



EMPLOYMENT TRIBUNALS

Claimant: Ms N. Christian
Respondent: Marks & Spencer plc
Heard at: East London Hearing Centre
On: 10-12 November 2021
Before: Employment Judge Massarella

Representation

Claimant: In person
Respondent: Mr A. Francis (Counsel)

RESERVED JUDGMENT

The judgment of the Tribunal is that: -

1. the Claimant's claims of unfair and wrongful dismissal are not well-founded and are dismissed.

REASONS

The hearing

1. The procedural history of this case is set out in a separate order, dated 13 May 2021. It was originally listed for hearing over three days in May 2021. Because the case was not ready for hearing, it was adjourned to these dates.
2. It was agreed at a previous hearing that, because the Claimant has dyslexia, she would need additional time to read the documents to which she was taken. In fact, Mr Francis (Counsel for the Respondent) carefully read out any passage which he referred the Claimant to in cross-examination, to ensure that she had time to absorb its context and content. Indeed he was sensitive at all times to the fact that the Claimant was a litigant in person.

3. The Claimant also made notes as she was being cross-examined which, she explained, helped her to process information. Although I explained to her at a previous hearing the importance of preparing her questions for the Respondent's witnesses (and recorded that guidance in my written order), the Claimant told me on the first day of the hearing that she had not prepared any written questions; she had them in her head. I suggested that she might wish to spend some time between the first and second days making notes of her questions. In the event, the Claimant did have a list of questions and was able to cross-examine both the Respondent's witnesses in detail: she questioned Ms Powell for around two hours, and Ms O'Donoghue for around two and a half hours.
4. Before any of the witnesses gave evidence, I explained to them all the importance of focusing on answering the specific question asked; I encouraged them to give concise answers.

The issues

5. At a preliminary hearing on 2 November 2020, EJ Russell recorded the position as to the scope of the final hearing:

'The claim will proceed as currently pleaded, essentially as a claim of unfair dismissal and notice pay. The Claimant denies that capability (health) was the genuine reason for dismissal and will be able to rely upon the factual assertion that the manager wanted to dismiss her to enable [Ms A] to return, despite the alleged racial comments by the latter, and that she should have been referred to Occupational Health. She is not entitled to rely on the same as separate acts of discrimination or harassment, whether because of age, race, religion or belief.'
6. I have referred to this colleague (against whom the Claimant made allegations of discrimination) as 'Ms A'. I am satisfied that it is appropriate to do so: naming her is not necessary for the determination of these claims; there is no public interest in doing so.

Findings of fact

7. The Respondent is a national retailer. Employees in its stores are organised into business units, based on the departments in which they work (menswear, womenswear and so forth).
8. The Claimant commenced employment on 6 August 2017. She worked as a stylist in visual merchandising ('VM'), a relatively small team, which specialised in updating in-store displays to reflect seasonal changes to the lines on sale.

Policies

9. The Respondent has an attendance management policy. The Claimant confirmed that she was familiar with it. The section dealing with managing underlying ill-health and long-term sickness absence provides that, if an employee has an underlying condition, her line manager should meet with her to discuss the prospect of a return to work. The line manager should consider what reasonable adjustments, if any, can be made. The policy also requires the

employee to maintain a level of contact. If contact cannot be made, the absence will be managed in writing.

10. The Respondent's sickness absence policy also contains a requirement for the employee to keep in touch, if absent for longer than a day, and warns that, if the employee does not keep in touch, disciplinary action may be taken. The same policy contains a section dealing with long-term ill-health, which is defined as absence for more than four weeks. The procedure provides for initial, interim and final ill-health meetings. Reasonable adjustments should be discussed at the meetings. If the employee declines an occupational health ('OH') referral, a decision may be made based on the information available. At the final meeting, if the ongoing absence cannot be accommodated, dismissal may be considered.

