EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4105793/2022

Held in Glasgow on 11, 12, and 13 January 2023

Employment Judge M Robison

Mr G Maxwell	**Claimant** **In person**
HBOS Pic	**Respondent** **Represented by:** **Ms R Thomas - Counsel**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that the claim for unfair dismissal is not well founded and is dismissed.

REASONS

1. The claimant lodged a claim in the Employment Tribunal for unfair dismissal on 28 October 2022 following his dismissal effective 2 June 2022.

2. The respondent resists the claim, asserting that the claimant was dismissed for a potentially fair reason namely capability; and that they acted reasonably in treating the claimant's long-term absence as a sufficient reason for dismissing him in the circumstances.

3. At the outset of the hearing, I clarified that the only legal issue for determination was the question of whether the dismissal was unfair. The claimant asserted that he wished to rely on events leading up to the dismissal, and that had it not been for the way he had been treated by the respondent then he would not have found himself on long-term absence for ill health. I confirmed that the Tribunal would consider the reason for dismissal and

whether it was reasonable in all the circumstances. I advised that I had expected to hear evidence about the background and the lead up to the dismissal, but that there were no other legal claims to determine in respect of any other conduct of the respondent.

4. The claimant expressed concern about that. However, I confirmed that although I noted that there was reference in the occupational health reports to the claimant potentially being disabled for the purposes of the Equality Act 2010, no claims under the Equality Act were being pursued. Further, no other claims were being pursued under relevant employment legislation.

5. At this hearing, the Tribunal heard evidence for the respondent from Mr Craig Rafferty, senior bank manager with the respondent and dismissing officer, and Mr Phil Moran, senior bank manager, who heard the appeal. The Tribunal also heard from the claimant and from his trade union representative, Ms Susan Monti.

6. It had originally been envisaged that this hearing would consider both liability and remedy. However, when it became clear that there would be insufficient time in the three days allocated to hear evidence from the claimant about remedy (in regard in particular to his loss of benefits, including subsidised mortgage), a decision was made to restrict this hearing to liability only. It was agreed that a further date would be fixed for hearing evidence about remedy, should that be required.

7. A joint file of productions was lodged, with additional documents being lodged by the claimant on each day of proceedings. Although Ms Thomas objected to those lodged on the last day in particular, I allowed these to be lodged, but taking account of the fact that Mr Rafferty had not had the opportunity to give evidence about them.

8. The documents lodged are referred to in this judgment by page number as appropriate. After the hearing both parties lodged written submissions which have been taken into account in making this decision.

Findings in fact

9. On the basis of the evidence heard and the documents lodged the following relevant facts are admitted or proved.

10. The claimant was employed by the respondent from 9 May 1988 to 2 June 2022, working in a number of positions in their branches in Dumfries and Galloway. Latterly, the claimant was employed as a claims processer in the fraud and disputes team, prior to the claimant's absence on sick leave.

Relevant respondent policies

11. The respondent's "Health, Wellbeing and Attendance Policy" sets out key principles in regard to sickness absence and sick pay. It states that 28 calendar days or more is considered long term absence. Line managers will agree a "wellness plan" with colleagues (page 74). The informal policy is set out in a document headed "Managing your health and wellbeing day to day" which states that a wellness plan provides a framework to support a colleague in work or back to work (page 75).

12. Where that does not help to improve attendance, the line manager can decide to move to a more formal framework (page 76). The scheme is explained in the policy "Managing your health and wellbeing more formally" (page 76) and "Is it time to manage things more formally" (page 77), which is accompanied by a policy document headed "The practicalities" (pages 78- 80). This includes a review meeting and a final meeting at times agreed with the line manager. Further policies include "Wellness plan explained" (pages 81- 83) and "Resolving your differences" (page 84) which explains how colleagues can appeal formally after the review or final meeting.

Project Kite restructuring 2018

13. From 2015, the claimant was employed as a grade C link branch manager where he was responsible for managing two branches and six members of staff.

14. During a restructuring entitled "Project Kite" which took place in 2017/2018, the role of grade C link bank manager was deleted. Affected employees were given the opportunity to confirm their interest in redundancy.

15. In a document headed "Project Kite Frequently Asked Questions", the following information is included:

Q: "I don't agree with the role that I have been mapped into, what is the appeals process?"

A: "You should try to resolve any concerns informally with your line manager in the first instance. Your line manager may refer your case to an independent review panel (section 4.2, page 98)

Q: "What is the Job Security Policy (JSP)?"

A: "The JSP [with hyperlink] identifies the principles that the Group commits to in dealing with potential redundancy situations, including meeting our legal obligations. The principles are supported by the job security procedures which detail best practice requirement and set out redundancy pay arrangements" (section 1.6, page 105)

Q: "Can I ask for VR?"

A: "Colleagues have the option during their one to one with their line manager to indicate an interest in VR. This indication does not guarantee an offer of voluntary redundancy; however colleagues can register an interest if they genuinely wish to exit via voluntary redundancy" (section 2.8, page 108)

Q: "If I am not appointed to a role in the new structure, what happens next?"

A: "You will be placed 'at risk' of redundancy and this will be confirmed in writing……" (section 3 headed up Redeployment and Support, 3.1 page 110).

16. The claimant indicated that he was interested in VR. However, in June 2018, the claimant was advised that he was to be placed in a newly created grade B customer service supervisor role (CSS). The claimant accepted this role reluctantly because it was a demotion from a grade C to a grade B which he considered to be demeaning and a step back in his career. At that time there were no grade C roles within 1.5 hours of his home address. Although the role carried less responsibility, the claimant was provided with job security and his salary was protected.

17. The claimant raised concerns about the role informally with management, including Ms Kay McCall, area manager. However, he made no formal complaint at the time, because initially he was resigned to accepting the position.

18. Under the Job Security Policy, which applied to the claimant's circumstances, the claimant was offered the right of appeal if he thought that the process had not been fair. The claimant did not appeal at the time. He did not make any applications then or since for any grade C roles.

19. The claimant was initially moved by the branch hub manager, Fiona Will, to the Castle Douglas branch having previously worked in the Kirkcudbright branch. When he was asked to work in Kirkcudbright to cover holidays, he was refused his expenses claim. Following his complaint, it was confirmed by Ms McCall that his base branch was to be Kirkcudbright. The claimant was also concerned at that time that Ms McCall had breached a confidence by passing on to Ms Will what the claimant had said about her. This resulted in a deterioration of his relationship with Ms Will.

20. In or around 15 October 2018 in a meeting with Ms McCall, the claimant raised his desire to appeal the decision to put him into the role of CSS.

21. By e-mail dated 16 October 2018, Ms McCall asked the claimant to confirm which areas he wanted to appeal his placement on, and forwarded further information about the process including when an employee could appeal (page 127).

