EMPLOYMENT TRIBUNALS

Claimant: Mrs S Kuhlman

Respondent: Secretary of State for Justice

Heard at: Hull **On:** 9, 10 and 11 January 2024

Before: Employment Judge Miller
Mr M Taj
Mr D Crowe

Representation
Claimant: Ms L Talib – counsel
Respondent: Ms R Mellor – counsel

JUDGMENT having been given at the hearing on 11 January 2024 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

1. The claimant was employed by the respondent as an "Operational Support Grade" at HMP and YOI Moorland May 2005 until 18 November 2022.

2. Early conciliation started on 15 February 2023 and ended on 21 March 2023.The claim form was presented on 20 April 2023.

3. The claimant brought claims of unfair dismissal and discrimination arising from disability under s 15 Equality Act 2010.

4. There was a preliminary hearing before EJ Armstrong on 7 July 2023 at which the issues in the case were identified and the issues are attached as an appendix.

The tribunal hearing

5. The final hearing was held in Hull. The Tribunal had an agreed file of documents and witness statements from the claimant; and for the

respondent from Ms Willis (the prison governor) and Ms Sarson, Ms Willis' Secretary. All witnesses attended and gave evidence and in our view all witnesses were open, honest and doing their best to help the tribunal.

6. Both parties were represented by counsel and we are grateful for their assistance.

7. At the start of the hearing the respondent agreed that the claimant's sickness absence arose in consequence of her disability of anxiety and depression so that the only issue remaining in dispute, in respect of the disability discrimination claim, was whether the claimant's dismissal was a proportionate means of achieving a legitimate aim.

Findings of fact

8. We have made as far as possible, only such findings of fact as are necessary to determine the issues in this case. Where any facts were in dispute we have made our decision on the balance of probabilities.

9. The claimant's job included monitoring communications, post room duties, prisoner supervision and transport and prison visitor information.

10. It is agreed that the claimant was at all material times disabled by reason of anxiety and depression. The claimant also has, or has had, a number of other health conditions that have led to various absences in the past. On each occasion she has returned to work after various periods of absence.

11. Some of these absences have resulted in occupational health referrals. In 2015 an occupational health advisor said that the claimant was likely to be disabled under the Equality Act 2010 because of her depression and underactive thyroid. In another report in 2018 the advisor said that the claimant continued to suffer from long standing depression.

12. In April 2021, the claimant was off sick with Anxiety, and an occupational health advisor recorded at that time that the claimant described ongoing intrusive depressive symptoms. In that report the advisor said that the prognosis in reactive depressive symptoms was such that employees tended to recover in weeks rather than months and the claimant did make a relatively quick recovery after 5 or 6 sessions of CBT.

13. The claimant returned to work on restricted duties from that period of absence, which lasted about two months, in around June 2021. The claimant attended a formal attendance review with Ms Willis on 24 August 2021 after that period of absence. The claimant was back at work doing her full job by the date of that meeting.

14. Ms Willis considered dismissing the claimant at that point but did not do so. She recorded in the outcome letter sent to the claimant after that meeting that the claimant had been suffering from stress and depression since she was 18. She said that the claimant's attendance was not satisfactory, but her absences were "reasonable in the circumstances." The claimant was not given any formal warnings under the respondent's Attendance Management Policy but was informed that if she did not maintain a period of

regular and effective service, she would be called back to a meeting at which dismissal would be an option.

15. In the notes of that meeting, the claimant is recorded as saying that there was no stability – she needed a work area in which she could settle and not be moved from one area to another. On her return at that point she had worked in Lateral Flow Testing – which was a short-term measure introduced during the COVID-19 pandemic – and she was happy with the day-to-day structure in that role.

16. The claimant had one day of sick leave in November 2021 in relation to low iron.

17. The claimant reported sick, and was off work for a short period, with sciatica on 20 June 2022. The claimant's anxiety and depression were under control by this point, and she had not had any absences related to that since August 2021.

18. The claimant was at work on 1 July 2022 and there was an incident with the custody manager, Mr Adam Wakelin. The claimant was, from her perspective, wrongly criticised and admonished by Mr Wakelin for something that was not her fault or responsibility. Ms Willis says she was told a different version of events – that in fact the claimant had reacted badly to being told what to do and some informal management intervention would have been required at some point to address the claimant's behaviour. We make no decision about what actually happened, but the issue was never addressed and the claimant's version of events was never considered.

19. The claimant went off sick from 4 July 2022 following this incident. The claimant reported to Ms Waltham (security governor) initially that she was not in a good place and did not feel valued.

20. On 11 July the claimant told her line manager, Michelle Drayton, about what had happened on 1 July and how it had made her feel. The claimant was absent with anxiety and/or depression at this point.

21. The claimant attended an occupational health meeting on 15 July 2022. The claimant was assessed as experiencing severe symptoms of anxiety and depression which the claimant reported were caused by work related issues. The claimant reported significant mental ill health and the occupational health report said that the claimant:

    "was likely to remain symptomatic until the perceived work-related issues have been resolved. I suggest management look into resolving these issues as soon as possible".

22. The advisor was unable to give a timescale for the return to work.

23. Throughout July 2022, on three occasions, Ms Drayton attempted to contact the claimant by phone but was unsuccessful – the claimant said that she did not have any missed calls. When Ms Drayton emailed the claimant to make

contact she replied promptly so we conclude that the claimant did not receive those initial calls.

