EMPLOYMENT TRIBUNALS

Claimant: Ms. Bharti Ladwa

Respondent: Her Majesty's Revenue & Customs

Heard at: Leicester Employment Tribunal

On: 21 – 22 January 2019

Before: Employment Judge Dyal

Representation:

Claimant: in person

Respondent: Mr Lyons of Counsel

JUDGMENT

1. The Claimant was not unfairly dismissed.

REASONS

Introduction

1. The Claimant complains of unfair dismissal contrary to s.94 and 98 Employment Rights Act 1996 (ERA). The issues for the tribunal are:

    1.1. What was the reason for the dismissal?
    1.2. If the reason was a potentially fair one, was the dismissal fair or unfair having regard to the test of fairness at s.98(4) ERA?

2. The Claimant previously complained of disability discrimination additionally. However, that complaint was withdrawn and dismissed upon withdrawal in July 2018.

The hearing

3. The tribunal was presented with an agreed bundle of documents running to some 825 pages. The tribunal heard evidence from Mrs Bagshaw, Mr Patel and Mrs Stevenson for the Respondent and from the Claimant. The witnesses were all cross examined. The Claimant, who was representing herself, had not prepared many questions for the Respondent's witnesses. I suggested she use the time I took for pre-reading to prepare questions. In the event, I asked a significant number of questions of the Respondent's witnesses to assist in placing the parties on a more equal footing and to ensure I had more of the evidence I needed to resolve the case.

4. Some reasonable adjustments were made to accommodate the Claimant's needs during the course of the hearing. She asked to, and I of course allowed her to, eat snacks at any time; she explained that this practice helped her to stave off panic attacks. We also took additional breaks both scheduled and unscheduled as they were required. Finally, the Claimant explained that she found it particularly difficult to talk about her health problems (especially her non-work related health problems). I therefore directed that cross examination on that topic be kept to a minimum and directed Mr Lyons to approach the matter sensitively. So far as I could discern the Claimant coped with the demands of cross-examination well and she often gave robust answers.

Findings of fact

5. I make the following findings of fact on the balance of probabilities. Before coming to them I should say that I am satisfied that each of the witnesses before me endeavoured to give truthful evidence to the best of their respective recollections.

6. The Claimant was employed by the Respondent from around October 2002 to 20 March 2018. Latterly she was employed as Assistant Officer and worked at Saxon House, Leicester. In essence, she worked in a customer service type of role that involved both administrative work and telephony.

7. She worked in a team of about 11 people. There was a strong performance culture and each employee's performance was measured using statistics to measure key performance indicators on a daily basis. Records were kept of each employee's performance relative to others in their team, of their team relative to other teams and beyond. There was a Performance Management Review (PMR) system in place by which each employee received an overall grade for performance halfway through and then at the year end of each performance year. The grade was essentially based upon the statistics applicable to the employee.

8. No relevant events took place in the Claimant's employment until the performance year 1 April 2016 to 30 March 2017. During that year the Claimant had a new manager, Mr Raj Tank. This was a difficult year for the Claimant. She experienced significant work place stress as well as other health problems. In the result, her attendance and performance suffered. The Claimant repeatedly reached out to Mr Tank for support and assistance but he generally failed to provide it or failed to provide it within a reasonable timeframe. Mr Tank was unresponsive to concerns raised by the Claimant in relation to her own performance, his assessment of her performance and her need for development and coaching. She chased him repeatedly for a performance development plan, but he failed to put it one in place until very late in the performance year leaving little time for improvement. In short, even though the Claimant proactively sought support and assistance in an appropriate way, Mr Tank failed to provide it.

9. On around 24 March 2017, Mr Tank was moved to a different team and a new manager, Ms Katie Bagshaw became the manager of the Claimant's team. Overall, I have no doubt that Ms Bagshaw was very supportive and did not replicate the errors Mr Tank had

made. The Claimant broadly accepted this in her evidence. She did not entirely accept it as she was able to point to one or two incidents in respect of which she was less than happy with Ms Bagshaw's approach. There was a single occasion on which the Claimant had to push for some training and an occasion on which Ms Bagshaw and the Claimant disagreed as to the extent to which another employee's panic attack was distracting. However, the tribunal's assessment is that these were very minor disagreements that had no bearing on the main issues in this case at all. Overall, Ms Bagshaw was a careful and methodical manager who regularly met with the Claimant, set her targets, reviewed her performance, assisted with develop needs and generally provided positive and supportive management. It should also be said that the Claimant in turn performed well for Ms Bagshaw. Ms Bagshaw was satisfied with the Claimant's performance and this was reflected in feedback.