The period of employment before the long-term absence

11. The Claimant worked in the Thurrock store. Her line manager before May 2019 was Ms Isobel O'Leary. The Claimant raised grievances while working in Thurrock. She agreed that in the period leading up to the long-term absence she had a strained relationship with some members of the VM team, including Ms O'Leary.
12. In March 2018 the Claimant raised a grievance alleging bullying and harassment. She wrote:¹

'the atmosphere at work has become unbearable and very stressful culminating in me now suffering from panic attacks. An equal opportunity policy is supposed to be in force at M&S but I find this very hard to believe as my work environment has not been free from discrimination and harassment and victimisation. The extreme unprofessionalism that has been demonstrated by management teams is totally unacceptable along with the lack of communications between management [and] the teams.'
13. The outcome she was seeking was a transfer to the Fenchurch Street store, where she wished to continue working as a VM stylist; she wanted to take herself out of what, for her, was a difficult situation in the Thurrock store. In the same document she wrote positively about some managers, including Ms Powell, who would in due course become her line manager.
14. On 3 May 2018, the grievance was dealt with by Ms Ellie Chamberlain, a commercial manager at the Cheshunt store. The outcome was sent to the Claimant on 3 May 2018. Ms Chamberlain concluded that there was no case to answer, but agreed that there had been a breakdown in the relationship between the Claimant and Ms O'Leary and suggested a facilitated conversation to help them move forward.
15. The letter recorded the Claimant's belief that there would be a vacancy at the Fenchurch Street store for a VM stylist because two members of the team were due to go on maternity leave. Ms Chamberlain wrote that, in fact, there was no current vacancy for a VM stylist at either the Fenchurch Street or Ilford stores and explained that staff who were going on maternity leave were not always

¹ Original spelling and grammar retained in quotations from contemporaneous documents, except where correction is necessary for understanding, when square brackets are used

replaced; it depended on whether the store had exceeded its staffing hours. When a vacancy arose, the Claimant would be supported to apply for it. Ms Chamberlain wrote:

‘I asked you if the situation in Thurrock was so bad that you would like me to review vacancies on other BUs [business units] in these stores, however you replied that you would prefer to stay at Thurrock on VM. Unfortunately, as there are no VM roles in the stores currently we are unable to facilitate a transfer, however, should a vacancy become available you would be welcome to apply for this.’

16. On 14 May 2018 the Claimant raised a grievance against another employee, Ms A, a member of the VM team at Thurrock, alleging race discrimination (in relation to a comment about red and brown coloured M&Ms). In an email of the same day, the Claimant wrote:

‘The environment at Thurrock was unbearable I’ve had enough ... After going home to my family I had lost sleep over there and decided to call the store I spoke to Jemma Murphy Cafe commercial manager who was on duty that day. I explained to her that I did not now feel comfortable in returning back to the Thurrock store, and if I could have a transfer to another store.’

17. An interview took place on 18 June 2018, which was conducted by Mr Marc Hooper. Mr Hooper asked the Claimant what outcome she was seeking and she repeated that she wanted a transfer to the Fenchurch Street store as a VM stylist. Mr Hooper pointed out that there was a recruitment freeze and asked her if she was willing to do a different role. She said that she was not aware of the freeze, that she wanted to continue as a VM stylist and did not want to do a different role.

18. The grievance was investigated by Ms Francesca Buzer. The conclusion was that no formal action would be taken against Ms A.

19. On 27 June 2018, the Claimant emailed HR, raising a complaint against her store manager. The Claimant confirmed that this was in addition to her grievances about Ms O’Leary and Ms A. In this document she wrote:

‘I did thoroughly enjoy working at Thurrock, but it has now [be]come totally unbearable for me to continue to work in this hostile environment. This has caused my IBS to flare up. I’ve been subscribed medication for this now from my GP. In order to continue working so this will not affect my absence.’

20. On 28 June 2018 Mr Hooper wrote to the Claimant, recording that the Claimant’s desired outcome remained a transfer. He explained that there were no live VM vacancies in those stores. He also recorded that the Claimant had said in the meeting that she did not want any role within the Thurrock store, other than a VM role.

The move to the lingerie department

21. The Claimant confirmed to the Tribunal that it was not possible for her to continue working in the VM team in Thurrock because it was causing her stress

and anxiety. Serious allegations were made against colleagues by the Claimant, and counter-allegations were made against her.

22. As a result, the Claimant was moved on an interim basis to the lingerie department in late March/early April 2019, where she worked under Ms Powell. The Claimant and Ms Powell had a very good working relationship. The Claimant worked in that department for around two weeks before going off sick. Part of her work with Ms Powell was as a stylist, but not all of it. She was unhappy about that, as she only wanted to do VM work. So far as she was concerned, she was employed as a stylist and that was the only role she should have to perform. She said at the time, and confirmed to the Tribunal, that she was not willing to consider alternative roles, whether in the Thurrock store or elsewhere. She continued to hope that she would transfer to a VM role in another store.

