EMPLOYMENT TRIBUNALS

Claimant Ms Alison Crowther

Respondent West Northamptonshire Council

HEARD AT: Cambridge (attend in part by Cloud Video Platform)
ON: 9 to 11 January 2023

BEFORE: Employment Judge J Lewis KC

Representation

For the Claimant: Stephen Crowther (Claimant's brother)

For the Respondent: Ms Shahan Ismail (Counsel)

JUDGMENT

1. The Claimant's claim in relation to failure to make payment in lieu of annual leave on termination of employment succeeds, and the Respondent is ordered to pay the Claimant the sum of £1,245.92 in respect of that claim.

2. The Claimant's claim of wrongful dismissal succeeds, and the Respondent is ordered to pay the sum of £7,664.52 in respect of that claim.

3. The claim of unfair dismissal succeeds, with remedy to be determined at a further hearing.

REASONS

1. This was a hearing of the Claimant's claims of unfair dismissal, breach of contract (notice pay) and holiday pay (pay in lieu of accrued holiday pay on termination of employment). I heard evidence from the Claimant and, on behalf of the Respondent, from Alison Parry (who at the relevant time was the Respondent's Head of Environment Management and the Claimant's line manager) and Emma Cooper (Assistant HR Business Partner for the Respondent).

ISSUES AND RELEVANT PROCEDURAL HISTORY

2. Although the only claims are for unfair dismissal, breach of contract and holiday pay, at the preliminary hearing on 2 June 2020, the matter had been listed before a full panel. That may have been because there had originally been a discrimination claim, although the order dismissing on withdrawal was made on the date of the preliminary hearing (though sent to the parties on 21 June 2020). The notice of hearing of 22 November 2021 also provided that the hearing would be before an Employment Judge and two non-legal members, though there does not appear to have been specific consideration of this. However only I had been allocated to hear the case. I canvassed the issue with the parties at the outset of the hearing, drawing their attention to the default position under s.4 of the Employment Tribunal Act 1996 ("ETA") for the claims in issue to be before a judge sitting alone, but with the discretion for it to be before a full panel and the factors to be taken into account. Both parties were content to proceed without non-legal members, and for reasons I gave verbally at the hearing, taking into account the factors in s.4(5) ETA, I concluded that was clearly the appropriate course. In so far as a change of circumstances was required to depart from the previous listing that was provided by the fact that only I had been allocated and the further delay what would be caused if there was a need to relist before a full tribunal.

3. The Claim was presented on 24 October 2019, following ACAS notification on 3 September 2019 and an ACAS certificate issued on 16 October 2019. A claim of disability discrimination was dismissed on withdrawal by a Judgment of 2 June 2020. The remaining issues were identified at a preliminary hearing on 2 June 2020 before EJ Kurrein as follows:

   "**Unfair Constructive Dismissal**

   1 Was the Claimant dismissed?
   1.1 Did the Respondent breach the so-called 'trust and confidence term' i.e. did it, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or to seriously damage the relationship of trust and confidence between it and the Claimant?
   1.2 If so, did the Claimant affirm the employment before resigning?
   1.3 If not, did the Claimant resign in response to the Respondent's conduct (to put it another way, was it a reason for the Claimant's resignation – it need not be the reason for the resignation)? If the Claimant was dismissed, she will necessarily have been wrongfully dismissed because she resigned without notice
   2 The alleged conduct the Claimant relies on as breaching the trust and confidence term is said to be:
   2.1 Management's insufficient attempt to understand the Claimant's medical condition and its consequences and attempt to minimise the duration of absence from work
   2.2 Management's insufficiently following up on advice received from their appointed occupational health adviser and the consequences of this

2.3 Procedurally unfair application of the absence management procedure
2.4 Failure by management to fulfil all of its obligations arising from the absence management hearing on 6th March 2019
2.5 The impact of the prospective sale of Everdon Outdoor Centre in management's approach to the Claimant's absence
2.6 Failure by management to organise the Claimant' s return to work process in a timely fashion
2.7 Management's dismissive approach to the Claimant's grievances 17 & 18 June 2019 and failure to remedy them?
2.8 Management's provision of an outcome on 26th June 2019 on the Claimant's grievances prior to any grievance hearing taking place and the negative effect on the employment relationship with the Claimant
3 If the Claimant was dismissed what was the principal reason for dismissal and was it a potentially fair one in accordance with sections 98(1) and (2) of the Employment Rights Act 1996 (ERA) and, if so, was the dismissal fair or unfair in accordance with the ERA section 98(4), and, in particular, did the Respondent in all respects act within the so-called "band of reasonable responses"?

Remedy for unfair dismissal

4 If the Claimant was unfairly dismissed and the remedy is compensation:
4.1 if the dismissal was procedurally unfair, what adjustment, if any, should be made to any compensatory award to reflect the possibility that the Claimant would have been dismissed in time anyway?;
4.2 would it be just and equitable to reduce the amount of the Claimant's basic award because of any blameworthy or culpable conduct before the dismissal, pursuant to ERA section 122(2); and if so, to what extent?
4.3 Did the Claimant, by blameworthy or culpable actions, cause or contribute to dismissal to any extent, and if so, by what proportion, if at all, would it be just and equitable to reduce the amount of any compensatory award, pursuant to ERA section 123(6)?

Breach of Contract
5 How much notice pay is the Claimant entitled, if any?

Holiday pay
6 Does the Respondent owe the Claimant holiday pay in respect of pay in lieu of accrued but untaken holiday pay?

Limitation
7 Limitation: whether there was a break of 3 months or more between any periods of employment in respect of which the Claimant claims?

Other matters
8 The number of weeks for which the Claimant has an entitlement to be paid?
9 How much pay is outstanding to be paid to the Claimant?
10 Has the Claimant demonstrated mitigation of her claimed losses?"

4. These issues were confirmed with the parties at the outset of the hearing, subject to the following:
   4.1 I made an order (to which there was no objection) for West Northamptonshire Council to be substituted as the Respondent on the basis that I was informed that the Northamptonshire County Council no longer existed and claims and liabilities were transferred to West Northamptonshire Council in 2021.
   4.2 The Respondent raised an issue as to whether permission to amend was required in two respects. One related to paragraph 2.1 of the list of issues and this point was not pursued on clarification it was intended to convey that the failings by the Respondent had prevented the Claimant returning earlier. The other related to paragraph 2.5, being a complaint as to "the impact of the prospective sale of Everdon Outdoor Centre in management's approach to the Claimant's absence". The Claimant explained that it was her contention that the prospective sale influenced the approach including the complaints made in her statement as to the process being the wrong way round by not writing to the neurologist before proceeding to the formal stage of the absence process. In explaining the absence of reference to this in the Claim Form Mr Crowther referred to lack of space to include details on the form. I explained that this was not of itself an answer to the point that claims could only be determined on the basis of matters in the claim form either as originally set out or by amendment. An application was made to amend in the terms of paragraph 2.5 of the list of issues. There had been no pleading point taken by the Respondent until the first day of the hearing, notwithstanding that it had been set out in the issues in the since the preliminary hearing on 2 June 2020. In those circumstances the Respondent indicated that there was no objection to the amendment provided that the Respondent could give supplemental evidence in response to the point. There was no objection on behalf of the Claimant to that course and on that basis, and taking into account the balance of hardship and prejudice (as explain more fully in my oral reasons), I allowed the amendment.
   4.3 The Respondent clarified that it was conceded that if the Claimant was constructively dismissed, then the dismissal was unfair and that no fair reason for dismissal was advanced.
   4.4 The Schedule of Loss had limited the period of claim to 6 months. However the Claimant clarified that this was not on the basis of losses having stopped then and that although she found some alternative work it was not at the same level. On canvassing the issue the Claimant sought not to stick to that limit, and the Respondent indicated it had no objection to the Claimant proceeding on the basis of actual losses. However there was an issue as to the scope of disclosure as mitigation details had only been given up to February. There was also an issue to be clarified as to pension losses. In the event it was agreed that these would be dealt with by further case management orders to be made in the event that the unfair dismissal liability issue was determined in the Claimant's favour.
   4.5 In relation to remedy there is an issue as to whether there should be an

uplift of up to 25% for non-compliance with the ACAS code. The Respondent confirmed that no case is advanced that there should be any reduction for non-compliance with the code.

4.6 The Respondent confirmed that it was agreed that if the Claimant was constructively dismissed, the Claimant would be entitled to 12 weeks' notice pay.

4.7 There is no issue as to limitation. The Respondent accepts that the claims are in time.

5. In the course of final submissions the Respondent further conceded that there is no deduction to be made in relation to issues 4.1 to 4.3 (contributory fault or chance of dismissal in any event). Issues 4.1 to 4.3 therefore fall away.

6. In relation to the heads of matters relied upon by way of conduct alleged to be in breach of the implied term of trust and confidence (paragraphs 2.1 to 2.8 of the list of issues), these were further particularised in the course of closing submissions as follows:

6.1 Paragraphs 2.1 and 2.2 can be taken together and encompass failure to obtain input from the neurologist, which could be separated into three periods:

(a) before proceeding to the formal stage of the absence procedure;

(b) at the start of the formal stage (when the Claimant was instead to put questions to the neurologist); and

(c) at any time after the result of the Claimant's having reported the outcome of the consultation on 27 March 2019 had been reported.

6.2 Paragraphs 2.3 and 2.4 can be taken together and encompass:

(a) Deciding to proceed to the formal absence hearing before obtaining evidence from the neurologist.

(b) Not affording an appeal from the outcome of the 6 March 2019 meeting.

(c) Selective use of the occupational health ("OH") letter to justify the formal absence hearing in that reliance was placed on the neurologist's view as to the Claimant not coming back to work, whilst not writing to him because there he had not seen the Claimant since November 2018.

(d) Failure to equip the Claimant for her to make a direct approach to the neurologist in her consultation following the meeting on 6 March 2019.

(e) Failure to clarify whether the Claimant had exited the formal procedure of to give reassurance that she was not under threat of dismissal.

(f) Failure to hold review/ monitoring meetings at least every two weeks during the period of the formal absence procedure and to keep formal records of such meetings.

6.3 In relation to paragraph 2.6 of the List of Issues (failure by management to organise the Claimant's return to work process in a time fashion), the Claimant relies on alleged inertia in the last six months of her

employment and in particular (a) in the two months after 10 January and (b) in the period after she submitted her return to work plan on 25 April 2019.

6.4 Paragraphs 2.7 and 2.8 can be taken together and encompass:
   (a) refusal to allow the Claimant to pursue a grievance at all; and
   (b) giving an answer to her correspondence of 17 and 18 June 2019 without affording her a hearing.

   These were developed in argument by the Claimant as encompassing not permitting a grievance without having to go through a hearing with her line manager when they had already been rejected.

PAY IN LIEU OF ANNUAL LEAVE

7. By the final day of the hearing there was common ground in respect of the claim for failure to pay the Claimant in lieu of annual leave on termination of her employment that:

   7.1 The claim was limited to the period for the leave year beginning 1 April 2019, (the Claimant having taken her annual leave in the previous year).

   7.2 Although the Claimant had exhausted her sick pay and was not being paid, she was entitled to have her annual leave in lieu paid at the rate of her weekly pay if working through her normal week, which was agreed as being £638.71 per week.

   7.3 The Claimant's annual entitlement is to 40 days leave (32 days plus 8 public holidays), and this equates to 8 weeks leave.

   7.4 No payment of annual leave had been paid for year beginning 1 April 2019 (a total of 89 days by the date of termination of employment on 28 June 2019).

