EMPLOYMENT TRIBUNALS

Claimant: Mrs C Evans

Respondent: Maritime & Coastguard Agency

Heard at: Cardiff by CVP **On:** 11 – 14 January 2022

Before: Employment Judge C Sharp
Mr M Lewis
Mr C Stephenson

Representation
Claimant: Miss J Denton (Counsel)
Respondent: Mr J Edwards (Counsel)

RESERVED JUDGMENT

By unanimous decision:

1. The Claimant's claim of unfair dismissal is well founded;

2. The Claimant's claim of discrimination arising from disability is not well founded and is dismissed;

3. The Claimant's claim of direct age discrimination is not well founded and is dismissed;

4. The Claimant's remedy in respect of her successful unfair dismissal claim will be considered by the Tribunal at a later remedy hearing to be listed.

REASONS

Background

1. The Claimant, Mrs Cheryl Evans, was employed as an administration officer, latterly in the role of business support unit officer, by the Respondent between 25

March 2002 and 17 September 2019. The Respondent is an executive government agency responsible for the implementation of British and international maritime law and safety in the seas. The Claimant was based in the Swansea Business Support Unit ("BSU"). It appears that from time to time there were temporary and other members of staff working with the team, but the core of the team was three administration officers (including the Claimant), two Executive Officers and a Business Support Partner (the team manager).

2. The Claimant's position is that following a reorganisation in June 2017 (involving office closures and job losses), her workload (and that of the BSU generally) increased. The Claimant was ultimately signed off work from 5 March 2019 due to work-related stress and never returned to work. During the course of the hearing, the Claimant referred to other issues within the workplace as causing stress. It was evident from the evidence before the Tribunal from both parties that the appointment of a new Business Support Partner for the BSU in late 2018/early 2019 caused difficulties for some of the staff due to his different management style and interest in the staff's work. The Claimant felt under scrutiny. The Tribunal did not need to determine whether the new team manager was at fault due to the nature of the case before it – in essence, it was not relevant why the Claimant felt stressed to determine her claims. There was no dispute that the Claimant suffered work-related stress.

3. The Claimant's role was focused on cashiering activities e.g. completing the cash book, reconciliation entries in the bank statements, recording cheques received, chasing up and completing loose ends at the month end. Her work was checked by the Executive Officers and signed off by the Business Support Partner. The Claimant worked part-time, and therefore when she was not at work, others undertook her tasks or they were not done until her return.

4. The Claimant attended two occupational health assessments on 18 March 2019 and 28 June 2019. At both assessments, the Claimant was found to be unfit for work due to stress with no likely or known return date. At the second assessment, she was expressly found to be fit to attend meetings. This question was asked by the Respondent as the Claimant was refusing to attend meetings to discuss her absence and the reasons for it on the basis that she had been signed off work by her GP (who also wrote a letter saying that the Claimant should not have to engage with the Respondent while ill). The Claimant refused several invitations to attend meetings (both informal and formal) or set out her concerns, including a refusal to attend a meeting on 3 June 2019, claiming that her doctor had been consulted and had advised non-attendance (when in the medical records there was no record of any such consultation at that time), and two refusals in August 2019 where the Claimant said the trade union representative was not available.

5. The Claimant's position in relation to meetings appeared to be in conflict with the advice received from her union; it was suggested by the union on 30 April 2019 to the Respondent that the Claimant should attend a meeting for it then to confirm that the Claimant would not attend a meeting. The Claimant only attended one absence meeting which was on 19 July 2019; this was a formal absence meeting after the case had been transferred to a decision manager with a warning that dismissal was now a possibility (amongst other options). The Claimant also

declined invitations to write to the Respondent setting out her concerns or to take part in the investigation undertaken by a colleague from the Cardiff office, Mr Paul Hughes, into how the claimant's team was interacting with each other.

6. Ultimately, the Claimant was dismissed by Ms Sarah Morgan, Head of Registry Branch and the decision manager, on 17 September 2019 in her absence. The claimant appealed on 23 September 2019. Her appeal letter set out the following grounds of appeal:

   a) the procedure used was not correct;
   b) the decision to dismiss was not supported by the information or evidence available to the decision maker;
   c) that the actions of the Respondent had caused her stress by its failure to follow its own policies.

   The Claimant challenged the four areas considered by the decision maker, namely the advice from Occupational Health (which the Claimant said did not support dismissal), the meeting of 19 July 2019 (which the Claimant said did not support dismissal), the Claimant's alleged lack of engagement with the whole process (the Claimant relied upon her GP advice and sick notes to explain this), and the lack of a return to work date or support place (the Claimant said the Respondent was at fault due to its lack of support).

7. The appeal hearing took place on 11 November 2019. Captain Ranjit Joseph did not uphold the appeal and confirmed the dismissal in his letter of 15 November 2019. The parties undertook ACAS early conciliation between 9 December 2019 and 6 January 2020. The Claimant presented her complaint to the Tribunal on 6 February 2020.

The claims/the hearing

8. The Claimant brought three claims - a claim of ordinary unfair dismissal, discrimination arising from disability (the dismissal being caused by her long-term absence due to workplace stress), and direct age discrimination (that the claimant was dismissed because of her age). Disability was not conceded and therefore the tribunal will need to determine whether the Claimant was disabled at the time of her dismissal.

9. The age claim involves a comparison with another administrative officer in the team, Ms Sarah McLean. Ms McLean was dismissed on 28 July 2020 following a period of both sick and special leave. Ms McLean was signed off sick in February 2019, weeks before the Claimant was the same position. While the Claimant pleaded that Ms McLean was in her 40's, the parties accept that she was approximately 36 at the time of the Claimant's dismissal.

10. The Tribunal heard oral evidence from Ms Emma McLean (Executive Officer in the BSU), Ms Carole Galloway (human resources) and Captain Joseph on behalf of the Respondent. It also heard from the Claimant, Ms Sarah McLean and Ms Cheryl Mort (another administrative officer in the same team who resigned in 2019) on behalf of the Claimant. Ms Nicola Smith, the other Executive Officer in the BSU,

supplied a witness statement but did not attend to give evidence. Counsel for the parties accepted that Ms Smith had good reason not to attend (which was disclosed to the Tribunal), that the statement should be viewed as hearsay and the weight to be put on it was a matter for the Tribunal. The dismissing officer, Sarah Morgan, did not attend the hearing and no statement was provided from her. No explanation for her absence was given to the Tribunal until the panel asked Ms Galloway for an explanation while she was giving evidence. Ms Galloway informed the Tribunal that Ms Morgan had been dismissed and had not been approached to give evidence to this Tribunal.

11. The hearing was listed for liability and remedy over four days (11 -14 January 2022). It appears though that in a Preliminary Hearing on 21 December 2021 with Employment Judge T V Ryan (the Order was not within the hearing bundle or administration file for the Tribunal to confirm), the Tribunal and the parties felt five days would be more appropriate. However, the length of the hearing was not extended, and the hearing panel was unaware of this discussion until it received an email from the parties on the morning of the hearing, explaining that unavailability dates had been supplied in the hopes of gaining an extra day.

12. At the outset of the hearing, the Judge explained no extra day had been listed and while it could be listed for a later date, there would be a significant delay. After discussion, it was agreed to only deal with liability for all three claims, and *Polkey* and contributory conduct in respect of the unfair dismissal claim over the four hearing days, though it was likely the judgment would need to be reserved due to lack of time. The Tribunal was particularly influenced in this decision by the Claimant's personal injury claim in respect of the discrimination matters, which would involve complex points regarding causation, the avoidance of double recovery with any injury to feelings award, and evidence. To deal with such matters would require at least one further day. Ms Denton, appearing on behalf of the Claimant, accepted that the key elements of the personal injury claim had not been pleaded and explained it was based on the contention that the depression diagnosed by a GP post-dismissal was an injury caused by the discriminatory dismissal (the only objective evidence before the Tribunal dealing with this was the Claimant's GP records). To press ahead with the remedy issues in such circumstances would not be a good use of limited Tribunal resources, particularly as it was not known if the Claimant would succeed in any of her claims.

13. Following the conclusion of the oral evidence, Counsel for the parties provided written submissions which were amplified by oral submissions. The Tribunal gratefully adopts the written submissions and deals with the points raised where relevant in its Reasons below. However, it is pertinent that there was no substantial dispute between the parties as to the law, which was discussed both at the outset of the hearing and during submissions.

The relevant law

Unfair dismissal

14. The Employment Rights Act 1996 gives employees the right to claim unfair dismissal:

"94 The right
(1) An employee has the right not to be unfairly dismissed by his employer.
(2) Subsection (1) has effect subject to the following provisions of this Part (in particular sections 108 to 110) and to the provisions of the Trade Union and Labour Relations (Consolidation) Act 1992 (in particular sections 237 to 239).
….