The Claimant's extended sickness absence

23. On 16 April 2019, the Claimant began a period of long-term sick leave. The reason given was work-related stress, depression and panic attacks. She never returned to work after that date.
24. Under the Respondent's policy, for the first week of absence, the Claimant could self-certificate, but she was required to phone her manager before each shift, if she could not attend work. On 18 July 2019, Ms Danielle Arnold wrote to the Claimant to say that she was concerned that the Claimant was absent from work and that she had been unable to contact her by telephone since 16 April 2019. She reminded her of the need to maintain regular contact.
25. By 30 April 2019 the Claimant had hit one of the triggers in the sickness absence policy. Ms Lisa McConville, the Claimant's line manager at the time, wrote to the Claimant, inviting her to a meeting on 7 May 2019, at which they would discuss the reasons for her absence and any support the Respondent could provide.
26. On 1 May 2019 the Claimant emailed HR saying:

'I am now feeling harassed and unable to recover in peace. I'm currently taking a course of antibiotics which I will be unable to attend any meetings commencing the following weeks ... The earliest scheduled time will be 10 May 2019 at 10 a.m. to be held at the Ilford branch...'
27. On 7 May 2019, Ms McConville wrote to the Claimant rearranging the meeting to 10 May 2019, as the Claimant had stipulated. In a separate letter of the same date, she explained to the Claimant that she was leaving the Thurrock store on 20 May 2019, and that Ms Powell would take over as the Claimant's new line manager. She told the Claimant that she had found a live vacancy at the Marble Arch store, as part of an events team working closely with the VM team. The Claimant did not pursue that opportunity.
28. Under the Respondent's policies, the Claimant remained on full pay for the first eight weeks of her absence. By this stage the Claimant was required to telephone her line manager once a week. The Claimant did not regard this as reasonable because (she explained to the Tribunal) it meant that she was 'not able to get any rest'.

29. The Claimant attended the meeting on 7 May 2019 with her union representative. Ms McConville explored the medical position with the Claimant, who described the treatment she was receiving from her GP; she said that she was still feeling quite anxious, but she would like to return to work in her role as a VM stylist. Ms McConville explained that the Respondent would continue to seek VM roles for the Claimant in other stores but, in the meantime, she suggested that the Claimant come back to work as a customer assistant in the lingerie department under Ms Powell's management. The Claimant regarded that as a demotion and refused. It was not a demotion: the visual stylist and customer service assistant roles were the same grade.

The weekly phone calls with Ms Powell

30. Thereafter the Claimant had weekly telephone conversations with her line manager, Ms Powell, as required under the policy. Ms Powell kept a careful note of their conversations, which I accept accurately recorded their discussions. The Claimant explained that she found these calls objectionable, because it did not allow her to rest, but she engaged nonetheless. In these calls, beginning on 3 June 2019, Ms Powell explored with the Claimant what the current medical position was and what adjustments might be made to facilitate a return to work. In none of these calls did the Claimant indicate when she might be fit to return.
31. On 1 July 2019, Ms Powell invited the Claimant to an initial long-term sickness absence meeting in Thurrock on 9 July 2019. The Claimant phoned Ms Powell the day before the scheduled meeting to say that she would not be able to attend. Ms Powell rearranged the meeting to 15 July 2019 in Ilford at the Claimant's request.

First long-term sickness absence meeting on 15 July 2019

32. The meeting went ahead. By this time the Claimant had been absent from work for two months. The focus of the meeting was the Claimant's health. The Claimant explained that she was suffering from anxiety, depression and insomnia. She had been prescribed medication and had been advised to take exercise to manage anxiety. She was having counselling sessions over the phone. She confirmed that she did not have an appointment to see her GP, but she would make one and would update Ms Powell. Ms Powell asked if the GP had given an indication of when she might be able to return to work. The Claimant told her that the GP was guided by how she (the Claimant) felt: the absence was open-ended at present.
33. Ms Powell explained that the business could not support long-term sickness absence, with no end-date in sight. Miss Powell explained that there were still no VM roles available at the Claimant's preferred stores. There was, however, an opportunity in the Thurrock outlet store (as opposed to the Thurrock store itself), which was part-VM and part-customer facing. The Claimant rejected this, she explained to the Tribunal, because it was 'not a job role as a stylist, they were offering me a position in an outlet with no windows and no VM mannequins'. She did not wish to do work involving customer service. Ms Powell emphasised that the Claimant could still return to the role in the lingerie department, if she wished. Ms Powell explained that, if her sickness absence continued, she would continue to be managed under the attendance policy, and

that this might result in dismissal for ill-health. She also explained that she would need to maintain contact with the Claimant during her absence.

