



# EMPLOYMENT TRIBUNALS

## Claimant

Ms C Bailey

v

## Respondent

Secretary of State for Justice

**Heard at:** Norwich

**On:** 21/22/23/24 May 2024

**Before:** Employment Judge Conley  
Ms S Williams  
Mr A Hayes

## Appearances

**For the Claimant:** Herself, as a Litigant in Person

**For the Respondent:** Mr A Webster, Counsel

# JUDGMENT

1. None of the claimant's claims of discrimination are well founded and all are dismissed.
2. The claimant's claim of unfair dismissal is well founded and succeeds.
3. The Tribunal finds that it is possible that the claimant may have been dismissed fairly had the respondent adopted a fair procedure and is considering making an adjustment to the award of compensation under *Polkey*. This is a matter that will be considered at the remedy hearing.
4. The matter is to be listed for a remedy hearing on the first convenient date after the 1<sup>st</sup> September 2024. This is to be heard remotely via CVP.

# REASONS

## BACKGROUND

1. By a claim form presented to the Employment Tribunals on 19 April 2023, following a period of early conciliation between 20 February 2023 and 3 April 2023, the Claimant sought to pursue the following complaints:

- i. Discrimination on the grounds of disability (both direct and indirect);
  - ii. Harassment;
  - iii. Victimisation;
  - iv. Direct discrimination on the grounds of sex;
  - v. Unfair dismissal.
2. In summary, the basis for her claim was that during the course of 2022 she was suffering from a disability, namely anxiety and depression, which had originally been triggered as a result of her exposure to a series of traumatic events in her workplace, HMP Norwich, at the very end of 2021.
3. During this period, she had been made the subject of a temporary promotion, but on the 6<sup>th</sup> September 2022, seemingly without warning or notice of any alleged performance issues, the Temporary Promotion was terminated and she was returned to her more junior substantive position.
4. The claimant asserts that this amounted to a demotion, and that the decision to do so was because of her disability. She subsequently took an extended period of sickness absence following a recurrence of her mental health issues which ultimately resulted in her dismissal on capability grounds on 22 November 2022, which the claimant also alleges to have been an act of discrimination. In addition, or in the alternative, she asserts that that dismissal was unfair.
5. The claimant further alleged that she had not been provided with reasonable adjustments to enable her to perform her duties, that she had been victimised on account of a grievance that she raised following the removal of her temporary promotion, and that she was subjected to harassment in relation to a comment made by Declan Moore (the Governor in charge of HMP Norwich) during the course of the meeting during which she was dismissed.
6. The Claim was resisted by the Respondent and on 1 June 2023 they presented a Response which included comprehensive Grounds of Resistance to the Claim. In essence, the claim is resisted on the grounds that:
  - i. The claimant was not disabled for the purposes of the Equality Act.
  - ii. In any event, she was not discriminated against in any of the ways alleged by her in relation to the cessation of her temporary promotion to Supervising Officer, or in relation to her ultimate dismissal.
  - iii. She was dismissed fairly on the grounds of capability in accordance with the respondent's policy on absence, in that the Respondent properly determined that she was fit for work (placing reliance on a number of Occupational Health Reports) but that she, the claimant, could not give any indication when or indeed if she would ever be in a position to return to work.

## **THE PROCEEDINGS**

7. It is important to note that the claimant has been unrepresented in the course of this hearing but this was not always the case. When she first submitted her claim, she was represented by Mr Doug Frame, who was at the time with Fosters Solicitors, a local firm in Norwich.
8. On 3<sup>rd</sup> October 2023, Mr Frame appeared at a telephone case management preliminary hearing before Employment Judge Warren. The respondent was represented then, as now, by Mr Andrew Webster of Counsel. The Preliminary Hearing summary makes for rather puzzling reading as it would appear that Mr Frame was wholly unprepared for that Case Management Hearing. He was seemingly completely unaware that the hearing was due to take place and therefore it was not possible for the case to be properly case managed.
9. As a result, the List of Issues could not be prepared during the course of the hearing and the respondent was directed to serve a List of Issues reflecting the case management discussion by 10 October 2023.
10. The Tribunal wishes to note that it has been troubled by the List of Issues that was submitted in this case. It is not clear to us when this list of issues was finalised and whether those who previously represented the claimant provided much in the way of input. Some of the claims appear to be misconceived and it was felt that the questions lack sufficient particularity and do not necessarily reflect what we have considered to be the relevant issues that arise on the face of the evidence that we have considered.
11. For reasons which will become clear we do not feel that this will have made any significant impact upon the decisions that we have reached but we find it regrettable that the claimant's interests may not have been best served in this regard by those who were assisting her at that time. Of course we must make it clear that neither Mr Frame nor Fosters Solicitors have been present to explain the position and so we do not make any express criticism of them.
12. On the first day of this hearing we were informed that the claimant's representatives had come off-record on 12 April 2024, approximately six weeks before the final hearing. When the case commenced, the claimant submitted that she had been wholly unaware that the case had been listed at all this week, and sought a postponement of the proceedings to enable her to have more time to prepare for the hearing and possibly to seek alternative representation. This application had already been refused on papers by Regional Employment Judge Foxwell on 20 May 2024 and it was similarly refused by us having heard further representations by the claimant.
13. In short, we decided that we could not accept that the claimant was completely unaware of the proceedings given that she had been legally represented for a significant period of time and had been in correspondence with her solicitors until shortly before they withdrew; and secondly, once they had withdrawn, the respondent had been in direct communication with her and had sent her the case papers including the final hearing bundle which included details of the hearing date. There was also evidence that she the