98 General
(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—
(a) the reason (or, if more than one, the principal reason) for the dismissal, and
(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
(2) A reason falls within this subsection if it—(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do…
(3) In subsection (2)(a)—(a) "capability", in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality,…
(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—
(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
(b) shall be determined in accordance with equity and the substantial merits of the case."

15. Lord Denning MR explained in Taylor v Alidair Ltd [1978] IRLR 82, [1978] ICR 445:

"Whenever a man is dismissed for incapacity or incompetence it is sufficient that the employer honestly believes on reasonable grounds that the man is incapable and incompetent. It is not necessary for the employer to prove that he is in fact incapable or incompetent."

The *Alidair* test is three-fold:

(a) Does the employer honestly believe that the employee is incapable of doing the job; and
(b) Are the grounds for that belief reasonable?
(c) Are they based on a reasonable investigation?

16. Effectively, the *Alidair* test replicates the questions to be asked when considering a conduct dismissal but within the context of a capacity dismissal.

17. In cases of ill-health capability, in East Lindsey District Council v Daubney [1977] ICR 566 the EAT stressed the importance of consultation and discovering the true medical position. It was said by Mr. Justice Phillips that:

"Unless there are wholly exceptional circumstances, before an employee is dismissed on the ground of ill health it is necessary that he should be consulted and the matter discussed with him, and that in one way or another steps should be taken by the employer to discover the true medical position. We do not propose to lay down detailed principles to be applied in such cases, for what will be necessary in one case may not be appropriate in another. But if in every case employers take such steps as are sensible according to the circumstances to consult the employee and to discuss the matter with him, and to inform themselves upon the true medical position, it will be found in practice that all that is necessary has been done. Discussions and consultation will often bring to light facts and circumstances of which the employers were unaware, and which will throw new light on the problem. Or the employee may wish to seek medical advice on his own account, which, brought to the notice of the employers' medical advisers, will cause them to change their opinion. There are many possibilities. Only one thing is certain, and that is that if the employee is not consulted, and given an opportunity to state his case, an injustice may be done."

18. The EAT in DB Schenker Rail (UK) Ltd v Doolan EATS 0053/09 emphasises that, while *Daubney* requires an employer to establish the *"true medical position"* before deciding to dismiss, that should not be read as requiring a higher standard of enquiry than required for a misconduct dismissal. The Burchell approach, requiring that a reasonable investigation into the matter be carried out, still applies. "*Reasonable*" does not mean taking every possible step that could be taken – it is an investigation that is reasonable within a range of reasonable responses open to a reasonable employer.

19. In Spencer v Paragon Wallpapers Ltd [1977] ICR 301, it was said that every case depends on its own circumstances. The basic question is whether, in all the circumstances, the employer can be expected to wait any longer, and if so, how much longer. Relevant circumstances include the nature of the illness, the likely length of the continuing absence, the need of the employer to have done the work which the employee was engaged to do. This was more recently considered in BS v Dundee City Council 2014 IRLR 131, a case cited by Mr Edwards on behalf of the Respondent, who highlighted the observation that while length of service can be relevant, in the case of an ill-health dismissal its relevance is not so clear cut.

20. Procedural fairness is also relevant. If a policy is in place, whether it was complied with is a relevant factor, though a failure to comply does not render a dismissal automatically unfair. The circumstances of the case remains paramount in assessing fairness.

21. While criticisms were made of various parts of the process by Miss Denton on behalf of the Claimant, by the end of the hearing following the oral evidence of the appeal officer, there was a focus on the appeal. The mere fact that there was a procedural failing in the appeal process will not automatically displace the fairness of the original dismissal. As Gwynedd Council v Barratt and another [2021] EWCA Civ 1322 confirmed, a failing in the process relating to the appeal can render the dismissal unfair, but not automatically. In London Central Bus Company Ltd v Manning EAT 0103/13, a tribunal found a dismissal unfair solely on the basis that

the employer had failed to show the Claimant a list of unsuitable vacancies at the appeal hearing. The EAT upheld the appeal, holding that a procedural defect in the appeal process, while relevant, could only render a dismissal unfair if, as stated in West Midlands Cooperative Society Ltd v Tipton [1986] A.C. 536, it denied the employee the opportunity of demonstrating that the reason for their dismissal was not sufficient for the purpose of S.98(4). This was a point Miss Denton made both in cross-examination and in her submissions – that the appeal officer had not understood his role and accordingly denied the Claimant this opportunity.

22. The dismissal of an employee may be fair, even in circumstances where an employer's conduct has caused, or materially contributed towards, an employee's capability to work. The question for the tribunal to address is whether or not, in the circumstances of that particular case, a reasonable employer would have waited longer before dismissing the employee (McAdie v RBS [2007] EWCA Civ 806 and BS v Dundee City Council [2014] IRLR 131 cited by both parties; City of York v Grossett [2018] EWC Civ 1105 by the Claimant) O'Brien v Bolton St Catherine's Academy [2017] EWCA Civ 145 was not cited but it makes a similar point that when considering an unfair dismissal claim and a s15 claim that there is not a necessary inconsistency between the tribunal, on the one hand, rejecting the claim of unfair dismissal and, on the other, upholding a claim under Section 15 of the Equality Act 2010 in respect of that same dismissal. That is because the issue of whether a dismissal is unfair or not is determined by reference to the question of whether that dismissal was within the range of reasonable responses open to a reasonable employer.

23. There is, therefore, a relatively significant degree of latitude for an employer in respect of a decision to dismiss and its fairness or otherwise. In fact, a tribunal may disagree with a decision taken by an employer to dismiss an employee but that will not necessarily mean that the decision was unfair. The dismissal will only be said to be unfair when it can properly be said that the decision to dismiss the particular employee in the particular circumstances of the case was one which was outside the range of reasonable responses. The Tribunal cannot substitute its own view of the matter and what it would have done in the circumstances if it had been the employer.

24. While the decision deals principally with liability only, the parties agreed that the usual course of considering *Polkey* and contributory conduct for this claim would be appropriate at this stage as it would involve findings of fact. "*Polkey*" is a reference to the well-known case of Polkey v AE Dayton Services Ltd [1988] 1 AC 344 where it was said:

"Employers contesting a claim of unfair dismissal will commonly advance as their reason for dismissal one of the reasons specifically recognised as valid by section 57(2)(a), (b) and (c) of the Employment Protection (Consolidation) Act 1978. These, put shortly, are: (a) that the employee could not do his job properly; (b) that he had been guilty of misconduct; (c) that he was redundant. But an employer having prima facie grounds to dismiss for one of these reasons will in the great majority of cases not act reasonably in treating the reason as a sufficient reason for dismissal unless and until he has taken the steps, conveniently classified in most of the authorities as "procedural," which are necessary in the circumstances

of the case to justify that course of action. Thus, in the case of incapacity, the employer will normally not act reasonably unless he gives the employee fair warning and an opportunity to mend his ways and show that he can do the job; in the case of misconduct, the employer will normally not act reasonably unless he investigates the complaint of misconduct fully and fairly and hears whatever the employee wishes to say in his defence or in explanation or mitigation; in the case of redundancy, the employer will normally not act reasonably unless he warns and consults any employees affected or their 1 Now section 98 of the Employment Rights Act 1996 Case Number: 1600471/2019 40 representative, adopts a fair basis on which to select for redundancy and takes such steps as may be reasonable to avoid or minimise redundancy by redeployment within his own organisation. If an employer has failed to take the appropriate procedural steps in any particular case, the one question the industrial tribunal is not permitted to ask in applying the test of reasonableness posed by section 57(3) is the hypothetical question whether it would have made any difference to the outcome if the appropriate procedural steps had been taken. On the true construction of section 57(3) this question is simply irrelevant. It is quite a different matter if the tribunal is able to conclude that the employer himself, at the time of dismissal, acted reasonably in taking the view that, in the exceptional circumstances of the particular case, the procedural steps normally appropriate would have been futile, could not have altered the decision to dismiss and therefore could be dispensed with. In such a case the test of reasonableness under section 57(3) may be satisfied."

25. In other words, an unfair dismissal cannot be rendered fair because it made no difference unless the Respondent reasonably regarded the procedural failing as a wholly futile step. Futility has not been argued in this case. However, the difference that any failing identified by the Tribunal made if a fair procedure had been undertaken is relevant to compensation – the award must reflect the likelihood that the employee would have lost their job even if a fair procedure had been followed (which could be regarding substantive or procedural failings). For example, if the failing made no difference as the employee would have been dismissed by the respondent if a fair procedure had been followed, the deduction to the compensatory award would be 100%; an alternative would be that despite the failings, the employee would have been dismissed two weeks later as the whole business closed, only two weeks' pay may be awarded. The Tribunal must consider not what a hypothetical employer would do but what this respondent would do, on the assumption the employer would this time have acted fairly. More recent decisions of the appeal courts have moved away from a detailed discussion of the procedural/substantive issue and have shifted the focus onto whether tribunals come under an absolute duty to consider making a *Polkey* reduction whenever there is evidence to suggest that the employee might have been fairly dismissed, either when the unfair dismissal actually occurred or at some later date — see Gover and others v Propertycare Ltd 2006 ICR 1073, CA; Software 2000 Ltd v Andrews [2007] 1 WLUK 595.