34. In the most recent fit note, the Claimant's GP had suggested that the Claimant be referred to OH. Ms Powell agreed to look into it.
35. Towards the end of the meeting the Claimant had a panic attack. Ms Powell terminated the meeting and concentrated on making sure that the Claimant would be able to get home safely.

The events after the first long-term sickness absence meeting

36. The next day, 16 July 2019, Ms Powell phoned the Claimant, to continue the conversation. She raised again the role in the Thurrock outlet store. The Claimant hung up.
37. Ms Powell took advice about an OH referral from HR. HR advised that, because the Respondent was not disputing the reason the Claimant was giving for her absence or the treatment she was receiving, an OH referral was not necessary at that stage, but it might be appropriate later.
38. Ms Powell recorded the outcome of the meeting in a letter, which she sent to the Claimant on 17 July 2019.
39. Ms Powell and the Claimant spoke by phone on 29 July 2019. The Claimant told Ms Powell that she had a new fit note from her GP, which she would provide, but that her GP did not provide a prognosis for her recovery. Ms Powell informed the Claimant that, because of her continuing absence, she would be invited to a second absence review meeting.

Attempts to arrange a second long-term sickness absence meeting

40. From here on Ms Powell had difficulty contacting the Claimant, whether on her home or mobile number. The Claimant was having financial problems and her phone had been disconnected. There was also an incident when her home was burgled – although the Claimant was not able to give the precise date of that incident, either at the time or at the Tribunal hearing.
41. On 5 August 2019, Ms Powell wrote to the Claimant inviting her to a meeting at the Ilford store on 9 August 2019. She had still not received the fit note which the Claimant had said she would provide. She explained that the purpose of the meeting was to discuss the Claimant's absence and whether there had been any improvement in her condition. They would also discuss any reasonable adjustments that might be made to support the Claimant's return to work, including alternative work. She emphasised that the Respondent needed colleagues to attend work regularly to meet operational demands. She warned the Claimant that one possible outcome of the meeting might be dismissal, if there was no indication of a return to work within the foreseeable future.
42. On 8 August 2019, the Claimant wrote to Ms Powell, informing her that she would not be able to attend the meeting on 9 August 2019.
43. The Respondent received the Claimant's latest sick note on 9 August 2019, but the copy was illegible. On the same day Ms Powell wrote to the Claimant

rescheduling the meeting to 16 August 2019 at the Thurrock store. She restated the reasons for the meeting.

44. By email dated 14 August 2019, the Claimant wrote that she would not be able to attend the meeting because she was unwell and had prior commitments. The Claimant resubmitted her fit note and highlighted that her GP was recommending a referral to OH.
45. The Claimant and Ms Powell spoke on the phone on 19 August 2019. Because the Claimant still did not have her own phone, she had phoned from a friend's mobile, who was not willing to give the Respondent permission to call her on the number. Ms Powell agreed that an OH referral would be made. She asked the Claimant how she was getting on and whether she had had any more therapy. The Claimant said that it was none of Ms Powell's business. Ms Powell stressed the importance of keeping the Respondent informed of her progress. The Claimant then said that she was on a waiting list for counselling. Ms Powell reminded the Claimant that her current fit note expired the following day. Ms Powell confirmed that she would communicate with the Claimant by post.
46. By letter dated 20 August 2019, Ms Powell wrote to the Claimant rearranging the meeting to 28 August 2019 at 2 p.m. at the Thurrock store. The letter was sent both by registered mail and by first class post. It explained the purpose of the meeting and summarised the history of cancelled meetings. Ms Powell again warned that one possible outcome of the attendance management procedure might be dismissal. It also attached a consent form to allow the Respondent to make an OH referral and asked the Claimant to sign and return it. Ms Powell wrote:

