



# EMPLOYMENT TRIBUNALS

**SITTING AT:** LONDON CENTRAL BY CVP

**BEFORE:** EMPLOYMENT JUDGE F SPENCER

**BETWEEN:** MS S DOHERTY CLAIMANT

AND

SOPHIA WEBSTER LIMITED RESPONDENT

**ON:** 6 AND 7 JUNE 2023

## **Appearances**

**For the Claimant:** Ms Akers, counsel

**For the Respondent:** Ms Noble, Senior manager, company secretary

## **RESERVED JUDGMENT**

The Judgment of the Tribunal is that the Claimant was not unfairly dismissed.

## **REASONS**

1. The Claimant, Ms Susannah Doherty, was employed by the Respondent, from 19 March 2018 until her dismissal with pay in lieu of notice on 16 September 2022. By a claim presented on 15 February 2023 she brings a claim of unfair dismissal.
2. I heard evidence from the Claimant and, on behalf of the Respondent, from Ms J Sciacca, Production Manager and previously the Claimant's direct report, from Ms L Noble, General Counsel and Company Secretary and Mr R Stockley, CEO. I had a bundle of documents provided electronically.

## **Relevant facts**

3. The Respondent is a small company involved in the retail shoe business. It is run by Sophia Webster and her husband, Mr Robert Stockley. It employs approximately 45 people. The tone and content of the emails in the bundle suggest a friendly, small team that is run in an informal way. Ms Noble is company secretary, general counsel and has a broad senior role.
4. The Claimant was originally employed as Production Manager. She was a popular and well-regarded member of the team. Ms Noble was her line manager. Since the pandemic the team had reduced considerably in size. In December 2021 the Claimant's direct report, Ms Sciacca, was given a new title of Junior Production Manager (from Production Co-ordinator) and the Claimant's title was changed to Senior Production Manager. The Claimant says that she had concerns about the changes of job titles, and that it would dilute the functions of her role. She did not express those concerns at the time. In her subsequent grievance the Claimant complained that she was not consulted about the changes (but I am satisfied that that she was consulted about the change to Ms Sciacca's job title). (115)
5. In April 2022 a colleague, Ms Butler was promoted to Head of Product. Previously Ms Butler had been Senior Product Development Manager, which was on a par with the Claimant's role. The new role would oversee both Product Development and Production, the latter being the Claimant's responsibility.
6. The Claimant was aggrieved by this change. She told the Tribunal that she felt sidelined and overlooked and that she had not been given the opportunity to apply for the role. However she made no complaint at the time. The Claimant says that from then on Ms Butler became dismissive of her.
7. In May 2022 the Claimant was further aggrieved because she felt that Ms Butler had not copied her into an email which was within her remit. The Claimant felt sidelined but, apart from sending Ms Butler a reminder to copy her into production related emails, she made no complaint the time.
8. The Claimant lives a long way from the Respondent's office and following the return to work after the pandemic it had been agreed that she would only need to work in the office one day a week. In practice, however, because of other travel commitments, the Claimant was not in the office as frequently as that. Ms Sciacca lived close to the office and attended the office every day. I accept that as a result Ms Sciacca became the person people come to ask /discuss things with. She also had to keep the Claimant updated, as much of what was being done was happening in the office and this added to her workload.
9. On 20 June 2022 there was a meeting between Ms Butler, Mr Stockley and Ms Noble. Ms Butler was of the opinion that Ms Sciacca was facing major challenges with workload, was very stressed and "at breaking

point.” Ms Butler considered that Ms Sciacca was shouldering the bulk of the production work and that the Claimant had become detached from work and had become negative.