claimant had received, completed and returned and pre-hearing questionnaire which also clearly identified the dates for this hearing.

14. Unfortunately, whilst the claimant had been represented, she had not prepared a formal witness statement and therefore invited the Tribunal to treat her grounds of claim as being her evidence-in-chief for the purposes of this hearing. This application was unopposed by Mr Webster and was allowed by the tribunal.

## **THE ISSUES**

15. As a result of the hearing before Employment Judge Warren, the issues to be determined at this hearing were crystallised and narrowed, and at some stage a joint list of issues was prepared and served upon the tribunal.
16. It is not necessary for the list of issues to be reproduced here. Suffice it to say that the live issues as far as we are concerned are as follows:
  - i. Whether the claimant was disabled within the meaning of section 6 of the Equality Act 2010;
  - ii. If so, the extent of the respondent's knowledge of her disability;
  - iii. Whether the Tribunal has jurisdiction to consider any matters prior to the claimant's dismissal due to the applicable statutory time limits;
  - iv. Whether the respondent failed in its duty to make reasonable adjustments under section 20 of the Equality Act
  - v. Whether the claimant was subjected to harassment for the purposes of section 26 of the Equality Act, in relation to a comment allegedly made by Declan Moore (which is alleged to have been discriminatory both on the grounds of the claimant's sex and her purported disability);
  - vi. Was the claimant subjected to direct disability discrimination under section 13 of the Equality Act in relation to both (a) subjecting the claimant to disciplinary action and (b) dismissing the claimant
  - vii. Was the claimant subject to victimisation under section 77 of the Equality Act;
  - viii. Was the claimant unfairly dismissed under section 98 of the Employment Rights Act 1996.

## **THE EVIDENCE**

17. The evidence in this case came from the following sources:
  - a) The written and oral evidence of Christopher Pryke (the claimant's line manager), Kevin Clark (currently the Governor of HMP Wayland, but at the material time was Deputy Governor at HMP Norwich, who conducted a grievance appeal) and Declan Moore (the Governor of HMP Norwich who made the decision to dismiss) on behalf of the Respondent;
  - b) The written and oral evidence of the Claimant;
  - c) An agreed Bundle of Documents amounting to 348 pages

18. The Tribunal was provided with submissions from both parties to whom we are grateful, and which we have considered with care.

### **FINDINGS OF FACT**

19. The claimant commenced employment with the respondent as a prison officer working at HM Prison and Young Offenders' Institution Norwich on 17 September 2018. She was employed in a Band 3 role, on a starting salary of £21,219 per annum comprised of £18,136 of base pay plus an additional £3,083 for working unsocial hours, based upon a 37 hour working week .

20. She was dismissed from this role on 22 November 2022 on the grounds of medical inefficiency during the course of a Formal Attendance Review Meeting (FARM) with Governor Declan Moore. Therefore her total period of Employment was 4 years one month and 5 days.

21. She received payments in lieu of 5 weeks notice, and compensation in the sum of £5,525.

22. In November 2021 the claimant was appointed to a Temporary Promotion to the rank of Supervising Officer - a Band 4 role with additional supervisory responsibilities - working on 'A' Wing, with oversight of drug dependent prisoners. 'A' Wing is an induction and first-night centre within the prison and integrated drug treatment system with space for approximately 225 prisoners and as such is by far the largest wing of the prison. Accordingly, it is widely perceived to be the most challenging and demanding section of the prison from the perspective of the prison officers.

23. Temporary promotions (TP) of this kind are a relatively regular occurrence within the prison service. HM Prison and Probation Service (HMPPS) advertises available temporary promotion opportunities and Prison Officers can apply for these opportunities through submission of an expression of interest form. They are usually assigned to staff for an initial period of approximately 28 days with further extensions potentially being granted thereafter on a case by case basis and dependent upon service requirements.

24. Reasons for a TP can include a shortage of employees at a particular grade or, as was the case here, as a result of the promotion of a Band 4 employee to Band 5, with the result being the creation of a vacancy at Band 4 which had to be backfilled.

25. Best practice is that TP are to be kept under regular review, with any issues relating to performance at the enhanced role to be identified and discussed between the officer and their line manager in the course of 'conversations' (a system which replaced the more formal appraisal process that formerly existed).