'in our previous meetings we have discussed several options to assist with your return to work. This includes a store move to Thurrock outlet. To date you have not made me aware whether this would be suitable for you and we will discuss this in the meeting. We also discussed a return to Thurrock store in Lingerie, whilst you wait for any potential roles to become available that you wanted to transfer to. As I explained in the meeting on 15/07/2019, at present there are no visual roles available in the stores you had requested.'
47. I am satisfied that the Claimant received this letter in one or other form. I note that she received the later letter of 29 August 2019, which was also sent to her home. Moreover, she did eventually return the OH consent form (see below), which was only sent to her as an attachment to the letter of 20 August 2019. I think it likely that she must have collected both letters from her home address, whether or not she was living there at the time.
48. The Claimant did not attend the meeting on 28 August 2019, nor did she contact Ms Powell to say that she would not be attending.
49. On 29 August 2019, Ms Powell wrote to the Claimant about her non-attendance at the meeting and the lack of contact more generally. She asked the Claimant to phone her before 4 September 2019 (on a number which she provided) to discuss the medical situation, the prognosis, possible adjustments to support a return to work and future actions. She warned her that if she did not do so she

would be invited to a disciplinary investigation to discuss why she was not staying in touch as agreed.

50. The Claimant phoned Ms Powell on 2 September 2019 and told her about the burglary at her home, which had caused her distress. Later the same day, Ms Powell wrote to the Claimant, inviting her to a meeting on 6 September 2019 at the Thurrock store. The letter also reminded her of the need to complete and return the OH consent form. That the Claimant still had not done so by this point was acknowledged by her in a letter of 4 September 2019 to Ms Emma Colom ('I will fill in the form and return back to yourself ... for the attention of Katherine Powell'). I note that there was no suggestion in this letter that she had not received the form or that she was unable to return it for any other reason.
51. In the same letter the Claimant explained that she would not be able to attend the meeting on 6 September 2019 as she was unwell. She asked that future meetings take place at the Ilford store. She wrote a separate letter 'to whom it may concern', stating that she considered she had valid reasons for not attending the previous meetings.

Invitation to the final meeting

52. By letter dated 11 September 2019, Ms Powell wrote to the Claimant inviting her to a final ill-health meeting on 20 September 2019. The meeting would take place at the Thurrock store. I accept Ms Powell's evidence that she was unable to meet the Claimant at the Ilford store on that day because of her own commitments as a manager. I am satisfied that it was reasonable to hold the meeting at the Thurrock store: it was the Claimant's place of work; the meeting would have been conducted in private and away from other colleagues; and in any event most of the colleagues about whom the Claimant had concerns had left the store.
53. The invitation letter also reminded the Claimant that the Respondent had not received her signed OH consent form, and that the Claimant's current fit note was due to expire on 18 September 2019. The letter warned her that, if the OH consent form was not received, the meeting would proceed without OH advice. A warning of the possibility of dismissal was given again.
54. Ms Powell made a further accommodation for the Claimant: if she considered that she was too unwell to attend the meeting on 18 September 2019, she could fill out a questionnaire, which was attached to the letter. Again, the letter was sent by registered post and first-class mail. On the balance of probabilities, I am satisfied that the Claimant received it, notwithstanding her later denial.
55. On 16 September 2019, the Claimant phoned Ms Powell. Ms Powell discussed the letter of 11 September 2019. The Claimant said she had not received it. Ms Powell told her over the phone what it contained and stressed the importance of attending this meeting as it was a final meeting. She explained that, along with the letter, was a medical questionnaire which, if she was going to be unable to attend in person, she should complete and return to Ms Powell before the meeting. She was clear that the meeting would take place in any event. She also reminded her that she needed to return the signed consent form for the OH referral.

56. The Claimant asked if the meeting could be moved to the Ilford store. Ms Powell said that it could not and explained why. Before ending the call, Ms Powell again went over all the information contained in the letter and stressed to the Claimant the importance of attending the meeting and/or completing the medical questionnaire and the OH consent form. She also reminded the Claimant that her current fit note was due to expire on 18 September 2019 and that her expectation was that either the Claimant would return to work on her next working day or would provide a new certificate from her GP. The Claimant said that she 'might not be attending the meeting' because of the incident at her home. She did not say that she would not be attending because of a prior commitment.