24. The claimant attended a further occupation health assessment on 4 August 2022. This report described significant psychological symptoms including high anxiety levels. The claimant was not fit for work and the advisor was unable to provide a timescale when the claimant would be fit for work. The claimant was prescribed a higher level of anti-depressant medication and was waiting for counselling.

25. Although the occupational health advisor could not provide a date for a return to work, the claimant was keen to return to work and it was indicated that counselling, for which the claimant was waiting, might help and that with appropriate treatment the claimant may in fact be able to return to work.

26. On 9 August 2022, the claimant contacted Ms Drayton at her request to discuss the claimant's absence. The claimant reported that she was still feeling bad, that she was waiting for counselling, but they managed to complete a stress risk assessment together. At that point, the claimant could not contemplate returning to work.

27. On 17 August 2022 the claimant was invited to a formal attendance review meeting. The claimant was offered the right to be accompanied. The respondent's sickness absence management policy has two different processes for when an employee has returned to work or when they remain off sick. We find that the provision of warnings under the policy only applies when someone has returned to work. They may then be given a warning to improve or maintain their attendance. (Referred to as full and effective service).

28. In the case of someone off long term sick, the process was a series of Formal Absence Review Meetings (FARMs) which would either result in a return to work (possibly with adjustments) or dismissal or demotion. The claimant was in the "FARM" process in which a series of escalating attendance warnings did not apply.

First Formal Absence Review Meeting

29. The first formal attendance review (in this period of absence) took place on 8 September 2022 with Ms Drayton and the claimant, who was accompanied by her trade union representative, Ms Sally Jameson. At the meeting, the claimant said she was beginning to improve, but that she was still anxious coming into the prison. The claimant said that she did not want to remain on operational duties – i.e. working directly with prisoners – and she wanted more consistency in her work. There was a discussion about alternative roles.

30. We find that Ms Drayton said that a move to a non-operational role could be considered, but that this would depend on a role being available and the governor approving it. It was not disputed that Ms Willis never did in fact approve such a role. There was, however, discussion of amending the claimant's duties to limit them to administrative duties, including covering

other administrative duties when necessary and thereby limiting the claimant's operational role. A phased return would be undertaken when the claimant was ready to return. The claimant was clear in this meeting that she did want to return to work.

31. The notes of the meeting were sent to the governor – Ms Willis – to consider arranging a further meeting potentially to consider dismissal or demotion. The minutes of the FARM in September 2022 were never sent to the claimant and she did not have an opportunity to check them.

32. We find that at the meeting on 8 September 2022 there was also a discussion about mediation with Mr Wakelin, but the claimant was told that this could not be done until the claimant returned to work. We have heard no evidence as to why this was the case at that time. The claimant, as far as we can tell, simply accepted the respondent's position on this. We also find that at that meeting, the claimant said that she hoped to return to work by Christmas 2022.

33. In oral evidence, Ms Willis explained her view that it would be difficult to address the issues between the claimant and Mr Wakelin while the claimant was off sick because that would involve challenging the claimant about her behaviour and this may well exacerbate her ill health. This reasoning was not put to the claimant at any point. As it only came up in Ms Willis' evidence to the tribunal, we do not know what the claimant's response to this reasoning would have been.

34. Ms Drayton completed a further referral to occupational health and the claimant attended a further occupational health appointment on 20 September 2022. The resulting report recorded that the claimant had been absent from work from 4 July 2022 with anxiety and depression which was triggered by an incident at work (namely the incident on 1 July 2022). The claimant's medication had been recently increased and the occupational health advisor's assessment indicated that the claimant was experiencing severe symptom associated with anxiety and depression.

35. At this time, the claimant was still waiting for her counselling. The occupational health advisor said:

> "Mrs Kuhlman informs me, of having been into the workplace to meet her line manager and discussed a number of options with her including a transfer out of uniform into an admin position. It Is a decision for management to make in changing Mrs Kuhlman's role within the business.
>
> In my opinion, following assessment today, she remains unfit for work due to her symptoms level.
>
> In my opinion, Mrs Kuhlman requires some counselling intervention to reduce her symptoms to allow a return back to work.
>
> In my opinion, the issues in this case are not primarily medical, with Mrs Kuhlman having a reactive response to the workplace issues she has been exposed to which have impacted upon her mental well-being. I recommend

there is an open and frank discussion about the workplace issues between management and Mrs Kuhlman.

Without management Intervention it is unlikely the issues will be resolved and her absence could continue".

36. The occupational health advisor suggested that the claimant be re-referred to them in four weeks, and we conclude that that was to assess whether the counselling, if it had started, was having any impact on the claimant's fitness for work. At the end of that report, the advisor in fact says, "there is an expectation she could return to work after counselling support" (although they do not suggest a time scale). No further occupational health referrals were made.

37. On 31 October 2022 the claimant was invited to attend a Formal Absence Review Meeting with Ms Willis. She was given the opportunity to be accompanied and the claimant knew that dismissal might be an outcome of that meeting.

Second Formal Absence Review Meeting

38. The claimant attended the final review meeting on 18 November 2022. The hearing was conducted by Ms Willis, the Prison Governor. She was accompanied by an HR consultant, Tricia Anderson and Ms Sarson (Governor secretary) took notes. The claimant attended with her trade union representative, Ms Jameson.