22. The claimant in an e-mail response dated 19 October 2018 (page 126), advised that he had not been aware of any time scales in which to appeal, but noted in the Job Security Agreement that a time scale of 14 days was stated. He advised that it had only become clear in the past few weeks that the role was unsuitable for him and he asked the bank to reconsider the decision not to offer him voluntary redundancy.

23. The claimant was advised that he was out of time to appeal.

Covid pandemic arrangements

24. In or around April 2020, the respondent allowed employees with health issues to take a period of time off work to shield in accordance with Government guidance at the time. Although the claimant did not officially require to shield, because of his health issues, he was advised by his GP to do so. The claimant took a period of nine weeks off work to shield.

25. After nine weeks, the claimant was asked to return to work. As the claimant remained concerned about risks of customer contact, he was offered a role in frauds and disputes on credit card disputes which was a non-customer facing role. He commenced this role in June 2020.

Community bank redundancies Spring 2021

26. In Spring 2021, the respondent conducted a further restructure of community banking and invited employees at grade C to apply for redundancy. The claimant was however ineligible because he was at that time grade B.

Claimant's grievance

27. On 19 April 2021, the claimant intimated a grievance, addressed to his then line manager, Steven Lumb. He complained about being treated unfairly in recent organisational restructures. He asserted that he was forced move from link C manager to CSS in 2018 and that had denied him the opportunity to apply for VR in the 2021 restructure, when only level C managers and above were allowed to apply for VR. The claimant also expressed concern about having to work in a small windowless office in the Kirkcudbright branch since the end of July 2020, which he had understood was temporary, but was at that time then due to continue until July 2021. He asserted that these events, along with worry over COVID-19, had led him to suffer stress and mental health issues.

28. He stated that his grievance was as a result of the mismatch between the link C manager and CSS role; the unjustified demotion he experienced; being

denied the opportunity to apply for VR; that he should still be considered equivalent level C colleague; and that since the CSS role did not fit with his experience, knowledge and skill set, he should have been offered redundancy in 2018.

29. He expressed concern that "over the past three years" he had been "let down, unappreciated, pushed around, not taken seriously, had [his] trust betrayed, and generally very poorly treated". He said that his mental health had "taken a downward dip" because of the conditions he was working in and knowing he was not to be considered for redundancy so would have to return to "working on the counter" (page 117).

30. A grievance investigation was commenced by Mr Mubeen Quadir (page 118). During the investigation, Mr Quabir interviewed Ms McCall (page 135-138) and Ms Will (page 139- 142).

31. The claimant's grievance was heard at a meeting which took place on 17 May 2021 via teams. It was chaired by Mr Quadir, and notes were taken by Ms Ciara Gilligan (page 130 - 134). The claimant was accompanied by his union representative, Ms Susan Monti. During the hearing, when asked "what are you seeking as a resolution", he replied "To be made redundant, I don't feel worthy or valued at all. I have given a lot to the bank over the past 30 plus years, feel denied the opportunity to appeal the decision the process was not made clear at all, details from that applied to me are right at the bottom of the documents, poor communication from the managers, didn't make it clear". Ms Mondi adds that "as a union we would encourage the Group not to make colleagues redundant but the CSS role just isn't there, nobody replaced [the claimant] when not there, he feels undervalued" (page 133).

32. The claimant was advised of the outcome by letter dated 17 June 2021 (page 143 - 146). Mr Quabir concluded, in regard to the claimant's claim that he had been forced to accept the grade B role in the restructuring, that the role was based on scoring and location (the only other band C role available being 1.5 to 2 hours travel each way) and that he had not been unfairly treated in the restructure (page 145). He stated that all colleagues who are impacted by a

restructure were covered by the Group's Job Security Policy which included a right of appeal, but that the claimant did not appeal following the restructure in 2017 (sic) (page 145). Mr Quabir noted that the claimant had been advised of a grade C vacancy by Ms Wills but that he had told her he would not be applying for it (page 145).

Absence on sick leave and grievance appeal

33. On 18 June 2021, the claimant called his line manager, Mr Lumb, to advise that he would not be going into work that day. The claimant advised again on 21 June that he would not be attending work and that he would be attending his doctor. Mr Lumb advised him that he could support him by allowing time off if he needed it. He advised that he could return to the branch rather than continue in the frauds and disputes role, so that he did not need to work alone in a small room but could work with colleagues. These colleagues could assist with shadowing/upskilling where needed.

34. The claimant was subsequently signed off sick by his GP practice until 23 July 2021 (page 251).

35. By letter dated 30 June 2021, the claimant intimated an appeal to the grievance outcome setting out his concerns over 13 pages (page 147 to 160).

36. On 2 July 2021, Mr Lumb again spoke to the claimant when it was agreed that they would keep in touch weekly ongoing. He referred the claimant to various support mechanisms, including EAP, Bupa and Bank Workers Charity. When asked what he would like to return to, the claimant said that he did not want to return to work on the counter but otherwise he would prefer to await the outcome of his appeal before commenting further (page 252).

37. The grievance appeal was heard on 9 July 2021 by Ms Nicola Quin, with Ms Frances Dodd taking notes (pages 164-175). The claimant was accompanied by his trade union representative, Ms Mondi. The claimant provided amended appeal meeting notes (page 176). Ms Quin interviewed Ms McCall as part of the investigation of the appeal (page 177- 181).

38. On 22 July 2021 the claimant spoke to Mr Lumb to advise that he had been signed off until 16 August 2021. The claimant advised that he did not want to return to his previous role as CSS as he felt it was beneath his capacity (page 253).

39. On 4 August 2021, Mr Lumb created a "wellness plan" in line with policy to record discussions and actions discussed with the claimant during his absence (page 250).

First occupational health report

40. On 18 August 2021, the claimant was interviewed by occupational health and a report was forwarded to Mr Lumb (pages 190- 193). That report included reference to resources for support, including contacting the mental health advocates hub (page 191).

41. The report stated that "Your colleague now feels that the relationship between him and the business has irretrievably broken down and that returning to work in any capacity is currently considered to be extremely difficult for him and likely to continue to impact significantly on his mental health and well-being. Mr Maxwell is currently taking prescribed medications for a number of medical conditions including depression which was first diagnosed seven or eight years ago and he reports that mental and physical health symptoms have been significantly exacerbated by recent work-related stress" (page 190).

42. Linder general recommendations, the occupational health adviser concluded:

"your colleague does not feel that he is currently in a position to consider any return to work plans in any capacity at this time and I am unable therefore to predict a return-to-work date as a result.

In my opinion it would appear that your colleague has developed some significant psychological symptoms which appear to have also exacerbated his underlying mental health issues and this appears to have arisen in response to his perceptions of issues within his employment.

Your colleague reports that these issues had been developing over longer periods of time and he now appears to be displaying a response to a situation that has put him under considerable mental and physical strain. I cannot know in detail what has happened during his employment simply from assessing him over the phone today however I refer to his perceptions of the situation however because it is these feelings that are now forming a barrier to him returning to work. These barriers are likely to remain unless as a result of dialogue, a solution acceptable to both Mr Maxwell and the organisation can be found".