8. The Claimant is therefore entitled to be paid the total sum of £1,245.92 (ie 8 weeks x 89/365 x £638.71). [The figure was agreed at the end of the hearing as £5,109.68, but that is the full year entitlement, before applying the pro rata for the 89 days of the year up to the date of termination.]

MATERIAL FACTS IN RELATION UNFAIR/ WRONGFUL DISMISSAL CLAIMS

9. The Claimant's continuous employment with the Respondent commenced on 7 January 2002. From on or around 19 January 2013 she was employed by the Respondent as Centre Manager of the Everdon Outdoor Learning Centre near Daventry. The Centre provides students (predominantly primary age but some pre-school and occasionally secondary school) with experience of wildlife and the outdoors. The Claimant's role involved overall management of the Centre. She was one of two qualified assessors able to mark assignments. Amongst other functions were risk assessment and making sure facilities were ready for the children (in conduction with her line manager and Health and Safety Officer), sometimes doing some teaching, and driving the minibus at the site.

Sickness absence

10. The Claimant began a period of sickness absence on 23 April 2018 from which, ultimately, she did not return before the termination of her employment. She was diagnosed in around April 2018 with Spontaneous Intracranial Hypotension ("SIH"). It is a rare condition; the Claimant's neurologist informed her that even he had only seen it twice. It caused "blinding pressure headaches, initially double vision, later visual disturbances, auditory sensitivity, balance problems, dizziness and physical weakness". Episodes could range from a few minutes or hours or up to several days of incapacity. However along with the bad days she had good days when the symptoms temporarily relented. Ultimately the Claimant did not return from that sickness absence. Broadly her constructive unfair dismissal claim relates to the management of her sickness absence and investigations relating to it, the way the procedures for management of sickness absence were applied, and ultimately the handling of issues she raised by way of grievance, culminating in her resignation without notice by letter dated 28 June 2019.

Grievance policy

11. The Claimant's terms and conditions expressly provided that the grievance procedure is non-contractual [**C58**]. So far as material the Grievance Procedure [**C61-66**] (known as the "Resolving Workplace Concerns Policy") provides that:

    11.1 Clause 4: Any work related concerns should be raised informally with the line manager as soon as they arise to enable issues to be resolved quickly and directly outside the Grievance Procedure.

    11.2 Clause 5:

    (a) Where an issue has not been resolved informally an employee should raise the concern directly with their line manager. The manager will arrange a meeting to discuss the concerns. This should take place as quickly as possible and should focus on understanding what the concern is and how it can be resolved. Wherever possible the Formal Resolution Meeting would be arranged by the manager within 7 calendar days of receipt of the written concern.

    (b) Where an issue relates to an employee's line manager the employee should discuss this with the next level of management.

    (c) The outcome letter should confirm any agreed actions and advise of the right to appeal.

    11.3 Clause 6: The appeal would be submitted to the person with whom the original appeal was raised but would be conducted by a different manager, usually being the next level of manager.

12. Clause 7 of the policy provided that the procedure should not be used to "raise a counterclaim" against the application of another procedure, and any such concerns should be considered as part of that procedure. However neither party sought to place reliance on that provision.

Management of Sickness Absence Policy

13. The Respondent also had a policy on Management of Sickness Absence ("MSA"). The policy was not appended to the terms and conditions of employment. The Claimant's case was not put on the basis that failure to follow the policy would of itself be a breach of a distinct contractual term. However failure to follow the Respondent's own policy would plainly be an important factor to take into account in relation to whether there was a breach of the implied term of trust and confidence.

14. The Policy provided for the informal absence review process to be triggered by an absence of 21 days or more [**C204**]. It provided for Informal Absence Review meetings to be held. Guidance as to that part of the policy is set out in section 11 of the MSA policy. Amongst other things it provided for the employee to be provided with a written Attendance Improvement Plan and making the employee aware that the formal procedure may be applied if attendance did not improve during the informal monitoring period. It also provided that an informal monitoring period of normally no more than eight weeks would be set and for an agreed schedule of contact appropriate to the circumstances and nature of the sickness. It further provided that if the employee's attendance had not improved to an acceptable standard during the informal monitoring period the manager should inform the employee that the matter would be referred to the formal absence review procedure. [**C205**]

15. Clause 12 of the MSA Policy provides that [**C208**]:

    "The formal procedure is to be applied if the informal procedure has not brought about an improvement in the employee's attendance. … Before starting the formal procedure, managers must satisfy themselves that sufficient reasonable action has already been taken to informally address absence issues e.g.

    - any underlying causes for absence have been investigated
    - Occupational Health advice has been obtained
    - any reasonable adjustments have been identified, explored and implemented where possible"

16. The formal process has two stages [**C208-212**]:

    16.1 Stage 1 – A stage 1 meeting which includes a review of the informal process and agreement on the way forward including timescales for improvement. This is followed by a review period of a maximum of 8 weeks but with provision in exceptional circumstances for a further monitoring period of a maximum of four weeks. The policy also provides that in the letter following the stage 1 meeting the employee is

to be advised that if the employee fails to achieve the improvements in the review period, a stage 2 meeting will be arranged where dismissal may be an outcome.

16.2 Stage 2 – A stage 2 meeting where (subject to the possibility in exceptional circumstances of a further monitoring period of up to 4 weeks) the employee will be dismissed if attendance has not improved, subject to a right of appeal.

17. Under clause 8 of the Policy, in relation to return to work discussions, it is provided that:

> **"Risk assessment**
> It may be appropriate for a risk assessment to be undertaken as part of a return to work meeting. …
>
> **Where a GP medical statement says the employee 'may be fit for work'**
> Where a medical statement advises the employee may be fit with temporary adjustments, a risk assessment must be undertaken …"

18. Therefore whilst there may be other circumstances in which a risk assessment is appropriate, it is mandatory where a GP medical statement stays that the employee may be fit to work with temporary adjustments, a risk assessment must be undertaken [**C200**].

19. Clause 9 of the Policy deals with Adjustments to Work. Amongst other things this provided that normally a phased return to work would commence at no less than 40% of the employee's contracted hours and build up to 100% over a maximum period of four working weeks and that during this time the employee would receive normal working pay [**C202**]. In exceptional circumstances based on OH advice a longer phased return could be considered but pay would be adjusted pro rata to the hours worked if it extended beyond four weeks.

20. It was further provided that amended duties would normally be for no longer than four working weeks [**C202**].

21. Clause 14 of the MSA Policy [**C213**] makes some provision for the situation where the employee may be ready to return to work but further investigation is needed before permitting this. It was not part of the Claimant's case that it applied in the circumstances of her case prior to the termination of her employment.

Initial period of absence

22. In May 2018, shortly after the commencement of the Claimant's absence, Alison Parry, the Respondent's Head of Environment Management for its PLACE Directorate, took over responsibility for the management and operation of the Respondent's outdoor activity centres including Everdon.

23. There had been a decision to sell the Council's three outdoor education centres, including Everdon. Ms Parry was appointed to lead on the sale of Centres as going concerns. In relation Everdon there was exploration of a potential sale to the Parish Council. Staff were made aware of the possibility of a sale during 2018. Ultimately in March 2020 the Parish Council decided not to proceed with the sale in the light of the projected impact of the Covid pandemic on revenues.

24. As a result of Ms Parry's appointment there was a change in the Claimant's line manager from Chris Haines to Ms Parry. Because Ms Parry had not taken over this role until after the Claimant had gone off sick, Mr Haines (as well as Ms Parry) continued to be involved in communications and attend absence review meetings with the Claimant. Emma Cooper provided HR support to Ms Parry.

Voluntary work

25. From early in her period of absence the Claimant carried out desk based work at home on a voluntary (unpaid) basis. This included marking student papers, and advising students and Rangers (when rangers brought issues to her at home) and updating the website, which again she could do from home. The Claimant herself did not expect to be paid for this work during her sickness absence.

26. Ms Parry's evidence (which the Claimant disputed) was that the Claimant said she thought this would be beneficial for her mental health. There was no reference to this in Ms Parry's chronology, but only that in the context of asking to visit Everdon she made reference to keeping her hand in. Whilst in that context the Claimant may have made a passing comment about keeping her hand in, I do not accept that she otherwise indicated that this was her reason for helping out on a voluntary basis. Ms Parry's chronology includes a reference to the Claimant wanting to help her colleague (15 May) and continuing to support her colleague when she could (13 September) and that she would "continue to try and support the Centre where able to". Further the Claimant's colleague, who was the only other assessor, was tied up delivering group sessions in the Claimant's absence and it was necessary for assignments to be marked so that qualifications could be completed, and because otherwise this could have caused difficulties with the contract awarding body. In those circumstances I conclude that the support was provided predominantly as a matter of conscientiousness and if a passing reference was made to keeping her hand in, this did not indicate otherwise.

27. As noted further below, when instructing occupational health in January 2019 Ms Parry took the opportunity also to ask about the work done on a voluntary basis. However it was only in February 2019 that a risk assessment was carried out in relation to that work. Ms Parry took the view that there was little risk in the limited work being done on a voluntary basis given that it was ad hoc and done as and when she felt able to do so with no requirement to do so and its limited administrative nature done from home. In oral evidence Ms Parry suggested for the first time that the risk assessment in February

was prompted by becoming aware that the Claimant wanted to go on site and do an assessment in the field, which was different in nature to the work previously done. That was not put to the Claimant. But little in my view turns on the precise reason for formal assessment being done at this stage.

14 August 2018 informal review meeting

28. The first informal review meeting took place on 14 August 2018. Prior to this the Claimant, Ms Parry and Mr Cooper had been in regular communication in relation to the Claimant's situation, and were made aware of the investigations being carried in relation to her condition including by a neurologist. There were times when it appeared the condition was getting better and then others when it was worse. Towards the end of July 2018 the situation appeared to have improved. As a result at the start of August 2018 Ms Parry notified the Claimant that HR had advised that there be an informal review meeting.

29. The Claimant's evidence was that this meeting only took place at the Claimant's prompting. I do not accept that her recollection is correct in this respect. Whilst the contemporaneous correspondence from this period was not before me, a chronology prepared by Ms Parry in October 2019 from her emails supports her recollection that it was HR who suggested this meeting.

30. There was discussion at the 14 August meeting about a possible phased return to work starting in September. However this did not happen at that stage due to a deterioration in the Claimant's condition.

31. Matters continued to fluctuate. In mid-September 2018 the Claimant indicated that things were improving but in November she reported a downward spell and that the neurologist had advised her not to do any work.

Exhaustion of contractual sick pay

32. In October 2018 the Claimant's contractual sick pay expired. Thereafter her sickness absence was unpaid (other than annual leave taken in the year to 31 March 2019). She continued to carry out work for Centre on a voluntary, unpaid, basis.

December 2018 informal review meeting

33. Ms Parry and Mr Haines held a further information review meeting with the Claimant on 6 December 2018 [**C76**]. It was agreed that the Claimant would be referred for an OH report (by the Respondent's external occupational health adviser, Health Management Limited ("HML")). It was also agreed that there would be a further meeting to review the situation in January or February. Ms Parry made clear that if there had been no improvement by then a formal absence review would be arranged.

Occupational health report

34. The Claimant attended an appointment with HML on 3 January 2019. She offered her GP and neurologist details so that HML could write to them if they wished do so.

35. HML issued a report dated 10 January 2019 [**C69-71**]. Ms Parry had requested advice regarding the Claimant's fitness to return to work and possible time scales, interim measures that could be put in place and a determination of her fitness to undertake unpaid voluntary work for the Centre with immediate effect.