26. The Tribunal has not seen any evidence that such conversations ever occurred with the claimant for the 10-month duration of the TP. We are certainly satisfied

that at no stage were any performance related issues brought to the claimant's attention until the 6 September 2022 when the TP was terminated.

27. On 29 December 2021, whilst working on 'A' Wing as the most senior officer present, the claimant was directly involved in dealing with a traumatic death in custody.
28. The circumstances of this death in custody were particularly harrowing and they were described by the claimant during a Trauma Risk Management (TRiM) assessment on the 10 March 2022 to Katie Hodgkins (a TRiM practitioner at HMP Bure) in the following terms:

*It was meal time and she [the claimant] was the only SO on duty for two wings when normally there should be two. A 'Code Red' was called so she made her way to the cell. As she was en route it came over the radio that it was now a 'Code Blue' so she rushed to the cell. She described the cell as a bloodbath and that it looked like a murder scene. Seeing blood everywhere all up the walls all over him and all over the bed, she thought he looked dead she tried to call for healthcare but they had no radio, she began CPR. She tried to hold his neck wound, she described herself as being on autopilot and that it took some time for her to realise that her hands, trousers and shoes were covered in blood .*

29. On any view, this would have been and was an exceptionally distressing incident, even for a person accustomed to working within the challenging environment of the prison estate.
30. The claimant was referred for counselling but declined due to the fact that she did not feel comfortable seeking help of that kind and she had not fully processed the events that she had witnessed. The Tribunal accepts this to be true.
31. In addition to dealing with this death in custody, in the subsequent weeks thereafter the claimant was involved in another distressing incident in which a prisoner lacerated their own arm down to the bone, which once again required the claimant to administer first aid, and in relation to a further death in custody in which a prisoner hanged himself.
32. As a result of a colleague's intervention, in March 2022, the claimant was referred to TRiM as her mental health had gone into decline. When she was assessed on the 10 March 2022, the TRiM practitioner Katie Hodgkins identified a number of signifiers of mental ill health, including upsetting thoughts of various kinds, upsetting dreams, panic and overwhelming anxiety, drinking more than usual to aid sleep, reduced appetite, reduced motivation and poor concentration. Katie Hodgkins concluded that "[the claimant's] symptoms are having a significant negative impact on both her time in work and her life outside of work" and stated that the claimant "will also be thinking about taking some time off work in order to allow herself to begin recovering."

33. Following this assessment, the claimant took a period of 10 days sickness absence from 23 March 2022 to 1 April 2022, which is recorded on her absence record within the bundle as being her only absence related to a mental health issue prior to 6 September 2022.
34. On 5 April 2022, the claimant was assessed by Rosalind Wilmshurst, an Occupational Health Advisor with Optima Health. During the consultation, the claimant reported feeling unsupported by her employer (the respondent) and that she had been experiencing symptoms of flashbacks, low motivation, unrefreshing sleep, fatigue, increased incidence of migraines, low mood and anxiety.
35. Ms Wilmshurst assessed the claimant's psychological well-being, and based upon that and the consultation generally, it was her opinion that the claimant was "marginally fit for work with management support." She recommended that a meeting be arranged with the claimant and management to begin a constructive dialogue around the perceived organisational triggers. There is no evidence that such dialogue ever took place.
36. The report refers to the claimant having consulted with her GP who recommended that the claimant refrain from work. She said in her clinical opinion Cognitive Behavioural Therapy (CBT) would be beneficial for the claimant's work-related incidents and stated 'I leave it to you as the manager to decide if recommendations made are feasible for the business to support'. The CBT recommendation was never carried forward.
37. As far as the claimant's outlook was concerned "most individuals with a mental health episode will get better responding favourably to at least one medication and in addition will benefit from psychotherapy. Full recovery is usually complete...the risk of relapse increases with every episode or known triggers." There is no evidence that any psychotherapy was ever provided.
38. On 10 May 2022, Katie Hodgkins, the TRiM manager, conducted a follow up meeting with the claimant and stated that "I am pleased to say that she the claimant has come on leaps and bounds since I last saw her". She went on to say that the claimant's only ongoing symptoms were very occasional nightmares, moments of anxiety when faced with self-harm acts that generate large amounts of blood loss but positively she reported that these feelings are short-lived and that she can quickly rationalise the same thing is not happening again. Her most serious indicators, for example flashbacks and seeing the deceased when out walking her dog, have now passed and she feels she's coping well at work. Ms Hodgkin's recommended that it would be "helpful for Chloe's line manager to check in with her occasionally" to ensure that she was continuing to make positive progress. However, there was no evidence that such check-ins were taking place and the evidence of the claimant's line manager Mr Christopher Pryke was that he was unaware of the claimant having any wider mental health condition or its impacting her whilst she was at work.
39. On 6 September 2022 (the claimant's birthday, something the prison must have been aware of) she was required to attend a meeting with her line manager Mr

Pryke and Mark Sargent the governor of 'A' Wing in order to discuss various aspects of her performance. The claimant had virtually no notice of this meeting because it had been arranged whilst she was on a period of annual leave, something that the prison would also have inevitably known about, she had very little time to prepare for the meeting and had no understanding prior to the meeting commencing as to what issues might be discussed.

