



# EMPLOYMENT TRIBUNALS

## BETWEEN

**Claimant** and **Respondent**

**Miss J. Boswell**

**HM Land Registry**

**Held at: Exeter**

**On: 29-31 January,  
1-2, 5 February 2024**

**Before: Employment Judge Smail  
Mrs V. Blake  
Ms E. Smillie**

### **Appearances**

**Claimant:** In Person  
**Respondent:** Mrs S. Hornblower

## REASONS

1. The Claimant was employed by the Land Registry ('the Respondent') between 27 April 1992 and 7 June 2022. That is 30 years' public service, which we acknowledge. The Claimant started aged 19 and left aged 49. Latterly, from 2012, she worked at an Executive Officer Grade, as Learning and Development Officer. Her duties included the identification and booking of training courses for employees of the Respondent with training providers, often external. She had the responsibility for arranging for the payment of the external courses.
2. The role fell within the Office of Digital, Data and Technology, specifically the section concerned with the provision of Capability, Learning and Development activities.
3. She was dismissed ostensibly for lack of capability. She was paid in lieu of notice for 13 weeks, along with the relevant holiday pay and a severance payment under the Civil Service Compensation Scheme of £13,565. That represented 25% of the maximum 2 years' salary payable under the scheme, reduced for contributory factors.

4. It is accepted by the Respondent that the Claimant has been disabled at all material times with Obsessive Compulsive Disorder, anxiety and depression, and knowledge of the same is conceded from 26 September 2018, the date of an Occupational Health ('OH') Report.
5. The case has been significantly case managed. The claim was presented on 22 July 2022. ACAS dates were 23 to 27 June 2022. There was a Preliminary Hearing before EJ Midgley on 14 June 2023. It was agreed at that hearing to divide off all issues other than those that related expressly to the dismissal. At a further preliminary hearing before EJ Roper on 30 October 2023, the allegation that redeployment was a reasonable adjustment flowing from a discriminatory PCP was withdrawn.

### **THE ISSUES**

6. The Preliminary Hearings identified the issues set out in the Appendix to these Reasons. One reason why we have focused on the events surrounding dismissal in the hearing was that it was common ground that the Claimant had to be redeployed. This was because there had been an irretrievable breakdown in the relationship between the Claimant and the managers of her section within the Office of Digital, Data and Technology. The issues have to be considered against the background of this agreed position.

### **THE HEARING**

7. On behalf of the Claimant, we heard from Mark Kelly, the internal union rep; Caroline Bray, a colleague; and the Claimant herself. From the Respondent, we heard from Colin Mitchell, Senior Land Registry Executive, who dealt with the attendance appeal; Jonathan Mudford, Senior Delivery Manager, who dismissed the Claimant under the performance management policy; Stuart Brown, Head of the Office of Digital, Data and Technology, who was the dismissal appeal manager; Sam Richards, HR Consultant (Managers' Advice Service); and Jon Cocking, Deputy Director of HR, who for a period oversaw an informal attempt to redeploy the Claimant. There was a bundle which started at 1331 pages long. There were sundry additions in the usual way.

### **THE LAW**

#### **Unfair Dismissal**

8. The general law of unfair dismissal is set out under section 98 of the Employment Rights Act 1996:

**98 General.**

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

- (a) the reason (or, if more than one, the principal reason) for the dismissal, and
- (b) that it is either a reason falling within subsection (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.

(2) A reason falls within this subsection if it—

- (a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,
- (b) relates to the conduct of the employee,
- (c) is that the employee was redundant, or
- (d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

(3) In subsection (2)(a)—

- (a) “capability”, in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and
- (b) “qualifications”, in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.

(4) 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.

9. Whilst capability is the primary reason relied on by the Respondent, irretrievable breakdown has been mentioned in the alternative. Gallacher v Abellio Scotrail Limited UKEATS/0027/19/SS is a case that is illustrative of irretrievable breakdown of an employment relationship as being some other substantial reason and a potentially fair reason for dismissal. In that case a dismissal, the reason for which was irretrievable breakdown in relationships, was found to be fair even though there was no procedure over and above the communication of the decision to dismiss. Per Choudhury J:

This was a case involving two senior managers who needed to be able to work together effectively in order to deliver what the business required at a critical juncture. The Tribunal considered that the Claimant was not interested in retrieving the relationship at the time: see [255]. That conclusion was supported by, amongst other matters, the findings that neither individual had trust and confidence in the other; that the Claimant had been “*truculent*” towards Ms Taggart in relation to the recruitment issue; that the Claimant had been unable to put matters behind her and move on; that longstanding issues between them remained unresolved even at 11 March 2017; and that Ms Taggart genuinely believed that there was an irretrievable breakdown in relations.