26. The Respondent argues that the Claimant contributed to her dismissal by not attending meetings and thus preventing the agreement of a return to work plan. Section 122(2) of the Employment Rights act says:

"Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly."

27. There is no requirement for a causative relationship between the conduct and the dismissal. In Steen v ASP Packaging Ltd [2014] 42 ICR 56 the Employment Appeal Tribunal suggested the following should be assessed:

    (a) What is the conduct which is said to give rise to possible contributory fault?
    (b) Is that conduct blameworthy? The tribunal has to assess as a matter of fact what the employee actually did or failed to do (not what the employer believed).
    (c) Did any such blameworthy conduct cause or contribute to the dismissal to any extent (this is only relevant to the compensatory award)?
    (d) If so, to what extent should the award be reduced and to what extent is it just and equitable to reduce it? The EAT noted that *"A separate question arises in respect of section 122 where the tribunal has to ask whether it is just and equitable to reduce the amount of the basic award to any extent. It is very likely, but not inevitable, that what a tribunal concludes is a just and equitable basis for the reduction of the compensatory award will also have the same or a similar effect in respect of the basic award, but it does not have to do so."*

28. In Nelson v BBC No 2 [1980] ICR 110 it was said: *"It is necessary, however, to consider what is included in the concept of culpability or blameworthiness in this connection. The concept does not, in my view, necessarily involve any conduct of the complainant amounting to a breach of contract or a tort. It includes, no doubt, conduct of that kind. But is also includes conduct which, while not amounting to a breach of contract or a tort, is nevertheless perverse or foolish, or, if I may use the colloquialism, bloody minded. It may also include action which, though not meriting any of those more pejorative terms, is nevertheless unreasonable in all the circumstances. I should not, however, go as far as to say that all unreasonable conduct is necessarily culpable or blameworthy; it must depend on the degree of unreasonableness involved."*

29. In Hollier v Plysu Ltd 1983 IRLR 260, the EAT thought that the contribution towards dismissal when considering the compensatory award should be assessed broadly and should generally fall within the following categories: wholly to blame (100 per cent); largely to blame (75 per cent); employer and employee equally to blame (50 per cent); slightly to blame (25 per cent).

Disability

30. There was no dispute between the parties as to the relevant legal principles. The cases of Aderemi -v- London and South Eastern Railway Limited [2013] ICR 591, Leonard -v- Southern Derbyshire Chamber and Commerce [2021] IRLR 19 and Abadeh -v- British Telecommunications PLC [2001] IRLR 23 are relevant. Both parties cited Herry v Dudley Metropolitan Council [2017] ICR 610, which in turn relies upon J v DLA Piper (see below).

31. The starting point is the definition of disability under Section 6 of the Equality Act 2010:

    "Disability:
    (1) a person (P) has a disability if –
    (a) P has a physical or mental impairment, and
    (b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day to day activities…
    (5) A Minister of the Crown may issue guidance about matters to be taken into account in deciding any question for the purposes of sub section (1). (6) Schedule 1 (disability: supplementary provision) has effect".

32. Schedule 1 of the Act contains a number of relevant provisions. Paragraph 2 deals with the issue of "long term" and says:
    "2 (1) the effect of an impairment is long term if –
    (a) it has lasted for at least 12 months,
    (b) it is likely to last for at least 12 months, or
    (c) it is likely to last for the rest of the life of the person affected.
    (2) If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day to day activities, it is treated as continuing to have that effect if that effect is likely to reoccur."

33. "*Likely*" should be taken to mean "*could well happen*". The tribunal also had regard to Singapore Airlines Ltd v Casado-Guijarro [2013] UKEAT/0386/13/BA which reiterated the position at law that a Tribunal cannot, when assessing whether a claimant is a disabled person at a particular point in time, take into account what subsequently happened to the individual. Assessing whether something is likely requires the focus to be on the evidence that was available at the particular time. The Tribunal has to assess it in the round on the basis of what was known at the time.

34. Paragraph 5 of Schedule 1 says:

    "5(1) An impairment is treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day to day activities if – (a) measures are being taken to treat or correct it, and
    (b) but for that, it would be likely to have that effect.
    (2) "measures" includes, in particular, medical treatment and the use of a prosthesis or other aid."

35. An Employment Tribunal should consider the guidance issued by the Secretary of State regarding matters to be taken into account when determining questions relating to the definition of disability and the Employment Statutory Code of Practice by the Equality and Human Rights Commission.

36. Section 212(1) of the Act states that the word "*substantial*" means more than minor or trivial. The case of *Aderemi* confirms at paragraph 14 that: *"…the Act itself does not create a spectrum running smoothly from those matters which are clearly of substantial effect to those matters which are clearly trivial but provide for a bifurcation: unless a matter can be classified within the heading "trivial" or*

"insubstantial", it must be treated as substantial. There is therefore little room for any form of sliding scale between one and the other."

37. The focus must be on what the Claimant cannot do or can only do with difficulty (*Leonard*). It is important to step back and look at the overall picture (confirmed recently in the EAT case of Elliott -v- Dorset County Council UKEAT/0197/20/LA). The onus is on the Claimant to satisfy the burden of proof that she is disabled for the purposes of the Equality Act.

38. At the outset of this hearing, the Tribunal referred to the four questions set out in the case of Goodwin -v- Patent Office [1999] ICR 302 set out by Mr Justice Morison (President) in order to ascertain what issues were disputed and all of which need to be resolved by the Tribunal:

(1) Did the Claimant have a mental impairment?
(2) Did the impairment affect the Claimant's ability to carry out normal day to day activities?
(3) Was the adverse effect substantial?
(4) Is the adverse effect (upon the Claimant's ability to carry out normal day to day activities) long term? It is worth pausing to note that the requirement of "*long term"* in the Judgment of the Tribunal applies to the adverse effect, and not necessarily to the condition or impairment. The Tribunal considers it a requirement of the Act that the long-term requirement applies to the adverse effect on normal day to day activities.

39. The Tribunal also had regard to the decision in J v DLA Piper UKEAT/0263/09, which it considered had a number of pertinent points for the current case, in which Mr Justice Underhill stated:

"40 Accordingly in our view the correct approach is as follows:
(1) It remains good practice in every case for a tribunal to state conclusions separately on the questions of impairment and of adverse effect (and in the case of adverse effect, the questions of substantiality and long-term effect arising under it) as recommended in Goodwin.
(2) However, in reaching those conclusions the tribunal should not proceed by rigid consecutive stages. Specifically, in cases where there may be a dispute about the existence of an impairment it will make sense, for the reasons given in para. 38 above, to start making findings about whether the claimant's ability to carry out normal day-to-day activities is adversely affected (on a long-term basis), and to consider the question of impairment in the light of those findings …"

Mr Justice Underhill further stated, on identifying whether there is an impairment at all, particularly in relation to mental health conditions:

"42: "The first point concerns the legitimacy in principle of the kind of distinction made by the tribunal, as summarised at para 33(3) above, between two states of affairs which can produce broadly similar symptoms: those symptoms can be described in various ways, but we will be sufficiently understood if we refer to them as symptoms of low mood and anxiety. The first state of affairs is a mental illness – or, if you prefer, a mental condition –

which is conveniently referred to as 'clinical depression' and is unquestionably an impairment within the meaning of the Act. The second is not characterised as a mental condition at all but simply as a reaction to adverse circumstances (such as problems at work) or – if the jargon may be forgiven – 'adverse life events'. We dare say that the value or validity of that distinction could be questioned at the level of deep theory; and even if it is accepted in principle the borderline between the two states of affairs is bound often to be very blurred in practice. But we are equally clear that it reflects a distinction which is routinely made by clinicians – it is implicit or explicit in the evidence of each of Dr Brener, Dr MacLeod and Dr Gill in this case – and which should in principle be recognised for the purposes of the Act. We accept that it may be a difficult distinction to apply in a particular case; and the difficulty can be exacerbated by the looseness with which some medical professionals, and most lay people, use terms such as 'depression' ('clinical' or otherwise), 'anxiety' and 'stress'. Fortunately, however, we would not expect those difficulties often to cause a real problem in the context of a claim under the Act. This is because of the long-term effect requirement. If, as we recommend at para 40(2) above, a tribunal starts by considering the adverse effect issue and finds that the claimant's ability to carry out normal day-to-day activities has been substantially impaired by symptoms characteristic of depression for 12 months or more, it would in most cases be likely to conclude that he or she was indeed suffering 'clinical depression' rather than simply a reaction to adverse circumstances: it is a common sense observation that such reactions are not normally long lived."