10. On 4 May 2017, Mr Tank (to whom it fell to give the Claimant a PMR score for the 2016-2017 performance year), notified the Claimant that her rating was 'needs development'. The Claimant appealed this decision using the appropriate appeal procedure. In essence, she complained that Mr Tank had failed to manage her sickness absences properly and that he had failed to support her including by failing to put a performance improvement plan in place in good time. She complained that she had not therefore been given the same opportunity as other staff to achieve. The gist of her appeal was that Mr Tank had not supported her properly and if he had, she may have achieved better. It was not her case that her performance had, objectively, been good enough to merit a better rating.

11. The appeal was dealt with by Mr David Lloyd. Mr Lloyd essentially found that the PMR rating is a data based rating and the statistics (the Claimant 's KPIs and Returns Capture and Appeals / Amendments) were relatively low. Therefore, the rating was correct. However, he also found as follows: *"it is clear from the evidence provided that the manager* [Mr Tank] *could and should have done more to support the jobholder/thus whilst the jobholders' points here are very valid it cannot change my decision."* That is because failures of procedure (such as performance management) cannot, in accordance the rules of the appeal scheme, alter the grade given. Mr Finch finished with some emollient words: *"it is really important to make clear that this marking isn't a punishment more a reflection of the statistical evidence presented… from the start of next PMR year I believe the jobholder has a different manager and I think the Higher Officer responsible for the floor* [Ms Bagshaw] *is aware of the issues so I would urge the job holder to look forward to the coming year. .. if at any point the jobholder does not feel they are getting the support then they should contact the HO responsible for the floor to raise her concerns and they will be supported.*

12. Ms Bagshaw, continued to manage the Claimant sensitively. She met with her and they discussed the outcome of the appeal on 5 June 2017. The Claimant rehearsed concerns about Mr Tank. Ms Bagshaw was in no position to disturb the appeal outcome. But she was sympathetic and suggested the Claimant consider the available guidance in respect of raising a grievance and suggested she speak to a PCS representative.

13. Ms Bagshaw was also keen to manage the Claimant's stress and following discussion on 12 July 2017 a stress reduction plan was put in place. This appears to have been an appropriate plan and there is no criticism of it from the Claimant.

14. The Claimant continued to report feelings of stress and also of panic attacks. As such she was referred to Occupational Health (OH) and a report was produced on 19 July 2017. In essence, the only significant stressor identified was the historical lack of support and the like from Mr Tank. The existing management arrangements were not impugned. The advisor considered the Claimant fit to work subject to adjustments being made,

namely: reducing to three quarters of normal hours for three weeks; reviewing the stress risk assessment; and allowing the Claimant to get air for 5 – 10 mins in the event of a panic attack.

15. Ms Bagshaw was happy to make these adjustments. There were two meetings with the Claimant to discuss them and other matters, one on 16 August 2017 and another on 24 August 2017. It was ultimately decided that in order to facilitate reduced hours the Claimant would need to use leave and flexi-time if she wanted to avoid a loss of pay. Ms Bagshaw reassured the Claimant that her rating for 2016-17 would not affect her pay or her internal job prospects with the Respondent.

16. On 29 August 2017, the Claimant raised a formal grievance (dated 25 August 2017). In essence, she complained in some detail about the lack of support from Mr Tank in the 2016-7 performance year. She added that this was discrimination based on disability. The resolutions sought were for the PMR mark to be changed, on the basis that if she had been properly managed she would have performed better, and an apology from Mr Tank.

17. The grievance was dealt with by Mr Geoff Finch. Mr Finch immediately met with the Claimant on 29.08.17. He explained that he did not have authority to change the PMR mark and that the grievance would need to be tested against the grievance criteria in the Grievance Policy.

18. On 30 August 2017, the Claimant commenced a period of sickness absence from which she never made any sustained return. This absence was certified by her GP and in essence the reason for it was work related stress.