The meeting on 20 September 2019

57. The Claimant did not attend the meeting on 20 September 2019, nor did she submit the OH consent or the medical questionnaire. The meeting proceeded in her absence. Ms Powell worked through the issues which she considered relevant and made extensive notes. She concluded:

'I have considered the length of time Natasha has been absent from work, 16/04/19, which has had an impact on the operational requirements of the lingerie department, as a full-time employee, 37½ hours a week. These are hours I cannot replace which puts extra pressure on her colleagues as the same tasks need completing'.

58. She concluded that there was no foreseeable return to work in sight. The Claimant confirmed in cross-examination that this was correct. Ms Powell's decision was that the Claimant should be dismissed for capability (ill-health), with pay in lieu of notice.
59. The Claimant wrote a detailed letter, addressed 'to whom it may concern', which she dated 20 September 2019. It is apparent from an email of 26 September 2019 that the letter was not received by the Respondent until 23 September 2019. In it she said that she was 'still waiting for a reply by email from Kate Powell section manager regarding absence meeting to be held on 20 September 2019 2 p.m. at the Thurrock store'. The letter did not state that she was/had been unable to attend the meeting on 20 September 2019 because of a prior appointment. The Claimant's letter did not include the completed medical questionnaire or the signed OH consent form.
60. It is apparent from this letter, and a later email from the Claimant on 3 October 2019, that she spoke to the Respondent's employee support team (PPS) on 16 September 2019. In the course of the appeal, Ms O'Donoghue accepted that the Claimant had raised concerns with PPS about the location of the meeting. However, there is no evidence that she told PPS that she could not attend the meeting on 20 September 2019 at all; she certainly did not tell Ms Powell that when she spoke to her on 16 September 2019.

Dismissal

61. Ms Powell summarised the outcome in a letter sent to the Claimant on 24 September 2019. She wrote, among other things:

'I have not received any updated medical information since the meeting we had on the 15/07/2019. In addition, you did not provide me a letter and/or the questionnaire sent to you with the invite letter sent on 11/09/2019, for me to consider in the meeting held on 20/09/19 and therefore I have considered the following information which was available to me.

You have been off sick since 16/04/19 for work related stress, depression and panic attacks and your doctor has been unable to provide an estimated return date for you. Your current certificate of absence expired on 18/09/19 and you have not returned to work or supplied a further statement of fitness for work to explain your ongoing absence. In addition, we were unable to obtain an occupational health referral report despite you agreeing to this as you have not returned the consent form which is required for us to refer you. This was sent on 20 August 2019. Therefore, I am unable to consider expert occupational health support.

[...] we have offered a number of roles which we believe are suitable for you. However, you have rejected these roles and you have not attended multiple meetings previously arranged. I have therefore been unable to work with you towards a return to work date. In addition, the operational impact of your long-term absence is unsustainable as you have been absent since 16/04/2019 and this adds pressure onto your colleagues to increase workload which in turn impacts on our customers. In addition, I am unable to replace your hours and have had to stretch the resource to cover operational requirements. Therefore, I have come to a very difficult decision to dismiss you on the grounds of your incapability to return to work in the foreseeable future due to ill-health.'

62. The letter referred to the Claimant's right to appeal. The Claimant was given four weeks' pay in lieu of notice, plus payment for accrued but untaken holiday.
63. The Claimant did eventually send the signed OH referral consent form. She dated it (by hand) '9/2019'. I note that she gave the month and year, but not the day. In the appeal meeting Ms O'Donoghue showed the Claimant confirmation that the OH form and latest GP fit note was sent five days after the dismissal. The Claimant replied that she did not remember when she had sent them. I find, on the balance of probabilities, that she sent them after she received the letter of dismissal.

Ms A

64. There had been some suggestion by the Claimant, earlier in the proceedings, that she was alleging that she was dismissed to make way for Ms A. She did not put that to Ms Powell when questioning her; when I pointed this out, she said that she was not pursuing it.
65. In any event, Ms Powell had made enquiries of the Visual Commercial Manager at the Thurrock store in April 2021, who told her that Ms A had not worked for the Respondent since she resigned. I am satisfied that there is no evidence that Ms Powell had an ulterior motive in dismissing the Claimant. She struck me as a compassionate and sensitive manager, who had a good working relationship

with the Claimant, and was sympathetic to her difficulties. I accept her evidence that she took the decision to dismiss the Claimant extremely seriously.