39. There are notes of this meeting but they are brief. Regrettably, the style of these minutes, which is to provide a summary of matters discussed, has the potential to cause ambiguity and confusion in these circumstances. While this style of minuting is perfectly reasonable for recording meetings and action points, where there is a possibility of the content of meeting being subjected to external scrutiny at some point in the future, it would be more helpful to record more clearly, even if not verbatim, what each party says. The meeting was in the region of two hours long and the notes are just less than three pages. This inevitably means that detail and, consequently, nuance is omitted.

40. We have therefore sought to reconstruct the relevant details of the meeting from the evidence we have which is necessarily less reliable than a detailed contemporaneous note or recording. We make the following findings about this meeting.

41. Ms Wilis had access to the notes of the previous FARM, the occupational health reports, the stress risk assessment, the absence management procedure and the keeping in touch notes.

42. The claimant had not been provided with the notes of the meeting of 8 September 2022 by the time of the final meeting or, in fact, at any time since.

43. Ms Drayton did not attend the meeting because she was on night shifts and Ms Wilis believed her attendance would have delayed the meeting. It was

not part of the respondent's policy that Ms Drayton as the claimant's line manager was required to be in attendance, but Ms Willis agreed it would be best practice if she were there.

44. The claimant said that she found it difficult to come to the meeting in the prison.

45. The claimant said that she had started counselling the previous week. Ms Willis did not ask the claimant how her counselling was going.

46. The claimant explained to Ms Willis that she had not used the respondent's counselling service as she had already started the referral process through her GP. The claimant said that she did contact PAM assist (the respondent's counselling provider) a week or two after occupational health recommended it in September 2022 but by that time she had already started the process through her GP. The claimant did not want two sets of treatment running at once.

47. The claimant said that she was not fit for work at that time, although we will return to this.

48. There was then a discussion about whether the claimant could change her duties. The discussion is recorded as follows:

> "Mrs Kuhlman advised that the OSG role was chaotic, and she was struggling with this, there was a discussion with CM Drayton in the previous FARM about potential Admin role. The Governor did explain that is the role of an OSG which Mrs Kuhlman agreed. The Governor asked if Mrs Kuhlman had done Admin work before, Mrs Kuhlman advised that she did do Mercury updates and the Covid testing. The Governor explained that for instance; if she was to go into Business Hub that the expectation would not just be 1 consistent role, there is a variety of roles that need to be completed within the function, however reverted back [to the] discussion previous in the meeting that Mrs Kuhlman advised that she is not fit for work".

49. This note of what has turned out to be an important part of the meeting is brief and ambiguous. Having heard the accounts of the claimant, Ms Sarson and Ms Willis we find that the claimant did raise the possibility of undertaking an admin role and we find that this was something that she considered might help in her return to work. This is consistent with the occupational health reports which Ms Willis had and the claimant had discussed an admin role in those terms in September 2022 with Ms Drayton.

50. Ms Willis understood the claimant's problems with her OSG role to be the fact that it was "chaotic" by which she understood that the claimant could suddenly be taken from one task and put on another.

51. The claimant described at this hearing having to drop one job and do another which could be in another part of the prison. The claimant said in evidence that she sometimes agreed to work a longer shift to ensure the work was covered. The claimant's report (in the letter she sent on 28

December 2022 to Ms Judge) of the disagreements with Mr Wakelin and Mr Rodgers provides some insight into what we think the claimant meant by chaotic. She describes what she perceives as contradictory instructions from managers, and conflicting and competing priorities for different jobs to be done. Ms Willis' evidence was that the admin role was also varied so that she believed that the admin role would not provide any relief from that.

52. We make two further findings about this. Firstly, this was not discussed in any detail with the claimant. We accept Ms Willis' evidence that she explained to the claimant that an admin role would not address the claimant's problems and she said that the claimant's response was something like "right ok". However, Ms Willis quickly then went on to say, it is moot anyway, because the claimant was not fit for work. Ms Willis said that at the meeting in November and at this hearing.

53. The second point is that in our view, having heard the evidence about the claimant's job very briefly, it seems inherently likely to us that there is a difference in the stresses arising on the one hand from having to move from one job to another completely different job in another part of the prison at the drop of a hat and under what appears to be continual pressure of time and on the other hand having to do varied admin tasks, albeit that they might also change suddenly.

54. We accept that we heard no real evidence about what the administrative tasks actually comprised of, so we might be wrong about the difference in pressure based only on the tribunal's industrial experience. However, the fact remains that Ms Willis did not explore the stressors of the OSG job and the possibility of an administrative role in any detail with the claimant – instead she quickly reiterated her view that the claimant was in any event not fit for work and, in our view, dismissed the claimant's suggestion.

55. We also heard, very honestly and openly, from Ms Willis that had an administrative role been a feasible prospect from Ms Wilis' perspective, she would have taken appropriate steps to identify a role including in other prisons in the region.

56. The claimant did say that she was not fit to return to work at that point. She said, in oral evidence that on that day in November, she wasn't fit to return to work given the level of anxiety that she was at, but if she had been given options, it would have given her something to work towards. This position is consistent with that set out in the claimant's appeal document which we will come to and we find that when the claimant said she was not fit to return to work, she meant not fit to return to the OSG job or any other job without proper consideration of the nature of the job and her work related issues.

57. The notes then record that Ms Wilis asked the claimant if any further reasonable adjustments could be made and the claimant said not. It was Ms Willis' evidence that she had addressed reasonable adjustments at the start of the meeting, but we find that she did not. The reference at the start of the meeting to reasonable adjustments was part of the introduction during which Ms Willis was setting out what would be discussed at the meeting, which included reasonable adjustments.

58. We find, therefore, that the claimant had made a suggestion of a reasonable adjustment – being a move to an admin post – and Ms Willis had rejected that as not appropriate because she believed it would not assist the claimant; and the claimant was not fit for work in any event. Although Ms Willis said in evidence that she was not aware at the time that the claimant had any problems dealing with prisoners per se, it is recorded in the notes of the September meeting that the claimant would prefer a non-operational role. Ms Willis then asked if there were any further reasonable adjustments that respondent could make, and the claimant said there were not.

59. It is then recorded that:

> "The Governor and Mrs Kuhlman agreed on what the outcome would be today (dismissal), and the Governor asked if Mrs Kuhlman had seen the figures to which she had".

60. Both counsel submitted that we do not need to make a finding about what was said or meant here but we think we do. It has a material impact on the reasonableness or proportionality of Ms Wilis' decision if the claimant wholeheartedly agreed that dismissal was the right outcome. The claimant's oral evidence about this was not clear – she said she was upset and distressed that day and not clear minded. In re-examination she said that she did not agree to being dismissed but she had to accept it. The claimant was, in our view, keen to return to work in the September 2022 meeting and counselling having just started there was no obvious reason to think that would have changed by the final FARM.

61. Weighed against that is the fact that the claimant did not appeal against her dismissal (discussed below). This could support a finding that the claimant did agree with her dismissal, but it could equally support a finding that she was resigned to the reality of the situation and knew that an appeal would be fruitless.

62. Ms Willis' oral evidence was also unclear. In our view the clearest account she gave was when she said in oral evidence:

> "it felt to me almost like an agreement – the evidence was not sure got anywhere else to go and the claimant said yeah I know – almost a tacit agreement. Didn't say right, but almost accepted".

63. In reality, these two accounts are not far apart, and we find that the claimant accepted that she was going to be dismissed, but she did not agree it was the right outcome. Ms Willis heard that acceptance and we think it is likely she has mis-interpreted that as agreement to the decision.

64. We make the further additional findings about that meeting.

65. The claimant and her TU rep did not at that meeting raise any issue about the specific issue with Mr Wakelin, about resolving those issues or having workplace mediation. The claimant did not say that she hoped or expected to return to work in December, although Ms Willis did know that the claimant's fit note ran out in December.

66. Ms Willis made the decision to dismiss the claimant before she adjourned the meeting to consider it. She said that was because, effectively, she had reached a conclusion and there was no point in dragging out the decision.

67. The meeting was then adjourned after Ms Willis had told the claimant she would be dismissed. Ms Willis does not explain the purpose of the adjournment in her statement but says that when she returned, she confirmed that the outcome was dismissal. The claimant was offered the chance to work her notice or to be paid in lieu and the claimant opted for a payment in lieu so that her dismissal was effective immediately on 18 November 2022. Ms Willis also considered whether the claimant might be entitled to a payment under the civil service compensation scheme and, if so, how much. We have no details of the scheme and it is not a matter that we can consider directly, but Ms Willis' decision was that the claimant would be entitled to a payment at 75% of the maximum. The amount of the payment depends on the extent to which, amongst other things, the claimant has complied with the respondent's attendance management policy and showed a commitment to return to work. The claimant and her trade union representative were not happy with this decision so Ms Willis said she would not make that decision at that meeting but would consult with Ms Drayton and convene a further meeting to discuss that decision specifically.

68. The claimant was not given a copy of the minutes of the meeting of 18 November 2022 to check.

69. The meeting about the civil service compensation scheme took place on 28 November between Ms Willis, Ms Drayton and Ms Jameson. The claimant did not attend. Ms Wilis did not deviate from her initial decision that 75% was payable on the basis that the claimant had failed to access PAM assist (resulting in a delay to the counselling); she had not kept in contact with her manager; and that the claimant had had to be chased for her fit notes. It is not necessary or appropriate for us to resolve any disputes of fact specifically about that as it is not part of our role to do so, we simply record the disputes.

Outcome letter

70. The claimant was sent her outcome letter dated 28 November 2022 and we find that she received it between 12 and 14 December 2022.

71. In the letter, Ms Willis summarised the reasons for her decision – that the claimant had been absent since 2 July 2022, that the occupational health report from September 2022 stated that the claimant remained unfit for work, that the claimant's fit note expired on 12 December 2022, that the claimant could not say when she would be fit for work, that the claimant had recently commenced counselling through her GP and that the claimant did not wish to be considered for ill health retirement. Ms Willis concluded that the respondent could not sustain the claimant's attendance due to the impact on service levels and that she could not recruit a replacement when the claimant remained employed.

72. She said:

"Taking account of all the information available to me I have concluded that your employment with HMP & YOI Moorland, will be terminated because you have failed to maintain an acceptable level of attendance and you [are] unable to return to work within a reasonable timescale".

73. This, we find, was Ms Willis' real reason for dismissing the claimant.

74. Ms Willis went on to say:

"We discussed all the points above, and I considered an alternative post in the admin hub before reaching this decision but do not believe this would affect your ability to maintain an acceptable level of attendance or return to work in a reasonable timescale due to the changing nature of the admin role. In essence, the role itself is not the issue, but you are not fit to return in any capacity at this time".

75. This reflects our findings about the conversation in the final meeting about the admin role – that Ms Wilis had rejected that as a suitable option.

76. Ms Willis also set out her decision about the compensation scheme in the letter. The claimant was entitled to appeal both the decision to dismiss her and the decision about the compensation scheme. There are two different appeal routes against each of those decisions (dismissal and compensation) and in our view that is reasonably clear in the letter.

77. There is, however, very limited information about how to appeal the compensation – it says that the claimant may appeal against the level of compensation to the civil service appeal board within 21 days of the effective date of dismissal (identified in that letter as 18 November 2022). It does not say how you do that or provide any contact details in the body of the letter. We note that by the time the claimant received this letter the time limit for appealing had passed, but we have no information about any provision for extending time to appeal in such circumstances.

78. The appeal against dismissal must be made to a Helen Judge, a more senior manager, within 10 working days of the date of receipt of the dismissal letter.

Appeal

79. The claimant wrote to Ms Judge on 28 December 2022. It is not immediately obvious from the content of the letter whether it is an appeal against dismissal, compensation level or both. The claimant was clearly expressing dissatisfaction with the decision to dismiss her – she said:

"the establishment and its management failed me in a major way here by not addressing the issues I raised which caused me to go off sick. Had these issues been addressed right at the outset, as suggested by [occupational health], I may very well not be in the position I find myself in today and more crucially, may not have suffered the mental stress and anxiety that I did throughout the whole of my absence.

I will now draw your attention to the OH Report dated 20 September 2022, where [the occupational health advisor] wrote, "I recommend that there is an open and frank discussion about the workplace issues between management and Mrs Kuhlman. Without management intervention, it is unlikely the issues will be resolved, and her absence could continue."

In my view both of these reports and recommendations have been totally ignored and had they not been ignored, I may have been able to save my job and limit the mental breakdowns I have suffered. These issues were not even mentioned in my Capability Hearing".

80. We have made our findings about what was discussed in the hearing and we do not repeat them. However, at this stage it was clear that the claimant was raising the issue of a failure by Ms Willis to address her work-related issues and expressing her dissatisfaction with that.

81. The letter concludes, however:

"I would implore you to reconsider my compensation award on the grounds that my sick record offers an insight into the immense pressures I have endured over the last 3 years, some of which has been accepted by management and crucially, that the issues I have talked about with CM's Rodgers and Wakelin have been totally ignored, never discussed despite OH requesting as such".

82. The claimant went on to say that she believed she had not been treated fairly and that she loved her job and now it is gone.

83. The claimant did not anywhere in that letter say that she was then, or would at any point in the future, be fit for work.

84. On 3 January 2023, the claimant sent an email to Ms Trinity Catch, Ms Judge's secretary, and said:

"I am not disputing my dismissal. What I am disputing is my compensation payout".

85. In oral evidence, the claimant confirmed that she was not seeking in this appeal to get her job back. Nonetheless, after some correspondence, the letter was treated as an appeal against dismissal. Ms Catch invited the claimant to provide more new evidence in support of her appeal so that Ms Judge could decide whether to exercise her discretion to allow the appeal out of time, but the claimant did not provide any further evidence. She said again in an email of 12 January 2023 that she was not appealing against the dismissal. We find that the claimant was appealing only against the reduction in compensation under the civil service compensation scheme. In our view, this was consistent with the claimant being resigned to her dismissal rather than agreeing that it was the correct outcome.

86. We make the following additional findings of fact.

87. There were 60 OSG jobs at the prison. At the relevant time, there were 6 vacancies, 2 people off sick (we do not know if that included the claimant or

was in addition to the claimant) and 2 people on restricted duties. If there were not enough people on shift to do all that needed doing, the respondent could ask people to volunteer to work more or reduce some of the jobs that were done (dropping jobs). The consequences of dropping jobs are serious in a prison. For example, stopping the post room means prisoners do not get their post leading to disharmony. A reduction in gate security presents an obvious security risk. Less cover means more restrictions on prisoners – longer time locked up. Asking people to volunteer to work longer shifts causes pressure on staff.

88. There was a government instruction that overtime could not be used to cover sickness absence. It is the respondent's policy that a person could not be recruited to cover the claimant's sickness absence unless and until she was dismissed or redeployed.

89. Finally, the claimant was not fit for work between February and May 2023 and she was well enough to start work again in May 2023.

Law and conclusions

90. We address first the claim of discrimination arising from disability under section 15 Equality Act 2010. This says:

(1) A person (A) discriminates against a disabled person (B) if—

(a) A treats B unfavourably because of something arising in consequence of B's disability, and

(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

91. It was agreed that the claimant was treated unfavourably by being dismissed, that this was because of her sickness absence and that her sickness absence arose in consequence of her disability. The respondent also agrees that they knew the claimant was disabled by reason of anxiety and depression at the date of her dismissal. We do not, therefore, need to consider the law relating to those issues any further.

92. The matter in dispute is whether the dismissal of the claimant was a proportionate means of achieving a legitimate aim.

93. The two legitimate aims relied on by the respondent are:

a. Maintaining a fair effective and transparent absence management procedure/policy;

b. Fulfilling its statutory duty of maintaining a safe secure environment for those serving custodial sentences and protecting the public.

94. It is a matter for the judgment of the tribunal whether an aim is legitimate provided it is legal, not discriminatory and it represents an objective

consideration. In this case, there was no challenge by the claimant to the legitimacy of the aims and in our judgment the aims are legitimate.

95. The real issue is whether the decision to dismiss the claimant on 18 November 2022 was, in all the circumstances, a proportionate means of achieving those aims.

96. We were referred by Ms Mellor to the case of *O'Brien v Bolton St Catherines' Academy* [2017] EWCA civ 145. In that case, the claimant had been off sick for just over a year by the time of her dismissal. She was dismissed and at her appeal a few months later she brought evidence that she was fit for work and would be fully better within a couple more months. The respondent refused her appeal on the basis that it was not satisfied with the medical evidence.

97. Ms Mellor relies on that case as an example of the sort of evidence that might be required to show proportionality and legitimate aim. In our view that case is of limited assistance. As Ms Mellor says, each case is fact specific. In that case the employee had been off for a year, by the time of the appeal was fit for work but the respondent had concerns about the reliability of the evidence showing the claimant's fitness for work. In that case, the tribunal was entitled to conclude that it was disproportionate not to wait a little longer for further evidence before dismissing the claimant's appeal.

98. Lord Justice Underhill observed in that case:

"The proposition that it was unfair of an employer to decide, after a senior employee had already been absent for over 12 months and where there was no certainty as to when she would be able to return, that the time had come when the employment had to be terminated, seems to me to require very careful scrutiny. The argument 'give me a little more time and I am sure I will recover' is easy to advance, but a time comes when an employer is entitled to some finality".

99. However, he also acknowledged that it is a matter for the tribunal to decide itself, objectively on the evidence before it whether the dismissal was proportionate.

100. We refer also to the recent case of *Boyers v DWP* [2022] EAT 76, a decision of the president of the Employment Tribunal in the EAT. That, in our view, summarises helpfully the test, which having heard counsel's submissions, we do not believe is controversial. Judge Clark said:

"When assessing whether unfavourable treatment can be justified as a proportionate means of achieving a legitimate aim, the discriminatory effect of the treatment must be balanced against the reasonable needs of the employer. The treatment must be appropriate and reasonably necessary to achieving the aim. The more serious the impact, the more cogent must be the justification for it. It is for the ET to undertake this task; it must weigh the reasonable needs of the employer against the discriminatory effect of the treatment and make its own assessment of whether the former outweigh the latter".

101. Reference to the reasonable needs of the employer means the needs of the employer as expressed through the legitimate aims. When balancing the discriminatory effect of, in this case, dismissal against the legitimate aims we must consider whether something else less discriminatory might have been done instead. This could include whether any potential reasonable adjustments have been made to allow the claimant to return to work. We do not agree with Ms Mellor, however, that in this context it is always helpful to consider the individual elements of a claim under section 20/21 of the Equality Act 2010 rather than considering in a more general sense whether anything less discriminatory might have been done first.

102. We consider the second legitimate aim first because it is the one addressed for by the respondent.

    Fulfilling its statutory duty of maintaining a safe secure environment for those serving custodial sentences and protecting the public.

103. We wholly accept that it is necessary to maintain an adequate complement of staff to meet the difficult demands of running a safe and humane prison. The barrier to this, in so far as the claimant's absence was concerned, was the inability to appoint someone to cover the claimant's absence. This was because of the respondent's wholly reasonable position, in our view, that they could not recruit a replacement while someone is still occupying the job, even if they are not fulfilling it. It is obvious, however, that there must be a period in any organisation during which an employer ought to be able to sustain a period of absence. To take an extreme example, it would not have been proportionate to have dismissed the claimant after one day's sickness absence. The question is then, at what point does it become proportionate.

104. In our view, it is the point at which the respondent can no longer reasonably be expected to wait in the hope that the claimant can return. Answering that question will include consideration of the respondent's resourcing issues. The evidence we heard was that the respondent was running a service requiring 60 people with either 51 or 52 people undertaking the whole of their duties.

105. The claimant had by the time of her dismissal been absent for 210 days in 24 months and had been continually absent for 4 ½ months since 2 July 2022. Dismissing the claimant would have allowed the respondent to recruit a replacement and, if that recruitment was successful, increase its staffing.

106. To that extent, dismissing the claimant is a means of seeking to achieve the legitimate aim. The real question is whether something less discriminatory could have been done. In our judgment, it could.

107. The occupational health evidence was that the claimant's health may improve sufficiently to return, or identify a date of return, to work after about 4 sessions of counselling. This had been the case for a while –certainly since the occupational health report of 20 September 2022 – and counselling had just started at the date of dismissal. There was no good reason why the claimant could not be given a further 4 weeks to find out what the actual effects of the counselling would be. Ms Willis' explanation for not delaying was that the claimant had been off a long time and the

claimant could not say if or when she would be fit for work, and she did not ask for additional time.

108. It might be that the claimant would not be fit after 4 weeks or another period, but the occupational health advice was that it was possible. It was incumbent on Ms Willis to let the claimant see if the counselling would have an impact. As an experienced and very senior manager, she ought to have asked the claimant if it might help to give the claimant a short period to see what impact the counselling would have.

109. Although we heard about the impact on the respondent of the claimant's absence generally, we did not hear what difference a further 4 weeks (or other relatively short period) would make to the respondent.

110. Given that there was a possibility of the claimant improving, as weighed against the impact on the claimant of being dismissed, it was disproportionate not to allow the claimant a chance to see if after a short period she might be well enough to return to work or at least have a date by which she was likely to return to work. At that point the outcome might have been dismissal, but by then it would have been more likely to be proportionate as the counselling would have had a chance to be effective.

111. We conclude that the respondent had been managing the claimant's absence for 4 months and it is unlikely that a further four weeks would have a substantial impact. The respondent also had, as a matter of fact, the ability to recruit a further 6 people because it had that many vacancies in the claimant's department but had not done so. That would have been a more proportionate way of alleviating any immediate staffing problems and we did not hear any evidence why those vacancies had not been filled.

112. In considering whether it would have been proportionate to give the claimant an opportunity to undertake more counselling, we place no weight on the fact that in the end the claimant was not fit for work until May 2023 because she had in the meantime been dismissed. It is obvious that being dismissed will have a different impact on someone's mental health than an opportunity to have treatment, recover and return to a job they say they love.

113. The occupational health evidence was also that the claimant's prospects of returning to work would be improved by resolving the workplace issues. This meant the issues with Mr Wakelin and the issues with the OSG job more generally. Ms Willis did not properly consider these at the meeting on 18 November 2022.

114. There was no good reason advanced by Ms Wilis as to why mediation with Mr Wakelin (or any other consideration of the claimant's workplace issues for that matter) could not start before the claimant was back at work and it was obvious from the occupational health reports that these issues needed to be resolved before the claimant would be fit for work.

115. Ms Willis did not know the detail about the issues with Mr Wakelin at the final hearing because the claimant did not raise it, Ms Drayton was not there and it was not recorded in the minutes of the September meeting. However,

occupational health were clear that there were workplace issues to be resolved and Ms Willis did have copies of all the occupational health reports.

116. It was, in our view, incumbent on Ms Willis to explore what these workplace issues were – what were the barriers to being fit for work if not medical (as clearly stated in the occupational health reports). She did not do so. Instead, she adopted the position that as the claimant was not fit for work, nothing more could be done until she was. This was referred to as a chicken and egg situation but it is more like putting the cart before the horse. Ms Willis required the claimant to be fit for work before she would consider exploring issues with the claimant that would (or might) help her become fit for work. This was not a reasonable, or proportionate, response to the claimant's problems.

117. Ms Willis was concerned about the impact of exploring the issues with Mr Wakelin on the claimant, but this was from the perspective that she was already satisfied the claimant's behaviour needed addressing. She had made up her mind the claimant was in the wrong in the incident on 1 July 2022 without hearing the claimant's version of events (or in fact knowing what the specific issues were). This, in our view, is not a proportionate response.

118. The second workplace issue related to the nature of the OSG role. This was mentioned but was dismissed by Ms Willis. Again, in our view, this required more consideration by Ms Willis. Ms Willis decided that an administrative role would not work for the claimant, or address the claimant's problems with the OSG role, on the basis of assumptions about the claimant's problems. Ms Willis seems to have overlooked that the claimant said that a non-operational role would be preferable in the September meeting with Ms Drayton. A proper discussion and consideration of whether <u>if</u> an administrative role was available, that would improve the claimant's chances of returning to work was required. Again, it was disproportionate to require the claimant to be fit for work before exploring with the claimant whether a different role would help her back to work. This is another cart before the horse situation.

119. In was obvious from the occupational health reports that the non-medical barriers to a return to work needed to be explored first, while the claimant was off sick. There was a missed opportunity to do this before the final hearing in November but there was an opportunity for Ms Willis to remedy this at the final hearing and she did not do so.

120. We are mindful of the respondent's argument that the claimant had been off a long time, and that this was the second period of relatively lengthy absence with two shorter periods in between, and that even the claimant was saying she was not fit for work. We also bear in mind Lord Justice Underhill's comments, although by the date of the hearing the claimant had been absent for 4 ½ months, not a year.

121. However, in this case the claimant believed she was not fit for work without addressing the issues. A short period to let counselling have a chance to be effective and a proper discussion with the claimant about what the

workplace issues were and whether addressing them might improve the claimant's chances of returning to and remaining at work in the future would have been proportionate. The failure by Ms Willis to address those issues meaningfully with the claimant was disproportionate.

122. In our judgment, therefore dismissing the claimant on 18 November 2022 was not a proportionate means of achieving the second legitimate aim.

123. We consider the first legitimate aim:

    a. Maintaining a fair effective and transparent absence management procedure/policy.

124. As we understand it, it is the respondent's case that dismissing the claimant achieves this aim by consistently applying the policy and, particularly, is in accordance with paragraph 2.98 of the policy which requires dismissal where there are no further adjustments to be made. We can deal with this shortly. We have found that the claimant was dismissed in circumstances where the respondent ought not to have dismissed her without giving a further period to explore workplace issues and assessing the impact of counselling. This was unfair to the claimant so that dismissing the claimant in the circumstances when she was dismissed does not achieve the aim of maintaining a fair absence management policy.

125. There were also potential further adjustments available. Firstly, to the policy itself in waiting a little longer and secondly in terms of a potential redeployment into an administrative role as discussed at length above. All adjustments had not been exhausted so the policy was not in any event properly applied.

126. Finally, we address Ms Willis' understanding that the claimant had agreed to her dismissal. We have found that the claimant did not agree – she accepted it. We consider that Ms Willis' interpretation of the claimant's apparent agreement was not reasonable. Had she adjourned to think about the case before making a decision to dismiss and reviewed the earlier meetings and occupational health reports, Ms Willis was likely to have concluded that the claimant was *accepting* her fate, rather than *agreeing* with it. It would also have given Ms Willis an opportunity to reflect on the content of the occupational health reports. We do not know if this would have caused her to make a different decision, but in our view the claimant's *apparent* agreement to the dismissal does not support a proposition that the dismissal was proportionate.

127. For these reasons, dismissing the claimant was not a proportionate means of achieving the first legitimate aim.

128. The claimant's claim that she was treated unfavourably because of something arising on consequence of her disability is therefore well founded and is upheld.

Unfair dismissal

129. Under section 94 of the Employment Rights Act 1996 an employee has the right not to be unfairly dismissed by their employer. Section 98 of the Employment Rights Act 1996 says that it is for the respondent to show the reason for the dismissal and that, as far as is relevant in this case, it is for a reason falling in section 98(2). One of those reasons is that the dismissal relates to the capability or qualifications of the employee for performing work of the kind which she was employed by the employer to do.

130. We have not heard any argument that the claimant was not dismissed because of her ill health absence and we have, in any event, found that that was the reason. This is a reason related to capability which is a potentially fair reason in section 98(2) and the claimant was dismissed for a potentially fair reason.

131. Section 98(4) ERA 1996 says:

132. Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

    (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

    (b) shall be determined in accordance with equity and the substantial merits of the case.

133. When considering the reasonableness of the decision to dismiss, the following factors are relevant:

    a. The nature of the employee's illness

    b. The prospects of the employee returning to work and the likelihood of the recurrence of the illness

    c. The need for the employer to have someone doing the work

    d. The effects of the absence on the rest of the workforce

    e. The extent to which the employee was made aware of the position

    f. The employee's length of service.

134. When considering whether the decision to dismiss the claimant was fair, we remind ourselves that we must not substitute our own decision. The question – at every stage of the process – is whether the acts and decisions of the respondent were within the band of reasonable responses of a reasonable employer.

135. Finally, we have considered the case of *Polkey v AE Dayton Services Ltd [*1988] ICR 142 in relation to the question of the impact of an alleged failure to follow a fair process. In that case it was held that

    a complaint of unfair dismissal will not succeed merely because of the manner in which the dismissal was carried out. A failure to observe a proper procedure may make a dismissal unfair, but this is not because such failure by itself makes the dismissal unfair, but because the failure, for example, to give an employee an opportunity to explain may lead the tribunal to the conclusion that the employer, in the circumstances, acted unreasonably in treating the reason for dismissal as a sufficient reason. The tribunal will look at the practical effect of the failure to observe the proper procedure in order to decide whether or not the dismissal was unfair.

136. We must consider the impact of any procedural default on the fairness overall. The question is, did the failure to strictly follow the policy mean that the decision to dismiss was not within the band of reasonable responses of a reasonable employer?

137. Ms Mellor fairly acknowledged that if the dismissal was held to be discriminatory, it would also be unfair and we agree. Although it is not always the case, in this case we have already found that the employer could have waited longer and dismissal was therefore not within the band of reasonable responses of a reasonable employer at the time. For that reason, the claimant was unfairly dismissed.

138. For the sake of completeness, however, in our view the occupational health evidence was clear that counselling may have a positive impact and resolution of workplace issues was required before the claimant could return to work as already discussed. No reasonable employer, having that information, would have taken the decision to dismiss the claimant without first exploring these issues, as we have already explained. We refer again to the fact that Ms Willis did not adjourn the hearing to reflect on those reports and the notes of the earlier meeting before making her decision to dismiss the claimant.

139. Secondly, in our view the failure to provide the claimant with a copy of the notes of the September meeting combined with Ms Drayton not attending the November meeting meant that matters the claimant had discussed with Ms Drayton but which were not recorded in the notes were not before Ms Willis.

140. In our judgment, if Ms Drayton had attended the November meeting there is a possibility that the meeting would have gone differently. The claimant had a good relationship with Ms Drayton so she might have felt differently at the meeting and it is wholly possible that a more detailed discussion of what had occurred at the September meeting would have been had.

141. This could have resulted in a more meaningful exploration of what the workplace issues were, what the claimant's problems with the OSG role were and what were the prospects of a December return as the claimant had hoped for in September. Ms Willis agreed that it would be best practice for the line manager to attend the FARM.

142. Ms Willis' decision not to invite Ms Drayton was because she was on night shifts. While this might have made arranging the meeting more difficult or caused a delay, we have not heard that it was impossible to arrange or that Ms Willis had discussed Ms Drayton's attendance with the claimant or Ms Drayton.

143. Failing to undertake enquiries about Ms Drayton's attendance or considering alternative arrangements for the meeting in all these circumstances was outside the range of reasonable responses of a reasonable employer.

144. In respect of the failure to provide the notes of the September meeting, if the claimant had seen these notes, she might have been reminded that she had specifically said she would prefer a non-operational role previously and she would be better equipped to explain the benefit of an administrative role to Ms Willis.

145. In so far as these decisions, or oversights, can be said to amount to a procedural failing, they have in our view had an adverse impact on the fairness of the decision to dismiss the claimant for all the reasons we have explained.

146. For these additional reasons, the decision to dismiss the claimant was unfair and the claimant's claim of unfair dismissal is well founded and upheld.

147. We have not considered at this stage what chance there was that the claimant might have been dismissed fairly and in a non-discriminatory manner had a different process been followed, or after a period to see what the impact of counselling or resolution of workplace issues might be. It was agreed that the start of the hearing that we would consider remedy only and further evidence is required on these issues. Remedy, including these issues, will therefore be considered at a further hearing.

Employment Judge **Miller**

Date: 25 January 2024