19. On 6 September 2017, the Claimant was referred to OH. Throughout the Claimant's sickness absence she had regular keeping in touch meetings with Ms Bagshaw (not all of which are identified in these reasons). On 14 September 2017, in one of those meetings, the Claimant reported her ongoing frustration about the PMR grading and reported that she was still unwell.

20. On 7 September 2017 Mr Finch wrote to the Claimant and indicated that he did not think the grievance met the grievance criteria and therefore could not be dealt with as a grievance. In essence this was because it was raised over three months after the events complained about and because he did not think that the disability discrimination aspect was sustainable because, he said, the Claimant had not been treated less favourably than others who were not disabled. However, he said the issues could be dealt with by way of management action and asked to meet with the Claimant. Management action in this context means meeting with management to discuss a way forward.

21. On 20 September 2017, Ms Bagshaw invited the Claimant to an absence review meeting. That meeting took place on 28 September 2018. It was agreed that there were no reasonable adjustments that would enable the Claimant to return to work. The Claimant was not fit to return to work at that time nor was she able to say when she would be. She indicated that she was stressed by the grievance process.

22. On 12 October 2017, following a consultation, an OH report was produced. Essentially, it indicated that there was no underlying ill-health condition as such and, while the Claimant was suffering from stress, this was reactive. There were business issues which if resolved, would mean that the Claimant could return to work. However, it was clear that return to work was conditional on resolving the underlying work-related issues: these were, in essence, the PMR grading and Mr Tank's management of the Claimant.

23. At a keeping in touch meeting with Ms Bagshaw on 19 October 2017, the Claimant indicated that she did not know when she could return to work or what support would enable that to happen.

24. On 19 October 2017, Ms Bagshaw invited the Claimant to a formal absence review meeting on 31 October 2017. The meeting took place on that date. Ms Bagshaw noted that the Claimant had taken 32 days of sick leave between September and year-end 2016 and a further 52 days in 2017 to date. When asked about when she would be able to return to work the Claimant said: *"I don't think I will be able to walk back into the office because of how I feel I have been treated. If I do not receive a satisfactory outcome I will resign."*

25. On 31 October 2017, Mr Richard Langton wrote the Claimant endorsing Mr Finch's view that the grievance had not passed the grievance test and adding that she could not complain against her PMR rating because she had already appealed.

26. On 2 November 2017, the Claimant wrote to Ms Bagshaw. She made some comments in relation to the meeting of 31 October 2017 but also asked a number of questions. The questions really related to the Claimant's grievance so Ms Bagshaw passed them to Mr Finch. He in turn, initially, declined to respond.

27. On 16 November 2017, the Claimant was invited to a meeting to discuss her sickness absence with Mr Kalpesh Patel on 29 November 2017. The letter indicated that the meeting would consider, among other things, whether she should be dismissed or demoted.

28. On 21.11.17 the Claimant had a further meeting with Mr Finch. At the meeting, Mr Finch took a conciliatory approach. He emphasised that he was looking for a solution to bring the Claimant back to work, that the Claimant's current performance was good and there were no issues with it. There was a discussion about what it would take for the Claimant to return to work and she indicated that she wanted the questions in her email referred to above answered, she wanted an apology and she wanted her PMR appeal to be reopened. The Claimant explained in her evidence to the tribunal that she had been struggling to think straight in that meeting and that is why she sent Mr Finch a follow up email later that day. In that email the Claimant indicated that the resolutions she wanted were: answers to the questions she had raised and a wide ranging apology from Mr Tank, including for ignoring her emails, not giving her information which she had needed, not holding meetings in good time, not providing documents requested, not treating her the same as other team members, making it more difficult for her to achieve her objectives than was necessary.

29. On 22 November 2017, Mr Finch reverted to the Claimant and indicated that he could not reopen the PMR process or give her the relief she wanted. He indicated that he could arrange any further support she may need including by reviewing the stress plan and that he would look at any other reasonable adjustments that may be needed. He apologised that the process been stressful and had not led to the resolution the Claimant wanted.

30. On 28 November 2017, the Claimant wrote to Ms Bagshaw indicating that she wanted to resign. Ms Bagshaw responded discouraging that course of action.

