



EMPLOYMENT TRIBUNALS (SCOTLAND)

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**Case No: 8000365/2023 Hearing Held at Edinburgh on 9, 10 and 11 April 2024
by Cloud Video Platform**

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**Employment Judge: M A Macleod
Tribunal Member: S Cardownie
Tribunal Member: J Chalmers**

J Henderson

**Claimant
In Person**

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Maximus UK Services Limited

**Respondent
Represented by
Ms S Harty
Barrister**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

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**The unanimous Judgment of the Employment Tribunal is that the claimant's
claims all fail, and are dismissed.**

REASONS

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1. The claimant presented a claim to the Employment Tribunal on 20 July 2023 in which she complained that she had been discriminated against on the grounds of disability by the respondent.
2. The respondent submitted an ET3 response form in which they resisted all claims made by the claimant.

3. A Hearing on the Merits was listed to take place on 9 to 12 April 2024 by Cloud Video Platform (CVP) before a full Tribunal. As it turned out the Hearing concluded on 11 April.
4. The claimant appeared on her own behalf at the Hearing. Ms Harty, barrister, appeared for the respondent.
5. A Joint Bundle of Productions was presented to the Tribunal, upon which reliance was placed by both parties and the Tribunal at the Hearing.
6. The claimant gave evidence on her own behalf.
7. The respondent called as witnesses Andrea Fraser-McHenry, formerly Business Support Manager for Scotland for the respondent; Gordon Hill, Assessment Centre Manager and Anthony Hutchinson, Performance Director.
8. At the outset of the Hearing, the Tribunal was provided with a Joint Statement of Agreed Facts. On inspection, however, it appeared that each party had presented their own version. As a result, the Tribunal disregarded the Statements on the basis that it was clear that they had not been agreed in full.
9. Based on the evidence led and the information presented, the Tribunal was able to find the following facts admitted or proved.

20 Findings in Fact

10. The claimant, whose date of birth is 19 January 1969, commenced employment with the respondent as a Service Delivery Lead. The respondent is a company which carries out medical assessments on claimants for state benefits, on behalf of the Department of Work and Pensions. The claimant was responsible for managing an administrative team, and ensuring the preservation of medical information and records. The team comprised approximately 9 staff.

11. When the claimant started, her line manager was Alison Forrest, but towards the end of 2017, Andrea Fraser-McHenry took over that responsibility.
12. From 16 October 2018, the claimant was signed off work due to illness. Her GP records (which were not seen by the respondent at the time) confirmed that the impression derived from her symptoms was that she was suffering from trigeminal neuralgia, given her history of blurred vision and forgetfulness. It was also noted that her brother had died suddenly, for which no explanation had been forthcoming (121).
13. The claimant never returned to work for the respondent. Her employment was terminated on 24 February 2023.
14. On 6 November 2018, the claimant was seen by the respondent's Occupational Health provider, Health Management (hereinafter referred to as "OH"), and a report was provided by the OH Advisor, Tina Bain (139). She summarised her opinion that the claimant remained unfit for work due to ongoing symptoms of anxiety, low mood, pain and impending planned surgery (to remove her gall bladder).
15. The recommendations made by OH in that report were that there was no clear return to work date at that time, but it was unlikely within the next 4 weeks; that she may benefit from a short (1-2 week) adjustment to her hours at work but this would be more apparent following her next OH appointment; that it was unlikely that her condition would be regarded as a disability within the meaning of section 6 of the Equality Act 2010. It was also expected that when she recovered from her current condition she would be able to return to reliable service and attendance in the future.
16. The claimant was advised to follow the advice and recommendations of her GP, and to maintain a healthy lifestyle.
17. On 17 December 2018, the claimant was seen by OH again and the report by Gillian Gladwell, OH Adviser, (142) stated that she was currently

unfit to continue in her current role, and not fit to return to work in any capacity for a further 4 to 6 weeks.

5 18. It was noted that *“Mrs Henderson is of the opinion that things will improve if she is given the chance to manage her issues. She stated she appreciated the concern shown by the business, but she is finding the regularity of contact is having a negative effect on her recovery. This is causing her further anxiety rather than being reassuring to her.”*

10 19. In light of this, OH advised that the frequency of contact between the claimant and her manager be reduced in order to allow her time to manage her anxiety issues.

15 20. The respondent operated a Sickness Absence Management Policy (322ff). At section 4.5 (327), it provided that *“Whilst absent from work due to sickness, the employee must ensure they are contactable and maintain in regular contact with their Line Manager. The line manager will discuss with the employee the most appropriate method and frequency of contact based on the length and reason for absence, particularly if they are off for more than 7 day.*

20 *This is to allow the employee to update the Line Manager on their health and expected return to work as well as keep the employee engaged in the business and identify ways to support their return to work. It also allows the line manager to plan for the needs of the business and make arrangements to make sure work is covered. Keeping in contact from an early point in the employees’ absence, in some cases, can also prevent the absence from being prolonged.*

25 *Employees do not have the right to cease contact with Maximus at any point whilst they are absent and must update the company on any changes in their contact details...”*

21. At section 4.6.1, the policy set out provisions in relation to a phased return to work (328):

“When an employee returns to work after a period of long-terms absence, in order to support their return it may be appropriate for them to return on a phased return and increase their hours or duties over a period of time until they are working to their full capacity.

5 *Employees who return on a phased return will [be] paid their salary for the hours they work and they will receive any CSP, or no pay if they have exhausted their CSP, for the hours they are absent. Where CSP is not available, the employee may be able to take accrued annual leave to facilitate their phased return.*

10 *Phased return patterns should be relative to the length of the absence and usually no longer than 4 weeks in duration and reviewed on a regular basis however they may be longer subject to medical guidance.”*

15 22. Ms Fraser-McHenry, the claimant’s line manager, made regular contact with her in order to ensure that the respondent understood clearly how she was feeling, and to offer support to her while absent by remaining in touch. Notes of those communications were made and kept by Ms Fraser-McHenry (452ff). She also conducted welfare meetings with the claimant in order to review the ongoing absence.