36. The report, by Dr Edet, noted that the Claimant was already carrying out unpaid work including marking which she was able to do at home in short bursts to accommodate her symptoms (which were variable from day to day but included headaches, sensitivity to sounds, particularly loud noises, intermittent dizziness, poor balance and blurred vision). She advised that the unpaid work had not caused any difficulty and could continue if it was mutually agreed.

37. Dr Edet expressed the view that based on her assessment there was scope for the Claimant to carry out temporary amended duties. She considered that the Claimant would struggle to undertake the full remit of her role, particularly the aspects that are outdoors and more physically strenuous. But she expressed the view that there was a possibility that she would be able to undertake home-based work doing the more administrative aspects of her role but that this would require further discussion and agreement with the Respondent. Such work would enable her to avoid the sensory stimuli that may have worsened her symptoms and offer more scope to pace her tasks. The report noted that the Claimant had expressed her keenness to return to work as soon as possible, that the absence should be considered temporary and that a return to normal work within a few months should be anticipated but that it was not possible to be more specific.

38. However the report noted (as the Claimant had already relayed in November) that the Claimant had been advised by the neurologist not to return to work. Dr Edet commented that it was not clear what underlay this advice and what would determine fitness to work from his perspective. The report concluded, under the heading of "Future Plans", that:

> "I think it would be helpful in this case to write to her neurologist for a medical report. I am aware … that the neurologist had advised that she is not fit for work at present but it would be helpful to liaise with them to understand their rationale for this recommendation and the likely timescales. Furthermore we would be able to provide information to them about her role and the potential for amended duties. This information sharing may enable the neurologists to support her return to work with adjustments within an earlier timeframe than might currently be the case.

I have not recommended any route follow-up at this stage. I would be grateful if you could contact our admin team for authorisation regarding proceeding to request a report from her neurologist."

39. As addressed further below, this recommendation was never actioned.

February information review meeting and progression to formal stage

40. Mr Haines and Ms Parry had a further meeting with the Claimant on 7 February 2019 by way of follow up on the OH report. Ms Parry explained that in the absence of a specific return date, the Claimant's absence was not sustainable indefinitely and that there would need to be a Stage 1 formal absence review meeting under the MSA Policy.

41. In deciding to proceed to the formal stage, Ms Parry predominantly took into account the length of time that the Claimant had been off work, that over that time there had been periods of apparently being ready to return and then deterioration and that there was no clear date for a return and that there was now an occupational health report in place by way of guidance. A further factor identified by Ms Cooper, in explaining her advice to Ms Parry to proceed to the formal stage, was the impact on the business of the Claimant's absence and the financial impact of the absence, that although OH were suggesting that the Claimant may be fit to return on amended duties, it was not clear from the neurologist whether the Claimant was able to return and the disparity between the two. The latter point was relied upon even though no clarification had yet been obtained as to the reasoning underlying the neurologists view.

42. On the basis of these considerations Ms Cooper and Ms Parry considered that sufficient reasonable action had been taken at the informal stage to address the absence issues. Ms Parry did not specifically consider the factor of whether "any reasonable adjustments have been identified, explored and implemented where possible" [**C208**]. As noted above, the OH report had identified a specific step still to be taken in exploring amended duties with the neurologist, and seeing whether he could support an earlier return on this basis. The Respondent's case was that this was one of a number of non-exclusive examples of factors that might bear on whether there had been sufficient steps rather than a condition that had to be satisfied in order to proceed. I return to that issue in setting out my conclusions below.

Stage 1 Review Meeting

43. The stage 1 review meeting proceeded on 6 March 2019, chaired by Ms Parry and also attended by Mr Haines, Ms Cooper, and the Claimant, accompanied by her colleague, Jane Beasley. [**C76-78**] The Claimant recounted the fluctuation in her condition, explaining that she was now having more good days than bad days. She explained that she was able to fit the voluntary work she did around the good days. On the day of the meeting she was experiencing pain on one side of her head that she had woken up with, but on the previous day she had been fine. She noted that

stress events tended to trigger the head pain. She relayed that her Ophthalmologist had expressed the view that the Claimant was back to around 80% recovered.

44. As well as a discussion around options for returning to work, there was a discussion of alternative options such as ill health retirement and redeployment, and redundancy. At the Claimant's request, Ms Cooper agreed to look into whether the deadline for expressing an interest in voluntary redundancy could be extended.

45. One of the issues discussed at the meeting was writing to the Claimant's neurologist as the occupational report had recommended. The Claimant last appointment with the neurologist had been on 27 November 2018 and she confirmed that she still had not had a further meeting despite writing and requesting an urgent appointment.

46. As well as having external OH support from HML, the Respondent had access to internal OH input from its Health, Safety and Wellbeing Manager, Kennie Bassey. She was a shared resource with other Councils, and a healthcare professional, being a physician associate and member of the Institute of Occupational Safety and Health. As Ms Cooper explained at the meeting on 6 March 2019, she had discussed OH report with Ms Bassey, who had advised that they should wait until the Claimant had seen the neurologist again before asking HML to seek a report from the neurologist, so as to ensure an up dated view on prospects for returning to work or eligibility for ill health retirement. There was discussion of the Claimant using, as leverage for an early appointment, the impact that her absence was having on work. Ms Cooper also agreed to provide the Claimant with some key questions to ask the neurologist so that this could be reflected in the report. The Claimant raised no objection to this course.

47. In accordance with the MAS Policy, the Claimant was advised that if the Claimant did not achieve the improvement required in the review period the next steps was a Stage 2 formal absence review meeting where dismissal was a possible outcome [**C80**]. This was not a disciplinary warning in the sense of indicating any wrongdoing. But it was a warning of the consequences liable to follow if the improvement in attendance was not achieved. The Claimant was not informed of any right of appeal against the decision to do proceed to the formal stage, there being no such right under the MAS Policy.

48. The letter of 13 March 2019 summarising the meeting also enclosed an Attendance Improvement Plan ("AIP") [**C81-82**]. The Claimant signed it by way of agreement on 22 March 2019. Her written evidence was that she felt she had no choice but to sign the AIP. However in oral evidence she accepted that under the stress of the situation there were no other suggestions that occurred to her at that time.

49. The AIP plan included provision for the Claimant to continue to chase the neurologist for an appointment. The Claimant duly did so by a letter dated

14 March 2018 [**C83**], which she sent to the Respondent on the following day (stating that she would also continue to support the work of the Centre) [**C84-85**]. The Claimant had previously written to seek an appointment in January, and the Plan noted that the impact of absence on work could be used as leverage to obtain an earlier appointment. Consistently with this, to emphasise the urgency she noted that the Respondent had commenced formal proceedings under the long term absence policy that could culminate in her dismissal, and noted that the Respondent wished to write to him before taking any decisions.

50. The AIP also set a date of 22 March 2019 for Ms Cooper, having liaised with Ms Bassey, to provide the Claimant with key questions to put to the neurologist. Ms Parry reverted to the Claimant in relation to this in an email of 15 March 2019 [**C84**], noting that Ms Bassey had suggested a question as to the cause of SIH and what the prognosis was for the condition from a work perspective.

51. Ms Parry also relayed that Ms Bassey had asked if the Claimant would agree to providing her with the specialist/ neurologist reports as this might speed up the process of determining fitness to work or next steps. The Claimant did not respond. Her evidence was that there were no such reports and nor would they have helped because what was required was the interpretation of the neurological findings in their impact on return to work and that she did not wish to reveal the confidential neurological information to her employer (though she would have been content for it to be sent to the external OH). However that was not expressed to the Respondent. It is not necessary for present purposes to determine whether it is correct that there was in fact no such reports, though I consider there is force in the Respondent's contention that the outcome of the consultations must have been relayed at least to the Claimant's GP even if there was no report sent directly to the Claimant.

Claimant's proposed return to work and plan

52. The Claimant attended a further appointment with her neurologist on 27 March 2019, which he accommodated before his regular appointments. At the time of the appointment the Claimant was still experiencing headaches, fatigue and difficulty focussing. The neurologist increased her medication in an attempt to assist her to deal with this. As a result of experiencing an improvement in her condition, the Claimant sent Ms Parry an email on 10 April 2019 [**C94**] informing her that the neurologist had said that she was making good progress and she stated that she was looking to make a phased return to work "at the beginning of June". She suggested it would be helpful if they could develop a programme of gradually increasing duties.

53. Ms Parry replied by an email of 11 April 2019, agreeing to meet up with the Claimant and asking if the neurologist had provided any advice on what a return to work programme might comprise [**C93**]. The Claimant replied by email of 16 April 2019 [**C93**] that they had not "got into discussing the finer details of the job" as it had been an emergency appointment slotted in before the neurologists normal clinic. She suggested that she (the Claimant) draft

something up as a basis for discussion and revert with some suggestions after Easter. Ms Parry agreed (by an email sent later that day) [**C95**].

54. The AIP report had stated that the neurologist's report was "key in moving the matter forward". In relation to question on the pro forma as to whether reasonable adjustments had been identified, it recorded that this was dependent on further medical advice following review by the neurologist. However the Respondent neither suggested any follow up with the neurologist at that stage nor did they seek further medical advice. Ms Parry and Ms Cooper's view was that things had moved on since the Claimant appeared to be making progress (as the neurologist had said), and the appropriate course was to compile the proposals for a phased return in the first instance and then to take advice on this. The focus was therefore now on working towards the phased return to work. For her part the Claimant did not suggest that she considered it important at that stage to for the Respondent to write seeking input from the neurologist.

55. The Claimant submitted her proposals for a phased return to work under cover of an email to Ms Parry of 25 April 2019 [**C96-101**]. She noted that she had allocated the bulk of the time to marking assignments. The proposals ran from 3 June 2019, working for 10 hours a week for four days a week (2.5 hours per day) for the first three weeks, working exclusively from home. From 24 June 2019 her hours were to increase to 40 hours a week, with 25% of the time spent on site. Hours were to be gradually increased, reaching 33 hours per week (90% of full time) and 100% on site for three weeks from 14 October 2019. The Claimant explained that she did not feel able to work with children at that time or to drive the minibus. For each week they set out her proposals as to what she would do and what work would still need to be covered. For the initial few weeks she concentrated on work which either she was already doing voluntarily or which she would have been doing if the need for it had yet arisen such as arranging external verification visits.

56. Ms Parry replied on 29 April 2019 noting that she was on leave that week but would be in touch regarding a meeting in the week commencing 6 May 2019, which was when she would be back from leave. She also forwarded it to Mr Haines and Ms Cooper so that they could provide their input.

57. There was a delay before there was any reply. There was no substantive response until the Claimant sent Ms Parry a chaser email of Thursday 23 May 2019 (at 8.24am), requesting an update on what decision had been taken about her return, and the process of undertaking risk assessments and briefing staff at the Centre [**C115**]. The Claimant had not chased for a response prior to this. It was not mentioned when she sent in her fit note on 13 May 2019, or when she was in contact with Ms Parry by phone and email between 17 to 23 May in relation to dealing with a customer complaint.

58. Ms Parry replied on the morning of 23 May 2019, apologising for not replying earlier, stating that she had now received HR advice (which was received that day) and asking to meet with the Claimant to discuss, and suggesting

various dates [**C114**]

59. The Claimant replied later that morning asking if it was possible to give her an indication of the HR advice so that she was "not worrying about it" [**C114**]. The meeting was ultimately arranged for the following Tuesday (28 May 2019), taking into account the Claimant's limited availability on 29 May and Mr Haines' diary. In the meantime, either on 28 or 29 May 2019, in the light of the concern the Claimant had raised, Ms Parry called the Claimant and reassured her as to the limited points raised by HR (around minimum 40% hours requirement and changing on a monthly basis to fit in with payroll).