40. Mr Justice Underhill further identified at paragraph 44 of the judgment that terms such as "anxiety, stress, or depression" are often used as loose terms by laymen and some health professions - it is important to bear in mind this in considering both the impairment issue and the adverse effect issue. Tribunals may have to look behind the labels and look at the reality "*on the ground*".

41. The case of *Herry* develops this point in relation to work-related stress. At paragraphs 55 & 56, it states:

"55 This passage has, we believe, stood the test of time and proved of great assistance to employment tribunals. We would add one comment to it, directed in particular to diagnoses of stress. In adding this comment we do not underestimate the extent to which work-related issues can result in real mental impairment for many individuals, especially those who are susceptible to anxiety and depression.

56 Although reactions to adverse circumstances are indeed not normally long-lived, experience shows that there is a class of case where a reaction to circumstances perceived as adverse can become entrenched; where the person concerned will not give way or compromise over an issue at work, and refuses to return to work, yet in other respects suffers no or little apparent adverse effect on normal day-to-day activities. A doctor may be more likely to refer to the presentation of such an entrenched position as stress than as anxiety or depression. An Employment Tribunal is not bound to find that there is a mental impairment in such a case. Unhappiness with a decision or a colleague, a tendency to nurse grievances, or a refusal to compromise (if these or similar findings are made by an Employment Tribunal) are not of themselves mental impairments: they

may simply reflect a person's character or personality. Any medical evidence in support of a diagnosis of mental impairment must of course be considered by an Employment Tribunal with great care; so must any evidence of adverse effect over and above an unwillingness to return to work until an issue is resolved to the employee's satisfaction; but in the end the question whether there is a mental impairment is one for the Employment Tribunal to assess."

42. In essence, *Herry* reminds Tribunals that work-related stress is not necessarily an impairment and it is whether there is evidence such stress had a substantial adverse impact on a Claimant's ability to carry out normal day-to-day activities which will resolve this issue.

s15 Equality Act – discrimination arising from disability

43. As for the correct approach when determining section 15 EqA claims, the Tribunal refers to Pnaiser v NHS England and others UKEAT/0137/15/LA at paragraph 31, though neither party referred to this leading case:

"(a) A Tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises.
(b) The Tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a section15 case. The 'something' that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.
(c) Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A's motive in acting as he or she did is simply irrelevant: see Nagarajan v London Regional Transport [1999] IRLR 572. A discriminatory motive is emphatically not (and never has been) a core consideration before any prima facie case of discrimination arises, contrary to Miss Jeram's submission (for example at paragraph 17 of her Skeleton).
(d) The Tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is "something arising in consequence of B's disability". That expression 'arising in consequence of' could describe a range of causal links. Having regard to the legislative history of section 15 of the Act (described comprehensively by Elisabeth Laing J in Hall), the statutory purpose which appears from the wording of section 15, namely to provide protection in cases where the consequence or effects of a disability lead to unfavourable treatment, and the availability of a justification defence, the causal link between the something that causes unfavourable treatment and the disability may include more than one link. In other words, more than one relevant consequence of the disability may require consideration, and it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability.
(e) For example, in Land Registry v Houghton UKEAT/0149/14 a bonus payment was refused by A because B had a warning. The warning was given for absence

by a different manager. The absence arose from disability. The Tribunal and HHJ Clark in the EAT had no difficulty in concluding that the statutory test was met. However, the more links in the chain there are between the disability and the reason for the impugned treatment, the harder it is likely to be to establish the requisite connection as a matter of fact.

(f) This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.

(g) Miss Jeram argued that "a subjective approach infects the whole of section 15" by virtue of the requirement of knowledge in section 15(2) so that there must be, as she put it, 'discriminatory motivation' and the alleged discriminator must know that the 'something' that causes the treatment arises in consequence of disability. She relied on paragraphs 26 to 34 of Weerasinghe as supporting this approach, but in my judgment those paragraphs read properly do not support her submission, and indeed paragraph 34 highlights the difference between the two stages - the 'because of' stage involving A's explanation for the treatment (and conscious or unconscious reasons for it) and the 'something arising in consequence' stage involving consideration of whether (as a matter of fact rather than belief) the 'something' was a consequence of the disability.

(h) Moreover, the statutory language of section 15(2) makes clear (as Miss Jeram accepts) that the knowledge required is of the disability only, and does not extend to a requirement of knowledge that the 'something' leading to the unfavourable treatment is a consequence of the disability. Had this been required the statute would have said so. Moreover, the effect of section 15 would be substantially restricted on Miss Jeram's construction, and there would be little or no difference between a direct disability discrimination claim under section 13 and a discrimination arising from disability claim under section 15.

(i) As Langstaff P held in Weerasinghe, it does not matter precisely in which order these questions are addressed. Depending on the facts, a Tribunal might ask why A treated the claimant in the unfavourable way alleged in order to answer the question whether it was because of "something arising in consequence of the claimant's disability". Alternatively, it might ask whether the disability has a particular consequence for a claimant that leads to 'something' that caused the unfavourable treatment."

44. When considering justification, the role of the Tribunal is to reach its own judgment, based on a critical evaluation, balancing the discriminatory effect of the act with the organisational needs of the Respondent.

45. The burden of proof is on the Respondent to establish justification (MacCulloch v ICI [2008] ICR 1334). The legitimate aim must be identified by the Tribunal. Paragraph 10 in *MacCulloch* says:

"(1) The burden of proof is on the respondent to establish justification: see Starmer v British Airways [2005] IRLR 862 at [31].

(2) The classic test was set out in Bilka-Kaufhaus GmbH v Weber Von Hartz (Case 170/84) [1984] IRLR 317 in the context of indirect sex discrimination. The ECJ said that the court or tribunal must be satisfied that the measures must "correspond to a real need … are appropriate with a view to achieving the objectives pursued and are necessary to that end" (para 36). This involves the application of the proportionality principle […]. It has subsequently been emphasised that the

reference to "necessary" means "reasonably necessary": see Rainey v Greater Glasgow Health Board (HL) [1987] IRLR 26 per Lord Keith of Kinkel at pp 142-143.
(3) The principle of proportionality requires an objective balance to be struck between the discriminatory effect of the measure and the needs of the undertaking. The more serious the disparate adverse impact, the more cogent must be the justification for it: Hardys & Hansons plc v Lax [2005] IRLR 726 per Pill LJ at paras 19-34, Thomas LJ at 54-55 and Gage LJ at 60.
(4) It is for the employment tribunal to weigh the reasonable needs of the undertaking against the discriminatory effect of the employer's measure and to make its own assessment of whether the former outweigh the latter. There is no 'range of reasonable response' test in this context: Hardys & Hansons plc v Lax [2005] IRLR 726, CA."

46. In the context of objective justification in s.15 claims, the Tribunal is reminded that it should not focus on the process leading to the decision to dismiss but should engage in an objective assessment, balancing the needs of the employer, as represented by the legitimate aims pursued, against the discriminatory effect of the decision to dismiss (Department for Work and Pensions v Boyers EAT 0282/19). The tribunal is required to carry out an objective assessment and reach its own conclusion, having undertaken a critical evaluation, through which it must balance the discriminatory effect of the act complained of with the organisational needs and requirements of the employer. This is a different approach to an unfair dismissal claim and can lead to different outcomes from the same facts.

47. In order to assess whether the prima facie discriminatory measure (in this case, dismissal) is or is not proportionate in the context of the legitimate aim being pursued, a tribunal must weigh the real needs of the undertaking against the discriminatory effect of the proposal. There must, in this context, be an objective balance between the discriminatory effect of the dismissal and the reasonable needs of the employer (Hampson v Department of Education and Science [1989] ICR 179). How the Tribunal weighs the needs of the Respondent's undertaking against the discriminatory effect of the dismissal is critical. The treatment must be an appropriate means of achieving a legitimate aim and reasonably necessary in order to do so (Hardys and Hansons plc v Lax [2005] ICR 1565 and Homer v Chief Constable of West Yorkshire [2012] ICR 704.

48. While the Tribunal should approach matters objectively, in Birtenshaw v Oldfield [2019] IRLR 946, the EAT held that in assessing proportionality it should give a substantial degree of respect to the judgment of the employer as to what is reasonably necessary to achieve the legitimate aim.