10. The approach to assessing reasonableness in unfair dismissal law is illustrated by the guidance given in Iceland Frozen Food v Jones 1982 IRLR 439 EAT to the effect that the starting point should always be the words of Section 98(4) themselves. In applying this section an Employment Tribunal must consider the reasonableness of the employer’s conduct not simply whether the Employment Tribunal consider the dismissal to be fair. In judging the reasonableness of the employer’s conduct an Employment Tribunal must not substitute its decision as to what was the right course for that of the employer. In many though not all cases there is a band of reasonable responses to the employee’s [capability] within which one employer might reasonably take one view whilst another quite reasonably take another. The function of the Employment Tribunal as an industrial jury is to determine whether in the particular circumstances of each case, the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair. If the dismissal is outside the band, it is unfair.

#### Discrimination Arising from disability

11. Discrimination arising from disability is provided for under Section 15 of the Equality Act 2010. That provides at subsection (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.

Failure to make reasonable adjustments

12. Section 20 of the Equality Act 2010 sets out the duty to make reasonable adjustments. By subsection (2) the duty comprises of the following three requirements. We are concerned with the first only which is provided for at subsection (3). The first requirement is a requirement where a provision, criterion or practice (PCP) of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to avoid the disadvantage. Substantial here means more than minor or more than trivial.

**FINDINGS OF FACT ON THE ISSUES**

Performance Management warnings

13. On 4 February 2021 the Claimant was warned by her line manager Joanne Sarson for 'issues impacting on the immediate team and wider'; namely: a) using the Government Procurement Card ('GPC') for higher value Learning and Development despite instruction to do otherwise leading to the incurring of unnecessary VAT payments; b) use of the planner spreadsheet and pipeline tools; c) working 'visibly' within the team and sharing communication; d) 'maintaining a proper and professional manner' when working with management and the team. There was a review period of 2 months.
14. A performance improvement plan was put together. Three areas were identified. A) Ensuring the accuracy of the L&D planner, spreadsheet and pipeline. B) Ensuring L&D is purchased according to team guidelines. C) Working visibly with the team, communicating positively and sharing information.
15. On 26 May 2021 a 'final warning' was issued by Amanda Light (Joanne Sarson's line manager; the Claimant's second line manager). The Claimant was said to be continuing to challenge the team guidelines on procurement; there was lack of acceptance of using the team tools, such that planner or spreadsheet was not updated in a timely fashion; still reluctant to work visibly within the team; not able to listen to - or act on - feedback and perceive it as criticism. There was a review of one month.
16. The Claimant was off sick, save for short periods, from the date of the final warning to 14 January 2022.

17. On 27 April 2022 Clare Ashcroft conducted a review of the final warning stage, given, the passage of time. Clare Ashcroft repeated the position that work was not at a satisfactory level because there was no evidence of any of the three areas on the PIP having been achieved. Reference was made to the possibility of redeployment. Clare Ashcroft stated that the Claimant had turned down alternative roles or that they had been deemed unsuitable for experience and qualifications reasons. Her case was going to final determination. That was to be Jon Mudford on 11 May 2022.

### Occupational Health Reports

18. On 26 September 2018 Janet Dyson, an OH adviser, noted that the conditions of OCD, anxiety and depression had been in place for 10 years. Flaring up of symptoms was down to personal and work-related stressors. At that stage adjustments within the role and the provision of identified equipment were the recommendations. The Claimant was fit to perform her role.
19. On 22 June 2020, Jane Andrews, OH adviser, confirmed that the Claimant was fit for work but had experienced work-related stress and exacerbation of anxiety disorder. She required management support. There was no medical reason for performance or attendance to be impaired.
20. On 13 January 2021, Sandra Wood, OH adviser, stated the Claimant's problems were work-related and would be unlikely to resolve with work issues continuing. The Claimant was fit to work in her current role with no adjustments.
21. On 11 May 2021, Kerry Freer, Consultant Occupational Physician, reported that the Claimant was medically fit to work without adjustments required for her mental health.

'I do not think the behaviours currently observed in work and her issues with regards to following work processes and guidance is secondary to her health; rather she is unhappy and disagrees with what has happened in her role...

'Her perceptions of issues at work and struggling to accept the changes that have occurred appear to be having a negative impact on her mental health in general and seem to be resulting in negative behaviours being observed at work.'

Counselling was recommended.

22. On 30 January 2022 and subsequently amended on 9 February and 16 February 2022, Dr Sadagopan Varadarajan, Medical Director and Consultant Occupational Health Physician, recorded that the Claimant had requested to move to a different area of the Respondent. He was asked -

'Given that the only situation Jane wants to the current situation is a move, and currently no redeployment option is available, what is the likelihood of Jane being able to return to work to her current role?'

He replied –

‘This is an employment matter and not a medical issue.’

‘As for reasonable adjustments, the employer could explore using a different line management chain to address issues.’

23. We observe that the latter point had to mean redeployment because there was no basis for moving Joanne Sarson and Amanda Light.

The Claimant’s grievance dated 25 March 2021

24. The Claimant’s grievance alleging bullying against Sarson and Light, and working in an unsafe oppressive environment, was rejected by Amy Baxter on 22 June 2021. Her recommendation was further mediations. The Claimant had already had one mediation with Joanne Sarson on 3 and 4 August 2020.