10. Ms Noble then scheduled an informal meeting with the Claimant, in order to check if the Claimant was all right and find out how things were going in production generally. In the meantime on 23<sup>rd</sup> June the Head of Merchandising and Wholesale telephoned Ms Noble to complain about the Claimant’s negative attitude and lack of preparation. (79)
11. Ms Noble and the Claimant had a meeting by Teams on 24<sup>th</sup> June, described by Ms Noble as a catch-up meeting. The Claimant said she was happy at work. She said she had felt undermined by Ms Butler a few times, but she had addressed it. (81) She was concerned not to be asked to come into the office more often than once a week. Ms Noble concluded that there was nothing of major concern to worry about.
12. However, a month later, on 22 July 2022 Ms Butler reported to Ms Noble and Mr Stockley that the Claimant and another team member had argued in a “hostile and aggressive way” in front of the wider and junior team. Ms Noble told the tribunal that by then they had become concerned that the Claimant had become disengaged from the business and was giving the impression that she didn’t care.
13. On 25 July Ms Noble asked the Claimant to attend a meeting with herself, Mr Webster and Ms Butler “to chat about some of the production issues we are facing, to get some feedback from you where things are and to share our thoughts and some feedback we have.” (87) As the Claimant was due to be in the office on Thursday, she suggested that it should take place on Thursday 28 July 2022 “out of the office so that we can have a more frank and open conversation”.
14. The Claimant says that the reference to the meeting being “open and frank” led her to believe that she was going to be heavily criticised. She says that the thought of the meeting made her feel unwell. “*I had been in the business for several years and I witnessed a number of colleagues being dismissed in a similar manner.*” (In fact however, the Claimant had not this witnessed any of her colleagues being dismissed at off-site meetings.)
15. Contemporaneous notes (86) show that the Respondent did want to speak plainly to the Claimant about what was perceived as a lack of engagement, but there is no evidence that the Claimant was going to be dismissed.
16. On 27<sup>th</sup> July the Claimant informed Mr Stockley and Miss Noble that she had become ill and would not be at work for the rest of the day. There were no details. In a further email on 28<sup>th</sup> July the Claimant again said that she was “sick and unable to attend work today”. Subsequent emails

from the Claimant (eg 106/ 107/ 108 ) simply said that she was unwell and unable to work.

17. On 29<sup>th</sup> July the Claimant submitted a formal grievance about ill treatment by Ms Butler. (97 – 101). In her grievance the Claimant said that she was being undermined, micromanaged and left out of business-critical emails and her working relationship with Ms Butler had deteriorated. She considered that the meeting with Ms Noble on 24<sup>th</sup> June had been a fact-finding meeting. She complained about her change of job title, about not being copied into an email on a matter which was within her remit and that her performance had been called into question by the way that Ms Butler had sought to manage her. She complained about the email of 25<sup>th</sup> July which asked her to attend a meeting on 28<sup>th</sup> July, and to the suggestion that they be frank and open, suggesting that she was going to be criticised.
18. On 3 August the Claimant sent a fit note from her GP signing the Claimant off for two weeks for “reactive anxiety – work-related”. The Claimant said in evidence that by then she had taken legal advice because she felt she was being managed out, but the only basis for that belief was the invitation to the off-site meeting on 28<sup>th</sup> July .
19. Ms Noble was on holiday for the first week in August but on 3 August she sent the Claimant an initial written response, explaining the background to the changes in job title, and suggested that they meet further to discuss matters (111). The initial response was friendly in tone and, as expressed in the covering email, intended to put the Claimant’s mind at ease. The Claimant was told that *“you have been a key, important and much liked member of our team for four years and we are genuinely keen to address your concerns and restore our much-valued relationship”*. Ms Noble said that the Claimant had been in agreement with the changes to Ms Sciacca’s title and had been consulted. She attached emails showing this. They had thought she had been pleased with the change to her title but said this could be discussed later when they met. It is a thoughtful email.
20. On her return Ms Noble interviewed Ms Butler in relation to the issues raised by the Claimant in her grievance. On 9<sup>th</sup> July Ms Noble wrote to the Claimant to say that she had completed her investigation into her complaints about micromanaging and that she now wanted to set up a meeting for the 12<sup>th</sup> or the 15<sup>th</sup> to discuss things with her and asked the Claimant which would be more convenient. The Claimant did not reply.
21. Ms Noble chased on 15 August and again on 17 August. The Claimant replied that she was not well enough to attend a meeting. She asked that follow up queries on her grievance be put to her in writing.
22. Ms Noble sent the Claimant follow up questions in writing on 22<sup>nd</sup> August (154). In particular she asked what would be an appropriate resolution to the grievance. She said that they had hoped to hear more from the Claimant and to understand her thoughts, and she was happy to speak at

any time should the Claimant feel able to. (In a second email she said that while they would not normally disturb her with work matters while she was unwell, she wanted to tell her that they proposed to hire a further assistant for the Claimant's team and would be happy to receive any feedback.)