49. The approach to be adopted to the question of justification in a section 15 EqA case was specifically considered by the Court of Appeal in O'Brien v Bolton St Catherine's Academy [2017] EWCA Civ 145, [2017] ICR 737. Underhill LJ observed:

"37. … More generally, the proposition that it was unfair of an employer to decide, after a senior employee had already been absent for over twelve months and where there was no certainty as to when she would be able to return, that the time

had come when the employment had to be terminated, seems to me to require very careful scrutiny. The argument "give me a little more time and I am sure I will recover" is easy to advance, but a time comes when an employer is entitled to some finality. That is all the more so where the employee had not been as co-operative as the employer had been entitled to expect about providing an up-to-date prognosis … and where the evidence relied on at the appeal hearing was only produced at the day of the hearing and was not entirely satisfactory. …
45. … In principle the severity of the impact on the employer of the continuing absence of an employee who is on long-term sickness absence must be a significant element in the balance that determines the point at which their dismissal becomes justified, and it is not unreasonable for a tribunal to expect some evidence on that subject. What kind of evidence is appropriate will depend on the case. Often, no doubt, it will be so obvious that the impact is very severe that a general statement to that effect will suffice; but sometimes it will be less evident, and the employer will need to give more particularised evidence of the kinds of difficulty that the absence is causing. What kind of evidence is needed in a particular case must be primarily for the assessment of the tribunal,. …"

50. Section 15(2), EqA provides:

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

51. The proper approach to be taken in applying this provision was comprehensively summarised by HHJ Eady QC (as she then was) in A Ltd v Z [2020] ICR 199:

"23. In determining whether the employer had requisite knowledge for section 15(2) purposes, the following principles are uncontroversial between the parties in this appeal:

(1) There need only be actual or constructive knowledge as to the disability itself, not the causal link between the disability and its consequent effects which led to the unfavourable treatment: see York City Council v Grosset [2018] ICR 1492, para 39.
(2) The respondent need not have constructive knowledge of the Complainant's diagnosis to satisfy the requirements of section 15(2); it is, however, for the employer to show that it was unreasonable for it to be expected to know that a person (a) suffered an impediment to his physical or mental health, or (b) that that impairment had a substantial and (c) long-term effect: see Donelien v Liberata UK Ltd (unreported) 16 December 2014, para 5, per Langstaff J (President), and also see Pnaiser v NHS England [2016] IRLR 170, para 69, per Simler J.
(3) The question of reasonableness is one of fact and evaluation: see Donelien v Liberata UK Ltd [2018] IRLR 535, para 27; none the less, such assessments must be adequately and coherently reasoned and must take into account all relevant factors and not take into account those that are irrelevant.
(4) When assessing the question of constructive knowledge, an employee's representations as to the cause of absence or disability-related symptoms can be of importance: (i) because, in asking whether the employee has suffered substantial adverse effect, a reaction to life events may fall short of the definition of disability for Equality Act purposes (see Herry v Dudley Metropolitan Borough

Council [2017] ICR 610, per Judge David Richardson, citing J v DLA Piper UK LLP [2010] ICR 1052), and (ii) because, without knowing the likely cause of a given impairment, "it becomes much more difficult to know whether it may well last for more than 12 months, if it has not [already] done so", per Langstaff J in Donelien 16 December 2014, para 31.
(5) The approach adopted to answering the question thus posed by section 15(2) is to be informed by the code, which (relevantly) provides as follows:

"5.14 It is not enough for the employer to show that they did not know that the disabled person had the disability. They must also show that they could not reasonably have been expected to know about it. Employers should consider whether a worker has a disability even where one has not been formally disclosed, as, for example, not all workers who meet the definition of disability may think of themselves as a 'disabled person'.
5.15 An employer must do all they can reasonably be expected to do to find out if a worker has a disability. What is reasonable will depend on the circumstances. This is an objective assessment. When making inquiries about disability, employers should consider issues of dignity and privacy and ensure that personal information is dealt with confidentially."

(6) It is not incumbent upon an employer to make every inquiry where there is little or no basis for doing so: Ridout v TC Group [1998] IRLR 628; Secretary of State for Work and Pensions v Alam [2010] ICR 665.
(7) Reasonableness, for the purposes of section 15(2), must entail a balance between the strictures of making inquiries, the likelihood of such inquiries yielding results and the dignity and privacy of the employee, as recognised by the code."

52. At the outset of the hearing, the Tribunal asked Mr Edwards if knowledge of the disability of work-related stress was conceded (in the event that the Tribunal found that the Claimant was disabled), given content of the sick notes and Occupational Health reports. It pointed out that the knowledge point was about the Respondent's actual or constructive knowledge of the work-related stress, not the "*something*" arising. Mr Edwards reserved the Respondent's position on this issue, and it remained in dispute to be determined by the Tribunal.

Direct age discrimination

53. The Claimant is asserting direct age discrimination under s.13 Equality Act 2010:

"(1) 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.
(2) If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim."

54. The comparison that the Tribunal had to make under s. 13 is set out within s23(1):

"On a comparison of cases for the purposes of sections 13, 14 or 19, there must be no material difference between the circumstances relating to each case."

55. The claimant compares herself to Sarah McLean, who was also an Administration Officer in the same team as the Claimant and on sick leave at approximately the same time for work-related stress. The Claimant says that there are no material differences between her and Ms McLean other than age. The Respondent disagrees. It points out Ms McClean was willing to engage with the Respondent and there was an expectation once her concerns had been addressed, she would be able to return to work. The Respondent says that this was not the case with the Claimant, who refused to attend most of the absence meetings and would not engage with her managers or the investigator appointed to investigate concerns about the team generally.

56. The Tribunal reminded itself of the case of Balamoody v. United Kingdom Central Council for Nursing, Midwifery and Health Visiting [2001] EWCA Civ 2097. In that case, while the Claimant had been adamant in comparing himself to a particular individual (who was not found to be an appropriate comparator), the Court of Appeal held that the Tribunal should have, when assessing whether the claim of race discrimination had reasonable prospects of success, considered if a hypothetical comparator could assist the Claimant, given the evidence from which an inference of discrimination could be drawn available to it. In short, it is not fatal to a discrimination claim if the actual comparator is not appropriate if a hypothetical comparator can be drawn from the evidence before the Tribunal. The Tribunal raised this case with the representatives at the outset of the hearing in order to give them an opportunity to consider the matter at the submission stage, as well as pointing out that the case as pleaded appeared to have the wrong age for the comparator. In their submissions, both parties accepted *Balamoody* might apply.

57. The case of Nagarajan v London Regional Transport [1999] IRLR 572 confirmed that a finding of direct discrimination did not require that the discriminator was consciously motivated in treating the complainant less favourably. It was sufficient to support a finding of discrimination if it could properly be inferred from the available evidence that, regardless of the discriminator's motive or intention, a significant cause of the decision to treat the complainant less favourably was her protected characteristic. Conscious or subconscious influence due to the existence of a protected characteristic is enough to render the act discriminatory if it was a significant influence.

58. As the submissions of the parties confirmed, as this is an age discrimination case, it is a defence if the Respondent's dismissal of the Claimant was because of her age if it was a proportionate means of achieving a legitimate aim. The same principles apply in this regard as the defence of objective justification for a s15 claim and should be read across to this claim too.

Findings

59. The Tribunal considered it most convenient to make the relevant findings of fact as it considered the legal issues in turn.

Unfair dismissal

60. Did the dismissing officer, Ms Morgan, genuinely believe the claimant was no

longer capable of performing her duties? There is no statement or oral evidence from her, so the Tribunal must consider the contemporaneous evidence available as the evidence of what she believed; principally her emails/letters, the dismissal letter and the minutes of the meeting between Ms Morgan and the Claimant on 19 July 2019.

61. Once the Claimant left the office on 5 March 2019, she no longer attended work in order to carry out her role. In addition, the correspondence from the Claimant in the Tribunal's view justified Ms Morgan's conclusion, as set out within her dismissal letter, that the claimant was not engaging with the absence management process. This process (pages 736 to 760) required an employee to attend both informal and formal meetings once they had been absent on a continuous basis (21 working days or more).

62. The Claimant's initial position was that she was signed off as unfit for work and therefore did not need to attend any meetings. It is well established that being signed off sick from work does not mean that an employee is not well enough to attend absence management meetings (or indeed take part in legal proceedings); the policy makes it clear that engagement is necessary to enable both parties to understand what are the issues and where appropriate be given an opportunity to address them – "*During any continuous sickness absence, the manager and employee should work together to explore what the employee can do, or might be capable of doing with help and support, to return to work as soon as they are able"* (page 748).

63. The Claimant's GP, who did not appear to be an occupational health specialist from the evidence before the tribunal including the surgery's letterhead at page 325, did send a letter dated 29 April 2019. The GP said that "*in my opinion she [the Claimant] is not ready as yet to sit down to a meeting and discuss her return to work at this point".* No reason was given other than a conversation with the Claimant. As the Respondent's witnesses pointed out, particularly Ms Galloway, not talking to the Claimant meant that there could be no resolution, a point echoed in the second Occupational Health report from a specialist. Ms Morgan had the benefit of two occupational health reports, neither of which said that the Claimant was unfit for meetings and one expressly said that she was fit to attend meetings (28 June 2019). Once the Claimant had seen this second Occupational Health report confirming she was fit to attend meetings, then that she was willing to engage with the principle of attending a meeting. This led to the Claimant attending the formal meeting on 19 July 2019 with Ms Morgan.