25. Sophie Ford had upheld Amy Baxter’s decision on appeal in August 2021, but recommended redeployment or a new line management chain. Again, this can only mean redeployment because no adverse findings were made against Sarson and Light. Clare Ashcroft had come in with the intention of being a temporary line manager to navigate the PIP. She started in October 2021. The Claimant herself said she could not work with Sarson and Light.

Downgrading, redeployment (or other sanction)

26. The relevant paragraph in the management of performance policy, in respect of options open to the manager deciding what to do with an employee who had not complied with performance warnings (i.e. at stage 3 of the process) provided: -

The Deciding Officer may wish to consider offering a voluntary downgrade or redeployment to another role as an alternative to dismissal. Check with HR first, to confirm whether this is possible. The team member must agree and there must be a reasonable prospect of them performing to an acceptable standard at the lower grade or in another role. Alternatively, discuss alternative sanctions with HR if these would allow them to improve their performance.

27. As to downgrading: the Claimant made it clear that she would not entertain downgrading, even if there was pay protection in the sense that her pay in a downgraded post would be her old pay until such time as the pay for the downgraded post caught up with what she was paid in the L&D role. The Claimant’s position on downgrading was first stated in a discussion with Clare Ashcroft on 19 January 2022. She rejected Registration Officer roles on an AO grade, a grade lower than her EO grade. The Claimant stated she had ‘earned her EO grade’. She repeated that position with Jon Cocking on 25 March 2022. Mr Cocking was conducting an informal review of the redeployment possibilities in his capacity as Deputy Director of HR. The Claimant emailed –

Alternative positions

Thank for you looking at possible payment protection and EO casework. With respect I appreciate that, however I don't want to be an AO again, that may sound ungrateful but I worked too hard to get my EO to lose it. I've done casework as an AO previously and I don't want to do that again. It's not just about the money and I don't see why I should be demoted because of the situation I am in which I am not accountable for. I don't want to be doing AO work again in any form, I spent a long time in the LR as an AO and I've moved on from that. The current management treat me as if I am an AO and I don't appreciate it so if it is only going to be AO work on offer as an alternative then please could you confirm that.

28. The Claimant knew the risks of not finding alternative work. Clare Ashcroft recorded a conversation she had with the Claimant on 23 February 2022 –

I said to Jane that we needed to lay our cards on the table. I said to her that at the present moment the Performance Improvement Plan had not been met and I personally could not see this changing in the next two weeks. I said to Jane that if she really wanted to, I believed she could still 'pull it back' but I didn't think she wanted to. She agreed and said that at the mediation she was prepared to meet in the middle but it was all their way or no way. Jane still states that she just wants to get on with her work in her own way and refuses to work the same way as the rest of the team. I said to Jane but you do realise that if another suitable role doesn't come up, this may mean you are dismissed, she said she realised that and she needed a new challenge. She did express concern mainly from a financial point of view and stated that she was still a number of years from retirement.

29. Her refusal of downgrading with pay protection limited options. The Respondent identified a number of vacancies in jobs requiring extensive IT skills (and qualifications). It is common ground that these were not suitable. Any job she went for would have to be applied for.

30. A job was identified in the Central Print function which is in Plymouth; the printing of office copies, plans and the like. The Claimant rejected applying for it. She emailed on 23 March 2022 –

1. Reference this job, It's Central Print which is on the other side of Plymouth to me and I couldn't get there on public transport or by walking.
2. It's very manual work which isn't suitable for me now because I do have painful physical conditions some of which are age related and I am sorry but I am not going into those.
3. I am avoiding being around people because of the Covid crisis especially since my Mum is 82 with serious health conditions, I need my Mum alive. I share a house with her and I am her primary carer so I need to reduce the risk of bringing in Covid since it is rife in Plymouth. Seaton Court seems to report a Covid case weekly so it makes me very anxious being around people now because of Covid and my Mum is also very anxious about it.
4. Also whilst I get on with the majority of people, there is a person at Central Print that would not like to see me because I gave evidence in a grievance against her, on behalf of someone else and it would raise my stress levels even more to be around this person. We have worked together before and clashed severely and I am stressed enough as it is without further additional stress/fear of being around this person, with due respect I need my stress levels reduced not raised. I think it would raise her stress levels too if I was there and I am sure that no-one



else there wants any aggravation either as a result of us being back in each other's vicinity.

5. I have embraced working at home and I appreciate it, I don't see the need to be back in a building again if it's an admin/management job, with the technology in place there's little that cannot be done from home which the Central Job isn't plus with my mental health conditions I do not feel working out there would be helpful in easing those. I can get to Seaton Court for the occasional visit if need be but I am on the opposite side of the city to Central Print which is why I would not apply for a job there.
6. If it has been an admin/management job I could have done from home then I would have likely taken it but it's not and as you said before it should be a job I am capable of.

If I am not going to be moved or offered a suitable post then I would rather know please so that I can tender my resignation even though it will cause me financial hardship because my mental health is in a bad way due to work, as the Occupational Health Report stated.

31. That last part of the email showed the Claimant was contemplating resignation, an acknowledgment of the position in which she found herself.
32. There was a potential HR support role as an HR support desk adviser. Central HR is in Nottingham where the HR function is managed. There would have had to be attendance at HR team meetings in Nottingham. These were at least monthly and possibly more often. Expenses would have been paid to cover travel and accommodation. Travel would have been in work time. Otherwise, the work could be done remotely from Plymouth. The Claimant spoke to the recruiting manager. In the event, the Claimant did not apply for the role. She had the impression the recruiting manager did not want her to apply.
33. One job has taken a significant amount of Tribunal time in assessing whether there was an unreasonable failure to invite application to it and/or arrange a trial in the role. Mark Kelly, the Claimant's trade union rep suggested the best option would have been a trial in the role of Executive Registration Officer. That is the Registration Officer case worker at an EO role. Mrs Bray, an employee of the Respondent, shared in evidence Mr Kelly's position. There was a shortage of caseworkers in the organisation. There had been a call to arms to cover the registration of severances of joint tenancies, for example. We have seen an extract from the job description of the Executive Registration Officer.

Technical skills and qualifications

On application candidates need to demonstrate the potential to operate and coach at the relevant technical level.

On appointment to the EO grade, the expectation is that candidates have the ability to process and coach on, core elements of RCU1 technical authority that are relevant to their job role.

In post, the expectation will be to develop full competence in the role and RCU1 technical authority, settling applications, taking relevant referrals, and if applicable, managing a team of staff.

Experience

- Effective organisational skills and ability to prioritise work
- Effective communication skills, taking account of appropriate styles and methods
- Ability to coach, mentor and develop others
- Excellent attention to detail and ability to make sound judgments/decisions based on available evidence
- Ability to motivate and engage individuals to achieve a common goal
- Ability to deal with sensitive/personal issues in a prompt, calm and constructive manner (applicable to line manager).

34. This role was discussed between Joanne Sarson, Clare Ashcroft and Sam Richards at the end of January 2022. Reservation was expressed about the Claimant's ability to coach others and work in a line management role.

35. On 31 March 2022 Clare Ashcroft asked the Claimant whether she would consider an 'EO casework role'. Clare Ashcroft shared the information from Mr Richards of HR as to what the role and preparing for it would entail –

'We would still need to establish if this is a suitable role for Jane and if there are any opportunities.

- Period of training would take place in the office, this is likely to be around 3 months, followed by consolidation period of around 10 weeks.

- Requirement for use of the mapping system

- EO courses often include a "showcase" during the training. The individual would present a case to demonstrate the knowledge/learning they have developed

- A "checker" will look at an individual's work throughout their training to ensure they are working at a level of quality and output that is satisfactory.

- The above is part of what is required to gain technical authority. When "in role" there would also be things like expectations around the following of practice guidance, work being done by a caseworker is also quite "visible" with data being used as part of performance conversations (albeit not exclusively) etc.'

36. The Claimant's position was recorded as follows:-

Jane advised she would view this as a last resort, she had concerns about being in the building and for such a long stretch of time but she would consider it. She expressed concerns about the targets and it being stressful but she was open to this rather than being dismissed. She said she liked working from home and she wasn't keen on being around people again. Jane asked if there could be reasonable adjustments and I said it was unlikely as she would need to conform. I also stated it could be a positive move as if she was on a training course with people brand new to LR, she could start her casework knowledge from scratch. Jane said she wanted to leave it there as she wanted to discuss it with the Union.

37. On 4 April 2022 Mr Richards emailed Ashcroft, Sarson and Light with further details of the training requirements, saying he was happy for those details to be shared with the Claimant. He also stated they would need to speak to Jeff Saunders who heads up the Ops team training.

38. On 5 April 2022 Joanne Sarson circulated a record of discussion and decision held between Ashcroft, Richards, Jeff Saunders and Alison Jago (HR) to this effect –

\* We looked at the ERO job description, and the entry requirements for that role. Jeff also outlined the extensive training programme that is required for a new entrant into the role, with a minimum of 18 weeks training for someone in Jane's position to reach the requirements for a technical authority. The outline of this programme has been shared with Jane in the last couple of weeks. The ERO role requires candidates to demonstrate capability against Making Effective Decisions, Working Together, Delivering at Pace and Developing Self and Others, there is evidence from the performance improvement period that Jane does not demonstrate the level required for the role. There is also a requirement to take the online Civil Service Casework Skills Test and the online Civil Service Verbal Test, Jane has stated she is not willing to do these tests. After looking at the role as advertised today, the consensus was that Jane would not be likely to meet the minimum requirements of the recruitment process.

\* Regarding redeployment (rather than recruitment criteria) - taking into account all the information above, we felt that that option would not be the right investment to make for Land Registry and could possibly place Jane under even more stress and anxiety due to the demands of the role and the training programme.

@Richards, Sam of course, the ERO vacancies have been advertised so Jane could still apply if she feels this is the route for her?

39. Alison Jago of HR knew this was an important decision. She knew it might be put under the microscope at a Tribunal. She was right. The Respondent has always known this was a key decision. It seems that the Tribunal was not alone in identifying its significance.

Hi Joanne

I wonder whether you would need to relate Jane's specific evidenced performance issues to the requirements of the role.....

So for example, the role needs Effective Decision Making but there are concerns because there is evidence Jane does not follow policy and guidance or consult others when needed to make a decision. As a result some of the decisions she makes are not in line with desired or standard practice. Another example would be that in Working Together the role requires close collaboration with colleagues, a coaching style and strong engagement with team delivery targets and there is evidence Jane works very much alone / in a silo, doesn't include others, doesn't deal well with structured target setting or monitoring.

These are just examples from memory of our conversation, but do you think you will need this level of detail. I'm thinking if you needed to defend the decision in an appeal or tribunal setting we would need to be very clear what that decision is based on.

Also, I'm not sure we mentioned that Jane would have to take the tests. We are asking our internal staff to undertake the Casework skills test but that is more to reduce numbers to interview. We ask our externals to undertake the Casework skills and Verbal Reasoning test but we wouldn't ask Jane to do them if we thought this was suitable redeployment for her....which we don't because of the nature of the role. I think it's a fair point that based on her long standing and consistent areas of poor performance we do not believe she would meet the standards required for an internal applicant in this role, based on the job description and the selection criteria.

Hope this is helpful. Sam would be better able to advise on the level of justification required.

40. At the stage 3 hearing on 11 May 2022 within the performance management procedure, at which dismissal or redeployment were options, the ERO role was discussed as follows. Mr Mudford was in the Chair.

JM moved on to the ERO opportunity in casework.

138. JB said she hasn't given it much thought as Clare had just told her that she wasn't suitable, she was instead told to apply for the role but it was shortly before the deadline for the progression scheme'

139. JM talked through the evidence and the role, JM asked how JB would find training in the office.

140. JB said she would do the training if she had to but the high number of covid cases in Seaton Court is a concern.

141. MK said casework is typically very hard but Jeff Saunders has worked hard to put a training regime in place and JB would get the skills she needed.

142. JB added that she has done casework as an AO and obtained the LRQ. However she is worried about targets and JB focused more on quality. She was annoyed that CA ruled out the role before speaking to JB.

143. JM said he has a record of the conversation.

144. JB said she hasn't ever been told in writing that she should be applying for tests and it sounds like there is different understandings.

145. JM said there is a process for a job match, to meet the requirements of the job, management have identified a role and if for example, a test is required.

146. JB said these are taking place after decisions have been made. She only saw the list of roles for the first time in February.

147. JM said that roles are normally looked at when someone is at the Deciding Officer stage of the poor performance procedure

148. JB said she asked to move for mental health reasons back in 2020.

149. JM said he gets the feeling that management have approached JB to discuss roles, some have been ruled out and others discussed. Does JB think there is roles out there that are suitable?

150. JB said she isn't sure what is available but it feels like there isn't a lot offered. JB has applied for a PA job and it is an admin role which she can do. JB has said that she can't be transferred to areas short-staffed unless there are official roles. JB has said she has had conversations with people and knows there is gaps elsewhere.

151. MK said casework is worth looking at and he tried to have conversations with JB. It is down to whether it is apparent that JB isn't capable and it would then be satisfied that this process has been complete.

152. JB said she did legal casework and some areas she wasn't as good at with spatial work and she did the LRQ certificate and diploma.

153. MK added that his frustration is that JB is an EO already and he appreciated there is a process but that means she has met the minimum criteria for an EO. Someone could join HMLR externally or from another department into an EO casework role.

154. JB added to this how they would apply, take the tests and sit an interview.

155. JM confirmed that he would go away and look at all of this.

41. Whilst floating the idea of this job, the Claimant was not pushing it strongly. She 'had not given it much thought'. Her union rep said that case work was worth looking at and had 'tried to have conversations with [the Claimant]'. As with the conversation with Clare Ashcroft in March 2022, when the Claimant referred to this as 'the last resort', she was not, in truth, showing much enthusiasm for it.

42. The outcome on this was expressed by Mr Mudford as follows:-

With particular reference to the ERO Casework role we discussed I can see that the views of the Head of Technical Training & Operational Capability, and a HR Business Partner have been sought for your managers to give full consideration to the suitability of this role. Taking all of this into account, your managers have found that based on the areas of your poor performance, that this would not be a suitable alternative role for you to be redeployed into and based on the evidence I have considered I do not believe this to be unreasonable. Whilst you have concerns over JS and AL being involved in this process I can see that CA was involved in the discussions around the ERO Casework role. With this and my own review of the roles I do not believe you have been adversely affected by this.

I have carefully considered all the facts relating to your situation. Despite our efforts to support you and to provide you with the opportunities to improve, including potential downgrading, your work performance remains unacceptable, and I have therefore decided that you should be dismissed on the grounds of poor performance.

43. This decision was revisited on appeal. The Claimant argued: -

SB asked JB what had taken place around the ERO casework role. JB stated that it had been decided by others that she was not suited to this role. JB stated that this was not right as she had previous experience in casework and had even obtained the LRQ qualification. JB acknowledged it was a while ago since she had worked in casework but that it was her belief that she could have done this role. JB described the casework role as being prescriptive and process driven but she said she would have been fully capable of doing this job if she had been given the choice and she would have preferred this over being dismissed. JB stated that working at HMLR was only her only income and she needed the job.

44. She raised the concept of trial period in the appeal. She said she would have been happy to go on a 3-month trial. Mr Kelly's point was that training and trial period would go hand-in-hand and it would be readily apparent whether the Claimant could perform the work.

45. Stuart Brown on 27 August 2022 gave the appeal outcome on this.

4. SB said he was content there had been several conversations with Clare Ashcroft (CA) in March 2022 about the available ERO casework roles, where JB had expressed some concerns about the role. These had been around the training programme for the role and the requirement for all applicants to take the associated tests.

5. SB said he could see there had been discussions between JB's line manager and work managers with Jeff Saunders (Head Technical Training and Operational Capability) and the HR Business Partner for Operations and that the purpose of these discussions had been to understand this role in further detail. SB said the result of these discussions was the conclusion, given the performance improvement plan in place, JB did not demonstrate the level of capability against the core behaviours from the success profiles framework required for this role, which all candidates applying for this role would need to demonstrate.

6. SB stated he was satisfied that the appropriate conversations and considerations had been made as to JB's suitability for the casework role and that he agreed with their conclusions given JB's skills and experience she had demonstrated in the last 10 years in her role and that it wouldn't have been appropriate to place her into the casework role in light of the performance improvement measures JB was required to make.

7. SB recognised that JB had previous casework experience, but

also noted that this was from many years ago. SB stated he was aware the casework role had evolved over the years JB had been working in DDaT. SB noted that JB had previously indicated her preference was not to return to a casework role and would only do so "if you had to". In addition, SB noted JB had expressed a preference to work alone and that JB had previously stated that she would not deal well with structured target setting or monitoring of performance, all of which were core elements of the ERO Caseworker role.

8. SB stated he had taken into account the performance improvement plan that had been in place and concluded that it had been a reasonable conclusion that it was not appropriate to redeploy JB into this role, especially without having undertaken the required application and assessment process for JB to demonstrate her aptitude and capability for the role.

### **CONCLUSION ON UNFAIR DISMISSAL**

46. The Claimant, in truth, has had one argument on unfair dismissal and it is that the Respondent unreasonably blocked her from the ERO caseworker role without undertaking a trial. Mr Kelly the Union rep rightly identified this as the best argument. It is the only argument. It is an arguable position.

47. However, we can only intervene if the Respondent has taken a decision which is unreasonable, outside 'the band of reasonable responses'. In our judgment the Respondent's decision was justifiable and so within the band of reasonable response. The following is clear:-

(a) The Claimant was not enthusiastic about the job;

(b) The history of falling out with colleagues suggested that she was unlikely to succeed in the leadership aspects of the role which were i) to be a coach/mentor on technical issues and potentially ii) to lead a team. The phrase that the Claimant preferred to 'work in a silo', employed by Alison Jago in her email of 5 April, 2022 seems fair.

If it had been thought that the Claimant might succeed, a trial period would have been offered. The Respondent's managers party to the discussion on 5 April 2022, as subsequently reviewed by Messrs Mudford and Stuart Brown, did not think she would succeed. They had a reasonable basis for that view.

48. The other listed arguments as issues for unfair dismissal do not get off the ground because it was a common position that the Claimant needed to be moved if she was to retain employment at the Respondent. The issue on unfair dismissal, then, is whether it was reasonable not to redeploy the Claimant. We have dealt with that above. It was.

49. The Respondent shows that the reason for dismissal was capability. The elements of the lack of capability were (a) Claimant was not accepting of

team guidelines on procurement; (b) there was lack of acceptance of using the team tools, such that planner or spreadsheet was not updated in a timely fashion; and (c) the Claimant was reluctant to work visibly within the team; not able to listen to - or act on - feedback and would perceive it as criticism. The reason for dismissal could equally have been irretrievable breakdown.

50. Dismissal was a reasonable sanction because after exhaustive attempts the Claimant had not secured alternative employment. She had to leave her old employment, inter alia (there were the 3 problem areas as listed above), because she failed to get on with her managers and colleagues. That was a key aspect of the job. The grievance process found that was not their fault.

### **THE DISCRIMINATION CLAIMS**

51. These were not developed by the Claimant in front of us. That's because the focus of the hearing was on redeployment because it was common ground that the Claimant had to move.
52. The Claimant does not prove that her disabilities lessened her cognitive function. Her absences were related to her disabilities. She does not prove having been bullied or unsupported by managers. She fell out with them.
53. The Claimant was not dismissed for absences. She was dismissed for capability and might have been dismissed for irretrievable breakdown.
54. Even if, which has not been proved on the balance of probabilities, her failure to co-operate arose from her disabilities, the Respondent in any event shows that dismissal was a proportionate means of achieving a legitimate aim. The legitimate aims were all of those set out in the list of issues. Dismissal was a proportionate (or balanced) response because reasonable efforts had been made to facilitate redeployment and that had not proved successful. The decision not to trial the ERO case worker role was justified, for the reasons set out above. The Claimant did not secure redeployment. Dismissal, therefore, was inevitable. She herself had contemplated resignation.

### **REASONABLE ADJUSTMENTS**

55. The PCPs are conceded by the Respondent. The Claimant does not show reduced cognitive function. She does show that the application of the policy and procedures caused exacerbation of symptoms. The last OH report is to that effect.
56. However, it was not reasonable for the Respondent to make more adjustments than they did. In respect of the sickness procedure- PCP 2: in



paragraph 8 of his witness statement, Mr. Colin Mitchell, in respect of the absence appeal, sets out that that the review points were originally 10 days of absence and/or 4 occasions of absence, but that these were uplifted by Ms. Sarson to 15 days over 6 spells of absence- i.e. an increase of 50 %, and then further uplifted by Ms. Atkinson to 8 spells or 20 working days, i.e. an increase of 100 % from her original triggers. On appeal against the First Written Warning, (by which time the Claimant had been absent for 70 days between 1<sup>st</sup> June 2020 and 16<sup>th</sup> December 2020 during three separate periods of absence) the Claimant had agreed to Mr. McCaffery's resolution as to an improvement period of three months with 9 months further monitoring if her attendance had not improved, and that the procedure had been held in abeyance for the remainder of 2021 whilst the Claimant's grievance and appeal were concluded. By February 2022, the Claimant had been absent for 117 days since she had been issued with the first Written Warning, meaning she had exceeded the review points of 15 days, 6 occasions. Sufficient adjustments had been made.

57. In respect of the performance management, there was a reluctance by the Claimant to engage with the Action Plan and acknowledge that she needed to improve and participate in the performance improvement process. The Respondent was not able to ignore what its managers saw.

58. Mr Mudford also records what had been done in the history of events.

39. Regarding the Claimant's contention that she felt the Respondent had done nothing to support her, I found clear evidence that this was not true:-

(a) Mediation took place between the Claimant and line management;

(b) Training was provided, in particular an external course on Building Personal Resilience and several personal development courses on Civil Service Learning, and our own in-house Learn Hub learning platform, including the Managing Change Toolkit, Managing Difficult Conversations and a Teamworking learning path;

(c) The Respondent changed her line management on two occasions - Ms Sarson, changed to Ms Light and then Ms Ashcroft;

(d) A SRA was conducted and completed;

(e) The way the Claimant would attend meetings had been adapted and communications during the poor performance period were done via e-mail/letter where requested;

(f) A Workplace Adjustment Passport ("WAP") was created and regularly reviewed, along with Employee Assistance Programme support offered; and

(g) Several referrals to OH were made. Having reviewed the OH reports it was clear that whilst they referenced the Claimant's OCD, the OH reports found that this did not have a significant effect on the Claimant's performance and made no recommendations for adjustments in relation to this condition. Neither did the Claimant suggest any recommendations.

40. It was clear to me that, for the procedure under the Policy to work, there had to be a two-way process i.e. engagement from management and the employee. I

believe that the Claimant was unwilling to help management understand or offer alternative ways of working, other than the Claimant working in the same way she always had. A clear example of this was the Claimant's utter refusal to undertake receipting of purchase orders and use of the GPC card in line with new (nationwide) team instructions validated with the finance team.

59. That was fair comment. There was nothing more that it was reasonable for the Respondent to do.

60. In conclusion, then, the Claimant's claims fail.

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Employment Judge Smail  
Dated 06 April 2024

Judgment sent to the parties on 19 April 2024

For the Employment Tribunal

**APPENDIX: the issues identified at the Preliminary Hearings**

**1. Time limits**

1.1 The claim form was presented on 22 July 2022. The claimant commenced the Early Conciliation process with ACAS on 23 June 2022 (Day A). The Early Conciliation Certificate was issued on 27 June 2022 (Day B). Accordingly, any act or omission which took place before 24 March 2022 (which allows for any extension under the Early Conciliation provisions) is potentially out of time so that the Tribunal may not have jurisdiction to hear that complaint.

1.2 Were the reasonable adjustments claims made within the time limit in section 123 of the Equality Act 2010?

The Tribunal will decide:

1.2.1 Was the claim made to the Tribunal within three months (plus the Early Conciliation extension) of the act or omission to which the complaint relates?

1.2.2 If not, was there conduct extending over a period?

1.2.3 If so, was the claim made to the Tribunal within three months (plus the Early Conciliation extension) of the end of that period?

1.2.4 If not, were the claims made within a further period that the Tribunal thinks is just and equitable?

The Tribunal will decide: 1.2.4.1 Why were the complaints not made to the Tribunal in time?

1.2.4.2 In any event, is it just and equitable in all the circumstances to extend time?

**2. Unfair dismissal**

2.1 The respondent accepts that it dismissed the claimant, and it asserts that it was a reason related to capability (performance), which is a potentially fair reason for dismissal under s. 98 (2) of the Employment Rights Act 1996.

2.2 Did the respondent act reasonably in all the circumstances in treating the claimant's performance as a sufficient reason to dismiss the claimant? The Tribunal will usually decide, in particular, whether

2.2.1 The respondent adequately warned the claimant and gave the

claimant a chance to improve; and

2.2.2 Dismissal was within the range of reasonable responses.

2.3 Did the respondent adopt a fair procedure? The burden of proof is neutral, but it helps to know the claimant's challenges to the fairness of the dismissal in advance and they are identified as follows:

2.3.1 the respondent subjected the claimant to the Managing Poor Performance Policy and the Sickness Absence Procedure thereby exacerbating her stress and making it more likely that she would fail to perform and/or require sickness absence; and

2.3.2 the respondent refused to redeploy the claimant or change her line management chain; and

2.3.3 the respondent's processes were discriminatory for the reasons detailed below.

2.4 If it did not use a fair procedure, what is the percentage chance that the claimant have been fairly dismissed in any event and, if so, when would that have occurred?

2.5 If the dismissal was unfair, did the claimant contribute to the dismissal by culpable conduct? This requires the respondent to prove, on the balance of probabilities, that the claimant committed the misconduct alleged.

### **3. Discrimination Arising From Disability (s 15 Equality Act 2010)**

3.1 The respondent accepts that it dismissed the claimant on 7 June 2022 and that her dismissal is unfavourable treatment for the purposes of section 15 EqA.

3.2 Did the following things arise in consequence of the claimant's disability, the claimant's case is that:

3.2.1 in order to manage the symptoms of her conditions, she required periods of sickness absence; and

3.2.2 when the conditions were acute, they affected her cognitive

function, memory, and processing skills, and sleep and caused fatigue; and

3.2.3 her symptoms were more acute when she felt unsupported or bullied by her managers.

3.3 Was the unfavourable treatment because of any of these things?

3.4 Was the treatment a proportionate means of achieving a legitimate aim? The legitimate aim relied upon by the respondent is its ability to:

3.4.1 ensure the correct and proper delivery of public services; and

3.4.2 conducting fair, consistent, effective, and proportionate management of the claimant as its employee; and

3.4.3 safeguard effective working relationships and the wider reputation of the respondent's service; and

3.4.4 ensure the efficiency of the respondent's service as part of the wider civil service.

3.5 The Tribunal will decide in particular:

3.5.1 Was the treatment an appropriate and reasonably necessary way to achieve those aims;

3.5.2 Could something less discriminatory have been done instead;

3.5.3 How should the needs of the claimant and the respondent be balanced?

3.6 The respondent knew of the claimant's disabilities at the time of dismissal.

#### **4. Reasonable Adjustments (ss 20 and 21 Equality Act 2010)**

4.1 Did the respondent know or could it reasonably have been expected to know that the claimant had the disability? If so from what date?

4.2 A "PCP" is a provision, criterion or practice. Did the Respondent

have the following PCPs:

4.2.1 PCP 1: the respondent's Managing Poor Performance Policy (the Policy) by which employees who were deemed to be underperforming could be dismissed (the respondent accepts that this PCP1 was in place); and

4.2.2 PCP 2: Employees who had periods of sickness absence were at risk of dismissal (the respondent accepts this PCP2 was in place).

4.3 Did these PCPs put the claimant at a substantial disadvantage compared to someone without the claimant's disability, in that:

4.3.1 PCP 1 and PCP2: the application of the Policy and Procedure to the claimant caused her stress, which exacerbated the symptoms of her depression and anxiety and OCD, causing (i) additional sickness absence, subjecting the claimant to increased risk of sanction under the Procedure; and (ii) reduced cognitive function and performance, subjecting the claimant to increased risk of sanction under the Policy; and

4.4 Did the respondent know or could it reasonably have been expected to know that the claimant was likely to be placed at the disadvantage?

4.5 What steps (the 'adjustments') could have been taken to avoid the disadvantage? The claimant suggests:

4.5.1 PCP 1: suspending the Policy, permitting the claimant longer periods between reviews, and/or less micromanagement and avoiding negative feedback; and

4.5.2 PCP 2: the respondent should have accepted the correlation between the claimant's sickness absence and the manner in which she was managed under the Policy; avoided applying the Procedure and Policy concurrently; discounting periods of sickness absence and/or permitting the claimant greater periods of sickness absences before triggering the stages of the Procedure.

4.6 Was it reasonable for the respondent to have to take those steps and when?

4.7 Did the respondent fail to take those steps?