43. She advised two to three sessions of counselling before he would be ready to discuss work related issues and that a stress risk assessment should be undertaken. She continued:

"where a resolution cannot be reached to support your colleague with a return-to-work plan and your colleague still feels unable to return to work irrespective of stress risk assessments and discussions, I recommend that your HR department are requested to consult with yourselves and your colleague to consider what options are available to him in respect of his future….

although your colleague does not feel in a position to consider a return to work at this time, if your colleague does wish to return to work in the future, following further discussion with management, I recommend that a phased return to work plan is accommodated for your colleague, starting back on around 50% of contracted hours and building up to the usual contracted hours gradually as symptoms and stamina improve….discretionary breaks may also be helpful….arrang[e] cognitive support…if symptoms are affecting memory and concentration on return to work…..

regarding the likelihood of rendering reliable service and attendance in the future your colleague is likely to remain vulnerable to sickness absence when reflected against non-affected peers until symptoms can be effectively managed through a combination of symptom management through effective treatments and a satisfactory outcome/resolution of perceived work-related issues…In my opinion it is likely that the colleague's ongoing medical

condition would be considered to be disabilities as described in the Equality Act 2010" (page 192).

44. By letter dated 16 August 2021, the claimant was advised that his grievance appeal was not upheld (pages 182 - 189). In regard to his complaint about unfair treatment in 2018, Ms Quin noted that although Ms McCall had said that he was unhappy with the placement, he had not advised that he wanted to raise anything formally. Ms McCall said there were no discussions about a trial period because it had not been agreed that the role was unsuitable from a skill perspective. She concluded that the correct procedure had been followed.

Proposal for compromise agreement

45. The claimant advised Mr Lumb that he would following up the outcome of the grievance appeal in writing. Mr Lumb suggested that he could indicate a sum that he would be happy with as a settlement in a compromise agreement.

46. By letter dated 3 September 2021 the claimant wrote Mr Craig Rafferty, senior bank manager (and Mr Lumb's line manager). He advised that his relationship with the bank had severely deteriorated because of events over the last three years and added:

"I do not think I will be able to bring myself to return to work for LBG. The very thought fills me with gloom and worry and that is the last thing I need given my present situation. As stated by the occupational health consultant, I feel the employer/employee relationship has broken down irreparably…..

Whilst I appreciate that the Bank is not looking to make any redundancies at this time, I would like whoever has the power to do so to consider a financial settlement, in return for which I would leave the group. I believe that this would be the best way to proceed for both parties, bringing the situation to a prompt close rather than having it drag out over a prolonged period, reducing the workload for the colleagues involved, and allowing me to focus on getting back to better mental health.

I have calculated that, if I were to be signed off for a full year (another 42 weeks) then this would cost the business a further £25,565 in salary and £3,834 in pension contributions, plus employers National Insurance contributions and associated administration and other costs linked to the management of my position. If I were to leave sooner I would also lose out on my staff mortgage rate and other benefits, and I would appreciate some compensation for this. A total figure of £40,000 would be acceptable to me. I would also be willing to sign a non-disclosure agreement" (page 195-196).

47. Mr Rafferty was on holiday at the time. Mr Lumb telephoned to acknowledge receipt. He advised compromise agreements/redundancies were not being considered by the bank at that time.

48. The claimant wrote again to Mr Rafferty on 15 September 2021 (page 197) complaining that the only response to his letter of 3 September was that phone call which he considered "unprofessional". He also complained that the bank had failed to take account of the observations in the OH report.

49. Mr Lumb took steps to identify a mental health advocate as recommended by the occupational health adviser, but unfortunately despite efforts these did not reach the claimant (pages 199-203).

Wellness Plan taken over by Craig Rafferty

50. On his return from holiday, Mr Rafferty took over the role of overseeing the claimant's wellness plan.

51. On 25 September 2021, the claimant was injured in a fall and attended hospital. Mr Rafferty subsequently arranged a wellness review meeting which took place via teams on 15 October 2021 when it was agreed that given his physical injuries it was appropriate to defer discussion about his health and return to work until a later date (page 257). Mr Rafferty set out the support the bank could offer. At this meeting Ms Monti requested consideration of a redundancy or exit package.

52. Mr Rafferty advised the claimant that the respondent was to revert to its normal absence policy as of 1 November 2021. This had been adjusted during

the pandemic to full pay for "emergency leave", rather than six months full pay and six months half pay for "normal" sickness absences. This meant that the arrangement for sick pay would revert on 1 May 2022 to half pay.

53. At a further wellness review meeting which took place on 4 November 2021, at which Ms Monti was present, in regard to his mental health, the claimant advised that "he is still not in a good place". Ms Monti again asked Mr Rafferty to take the option of a redundancy/termination agreement to HR (259).

54. On 9 November 2021, the claimant set out his concerns in a letter to Ms Jo Harris, managing director of the Bank of Scotland Community Bank (pages 203-204).

55. At a further meeting with Mr Rafferty on 17 November 2021, the claimant said that his mental health was not much changed and that he could not comment on the way forward until he had received a reply from Ms Harris. He said that he did not "fancy a return to branch however [he] would not rule anything out".

56. Ms Harris reviewed the claimant's concerns and responded in an e-mail dated 22 November 2021, advising that the process of dealing with the grievance and appeal had been conducted in line with their guidelines.

57. In a subsequent teams meeting on 8 December 2021 at which Ms Monti was present, the claimant confirmed that not much had changed in regard to his mental wellbeing and that he "felt dread at returning to work". Mr Rafferty, by reference to the proposed adjustments in the occupational health report, advised they could support him with those adjustments which included a phased return, reduced workload and breaks. The claimant confirmed the support mechanisms to which he had sought to access (page 260).

58. On 17 December 2021, Mr Rafferty advised that he was looking to move to the formal stage of the absence process at the expiration of the claimant's current sick line on 18 January 2022 (page 261). At a meeting which took place on 18 January, at which Ms Monti accompanied the claimant, Mr Rafferty advised that he would be moving the absence process to the formal stage (page 261).

59. A first formal review meeting took place on 27 January 2022. Mr Lumb took notes of the meeting (pages 208 - 213) at which the claimant was accompanied by Ms Monti. Mr Rafferty advised that he would obtain a further occupational health report and a completed stress risk assessment before moving to final formal review meeting (page 211).

Second occupational health report

60. In the referral to occupational health to request a further report (pages 214-220), the claimant's mobile number was inadvertently recorded incorrectly (page 215). This resulted in the claimant not being contacted on two occasions when he was due to receive a call from occupational health, on 23 February 2022 and again on 25 March 2022.