40. A number of issues had been reported to Mr Pryke regarding some performance issues, including a perceived reluctance on the part of the claimant to work on 'A' Wing. This was most clearly evidenced by an email sent by the claimant on 1st September 2022 in which she said the following "ok thanks I know again this sounds cheeky but is it possible I could have an easy day that day as I really don't want to be dealing with loads of dicks if possible not 'A' Wing", and by the fact that she appeared to be frequently swapping 'A' Wing shifts with other officers.
41. The claimant accepted that she had struggled to work on 'A' Wing due in part to frustration that she had with the staff, and the perception that there was an attitude of it always having to be "the Norwich way". Prior to this meeting, her performance had not been called into question directly with her.
42. The record of the meeting shows that one piece of evidence relied upon by Mr Sargent of a performance issue was an email from Steve Searby in relation to an issue that had arisen at the servery. This becomes significant in the context of the grievance the claimant goes on to raise at a later date.
43. During the course of the meeting, it was put to the claimant that she had reached trigger warning Stage One on account of her attendance. She was informed that her performance had not been up to the desired standard, and as a result the respondent would not be supporting her continued TP position beyond that week. At this point the claimant got visibly upset, stated that she always strives to work hard and it was not fair to take her TP away and that she was going to go sick; she then removed her epaulets and left the meeting.
44. At no stage during the course of the meeting was there any reference to, or enquiry about, her mental health or indeed any aspect of her welfare. There was no reference to the fact that she had previously undergone a traumatic experience whilst working on 'A' Wing, nor any attempt to establish whether any reluctance on the part of the claimant to work on 'A' Wing was in any way connected to any of her previous experiences.
45. On 13 September 2022, the claimant raised a grievance in which she cited that she had been discriminated against on the grounds of disability and 'gender' (the fact that she is a woman); the nature of the grievance was that she had been 'bullied and victimised'. In essence the grievance surrounded the meeting of the 6 September 2022. She complained of the late notice of the meeting, and in relation to issues concerning her performance she disputed the suggestion that she did not wish to be working on 'A' Wing. She stated that some of the duty swaps that have taken place with SO Knott (a male prison officer) had been at his instigation and he had not been criticised.



46. On 20 September 2022 a Formal Attendance Meeting took place between the claimant and Mr Pryke. This arose because a trigger point had been engaged due to the number of periods of absence during the preceding 12 months. It was confirmed at the meeting that she (the claimant) had been referred to OH, and he concluded that he was happy to support her back to work; he was fully aware of the sick absence policy, and he was content to manage her on it. The claimant was offered work within any group within the establishment.
47. On the 26 September 2022 the claimant was assessed by Sharon Fraser, a mental health advisor with Optima Health, following the referral to OH. The assessment took place by telephone (as did all referrals of the claimant to OH) and Ms Fraser identified that the claimant's issue was work-related and included her unhappiness about her temporary promotion ceasing, and the way in which it was done without reasonable explanation. The impact appeared significant and she had already submitted a grievance. She believes that working on 'A' Wing might be a contributory factor to the intensity of emotions.
48. As a result of a self-reporting psychological questionnaire, the claimant's scores reflected 'moderately severe depression and moderate anxiety' and that she was experiencing disturbed sleep and ruminating thoughts linked to work. Regarding her capacity for work, her view was that she was unfit for work and went on to say that if some clarity on the issue (namely the removal of her TP) was to be provided at the grievance meeting on the 4 October 2022 she anticipated that a return to work in some capacity should be possible afterwards, and that a phased return was not considered necessary.
49. As regards disability, Ms Fraser concluded that the claimant's condition is unlikely to be considered a disability because it had not lasted longer than 12 months nor was it likely to last longer than 12 months.
50. On 4 October 2022, the grievance meeting with Mr Pryke, accompanied by Lindsay Maskell the 'People Hub Manager', via MS Teams. The meeting lasted around 90 minutes. A detailed transcript of the meeting was contained within the bundle.
51. Also present at the meeting was Steve Searby, who is identified as a 'Union Representative' and as such, presumably his role was to support the claimant in relation to her grievance. This was the same person who had previously complained about the conduct of the claimant and whose email was cited as evidence of her poor performance in the meeting of the 6 September 2022.
52. Mr Pryke summarises the grievance meeting in his witness statement in a way which appears through and measured. However, the transcript shows that he was doing most of the talking and rather than listening to the matters raised by the claimant, his tone is frequently defensive of his and his colleagues' actions with respect to the claimant.
53. The claimant complains that it was inappropriate for Mr Pryke to have conducted this grievance meeting given that much of the grievance was

directed towards him as her line manager. The Tribunal agrees that this should have been identified as a conflict of interests, and all the more so when considering the role of Mr Searby the union representative.