20 23. On 24 July 2019, Ms Fraser-McHenry met with the claimant in Starbucks and noted that there was no difference in the claimant’s condition (526). She explained the current treatment she was receiving. It was then noted that *“Jeananne has been attending welfare meetings recently at two monthly intervals and fortnightly contact KIT by telephone though as noted in the letter attached am happy to meet or support on the telephone*
25 *at any time. Do we wish to keep at 2 monthly or should they be 3 monthly?”* Melissa New responded (527) to advise that while it was necessary to have regular check ins and welfare meetings, she could agree with the employee what they both considered would be helpful.

30 24. From time to time the claimant would request a change in the time or date of the welfare meeting (for example, on 29 September 2020 (571)), which would be accommodated.

25. Ms Fraser-McHenry understood that the claimant was content with the level of contact, and had she complained about it she would have considered the matter at that stage.
26. The claimant felt that there were occasions when she would phone Ms Fraser-McHenry but she would not take the call or would not respond to a voicemail. Ms Fraser-McHenry's position was that she sought to answer each call when she could, but that with a significant number of staff to manage, she would not always be available to accept a call. She would attempt to contact the claimant within a short period of time thereafter.
27. On 7 December 2020, Ms Fraser-McHenry met with the claimant for a welfare meeting, conducted by telephone (155). With regard to the possibility of returning to work, the claimant said that she did want to return to work, and that her conditions were not caused by work. She expressed concern that she would struggle with concentration and pain control, referring to constant pain, anxiety, panic attacks, exhaustion and tiredness having an impact on her ability to return to work, as well as her sleeping pattern which left her exhausted. They also discussed the potential of the SDL role (the claimant's role) being filled in Edinburgh.
28. It was noted that a return to work plan was not applicable at that time "*as Jeananne's (sic) does not feel able to due to her ongoing health issues and pain levels.*"
29. On that date, Ms Fraser-McHenry wrote to the claimant to confirm the terms of their discussion (162).
30. She stated:
- "In order to support your health and return to work, during the meeting we agreed the following support/adjustments/next steps:-*
- *For you to continue to consult with your GP*
 - *To contact the pain clinic for an update*

- *For you to continue to try and contact your Mental Health Nurse, if unable to consider using EAP [Employee Assistance Programme] for which I have attached the contact details*
- *Access the private Medical services that are available to you*
- 5 • *To use any self help resources that are available to you*
- *Keeping in Touch fortnightly, as arranged and agreed on a Wednesday and at any further times that you need my support*
- *Send on Fit notes to cover absence*
- *Let me know at any time if you need any further support*
- 10 • *Continue with fortnightly KITs on Wednesdays as agreed.*

As discussed in the meeting, unfortunately you felt that you are not yet fit to return to return to work in the immediate future. I have therefore scheduled a further informal meeting which to take place on Wednesday 10th February 2021 at 11am, venue to be arranged depending on the current situation with Coronavirus.”

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31. On 9 December 2020, the claimant called her line manager at 10.30 as arranged but Ms Fraser-McHenry was unavailable as she was on a telephone conference call (“telekit”). The claimant emailed at 1.58pm that day (165) to say that she had done so, and that she had been called back at 12.17pm. She went on to explain what had happened since the previous meeting, and Ms Fraser-McHenry responded that afternoon in positive terms.

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32. They met as arranged on 10 February 2021, again by telephone (181). It was noted that “Jeananne does not feel in a position to return to work now or anywhere in the near future because of the level of her pain, the anxiety and stress that she is feeling. Jeananne also feels that she has no concentration and is not sleeping at all which are all barriers she feels to returning to work.”

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33. Ms Fraser-McHenry emailed the claimant on 25 February 2021 (186) to confirm that the Keeping in Touch days would be reduced to once a month. She said that if this became unsuitable or caused any issues she should let her know.

5 34. On 22 April 2021, Ms Fraser-McHenry met with the claimant and noted (590):

10 *“To note, Jeananne had requested less contact and as a support measure KIT’s had been reduced to once a month. I will offer the further support to Jeananne of reduction of her Welfare meetings to every 3 months to see if this also helps support her and ease her anxiety. Jeananne is aware that if she needs anything at all or any further support that she can contact me at any time...”*

15 35. On the following day, she confirmed the outcome of that meeting (209), and said, among other things, *“Keeping in Touch monthly on a Wednesday arranged and agreed and at any further times you feel that you need my support.”* Once again it was noted that the claimant felt that she was not fit to return to work in the immediate future, and a further informal welfare meeting was arranged for 21 July 2021.

20 36. They met again on 21 July 2021 by telephone (213ff). Again, the claimant confirmed that she wanted to return to work if she got better, but that she could not consider this at that moment.

25 37. At this point, we note that many of the notes recorded in these meetings were similar or exactly the same from meeting to meeting. The claimant’s view was that they were not an entirely accurate reflection of the meetings, but were “generic” in their terms. We were prepared to accept that Ms Fraser-McHenry’s notes were generally accurate, and the reason for their similarity was simply that the same issues were being discussed at each meeting.