61. That referral noted that the claimant was at the formal review stage and the outcome could be that he was dismissed. The occupational health advisor was asked to answer the following additional questions: "When is the colleague likely to be able to return to work to carry out their full time role as the colleague has been absent from the business for 7 months and there is no imminent return to work date and the current fit note expires in 2 months time? Is there any particular reason why the fit notes have gradually increased in length throughout the absence? The previous notes have been for three weeks and the current one increased to two months. Is there any mediation/counselling that is likely to help the colleagues return? The colleague has previously been made aware of the counselling and has had only two sessions of counselling in 7 months. Furthermore if the colleague had taken the counselling earlier would that have enabled them to return to work sooner? Is there anything that the business could offer the colleague and above what we already have done that could help their ability to attend work including any reasonable adjustments? What has the colleague done to help aid his return to work?" (page 219)

62. Another stress risk assessment was completed as requested (page 229 - 236).

63. A meeting with an OH doctor eventually took place on 5 April 2022, but a further consultation was arranged because there was insufficient time to conclude the interview, and a second interview took place on 10 May 2022. A report was produced (pages 242-244) which included the following.

64. Under background and current situation, it stated: “Mr Maxwell shared with me the details of his health history. He has seen a significant decline in his mental health due to perceived stress and strain, which by his account is related to factors within his employment, including work-related employment relation matters and interpersonal difficulties for which he has put in grievances previously…currently he does not feel sufficiently well to attempt to return to work, given the extent and severity of his symptoms, whilst the employment issues remain unresolved…he does remain significantly symptomatic, with low mood, heightened anxiety, negative thought and impaired memory and concentration”.

65. Under opinion and recommendations, it stated: “Mr Maxwell has become unwell as a result of perceived stress and strain which he identifies as arising from issues within his employment. At present I do not think he is sufficiently well to attempt a return to work. Given the protracted period of absence thus far with no material resolution to the employment relation matters being reached as described above, I think a return to work prognosis remains poor and as such I cannot advise you on what a foreseeable return to work date could be.

It appears he has been significantly distressed as a result of his work related experiences and had hoped to have such matters resolved internally, but this has not been the case and he recognises now that he feels his relationship with the business has probably suffered more widely. He remains low in mood but that needs to be seen in the context of him remaining unhappy. He needs to continue engaging with treatment, as he is doing, and I would advise that you engage him as best you can, but I am not confident of him being likely to be able to return to work any time soon.

My view is that he is sufficiently well to attend any meetings, and I would encourage dialogue between both parties to take place as soon as possible, where perhaps you could negotiate a way forward whereby he returns. Having said that, for this to work there would evidently need to be a lot of engagement with him to restore trust in the working relationship. If that is not possible, then as I mentioned before, a return to work prognosis would be poor…..

If you can negotiate some kind of arrangement as suggested and Mr Maxwell felt sufficiently well to be able to attempt a return, then medically I would be supportive and I would suggest that re-referral is made at this stage for further occupational health advice on an appropriate rehabilitation plan. If that simply is not possible, or not within a timescale that is tolerable for you, then I would advise that you engage him sensitively as to the employment options moving forwards, and I would advise Mr Maxwell reach out to his GP and other support services to ensure he is fully supported during this period which may be difficult for him.

It is safest to assume that the statutory definition of disability would be satisfied in this case on account of his long-standing significant and enduring psychological health symptoms, though ultimately this is a legal decision".

Termination of employment

66. On 13 May 2022, the claimant was invited to attend a final review meeting on 23 May 2022, when he was advised that the potential outcome was the ending of employment on grounds of capability (page 248). That letter also stated, "you can bring along a work colleague or union representative with you. Please let me know who you plan to bring and if the date needs to be amended to accommodate availability, just let me know. We should try to have the meeting within 7 days of the date I've suggested".

67. Given that the date did not suit Ms Mondi, the meeting was rescheduled to take place on 31 May 2023. Shortly prior to that meeting, Ms Monti explained that she required emergency dental treatment and could not after all attend in person, but she attended on teams. Notes were taken by Mr Lumb (page 266-273).

68. At the outset of the meeting Mr Rafferty stated that the meeting was to discuss the claimant's health, attendance and likelihood of return to work. He advised that he would speak to HR before reaching a final decision, which could be the termination of employment. He advised that the claimant could take a break at any time and invited questions before he continued.

69. Ms Monti expressed concern that she had required to attend the meeting via teams, and that she had only seen the OH report yesterday. Ms Mondi and the claimant asked for the meeting to be deferred. However, Mr Rafferty decided that it was reasonable to hold the meeting that day.

70. Mr Rafferty noted that the claimant had recently been signed off by his GP for a further eight weeks.

71. When asked "what's keeping you away from work what would need to change", the claimant is noted as replying, "No trust in management. I've been badly treated. The whole process over the last few years being moved from a band E to a B is a slap in the face. It's embarrassing, demeaning, unnecessary and ridiculous. The level B role was a job made up to put level C colleagues into. Management told staff not to say I am a manager. I suffered from depression at the time which the branch knew. They haven't considered what has happened and how I feel coupled with bereavement; the bank does not care… I'd need a time machine to correct things. I can't see any way to come back. I can't at the moment. I've 20 sessions of therapy booked in with Bupa which are better than the other ones I've used. They have better techniques available. It's not like I haven't tried. I can't forgive what's happened".

72. Ms Mondi suggested that "the occupational health report from last August and the new one both suggest that if Graeme is not able to come back that something financially and morally appropriate should be considered. I have asked about this and told that an exit package is not an option".

73. When she said that they needed to look at something other than dismissal, Mr Rafferty asked "what other alternatives are there?". She replied "I know there are no redundancies available but could this be explored? Retirement

through ill health? Something that won't have a negative impact on him….as a goodwill gesture".

74. The claimant interjected, "if I come back I'd have to retrain. With my health there is likelihood I'd be off again…the bank can do whatever it wants to. It's within their power to do what they want. The bank can do what's fair".

75. When asked "when do you think you can return to work", the claimant responded, "I can't say. I'm not comfortable putting my trust in management further up the line…".

76. The claimant then raised concerns about how his grievance and appeal was dealt with and Mr Rafferty advised that the bank did investigate and follow the full process. The claimant replied, "that's why I'm angry".

77. Mr Rafferty again asked the claimant if there were any other options he would like him to consider, to which the claimant replied that he would "like someone independent to go through the grievance process". Finally, Mr Rafferty asked, "is there anything else to be taken into consideration", to which the claimant replied, "I think you've covered everything".

78. Mr Rafferty had arranged to speak to the case consultant in HR at 11.30 am, when he discussed what had been said at the meeting. The meeting resumed at 12.15 pm when the claimant was advised that his employment was terminated. Mr Rafferty advised that he had discussed the question of ill health retirement with HR and he was advised that it was not applicable as he could work again. The claimant was advised that he could appeal.

79. The outcome was confirmed by letter dated 1 June 2022 (page 289- 290). In that letter Mr Rafferty noted that following the review meeting on 27 January 2022, there had been no improvement in attendance, but his absences had deteriorated further with the claimant being signed off until 15 July. He stated that he had concluded that there were no further reasonable adjustments which would make it possible for him to reach a sustainable level of attendance. He stated, "throughout the absence process, we discussed other roles within the organisation with working from home discussed numerous

times. At no point was any appetite shown by yourself for these potential opportunities".

80. On the matter of ill health retirement, he stated, "You/your union enquired about being considered for ill health retirement. Having reviewed all the occupational health reports and taken into consideration the wellbeing review and formal meeting, notes and after discussing this with HR, I can confirm ill health early retirement would not be applicable. Whilst you are currently unwell and seeking treatment, there is no medical evidence which states that you will never ever be able to work again for Lloyds Banking Group in any capacity…"

81. He went on, "your current level of attendance is not at a level that the business can support due to the impact on resourcing, colleagues, and customer service. Our resourcing needs are calculated on the level of colleagues available, expected customer demand…I have no confidence from our conversations that your health and attendance will improve going forward. This is demonstrated by your past attendance. You were made aware if your attendance did not improve you could be dismissed. We have discussed numerous adjustments, as detailed above and in the wellness plan, to support you and extended your informal wellness plan on numerous occasions. Despite this your attendance has not improved. Despite being absent since June 2021, you only commenced your counselling sessions in January 2022 with the EAP and more recently have only started your first counselling session with BUPA. You have advised you will need twenty sessions in total. Your union indicated you may be able to return to work after ten sessions. Occupational health have advised in their recent report they are not confident of you being able to return to work any time soon. Having discussed this with you, it was mentioned by you if you came back you would have to retrain and with your health there is likelihood you will be off work again".

Appeal

82. By letter dated 14 June 2022, the claimant intimated an appeal (page 292 - 296). An appeal meeting took place on 6 July 2022. Notes were taken by Ms

Abby Minto (pages 301 - 310). The claimant was accompanied by his trade union representative (who attended in person).

83. In regard to returning to work, he said that he did not think that he would accept a role of CSS or CSA. During the course of discussion about outcome, the question of ill health retirement was raised, and the claimant said that there was only a remote likelihood that he could work again for the bank. However, the claimant asserted that he was sure that he could work again outside of LBG.

84. The outcome of the appeal was communicated by letter dated 10 August 2022, when the claimant was advised that his appeal was not upheld.

85. With regard to his concerns about consideration of alternative roles, Mr Moran concluded that "whilst Craig has evidenced offering you alternative roles on only two occasions, I feel that you were more interested in leaving the bank at these points, giving Craig a view that you did not want to return to LBG. Furthermore, there is little evidence to suggest your willingness to explore opportunities yourself. I also feel that Craig offered lots of ways to support you if you were to return to your role in the branch".

86. On the matter of ill health early retirement, he noted that neither occupational health report states that he was not fit to work again. On checking with HR, he was advised that there was "a requirement for a medical report advising that you are not fit to work in any role including outside of LBG. Therefore as there was no evidence to suggest you are not able to work at all from a medical report and confirmation from yourself about our meeting that you felt that you could work in roles outside of the bank, ill health early retirement is not available to you".

Relevant law

87. The law in relation to unfair dismissal is contained in the Employment Rights Act 1996 (ERA). Section 98(1) provides that, in determining whether the dismissal of an employee is fair or unfair, it is for the employer to show the reason for dismissal and, if more than one, the principal one, and that it is a

reason falling within Section 98(2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held. Capability is one of the potentially fair reasons for dismissal.

88. Section 98(4) provides that where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair, having regard to the reason shown by the employer, depends on whether, in the circumstances, including the size and administrative resources of the employer's undertaking, the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissal and this is to be determined in accordance with equity and the substantial merits of the case.

89. In considering the reasonableness or unreasonableness of the dismissal the Tribunal must consider whether the procedure followed and the penalty of dismissal were within the band of reasonable responses *(Iceland Frozen Foods Ltd v Jones 1982* IRLR 439). The Tribunal must therefore be careful not to assume that merely because it would have acted in a different way to the employer that the employer therefore has acted unreasonably. One reasonable employer may react in one way whilst another reasonable employer may have a different response. The Tribunal's task is to determine whether the respondent's decision to dismiss, including any procedure adopted leading up to dismissal, falls within that band of reasonable responses. If so, the dismissal is fair. If not, the dismissal is unfair.

90. In a dismissal for capability, the classic test is set out in *Alidair Ltd v Taylor* 1978 ICR 445, which requires the Tribunal to consider whether the employer honestly believed the employee was incompetent or unsuitable for the job; and if so, whether the grounds for that belief were reasonable.

91. In capability dismissals for long term absence in particular, the Tribunal must consider whether the employer can be expected to wait longer for the employee to return by reference to all the circumstances of the case, including the nature of the illness, the likely length of the continuing absence, and the need for the employer to have the work performed. In addition, the Tribunal must also consider whether a fair procedure has been followed, which

requires consultation with the employee and obtaining medical reports to ascertain the employee's medical condition and likely prognosis as well as the consideration of other options open to the employer *(BS v Dundee CC* 2014 IRLR 131).

Tribunal deliberations and decision

92. In this case, the claimant claims only unfair dismissal. As noted above, this was clarified at the outset of the hearing, when the claimant asserted that he wished to rely on events leading up to the dismissal. He asserted that had it not been for the way he had been treated by the respondent then he would not have found himself on long term absence for ill health. While the Tribunal heard evidence about that background, the Tribunal focused on the question whether dismissal was reasonable in all the circumstances.

93. With regard the claimant's assertions about other unfair treatment, it was not apparent that there were any other valid claims which the claimant could pursue under employment legislation. While reference was made to the Equality Act during evidence, no claims were being pursued under that legislation. As discussed further below, there was no suggestion by the claimant that there were any reasonable adjustments which might have meant that he was not dismissed. Further, it had previously been brought to the claimant's attention that claims for personal injury cannot be pursued in the employment tribunal. Although the claimant represented himself, I noted that he was advised throughout by an experienced trade union representative.

94. I also noted from the claimant's submissions that he complains about statements made in the ET3. The purpose of this hearing was to test those statements, and the conclusion I have reached in this case is based on the evidence heard and the documents referred to.

95. On the basis of that evidence, and the documents lodged, I now consider each of the relevant legal questions relating to unfair dismissal.

What was the reason for the claimant's dismissal?

96. The respondent had asserted that the reason for the dismissal was capability, and specifically ill health capability following long term absence. There was apparently no dispute about that. Given the evidence, both oral and documentary, there is no doubt that the genuine reason for dismissal was capability, and I so find.

Has the respondent established a potentially fair reason for dismissing the claimant?

97. The *Alidair test* requires the Tribunal to consider first whether the respondent honestly believes that the claimant is incapable of performing his job, and secondly whether the grounds for that belief are reasonable.

98. In this case the respondent had very frequent discussions with the claimant over his absence of almost a year before he was dismissed, discussed further below. Over the course of that year the claimant himself advised on several occasions that he did not believe he could return to work in any capacity with the respondent, including at the review meeting on 27 January 2022 and at the final review meeting on 31 May 2022. As a result, I find that the respondent had reasonable grounds to conclude that the claimant was incapable of performing his job.

99. Given the respondent's reliance on the capability question, and given the evidence relied on to support their decision that dismissal was on that ground, and that being a potentially fair reason for dismissal, I find that this has been established.

Did the respondent act reasonably or unreasonably in treating that as sufficient reason for dismissing the claimant?

100. The reason for dismissal having been established, the key question for the Tribunal is whether the respondent acted reasonably in treating that as sufficient reason to dismiss. As set out in the case of *BS v Dundee City Council* (above), in ill health dismissals for long term absence, the Tribunal must consider whether the employer can be expected to wait longer for the employee to return by reference to the nature of the illness; the likely length

of the continuing absence; and the need for the employer to have the work performed.

101. On the matter of the nature of the illness, in this case the claimant suffered from a deterioration in his mental health. The claimant's mental health vacillated to a certain extent throughout the discussions with the respondent, but the claimant himself generally confirmed that it was not improving.

102. Thus, in regard to the likely length of the continuing absence, there were no indications that the claimant was on the road to recovery. Indeed, Mr Rafferty noted that while the claimant had initially been signed off by his GP for periods of three weeks, that had increased over time, and by the time of the final review meeting the claimant was signed off for a further two months. There were no signs that the claimant would be able to return to work any time soon, if at all. In the outcome letter, Mr Rafferty concluded that he had no confidence from their conversations that the claimant's health and attendance would improve going forward, as demonstrated by his past attendance.

103. On the matter of the need for the employer to have the work performed, in the outcome letter Mr Rafferty referenced this: "your current level of attendance is not at a level the business can support due to the impact on resourcing, colleagues, and customer service. Our resourcing needs are calculated on the level of colleagues available, expected customer demand. High levels of absence impact the customer directly with longer wait times in branch and impact your peers who pick up your portfolio of work". The claimant himself recognised this in his letter of 3 September 2021 seeking a compromise agreement, that his departure would "reduce the workload for colleagues involved". Thus, although a respondent of this size has significant resources, it cannot be said that the claimant's continued absence going forward had no or even little impact on the work performed by the employer.

l/l/as *the procedure adopted by the respondent unfair?*

104. The *BS* decision also requires the Tribunal to consider whether a fair procedure was adopted prior to making the decision to dismiss. The claimant

submitted that the respondent did not follow the respondent's laid down policies and procedures.

105. In this case it is apparent that the respondent did follow policy and procedure on sickness absence: first following the wellness plan, then moving to the formal stage (which was deferred following the claimant's accident) then moving from first formal to final formal meeting, and then an appeal stage.

106. The *BS case* indicates that in order for the procedure leading up to dismissal to be fair, a respondent will require to consult with an employee. In this case there was extensive consultation with the claimant, all set out in detail in the so-called "wellness plan". This records each contact with the claimant, from his first intimation that he was ill when he advised that he would not be attending work on the day after he received the outcome of his grievance on 18 June 2021. It records each occasion when the claimant was asked for his views on when he might be well enough to return to work. It records the occasions when the claimant was asked what support he might need to help him to return to work. It records discussions about the options which might be open to the claimant when he felt well enough to return to work. It records adjustments that might be put in place to facilitate that. The consultation with the claimant took place over a period of almost one year before he was dismissed.

107. In order for the procedure to be fair, there is an expectation that a respondent will have obtained medical reports setting out the likely prognosis before dismissing. In this case the respondent made an arrangement for a consultation with occupational health during the informal stage of the process in August 2021. The report produced was discussed at some length between the claimant and his line managers.

108. The claimant suggested that the recommendations from the report had not been acted upon, but I did not accept his evidence on that point. The report recommended, among other things, counselling and undertaking a stress risk assessment, both of which were implemented. The claimant complained that Mr Lumb had not followed up the advice about identifying mental health

advocates, but although this information did not reach the claimant, it is clear that efforts were made to send the list to him. The claimant himself delayed contacting EAP/Vallidium for counselling sessions for reasons which remain unclear. He contacted the Bank Workers Charity as suggested, but he advised that he had not heard from them "to this day", the fault for which cannot be laid at the door of the respondent.

109. The claimant focused in particular on the view of the occupational health nurse that "these barriers are likely to remain unless as a result of dialogue, a solution acceptable to both Mr Maxwell and the organisation can be found". He claimed this had not been acted upon, specifically in his letter of 15 September 2021. However, it is quite clear given the amount of contact between the claimant and the respondent, all as set out in the wellness plan, that there was considerable dialogue between the two. The fact that a solution which was acceptable to Mr Maxwell could not be found was not for the want of trying on the part of the respondent.

110. The occupational health nurse recommended if no resolution could be reached to return to work that "your HR department are requested to consult with yourselves and your colleague to consider what options are available for him in respect of his future". This was apparently interpreted by the claimant's trade union representative as "something financially and morally appropriate should be considered". That is her interpretation of the recommendation, but clearly that is not what is said in the report.

111. The occupational health nurse also made recommendations regarding adjustments which could facilitate a return to work, including reduced hours, a phased return and discretionary breaks. All of these were offered to the claimant by Mr Rafferty (specifically for example at the meeting on 8 December 2021).

112. That report was obtained at the informal stage. A further report was obtained at the formal stage. The claimant had a good number of concerns about the process of obtaining that report. He apparently challenged Mr Rafferty's request to have the matter considered by an occupational health doctor

(rather than a nurse). Mr Rafferty's rationale that he wanted the best possible advice because of the potential implications of their opinion (i.e., the possibility of dismissal) is self-evidently reasonable. The claimant expressed concern about the detailed questions in the occupational health referral, which he said had been commented on by the doctor, and which Ms Mondi thought unusual.

113. As I understood it, Mr Rafferty asked these questions because he was aware that the outcome had potentially serious consequences for the claimant and he wanted to be sure that he had all the information needed to make the right decision. This the claimant describes as "targeted at gathering evidence to justify potential dismissal", but equally it could have been used to justify not dismissing, depending on the answers.

114. The claimant expressed concern that he had waited not once but twice for a telephone call from the occupational health doctor, but it transpired that the reason for this was the fact that the claimant's mobile number had been incorrectly recorded. The claimant himself admitted that this was an inadvertent mistake, so although this did cause the claimant additional stress when the calls he was expecting did not materialise, clearly this cannot be relied upon to suggest any unfairness meted out by the respondent.

115. Further, once the claimant did have an opportunity to speak to the occupational health doctor, she took the view that there was insufficient time allocated to the call, and a further consultation was rearranged. Again, this is indicative of the matter being considered in a thorough way.

116. In the further occupational health report dated 10 May 2022 which was relied upon by the respondent in the final review meeting the doctor concluded that "at present I do not think he is sufficiently well to attempt to return to work. Given the protracted period of absence thus far with no material resolution to the employment relation matters being reached…! think a return to work prognosis remains poor and as such I cannot advise you on what a reasonable return to work date could be".

117. After almost a year of absence, there was no indication from the occupational health doctor when the claimant might be fit to return, and his GP had at that

time just signed him for a further two months. The claimant himself saw no prospect of a return.

118. Thus, the medical reports obtained informed the respondent that there was no likelihood of imminent return and little or no improvement despite the supports that had been put in place and the claimant's own attempts to manage his situation.

119. A fair procedure will also involve an employer giving consideration to all of the other options/alternatives to dismissal open to the employer.

120. The claimant submitted that despite the terms of the dismissal appeal letter, the respondent had not considered other working from home roles. He argued that the respondent had not done enough to consider alternative roles, but had expected him to do more, and concluded that he did not wish to return to work for the respondent. The evidence heard however supports the conclusion that the respondent had given consideration to different roles.

121. In particular, the claimant expressed concern about working while in frauds and disputes, alone in a very small office with no windows. He said he had raised his concerns informally at the time by reference to a text message, and that he had said that the circumstances were impacting on his mental health. He mentioned this in his grievance. During the very first week of his sickness absence, on 21 June 2021, Mr Lumb advised the claimant that he could return to the branch and that there would be plenty of time for shadowing/upskilling given three colleagues at Kirkcudbright at that time. Thus, it was clear that the claimant had from that time the option of returning to the branch and not returning to the same role which he said was impacting his mental health.

122. The claimant subsequently said that he had been made aware of permanent positions in fraud and disputes which involved working from home, but he did not apply because he was not prepared to work shifts. Although he subsequently found out that shifts could be negotiated, he did not apply at the time or enquire further (as the claimant confirmed during the appeal). Although he said that he was not prepared to travel, it was clear that the claimant could have the option of working from home.

123. The claimant also said that he was not prepared to return to the branch. However, other options which did not involve working in the branch or travelling were clearly open to the claimant. For example, the claimant was advised of non-branch jobs which were being advertised on 24 August 2021, but he said that he was not interested and that "he really feels that his time has come to an end with the bank" (page 254). He said, on 26 August, that he was not interested in working in another branch or pool within the branch network (page 255). Other opportunities outwith the branch network for example within fraud were mentioned, and the claimant was advised to register for Job shop (my career) (page 255).

124. Reference was made (during the grievance appeal) to alternative grade C roles which the claimant could have applied for, but he chose not to.

125. It is apparent from what was said during the wellness meetings, and the subsequent formal review meetings, that various options were considered including returning to the branch, returning to another branch, returning as CSS or CSA and returning outwith the branch structure, but none of the options was deemed suitable by the claimant. The claimant did not want to return to counter work but it is clear that was not the only option being suggested by the respondent. Mr Moran during the appeal asked about what alternatives he would consider which might not involve working in a branch, noting "LBG is a big company with lots of job opportunities".

126. It is clear from the wellness notes that the Mr Rafferty was prepared to discuss a return to any role with appropriate adjustments. In particular, the option of a phased return, of reduced hours and of increased breaks were all suggested to the claimant. The claimant however had apparently set himself against returning, and although he was taking advantage of supports and mechanisms to address his mental health issues, it appears that the claimant did not consider that he could return to the respondent in any capacity. The claimant's focus, and this is apparent throughout the sickness absence process, was to secure himself an exit package or latterly ill health early retirement.

127. Further the adjustments offered were the kind of adjustments as recommended by occupational health. While these might have been seen as reasonable under the Equality Act, the provisions of that Act are intended to support a return to work for disabled workers but not to facilitate an exit.

128. Throughout the sickness absence process the only alternative being put forward, time and again, by the claimant and by his trade union representative was an exit package or ill-health retirement.

129. The claimant submits, under a heading "alternatives to dismissal" that the opportunity to raise an application for ill health retirement was denied to him. There was however much discussion during evidence about the option of ill health retirement.

130. Both Mr Rafferty and Mr Moran said that they had discussed this option with their HR colleagues. Clearly they were not au fait with the details of that process nor which pension scheme the claimant was in but as they pointed out their HR colleagues would have been aware of that.

131. The claimant did highlight that there was a discrepancy between the advice given to Mr Rafferty and that given to Mr Moran who it transpired got advice from different HR colleagues. Mr Rafferty mentioned in the outcome letter that it was not an option open to him because it could not be said, given the medical reports, that the claimant would never work again for LBG. Mr Moran however had understood that ill health retirement was only available if an employee would never work in any capacity again.

132. If the claimant's pension scheme offered ill health retirement only where he was never working in any capacity again, even he accepted that was not the case. If, however, the pension scheme offered it where the claimant would never work in LBG again as Mr Rafferty understood, he did not read the occupational health report as suggesting that. Indeed, the outcome letter states, "Whilst you are currently unwell and seeking treatment, there is no medical evidence which states that you will never ever be able to work again for Lloyds Banking Group in any capacity." That is clearly a reasonable interpretation of the reports.

133. On the matter of ill health retirement, Ms Mondi confirmed in cross examination that although she could have made enquiries she did not. She said she expected the respondent to look at that, but she did not raise this at the appeal. She confirmed that offers of ill health retirement were rare, and this was not something which she had come across personally.

134. This of course is in any event a side issue. The claimant wanted the respondent to offer him redundancy/an exit package or ill health retirement. This would involve the termination of his employment but on his terms. This is not an alternative to dismissal as envisaged by the guidance from case law. It could not in any event be said that conflicting evidence about whether he was or was not entitled to an ill health retirement pension resulted in an unfair outcome, namely dismissal. The failure of the respondent to offer ill health retirement could not make a dismissal unfair.

135. The respondent's focus, rightly, was on facilitating the claimant's return to work. While the claimant was taking steps to improve his mental health, he was not prepared to return or to consider any of the alternative options suggested to facilitate a return.

136. The claimant submitted that the respondent had failed to take account of the fact that he was part way through a series of counselling sessions when they made the decision to dismiss him. However, the evidence heard was that the claimant had been offered counselling early on in the sickness absence process, but he had not taken up the opportunity until many months later. There was no indication that extending time for further sessions would have resulted in a return to work.

137. If the options presented by the respondent were genuinely not open for consideration because of his mental health, then the claimant always had an option to resign to protect himself from further mental trauma, especially if he no longer had trust in his employer, as he indicated in his letter of 3 September 2021 for example.