54. On 7 October 2022 the grievance outcome was reported to the claimant: it had not been upheld on any of the grounds raised.
55. The claimant presented a fit note from her GP Dr Sarah Falkingham at the Theatre Royal Surgery, indicating that she had been assessed on the 12th October and because of stress and anxiety she was not fit for work for a period of 2 weeks, echoing the finding of Occupational Health.
56. On 20th October 2022 (whilst still deemed unfit for work by reason of her gp fit note) the claimant was assessed again by telephone by Optima Health. Victoria Boylan who carried out a mental health assessment and found that the claimant continue to be suffering from 'moderate levels of anxiety and depression' but concluded that she was fit for work, subject to the qualification that 'resolution of work issues is pivotal to any return' and that she 'encouraged management and Miss Bailey to work together towards this purpose'. She reiterated the previous opinion regarding disability, namely that she did not satisfy the legal definition.
57. On 26 October 2022, the claimant presented a further fit note again certifying that she was unfit for work for a further two weeks once again as a result of stress and anxiety.
58. On 1 November 2022, as a result of a further referral to occupational health, claimant was assessed this time by Dr Sarah Smallcombe an Occupational Physician who on this occasion identified 'mild features of anxiety and moderate features of depression'.
59. In Dr Smallcombe's opinion the claimant was fit for work but her return to work date is 'likely to be after the appeal decision meeting as such a swift conclusion to the work issues is recommended.' Her fit note was to expire on 8 November 2022 and a phased return to work was recommended. Dr Smallcombe went on to say careful consideration will be needed in relation to where she will be working in order to successfully reintegrate her back into the workplace, and recommended that a stress risk assessment is completed. There is no evidence that such a risk assessment was ever carried out.
60. On 15 November 2022 the grievance appeal meeting was held, conducted by Kevin Clarke, then Deputy Governor at the prison. Once again Steve Searby was in attendance as the union representative. Mr Clarke did not uphold the appeal in any aspect. This was reported to the claimant on 21 November 2022
61. The very next day, the Governor of the prison conducted a Formal Attendance Review Meeting (FARM) with the claimant, in company with Jacqui Spencer (Head of Business Assurance), Naomi Conlin (HR Case Manager), Sheryl Knights (note taker) and, once again, Steve Searby, the POA Representative.

62. At the outset, Mr Moore made it clear that the purpose of the meeting was to discuss the claimant's current fitness for work and any adjustments that could be made, her eligibility for medical retirement, and dismissal on the grounds of medical inefficiency.
63. The claimant was asked why she had not come back to work and she explained that it was due to her mental health and the stress caused by the ongoing grievance procedures. She drew attention to the fact that the GP had repeatedly indicated that she was not fit to return to work. Mr Moore referred to the fact that the most recent OH report of the 20 October 2022 indicated that the claimant was fit to return to work.
64. Although there is no evidence that Mr Moore specifically stated that he 'does not go by GP records, only Occupational Health', he did appear to place more emphasis and reliance upon that conclusion of the OH report than upon the other evidence available.
65. In answer to the question 'Why are you still off and what is the prospect of you returning?' the claimant responded: 'My mental health has not been good. I have been struggling with the stress on everything that has been happening. Although I love my job I won't be returning'. However, when asked if she was resigning, she said no.
66. Following a short adjournment of the meeting, the claimant offered this explanation of her earlier remark: 'I am unsure of when I will be returning in the short term but possibly in the longer term'.
67. At the conclusion of the meeting, the claimant was dismissed on the grounds that her 'continued absence after a very long period of time has been too long and you can't see an end to it despite my OH telling me you are fit for work...'

## **THE LAW AND CONCLUSIONS**

### DISABILITY DISCRIMINATION

68. Before the Tribunal can go on to consider whether any of the claims advanced by the claimant are well founded, it is first necessary to address the fundamental question of whether the claimant was disabled at all. If the answer to this question is no, then all of the claims relating to his purported disability fall away.
69. In dealing with this issue, the Tribunal is required to address the following four questions identified in the case of *Goodwin v Patent Office* 1999 ICR 302 EAT
1. Does she have a mental or physical impairment (the 'impairment' condition)?
  2. Does it affect the claimant's ability to carry out normal day-to-day activities (the 'adverse effect' condition)?