38. Over a significant period of time, there was very little change in the claimant's condition, her ability to return to work or the information which was being received from her in each of the meetings.
39. On 20 October 2021, there was a further welfare meeting. Following that meeting, Ms Fraser-McHenry wrote to the claimant on 22 October 2021 (220ff). She recorded the current situation as before, but also advised that
5 *"We discussed the SDL role in Edinburgh and as you have no indication of a return to work in the near future, the post will be advertised. When you are ready to return to work, an alternative position within the terms of your contract will be offered. As agreed, we will keep the arrangement of*
10 *your welfare meetings every 3 months to help you with your anxiety levels and keep under review."*
40. As at 20 October 2021, the claimant had been absent from work for just over 3 years.
41. On 9 February 2022, a further welfare meeting was held by telephone
15 with the claimant (224ff). On that date, Ms Fraser-McHenry wrote to the claimant (229) to summarise their discussions. No significant changes in the claimant's condition were noted, nor in her ability to return to work.
42. Throughout the claimant's absence, her income had been protected
20 under a policy held by the respondent with Legal & General Assurance Society Limited ("Legal & General"). They wrote to the respondent on 29 April 2022 (253) to advise that following their most recent review of the claimant's claim, they took the view that her symptoms no longer met their definition of incapacity, and in particular, *"the policy definition which*
25 *states an individual must continue to be incapacitated by illness or injury from carrying out their own occupation."* As a result, they said, they were no longer able to pay any further benefit in relation to the claimant's application.
43. Essentially, Legal & General reached the view that the information being
30 presented by the claimant was not consistent with the Chronic Pain Abilities Determination (CPAD) assessment which they conducted with

her on 9 to 11 March 2022. The conclusion they reached was that
*“Following a careful review of all the evidence on file, it supports that
there are significant inconsistencies with Jeanannes reporting and her
true level of functioning. The evidence supports this not to be a true
5 reflection of her capabilities and we are no longer satisfied that Jeananne
is suffering from symptoms of such severity that she should be prevented
from fulfilling the duties of her insured occupation and being prevented
from returning to work.”*

44. They agreed to allow a 4 week phased return to work, and accordingly to
10 pay a further 4 weeks’ benefit up to and including 29 May 2022.

45. On 11 May 2022, Gladness George, HR Solutions Administrator, emailed
Ms Fraser-McHenry (256), having copied into the email the terms of Legal
& General’s decision. Ms George asked her to advise the claimant
accordingly.

15 46. On that date, Ms Fraser-McHenry arranged to call for a welfare meeting
with the claimant. She noted (613):

*“AFMcH Welfare Hearing with Jeananne who feels that she is much the
same. We discussed the decision by L&G to cease Jeananne’s claim to
IP [Income Protection] which Jeananne was not happy with or in
20 agreement. She did not want to discuss any potential RTW [return to
work] as she feels there is no way that she can. Notes and outcome letter
have been attached along with follow up emails to Jeananne. She is
intending to Appeal the decision and I have sent on the process for
Appealing. Please sign off letter for issue with the notes.”*

25 47. On 11 July 2022, OH provided a further report in relation to the claimant’s
condition to the respondent (298). Under “Advice on Fitness to Work”, it
was noted that *“She is clear that she would not cope with a return to
work, and, in my opinion, based on her current reported symptoms, it is
difficult to foresee who she would manage a SUSTAINED return to work
30 to provide regular and effective service, even with a phased return.”*

48. The report went on to say that *“If she did feel able at any stage, and her treating practitioners agreed, then a slow phased return would be advised.”*
49. On 26 August 2022, Gordon Hill took over as the claimant’s line manager, following the departure of Ms Fraser-McHenry from the business. He met with the claimant on 10 October 2022 by telephone (308ff). The claimant explained to Mr Hill that her GP could not understand the decision by Legal & General, and believed that the test upon which their decision was based was related to dementia, and not to fibromyalgia.
50. Mr Hill noted that *“Speaking about what coming back to work could look like Jeananne advises she could try it but is unsure of how she will be in the future with the condition as she feels she could attempt this but may result in being bedridden for days afterwards. Even the commute on the bus and walk to the centre would be a challenge.”* When discussing a return to work, she said that with fibromyalgia means that brain fog caused the claimant to forget things unless she took a note.
51. It was further noted that *“Jeananne feels nothing else can done even with reasonable adjustments in place which is aligned with what it recommended in the OH report in that it states it would be difficult to foresee how Jeananne would manage a sustained return to work to provide regular and effective service, even with a phased return.”*
52. The claimant did express disappointment that she had been left for 3 months, and that she felt she had not been supported in that time.
53. No return to work was planned at that time. The claimant said that ill health retirement would not be an option at that time, and that she was seeking advice from a lawyer.
54. Following that meeting, Mr Hill wrote to the claimant on 17 October 2022 (315). In that letter, he said that he would request information from HR and Legal & General to provide to the claimant, about the payment protection which had been stopped.

55. On 2 November 2022, Mr Hill wrote to the claimant to invite her to a formal meeting (long term sickness) (345). In that letter he explained:

5 *“Following our previous formal meeting on Monday 3rd October 2022 to discuss your absence from work. Unfortunately you are still not fit to return to work in the immediate future. I would therefore like to invite you to attend a further formal meeting in line with the Sickness Absence Management Policy which is available on Maximum People Manager for you to access.*

10 *The purpose of the formal meeting will be to discuss your sickness absence, identify if there is anything we or you can do to support you to return to work and agree next steps. Please be aware that should we not be able to identify and agree a return-to-work plan which enables your return to work in the near future, the outcome of this meeting could be the termination of your contract on the grounds of ill-health capability. No*
15 *decision will be made until you have had a full opportunity to put forward everything that you wish to raise, and this has been fully considered.”*

56. The meeting was arranged to take place on 7 November 2022, and the claimant was advised of her right to be accompanied to the meeting.

20 57. The claimant was concerned when she read this letter. She understood that the letter was suggesting that the previous meeting, on 3 October, was a formal meeting, which was not her understanding. She had been told that she could not be accompanied at the informal meeting on 3 October, and therefore could not understand why Mr Hill was describing it as having been formal.

25 58. The claimant emailed Mr Hill to advise him of this (348) on 4 November 2022. She said that he had told her that there would be a decision to dismiss her only after a number of meetings had taken place, in contrast to his letter, in which it was said that at the formal meeting on 7 November, she could be dismissed. She asked for more time to prepare.

59. Mr Hill responded (347) on 4 November: *"I have taken advice from People Manager and they have advised me that we should now in place of a Welfare meeting look to carry our (sic) first formal meeting in line with the Sickness Absence Policy.*

5 *This is why there is a change to what we initially discussed."*

60. He agreed to delay the meeting, until 9 November, as requested by the claimant.

61. The claimant responded (347) to advise that she would be in a position to attend the meeting. She asked if, since she was not a member of a trade union nor could she identify a suitable colleague to accompany her, she could record the meeting. Finally, she requested a copy of the respondent's Disability Policy.

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62. The claimant was advised that she was not permitted to record the meeting, and that the respondent did not have a Disability Policy.

63. The meeting took place on 9 November 2022, running from 2pm until 2.56pm. Notes were taken by Anca Cailean (351ff). Mr Hill chaired the meeting and the claimant attended unaccompanied.

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64. He explained the purpose of the meeting, and then moved to discuss the background to the claimant's absence. The claimant said that she did not feel supported, but kept in touch with her manager as instructed, with a call once per week, and a face to face meeting every 4 weeks. When asked why she felt disappointed and what she felt Ms Fraser-McHenry could do, she said:

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"Well if she had been friendlier really and she came across more as if she was going to be supportive when coming back, that would have helped.

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For example I remember a welfare meeting before COVID. I spoke with the MH nurse and doctor about a potential return to work in near future. I was not ready, but even speaking about the fact was a step forward, that is how I viewed and doctor and MH nurse felt the same way. Andrea

seemed horrified at the thought of me returning to work. She said that there have been many changes and I would be given the 4 week standard phased return. After this period I would be expected to be working at full capacity and I would also be expected to learn the administration role. Her statement was not reassuring in any way.”

65. Mr Hill, later in the meeting, raised the question of what a potential return to work would look like. He asked the claimant if she had covered a phased return. The claimant replied (358):

“JH: I am not in a position to try a phased return, because of fibromyalgia I just don't know how I am going to feel, don't now if it will be 3 good days or not. If I am ever having a good day is only a little less pain that day before, but I am always in pain. I may never go back to normal health, and my doctor could tell you that.

GH: Based on that, in terms of health and your conditions, do you feel this there anything at all, me the business could do to try and plan something, or do you feel like there is nothing.

JH: Well there is nothing that a doctor can do, is not curable, so I don't know what the business can do.

JH: As a business, do you feel that there are any reasonable adjustments you could offer to enable my return to work?

GH: The role you have as an SDL 100% office based, due to nature of role, do you feel would be suitable for you to return in any capacity at all.

JH: Travel would be problematic. I suffer from stress, anxiety, panic attacks, which can come in any time. I couldn't retain information at a meeting, not very good at taking notes, or conducting a meeting, so that wouldn't be very good for me. With the pain that I suffer I am likely to be more off than in and also suffer from bouts of depression.

JH: I don't know if you know about fibromyalgia, but the symptoms are vast, have insomnia, I can't function properly, I struggle to get dressed,

shower, etc, all things you take for granted, I had fibro fog and can go blank and not remember what I was going to say, so I am not in a position to lead a Team..

5 *JH: Yes with reference to current job role, although in reality you need concentration to do any job really, I can't always take in and retain any information and the journey itself would take hours. I just don't think I could do it, would be too tired and fatigued."*

10 66. Mr Hill then raised the BA role, to which the claimant replied that she had had no income for a while. Mr Hill subsequently summarised the conversation (361) as essentially that a potential return would not be feasible, and that it would be necessary to look at other roles within the business which would be realistic. The claimant replied that *"any job would be problematic really."*

15 67. When discussing the possibility of a phased return to work, Mr Hill did not understand that a phased return would be only over a period of 4 weeks. He considered that any recommendation from OH about phased return would be taken into account before determining that process.

20 68. It was Mr Hill's view, following the meeting, that a further OH report was called for and he wrote to the claimant, referring to a formal meeting on 28 November 2022 (in which they had, effectively, reconvened to consider the outcome of the earlier meeting)(374ff), and advising that she would be re-referred to OH (380).

69. On 12 January 2023, a further consultation took place with OH, and Ms Lola Adeyemi, OH Adviser, wrote with her report (382).

25 70. In her clinical opinion, *"Mrs Henderson remains unfit for work in any capacity at this stage and with unclear recovery/return to work timescale. Our records indicated a previous related OH Physical consultation that took place on 11 July 2022 with recommendations that remain valid for purpose. To avoid reprise, please refer to the previous advice letter for background details. Mrs Henderson opted to pre-read this advice letter*

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prior to sending it out to management that has been actioned as per her preference.”

5 71. Ms Adeyemi said that it was uncertain at that time when the claimant might return to work. In answer to the question, “*Are workplace adjustments recommended?*” she replied “*None at present, as Mrs Henderson remains unfit for work.*”

72. She recommended re-referral for further OH guidance with an OH Physician closer to her return to work date or if there were any reported significant changes with her function capability.

10 73. Following receipt of the OH report, Mr Hill convened a meeting on 30 January 2023 with the claimant. Once again, the claimant attended unaccompanied, and Ms Cailean took notes (387).

15 74. Mr Hill confirmed that the purpose of the meeting was to discuss any support the claimant might need, next steps and what they may look like going forward.

75. When asked about the report, the claimant said “*Well as I said is the exact same as the last one, even the assessor could not really understand it either, what I have is an ongoing condition.*”

76. There was then noted the following exchange:

20 “*GH: In the report it mentions you are unfit for work at the moment, it also talks about obviously there being no dates for a return to work. Obviously, you said there are no changes, we also talked int eh last meeting about working in a different capacity or role, is that something you considered or given more thought to?*

25 *JH: I told you before, I am not capable of doing any job really. I am in constant pain, and this is getting worse in my hip and leg.*

GH: Thank you Jeananne, I'll take a note that pain levels are getting worse.

GH: Right now you are not fit for work in any role, so no timescales attached are at the moment but to help us explore future potential plans, do you think you may be fit to return in any capacity at all?

5 *JH: Well if I feel better I would then yes, but I don't know if that would happen...*

10 *JH: I don't understand the purpose of these meetings really. I just get all this letters all the time and is talking about potential dismissal, then also about further evidence, which I have sent from doctor, pain clinic, etc. and feels like this is constantly hanging over my head. Everything seems to be taking so long, the OH then another meeting on 30th, don't understand the purpose really. We have already been over this. I understand this is a tick box exercise from the company but the stress and anxiety is putting on me is unbelievable really..."*

15 77. The claimant went on to complain that she had not received any support, and that *"all Andrea done was harassing me and bullying me."*

78. Following the meeting, Mr Hill issued a letter confirming his decision, dated 1 February 2023 (393), which was to convene a further formal meeting on 6 February 2023.

20 79. The invitation to that meeting was issued on 3 February 2023 (396). Notes of the formal meeting of 6 February 2023 were taken by Anca Cailean (398ff). The claimant remained unable to place a timescale upon her possible return to work, especially now that she was suffering from osteoarthritis and not getting any better.

25 80. Mr Hill confirmed that they would meet again shortly and he would issue his outcome.

81. The meeting was reconvened on 24 February 2023, and notes were taken again by Ms Cailean (403ff).

82. Mr Hill stated (405): *"Today following those discussions it's been recommended and discussed that next steps would be termination from*

the business in terms of contract and that would take effect as of today, in terms of that we don't have any impending return to work or anything we can plan, so these are next steps as of today."

5 83. He confirmed his decision in a letter dated 28 February 2023 (407). In that letter, he said:

10 *"I have carefully considered everything discussed within your formal meetings and sought the advice of medical evidence including independent occupational health reports and documentation from your doctor. As there is no indication of a return to work date or any support or adjustments to enable you to return to work in the foreseeable future, including redeployment into an alternative job role, it is with regret that I have decided to terminate your employment due to ill-health capacity."*

15 84. He confirmed that the claimant's effective date of termination was 24 February 2023, and advised her of her right to appeal against dismissal within 5 working days of receipt of the letter.

85. The respondent's appeal process is set out at Stage 4 of the Sickness Absence Policy (322 at 339), in paragraph 4.9.6.

86. The policy states that the appeal letter must clearly outline the grounds for appeal, which "may include" the following:

- 20
- *"An inconsistent/inappropriate decision*
 - *The sickness absence management policy/absence capability procedure was not properly applied*
 - *Extenuating circumstances*
 - *Unfairness of the hearing."*

25 87. The list was said not to be exhaustive.

88. The policy went on to state that the employee would be given notice of the appeal hearing and informed of their right to be accompanied.

89. The claimant was very unhappy and considered that she had been treated unfairly. As a result, she submitted an appeal to Anthony Hutchinson on 15 May 2023 (409), some 10 weeks late.
- 5 90. She complained about her treatment by Ms Fraser-McHenry, amounting to bullying and controlling behaviour, and said she felt that when she raised this it was brushed under the carpet. She noted that capability processes normally begin when income protection ceases, but wondered why it took from May until November 2022 to start the process. The respondent was aware that she had appealed against Legal & General's
10 decision to stop income protection.
91. She believed that she should have had 9 OH referrals over her absence, but pointed out that she had only had 4. She argued that the process had been very haphazard without any real structure. She concluded her letter by asking for a financial settlement in order to resolve the matter.
- 15 92. Mr Hutchinson replied to the appeal letter by email dated 19 May 2023 (415). He said that having reviewed the appeal, it appeared to be a repeat of previous issues and points raised during the hearing and in subsequent emails, with no further information being provided. He attached a letter seeking new information as to her grounds for appeal, as the current
20 appeal did not meet the appeal criteria. He also asked her to clarify what her desired outcome of the appeal was, since a financial settlement was not a potential outcome of the process.
93. He wrote again on 23 May and 31 May to ask for any new information (426). On 1 June the claimant emailed him to advise that she was not
25 seeking a financial settlement as part of her appeal, but by way of compensation for the way in which she had been treated (433), and Mr Hutchinson replied the same day to repeat his questions asking for a summary of the new points she was raising as part of the appeal, and what outcome she was seeking from the appeal.
- 30 94. The claimant did not respond to this email, and on 6 June, Mr Hutchinson wrote again (441):

“Hi Jeananne,

Given it's now been 3+ weeks since your original email stating you wanted to appeal and I am still unable to understand what new points you are raising as part of this appeal and what outcome you are seeking as a result of this appeal, I am assuming that you are no longer wishing to pursue and will close this case accordingly.

As you can see below, I have tried several times to clarify the above and have not received a response from you.

I hope this resolves the matter, please consider this closed.”

10 95. The claimant sent further text messages to Mr Hutchinson, complaining of the stress which she was enduring. He responded (719) by saying that her appeal did not appear to meet the criteria for appeal. He pointed out that she was not raising any concerns or issues about the process or decision making process, that she had one query which related to data protection which would not meet the appeal criteria and that she was
15 addressing a pay query with Payroll. He reiterated that the appeal process was closed.

96. The claimant was paid in lieu of notice, following an initial error, through the June pay run on 28 June 2023 (724).

20 97. Since her employment was terminated by the respondent, the claimant has made attempts to secure alternative employment, and applied to British Airways and also for a job involving proof-reading, all involving work from home.

25 98. The claimant stressed that much of her time has been taken up in preparing for these proceedings, and that without legal assistance she has required to carry out a considerable amount of research herself. That was “all-consuming”, and inhibited her efforts to find alternative employment.

99. The claimant received Social Security Scotland payments (formerly Personal Independence Payments) of £61.85 per week from 24 February 2023 until 9 April 2024, a total of £3,622.64; and Employment Support Allowance of £84.80 per week from 27 August 2023 to 9 April 2024, a total of £2,737.83.

100. The claimant said that her dismissal, and the way in which she was treated prior thereto by the respondent, had an impact on her health, and that she felt that she was not supported throughout the process by the respondent. She enjoyed her job and did not want to lose it, and it caused her stress, anxiety and depression to experience the lack of support which she felt. She wanted to return to work, but was prevented from doing so.

Submissions

101. Both parties presented submissions to the Tribunal, Ms Harty at greater length and detail than the claimant. Without repeating the terms of those submissions here, the Tribunal took careful consideration of what was said on behalf of both parties and refer to them in the decision section below.

The Relevant Law

102. Section 13(1) of the Equality Act 2010 provides:

“A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.”

103. Section 19 of the Equality Act 2010 provides:

“(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B’s.

(2) For the purposes of sub-section (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B’s if –

(a) A applies, or would apply, it to persons with whom B does not share the characteristic,

(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,

(c) it puts, or would put, B at that disadvantage, and

(d) A cannot show it to be a proportionate means of achieving a legitimate aim.”

Discussion and Decision

10 104. We addressed our minds to the List of Issues in this case, which were set out in Employment Judge Hoey’s Note (100ff), as follows:

Direct Discrimination (section 13, Equality Act 2010)

1. **It was conceded that the respondent dismissed the claimant on 23 February 2023.**

15 2. **Was that act less favourable treatment? The Tribunal will decide whether the claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the claimant’s. If there were nobody in the same circumstances as the claimant, the Tribunal will decide whether she was treated worse than someone else would have been treated in comparison to someone whose circumstances would have been the same as the claimant’s. The claimant relies upon a hypothetical comparator.**

20
25 3. **If so, was the dismissal because of disability (namely fibromyalgia)?**

Indirect Discrimination (section 19, Equality Act 2010)

- 5 1. A “PCP” is a provision, criterion or practice. Did the respondent have the following PCP: requiring those absent from work to keep in touch with the respondent and attend meetings and consultations during absence (including occupational health meetings)?
- 10 2. Did the respondent apply the PCP to the claimant?
3. Did the respondent apply the PCP to persons with whom the claimant does not share the characteristic, ie those who are not disabled?
- 15 4. Did the PCP put persons with whom the claimant shares the characteristic at a particular disadvantage when compared with persons with whom the claimant does not share the characteristic?
5. Did the PCP put the claimant at that disadvantage?
- 20 6. Was the PCP a proportionate means of achieving a legitimate aim?
7. The Tribunal will decide in particular whether the PCP was an appropriate and reasonably necessary way to achieve those aims; could something less discriminatory have been done instead; and how should the needs of the claimant and the respondent be balanced?

Remedy for discrimination

- 25 1. Should the Tribunal make a recommendation that the respondent take steps to reduce any adverse effect on the claimant? What steps should it recommend?
2. What financial losses has the discrimination caused the claimant?

3. **Has the claimant taken reasonable steps to replace lost earnings, for example by looking for another job?**
4. **If not, for what period of loss should the claimant be compensated?**
5. **What injury to feelings has the discrimination caused the claimant and how much compensation should be awarded for that?**
6. **Is there a chance that the claimant's employment would have ended in any event? Should her compensation be reduced as a result?**
7. **Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?**
8. **Did the respondent or the claimant unreasonably fail to comply with it?**
9. **If so is it just and equitable to increase or decrease any award payable to the claimant?**
10. **By what proportion, up to 25%?**
11. **Should interest be awarded? If so, how much?**

105. We addressed each of these in turn.

20 **Direct Discrimination (section 13, Equality Act 2010)**

1. **It was conceded that the respondent dismissed the claimant on 23 February 2023.**
2. **Was that act less favourable treatment? The Tribunal will decide whether the claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the claimant's. If there were nobody in the same circumstances as the claimant, the Tribunal will decide**

whether she was treated worse than someone else would have been treated in comparison to someone whose circumstances would have been the same as the claimant's. The claimant relies upon a hypothetical comparator.

5 **3. If so, was the dismissal because of disability (namely fibromyalgia)?**

106. The decision to dismiss the claimant was taken by Gordon Hill following the formal welfare meeting convened on 6 February and reconvened on 23 February 2023.

10 107. The reason for dismissal was that the claimant had been absent on the grounds of ill health since 16 October 2018, and that as at the date of dismissal, there was no medical evidence to give any indication of a return to work date or any support or adjustments to enable the claimant to return to work in the foreseeable future, including redeployment into an alternative job role.

15

108. We are conscious that the claimant does not complain of unfair dismissal, and that we must not seek to apply the tests relative to such a claim.

109. The question we must determine is whether the claimant's dismissal amounted to less favourable treatment than a person not sharing the claimant's disability would have received, on the grounds of disability.

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110. In this case, the claimant relies upon a hypothetical comparator.

111. The claimant accepted that she was absent from work due to ill health for the lengthy period which was identified. She also accepted, in meetings leading up to the decision to dismiss her, that she was not fit for work, that she would not be fit for work for some unidentified period and that she was unable to identify any adjustments which might be put in place to assist her back to work.

25

112. She appears to rely upon a particular criticism in this regard, that is, that the respondent never considered a phased return to work period of more

than 4 weeks. As Ms Harty put it in submissions, this was a constant refrain of the claimant's evidence, and she was insistent that it was the respondent's position that any phased return to work could not extend beyond 4 weeks.

5 113. We did not consider that the claimant was told, or could reasonably believe, that it was the respondent's position that any phased return to work could only be for 4 weeks. The respondent's Sickness Absence Management Policy has a section devoted to the subject, at 4.6.1(328). It is appropriate to quote this section insofar as relevant:

10 *"When an employee returns to work after a period of long-term absence, in order to support their return it may be appropriate for them to return to work on a phased return and increase their hours or duties over a period of time until they are working to their full capacity.*

15 *Employees who return on a phased return will paid (sic) their salary for the hours they work and they will receive any CSP, or no pay if they have exhausted their CSP, for the hours they are absent. Where CSP is not available, the employee may be able to take accrued annual leave to facilitate their phased return.*

20 *Phased return patterns should be relative to the length of the absence and usually no longer than 4 weeks in duration and reviewed on a regular basis however they may be longer subject to medical guidance."*

25 114. At no stage was it said to the claimant, in our judgment, either in written or verbal form by the respondent, that any phased return to work would only be for a period of 4 weeks. Legal & General determined that they would allow for a period of 4 weeks by way of phased return to work when they decided to cease income protection, and therefore to pay 4 more weeks' of benefit, but that was not a position adopted by the respondent.

30 115. In any event, it was noted by Mr Hill in October 2022 that the claimant's position was that "even with reasonable adjustments" there was nothing that could be done to enable her to return to work at that stage.

116. It is therefore our view that the respondent did not at any stage adopt the position that any phased return to work would only last 4 weeks. They did not take a rigid view on that, and their policy clearly envisages that while a phased return would usually be 4 weeks, it was determined relative to the length of the absence and could be longer, based on medical guidance.

117. The reality is that the respondent (and indeed the claimant) never reached the point where a serious discussion about a phased return to work could take place because at no stage was the claimant ever fit to return to work, nor could any date be identified for that return to take place. The claimant had been absent for more than 4 years from work, which in the Tribunal's experience is extraordinarily long without dismissal being considered, but at no stage was there any foreseeable date by which she could be anticipated to return to work.

118. Sadly, the claimant was never well enough to contemplate returning to work. She maintained this position consistently herself throughout the discussions she had with the respondent.

119. All of this being said, we were cautious not to stray into error by addressing a claim of failure to make reasonable adjustments which has not been advanced by the claimant. We must consider whether the decision to dismiss the claimant amounted to direct discrimination on the grounds of disability.

120. In our judgment, this was not a case in which it could be found that the claimant was treated less favourably than an employee not sharing her protected characteristic of disability in the decision to dismiss. An employee who remains absent from work without any foreseeable prospect of returning must realistically expect that their employer will not be in a position to tolerate that absence for more than 4 years, as happened here, and in our judgment, no employee would be treated more favourably than the claimant was here. Indeed, if an employee were not disabled, it appeared to us that they would not meet the requirements of

the income protection policy operated by Legal & General, and therefore a decision on their employment would be likely to be made much sooner than it was in the claimant's case.

5 121. In light of the fact that the medical evidence gave no prospect of the claimant being able to return to work within a foreseeable period of time; that the claimant herself repeatedly accepted that she was not fit to return to work, and could not envisage a time when she would be; and that the respondent could not be expected to agree to an employee being absent for more than 4 years without taking steps to bring her contract of
10 employment to an end, given that she was not able to produce any work or contribute effectively to the work for which she was contracted by the respondent, it is our conclusion that the claimant was not treated less favourably than any non-disabled employee would have been, in the same circumstances.

15 122. In our judgment, the respondent allowed the claimant to remain in employment for an extraordinarily long time, even once Legal & General had decided to withdraw her income protection. We are unable to sustain the claimant's submission that her dismissal amounted to disability discrimination.

20 123. We do not consider that the claimant was dismissed, fundamentally, because she suffered from fibromyalgia. She was dismissed because she was absent from work for more than 4 years without any prospect of return, and in these circumstances, we considered that was a decision which they were entitled to take, and it did not amount to direct
25 discrimination on the grounds of disability.

124. The claimant's claim of direct discrimination thus fails and is dismissed.

Indirect Discrimination (section 19, Equality Act 2010)

30 **1. A "PCP" is a provision, criterion or practice. Did the respondent have the following PCP: requiring those absent from work to keep in touch with the respondent and attend meetings and**

consultations during absence (including occupational health meetings)?

2. Did the respondent apply the PCP to the claimant?

3. Did the respondent apply the PCP to persons with whom the claimant does not share the characteristic, ie those who are not disabled?

4. Did the PCP put persons with whom the claimant shares the characteristic at a particular disadvantage when compared with persons with whom the claimant does not share the characteristic?

5. Did the PCP put the claimant at that disadvantage?

6. Was the PCP a proportionate means of achieving a legitimate aim?

7. The Tribunal will decide in particular whether the PCP was an appropriate and reasonably necessary way to achieve those aims; could something less discriminatory have been done instead; and how should the needs of the claimant and the respondent be balanced?

125. The claimant's persistent complaint through these proceedings was that the respondent, and particularly Ms Fraser-McHenry, had bullied and harassed her by requiring her to be in contact on such a regular basis as to be oppressive.

126. The claimant's evidence did not match that of Ms Fraser-McHenry. The claimant's position was that the level of contact was excessive and that despite requests on her part, the respondent never moderated their demands about contact. Ms Fraser-McHenry's position was that she did moderate the times and intervals in which contact would be required.

127. Dealing with the issues, we were able to conclude that the respondent did maintain a PCP requiring employees to keep in contact with their

employer during sickness absence, including attending meetings and consultations.

5 128. The PCP is essentially set out in the respondent's Sickness Absence Management Policy in section 4.5 (327). Any employee on sick leave must ensure that they are contactable and maintain regular contact with their line manager. It is provided that the line manager will discuss with the employee the most appropriate method and frequency of contact.

10 129. The purpose of the PCP was said in the policy to be to allow the employee to update the line manager on their health and expected return to work, as well as to keep the employee engaged in the business and identify ways to support their return to work. The policy goes on to state that employees do not have the right to cease contact with the respondent at any point while they are absent.

15 130. The PCP was applied to the claimant. She was required by Ms Fraser-McHenry, and indeed Mr Hill, to maintain regular contact with the business.

20 131. It is not clear – since no specific evidence was given in this regard – whether the respondent applied the PCP to any other employees not sharing the protected characteristic of the claimant, though the policy would apply to all such employees, in our judgment.

25 132. The claimant complains that the PCP placed her at a substantial disadvantage to employees not sharing her protected characteristic of disability. In fact, in our view, the claimant's complaint was not so much the PCP but the way in which the respondent applied it to her, as she regarded the frequency with which she was required to be in contact with the respondent as excessive and stressful.

30 133. The difficulty for the claimant on this point is that her evidence was in stark conflict with that of Ms Fraser-McHenry, in that she maintained that her regular pleas to moderate the number and frequency of contacts were ignored by her line manager, whereas Ms Fraser-McHenry's evidence

was that when the claimant made such a complaint, she treated it sympathetically and on several occasions did reduce the amount of contact which was required.

- 5 134. At the start of the relevant period which is the subject of the claimant's claim, the claimant had welfare meetings every 2 months, and keeping in touch calls fortnightly. The respondent's normal frequency would be welfare meetings every month and keeping in touch calls weekly.
- 10 135. On 24 February 2021, it was noted by Ms Fraser-McHenry (585) that it had been agreed between them that the claimant could cut down her keeping in touch calls to one a month.
136. On 21 April 2021, it was noted by Ms Fraser-McHenry (589) that the claimant had requested that the welfare meetings be reduced to one every 3 months, and that she agreed this in order to reduce the claimant's stress and anxiety.
- 15 137. In our judgment, the evidence of Ms Fraser-McHenry was to be preferred to that of the claimant in this regard. Ms Fraser-McHenry's evidence, supported by the file notes produced to the Tribunal, was that when the claimant sought to reduce the level of contact between them, she sought to agree to this as a supportive measure and considering that in the
20 circumstances it was reasonable to do so. The claimant sought to argue that the file notes produced to the Tribunal by the respondent were not accurate, but subsequently accepted in cross-examination that following the adjustments made in early 2021 she did not subsequently complain about the frequency of contact, and accepted that she was content with
25 the frequency at that stage.
138. The claimant's evidence was undermined by her tendency to be extremely critical of Ms Fraser-McHenry, painting her in a very unfavourable light, when it was our assessment that Ms Fraser-McHenry was a diligent and honest witness who sought to assist the claimant and
30 was sympathetic to her wish to have less frequent levels of contact with her.

139. On the evidence, therefore, we could find no basis upon which it could be said that the claimant was placed at any disadvantage, far less any substantial disadvantage, by the application of this PCP. It is clear from the regular contacts which the respondent had with the claimant that they were keeping themselves properly informed as to the condition of the claimant at any given time, and seeking to discuss with her the prospect of her returning to work with supports as required.

140. In any event, we did consider that the PCP was a proportionate means of achieving a legitimate aim. It was a legitimate aim to maintain contact with an employee, in order to maintain that employee's engagement with the business, to check on the progress of their illness and the prospect of their return to work, and to maintain an understanding in general of their welfare. The respondent's Sickness Absence Management policy clearly sets out the basis upon which maintaining contact was established. It is, further, entirely legitimate in our judgment for an employer to have contact with an employee who is absent from work, since they are bound to them in a contract of employment which has mutual obligations. If the claimant is unable to provide regular and effective service, the employer is entitled to take steps to establish how that regular and effective service may be restored.

141. To apply the PCP, by requiring the claimant to maintain a level of contact with the respondent, is entirely proportionate as a means of achieving the legitimate aim set out above. The manner in which the respondent in this case maintained contact was also proportionate, taking into account the claimant's concerns about the level of contact, and adjusting and extending the periods so as to alleviate those concerns.

142. Accordingly, in our judgment, the claimant's claim of indirect discrimination must fail. The respondent's application of the PCP in this case did not place the claimant at a substantial disadvantage in comparison with others not sharing the same protected characteristic, and even if it had, we considered that the PCP amounted to a proportionate means of achieving a legitimate aim.

143. The claimant's claim of indirect discrimination fails, and is therefore dismissed.

Remedy for discrimination

- 5 **1. Should the Tribunal make a recommendation that the respondent take steps to reduce any adverse effect on the claimant? What steps should it recommend?**
- 2. What financial losses has the discrimination caused the claimant?**
- 3. Has the claimant taken reasonable steps to replace lost earnings, for example by looking for another job?**
- 10 **4. If not, for what period of loss should the claimant be compensated?**
- 5. What injury to feelings has the discrimination caused the claimant and how much compensation should be awarded for that?**
- 15 **6. Is there a chance that the claimant's employment would have ended in any event? Should her compensation be reduced as a result?**
- 7. Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?**
- 20 **8. Did the respondent or the claimant unreasonably fail to comply with it?**
- 9. If so is it just and equitable to increase or decrease any award payable to the claimant?**
- 25 **10. By what proportion, up to 25%?**
- 11. Should interest be awarded? If so, how much?**

144. In light of the fact that the claimant's claims of disability discrimination have failed, no remedy is awarded to the claimant.

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Murdo A Macleod
Employment Judge

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05 July 2024
Date of Judgment

Date sent to parties

08/07/2024-----

15 I confirm that this is my Judgment in the case of Henderson v Maximus UK Services Limited and that I have signed the Judgment.