60. The delay between 29 April (or in any event 6 May when Ms Parry returned from leave) and 23 May 2019 was despite an clear need for urgency. The Claimant was not being paid, and was hoping to return to work (or more accurately, since she was already working voluntarily, to the payroll) on 3 June. If that was to be possible there would need to be input from HR and at least the internal OH. Delay risked putting back the date that the Claimant could return to the payroll. Further she had not been told that the clock had ceased to run on the Stage 1 process.

61. For Ms Parry's part she was awaiting a response from HR. However she failed to revert in the week of 6 May having referred to a meeting on her return, and failed chase up HR when there was no response until prompted by the Claimant. Nor did she specifically highlight to HR (and CH) the urgency, on the basis that they would have been aware of it. She was unable to explain those failures in evidence other than that she would have had a large number of other commitments (without having a specific recollection of what they were) and that she had been waiting for HR to revert.

Two weekly reviews

62. The AIP provided that Ms Parry was to review progress under the AIP through regular reviews with the Claimant. In relation to responsibility for this it provided that the Claimant and Ms Parry were "to liaise every two weeks (or more frequently) to monitor [the Claimant's] progress/ date with Neurologist". In terms of standards to measure this, it referred to "evidence of emails/ phone conversations".

63. There was no specification as to the form that the review would take. In the initial period after the stage one meeting the focus was on arranging the meeting with the neurologist and ascertaining the feedback from that meeting. The Claimant notified Ms Parry of the date of the consultation by an email of 25 March, and as noted above they liaised about the outcome of the consultation in emails between 10 and 16 April 2019. There was then the further correspondence of 25 and 29 April 2019 relating to the RTW Plan. However in the period from 29 April 2019 until email correspondence on 23 May, the only contact was an email from the Claimant sending her fit note (on 13 May 2019 [**C113,114**] and correspondence on 17, 20 and 22 May 2019 where the Claimant assisted in relation to responding to a customer

complaint.

64. The Claimant's evidence was that apart from the meeting on 28 May 2019 she did not recall contact other than email, though she subsequently accepted that there had been a call following the email on 23 May 2019. Ms Parry contended that there were telephone discussions but (unsurprisingly given the passage of time and the absence of any notes) could not recall any specific calls or what was discussed occurred other than the gist of the call following 23 May and that there were discussions when dealing with the customer complaint. I accept that there were telephone discussions around the time (17 to 23 May 2019) when dealing with the customer complaint. Whilst it is possible that as a courtesy Ms Parry may having asked how the Claimant was doing, there was no specific evidence as to what was discussed in those calls, and no note to evidence that this involved something that could be regarded as reviewing how the Claimant was progressing as provided for in the AIP.

65. I am not satisfied that there were other telephone discussions. If Ms Parry had made a point of calling the Claimant to check on how she was doing and meet the requirements of the AIP, it is to be expected that there would have been some note made of this or at least reference to it in correspondence.

66. That correspondence evidenced that progress had been made in securing the appointment with the neurologist, and in putting an action plan together. But there was no record of discussions more generally as to how the Claimant's health was progressing other than Claimant relaying that the neurologist had said that she was making very good progress. In Ms Cooper's evidence she identified that the sort of matters she would have expected to be covered in review discussions would be matters such as checking the Claimant's health situation, including how the Claimant was feeling, how her health was progressing and how she was managing health situation, and information as to any medical appointments that were due to take place and what additional support she felt might be needed. I agree that those as the sorts of discussions to be expected in order to comply with the AIP, particularly in the crucial period when there were proposals as to a possible return to work. There were no records made indicating that such discussion took place other than the correspondence about the appointment with the neurologist and feedback on this. Other than that I do not accept there were such discussions, save that Ms Parry may have asked in passing about the Claimant's health in the context of calls during the period 17 to 23 May 2019 when the Claimant was assisting with a customer complaint. I accept that the Claimant was left feeling isolated, albeit that in the context of still being in the formal process she did not feel able to voice that to Ms Parry.

67. Ms Parry's view was that the prospect of proceeding to Stage 2 of the MSA Policy had receded as they were now focussing on the plan to get the Claimant back to work. However she did not express that to the Claimant.

68. There was some ambiguity as to when the review period ran from as this

was not expressly started on the AIP. The Claimant's view was that it ran from the meeting on 6 March 2019, which was also stated as being the date it was created on the plan. Ms Parry favoured the view that it ran from 22 March 2019 when it was agreed. On either basis the 8 week period expired in May 2019 (either 1 May 2019 or 17 May 2019). Consistently with Ms Parry's view that the focus had move onto planning to return to work, there was no specific discussion of extending the period by the 4 weeks that could exceptionally be added. But there was no express reassurance given as to this or that they would not be progressing to Stage 2.

Response to Claimant's RTW Plan

69. The meeting between the Claimant, Mr Haines and Ms Parry to discuss the Claimant's first draft of the Returns to Work ("RTW") Plan proceeded on Tuesday 28 May 2019. Ms Parry followed this up with an email of 29 May to the Claimant (copying Ms Cooper and Ms Haines) attaching a copy of the HR advice from Ms Cooper at the Claimant's request and summarising agreed actions from the meeting [**C123-124**]. I accept that the note provides an accurate summary of what was discussed at the meeting. The Claimant was asked to amend the RTW plan so as to start with 15 hours per week (40%) and make the step increase in hours on a monthly basis, showing 100% of hours by November. It was also clarified that after the first month the Claimant would only be paid for the hours she worked (consistently with clause 9 of the MSA Policy [**C202**]). The Claimant was also asked to provide a short high level summary on a month by month basis of the nature of the increased duties so that occupational health could determine at what point these might require a further risk assessment.

70. It was noted that once the RTW plan had been amended it would then be sent to occupational health for advice. It was also planned that the Plan would be reviewed on a monthly basis to ensure that the Claimant was able to increase her hours and duties as planned. The Claimant was to seek a doctor's note which indicated her ability to return to work on a phased basis subject to various provisions being put in place (such as phased return to work, reduced hours, amended duties) and be broadened to working on administrative type duties from Everdon and not just from home. It followed pursuant to the MSA Policy, that provision of a fit note in those terms would trigger a mandatory requirement for a risk assessment.

71. Ms Parry's oral evidence was that she made clear at the meeting that before the Claimant started work there would have to be a further risk assessment. I do not accept that this was said. It was not mentioned in the her witness statement or in her note of the meeting. The only mention of a risk assessment in that note was that OH would need to determine at what point the more physically demanding duties might require a further risk assessment. The Claimant's own plan made reference to the need to update risk assessments in the first month but did not provide that this would need to be before start of work. If that needed to be corrected or clarified to stipulate that it be at the outset, I would expect the note of the meeting to make reference to this.

72. Nor do I accept the Claimant appreciated at that stage that a risk assessment would have to be carried out before she started work rather than in the first weeks of her plan. Whilst she had asked about the process of undertaking risk assessments in her email of 23 May 2019, that was not inconsistent with a belief that these could be carried out during June but after her return. Consistently with this the high level summary with her updated RTW Plan continued to provide for the updated of risk assessments in June and made no mention of this being done before starting work.

Updated RTW Plan

73. The Claimant provided her updated RTW Plan, and summary of the plan, under cover of an email to Ms Parry sent on 29 May 2019 (shortly before Ms Parry's email summarising the required actions) [**C127-130**]. As before the plan ran from 3 June 2019, and involved working 100% from home in the first three weeks. This was now to be for 40 hours, a week, at 3.75 hours per day over 4 days.

74. Ms Parry forwarded the Claimant's updated plan to Ms Cooper and Ms Bassey shortly after receiving it on 29 May 2019, and requested their advice [**C142**]. She sent a chasing email on 5 June 2019 [**C142**]. Ms Cooper informed Ms Parry that she still needed to speak to Ms Bassey to ensure that what the Claimant was proposing was safe and reasonable.

75. The Claimant emailed Ms Parry on 6 June 2019, asking about feedback on the proposed plan and noting that failure to accept the plan meant that she had been prevented from earning a salary despite having sent in the plan on 25 April for scrutiny and asking about progress [**C139**]. This was the first indication of complaint from the Claimant. At this point she had not yet supplied a fit not from her GP indicating that she may be fit to work.

76. Ms Parry replied by an email of Friday 7 June 2019 apologising for the delay [**C141**]. By way of explanation she forwarded an email from Ms Cooper to Ms Parry stating that she would have to speak to Ms Bassey in the following week to ensure that what was proposed was "safe and reasonable given the length of her absence and reasons for absence" and that she had requested a meeting on Wednesday 12 June 2019. Ms Cooper confirmed that Ms Cooper and Ms Bassey had arranged to speak on that day.

Fit note

77. Also on 7 June 2019 the Claimant sent her fit note covering the period from 2 June to 30 June 2019 [**C149-150**]. This provided that the Claimant may be fit for work taking into account amended hours and duties and the comment "phased return to work please".

78. The fit note was sent in the afternoon of 7 June, at 2.20pm, when Ms Parry was out of the office. She was also on leave for part of the following week, as a result of which there was a delay in forwarding the fit note to HR until

her return on 13 June 2019 [**C179**].

79. There had been some delay in sending in the fit note. It was dated 4 June 2019, but initially it did not have the words “phased return to work” on it. As a result of which the Claimant took it back to the surgery and had those words added. However

Requirement for further risk assessment

80. Prior to seeing the fit note, Ms Cooper met with Ms Bassey on the morning of Wednesday 12 June 2019 [**C103, 155C-D**]. As Ms Cooper relayed to Ms Parry in an email of 12 June 2019, Ms Bassey advised that she required the most recent report from the Claimant’s neurologist to establish whether the Claimant was fit to return and whether the working environment could accommodate her return, and that Ms Parry should review the phased RTW plan against the neurologist’s report and revert to Ms Bassey if further advice was required.

81. On her return to work on 13 June 2019 Ms Parry replied attaching a copy of the fit note and explaining that so far as she was aware the neurologist had not provided any further information when the Claimant saw him other than that she was progressing well and that (in an indeterminate time) she should make a recovery. She asked what they should specifically be asking the neurologist and commented that she presumed it was her GP who determined whether she was able to return to work.

82. In email later that afternoon, Ms Cooper informed Ms Parry that, having seen the fit note, Ms Bassey had advised that she was satisfied that the Claimant had been assessed as fit to return to work but that Ms Parry should undertake a risk assessment as provided for in the MSA Policy [**C155B**]. Ms Cooper added that she noted the difference between the one month period of fit note and the duration of the phased return, and that this should be clarified with the Claimant and that she should confirm to the Claimant that the period of the phased return was exceptional.

83. By an email of 14 June 2019 (copied to Mr Haines and Ms Cooper), Ms Parry informed the Claimant that HR had reverted to say that it would be necessary to carry out some more risk assessments on the proposed RTW Plan. She asked whether the Claimant was free to meet her and Ms Haines on Tuesday 18 June 2019 to go through the risk assessment [**C154**].

84. The Claimant’s contention was that a risk assessment should not have been required for the Claimant to return because the work she would initially be doing in the first three weeks was covered by the existing risk assessment I do not accept that. First, there was a difference between doing work ad hoc as and when the Claimant felt able to do so with no requirement and having a minimum hourly requirement. Second, it was a mandatory requirement under the policy. Further, I accept that Ms Parry was entitled to do (and did) take the view that it was appropriate at the outset to get off on the right foot, including identifying the trigger points that might arise when further

assessments may be required.