64. Ms Morgan had before her at the time of dismissing the Claimant the Occupational Health reports, the GP sick notes and the letter of the GP, combined with the Claimant's observation on 19 July 2019 that she did not know when she would be able to return; there was an absence of any evidence giving any known or likely return date to work for the Claimant. After 19 July 2019, the Claimant reverted to not engaging with the process and refusing to attend further meetings, though she was unable to explain why when asked by the Tribunal. The evidence shows that in relation to the proposed meeting on 6 August 2019, which had been agreed to take place once the previous fit note ran out on 2 August (the parties thought it was 2 August; the Tribunal reads the note as expiring on 4 August) to enable Ms

Morgan to review the Claimant's situation in the light of the most up-to-date medical information, the Claimant did not promptly ask her trade union representative if he would be available to attend the meeting (she did not contact him until 29 July). The Claimant notified Ms Morgan of her non-attendance on 1 August 2019. The Claimant refused further offers of meetings (again saying her representative was not available and making it clear that she did not want to attend – page 494) and when asked if she had anything she would like to contribute said that she had nothing further to add (11 September 2019 – page 483). Ms Morgan in the view of the Tribunal had a reasonable basis to conclude that the Claimant was failing to engage.

65. In the meeting of 19 July 2019, Ms Morgan discussed with the Claimant possible options to help her return to work. The Claimant expressed a willingness to undertake the stress risk assessment. This requires an employee to discuss with a well-being manager or another suitable individual the causes of stress and to agree an action plan to enable that stress to be reduced. This might have involved the management of the Claimant's team, but the claimant had by this time (see page 324) made it clear she did not want her management from BSU to be in contact with her and accused them of using friendly texts as a "*ruse*". The Tribunal does not accept the Claimant's oral evidence that they would have been welcome to visit her home for a chat and a hot drink. The minutes show that the Claimant and Ms Morgan agreed at the end of the meeting of 19 July 2019 that they would further discuss the way forward once the Claimant had seen her GP and was able to provide further medical evidence. The Claimant was signed off work for a further three months on 29 July 2019 (page 452). She refused to attend further meetings. Combined with the inability to provide any likely return to work date, this lack of engagement in the view of the Tribunal and given the contents of the dismissal letter, supported a finding that Ms Morgan genuinely believed that the Claimant was no longer capable of performing her duties at the time of her dismissal. This though does not explain why on 19 July 2019 Ms Morgan was considering the stress risk assessment option and by 8 August 2019 she said that it would not possible until there was a return to work date, particularly given the contents of the second Occupational Health report which made it clear the assessment would help get the Claimant back to work.

66. Was Ms Morgan's belief based on reasonable grounds? Given the contents of the Occupational Health reports, the lack of engagement in the absence management process by the Claimant which was not supported by specialist medical evidence, and the lack of a return date, the Tribunal considered these to be reasonable grounds for the belief. It noted that without the Claimant cooperating in the process, there could be no way forward, which is echoed in the second Occupational Health report. Ms Denton's submissions were that without the stress risk assessment, the process could not move forward, and it appeared that the Respondent expected the Claimant to do the running. She made the point that there was no evidence the Claimant would not be able to return if given support. However, this does not change the primary fact that the Claimant repeatedly refused to attend meetings, particularly the vital meeting due to take place in August 2019 to enable her to discuss options available with the decision maker. The evidence shows that the decision maker wanted to talk further to the Claimant, and it was the Claimant's refusal to attend or take part through any other means that prevented any further

consultation.

67. The Tribunal considered whether the belief was based on reasonable grounds following a reasonable investigation. This included consideration as to whether the consultation had been adequate and based on the up-to-date medical position. The Tribunal considered that the most up-to-date medical position was before the decision maker through the two Occupational Health reports and sick notes, though it was noteworthy how quickly the first Occupational Health report had been obtained (less than two weeks after the claimant first went on sick leave). The Tribunal considered that many attempts have been made to consult the Claimant, including invitations to formal and informal meetings, to have a trade union representative to present when not strictly required under the policy, to consider anything the Claimant wished to put in writing, and rearranging meetings. It is noteworthy that the Claimant at one point claimed that her GP advised that she could not attend a meeting on 3 June 2019 when the medical records show that there was no consultation at this time with the GP. The fit note was silent as to whether the Claimant was fit to attend meetings and while the GP letter of April 2019 said she was not ready; in the Tribunal's view it was reasonable for an employer to prefer the specialist advice occupational health in this regard. They are experts.

68. That said, the Tribunal was uncomfortable with aspects of the Respondent's approach. It questioned whether more efforts could have been made to try to understand the Claimant and to overcome the barrier of her lack of engagement while unfit for work with a mental health condition. Could the Respondent have asked Occupational Health for advice as to whether if a different approach might assist and if it had any suggestions? The Tribunal reminded itself of *DB Schenker Rail v Doolan* and the position that it could not substitute its view for that the Respondent. It was evident that the Respondent had tried repeatedly to get the Claimant to engage, obtained two Occupational Health reports within a short timescale, and considered the evidence provided by the GP. The investigation was within the range of reasonable responses open to a reasonable employer when carrying out an ill health capacity investigation.

69. The Tribunal considered whether the Respondent could have been expected to have wait longer before dismissing the Claimant or explore other alternatives. It reminded itself as to the size of the Respondent and its resources which the Claimant pleaded without challenge as being approximately 1050 staff (with a large volunteer cadre in addition); it is part of the wider civil service, despite being an executive agency. The Claimant was already at the lowest grade of officer and in her oral evidence accepted redeployment to another branch of the civil service would not have been acceptable to her.

70. The Tribunal noted the speed of which the Claimant had been taken through the absence management process, which is unusual in the public sector in its experience. The Claimant was signed off sick on 5 March 2019, seen by Occupational Health on 18 March (though the rapidity of this step could be explained by reference to work-related stress in the sick note), and referred to a decision maker with a view as to whether she should be dismissed on the basis that her absence could no longer be supported by the respondent, given the

Claimant's failure to attend meetings, including the final attempt by her manager on 4 June 2019. The formal meeting with the decision manager took place on 19 July 2019, which was adjourned to await further medical evidence. Attempts were made to have meetings in August 2019 and ultimately the Claimant was dismissed on 17 September 2019. The total process was slightly less than six months. However, the time taken to take the Claimant through the process was not such that it was so quick that it was unfair; it did though raise a query as to why the Respondent was so prompt, which was relevant to all the claims.

71. The answer in the Tribunal's view was that the BSU was struggling with its work due to more than just the Claimant's absence. While the Claimant was going through the process of continuous absence management due to her health, Sarah McLean and Ms Mort were also absent. These three individuals were the core of the administration team undertaking work at the Swansea BSU. As Emma McLean explained and shown at pages 482, 522 & 552 of the hearing bundle, the impact of these three individuals being absent from the office was substantial and it had not been possible to engage temporary staff to successfully deal with matters. There is no dispute that BSU was an important team to the wider work undertaken by the Respondent; for example, until cheques were received and cleared in respect of survey work for non-rolling accounts, surveys would not be undertaken. It appeared from the evidence before the Tribunal that unless the role was vacated by resignation or dismissal, a replacement could not be recruited.

72. By 17 September 2019, Ms Mort had resigned and therefore her role could be filled. This still left Sarah McLean, who by August 2019 according to her oral evidence was fit for work. It was not until 30 December 2019 (page 634) that it was known that she would be redeployed so her role could not be filled at the time of the Claimant's dismissal. That is also relevant that before going on sick leave on 5 March 2019, the Claimant's health and her attendance at work appears to be good; she had over 17 years' of service.

73. The Tribunal heard from more than one witness that the summer period was particularly busy time for the BSU and that this was on top of the additional work from the reorganisation. The monthly minutes of the BSU from 2017 onwards demonstrate that the workload did significantly increase, and at times there were backlogs, but broadly it appears that the administrative staff were managing; it was the Executive Officers who complained most of stress. The Tribunal considered that it was more likely than not that the promptness of the process was because the BSU was struggling, though its struggles were due to more than just the absence of the Claimant.