3. Was the adverse condition substantial that is more than minor or trivial (the 'substantial' condition)?
4. Is the adverse condition long term (the long term condition)
70. In relation to the first question, the Tribunal is in no doubt at all that the claimant had a mental impairment and therefore the first question is satisfied. There is ample evidence before us in the form of OH assessments, fit notes and TRiM consultations to establish beyond any doubt that at the material time the claimant was suffering from anxiety and depression to varying degrees. We fully accept this was and is a mental impairment which is well recognised as being capable of amounting to an impairment for these purposes.
71. We consider that it may well be that this is what the claimant meant when she described anxiety and depression as being a disability. We are of the view that the claimant found it difficult to distinguish between the fact that these are conditions which are capable of amounting to a disability and whether they did so in her particular circumstances.
72. In relation to the second question, we further accept that symptoms that she was exhibiting March 2022 and to a lesser degree in September 2022 were certainly having a significant impact on her wellbeing: they were causing her to have disturbed sleep patterns and for a time she was self-medicating with alcohol. However, for the most part, notwithstanding these effects, she was able to continue to carry out her usual day-to-day activities. We do not for a moment wish to be seen as diminishing in any way the affect of the symptoms upon the claimant. However, when considering the evidence, we are not persuaded that the condition was affecting her ability to perform her usual day-to-day activities for the purposes of this question.
73. It automatically follows from our answer to the above question that the answer to the question as to whether the adverse effect is substantial must also be no.
74. Although the fact that we have answered the preceding two questions in the negative means we don't necessarily need to go on to consider the fourth, it is worth making the observation that the claimant's condition is, according to the evidence, a response to particular circumstances, and the evidence from the occupational health reports and the TRiM assessment reports was that the claimant was expected to respond well to treatment and her condition was not expected to be long term. It was made clear that most people who have experiences similar to the claimant make a full recovery within a relatively short period of time.
75. We remind ourselves that there is no evidence at all that the claimant suffered from any similar symptoms prior to the events of December 2021. She had only had a single absence from work on mental health grounds prior to September 2022, and that she responded positively and very quickly in the aftermath of her assessment by trim and a period of absence from work.
76. When considering whether a condition is long term, we are required to consider the position as of the date of the alleged discriminatory act, rather than with the

benefit of hindsight at the date of the hearing. In considering all of these matters we are firmly of the view that even if all of the preceding three questions had been answered in the positive, we would still not be satisfied that the condition was long term for the purposes of the fourth question. We therefore conclude that she was not disabled for these purposes and therefore we need not go on to consider any of the subsequent issues that flow from her purported disability.

## **HARASSMENT RELATED TO SEX (S 26 EQUALITY ACT 2010)**

1. S26 Equality Act 2010 states, as far as is relevant
  - (1) A person (A) harasses another (B) if—
    - (a) A engages in unwanted conduct related to a relevant protected characteristic (in this case, the claimant's sex), and
    - (b) the conduct has the purpose or effect of—
      - (i) violating B's dignity, or
      - (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
  - (4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—
    - (a) the perception of B;
    - (b) the other circumstances of the case;
    - (c) whether it is reasonable for the conduct to have that effect.
2. In *Richmond Pharmacology v Dhaliwal* [2009] IRLR 336, the EAT analysed this provision. There are a number of elements.
3. Firstly, the unwanted conduct. Did the respondent engage in unwanted conduct? This is a subjective test. The test is whether the action or inaction of the employer contributed to the proscribed circumstances. It is not necessary under the Equality Act to consider the extent to which the action or inaction is attributable to the characteristic; the provision refers only to conduct 'related to' rather than 'on the grounds of' the characteristic (in contrast with the earlier legislation).
4. Secondly, the purpose or effect of that conduct. Did the conduct in question either:
  - (a) have the purpose *or*
  - (b) have the effectof either
  - (i) violating the claimant's dignity or
  - (ii) creating an adverse environment for the claimant?

5. Thirdly, the grounds for the conduct. Was that conduct on the grounds of the claimant's sex?
6. If the conduct had the effect of violating the claimant's dignity or creating an adverse environment, was it reasonable for the claimant to have felt that way. All the circumstances must be considered. In *Richmond Pharmacology*, it was said that

*"...if, for example, the tribunal believes that the claimant was unreasonably prone to take offence, then, even if [she] did genuinely feel [her] dignity to have been violated, there will have been no harassment within the meaning of the section. Whether it was reasonable for a claimant to have felt [her] dignity to have been violated is quintessentially a matter for the factual assessment of the tribunal. It will be important for it to have regard to all the relevant circumstances, including the context of the conduct in question. One question that may be material is whether it should reasonably have been apparent whether the conduct was, or was not, intended to cause offence (or, more precisely, to produce the proscribed consequences): the same remark may have a very different weight if it was evidently innocently intended than if it was evidently intended to hurt".*

7. The EAT cautioned against encouraging a culture of hypersensitivity. It will also be necessary to consider the purpose of the comments or actions to determine the context. In *Thomas Sanderson Blinds Ltd v English* UKEAT/0316/10/JOJ, UKEAT/0317/10/JOJ it was held that

