



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4110008/2021

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Held in Glasgow on 24, 25 and 26 October 2022

Employment Judge L Wiseman

10 **Mr C Kilshaw**

**Claimant
In Person**

15 **Santander UK PLC**

**Respondent
Represented by:
Mr T Merck -
Advocate**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The tribunal decided to dismiss the claim.

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REASONS

1. The claimant presented a claim to the Employment Tribunal on the 16 June 2021 alleging he had been unfairly dismissed and discriminated against because of the protected characteristic of disability.
- 25 2. The respondent entered a response in which it denied the dismissal had been unfair and denied the allegations of discrimination. The respondent did not concede the claimant was a disabled person and sought further information regarding this point.
3. The case was subject to case management, as a result of which, further
30 particulars of the claim and response were provided.
4. A preliminary hearing took place on the 4 April 2022 to determine whether the claimant was a disabled person within the terms of the Equality Act 2010. In

a Judgment dated 8 July 2022, the tribunal decided the claimant was not a disabled person in terms of that Act.

5. The claim to be determined by this tribunal was one of unfair dismissal.

6. The tribunal heard evidence from Ms Jane Kelly, Protection Team Manager, who was the claimant's line manager; Mr John Gibbons, Head of Commercial Development, who took the decision to dismiss; Mr Andy Laing, Head of Development for Business Banking, who heard the appeal and from the claimant.

7. The tribunal was also referred to jointly produced productions. The tribunal, on the basis of the evidence before it, made the following material findings of fact.

Findings of fact

8. The claimant commenced employment with the respondent on the 7 September 2009. He was employed as a Protection Consultant within the Insurance and Protection team, with responsibility for helping customers with home and life insurance applications over the telephone.

9. The claimant was seconded to the role of Curriculum Lead within the respondent's Quality and Control Oversight team from May 2018 to April 2019.

10. The claimant returned to his substantive post on 2 May 2019. His line manager was Ms Jane Kelly, Protection Team Manager.

11. The claimant was on long term sickness absence as at the date of the return to his substantive post. The claimant commenced a period of sickness absence on the 12 March 2019, until 5 March 2020. The reason for the absence was stress at work (Fit Notes were produced at pages 358 – 363).

12. The respondent's Sickness Absence Policy was produced at page 106. Ms Kelly, as the claimant's manager, was under a duty (in terms of the Policy) to maintain contact with the claimant. Ms Kelly held formal wellbeing meetings with the claimant in June (page 162); July (page 167); August (page 173);

September (page 180); October (page 186); December (page 197); January 2020 (page 204) and February (page 208).

13. The wellbeing meeting in May 2019 was conducted by Ms Katrina Kinsella, Insurance and Protection Team Manager. Ms Kinsella noted the claimant's line manager had previously logged the reason for absence as "anxiety and depression", but the Fit Notes had noted "stress at work". Ms Kinsella clarified the claimant felt stressed about a breakdown in relationship with his previous line manager, Mr Senior, and confirmed that when he returned to work it would be to his substantive role, and to Ms Kelly as line manager.
14. The claimant informed Ms Kinsella about a previous work difficulty with Ms Kelly, regarding a performance rating she had awarded the claimant some 3 / 4 years ago. Ms Kinsella considered the claimant and Ms Kelly should meet to discuss the issue and she reminded the claimant that Ms Kelly was there to support him.
15. The claimant understood he would be required to complete the necessary training and checks to return to his substantive role. The claimant referred to looking for other roles and Ms Kinsella advised he should continue to do so and apply for any role he liked.
16. Ms Kinsella agreed the claimant would submit a flexible working pattern request upon his return to work. She also confirmed a work related stress assessment would be carried out upon his return to work and that a phased return should be discussed with Ms Kelly.
17. The claimant, at the meeting with Ms Kelly in July (page 168) informed her that he had "reached a crossroads and [had] to decide where [his] career path may lead" but he had not actively looked at any other roles since the last meeting.
18. The claimant gave consent to Ms Kelly to approach his GP for a medical report and this was done on the 13 June 2019 (page 164). A follow up letter was sent on the 8 August (page 169). A report was provided by the GP (page 176). The GP confirmed the main reason for the absence related to "work related

stress and interpersonal difficulties with certain management members which he feels are not being resolved". The doctor confirmed the claimant had a history of fluctuating chronic low mood and anxiety over a number of years which is multifactorial, with one significant factor being an unresolved grief reaction. The claimant had not found antidepressant therapy to be helpful, and was awaiting counselling. The doctor described the claimant had developed a significant lack of trust in colleagues and management and he did not believe either to be impartial. The doctor was of the opinion that should the work issues be resolved satisfactorily, then he expected the claimant to return to work promptly. The doctor did not consider the absence to be covered by the "current disability legislation".