85. I accept however that there had been no prior indication to the Claimant that the risk assessment would need to be carried out before she returned from sickness absence.

Grievance

86. The Claimant initially replied by an email of 17 June 2019 enclosing a letter headed “Serious Breach of Contract – denial of salary payment” [**C158-159**]. She complained that the further discussions postponed still further her opportunity to earn her salary, and that even if she attended on 18 June it would probably not be until 24 June that agreement was given for her return and that at least three week’s salary would have been lost. She contended that whilst she did not object in principle to further risk assessments, these should have been dealt with between the original submission of the plan on 25 April 2019 and the projected return date of 3 June 2019. She asked for confirmation that the Respondent would pay her salary from her original return to work date of 3 June 2019 and stated that if this request was denied she would treat this as a serious breach of her contract of employment.

87. The Claimant followed with a further email to Ms Parry on the morning of 18 June 2019 attaching a grievance [**C163-164**]. She complained that:

    87.1 The Respondent had failed to establish a complete medical picture of her absence; it had not written either to her GP or neurologist despite being advised to do so by OH and had been given a warning that she could be dismissed based on incomplete medical evidence.
    87.2 The absence of a response to her planned RTW Plan and “the subsequent isolation” had badly damaged her confidence and mental health.
    87.3 This had been exacerbated by the further delay for meetings between management and HR and subsequent requests for risk assessments which could have been dealt with before the target return date and had prevented her earning her salary in fundamental breach of contract.

88. Ms Parry acknowledged receipt of the grievance by an email sent later that morning, and sought clarification of whether the Claimant would meet with her and Mr Haines for the risk assessment planned for that afternoon [**C164**]. The Claimant replied that she did not feel well enough to attend and would “not just carry on as if nothing had happened.” [**C164**]

89. Also on 18 June 2019 the Claimant submitted a data subject access request [**C168**].

90. The Claimant was being assisted in relation to this correspondence by her brother, a retired HR professional.

Grievance response

91. Ms Parry sent the Claimant a holding response on 21 June 2019, stating that she would be writing to re-arrange the risk assessment and would be addressing the points raised in the Claimant's letters to provide her with the opportunity to review them prior to the meeting [**C171**].

92. The Claimant replied later that afternoon taking issue with that approach [**C170**]. She referred to having raised a formal grievance in relation to a series of events adding up to a breach of contract. She said that her correspondence of 17 and 18 June 2019 had been the Respondent's "last opportunity to deal with the matter, as I am required to do under the ACAS code of practice" and required confirmation that the matter would be dealt with under the grievance policy.

93. Ms Parry replied by an email of Wednesday 26 June 2019 [**C170**], inviting the Claimant to a meeting on 3 July 2019 to discuss the points raised and her responses to them and to undertaking a risk assessment. She also confirmed that a response to the DSAR would be actions. Three letters dated 26 June 2019 were enclosed:

    93.1 A letter rearranging the informal review meeting [**C172-173**].
    93.2 A letter responding to the Claimant's 17 June 2019 letter, headed "Serious Breach of Contract – denial of salary payment" [**C174-176**].
    93.3 A letter responding to the grievance [**C177-180**]

94. In the letter dated 26 June 2019 rearranging the informal review meeting, Ms Parry also stated that:

> "Having referred to the Resolving Workplace Concerns Procedure [ie the Grievance Procedure], a copy of which is enclosed for your information, any work related concerns should be raised informally with the line manager to enable issues to be resolved quickly and directly outside of this procedure. As the points you have raised all relate to your current absence, I propose to respond to these under the Management of Sickness Absence Policy and Procedure and provide an opportunity for discussion at our next meeting.
>
> In the meantime, I have enclosed my response to the points you have raised to this letter prior to our meeting on 3rd July to provide you with an opportunity to review these before our meeting.
>
> Although the meeting is intended to be informal, if you wish, you may be accompanied at the meeting by a work colleague or your trade union representative. It is your responsibility to make arrangements to be accompanied." [**C172**]

95. The letter therefore explained that although a response to the grievance was provided, this was part of addressing the matters informally. It did not state expressly that should this not be satisfactory, it could be take further formally.

However it made reference to the need to raise the matter informally. The reference to this providing an opportunity for the issues to be "resolved quickly and directly outside of this procedure" quoted directly from paragraph 4 of the grievance procedure, referring to the informal stage.

96. In the letter responding to the Claimant's letter of 17 June 2019 [**C174-176**] Ms Parry emphasised that:

    96.1 Due to the length of the Claimant's absence it was necessary to ensure that the proposed five month phased return was properly risk assessed. Ms Parry stated that she had understood from their conversations that the Claimant was aware of the need to have a robust RTW Plan and to undertake a risk assessment and for OH to advise on this. The Claimant had made reference to the need for OH advice in her covering email when sending the revised RTW Plan on 29 May, where she commented that she hoped that her summary would answer questions that Ms Bassey may have.

    96.2 The fit note was only advisory and that it was for the employer to determine whether or not to accept it. It did not establish an automatic right to return to work and be paid the salary for June and that "it follows that there has not been a serious breach of contract due to "non-payment" of … salary in June".

97. Ms Parry's letter responding to the Grievance [**C177-180**], included the following:

    97.1 The Claimant had agreed with the approach of waiting until the Claimant had seen the neurologist before asking HML to seek a report to ensure an up to date view about prospects of returning to work (or eligibility for ill health retirement.

    97.2 In response to the complaint about having been given a warning, it was stated that no disciplinary action had been taken. The MSA policy had been followed including holding a first stage meeting in the light of the length of the absence and warning of the consequence if there was no improvement.

    97.3 In response to the complaint about ignoring the RTW Plan for six weeks, Ms Parry set out a timeline, concluding that she had contacted the Claimant whilst Mr Parry was on leave to advice it was being looked at, and how reverted to her when she had the necessary advice. She acknowledged that this had taken four weeks and this should have been less. She noted the contact with the Claimant over that period (including the Claimant providing factual information to enable Ms Parry to response to a corporate complaint about the service) and that there had been no complaint about isolation (including in the meeting on 28 May 2019).

    97.4 As to the contention that the risk assessment could have been carried out before the targeted return date, she noted the agreed actions on 28 May 2019, and that no fit not was provided until 7 June 2019. She apologised for the delay of four working days in forwarding the fit note to HR due to her being away from the office and then on annual leave until 13 June 2019. She highlighted that under the policy where a

medical statement or RTW plan advises that the employee may be fit with temporary adjustments, a risk assessment must be undertaken.

97.5 It was contended that the risk assessment could not be carried out until the fit note states that the employee may be fit to work. There was no further reasoning provided for that assertion.

97.6 There had "been no breach of contract because the advice contained on the fit note is for guidance purposes only and is not legally binding."

97.7 She concluded by offering to discuss the points raised and her responses in the meeting proposed for 3 July 2019. There was no mention of being able to pursue matters further, if dissatisfied, under the grievance policy.

Resignation

98. The Claimant responded by a letter of 28 June 2019 stating that she was resigning with immediate effect, and that this was in response to a repudiatory breach of contract. She complained that the Respondent had proceeded to determine her grievance without inviting her to a grievance hearing, that this added to the breach of contract and showed that her concerns were not being treated seriously. [**C188**]

99. Ms Parry responded by a letter of 4 July 2019 [**C190**]. She denied that there had been any deliberate intention to delay her return to work or to delay her chance to earn salary. She emphasised the importance of obtaining the right advice to ensure that the Claimant's return was safe and did not put her or others at any further harm, and hence the importance of a risk assessment. She noted that the GP had not provided any detail about what the phased return should entail or how duties should be amended and that the proposed RTW Plan extended beyond the period of the fit note and that it would therefore be necessary to obtain OH advice regarding this.

100. She added that although he meeting on 18 June had not taken place, that "as required within the Workplace Concerns Policy" [ie the grievance policy] she had responded to the concerns as an attempt to help resolve them informally, and that she had not been refused a formal grievance hearing as that would have been the next stage had the Claimant remained dissatisfied with the response. This was however the first time it was said expressly that the informal response was in accordance with the grievance policy or that if dissatisfied a formal grievance could be pursued.

101. The letter concluded by offering the Claimant an opportunity to reconsider her decision and requested a response within 5 working days. The Claimant's brother on the following day that she would not be returning to work. By a letter of 15 July 2019 Ms Parry therefore confirmed that the Claimant's last day of employment was 28 June 2019 [**C193**].

RELEVANT LEGAL PRINCIPLES IN RELATION TO CONSTRUCTIVE DISMISSAL

102. Since it is common ground that if the Claimant was dismissed, then the dismissal was unfair, the issues are whether:
    102.1 the Respondent was in breach of the implied term of trust and confidence;
    102.2 if so the contract had been affirmed; and
    102.3 If not, the Claimant left at least in part in response to the breach.

103. Relevant principles are summarised in ***Omilaju v Waltham Forest London Borough Council*** [2005] ICR 481 at paras 14-16 and ***Kaur v Leeds Teaching Hospitals NHS Trust*** [2019] ICR 1 (CA):
    103.1 There are two elements to the implied term of trust and confidence:
        (a) whether, judged objectively, the Respondent's conduct was such as to destroy or seriously damage the relationship of trust and confidence and
        (b) whether there was reasonable and proper cause or excuse for such conduct.
    103.2 Any breach of the trust and confidence term is inevitably repudiatory since the essence of the breach is that it is calculated or likely to destroy or seriously damage the relationship.
    103.3 The test of whether there has been a breach is objective.
    103.4 It is possible for a course of conduct or a series of discrete acts cumulatively to give rise to a breach of the implied term of trust and confidence. The last straw need not be of the same nature as previous acts. It need not be blameworthy or unreasonable but it must contribute to the breach; an entirely innocuous or trivial act on the part of the employer cannot be a final straw. The question remains whether cumulatively they are such as objectively to destroy or seriously damage the relationship of trust and confidence without reasonable and proper cause. However whilst the last straw need not of itself be a breach of contract and might be relatively insignificant it must be capable of contributing something to the earlier acts which cumulatively amount to a breach of the term, rather than being trivial.
    103.5 If there is a repudiatory breach it is not capable of being remedied. However the right to resign may be lost by virtue of express or implied affirmation of the contract (***Bournemouth University Higher Education Corp v Buckland*** [2011] QB 323 (CA)s). However the focus is on whether there has been affirmation following the last of the acts relied upon as contributing cumulatively to the breach of the implied term of trust and confidence. The mere fact that the contract has been affirmed following an earlier act, does not prevent reliance on that act as part of the conduct which cumulatively gives rise to a breach of the implied term if there is then a subsequent act which provides the last straw. Even if the prior conduct (which was followed by affirmation) was such as to amount to a repudiatory breach, the last straw revives the right to resign. Equally it follows that even if the last act in the course of conduct is too innocuous to qualify as a last straw, there can

be reference to an earlier act provided that there has not been affirmation subsequent to it.

103.6 Further, the resignation must be at least in part in response to the repudiatory breach of contract.

104. A line of authority following ***Cantor Fitzgerald International v Callaghan*** [1999] ICR 639 (CA) has emphasised the importance of the contractual provisions as to pay. As Judge LJ put it (at 648F) “it is difficult to exaggerate the crucial importance of pay in any contract of employment”. That was said in the context of a contractual provision as to pay. The Claimant does not rely on such a term. She does however contend that the effect of the delays in her case was such as to delay her return to work and to the payroll. The emphasis on the importance of pay to the contractual relationship has some resonance when considering whether alleged failings alleged to impact on the Claimant’s return to the payroll individually or collectively were sufficiently serious in nature as to be likely objectively to destroy or seriously damage trust and confidence.