*[40] There is, in our judgment, no general rule applicable to answer the question whether, when fellow workers use homophobic or sexist language to each other (or language relating to any other protected characteristic), both commit unlawful harassment; one commits unlawful harassment; or neither does. The answer lies in an application of the statutory test now contained in s 26 of the Equality Act 2010. We think in many cases both employees will have committed unlawful harassment; each will commit conduct having the effect of violating the dignity, or creating an adverse environment, for the other. Also in many cases the conduct will have had this purpose, and the other form of harassment ("purpose harassment") will be in play.*

*[41] In [that] case, where the fellow workers engaged in similar conduct toward each other while remaining genuinely good friends, the tribunal was entitled to reach the conclusion it did, so long as it applied the correct statutory test. We think that in substance it did".*

8. Clearly, this requires the Tribunal to consider the surrounding circumstances and take a view on the nature of the relationship between the alleged perpetrator of the harassment and their alleged victim.
9. In respect of whether the conduct was related to a protected characteristic, where overtly derogatory terms are used, little, if any, further enquiry is required. However, in less clear cut cases, whether conduct is related to the relevant protected characteristic is a matter for the Tribunal to decide on the

facts, having regard to the surrounding context. In our judgment, related to is a broad test and does not require a *causal* link between the acts complained of and the relevant protected characteristic.

10. We are able to deal with this issue very shortly indeed. We do not find that the claimant was harassed on the grounds of her sex in the manner alleged within the list of issues . Firstly the claimant had a very sketchy recollection at best of the precise words allegedly used by Mr Moore to the effect that 'he does not go by GP records, only Occupational Health'.
11. Although Mr Moore accepted that he might have said something similar he did not accept that he used the exact phrase and no record exists in which it is confirmed that he did use that or any similar phrase that might have had a similar effect upon the claimant.
12. Secondly, even if he had used the exact phrase we can find no basis for concluding that there was anything remotely derogatory about it and certainly not that it was capable of having the purpose or effect of violating the claimant's dignity or creating an intimidating hostile degrading humiliating or offensive environment for her under any circumstances.
13. We are prepared to accept this it may have been a statement which annoyed the claimant or one that she fundamentally and vehemently disagreed with, but that doesn't get anywhere close to the definition set out in section 26. We can therefore discount this limb of her claim with out any difficulty and without needing to go on to consider whether the claimant's sex had any bearing upon the use of the phrase in question (although for the record if we were required to make such a decision the answer would almost certainly be in the negative).

### **UNFAIR DISMISSAL**

77. Subject to any relevant qualifying period of employment (two years in this case) an employee has the right not to be unfairly dismissed by his employer (Employment Rights Act 1996, section 94). The Claimant plainly had served the relevant period and therefore has acquired that statutory right.
78. The respondent accepts that the claimant was dismissed. It is thus for the respondent to show one of the five potentially reasons for dismissal (Section 98 (1) and (2) of the Employment Rights Act 1996 ("the 1996 Act").
79. A dismissal will be unfair unless it is for one of the admissible reasons specified in the 1996 Act. Those reasons include (as is purported by the respondent here) "a reason which relates to the capability ..of the employee for performing work of the kind which he was employed by the employer to do."
80. The task of identifying the real reason for dismissal rests with the Tribunal (notwithstanding that the burden rests on the employer to prove that it was one of the five potentially fair reasons). The correct characterisation of the reason for dismissal will depend on what was at the forefront of the employer's mind.

If it was the employee's "skill, aptitude, health or any other physical or mental quality" then the reason for dismissal would be capability.

81. If a potentially fair reason is shown by the employer, the Tribunal needs to have regard to Section 98(4) of the 1996 Act which provides that: "the determination of the question whether dismissal is fair or unfair (having regard to the reasons 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".
82. The test in section 98(4) was further clarified by the Employment Appeal Tribunal in *Iceland Frozen Foods Limited -v- Jones* [1982] IRLR 439: (i) the starting point should always be the words of Section 98(4) themselves; (ii) in applying the section an Employment Tribunal must consider the reasonableness of the employer's conduct not simply whether they (the members of the Employment Tribunal) consider the dismissal to be fair; (iii) in judging the reasonableness of the employer's conduct an Employment Tribunal must not substitute its decision as to what was the right course to adopt for that of the employer. In many, though not all cases, there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view, another quite reasonably take another; (iv) 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 falls outside the band it is unfair".
83. There is a good deal of case law around dismissal of employees with long-term illness. Notably, in *Spencer v Paragon Wallpapers* [1977] ICR 301 it states: "Every case depends on its own circumstances. The basic question which has to be determined in every case is whether in all the circumstances the employer can be expected to wait any longer and if so how much longer. Every case will be different depending upon the circumstances."
84. The Tribunal must be satisfied that the procedure followed in relation to the claimant's dismissal fell within the band of reasonable responses (*Whitbread plc v Hall* [2001] EWCA Civ 268).
85. In arriving at our conclusions on the question of unfair dismissal we have considered the following key facts.
86. Firstly, the claimant was someone who had been employed since 2018 in a responsible role and prior to September 2022 there had been no aspects of her performance that had ever caused anyone to call her ability to carry out the role into question.
87. In fact we consider the fact that she was accepted on a temporary promotion as a Supervising Officer to be evidence of the fact that she was held in high



regard by the Prison Service and she was deemed to be capable of stepping up to the more senior supervisory position. The fact that, having been duly promoted to this more demanding role, she held that role for 10 months during which there is no evidence of any performance related issues save for those which were brought to her attention for the very first time on the 6 September 2022 supports our view yet further.