19. The claimant, in his subsequent meetings with Ms Kelly, referred on a number of occasions to "considering a career change", expressing that he "just doesn't feel comfortable to return", but he had no suggestions about how the respondent could help him return to work.

20. A work related stress risk assessment was carried out in November 2019 (page 190) which included a risk control action plan (page 193).

21. Ms Kelly met with the claimant on the 4 February 2020. The claimant was planning to return to work on the 6 March 2020, but had to discuss this with his GP. Ms Kelly confirmed his return would be supported by a phased return and consideration of the flexible working request (which was subsequently granted). Ms Kelly also confirmed that if the claimant did not return to work on the date agreed, or if there was no date confirmed for a return to work, the respondent could not sustain the level of absence and would move to a stage 3 attendance hearing.

22. The claimant did return to work on the 6 March 2020. The phased return to work plan was produced at page 211.

23. Ms Kelly completed the Sickness Absence Return to Work form (page 216). Ms Kelly, in response to one of the questions which asked whether the absence was linked to any underlying medical condition, answered "no". Ms

Kelly gave this response because she considered it was not clear from the information provided.

24. The claimant had a further absence from the 25 June until the 8 July 2020 because of cellulitis.
- 5 25. The claimant commenced a further period of absence on the 20 July 2020 with anxiety and depression.
26. Ms Kelly met with the claimant on the 26 August for a wellbeing meeting (page 231). The discussion included Ms Kelly informing the claimant that the respondent could not support this level of absence over the long term, and if
10 there was no return to work date then guidance would be sought.
27. The respondent obtained a further report from the claimant's GP (page 236). The GP noted that much of the stress seemed to revolve around work related relationships, and that it was impossible to predict a timescale for the illness and his ability to do the job. The GP advised that an occupational health report
15 be obtained.
28. Ms Kelly met with the claimant again in September and October (page 247).
29. A further work related stress risk assessment was carried out in October 2020 (page 250).
30. Ms Kelly contacted HR online for advice regarding next steps in
20 circumstances where there was no likely return to work date. Ms Kelly, in her email contact with HR (claimant's documents page 34) asked for the case to be reviewed to see if she could move to an employment review because there was no date to return to work.
31. Ms Kelly received advice from HR (claimant's documents page 36) that having
25 reviewed the information, the person did not believe the case was in a position to move to an employment review. The person wanted to understand more about the root cause of the absence,
32. Ms Kelly decided she needed to speak face-to-face with HR for advice and so she contacted Ms Julie Furnell to discuss the facts of the case. Ms Kelly was

keen to understand what the next steps would be if there was no return to work.

- 5 33. The decision was made to proceed to a stage 3 attendance hearing. The claimant was invited to attend the hearing (page 149) which was scheduled to take place on the 11 November 2020. The letter advised the claimant that due to his level of absence, a possible outcome of the hearing was that his employment could be terminated, with contractual notice, on grounds of ill health capability.
- 10 34. The claimant was provided with copies of the Stage 3 attendance hearing management report prepared by Ms Kelly (page 151). The report detailed the length of absence, the reasons for the absence, the wellbeing meetings, the stress risk assessments and GP reports. The report also included a section entitled Impact on the Business, in which Ms Kelly noted that due to the length of the absence with no return date, the business could no longer sustain the absence. Ms Kelly referred to colleagues having to pick up additional calls so that customer experience was not impacted. Ms Kelly also made reference to the fact that the claimant continued to highlight longstanding issues with senior management but was not willing to raise a grievance and have this investigated. Ms Kelly concluded all avenues to support the claimant had been exhausted.
- 15 35. The claimant was also provided with copies of all relevant documents.
- 20 36. Mr John Gibbons, Head of Commercial Development, chaired the hearing. Mr Gibbons read all of the information provided and made notes in preparation for the hearing (page 257).
- 25 37. Mr Gibbons attended the stage 3 hearing with a note taker present (Nathan Hope). The claimant attended with a trade union representative (Roberta Barbour). Mr Gibbons explained to the claimant that he intended to meet with him, and then with Ms Kelly. Mr Gibbons considered this to be appropriate in light of the grievance the claimant had raised against Ms Kelly earlier that day.
- 30 The notes of the hearing were produced at page 275.