DISCUSSION

Was there a repudiatory breach of contract?

105. I turn to consider in turn the matters relied upon as amounting to a repudiatory breach. I consider each of these in turn, before standing back to also consider the cumulative picture.

(1) Management’s insufficient attempt to understand the Claimant’s medical condition and its consequences and attempt to minimise the duration of absence from work; (2) Management’s insufficiently following up on advice received from their appointed occupational health adviser and the consequences of this

(a) Moving to the formal stage without writing to the neurologist

106. The MSA Policy required that before progressing to the formal stage the manager must be satisfied that sufficient reasonable action had already been taken to informally address the absence issues. It is to be viewed in the context of the strict timetable which is set once the formal stage has started, which provides for dismissal if there is not sufficient improvement after a maximum of 12 weeks at stage 1, and then subject to a four week review period at stage 2. The decision to enter the formal stage is therefore potentially crucial, and the requirement for sufficient reasonable action to informally address absence is the safeguard provided in relation to this. The bullet points that follow are illustrative instances of factors liable to bear on that criterion. They are not the only factors. Nor does the policy require that every action that could be taken to informally address absence issues has been taken. It requires only that there had been sufficient reasonable action. But the fact that factors in the bullet points are specifically identified is indicative of their likely importance. They also help illustrate what is meant

by sufficient reasonable action. It is not merely a matter of the time that has elapsed or the impact on the business. It is important to investigate the issues impacting on the absence, and the steps that can be taken to facilitate a return to work, before moving to the formal stage, given the consequence of triggering the formal stage.

107. As such I consider that application of the sufficient reasonable action test would ordinarily require that any reasonable adjustments have first been identified, explored and implemented where possible. Equally it was implicit in the bullet point as to the need to obtain OH advice that, where the advice was to take a further step to investigate the matter, that further the recommended further investigatory steps should ordinarily be followed before starting the formal process in the absence of a good reason not to do so. In this case the input from the neurologist was the key action point arising from the OH report. The AIP itself identified in terms that further support or adjustments were “dependent upon further medical advice following review by neurologist”. Further, far from having considered the reasonable adjustments factor and concluded that it as outweighed by other considerations, Ms Parry accepted that she had not considered it at all. Nor was the fact that there had not been a recent consultation a good reason not to follow the recommendation. At most that would point towards asking that the report be provided once there had been a more recent consultation.

108. In any event, I do not accept that, in the light of the terms of the OH report and the unusual nature of the condition which called for specialist input (as recognised in the terms of the OH report) that it was consistent with the policy to move to the formal stage without following first the recommendation to consult the neurologist. As noted above, there were other factors taken into account, such as the length of the absence, the fact that there was no clear picture yet of when the Claimant could return and (though this was only mentioned in evidence by Ms Cooper and not by Ms Parry) operational impact on the service. Those factors could have some bearing on whether sufficient reasonable action had been taken. But in the context of the timetable triggered by moving to the formal stage, I do not accept that proceeding to the formal stage before further investigation with the neurologist was on the facts of this case consistent with the MSA Policy. It started the clock running on the formal stage without having taken the key recommended step to understand the counterindications to the Claimant returning to work and factors likely to impact on such a return.

109. I am not satisfied that Ms Parry did properly focus on the test of whether there was sufficient reasonable action taken to informally address the issues, and satisfy herself that was the case. Had she done so it is likely that she would have addresses the reasonable adjustments factor which she accepted had not been taken into account and in the AIP was expressly left as to follow the neurologist input. It is more likely that she focussed instead on the length of time that the Claimant had been off, the uncertainty as to the date of return and relied on the advice of Ms Cooper, rather than specifically addressing that factor. But if she did apply the sufficient reasonable action test, and found it was satisfied, that conclusion was not reasonably available

to her in the circumstances of this case. There was not proper or sufficient cause or excuse to depart from the requirements of the policy.

110. There are a some mitigating factors to weigh into account in relation to whether this was objectively conduct such as to destroy or seriously damage trust and confidence. I accept that the Respondent acted in good faith on the basis of a genuine (though not reasonable) belief that it was permissible and appropriate to proceed to the formal stage. I also take into account that the Claimant object or express any disagreement with the proceeding to the formal stage, though the force of that point is weakened by the fact that she was not offered any right of appeal. I also take into account that it was only the first stage, the significance of which would to some extent ultimately depend on whether the Claimant was able to return to work.

111. As against that even though there was later a plan to return to work, the Claimant was placed in the highly stressful and pressured situation of having been warned that if she did not return or progress sufficiently towards doing so she the policy provided to move to the dismissal stage. She entered that process without the steps having been taken as recommended to gather the required input from her specialist to help frame the approach to the return to work. The unreasonable failure by the Respondent to follow its own policy on the fundamental issue of whether to proceed to the formal stage was at least conduct objectively likely to undermine trust and confidence. I return to consider further below, in the light of my conclusions on other matters relied upon, whether cumulatively these amounted to a breach of the implied term.

(b) Awaiting a further consultation and providing questions for the Claimant to ask

112. As to the position at the stage 1 meeting, the Respondent's thinking was that the process could be speeded up by the Claimant seeking the neurologist and at the same time posing questions, rather than OH writing and awaiting a report. Ms Cooper also had in mind her own experience of delays she had encountered in the past in waiting for specialist reports. However it was a poor decision, and not just (as Ms Cooper accepted in evidence) with the benefit of hindsight. The OH report had specifically explained that an advantage of OH writing to the neurologist was that they could accompany this with an explanation of the Claimant's role and the potential for amended duties. The Respondent was not to know that the Claimant would only be afforded a very short emergency appointment. But even allowing for that, simply sending the Claimant armed without any such information was likely at best to produce limited insight beyond a headline view as to whether the neurologist considered the Claimant was ready to return or his view of the expected timescale. The extent to which he might be able to comment on the ability to return earlier with amended duties, or as to risks in doing so, were likely to be limited by a failure to equip her with guidance as to what she should explain about this, together with the fact that it was dependent on what could be explained verbally within whatever time was afforded for a consultation, rather than being carefully set out in writing.

113. Added to this, the questions posed were limited. The question about the prognosis might have been interpreted as also covering what the prognosis was for return on altered duties. However that was not made clear, and in any event as was implicit in the OH report, the answer was likely to be more illuminating if an account had been provided of the role and amended duties. But that would depend on the Claimant having the time to set this out when seeing the neurologist and being able to do so on the hood, rather than being carefully set out in a report that the neurologist could consider.

114. I do not accept the Claimant's submission that it was humiliating to have sent her off to the neurologist with inadequate questions and to have to seek for herself the required information. I do however accept that the initial failure to seek a report before moving to Stage 1 was then exacerbated by the approach of leaving it to the Claimant to put questions to the neurologist, rather than following the recommendation in the OH report. Save only for the limited questions relayed to her, it placed the onus on the Claimant as to what was to be said to the neurologist rather than carefully framing and possibly agreeing with the Claimant an account of her role and possible adjustments, and questions related to this, so as to garner the views of the neurologist on the issues impacting on the prognosis for return and adjustments that may be required.

115. I take into account that there are some factors which point to more limited the significance of this decision in relation to what it could contribute to a breach of the implied term of trust and confidence. The Claimant was made aware that the Respondent was following Mr Bassey's view in opting not to write to the neurologist at that stage on the basis that waiting until the Claimant had seen a neurologist would be ensure an up to date view. She was aware therefore that the Respondent was following internal OH advice and of the rationale for that advice (albeit that there was no adequate explanation as to why not to write to the neurologist with a description of the Claimant's role and duties and questions to be answered, and request that this be based on an updated consultation). She was also aware that the Respondent was following the direction of Ms Bassey in relation to the questions to be asked. Further, although the reasoning was flawed, the Respondent was acting in good faith with a view to speeding up the process of obtaining input from the neurologist (and there was nothing to indicate otherwise to the Claimant).

116. I also take into account that the Claimant agreed to that course, and raised no objection to it. She did not suggest that it would be better to write to the neurologist. Her agreement was confirmed by signing the AIP. That is not a complete answer to a poorly managed process on the part of the Respondent. The Claimant was entitled to expect that the Respondent, with its resources including access to OH and HR support, would exercise reasonable care in and about the operation of the sickness management process. But I accept it is relevant to take into account.

117. Further, the Claimant's failure to respond to the request to provide a copy of any neurologist reports is also in my view relevant when weighting up the significance of the Respondent's failings in the course it adopted in relation

to the neurologist having moved to the formal stage. It was clear from Ms Bassey's request that she believed that the content of the reports would provide useful insight that could speed the process. If the Claimant considered at that stage that it was important to write to the neurologist, the obvious course was to reply explaining why simply providing the reports was not considered appropriate and suggesting instead that a request be made to the neurologist to provide a report. That was not done.

118. Whilst taking into account these factors, I accept that the poorly judged decision to send the Claimant to ask questions herself of the neurologist rather than following the external OH advice as to the approach to be taken, despite the rationale set out in the OH report, was objectively capable of contributing something to erosion of confidence in the Respondent. I regard it as adding to, but as less significant than, the decision to proceed to the formal stage without having first investigated the position with the neurologist which as above I consider was contrary to the MSA Policy.

(c) After the 27 March consultation

119. I turn to the position after the correspondence of 10 and 11 April 2019 when the Claimant relayed that she was looking to make a phased return from June, that her neurologist had said she was making good progress, but that they had not "got into discussing the finer details of the job". It was therefore known that the direct route of the Claimant asking questions had produced little information.

120. I accept that there is some force that in the Respondent's reasoning that matters had moved on compared to the time of the OH Report, and the 6 March meeting, in that the Claimant had reported back that there was an improvement to the extent that she was able to suggest that she put together a proposed plan. She did not suggest that she needed guidance from a neurological report to do so. All parties were focussed on the practicalities of formulating the RTW Plan. Formulating the RTW Plan, and putting it in a form that complied with internal HR Plan, would mean that advice could be taken on the particular proposals that it was intended to implement.

121. Whilst those are relevant mitigating factors, I do not however regard them as a complete answer. A consequence of having failed to act upon the advice in the OH Report, promptly or at all other than by sending the Claimant to ask some questions, was that when it came to seeking to risk assess the Claimant's proposals either there was a risk of inadequate investigation of the risks in the various stages of return to work (given the unusual nature of the condition and that even the OH doctor had identified the need for input from the neurologist) or that there would be a risk of further delay pending the need for further advice. This was despite the recommendation for a report from the neurologist having been made as early as January 2019.

122. I take into account the Respondent's submission that the Claimant, had she considered it necessary, could have raised again the issue of writing to the neurologist or herself sought further impact from him. I do not regard that as

a complete answer. She had been following the steps asked of her by her employer which had the benefit of access to both internal and external OH resources. It is not a sufficient answer to the management failures to seek to place the onus on the Claimant to have made further investigations when the Respondent had failed to act upon the advice in the OH report and the Claimant had then been following the Respondent's directions as to how the neurologist was to be approached.

(3) Procedurally unfair application of the absence management procedure and (4) Failure by management to fulfil all of its obligations arising from the absence management hearing on 6th March 2019

(a) Deciding to proceed to the formal absence hearing before obtaining evidence from the neurologist

123. This has been addressed above.

(b) Not affording an appeal from the outcome of the 6 March 2019 meeting.