88. Secondly, although she appears to have had a number of sickness absences, we consider that the figures presented are a little misleading, in that the longest periods of absence (11 days into 2020 and ten days in 2022) are easily explained: The 11 day absence was in the very early days of the COVID pandemic and is recorded as being related to the pandemic, at a time when any person who was symptomatic was required by law to stay away in isolation for 10 days; and the second absence in 2022 is a matter that has been covered in detail in the evidence in this case and was directly connected to the traumatic events which are at the heart of the fact of this claim.
89. Thirdly, we have already referred in our findings of fact to the fact that a number of suggested measures to support the claimant in the aftermath of her trauma - regular check-ins, CBT, psychotherapy - were not put into place by the respondent, and so to a degree there is culpability on their part as to why a recurrence of her symptoms may have arisen.
90. Fourthly, we have considered the chronology and content of the various pieces of information upon which Mr Moore made his decision to dismiss. We note that the claimant was deemed to be unfit for work by both her GP and the Occupational Health report of the 26 September 2022. She remained unfit for work, according to her general practitioner, up to and including the date of her dismissal. She was only judged to be fit for work for the very first time in an Occupational Health report of 20 October 2022; and even then it was subject to a number of qualifications which we have identified in our findings of fact. These qualifications were reiterated in the final occupational health report of the 1 November 2022. It was in our view reductive and inaccurate on the part of Mr Moore to rely solely on the headline finding that the claimant was fit for work, whilst simultaneously ignoring some of the other factors identified in the Occupational Health report.
91. We have been unable to understand how or why Mr Moore felt able to completely reject the findings of the GP fit notes in favour of the Occupational Health report without at least some attempt at further exploration of the underlying issues. There was no attempt to obtain the claimant's medical records by the respondent, and the Occupational Health Practitioners who assessed the claimant did not have access to her medical records either. They were only making an assessment of her mental health via relatively brief telephone assessments using self-assessment tools and so they could not be expected to amount to a comprehensive evaluation of the claimant's condition.
92. Given the obvious conflict between the various reports before him, it was unreasonable of Mr Moore not to look more deeply into the issue before deciding what evidence to accept and what evidence to reject .

93. When asking ourselves the question the ultimate question as to whether the employer could be expected to wait any longer and if so how much longer we have regard to the fact that an invitation to the FARM meeting was made on the 9 November 2022, less than three weeks after the first Occupational Health report indicated that the claimant was fit for work. In the context of a large public sector employer we do not consider that this is anything like long enough or a detailed enough investigation into the circumstances of her absence she justify even considering dismissal let alone taking the ultimate step to dismiss, particularly where, as here, the underlying cause of the claimant's anxiety and depression was exposure to psychological trauma whilst in the employment of the respondent.
94. Our view of Mr Moore's evidence was that we found he appeared to be wedded to the idea that because the service of the OH was being paid for by the respondent, it trumped every other consideration.
95. We have considered with care the phrase used by Miss Bailey in the course of the meeting and recorded as being "I love my job but I'm not returning". We have considered that comment in the context of the meeting as a whole. We find that the respondent has imbued that comment with a meaning and emphasis which is not necessarily borne out when one considers it in context.
96. The fact that when the claimant was given a moment to reflect on the statement, she set it in its proper context and explained that whilst she did wish to return she was not ready to do so in the short term suggests to us that that was precisely the intended meaning of that phrase. It was in our judgment a spontaneous and somewhat emotional response to the situation that was unfolding in that meeting. It should not have been taken to be a definitive statement that she had no intention of returning to work at any stage, and we do not consider that that was what was meant by it.
97. We find that Mr Moore placed more reliance upon that phrase than was reasonable and used it as a justification for the dismissal.
98. In light of all of the circumstances set out above, we are of the view that the decision to dismiss was one that fell outside the band of reasonable responses in light of the procedures adopted by the respondent, and the circumstances as they existed at the time.
99. We do consider that, had the respondent adopted a fair procedure, there is a chance that the respondent may have been fairly dismissed. This would have required at the very least a much more detailed consideration of all of the available medical evidence, and allowing a considerably longer period for the claimant to recover before making the decision to dismiss.
100. In the circumstances, when the Tribunal comes to consider remedy, the parties are invited to make submissions in relation to this issue and whether, as a result, any adjustment to the award of compensation should be made under *Polkey*.

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Employment Judge Conley

Date: ...4 October 2024.....

Sent to the parties on: 10 October 2024.

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For the Tribunal Office