38. Mr Gibbons invited the claimant to provide an overview of the position from his perspective. The claimant told Mr Gibbons that he had felt bullied and belittled by his team manager and that this had impacted on his mental health. He also made reference to the performance rating issue with Ms Kelly, which happened approximately 3 years previously. Mr Gibbons noted that within the lengthy period referred to, the claimant had not sought to raise a grievance to have these issues resolved.
39. Mr Gibbons explored with the claimant the actions he had taken to address his mental health issues.
40. Mr Gibbons also noted the claimant had continually made reference to other roles and he enquired whether the claimant had applied for any roles. The claimant had not done so.
41. The claimant told Mr Gibbons he hoped to return to work soon and that he was feeling better and mentally stronger. The claimant did not consider he could return to the protection team, and that if he came back he would seek an alternative role. The claimant confirmed the GP had been unable to predict a return to work date.
42. Mr Gibbons interviewed Ms Kelly because he wanted to understand the performance rating issue and also discuss the wellbeing meetings which had taken place with the claimant. Ms Kelly confirmed the notes of the wellbeing meetings had all been shared with the claimant and never challenged by him.
43. Ms Kelly confirmed the impact the continued absence was having on the team in respect of annual leave, people available to do ad hoc activities, impact on service level and extra training time.
44. Mr Gibbons took time to reflect on what he had been told by the claimant and Ms Kelly. He noted the Fit Notes had given the reason for absence as anxiety/depression; work related stress and stress/anxiety. Mr Gibbons did not consider this to be an issue because they all linked to low mood/anxiety. Mr Gibbons considered the respondent had followed the relevant policies and

procedures and had supported the claimant throughout the period of absence. However, there was no indication of when the claimant may return to work.

45. Mr Gibbons reconvened the hearing with the claimant and his representative. Mr Gibbons provided a summary of the position and confirmed the lack of attendance was not sustainable. He further confirmed support had been given to the claimant but, despite this, no improvements had been made and there was no sign of a return to work date. Mr Gibbons confirmed his decision was to terminate the claimant's employment on grounds of ill health capability. Mr Gibbons confirmed the right to appeal against his decision. He also confirmed the notice period allowed an opportunity to apply for other roles.
46. A letter of termination of employment dated 3 December 2020 (page 287) was sent to the claimant. The letter confirmed the claimant was entitled to 11 weeks' notice of termination of employment and that his last day of service would be the 11 February 2021.
47. The claimant appealed against the decision to terminate his employment. The claimant was invited to attend an appeal hearing on the 10 February (page 310). The claimant was provided with copies of the relevant documents.
48. The appeal hearing was chaired by Mr Andrew Laing, Head of Development for Business Banking. The claimant was accompanied by Ms Barbour, trade union representative and Mr Gibbons and a note-taker were also present.
49. Mr Laing had regard to all of the paperwork prior to the hearing, which included the respondent's Guidance for Appeal Hearing Managers (page 318).
50. Mr Laing understood there were four grounds of appeal: (i) the conclusion of Mr Gibbons that there was no indication of a return to work; (ii) no evidence was produced to support the position the absence had an impact on the business; (iii) Mr Gibbons' conclusion the claimant had been supported by the business and (iv) there had been a failure to take his mental health illness fully into account and there had, for example, been no reference to the Equality Act.