74. However, the question of whether the Respondent should have waited longer cannot overlook the fact that the Claimant said "*at this juncture"* she had nothing to add on 11 September 2019 (page 493), was refusing to attend further meetings with the decision maker and on 27 July 2019 been signed off as unfit for work for a further three months by her GP. There was no evidence available to the Respondent when the Claimant would be fit for work or when she would be willing to further engage. As *BS v Dundee* makes clear, there is a balancing exercise to be undertaken. While the Claimant was a long serving employee with a good attendance record, the nature of illness was work-related stress. She was not

willing to attend meetings to further discuss how the situation could be resolved as shown by her refusal to further meet with the decision maker in August 2019, despite the decision-maker having agreed to have such meetings to explore alternatives to dismissal. The BSU was an important team struggling with its workload due to staff shortages and was facing the loss of potentially all three administrative officers. It was in the Respondent's own interest to get the Claimant to return to work as soon as possible, given the specialist nature of her role. The Claimant was willing to do a stress risk assessment and the second OH report noted that this would help identify the Claimant's issues and address them, which was necessary to get her to return to the workplace. An alternative to dismissal was the parties working together to address the Claimant's concerns. The decision maker knew that the Claimant was willing to do the stress risk assessment but chose to dismiss her instead.

75. Stepping back and considering whether the Respondent acted reasonably in all the circumstances and treating the Claimant's absence as sufficient reason to dismiss her (in other words was dismissal within the range of reasonable responses open to a reasonable employer in the circumstances?), the Tribunal concluded that it was not, though the point was finely balanced given the Claimant's lack of engagement.

76. The Claimant was absent for work-related stress, and the decision-maker on 19 July 2019 knew that the Claimant was willing to do a stress risk assessment. This step did not require any further meetings with the decision-maker. What was required was for a well-being manager to contact the claimant and attempt to conduct the assessment. The dismissing officer did not take this step – the only explanation before the Tribunal is at page 471 where Ms Morgan told the Claimant in a letter of 8 August 2019 that *"A Stress Risk Assessment has not taken place yet so there is nothing I can send through. It was recommended in your first Occupational Health report as something to carry out on your return to work. As there has not been a return to work date set it hasn't been done."* There is no explanation why the second Occupational Health report was ignored or why Ms Morgan believed given the Claimant's situation why a return to work date was necessary to undertake the assessment. The assessment was the route to getting the Claimant back to work.

77. The Respondent may highlight at the lack of engagement by the Claimant, which the Tribunal accepts occurred, and her oral evidence that she in reality does not know why she did not attend any further meetings with Ms Morgan as the Claimant felt she was "*getting somewhere*". However, the assessment was an option raised in the meeting on 19 July 2019 and then not actioned without a proper explanation why not. It was not clear to the Tribunal if the Claimant realised in August 2019 that the point of no return had approached. She had been threatened with dismissal for several months by this point and had attended what both parties accept was a positive meeting in July 2019. Ms Morgan's letter of 8 August 2019 does mention dismissal is an option; the Claimant's response does not deal with the refusal of the assessment.

78. The dismissal letter (page 499) says that the Claimant has been dismissed due to her absence and inability to return to work within a reasonable timeframe,

combined with little or no contact to discuss the situation from the Claimant. There is no reference to the impact of the Claimant's absence on the team. The Tribunal's view is that a reasonable employer in these circumstances would have waited longer and ensured that a stress risk assessment was offered to the Claimant. A reasonable employer in these circumstances would have attempted to conduct the assessment while the Claimant was signed off sick under cover of the sick note of 27 July 2019 to work toward her return when that sicknote expired. Accordingly, the Tribunal finds that the Claimant was unfairly dismissed.

79. The Tribunal then consider the procedure used to dismiss the Claimant. It considered that the absence management policy was followed, with the exception of arranging an early stress risk assessment. However, this failure is explained by the first Occupational Health report expressing the view that the assessment should not take place until the Claimant had a likely return to work date. When specialist Occupational Health advises an amendment to a policy, in the Tribunal's view it is generally reasonable to action that. The Tribunal considered that the Claimant was suitably warned of the risk of dismissal, given access to a trade union representative, and given appropriate alternatives to ensure that she could take part in the process.

80. The Tribunal considered whether Ms Morgan should have specifically written and invited the Claimant to undertake the stress risk assessment or appoint a well-being manager after the meeting on 19 July 2019, and found that she should have taken further steps before dismissing the claimant. This is not part of the formal process but was raised as an issue at the appeal stage (to which the Tribunal will return shortly). This does not render the dismissal procedurally unfair, but is the reason why the Tribunal found previously that the Claimant had been unfairly dismissed.

81. The Tribunal considered the listed criticisms set out by the Claimant within the grounds of complaint. As Ms Denton accepted in her submissions, much of these points confused the continuous absence policy with the intermittent absence policy and therefore are not relevant. The Tribunal noted that the issue about retirement was never mentioned in the hearing or the submissions. It appeared that the Claimant accepted this was not an option for her due to her age. The heart of the procedural fairness issue is the appeal.

82. Captain Joseph was the appeal officer. Mr Edwards, Counsel for the Respondent, described the oral evidence of Captain Joseph as *"not a masterclass in how to give oral evidence*". In the judgement of the Tribunal, this is an underestimation as to how poor the oral evidence was from the appeal officer. Captain Joseph was unable repeatedly to answer a clear question put to him by Ms Denton on behalf of the Claimant. He persisted in answering questions he had not been asked, reiterating on a number of occasions that the problem was the Claimant's failure to engage and that his role was simply to check the process used by the decision-maker. Captain Joseph was given a number of warnings by the Judge that he should answer the question, to no avail. Matters became so difficult that at one point the Judge halted cross-examination, and asked Mr Edwards if there was some undisclosed issue that might explain the difficulty. Mr Edwards at that point was unable to assist, other than to say that he believed it was Captain Joseph's

first time in giving evidence. It is not uncommon in the experience of the Tribunal for witnesses to be giving evidence in a formal forum for the first time, or to require reminders to answer the question. Captain Joseph's evidence was of an altogether different nature, and it was striking that he appeared wholly unable to grasp that his role was to answer a question, not keep making the same unrelated statement repeatedly. The Tribunal noted that Captain Joseph cited as his qualifications an LLM, which is a Master of Laws, and was told what was expected of him more than once.

83. Ms Denton asked the Tribunal to draw adverse inferences from the manner in which Captain Joseph gave his evidence. The Tribunal would have been willing to do so, had there been a conflict between the evidence of Captain Joseph and the contemporaneous evidence or the evidence of the other witnesses. In fact, both the manner in which Captain Joseph gave his evidence and his constant refrain that his role was simply to check the decision manager had undertaken the process correctly and it was too late for the Claimant to seek to engage with the process at the appeal stage or to complain that the Respondent had not undertaken a stress risk assessment supported a part of the Claimant's case – namely, that Captain Joseph did not understand the correct role of an appeal officer and did not correctly carry out the appeal.

84. An example was in the appeal minutes where the Claimant told Captain Joseph that if he checked the monthly meetings of the BSU, he would find evidence that she had raised that she was suffering from stress. Captain Joseph did not check those minutes but relied on the assurances of the Executive Officers that the Claimant had not raised that point before going on sick leave. Ms Emma McLean accepted in cross-examination that the monthly minutes did show the workload had increased and the Claimant had said at least once that she was stressed. While the monthly minutes objectively do not show that the Claimant suffering more than the normal stress levels of somebody working in a busy workplace, and only then from time to time, the failure to check if the contemporaneous documents said what the Claimant asserted was a failure to carry out the correct role of an appeal officer.

85. Page 752 is an excerpt of the appeal section of the Absence Management Process:

"3. There are three grounds of appeal:
• a procedural error has occurred, and/or
• the decision is not supported by the information/evidence available to the manager or Decision Manager, and/or
• new information/evidence has become available which should be taken into account when reaching a decision about dismissal/demotion."

86. Captain Joseph's clear oral evidence was that new information/evidence should not be taken into account as it would be too late, and his failure to check the monthly minutes meant that he was unable to confirm if what the Claimant was saying was correct and therefore review whether the decision manager's decision to dismiss was supported by the evidence available to her. The Claimant's grounds of appeal raised points that the policy said she could raise at an appeal, but Captain Joseph's approach according to his own account was to restrict himself to effectively a procedural review based on what others told him.

87. The Tribunal considered that the appeal in this case did give the Claimant an opportunity to demonstrate that the reason for her dismissal was not sufficient for the purpose of S.98(4), that she did so demonstrate, but the appeal officer was not willing to listen. The Tribunal considered that the case of *Tipton* indicated that because the Claimant had the opportunity, and no other procedural failings had been identified by the Tribunal by the dismissing officer, the correct conclusion was that the procedure used to dismiss the Claimant was not unfair, despite the approach of the appeal officer. The Tribunal concluded that that could be a rather illogical position to adopt. It reminded itself that the legislation does not differentiate between substantive and procedural fairness, and of the legal cases cited above that showed tribunals are moving away from this distinction. The appeal serves as an opportunity to cure any deficiencies by the dismissing officer, and it was not used in this case.