124. In the absence of a right of appeal against moving to the formal stage in the MSA Policy, I do not consider that the right to offer an appeal was objectively capable of contributing to a breach of the implied term of trust and confidence.

(c) Selective use of the Occupational Health letter to justify the formal absence hearing

125. Mr Crowther submitted that the Respondent's reasoning in support of moving to the formal stage was contradictory. On one hand it highlighted the fact that consultant's view was not based on a recent consultation as a reason not to write to him for a report. Yet on the other it placed weight on the neurologist's view that the Claimant could not return to work, and the conflicting view of OH, in support of the justification to move to the formal stage. The key point being made here by the Respondent was that there was not a clear picture as to when the Claimant would be able to return. I do not regard the Claimant's criticism based on inconsistency as a point adding material to my conclusions about relating to the decision to proceed to the formal stage before further follow up with the neurologist. It does however reinforce the point noted above as to the inadequate basis for finding that there had been a sufficient reasonable act taken informally (including investigation of the position) to merit moving to the formal stage.

(d) Failure to equip the Claimant for her to make a direct approach to the neurologist in her consultation following the meeting on 6 March 2019

126. This is addressed above.

(e) Failure to clarify whether the Claimant had exited the formal procedure of to give reassurance that she was not under threat of dismissal; and (f) Failure to hold review/ monitoring meetings at least every two weeks during

the period of the formal absence procedure to keep formal records of such meetings

127. I address these points together below in the context of the Claimant's case as to inertia after she submitted her RTW plan on 25 April 2019. In the period prior to that the focus was on progress in arranging the meeting with the neurologist, and then relaying the outcome and formulating a RTW Plan, and Ms Parry and the Claimant were liaising about this at least every 2 weeks by email.

(5) The impact of the prospective sale of Everdon Outdoor Centre in management's approach to the Claimant's absence

128. There was no evidence before me that the process was impacted by a prospective sale of the Centre. Nor do I consider that there is any material from which I should infer that was the case.

(6) Failure by management to organise the Claimant' s return to work process in a timely fashion

129. The Claimant relies on alleged inertia in the last six months of her employment and in particular (a) in the two months after 10 January and (b) in the period after she submitted her return to work plan on 25 April 2019.

(a) Inertia from 10 January 2019 to the 6 March 2019 meeting

130. As the Claimant submitted, there was an opportunity upon receipt of the OH letter of 10 January 2019 to follow up on the advice to authorise MHL to write to the neurologist at a point when the last consultation in November 2018 was less historic. The Respondent sought to explain the delay on the basis of the wish first to discuss the OH report with the Claimant at the Stage 1 meeting, including identifying whether she agreed with or had any comments on the content of the OH report. I accept that in the first instance it was appropriate to discuss the report with the Claimant. But that could and should have been done at the informal review meeting in February. Consistently with my conclusion as to the decision to proceed to the formal stage, I do not accept that there was any good reason for waiting until a discussion of the report at the formal meeting. Further this delay came in the context of the Claimant's expressed keenness to return to work as soon as possible (as noted in the OH report) and the view expressed in the OH report that their writing to the neurologist and providing information as to her role and potential for amended duties may enable him to support a RTW with adjustments in an earlier timeframe. Objectively, the delay conveyed a failure to prioritise with a sense of urgency the need to take recommended steps to support the Claimant's return.

(b) Inertia from submitting the RTW Plan on 25 April 2019

131. I accept that there was a failure on the part of the Respondent to proceed with sufficient diligence in the period following submission of the initial RTW

Plan on 25 April 2019, or more specifically from Ms Parry's return from leave on 6 May 2019, to the point at which it was prompted to act on 23 May 2019.

132. The context demanded that consideration of the Claimant's RTW Plan be prioritised and dealt with as a matter of urgency. Despite continuing to carry out work for the Respondent on a voluntary basis in order to assist the Centre, she was not being paid. A delay in providing input on the RTW Plan, and obtaining OH input, was liable to delay the return to work and being returned to the payroll. That would be the case even if in the interim the Claimant obtained a fit note to the effect that she was fit to work. Further, so far as the Claimant had been made aware, she remained within the formal review process, with the prospect of being advanced to Stage 2 if she did not make sufficient progress in returning to work. That remained a risk at least until she was informed otherwise, or her RTW plan was approved and she had been able to make a successful return. The stressful nature of that situation ought to have been apparent to the Respondent. Further, this came against the context of a history of delay in implementing the key recommendation of the OH report.

133. In all more than 7 weeks elapsed from the initial RTW plan to the point on 14 June when Ms Parry reverted to say that HR colleagues had said that further risk assessments were required on the plan and proposed a meeting on 18 June 2019 to go through the risk assessments, with the implication that the Claimant could not return before then.

134. There were some mitigating factors in relation to the period after 25 April 2019. For the first week Ms Parry was on leave (though that does not explain HR's delay in replying until 23 May). Nor were concerns raised by the Claimant when Ms Parry was in touch with her between 17 and 22 May 2019 in relation to responding to the customer complaint. When the Claimant did first raise a concern, in her email of 23 May 2019, Ms Parry replied on the same day and apologised for the delay also called her either on that day or the following day and provided reassurance as to the limited nature of the changes required by HR. Ms Parry also acted promptly, both in forwarding the initial RTW Plan during her leave, and in forwarding the revised plan on 29 May 2019. She was also proactive in chasing up for a response for comments on the revised RTW plan on 5 June 2019, before she was chased by the Claimant, and then replied promptly to the Claimant's email of 6 June 2019 asking about progress, apologising for the delay and updating on the timing of the proposed meeting between Ms Cooper and Ms Bassey.

135. I also accept that the Claimant had no right as such to return to work on a phased basis on 3 June 2019. The Respondent was entitled first to be satisfied as to whether it was safe for her and others to return to work to assess whether the phased return was acceptable operationally.

136. However it was important to minimise the period of absence, and particularly unpaid absence. It was implicit in the Claimant's RTW Plan that she expected to be fit to return by that date. It was important for the

Respondent's management to take proactive steps to ensure that the input required on its part to facilitate this were taken in good time and to minimise any delay. That required the Respondent to plan for the steps that would need to be taken and to take proactive steps to put these in place. It ought to have been apparent from the fact of the proposal for a return on a phased basis that (a) OH input would be required and (b) an updated risk assessment would be needed. Steps should have been taken to plan for this to be done in advance of the proposed return date, whether by having OH and HR input together or by setting deadlines for each step to procure that they were completed in time for the proposed return subject to receiving the required fit note. Further the Claimant should have been kept in the loop as to what was being done and of anything further required from her.

137. Instead, particularly in the initial period to 23 May 2019 matters were allowed to drift. No explanation was provided for the delay until that date on the part of HR to respond. Despite the clear urgency of the situation, Ms Parry took no steps either to stress that to HR or to chase them for their response. In the Claimant's email of 16 April 2019 she had offered to draft up the proposed plan with a view to discussing it with Ms Parry, and Ms Parry had agreed to meet up after Easter to discuss the proposals [**C95**]. But despite saying on 29 April that she would be in touch with the Claimant on her return from leave in the week of 6 May 2019 she neither did so nor explained the delay. Further, the only input given at that stage was as to HR requirements relating to minimum hours at the start, fitting in with the monthly payroll and the need to show a return to full hours and the request for a short high level summary. There was no OH input sought from Ms Bassey until after the revised RTW Plan. Given the urgency, I do not accept that it was essential to await HR input before obtaining OH input. But even if that was required, that should have brought home the need to set deadlines for each stage to facilitate consideration of a RTW without delay. It was a serious failure in management to allow matters to drift at this crucial point with a proposed impending return, without taking proactive steps to procure that the required input was provided in good time with that date in mind.

138. Nor do I accept that it is an answer to these points that there was some delay in receiving the Claimant's fit note in June. The HR and OH input could have been given on the basis that a return to work was conditional upon a GP fit note supporting a return to work, as was expressly anticipated in the follow up action points from the 28 May meeting. The Claimant was not told that the GP note was required in order for OH to consider the position. When she wrote on 6 June 2019 chasing for feedback on her proposed return, she was told that Ms Cooper would be speaking with Ms Bassey on Wednesday 12 June 2019, and was not told her fit note would be needed for the purposes of their discussion. In any event the fit note was sent in on the afternoon on 7 June 2019 in advance of that discussion. If it was important to have that fit note available for consideration by OH, given the urgency and that it was known that the Claimant would be seeking a fit note, Ms Parry could have taken steps to ensure this occurred. That could have been done either by checking her emails whilst out of the office, or informing the Claimant that

she was out and asking for the fit not to be sent to Ms Cooper (and/or Ms Bassey).

139. Ms Cooper later took the view that the fit note was not adequate and called for further enquiry because it covered a different period to the phased return. I do not consider that anything turns on this. It was not something that was raised with the Claimant prior to her resignation. In any event, if what was required was a fit note covering the same period as the phased return, this should have been brought to the Claimant's attention in the meeting of 28 May 2019, and follow up email, which only provided that the Claimant would seek a doctor's note indicating her ability to return to work on a phased basis. Not do I consider it would have provided any reasonable basis for refusing to return her to the payroll for the initial period covered by the fit note whilst a further fit note was obtained if required for the longer period. These were all in any event matters that, with a proactive management approach and planning following receipt RTW plan, should have been capable of being addressed much earlier.

140. Nor do I accept that, if a risk assessment was required prior to a return to work, that this could not be done before and in anticipation of the GP fit note. Again it was known that the Claimant would be seeking a fit note, as stated in the email of 29 May 2019, and the assessment could have been conducted subject to receipt of that fit note. To the extent that this required the revision of the RTW Plan first (albeit the revisions were only minor), again the Respondent could and should have been proactively planning and setting deadlines to enable this to be done in a timeframe which avoided, or in any event minimised, the delay in returning to work.

141. Further, alongside the failure proactively to seek to minimise delay, there was a failure in communication with the Claimant, or to liaise with the Claimant to review progress as required by the AIP, particularly in the period from 25 April until 23 May, notwithstanding the requirement under the AIP for two weekly reviews. I refer to my findings above as to two weekly reviews and the sort of things that should have been but were not covered. The period after 25 April was crucial, not only because of the impending proposed return date but also because the 8 week stage 1 monitoring period expired. There was no information provided as to what the position was in relation to this or any reassurance given relating to the risk of proceeding to stage 2. Nor was there any update as to what was happening in relation to the RTW proposal. It was Ms Parry's evidence that she considered that matters had moved on from the warning about moving to stage 2 and that they were now focussed on the return to work, but no reassurance was given as to this.

142. I accept that there was a failure to keep records of absence review meetings other than as evidenced in emails. However whilst the absence of records is evidentially relevant to whether there was contact and review of progress other than as set out in the emails, I do not consider that the failure to make such records adds materially to the issue of whether there was conduct that could objectively contribute to a breach of the implied term of trust and

confidence. The important factor rests in the failures of communication, particularly in the crucial few weeks from acknowledgement of the RTW Plan to being chased by the Claimant on 23 May 2019. As noted above, I accept that, save in so far as it was raised in passing in calls when the Claimant was assisting with the customer complaint (17-23 May), and other than the correspondence seeking feedback on what the neurologist had said, there was a lack of contact from Ms Parry to check in on matters such as how the Claimant was feeling, how her health was progressing and how she was managing health situation.