51. The claimant, prior to the appeal hearing, provided a Timeline (claimant's documents page 24).
52. Mr Laing discussed with the claimant the issue that he did not want to return to his substantive post. Mr Laing questioned the claimant regarding the number of alternative posts he had applied for in the two year period of his absence. The claimant confirmed he had not applied for any posts. The claimant suggested this was because of his mental health and he further suggested he did not know he could apply during the notice period because although that had been stated at the stage 3 hearing, it had not been in the letter of termination of employment.
53. The claimant challenged the fact Ms Kelly had given her opinion regarding the impact his absence had on the team, rather than presenting facts and figures to support the position. The claimant argued this demonstrated a concerted effort by Ms Kelly to get him out of the business.
54. Mr Laing questioned Mr Gibbons about the Equality Act, and Mr Gibbons confirmed he did not believe the claimant was covered by the Act and he relied on one of the GP reports for this opinion.
55. Mr Laing questioned the claimant about the key things required to get him back to work. The claimant confirmed he would not want to work in the current role with Ms Kelly, and that he would need to apply for other roles.
56. The claimant's trade union representative asked Mr Laing to consider reinstating the claimant for a period of time – 3 months – to allow him to apply for jobs. If he was not successful he would resign.
57. Mr Laing reconvened the appeal hearing on the 12 December to give the claimant his decision (page 329). Mr Laing informed the claimant that whilst the claimant would not return to his substantive post, and wanted to look for an alternative role, he had not actively done so, even at times when his mental health would have allowed. The claimant had been informed at the stage 3 hearing that he could apply for roles during the notice period, but he still had not applied for any roles. Mr Laing concluded, in the circumstances, that it

was not reasonable to extend the notice period further to allow for applications to be made.

58. Mr Laing could not accept the claimant's position that due to lockdown and reduction in call volume, his absence would not have had any impact. Mr Laing confirmed the respondent's business model was that all employees were active and productive. That was built into plans and if a role had no impact, it would not exist. Accordingly, and as the claimant's role still existed, it was reasonable to assume the productivity and activity of the role was required.
59. Mr Laing noted none of the medical reports had been specifically asked points regarding the Equality Act. The issue of reasonable adjustments to the role to allow the claimant to return had been considered, but the claimant did not want to return to the role and therefore it was not possible for the respondent to adjust it. Further, Mr Laing accepted Mr Gibbons would not have reached a different decision even if the Equality Act had applied.
60. Mr Laing confirmed his decision was to uphold the decision to terminate the claimant's employment. Mr Laing further confirmed the claimant's notice period would be extended to the end of the month. The decision was confirmed in a letter dated 18 February 2021 (page 340).
61. The claimant was in receipt of Jobseekers Allowance from the 28 February until the 26 September 2021. The claimant started a Drylining apprenticeship on the 27 September 2021, which ended in March 2022.
62. The claimant has been self-employed since March 2022, undertaking ground work such as fencing and decking. He estimated he earns approximately £1400/1700 per month. The claimant has also been in receipt of universal credit.

63. The claimant, in his evidence to the tribunal, asserted there had been a deliberate attempt by Ms Kelly to move the case forward to a stage 3 hearing because she wanted to push him out of the business. The claimant, in support of this position, suggested Ms Kelly wanted to ignore the initial HR advice and chose instead to speak to another HR adviser, Ms Furnell, and that she did so because she knew the face to face meeting would not be recorded. The claimant did not ever suggest why Ms Kelly might have wanted to do this. It appeared to the tribunal, based on the evidence before it, that Ms Kelly had no issue with the claimant, whereas the claimant appeared to harbour a grievance against Ms Kelly arising from a performance rating given 3/4 years previously, which he had never addressed.

64. The claimant was also critical of the respondent's witnesses in the following respects:

- if witnesses said they had taken something into account, for example a policy or guidance, but made no reference to it in subsequent notes or correspondence, the claimant inferred from this that the witness was not being truthful about the matter;
- Ms Kelly had given an opinion regarding the impact of the claimant's lengthy absence on the business without providing facts and figures to support her position;
- Mr Gibbons had not checked the claimant understood what had been said at the stage 3 hearing;
- Mr Gibbons told him he could apply for posts during the notice period, but this had not been in the outcome letter, and the claimant had not checked the notes;
- there had been a lack of understanding about the Equality Act;
- the respondent's witnesses had not had their work/decisions checked and
- there had been no consideration of redeployment.

65. The claimant was aggrieved that he had told the respondent that he was feeling stronger, but they had not allowed more time for him to return to work. The respondent had *“failed to exhaust every avenue”*.

5 66. The tribunal found the claimant to be, on the whole, a credible witness. There were however occasions when the claimant undermined his credibility. For example, the claimant was critical of Mr Gibbons for not checking the claimant had understood he could apply for alternative posts during the notice period, particularly when this had been said at the stage 3 hearing but not noted in the outcome letter. The issue was not one of disadvantage: the claimant had not, for example, identified a suitable post for which he wished to apply, but had lost the opportunity to do so. The issue was simply one of action the claimant considered Mr Gibbons ought to have taken.

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15 67. A further example was the claimant’s criticism of Ms Kelly not producing facts and figures to support her opinion that the long term absence was having an impact on the team. Mr Gibbons and Mr Laing, when challenged about this, both said the issues highlighted by Ms Kelly were what they, as Managers with very lengthy experience, would have expected to be impacted. Mr Laing went further than this and, put simply, stated that if there was no impact then there could not have been any need for the claimant’s post. The issue was not so much that the claimant disagreed with what had been said, but that there was no evidence.

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25 68. The damage to the claimant’s credibility arose from the fact he focussed on “what ifs” rather than on the facts of the case, and did this to such an extent it undermined his credibility: was he really suggesting that the lengthy absence of an experienced team member would not have an impact on the rest of the team?

69. The tribunal found the respondent’s witnesses to be both credible and reliable. They had a good recollection of events and explained why actions had been taken and decisions made.

30 **Claimant’s submissions**

70. The claimant submitted the respondent had not given clear and transparent evidence regarding support for himself. Ms Kelly had wanted to push him out of the business and an example of this was her ignoring HR advice that more information was required rather than progressing to an employment review.
- 5 The claimant believed there had been deliberate concealment of the progress of his case.
71. The claimant noted none of the respondent's witnesses had referred to the guidelines or explored the opportunity of redeployment. There had been no consideration of the Equality Act or its impact on the claimant's case. There
- 10 had been a lack of notes/recordings of discussions and a lack of clarity.
72. The claimant considered his dismissal had been unfair because the respondent had removed him from the business without exploring all of the options.

Respondent's submissions

- 15 73. The claimant had been dismissed for reasons of ill health capability following a very lengthy absence, albeit there had been a brief return to work. The issue was whether the claimant was realistically ever going to return to work. Mr Merck reminded the tribunal the disability claim was no longer before the tribunal.
- 20 74. The respondent's witnesses had been referred to the Absence Management Policy. The claimant had questioned the respondent's witnesses about the definition of long term absence and underlying medical condition, but it was submitted that it ultimately made no difference to how the respondent dealt with the period of absence.
- 25 75. Mr Merck submitted the test to be applied by the tribunal was that of the reasonable employer: it could not be said that no other reasonable employer would have dismissed in the circumstances.
76. Mr Merck referred to the case of ***D B Schenker Rail EATS 0053/09*** at paragraph 35 and submitted the test to be applied by the tribunal was similar
- 30 to that in ***BHS v Burchell***. The respondent had done all it needed to do to

facilitate the claimant in looking for alternative work. It was not fair or reasonable to expect the respondent to wait any longer. The claimant's absence history was documented at page 151.

- 5 77. Mr Merck submitted the dismissal of the claimant had been fair and reasonable and he invited the tribunal to dismiss the claim. If, however, the tribunal found there had been a procedural defect, then a 100% Polkey deduction should be made to compensation based on the absence history. Further, it was submitted the claimant had failed to mitigate his losses in circumstances where he had not applied for any alternative posts.

10 Discussion and Decision

78. The tribunal had regard firstly to the terms of section 98 Employment Rights Act which provides (in summary) that in determining whether the dismissal of an employee is fair or unfair, it is for the employer to show the reason for the dismissal and that it is a reason falling within subsection (2).
- 15 79. The respondent in this case admitted the claimant had been dismissed and maintained the reason for the dismissal related to the capability of the employee for performing work of the kind which he was employed by the employer to do. This is a reason which falls within section 98(2)(a) of the Employment Rights Act. The tribunal noted the claimant did not suggest there had been any other reason for his dismissal.
- 20 80. The tribunal next had regard to the cases of ***Spencer v Paragon Wallpapers Ltd 1977 ICR 301*** and ***S v Dundee City Council 2014 IRLR 131*** where the Court of Session (in the latter case) held that a tribunal must consider whether the employer can be expected to wait longer for the employee to return.
- 25 81. An employer must also follow a fair procedure and this will involve consulting with the employee, carrying out a medical investigation to establish the nature of the illness and its prognosis and giving consideration to other options such as alternative employment.
- 30 82. The tribunal had regard to each of the above factors. There was no dispute in this case that Ms Kelly met regularly with the claimant throughout the period

of his absence to keep in contact with him and understand the medical position. The claimant was invited to, and attended meetings with, Ms Kelly and notes were taken of the meetings and provided to the claimant.

5 83. The record of absence (page 151) showed the claimant had been absent from the 12 March 2019 until the 22 October 2019 with anxiety and depression. (The absence closed on the 22 October to the 27 November to allow payment of accrued annual leave). The claimant's absence continued until the 5 March 2020, and the reason for the absence was noted as work related stress. The claimant returned to work briefly, before another absence on the 25 June 2020 10 until the 8 July 2020 because of cellulitis. The claimant was absent from 20 July 2020 until the termination of his employment, and the reason for the absence was anxiety and depression. The respondent's witnesses each noted the Fit Notes provided by the claimant's GP gave slightly different reasons for the absence, but as Mr Laing stated, he was satisfied the absences (with the exception of cellulitis) all related to low mood and anxiety. 15 The absence was long term as defined by the respondent's Absence Policy (which defines long term as more than 28 calendar days).

20 84. Ms Kelly took steps to obtain medical information regarding the claimant's condition and the prognosis for a return to work. Ms Kelly obtained a report from the claimant's GP in September 2019 (page 176) and in September 2020 (page 236). The reports confirmed the claimant's symptoms of low mood and anxiety had been longstanding. He had been prescribed antidepressants but had not continued with the prescription. The claimant had done cognitive behavioural therapy and found it useful and was trying to arrange 25 psychological therapy. The GP confirmed that much of the stress appeared to revolve around work related relationships and matters. The GP further confirmed (September 2020) that it was "impossible" to predict a timescale for any return to work.

30 85. Ms Kelly discussed each of the GP reports with the claimant and invited his views regarding the points identified in the report. The claimant told Ms Kelly that he did not like taking anti-depressants. Further, although he felt "mistreated" by the respondent and certain individuals, he did not feel

comfortable raising a grievance because he did not think he would get a fair hearing. Ms Kelly discussed with the claimant the fact that following the termination of the secondment and his move back to the substantive post, he was no longer in contact with Mr Senior, and his contact with senior management had been limited in order to try to address his concerns. The claimant confirmed he had no issue with those he currently had contact with but he felt there was a culture whereby he had been victimised at a high level and that if he raised this formally he would become a target.

86. Ms Kelly discussed with the claimant how these matters could be addressed and resolved. The claimant, in response to this, questioned whether his future was with the respondent. He could offer no proposals regarding what action the respondent could take to assist him in returning to work. Ms Kelly did advise the claimant that if he was unable to return there would come a point at which the respondent could no longer sustain the absence.

87. The tribunal was satisfied the consultation meetings with the claimant were regular, comprehensive and supportive. The tribunal noted the claimant, when asked about the meetings, confirmed they had been supportive: it was only towards the end of the process that the claimant changed his position regarding this.

88. The tribunal was also satisfied the respondent took action to investigate and understand the medical position. There were, as stated above, two reports from the claimant's GP, and also stress risk assessments and reports from occupational health. The respondent also received information from the claimant about what action he had been taking to help himself, and the claimant had taken up the offer from the respondent of accessing the Employee Assist Programme.

89. The position, as at the stage 3 hearing, was that the claimant had been absent long term, and there was no indication when he may be fit to return to work. Mr Gibbons and Mr Laing accepted the claimant had said he was feeling better/stronger and wanted to return to work, but neither considered this was realistic based on all of the information. The tribunal, in considering this, noted

there was nothing in the GP report to support what the claimant was saying. In fact, the GP had stated it was “impossible” to say when the claimant might be fit to return to work. There was also nothing to suggest the claimant’s circumstances had changed. The claimant did not, for example, attend the appeal hearing with a Fit Note from the GP supporting his position.

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90. The tribunal had regard to the case of ***D B Schenker Rail (UK) Ltd v Doolan EATS 0053/09*** where the EAT emphasised that whilst an employer is required to establish the true medical position before deciding to dismiss, that should not be read as requiring a higher standard of enquiry than required for a misconduct dismissal. The Burchell approach, requiring that a reasonable investigation into the matter be carried out, still applied.

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91. The tribunal was satisfied the respondent had carried out a reasonable investigation into the medical position and understood from that investigation that there was no indication of when the claimant may be fit to return to work.

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92. The tribunal next turned to consider the procedure followed by the employer when dismissing the claimant. The first matter to be considered is the issue of alternative employment. The claimant made it clear he did not want to return to his substantive post. The claimant, essentially, wanted the respondent to identify a suitable alternative role for him and give him the opportunity to return to that role. The respondent (Mr Laing’s evidence) accepted the claimant was not going to return to his substantive role but needed some indication the claimant was fit/prepared/ready to return to work (or when he would be so) in order to properly consider alternative roles. Mr Laing told the tribunal that *“if he indicated he was prepared to return to work, then it could have been considered. You cannot just sit there and be given a menu of jobs”*.

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93. Mr Gibbons and Mr Laing both questioned the claimant about what posts he had applied for during the period of absence if, as he stated, he wished to return to an alternative role rather than his substantive post. The claimant had not applied for any roles. Mr Gibbons and Mr Laing both accepted there had been a period of time when the claimant may not have been fit to apply for

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roles, but both considered there had, equally, been periods of time when he had been fit to do so. The claimant had not, and did not, identify any roles for which he may have been interested in applying.

5 94. The claimant was specifically told by Mr Gibbons that he could apply for roles during his period of notice (11 weeks). The claimant did not either identify any roles, or apply for any roles during the notice period. The claimant sought, at the appeal hearing and at the tribunal hearing, to criticise Mr Gibbons for not including the fact he could apply for roles during the notice period, in the letter of termination of employment. The claimant suggested he might not have understood he could make such applications; and he suggested Mr Gibbons had not checked he had understood this.

10 95. The tribunal considered this criticism was disingenuous. There was nothing to suggest the claimant had not understood what he had been told at the stage 3 hearing. Further, even if allowance is made for the shock of hearing employment has come to an end, the claimant had a representative present whom he could have asked for advice, and he was provided with a copy of the notes of the hearing. The tribunal also took into account there was nothing to suggest employees were not allowed to apply for posts during the notice period. Further, this was not a situation where the claimant had lost an opportunity to apply for a post: he had not identified any posts for which he wished to apply. The tribunal, for these reasons, dismissed the claimant's criticism of the process in this respect.

15 96. The tribunal noted this was not a case where the claimant was in the position of being able to return to work if an alternative role was offered. The advice from the GP was that it was "impossible" to say when the claimant would be able to return to work: there was no reference to, or suggestion of, the claimant being fit to return provided it was not to his substantive post.

20 97. The tribunal accepted the evidence of Mr Gibbons and, in particular, Mr Laing, that there had to be some indication of fitness and willingness to return to work in order to properly explore the options for alternative work. The tribunal accepted the respondent would have been willing to consider alternative work

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if the claimant had been ready to return to work. The statement by the claimant that he was feeling better/stronger was not sufficient in circumstances where it was not supported by the GP and where the claimant had been absent for a very lengthy period.

5 98. The claimant specifically asked Mr Laing, at the appeal hearing, to reinstate him for a period of three months so that he could search, and apply, for alternative posts. Mr Laing refused this request because the claimant was not fit to return to work and was unable to give any idea about when he may be fit to do so. Further, the claimant had had a period of three months (during his
10 notice period) to apply for jobs, but he had not done so.

99. The tribunal asked whether this was a reasonable decision falling within the band of reasonable responses, or whether the respondent could be expected to wait longer for the employee to return. The tribunal concluded that in the
15 circumstances of this case, where the employee had been absent on long term sickness and where there was no indication of when he may be fit to return to work, there was no basis upon which it could be said the employer should have waited longer for the employee to return. Mr Gibbons and Mr Laing both acknowledged the claimant had stated he was feeling
20 better/stronger and wanted to return, but this was not supported by any evidence. Mr Gibbons and Mr Laing each described the claimant's assertion as "unrealistic" and the tribunal considered this was a conclusion they were reasonably entitled to reach. The tribunal decided, for these reasons, that Mr Laing's decision not to reinstate the claimant for 3 months fell within the band
25 of reasonable responses which a reasonable employer might have adopted in the circumstances: it was a fair and reasonable decision.

100. The claimant was critical of the respondent for not ascertaining whether he was covered by the Equality Act. Mr Laing told the tribunal that he had been responsible for ensuring the provisions of the Equality Act had been adopted by the respondent in terms of its policies and procedures. He considered,
30 based on the information provided and his experience, that the claimant was not covered by the Equality Act. Mr Gibbons, very honestly, told the tribunal that he had not considered this beyond the fact that he had noted in a report

that the GP did not consider the claimant would have been covered by the Equality Act.

- 5 101. The claimant did not seek to argue what difference it would have made to the handling of his case. The tribunal accepted the evidence of Mr Laing that it would not have made any difference at all because reasonable adjustments had been considered during the consultation process and stage 3 process. The claimant had been asked about adjustments to assist him back to work and had confirmed there were none.
- 10 102. The crucial issue in a case covered by the Equality Act is that there must be some barrier preventing a return to work which can be resolved by the making of reasonable adjustments. This was not the case here: as stated above, the claimant was not saying that if a reasonable adjustment was made to move him to an alternative post, then he could return to work. The position was that even if that adjustment had been made, the claimant was not fit to return to work. The tribunal, for this reason, could not accept any criticism of the respondent for not dealing with his case under the Equality Act.
- 15 103. The claimant was critical of Ms Kelly for not producing evidence to support her position that the absence had an impact on her team. Mr Gibbons and Mr Laing, who are both managers with very lengthy periods of service and experience, each told the tribunal that the points identified by Ms Kelly were the points they would have expected to be impacted by the absence of a team member. The tribunal accepted the evidence of Mr Gibbons and Mr Laing and concluded it was reasonable for them to accept the information provided by Ms Kelly.
- 20 104. The claimant was also critical of Ms Kelly for making a second approach to HR. The claimant asserted Ms Kelly had done this because she knew a face to face discussion would not be recorded, and because she wanted to ignore the advice of HR Online. The tribunal could not accept this criticism of Ms Kelly. The tribunal accepted her evidence that she was looking for advice regarding the next steps to take in the claimant's case and that she felt she
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needed to speak to someone rather than having advice given online when she could not be sure all information had been read/explained clearly.

- 5 105. The claimant asserted Ms Kelly wanted him out of the business, but he offered no reason why Ms Kelly might have wanted this. The tribunal acknowledged there had been an issue some years earlier, but no grievance had been raised regarding this matter. Further, the claimant and Ms Kelly had numerous contact meetings and the notes of those meetings do not disclose any animosity between them. The tribunal concluded, in the circumstances, that this was an assertion made by the claimant without any basis or merit.
- 10 106. The claimant also challenged Ms Kelly about why if, as she said, she had referred to the respondent's policies and procedures, this was not referred to in the management report. Ms Kelly could not explain why she had not included it in the management report. The tribunal noted the claimant did not suggest Ms Kelly had acted outwith the policies and procedures, or that she had failed to take action she ought to have. The issue was raised to cast doubt on Ms Kelly's credibility. The tribunal could not accept there was any issue regarding Ms Kelly's credibility: she acted in accordance with the relevant policies and procedures and sought advice from HR where appropriate.
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- 20 107. The onus on the respondent is to follow a reasonable procedure which, in the circumstances of this case, involved consultation with the employee; an investigation of the medical position and consideration of options such as alternative employment. The tribunal concluded, having regard to the points set out above, that the respondent had followed a reasonable procedure. The tribunal further concluded the respondent genuinely believed the claimant had been absent on long term sickness absence because of symptoms of low mood and anxiety and that there was no indication of when the claimant would be fit to return to work. The respondent had conducted a reasonable investigation into the medical position, which informed and supported their conclusion.
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- 30 108. The tribunal decided the dismissal of the claimant in the circumstances was fair. The tribunal decided to dismiss the claim.

Employment Judge: L Wiseman
Date of Judgment: 9 January 2023
Entered in register: 10 January 2023
and copied to parties

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