23. The Claimant sent her response to the follow up questions on 30<sup>th</sup> August (162). She had no suggestions as to an appropriate resolution to the grievance and said she was not sure of a way forward.
24. Ms Noble sent the grievance outcome to the Claimant on 5<sup>th</sup> September (170). The grievance was not upheld. Ms Noble said that she felt that inviting her to an informal meeting to give feedback and discuss challenges was not unreasonable; that they had not been able to have conversations with the Claimant in which she was open and honest in her thoughts and that as a result an informal conversation was no longer appropriate and they wished to have a formal conversation under the disciplinary procedure to share their concerns. The outcome letter also said that they understood from her solicitor that she did not want to return to work but suggested that they facilitate a conversation with Ms Butler and Ms Sciacca to repair the relationship and that "Similarly we hope using the formal disciplinary process to try and resolve the concerns we had hoped to raise with you on 28 July will allow for clear an open communication."
25. The next day on 6<sup>th</sup> September Ms Noble wrote again to the Claimant seeking a doctors report, (enclosing a draft letter that the Respondent proposed to send to the Claimant's GP) and asking the Claimant to attend a sickness absence review meeting on 14<sup>th</sup> September at 1 pm "to review your current situation, to discuss your ill health and to consider what further support, if any, we can offer you to facilitate your return to work". It continued "if there is no likelihood of your return to work within a reasonable period, we will need to consider whether we can continue to support your absence or whether, regrettably, a further meeting should be arranged to consider the termination of your contract on the grounds of incapacity because of ill health." She was invited to send submissions in advance if she preferred.
26. On 9<sup>th</sup> September the Claimant appealed the grievance outcome. (179). She said that it was not true that she did not want to return to work and that it was unfair and assumptive to suggest otherwise.
27. Ms Noble invited the Claimant to a grievance appeal hearing with Mr Stockley on 13<sup>th</sup> September and informed the Claimant that she could attend in person, or virtually, and advised her that she could bring a colleague or a trade union representative.
28. The Claimant did not respond to, or acknowledge, the invitation to attend either the grievance appeal hearing on the 13<sup>th</sup> or the sickness review meeting on the 14<sup>th</sup>.

29. On 12 September the Claimant informed Ms Noble that she did not feel well enough to return to work and would be sending a further doctor's note. There was no further information. Ms Noble replied to ask the Claimant to respond to her email requesting a doctor's report and asking if she would be attending the sickness absence review meeting (185). The Claimant did not respond to that request but duly sent in a fit note signing her off for two weeks for "work related stress."
30. On 13<sup>th</sup> September Ms Noble emailed the Claimant to ask if she would be attending the grievance appeal scheduled for that day. The Claimant responded that she did not feel well enough to attend and asked for the appeal to be resolved in writing.
31. Ms Noble wrote to the Claimant again on 13 September in relation to her sickness absence. She said that they had not received a reply to their emails of 5 and 6 September, that they wanted to engage to understand her sickness and whether an adjustment could be made to allow a return to work. She told the Claimant that if there was no likelihood of a return to work at the end of the current fit note that she doubted if the Respondent would be able to continue to support her absence. She asked again whether she would consent to a doctor's report. The letter asked whether she intended to attend the sickness absence review meeting on the next day. She said that if she failed to attend or provide further information, they would make a decision in her absence which could include terminating her contract (191 ).
32. A further email was sent on 14 September at 9.30 asking the Claimant if she intended to attend the meeting. The Claimant responded at 12.24 that she was "still suffering with my health and do not feel well enough to attend the meeting proposed for today". No further information or submission were sent. At 18.10 Ms Noble wrote again to ask the Claimant if she would consent to a doctor's report and asking for a reply by midday the next day. There was no reply.
33. On 16<sup>th</sup> September Mr Stockley, in conjunction with Ms Noble, decided to terminate the Claimant's employment. A letter was sent the same day (203).
34. In the dismissal letter the Respondent says that they had attempted to engage with her, meet with her, seek information to understand her sickness and its likely duration and to understand if they could make any adjustments to facilitate a return. However, the Claimant had not been prepared to attend any meetings, had not replied to their request for consent to a medical report, or replied to many of the communications they had sent. They continued "you said that your illness was work-related, however we have no hope of resolving this without your input and cooperation."

35. It continues that as a small business they could not “ support an open-ended illness where we have no prospect of understanding its likely duration. Your team is unable to operate effectively on a long-term indeterminate basis without a key role being present.”... “In addition, we consider that your unwillingness to communicate or engage with us regarding your absence and other matters substantially undermines the relationship between you as an employee, and Sophia Webster as your employer. We have been trying to speak with you both about your illness and about the matters that you say have caused your illness since early in your absence which began on 27 July without success. We consider this a further substantial reason necessitating termination of your contract.” The Claimant was paid in lieu of notice and told that she had the right to appeal the decision within 10 days.
36. Mr Stockley gave evidence, which I accept, that if the Claimant had spoken to him, and said to him that she was having a tough time at the moment but that she really wanted to come back, he would not have dismissed her but there was no engagement: “*we did not know what the issue was or what might help to get her back to work*” and that he really wanted to find the source of the problem. Without speaking to the Claimant as to the possible length of her absence, he did not know if he could hire someone temporarily or for how long. He said that they were a small organisation and were very keen to retain the Claimant. “She was a really good employee and what I was seeing and hearing was out of character.” However, she would not engage or speak to them, budgets were limited, and he was concerned that they would lose more people because of the additional workload that was being placed upon them in the absence of the Claimant. In cross examination when asked if he had considered other roles for her within the company, he said he would have considered anything, but the Claimant would not speak to him and “we can only do so much one-sided”.
37. The Claimant appealed on 23 September 2022 but made it clear that she did not want to be reinstated. She said that “I was dismissed in circumstances where I was about to raise a second grievance about the poor handling of my sickness absence.” She said that the Respondent failed to take into account that they had an obligation to give an employee a reasonable time to recover and that the bar was set higher when the absence was work-related. She had sent fit notes. She said that she was dismissed just six weeks after her ill-health absence began. She had not been afforded a reasonable timeframe to recover. She did not accept that the company could not afford to sustain her absence from more than six weeks. She complained of having been bombarded with correspondence while she had been on sick leave.
38. However, the Claimant also said that she did not wish to be reinstated because there had “been an irretrievable breakdown in the employment

relationship given the way I have been treated”.

39. Ms Noble responded asking the Claimant what resolution she was hoping for and asking if she would be prepared to attend a virtual meeting. The Claimant said that she wanted her appeal to be dealt with by an external company and again confirmed she did not want to be reinstated.
40. The Respondent identified an HR consultant who would deal with the appeal, but only on the basis of the Claimant was willing to attend a hearing (as the Claimant had initially said that she was not well enough attend an appeal hearing). On 4<sup>th</sup> October Ms Noble asked the Claimant whether she would be prepared or able to attend a hearing run by the external consultant. The Claimant asked whether there would be anybody from internal HR present or whether it would just be the external consultant. She asked Ms Noble to confirm that she was entitled to bring someone with her to the meeting.
41. Ms Noble responded that only the external HR consultancy would be present, and that the Claimant would have the right to have a representative with her which should either be a colleague or a trade union rep. (211). The Claimant agreed to attend a meeting to discuss her appeal.
42. On 20<sup>th</sup> October the Claimant was sent a letter inviting her to an appeal meeting to take place on 26 October 2022. The letter which was sent by Ms Noble (but drafted by the HR consultancy) informed the Claimant that she had the right “to bring a trade union official as a companion with her to the meeting. There is no reference to bringing a colleague.
43. In the Claimant’s ET1 she complains that Ms Noble told her that “she was not permitted to have a work colleague as a companion at the appeal hearing and the Claimant was not part of the union. The Claimant would have requested a friend as a companion; however, she was not afforded the opportunity to put this forward prior to the appeal hearing.”
44. That complaint is not correct. Although the letter of 20<sup>th</sup> October omits the reference to bringing a work colleague as a companion, I do not accept that Ms Noble told her that she could not bring a work colleague. The Claimant had been told on 4<sup>th</sup> October that she could do so. At the start of the appeal hearing Ms Cooper (who heard the appeal) queried whether the Claimant wanted to be represented. The Claimant said that Ms Noble had told her that she was no longer able to have a colleague attend and that she would have asked a friend/colleague if she was allowed. This was not true, and the Claimant was seeking to take advantage of the omission in the letter of 4<sup>th</sup> October. In any event Ms Cooper offered to postpone and rearrange the meeting so that she could arrange for a companion to attend, and the Claimant declined.



45. The appeal hearing took place on 26 October 2022 before an HR consultant, Ms Cooper and a note taker. The Tribunal did not hear from Ms Cooper, but we have a transcript of the hearing. Since the Claimant did not want to be reinstated it is difficult to see what the purpose of the appeal was. After the hearing Ms Cooper sent a number of follow-up questions to Ms Noble.
46. At the appeal the Claimant complained about being sent “a barrage of correspondence” by Ms Noble which compounded her anxiety; she complained that the correspondence from the Respondent was unsympathetic in tone; that she did not believe the Respondent when they said in the 22 August email that they wished to discuss the hiring of an additional assistant for the Production team with her; that the Respondent sent three requests for doctors reports demanding a response, that the Respondent’s warning that her contract might be terminated was not conducive to her health.
47. What is striking is that at the hearing the Claimant provided no additional information about her ill-health, any adjustments that could be made to assist her to come back to work or any prognosis for the future return. In any event she made it clear that she did not wish to return to work.
48. An outcome letter was sent to the Claimant on 2 November confirming the decision to dismiss, responding to the Claimant’s various complaints and concluding that her failure to engage with the company during her absence had resulted in the fair termination of her employment.

### Submissions

49. For the Claimant Ms Akers submitted that this it was unreasonable to dismiss the Claimant after only seven weeks of absence. Her fit note was due to expire on 25 September. The Claimant had been dismissed only two days after her grievance outcome and not had an opportunity to consider it.
50. To the extent that the Respondent alleged that she was dismissed for lack of engagement, then the dismissal was unreasonable because she should have been warned that her continuing failure to engage could have led to her dismissal. A reasonable employer would have arranged another meeting after the 14<sup>th</sup> September meeting that she had failed to attend warning her that she would be dismissed if she did not engage.
51. For the Respondent Ms Noble said that they had done everything they could to reassure the Claimant in respect of the matters which she raised in her grievance. They had tried to sit down with her, but they couldn’t resolve her grievance without her engagement. It was clear that the Claimant did not intend to engage with them or to allow them to contact her GP. There was no hint that the Claimant was going to change her

view had they waited any longer. 'The Respondent believed that the Claimant did not want to return to work. They could not be expected to keep going when they were not getting any response. The business was struggling to cope, and they were getting no response.

The law.

52. In the case of unfair dismissal it is for the employer to show that the reason for the Claimant's dismissal is a potentially fair reason for dismissal within the terms of section 98(1). Capability and conduct are reasons which may be found to be a potentially fair reason for dismissal.
53. If the Respondent can establish that the principal reason for the Claimant's dismissal was capability, then it is for the Tribunal to consider whether the dismissal was fair or unfair within the terms of section 98(4). The answer to this question "depends on whether in the circumstances (including the size and administrative resources of the employers undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissal and shall be determined in accordance with equity and the substantial merits of the case."
54. An employee's ill health may affect their capability to do the job. General principles of fairness require, that the employer consults with the employee so that it can make an informed decision about whether to dismiss, consider how long the employee is likely to be away and whether it is possible to employ the employee in a different position in the organisation. In the end the question is one of reasonableness, weighing up compassion and sympathy to the employee with the requirements of the business and the impact that the employee's absence has on the business and his or her colleagues. However in order to assess the position the employee needs to engage.
55. As is now trite law, in assessing the reasonableness of the employer's decision to dismiss the Tribunal is not entitled to substitute its own judgement for that of the employer. The question for the Tribunal is whether the decision to dismiss fell within the band of reasonable responses. It is not the case that nothing short of a perverse decision to dismiss can be unfair, simply that the process of considering the reasonableness of the decision to dismiss must be considered by reference to the objective standards of the hypothetical reasonable employer and not by reference to the tribunal's own subjective views of what it would have done in the circumstances.

Conclusions.

56. I have not found this an easy case to decide. On the one hand, as Ms Akers submits, the Claimant was dismissed seven weeks after she first informed the Respondent that she was unwell. This was a very short period of time, in the context of an employee who had been employed for four years and had been well liked and well-respected.
57. On the other hand, an employee who is absent from work through ill

health has an obligation to communicate with their employer and to keep them informed of the position. The Claimant sent fit notes and lodged a grievance but did not otherwise engage. The Respondent was unable to obtain the information that they needed in order to make an informed decision as to how long the Claimant was likely to be away from work. In the end, the Respondent had good reason to conclude that giving her further opportunity to engage was unlikely to yield results.

58. I do not accept that the Respondent's communications were heavy-handed. The tone in their communications was generally sympathetic, at least in the early stages. The Claimant's communications were curt and uninformative. There was nothing in her communication which suggested that she might be ready or able to return to work in the near future. She was warned that if she did not attend the sickness absence meeting a decision could be taken in her absence which could result in her dismissal. (191). Despite this she did not attend.
59. The Claimant says that she was not well enough to attend the sickness absence review meeting (which was due to be held remotely) but she had been given the option to provide submissions in writing and had not done so despite having, in the same period, provided grounds to appeal the grievance outcome. (The Claimant said that she did not read the 5<sup>th</sup> September email inviting her to a sickness review meeting till the 9<sup>th</sup>, but there was still time to provide submissions in writing and ask for a postponement if she was too ill to do that . ) There is no evidence that she was too sick to pick up the telephone and talk to either Ms Noble or Mr Stockley to explain. The evidence in the bundle indicates that the Respondent's workplace was an informal one and Ms Noble had repeatedly made it clear that she was available to talk to her on the telephone. Mr Stockley was also accessible. If Mr Stockley had concluded that the Claimant was unlikely to return to work any time soon that was a reasonable conclusion to have come to. She had given no indication that she wanted to return and had provided no written submissions to clarify the position. The Claimant was no longer performing the functions of her role there was no indication that the situation was likely to change in the near future.
60. Despite presenting a grievance in some detail the Claimant did not want to attend a grievance hearing. A significant part of the Claimant's grievance related to the meeting proposed for 28 July. The Claimant was concerned that the Respondent would criticise her performance at that meeting. However an employer is entitled to raise performance concerns with its employees and the Claimant was being given an opportunity to put forward her side of the story. If the Claimant thought she was being managed out that was premature.
61. Although the Claimant had presented a fit note saying that she was unable to work, there was no medical or other evidence to suggest that the Claimant was too ill to engage with the Respondent in a way which might have enabled them to understand how long she was likely to be absent

and what they might be able to do to facilitate a return to work.

62. There are numerous emails from the Respondent which did not elicit any reply from the Claimant. The Claimant complains about a barrage of emails from the Respondent. It is clear however that many of those emails were sent because the Claimant was not responding.
63. The Claimant had presented a grievance and complained of work-related stress but, by not attending a grievance hearing, she was not enabling the Respondent to resolve it. It is apparent that she was not engaging with the Respondent in a way which would enable them to understand the nature of her absence.
64. I was troubled by the short space of time between the invitation to the first sickness review meeting and the dismissal and whether this was reasonable in all the circumstances. After some deliberation I concluded that it was not unreasonable. Although the grievance process is separate to the sickness absence review process, what had gone on before could not be ignored. The Claimant had failed to engage in the grievance process in any meaningful way, and was now not engaging at all in the sickness absence review process. This was a small employer, and the Claimant had a senior position. I accept that the uncertainty caused by her absence and her failure to engage was difficult for her colleagues and the business. While another employer may have chosen to wait longer before dismissing the Claimant and/or to schedule a further meeting to give the Claimant another chance to make representations, in the circumstance of this case, where the Claimant had refused to engage, I do not find that the decision to dismiss was outside the band of reasonable responses.
65. The claim is dismissed.

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Employment Judge Spencer  
5<sup>th</sup> July 2023

JUDGMENT SENT TO THE PARTIES ON

06/07/2023

FOR THE TRIBUNAL OFFICE