143. I accept that it was reasonable to require a risk assessment even though there was one already in place for the voluntary work being done. This was consistent with the requirements of the SMA Policy where there was to be a return on amended hours and duties. I do not accept there was no change from the situation where work was being done voluntarily. That did not entail any minimum hours commitment and allowed the Claimant freedom to work at her own pace around her good days whereas now there was to be a commitment to minimum hours per day and per week, and doing so with a view to building up in the future. It was also reasonable to have such an assessment at the start of the proposed return, looking forward to identify trigger steps along the way. However as noted above, the need for a risk assessment could and should have been identified and taken place far earlier. It should have been built into the steps put in place in response to the Claimant's RTW proposals so as to minimise any delay in the return to work. Further, so as to keep the Claimant in the loop the need for a risk assessment before she started work should have been discussed with the Claimant far earlier. At minimum it should have been discussed and explained at the meeting which took place on 28 May (and should have taken place earlier but for the delays in responding to the RTW proposals) and confirmed in the note of the meeting.

144. Again, I return below to consider the significance of these failings in the context of the cumulative conduct relied upon and my findings in the round.

(7) Management's dismissive approach to the Claimant's grievances 17 & 18 June 2019 and failure to remedy them; and (8) Management's provision of an outcome on 26th June 2019 on the Claimant's grievances prior to any grievance hearing taking place and the negative effect on the employment relationship with the Claimant

(a) Refusal to allow the Claimant to pursue a grievance

145. I do not accept the Claimant's contention that there was a refusal to allow her to pursue a formal grievance. I accept that the Respondent should have said in terms if the Claimant remained dissatisfied with the formal response, she was entitled to pursue a formal grievance, and further that this could be raised with the Claimant's line manager. This would have avoided the potential for misunderstanding, particularly given that the response was stated to be provided under the MSA Policy, whereas the Claimant had stated that she as raising "a formal grievance" and sought confirmation of the

intention to deal with the matter "under the grievance policy". However on a fair reading of the Respondent's correspondence of 26 June 2019 was providing a response at the informal stage, and not ruling out a formal grievance if not resolved informally. The letter headed "Rearranged Informal Review Meeting" (the Review Meeting Letter) explained that the Respondent was following the terms of the (Resolving Workplace Concerns Procedure (ie the grievance policy) in seeking in the first instance to resolve matters informally. To that end the Review Meeting Letter explained that Resolving Workplace Concerns Procedure provided that "any work related concerns should be raised informally with the line manager to enable issues to be resolved quickly and directly outside of the procedure". That was a reference to the terms of paragraph 4 of the grievance policy, which was enclosed. The letter went on to explain that the matter would be dealt with under the MSA Policy, but that was in the context of how the informal stage was to be addressed. The grievance letter referred back to this in providing that "[f]or the reasons previously stated" the response was being provided under the MSA Policy. On a fair reading, the reference to the reasons previously stated was to the explanation set out in the letter headed "Rearranged Informal Review Meeting".

146. Nor do I accept that the letters set a condition that the Claimant had to attend the informal meeting to discuss the responses before the matter was escalated to be treated as a formal grievance. The Review Meeting Letter stated that it was providing the response and "an opportunity for discussion" at the next meeting. The response to the grievance concluded by stating that it was hoped that it would reassure the Claimant and again referred to the "opportunity" to discuss the points in the meeting. The correspondence therefore offered the opportunity to discuss the responses at the informal meeting but did not stipulate that the Claimant was required to do so as a condition of pursuing a formal grievance. If there was uncertainty on the part of the Claimant as to what was being stipulated, and as to what the Claimant could do if she wanted to pursue a formal grievance without attending such a meeting, and to whom it should be raised, it was open to the Claimant to seek clarification from Ms Parry. Indeed the covering letter in relation to the review meeting specifically concluded by saying that if the Claimant had any questions relating to the letter the Claimant should not hesitate to contact her.

147. The Claimant emphasised before me that in both the letter relating to denial of salary payment [**C175**] and the grievance letter [**C180**] it was specifically denied that there had been a breach or serious breach of contract. I do not accept that this is inconsistent with an attempt to resolve the issue quickly at the informal stage. It set out the line manager's reasoning as to why she disagreed with the allegations in the grievance together with the invitation to discuss what was said.

148. Further, I accept that the Respondent was reasonable for the Respondent to seek to attempt to resolve matters informally by setting out its responses. It was a matter for the Claimant whether she accepted those responses or wished to proceed to a formal grievance. Whilst the ACAS guidance

provides that where a grievance is serious that employee should raise it formally, it does not follow that an employer cannot in the first instance set out informally an explanation of its position in the hope that this may explain the position and satisfy the employee.

149. I accept however that even at the informal stage it was not conducive to an early resolution to state definitively, before having held the meeting with the Claimant, that there had been no breach of contract. That language could reasonably be regarded (and was regarded by the Claimant) as conveying that a firm conclusion had been reached, rather than only a preliminary view subject to hearing from the Claimant. Further the gist of the Claimant's complaint and claim for lost pay was not that there was a contractual right to return on 3 June as such, but that the opportunity to do so was denied by unjustified delays on the part of the Respondent which had prevented her from being able to return earlier. Although the grievance response apologised for delays, which were described as "circumstantial", it communicated that there would be no payment for loss which the Claimant was contending had resulted from those delays, and did so in advance of hearing from the Claimant in a meeting to discuss her concerns.

150. In those circumstances, I do not accept the Respondent's contention that responses of 26 June 2019 were not capable of being a "last straw". I take into account that it remained open to the Claimant to attend the meeting and seek to explain to Ms Parry why she was wrong to have reached that conclusion, and that the focus on whether there was a legally binding right to return missed the point. It also remained open to her to pursue a formal grievance, in the first instance with Ms Parry's line manager. But it was a response which was reasonably regarded a conveying a decision by Ms Parry that there was no breach of contract and rejecting her claim to be paid for wages which she contended she had lost the opportunity to earn due to the delay. There was also merit in the complaint that failings on the Respondent's part had indeed caused delay in the Claimant having the opportunity to return upon providing a fit not allowing for this. Further the firm denial that there was a breach of contract was before hearing from the Claimant in the proposed meeting and exploring the issues. There was no indication that it was a preliminary view subject to hearing from the Claimant. These were not matters that were merely trivial or innocuous or which did not add anything meaningful to the other matters relied upon as constituting a breach of the implied term of trust and confidence.

(b) Answering the grievance without affording a hearing

151. I have addressed this above. The Claimant was not denied a formal grievance hearing. She was not invited to meeting to discuss the responses at the formal stage. But the a fair reading of the response was that Ms Parry had already decided that there was no breach of contract before hearing from the Claimant.

Was there cumulatively a breach of the implied term of trust and confidence?

152. I turn to consider whether cumulatively the failings that I have found on the part of the Respondent were such as to objectively, without reasonable cause and excuse, to seriously damage the relationship of trust and confidence. The key failings in my judgment were:
    152.1 Proceeding to the formal stage without having sought to obtain a report from the neurologist, contrary to the advice in the OH report, which was not compliant with the Respondent's own MSA Policy, and inertia in addressing this from when the OH report was sent until the first stage meeting.
    152.2 Failing thereafter to give instructions to HML to seek a report from the neurologist, based on information provided by them and the potential for amended duties, contrary to the recommendation in the OH report, and instead initially sending the Claimant and then not pursuing the matter further.
    152.3 The failures in the period after the Claimant provided the RTW Plan on 25 April 2019, most notably in the period to 23 May 2019, both to take steps proactively to be able to take the management steps and carry out investigations that would be required to enable the Claimant to return to work on 3 June 2019 or once she submitted a fit note permitting this or so as to minimise the delay, and to communicate effectively with the Claimant in the various respects noted above, consistently with the requirement under the AIP Plan to review progress with the Claimant on a fortnightly basis.
    152.4 The correspondence of 26 June 2019, including the assertion that there was no breach of contract.

153. I take into account that the failings must be sufficiently serious that they individually or taken cumulatively as a course of conduct objectively are such as to destroy or seriously damage the relationship of trust and confidence. It does not necessarily follow that a failing has that consequence even where it involves a breach of the Respondent's own policy. I remind myself that, whilst I accept that the Claimant had subjectively lost confidence in the handling of her sickness absence, the test is an objective one. I take into account that whilst I have made findings which are critical of management failings I have not found that management acted other than in good faith. That is an important consideration.

154. Nevertheless whilst taking into account that various mitigating factors I have identified above I am satisfied that viewed cumulatively these matters were, without reasonable cause or excuse, objectively likely to destroy or seriously damage trust and confidence. It is not necessary to decide whether any of them by themselves would amount to a repudiatory breach. The failing in the approach to obtaining neurological input within the formal stage added to the unreasonable failure to comply with the MSA Policy in proceeding to the formal stage without carrying out the obvious recommended investigation with the neurologist, and the inertia after the report was sent in January. The failings in the period after submitting the RTW Plan on 25 April are to be

seen in the context of the earlier failings, especially the flaws in the approach to progressing to the formal stage and in the light of the urgency of dealing with matters in the light of being in the formal process, with a timetable under the policy which involved the risk of moving to Stage 2 (as to which no reassurance was given) and the Claimant being unpaid. The delays were liable to impact on and delay the Claimant's return to the payroll, even though she was continuing to work on a voluntary basis.

155. Nor was there affirmation of the contract. If reliance is placed on submission of the amended RTW Plan, I consider that even aside from the issues in relation to the 26 June correspondence, it would be open to the Claimant to rely on the continued delay until 14 June 2019 before first making clear that the risk assessments had to be carried out before a return to work. Irrespective of whether there was good reason that OH feedback could not have been obtained earlier, the continued delay brought home the consequences of the Respondent having allowed matters to drift earlier in the period after 25 April. In any event, and if the correspondence of 17 and 18 June 2019 is regarded as having affirmed the contract, as set out above, I accept that the responses of 26 June were capable of providing the final straw.

156. The Claimant's claim of unfair dismissal therefore succeeds.

157. I do not accept that there should be an ACAS uplift. This would arise if there was a failure to comply with the Code and the failure was unreasonable (Trade Union and Labour Relations (Consolidation) Act 1992, s.207(2)). Whilst I have concluded that the approach was capable of being a final straw, I have also found that it did not deprive the Claimant of the opportunity to pursue a formal grievance should she wish to do so. If the Claimant had rejected the informal response but still wished to pursue a grievance, the next stage would have been to arrange a formal meeting. The Claimant resigned before matters reached that stage. The expressing of a firm view that there was no breach of contract at the informal stage did not entail a breach of the Code. In those circumstances I do not consider that there was a breach of the Code.

Wrongful dismissal

158. It follows from my conclusion that there was a breach of the implied term of trust and confidence that the Claimant's claim of wrongful dismissal also succeeds. It is common ground that the entitlement was to 12 weeks' notice at £638.71 per week. The Respondent concedes that if the wrongful dismissal claim succeeds 12 weeks' notice pay would be due (ie there is no issue raised as a reduction for failure to mitigate during the notice period in relation to that claim). Accordingly the Claimant is entitled to be paid the sum of £7,664.52 (£638.71 x 12).

Conclusion

159. The Claimants claims of unfair dismissal, wrongful dismissal and for pay in lieu of annual leave. The remaining issues as to remedy will be addressed at the remedy hearing listed for 25 April 2023 unless they have been resolved between the parties. As canvassed with the parties at the end of the hearing I have set out directions relevant to preparations for that hearing in a separate order.

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Employment Judge J Lewis KC

Date: 19 January 2023

ORDER SENT TO THE PARTIES ON:

Order sent to the parties on:

11 February 2023

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FOR THE TRIBUNAL OFFICE: