond accepting ill health retirement was dismissal on the grounds of capability. The Claimant accepted in evidence that to be the case.

76 The Respondent on two occasions told the Claimant that she could register her intention to appeal within the 10 day deadline and provide full details later. The Claimant did not do so. It is correct to say that the Respondent did not provide the details required by the Claimant prior to the 10 day deadline for appeal against dismissal but had done so within the timeframe for appealing the Tier 3 assessment itself.

77 However, the information she required related to the tier of ill-health retirement she was to receive. Therefore, this is an argument about the reasonableness of the terms of the dismissal rather than the dismissal itself which the Claimant accepted was inevitable.

78 All in all, we are entirely satisfied that the decision to dismiss fell well within the range of reasonable responses. The Respondent was offering the Claimant what it reasonably believed to be the best possible outcome in the circumstances. For these reasons the unfair dismissal claim fails.

79 Even if we had found that the Claimant's dismissal was unfair, she would have inevitably have been dismissed by reason of ill health capability. To the extent that the process would have taken any longer, she had by then exhausted her entitlement to contractually sick pay and so did not suffer any financial loss.

Disability

80 The Respondent accepts that the Claimant was disabled at the material time because of a mental impairment (Psychosis).

Direct Discrimination

81 At no point was it suggested to any of the Respondent's witnesses that they treated the Claimant the way they did because of the disability itself as opposed to as a consequence for something arising out of her Psychosis. In any event, we find the Respondent would have treated the same anybody who had been absent for the length of time the Claimant had with no prospect of return and for whom it had been agreed with their representative that progressing the grievance would have been detrimental to their health. Consequently, the direct discrimination claim fails.

82 Discrimination Arising from Disability.

83 The Claimant alleges that ill health retirement was imposed on her without consent. We find on the contrary that the Claimant agreed to ill health retirement having signed a consent form and subsequently having agreed not to appeal it. We do not accept this was unfavourable treatment in any way and it was considerably more favourable than the only other alternative which was capability dismissal.

84 Even if the Respondent's termination of the Claimant's employment could be objectively considered to be unfavourable, we are entirely satisfied that she had been assessed by a medical professional as permanently unfit to return to her role and unfit for the time being of any gainful employment. In such circumstances we would have been satisfied that the treatment was objectively justified.

Failure to Make Reasonable Adjustments

85 Whilst we do not accept that the Respondent operated the PCP specifically referenced at paragraph 7.1 of Judge Allen QC's annex of issues, we do find that the Respondent did have a practice of not keeping a grievance open indefinitely in circumstances where a complainant was unable to engage in the process. However, we find that the Respondent genuinely offered the Claimant to reopen her grievance when she was fit to do so and therefore find that she was not at any consequential substantial disadvantage.

86 In any event, the proposed adjustment was to conduct an investigation into the grievance even though the Claimant was too unwell to attend work and take part in the process. It is entirely fanciful to suggest that to do so would have resulted in any meaningful conclusion to the grievance or indeed one satisfactory to the Claimant. Therefore, we do not consider that the proposed adjustment was reasonable.

87 For completeness, we do not think it reasonable to keep the grievance live and in abeyance for an unspecified period of time. Others named in the grievance were entitled not to live in uncertainty.

Victimisation

88 It is accepted that the Respondent did not progress the Claimant's appeal against her Tier 3 assessment and has not yet undertaken the 18 month review of her Tier. The Respondent also accepts that these are significant failings. Whilst we are unable to make any findings on what the outcome of either would be, we are satisfied that the Respondent's failure to carry out its own procedures is in and of itself a detriment to the Claimant.

89 The question is whether there was any significant causal relationship between those failures and the Claimant's claim to this Tribunal. We can find no basis to say that there was. In other words, there is no 'something more'. The Claimant did accept that the person to whom she sent her first stage appeal had been ill and that the pandemic had likely caused some disruption to the Respondent's operations, and we find that it did. It is also relevant that the second stage appeal had been sent by post to an individual who had by then had started to work remotely. Thereafter, there are obvious administrative failures but nothing from which we can draw connection to the Claimant's ET1. We also note that the latter 6-month delay was nothing whatever to do with the Respondent and for those reasons the victimisation claim fails.

Employment Judge O'Brien
Dated: 12 September 2022