88. The Tribunal was clear as to the failing of the Respondent in this case, which was that the dismissing officer dismissed the Claimant too soon and should have taken steps to arrange for the Claimant to access the stress risk assessment before considering dismissal. It was this point that the Claimant raised (amongst other points) in her appeal, and if it had been properly addressed, the Claimant's dismissal would not have been upheld at the appeal stage. It is this which forms the Tribunal's finding of unfair dismissal. Whether it is technically both substantive and procedural unfairness is irrelevant as *Polkey* applies to both aspects.

89. Turning to *Polkey,* the Tribunal noted the contents of the second Occupational Health report that confirms that if the work issues of the Claimant were addressed, she would be fit for work. The single depressive episode was caused by the dismissal according to the GP (though the weight to be put on a diagnosis of causation by a GP is arguable), and arguably would not have occurred if the Claimant had not been dismissed. The Claimant was an employee with long service and her unchallenged oral evidence was that she loved her job; the contemporaneous evidence shows she was willing to do the stress risk assessment. In the Tribunal's view, the arguments of the Claimant on this issue were to be preferred; it concluded that the evidence supported a finding that if Ms Morgan had arranged for the stress risk assessment to take place during the three-month period from 27 July 2019, the Claimant's stress issues in the workplace would have been identified and an action plan agreed. While the Claimant refused to attend further meetings with Ms Morgan, for reasons that she herself is unable to articulate, a stress risk assessment is different and is undertaken with a specialist in this area, as described by Ms Galloway in her oral evidence. The Occupational Health report of 28 June 2019 is an articulation of the reality that until the Claimant had an opportunity to work through her issues, there would be no return. The Tribunal concluded that had the stress risk assessment being carried out, or at least attempted, there is no evidence on which it could find that the Claimant would have been fairly dismissed in the circumstances. On the contrary, it considers it more likely than not that, given the Claimant's love of the job, she would have commenced a phased return to work on or around 26 October 2019.

90. The Tribunal was not persuaded by the Respondent's arguments that the Claimant contributed to her dismissal. Its submissions glossed over the minutes of the

meeting of 19 July 2019 that shows the decision-maker understood that the Claimant would do a stress risk assessment, but she failed to take steps to progress this issue or explain sufficiently why it was not appropriate. There is no evidence before the Tribunal that the Claimant would have been dismissed for gross misconduct for misrepresenting that her doctor had specifically told her not to attend meetings in relation to the meeting on 3 June 2019; the point was not dealt with by the Respondent's witnesses. The Claimant was asked in cross examination about this and asserted that the consultation happened, and it had not been recorded. While this is an unconvincing explanation, given the strict rules on doctors about completion of medical records regarding consultations, there may have been other explanations that the Claimant would have given on reflection or evidence adduced about the impact of her mental health in her emails to the Respondent at that time. It is not for the Tribunal to sail on the *"sea of speculation".* In addition, there is no evidence before the Tribunal suggesting that the Claimant has anything other than a clean disciplinary record, and no evidence as to what the Respondent's general approach to this type of issue would be.

Disability

91. The Tribunal considered that the best approach was to look at the Claimant's ability to carry out normal day-to-day activities and whether there was a substantial adverse long-term effect, rather than start with the disputed issue as to whether there is in fact a mental impairment. This approach is expressly permitted by *J v DLA Piper*.

92. The Tribunal concluded that the Claimant had failed to establish that she was disabled for the purposes of the Equality Act 2010. Firstly, the Claimant's impact statement asserts that her ability to sleep (which could be described as a normal day-to-day activity) had been adversely affected from the reorganisation in June 2017 onwards. The Tribunal noted that the Claimant's impact statement was relatively short and light on specific evidence; for example, how was the Claimant's sleep affected ("*twice a week*" is not sufficient)? The Claimant's medical records do not support the Claimant in this regard. There is a reference to a prescription in February 2017 in her impact statement that is not within the medical records. Given that the Claimant historically seems comfortable and able to visit her GP, the Tribunal considered it more likely than not that if she was suffering from substantial issues with sleep, it would be something in which she will have consulted her GP. However, a substantial adverse effect on sleep has not been demonstrated in any event from the impact statement.

93. The Claimant is further undermined by her conflicting accounts of when the difficulties from stress rose. The Claimant asserts that it is from June 2017 onwards, but she told Occupational Health on 18 March 2019 that she started to feel stress about three months earlier when her new manager was put in post. This is consistent with the account that she generally has given about the whole situation and that of her former colleagues. The monthly BSU meetings mentioned that the Claimant did at times mention stress, but she was still able to undertake her role. The real cause of the Claimant's unhappiness does appear to be the appointment of the new Business Support Partner in late 2018/early 2019; this is what the Claimant told her own GP on 5 March 2019. There is no basis to support

any finding of adverse effect (or mental impairment) before 2019.

94. The Claimant in paragraph 11 of her impact statement cites other normal day-to-day activities as being relied upon, but they are not activities, such as feelings of worthlessness. Again, there is a lack of the detail required to establish the activities affected and the adverse effect. The Claimant cites concentration and mental co-ordination as an activity (which they are not), then mentions in passing social anxiety, mistakes at work before she was signed off sick (supported by the performance review in January 2019) and a driving incident in August 2019. However, the lack of information makes it impossible for the Tribunal to find a substantial adverse effect due to the alleged disability.

95. The most obvious activity that the Claimant was unable to carry out was going to work, but this is not specified as a normal day-to-day activity in the impact statement. The conclusions of the Tribunal are that the Claimant's case is very much similar to the *Herry* case; that outside of work, the Claimant appeared not to suffer any substantial adverse effects affecting her ability to carry out normal day-to-day activities. The Claimant's oral evidence about not being able to get out of bed is not within her impact statement and again there is a lack of information about the impact on activities.

96. As the Claimant has failed to establish a substantial adverse effect, the Tribunal did not consider the further consideration of the long-term issue would assist. The Claimant has not established that a mental impairment existed at the time of dismissal.

97. As the Claimant has failed to establish that she is disabled, the disability discrimination claim cannot proceed and is dismissed.

Direct Age discrimination

98. The Tribunal did not consider that Sarah McLean was the same in all material circumstances as the Claimant. While Sarah McLean was in the same role in the same team as the Claimant, though aged 36 and not in her 40s as asserted by the Claimant, there were two key differences. Firstly, the evidence before the Tribunal shows that Sarah McLean did engage with the absence management process by attending meetings explaining what her concerns were and discussing the steps to be taken. Her own oral evidence was that she was fit for work after six months and was unable to return due to her particular situation (Ms McLean was off work due to a specific issue with a specific individual who refused mediation). This is a material difference, given that the Claimant was required to engage with the absence management policy and did not.

99. The Tribunal considered the construction of a hypothetical comparator as per *Balamoody*. It considered there was sufficient evidence to allow it to do so but it could not be constructed in the way that Ms Denton proposed in her written submissions. As Mr Edwards pointed out, the lack of engagement point both before and after the appointment of the decision-maker is important and a material circumstance. The Tribunal considered that the hypothetical comparator would be better constructed as a female administrative officer in the BSU in her 40's absent

on a continuous basis due to work-related stress and who does not attend a number of formal and informal attendance meetings or set out her concerns using an alternative route. The only difference between the Claimant and the comparator is age.

100. The Tribunal reminded itself that the shifting burden of proof required the Claimant to show facts from which the Tribunal could conclude that she was dismissed because of her age. The Tribunal did not consider that the point about the Claimant being booked onto a pre-retirement course assisted the Claimant as she herself accepted that she chosen to book onto the course to find out more information. The Tribunal acknowledged that there were conversations about retirement in the workplace, given the retirement of the Business Support Partner, and accepted the Claimant's evidence that these conversations were general in nature. There is no evidence of any planned retirement date for the Claimant before the Tribunal.

101. However, the Tribunal concluded that the hypothetical comparator would have received the same treatment as the Claimant. It was the Claimant's lack of engagement and the lack of any return to work date that led the dismissing officer to decide to dismiss her, as stated in the dismissal letter. The Tribunal previously considered why the Respondent proceeded to dismiss the Claimant after slightly less than six months' absence and found no basis to support a finding that it was due to her age. The Claimant has not shown facts that shift the burden of proof. Accordingly, the direct age discrimination claim is not well founded and is dismissed.

Conclusions

102. Given that only the unfair dismissal claim has succeeded, the Tribunal considers it relevant to point out to the parties that they may be able to agree the issue of remedy, particularly given the statutory cap and the Tribunal's observations regarding *Polkey*. The Tribunal directs that the parties write within 21 days of promulgation of this Judgment to the Tribunal to confirm whether a remedy hearing is required. Appropriate directions will then be made if such a hearing is required.

Employment Judge C Sharp
Date: 18 January 2022

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

FOR EMPLOYMENT TRIBUNAL Mr N Roche