31. On 29 November 2017, the Claimant had a meeting with Mr Patel. Mr Patel was anxious to consider, among other things, what it was that was stopping the Claimant from returning to work. The Claimant's response, in essence, was that she felt she had been unfairly treated by Mr Tank and penalised in the result of her PMR. She also indicated

she thought she had been treated unfairly, including, that her questions had not been answered by Mr Finch. Mr Patel asked the Claimant whether she would be in a position to return to work when her existing fit note expired on 4 December 2017. She indicated that she would not because of the way that she was feeling.

32. On 30 November 2017, following an intervention by Mr Patel encouraging this, Mr Finch wrote to the Claimant answering the questions that she had posed by email. On 6 December 2017, the Claimant had a meeting with Ms Bagshaw. She told Ms Bagshaw that she was not happy with Mr Finch's answers. Ms Bagshaw offered to revert to Mr Finch but the Claimant said that she did not want further clarification. By that stage she had a further fit note which was due to expire on 2 January 2018. Ms Bagshaw asked the Claimant if she could return to work following the expiry of that fit note, and her response was that she would not be returning to work.

33. This was all fedback to Mr Patel. In light of this further information, Mr Patel gave notice of dismissal on 19 December 2017 to expire on 19 March 2018. He recorded his reasons at the time in a detailed note which I accept to be truthful. He also explained in his evidence (and I accept) that there was a significant impact on the business caused by the Claimant's absence. I set this out in more detail in the discussions and conclusions to avoid repetition.

34. On 19 December 2017, the Claimant wrote to Mr Finch with a point of detail in relation to one of the answers he had given her in his email of 30 November 2017. The Claimant was concerned that there was an error in the statistics used by Mr Tank to generate her PMR score. On a particular day in July 2016, the statistics recorded that the Claimant had worked 708 hours on that day. This in turn affected the assessment of her performance on that day. In fact she had worked 7.08 hours.

35. On 8 January 2018, the Claimant appealed against her dismissal. In her appeal she indicated that she was prepared to return to work immediately in her current position. She said that she had taken advice and now appreciated that Mr Lloyd's observations on deciding her rating appeal had supported her case and gave her some vindication. She also noted that her current performance was good. On those bases she was prepared to return to work immediately. However, despite saying that she was prepared to return to work immediately, she did not do so. She remained on sick-leave.

36. Also on 8 January 2018 the Claimant continued the correspondence in relation to her statistics in July 2016. On 10 January 2018, the Claimant called Ms Bagshaw chasing her for further information in relation to this matter. It came to light on that day that there had indeed been a mistake in the number of hours the Claimant had been recorded as working on a particular day in July 2016. It had indeed been 7.08 not 708 hours. This had affected her performance score for that day. While it is true that this was a discrepancy, it was not in a meaningful sense a material one: it related to a single day in a performance year and made no difference to the overall grade for that year.

37. On 17 January 2018, the Claimant was invited to an appeal hearing by Ms Kathryn Stevenson. On 18 January 2018, the Claimant had an email exchange with Ms Bagshaw. She indicated that she was not sure whether she would be fit to return to work on the expiry of her current fit note.

38. On 26 January 2018, the Claimant came to the office to look through her personnel file and at some paperwork provide by Mr Tank. She asked for a copy of her performance management self-assessment template from the 2016-7 performance year. She was clearly still preoccupied with the matter.

39. On 26 January 2018, the appeal hearing with Ms Stevenson took place. At the meeting the Claimant remained preoccupied with her PMR score and pre-occupied by the error that had been made in relation to the number of hours she had worked (7.08 not 708). The Claimant said that she accepted that her PMR score would not be changed but could not accept the time it had taken for the hours issue to be admitted and corrected. She continued to complain about Mr Tank and it was, in reality, clear that she had not been able to put those issues behind her although she said she was trying. The Claimant suggested that she could return to work on 31 January 2018 at a push but that she had a hospital appointment the following day. She suffers from anxiety in relation to hospital appointments. The Claimant said she would return to work if the decision to dismiss her was overturned.

40. The Claimant's fit note expired on 30 January 2018. Ms Bagshaw emailed the Claimant and asked if she would be returning to work. The Claimant responded that she would try to return to work on 5 February 2018 and explained it would be a very big push for her. She was then signed off until 4 February 2018 inclusive.

41. The Claimant attended work on 5 February 2018. She had a meeting with Ms Bagshaw and mentioned a possibility that she would resign. She also returned to the issues of her PMR rating and clearly remained preoccupied by them. A phased return to work was agreed.

42. On 9 February 2018 the Claimant had a further meeting with Ms Bagshaw. She explained that she thought she had been doing well but then she had spoken to her friends who were outraged that Mr Finch had not done more. She said she thought Mr Finch was getting a big bonus for getting rid of her. Ms Bagshaw said that no such thing was the case. The Claimant said that she was broken and could not return to work on Monday. She handed back her badge and the key to her drawer. Ms Bagshaw asked if the Claimant was resigning or resuming sick leave. The Claimant's response was that she was not sure.

43. Ms Bagshaw fed that back to Ms Stevenson who was due to determine the appeal that day. Ms Stevenson did so and dismissed the Claimant's appeal.

44. On 12 February 2018, the Claimant emailed Ms Bagshaw and said she would return to work the following day. She indicated that she would donate her wages for February to a dementia society. On 13 – 16 February 2018 the Claimant attended work and worked half days, using a combination of annual leave and flexi leave to cover the other halves of the days worked. She was then off sick on 19 – 21 February 2018. She worked half days on the working days between 22 and 28 February, using a combination of leave and sick-leave to cover the other halves of the days worked. She did not work the remainder of the notice period and used a combination of banked leave and unpaid leave to excuse her attendance. Her employment ended on 20 March 2018.

Law

45. By s.94 Employment Rights Act 1996 there is a right not to be unfairly dismissed. 'Capability' is a potentially fair reason for dismissal.

46. In ill-health capability dealing with long-term absence, there are usually three primary areas for consideration ***BS v Dundee City Council*** [2014] IRLR 131 [27]:

    46.1. Can the employer be expected to wait longer?

46.2. Has the employee been consulted and his/her views taken into account? If the employee does not know when he can return that is a significant factor operating against him.
46.3. Have adequate steps been taken to discover the true medical position?

47. The latter limb is most clearly explained in ***Daubney v East Lindsey District Council*** [1977] IRLR 181 at 184 (the passage, a *locus classicus,* is quoted at paragraph 25 of ***BS****)*

> *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. [emphases added].*

48. However, each case is different and the relevant factors and the weight to be given to them can vary in accordance with the facts. It is ultimately a question of applying the s.98(4) test and remembering that when applying that test the standard is the range of reasonable responses.

49. In *Iceland Frozen Foods -v- Jones* [1982] IRLR 439, the EAT held that the tribunal must not simply consider whether it personally thinks that a dismissal was fair and must not substitute its decision as to the right course to adopt for that of the employer. The tribunal's proper function is to consider whether the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted.

50. The range of reasonable responses test applies to all aspects of dismissal. In *Sainsbury's -v- Hitt* [2003] IRLR 23, the Court of Appeal emphasised the importance of that test and that applies to all aspects of dismissal, including the procedure adopted.

51. In *McAdie v Royal Bank of Scotland* [2007] IRLR 895 the Court of Appeal gave some importance guidance by endorsing the statement of the law as stated by the EAT in that case [36 – 39, 40]. This can be briefly summarised so far as relevant as follows:

51.1. Where the employer is responsible for the employee's sickness absence that does not of itself preclude a fair dismissal because of that sickness absence. If it were otherwise an employer would be required to keep on its books an employee who was incapable of any useful work.
51.2. However, as a matter of common sense and common fairness the employer's role in causing the incapacity may be a factor in whether it was reasonable to dismiss for incapacity. It may be reasonable, where the employer has played such a role, to for instance, put up with a longer period of sickness absence or to make additional efforts to find alternative employment.

51.3. That said, when assessing the fairness of the dismissal, the focus is squarely upon the circumstances that prevailed at the dismissal stage and appeal stage and it is an error of law to reason that 'no reasonable employer would have created a situation in which the employee became unfit for work and therefore the decision to dismiss must be unfair'. The tribunal must not lose sight of what it is assessing the fairness of: the dismissal.

Discussion and conclusion

Reason for the dismissal

52. I am satisfied that the reason for the dismissal was 'capability' and in particular, a belief that the Claimant was unable in the foreseeable future to make a sustained return to work and maintain satisfactory attendance (because of ill-health). This was the evidence of Mr Patel and Ms Stevenson and I accept it.

53. There was no real dispute about the reason for the dismissal and I am quite satisfied on the evidence that this was the reason.

Fairness: preliminary matters

54. I start by saying that I do not think this is any easy case. Assessing the fairness of the dismissal is not a simple matter because there are some unusual facts.

55. In applying the test of fairness, I must and do have regard to the fact the Respondent is a large employer with significant administrative resources.

56. I also have regard to the fact that the sickness absence and inability to make a sustained return to work was, at least in significant part, caused by Mr Tank's inadequate management of the Claimant. There were failings of management as Mr Lloyd found.

57. On the evidence, it is clear to me that management failings by Mr Tank in the year 2016 to 2017 contributed to the Claimant's burning sense of injustice in relation to the way she had been treated and the PMR score that she attained. She was never, in truth, able to properly move on from that. That this was the significant underlying cause of the Claimant sickness absence is supported by the OH evidence, broadly the GP fit-note evidence and the balance of the lay witness evidence. The sense of injustice continued to burn and contributed to the Claimant's ill-health sickness absence in 2017 and 2018. The Claimant was candid in saying that there were other underlying health problems too which played their part, and I doubt therefore that the sole cause of the Claimant's absence was Mr Tank; but his management of the Claimant was clearly a significant part of it.

58. In my assessment, the Claimant wanted to move on from the events of 2016-7 and her PMR score but try as she might was unable to and this prevented her from making a sustained return to work. The Respondent therefore had some culpability for the Claimant's ongoing sickness absence. However, as is clear from *McAdie,* this did not of itself preclude a fair dismissal. As is also clear from *McAdie,* it is a factor I should have firmly in mind when applying the band of reasonable responses test.

<u>Steps taken to facilitate a return to work</u>

59. As noted above an underlying cause of the Claimant's sickness absence was her PMR score and her unhappiness with the way Mr Tank managed her in 2016-7. Since this was very much apparent during the internal absence management process, I think it is highly

relevant to consider what steps were taken to resolve these underlying issues before the Claimant's dismissal when assessing the fairness of the dismissal.

60. In the first instance, there was a procedure in place for challenging a PMR score, namely the appeals procedure. The Claimant raised an appeal and, in my judgment, it was dealt with in an appropriate way. Mr Lloyd went a considerable distance in acknowledging that the Claimant made valid points in relation to the way that she had been managed. It is hard to disagree with Mr Lloyd's assessment that the PMR score should stand. That is firstly because the statistics showed that the Claimant did need development and secondly because it was, essentially, the Claimant's own case that she had needed support to assist in her development so as to improve her performance but that she had not got it. A perfectly sound way of looking at the matter then, which was essentially Mr Lloyd's way, was that the rating was not wrong, it was right. The better point for the Claimant was not that her PMR score was wrong, but the related yet distinct point that support and development had not been provided when it should have been.

61. If there was some sort of sanction for a 'needs development' rating, then the Claimant's mitigation for that rating would have been compelling so as to make a good case for not applying the sanction. However, there was no sanction: the rating did not sound in pay or internal job prospects or otherwise. There may have been an implied stigma attached to the rating, but Mr Lloyd's decision was accompanied by emollient words which were designed, I infer, to remove any such stigma the Claimant felt and try to reassure her that she made valid points about the past but that all would be well going forwards.

62. It is true to say that one of the features of the appeal process was that it did not in terms provide *full* redress, for what was accepted by Mr Lloyd to be managerial shortcomings by Mr Tank. It is fair to say that it provided *some* redress because Mr Lloyd's words in support of the Claimant's analysis of Mr Tank's management of her had a declaratory effect that vindicated her very significantly. I say that it did not provide full redress because there does not appear to have been any sanction for Mr Tank or any apology from him. There was, then, a gap. The gap might have been filled in a number of ways. Firstly, some sort of disciplinary or capability process or action against Mr Tank might have been commenced in light of Mr Lloyd's findings (whether formal or informal). This might have been a sensible course especially as, from what I can see, Mr Tank's side of things was not heard for the purposes of the rating appeal. Secondly, through a grievance process. This was also another sensible course and is the one that Ms Bagshaw swiftly and helpfully directed the Claimant to.

63. It is unfortunate that the Claimant did not raise a grievance until 25 August 2018. I also think it is in some respects regrettable that once raised it was not accepted, investigated and dealt with as a grievance. I do have some misgivings about some of the reasons that were given for not doing so. The decision that there was no viable disability discrimination complaint was summary and a conversation about what the Claimant meant by disability discrimination may have taken matters further. Likewise, although the Claimant was trying to outflank the outcome of her rating appeal in order to get her PMR result changed, and although it is perfectly reasonable for an employer to say that the outcome of one procedure is final and cannot be outflanked by invoking another procedure, that was not a complete answer. The grievance procedure could, in principle, have dealt with Mr Tank's management failings in and of themselves as distinct from the putatively consequential issue of its impact on the Claimant's performance.

64. However, by the time the grievance was raised, in so far as it related to Mr Tank's acts and omissions in respect of the way that the Claimant had been managed by him, at least five months had passed. Mr Tank ceased managing the Claimant on around 25 March 2017 and the grievance was not raised until 25 August 2017. Some of the

complaints the Claimant had about Mr Tank related to September 2016 so around a year previously. The rules of the grievance procedure provided that the grievance should be raised within three months of the date of the matter(s) complained of. Although all limitation rules can lead to wrongs being uncorrected, they do generally, and in this case, exist for good reason. Such as, ensuring that disputes are resolved swiftly while matters are fresh in the mind, for reasons of certainty and reasons of finality.

65. So overall, although I think it was quite harsh that the Claimant's grievance was not dealt with as such I can understand why it was not, and the decision not to was one which a reasonable employer might take. In reaching this conclusion I have regard not only to the fact the grievance was raised out of time but also because of the wider circumstances. Firstly, the fact the Claimant had already had *some* vindication from Mr Lloyd's findings. Secondly, the fact that the Respondent did everything it could to mitigate the harshness of the decision not to deal with the grievance as a grievance:

66. As set out in more detail in my findings of fact, a good deal of reassurance was provided to the Claimant especially by Ms Bagshaw but also by Mr Finch and Mr Patel. The clear message was that the past would not affect the future so far as the Respondent was concerned, that the Claimant was now doing well and that she would be supported going forwards. Mr Finch did what he could to ease the Claimant's sense of injustice without reopening the PMR rating or conducting a grievance investigation into Mr Tank's management of the Claimant. He did not initially think it helpful to answer some questions the Claimant posed of him by email, but, when it became clear to Mr Patel that answering those questions might aide the Claimant's return to work, Mr Patel asked Mr Finch to answer the questions and he did so. Ms Bagshaw asked the Claimant whether she wanted further clarification once those questions had been answered but in a way that was unsatisfactory to the Claimant (in an unspecified way). She did not, and that became a dead-end.

67. Ms Bagshaw was also always very willing to make any reasonable adjustments that might be needed to assist the Claimant to return to work and discussed this with the Claimant from time to time.

68. In judgment each of Mr Finch, Ms Bagshaw and Mr Patel did what they could to be supportive of the Claimant, to try and make her feel welcome and wanted ultimately with a view to returning her to work. In that regard, I think they did, between them, go the extra mile and this did mitigate the harshness of the decision not to deal with the grievance as a grievance but instead by management action.

69. It is finally of the utmost importance to bring things back to the dismissal and to emphasise that by the time the Claimant's case came to Mr Patel and then Ms Stevenson, there was a great deal of water under the bridge. The decision in relation to the Claimant's PMR rating and decision to not deal with her grievance as a grievance had already been taken by others. Those decisions, already made, were part of the circumstances that Mr Patel and Ms Stevenson found themselves in when determining whether to dismiss / dismiss the appeal.

70. It might be said that Mr Patel and/or Ms Stevenson should have reopened the historical decisions (the PMR appeal and the decision not to proceed with the grievance). While that is perhaps something they could have done, in theory at least, in my view the decision not to do so was well within the band of reasonable responses. It may have been different if the previous internal procedures had led to decisions that were manifestly wrong, but I do not think they had and nor did Mr Patel/Ms Stevenson.

Consultation: with medical advisors and with the Claimant

71. The Respondent obtained two occupational health reports that commented upon the reason for the Claimant's absence and her ability to return to work. In essence it was clear that the Claimant would not be able to make a sustained returned to work unless a resolution to the historical issues with Mr Tank was found *that satisfied her.* I think this was sufficient consultation with medical advisors and was an adequate basis upon which to proceed. There was no value in obtaining further or more up to date medical evidence as the indications from the Claimant continued to make clear that the reason for the sickness absence and the impediment to returning to making a sustained return to work was the same thing it had always been.

72. Between Ms Bagshaw, Mr Finch, Mr Patel and Ms Stevenson there was a great deal of consultation with the Claimant. She was usually unable to say when she would be fit to return to work. She did say in her letter of appeal that she would make an immediate return to work, but in my judgment her representations from then onwards about her ability to return to work were completely unreliable. She was not being dishonest: it was simply that whilst she wanted to return to work in principle, in practice she was unable to make any sustained return because she found it too difficult and stressful.

73. A significant complexity of this case is that after being served with notice of dismissal, effectively because of long-term sickness absence and an inability to return to work, the Claimant (a) said in her letter of appeal that she would make an immediate return to work in her existing job and (b) in fact attended work on a number of occasions.

74. These points are not lost on me and have given me considerable pause for thought as to whether or not it was reasonable to dismiss the Claimant (and dismiss her appeal against dismissal) or whether alternatively a different course needed to be taken to act in a way that fell within the band of reasonable responses, e.g. to give the Claimant further time to attempt a return to work.

75. In the end my view is that the Respondent's approach was within the band of reasonable responses. Despite what the Claimant said in her letter of appeal and despite returning to work for a few days here and there, it was obvious to all concerned that the Claimant was unable to make a sustained return to work. The Claimant never managed more than a few days without then going back on leave. Further, she handed back her badge and desk key at one stage and appeared on the verge of resignation. Yet further, and perhaps most importantly, it was obvious to the very end that she remained heavily preoccupied with her PMR score and Mr Tank's management of her and as such that she had been unable to resolve the stressor that prevented sustained attendance at work.

76. There did not appear to be any reason to have any confidence that the Claimant could make a sustained return to work in the foreseeable future. Poor attendance going forward, therefore, was rightly anticipated.

Impact of absence

77. I accept that the Claimant's sickness absence had a material impact upon the Respondent's business. Mr Patel's evidence, which I accept, was that the internal rules meant that for so long as the Claimant remained an employee on sick leave, she could not be replaced/backfilled and there would be no additional resources to cover her duties. This meant that the work that would normally be split between a team of 11 would be split between a team of 10. As a result, this had an impact on the performance output of the team. While I do not think that the impact of the Claimant's absence created any

sort of an emergency or anything of that nature, it created a problem that the Respondent could reasonably take the view could not be allowed to continue indefinitely.

78. By the date of the decision to dismiss, the Claimant's absence had protracted for a moderately long period. However, there was no indication really at that stage that a return to work was possible and there were powerful indications that it was not. The notice period was long and the Claimant's absence continued to be managed during that notice period. Ms Bagshaw fed back to the decision makers and certainly up until the conclusion of the Claimant's appeal I am sure that the decision to dismiss was kept under careful review. By that date the sickness absence had protracted from late August 2017 to early February 2018 and that was significant period of time. There remained, as I have said, no reason to anticipate a sustained return to work. The decision to dismiss was in the band of reasonable responses.

Alternatives to dismissal

79. This is a case in which alternative employment and/or demotion and/or changing reporting line were not potential solutions. There was no issue with the Claimant's actual job and she was no longer managed by Mr Tank. Ms Bagshaw was good manager with whom the Claimant had a good relationship.

Overall conclusion

80. I have a lot of sympathy with and for the Claimant. It does appear that she was poorly managed in 2016 – 2017 by Mr Tank and this does appear to have taken a heavy toll on her. It was not her fault that she was unwell, had extended sickness absence and was unable to make a sustained return to work when she tried in early 2018. Nonetheless, overall, I think the decision to dismiss the Claimant was within the range of reasonable responses.

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Employment Judge Dyal

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Date 05.02.2019

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

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FOR EMPLOYMENT TRIBUNALS