138. Despite his concerns about his mental health, the claimant chose not to resign but continued in employment in the hope of being offered an exit package.

Although the respondent accepted that he was invited to suggest terms for a compromise agreement, that option was not available for the claimant at that time or at the time he was dismissed. Any failure to consider a compromise agreement could not render dismissal unfair. It was accepted by the claimant and by the trade union representative that there was no option for redundancy, and indeed Ms Mondi described what was sought as a "goodwill gesture". The claimant stated that he considered it in the bank's gift to do the fair thing, but the only fair thing from his point of view was to give him a package to leave. Such a development would have meant that his employment was terminated anyway. I do note in any event that the claimant suggested the compromise agreement in September 2021, and he was paid in full until June 2022, with three months' pay in lieu of notice.

Did the employer's conduct in this case render dismissal unfair in the circumstances?

139. The claimant in evidence and submissions raised a number of other concerns about the way that his sickness absence had been dealt with by the respondent.

140. The claimant's submissions related to specific provisions of the policy which he complained had not been complied with. I have considered each of these arguments and I have concluded that they do not render dismissal or the procedure followed unfair, bearing in mind the range of reasonable responses open to a respondent.

141. In particular, the claimant submits that the respondent failed to supply him with a copy of the notes made following discussions between August 2021 and January 2022. While Mr Moran agreed that it was good practice to share such notes on a regular basis, and that five months was excessive, the claimant himself did not take any steps to obtain them during that period, and this was not at the forefront of his mind presumably because he had no need for them. The claimant did subsequently obtain a copy of the notes and it is apparent that any delay in providing the notes at the time could not be said to render the outcome unfair.

142. The claimant complained about the setting of the dates for the final review meeting and while there was a dispute about the precise words said by Mr Rafferty, the fact is that the meeting date was changed. That date was to accommodate the claimant's union rep, and although a request was made to defer that meeting, Ms Monti did attend, albeit on teams. Further and in any event, she attended the appeal hearing in person. The fact that the meeting went ahead that day could not be said to render either the process or the outcome unfair.

143. The claimant claimed that the final review meeting was restricted to one hour. I did not accept, based on the evidence of Mr Rafferty, and the notes of the meeting, that was the case. While there was a timetable, there were no absolute time restrictions, no evidence that the hearing was rushed, and the claimant decided not to take any breaks and concluded by saying he had nothing more to add. Although that meeting only lasted an hour or so, as Mr Rafferty pointed out, they were discussing matters which had been discussed at length both with the claimant, his union rep and with HR over the previous II months.

144. The claimant made submissions relating to the dismissal appeal. The claimant complained about a failure to acknowledge letters addressed to Mr Rafferty but such failures could not make dismissal itself unfair. Further, the claimant complained that Mr Moran had not considered all of the points raised in the appeal. I did not accept that evidence, not least because it was entirely appropriate to focus on the main points and the claimant apparently accepted that at the time. In any event, concerns about how an appeal is conducted after a fair dismissal will not render that dismissal unfair.

145. The claimant argues that had it not been for the way that he was treated by the respondent, then his mental health would not have suffered and he would not have been absent, at least not for so long.

146. In particular, the claimant complained that he had not been entitled to appeal the decision in 2018 when he was redeployed. He comes to this conclusion on his reading of the Job Security Policy, which he argued did not apply to

him because he was never at risk of redundancy. However, that is not how the Job Security Policy appears intended to be understood, and his position is not supported by the evidence heard. His own evidence was that he was resigned to accepting the grade B role and that he would just "suck it up". Once in the role, he was dissatisfied with it and sought, in October 2018, to appeal it which was considered to be out of time. It is apparent however that he could have lodged an appeal at the time. Although he complained informally, he continued in that role until he lodged a grievance in April 2021. Although he was not permitted to appeal in October 2018, his grievance, which refers back to that time, was investigated and then again what happened at that time was considered in the grievance appeal. The conclusion was that the correct procedure had been followed.

147. After that he wrote to the managing director to advise that he was unhappy about how they were dealt with. He asserted that their decision making processes were flawed resulting in them coming to flawed decisions which led to the outcomes he considered being unfair. While he complained that Ms Harris was not interested, I noted that she did review his situation and advised that her investigations confirmed that the correct procedures had been followed.

148. In fact, the April 2021 grievance was about him not having been made redundant in 2018 and then in 2021. He felt he was forced into the grade B job in 2018 but that he should have been made redundant then, and then because he was grade B not C this meant he missed out on redundancy in 2021 as well. Thus from 2018, the claimant's complaint is that he was not dismissed through redundancy.

149. The claimant was unhappy about how his grievance was dealt with, but as Mrs Thomas pointed out, it was the outcome of the grievance which upset the claimant, and it seems that nothing would satisfy him except to get the outcome he was looking for. If he takes a step back he will see that it is apparent that the essence of his complaint is about his employment not being terminated on his terms.

150. Ms Thomas in submissions refuted the claimant's assertion that the respondent had caused the claimant's ill-health. The respondent relies on the fact that the claimant had a pre-existing medical condition and had suffered a number of distressing personal matters; the respondent would have been entitled to refuse to revisit matters from 2018, but instead allowed the claimant to pursue a historical grievance; the respondent exhausted its internal procedure; Mr Rafferty listened to the claimant while he expressed his unhappiness about the grievance on a number of occasions but it was not appropriate that the matter should be revisited again.

151. Relying on *McAdie v RBS* [2007] IRLR 895, Ms Thomas argued that even if the Tribunal was of the view that the respondent had in some way caused or exacerbated the claimant's ill heath, that would not mean that it could not fairly reach the decision to dismiss the claimant.

152. The claimant also argued that the respondent did not take account of his 34 years of service. Relying on *BS v Dundee City Council* Ms Thomas argued that a distinction was to be drawn between length of service not being relevant per se in a capability case and its relevance in relation to another factor. It might be relevant if it demonstrated that an individual is a good worker with a good absence record and who would do their utmost to go back to work.

153. I agreed with Ms Thomas when she succinctly summed up the position thus: "In the present case it was very evident that the claimant had found himself in an entrenched position with a loss of faith in the respondent and there was no realistic prospect of him returning within any reasonable time frame".

154. Unfortunately for the claimant, the respondent's stance, that he should either return to work or be dismissed, is a perfectly reasonable stance to take. In all the circumstances, dismissal, as well as the procedure leading up to it, fall within the range of reasonable responses open to the respondent.

Conclusion

155. I conclude therefore that dismissal for capability reasons following a fair procedure was reasonable in the particular circumstances of this case. Dismissal in these circumstances was therefore fair. The claimant was fairly dismissed for capability reasons. This claim is therefore dismissed.

Employment Judge: **M Robison**
Date of Judgment: **24 February 2023**
Entered in register: **01 March 2023**
and copied to parties