The appeal against dismissal

66. On 2 October 2019, the Claimant presented an appeal against dismissal. The grounds of appeal were short. I reproduce them below:

'I am appealing against the decision that was made on the 21/09/2019 reason because the decision was unfailing made due to the fact that due procedural measures was not taken into consideration given the fact that I notify the department and/or the office concerned about my sickness (in which I posted in my doctor sick note alongside with other documentation that was needed for the attention of the Department and/or the office concerned).

The manager's decision was not fair or reasonable. Company policy wasn't followed. I received a letter from M&S dated on 26 September 2019.

I am looking for a permanent transfer as a FULL-TIME VM STYLIST with regards to the stores that was stipulated in my absence meeting.

I will send in further information and documentation in support of my predicaments and of the situation in question.'

67. Mr Graham Bennett (Thurrock store manager) appointed Ms Vicki O'Donoghue to hear the appeal. Although Ms O'Donoghue, who was the manager of a different store from the Claimant's, had been involved in dealing with previous processes relating to the Claimant's employment, she had not imposed any form of sanction on the Claimant. I find that she approached this appeal with an open mind, conducted a lengthy and detailed interview, and reached a thoughtful and well-reasoned appeal outcome. I reject the Claimant's contention that Ms O'Donoghue was not a neutral decision-maker, and ought not to have been dealing with the appeal at all.
68. Ms O'Donoghue interviewed the Claimant on 22 October 2019. Although by this stage the Respondent had received the signed OH consent form, Ms O'Donoghue concluded that the Claimant had had every opportunity to submit it before the dismissal, and that it would not be reasonable to commence the process at the appeal stage. In any event, the Claimant confirmed to her at the meeting (and again in Tribunal) that there was no foreseeable return date. Ms O'Donoghue interviewed Ms Powell on 11 November 2019.
69. Ms O'Donoghue dismissed the appeal in an outcome letter, which ran to four closely-reasoned pages. The letter recorded that the Claimant had failed to attend four previous meetings with Ms Powell at different locations, including Ilford. She had said in the meeting that neither she nor her GP were able to provide a timescale of when she could return to work, other than to say that it would be when she was 'well enough'. Ms O'Donoghue concluded that the Claimant had not been able to give a satisfactory explanation as to why she did not attend the meeting in Thurrock on 20 September 2019. She found that the Claimant had not asked Ms Powell to rearrange the date of the meeting. If she had concerns about attending the meeting in Thurrock, she could have

completed the medical questionnaire instead, but she had not done so. She found that the Claimant had been supported by Ms Powell at the Thurrock store in the lingerie department, until a live vacancy came up in one of the stores she wished to transfer to. However no such vacancy had arisen. She acknowledged that the Claimant had been the victim of a burglary, but the Claimant was not able to give the date and did not wish to discuss it further.

70. She recorded that the Claimant had produced a piece of paper, which the Claimant said showed that she had a telephone appointment with her GP on 20 September 2019 at 2 p.m. Ms O'Donoghue asked her for an appointment card, or other formal confirmation; the Claimant had said that she would send it to her. Ms O'Donoghue had received nothing from the Claimant by the date of the outcome letter, which was 10 November 2019. There was in the bundle a letter dated 20 November 2019 from the Claimant's GP practice, which does contain a reference to an appointment at 2 p.m. on 20 September 2019. However, given its date, it was (self-evidently) not available to Ms O'Donoghue.
71. Ms O'Donoghue upheld the decision to dismiss.

Notice pay

72. The Claimant was entitled to 4 weeks' notice under the relevant policy. By the date of termination, her hourly rate was £9. She worked 37.5 hours a week. Accordingly, she was entitled to £1,350 notice pay.
73. In an email dated 28 October 2019, the Respondent's payroll wrote to the Claimant, informing her that she would receive four weeks' notice pay and outstanding holiday pay in November, because payroll had been unable to amend her October pay in time to include the sums.
74. The payslip dated 6 November 2019 shows a payment for PILON of £1,350.
75. During the hearing the Claimant handed up a letter from the DWP, dated 16 November 2019, to the Respondent, copied to the Claimant. It was a Direct Earnings Attachment notice, explaining that the Claimant owed money to the DWP (£493.58). The DWP required the Respondent to deduct this sum from the Claimant's net pay and send it to them. Because the Respondent had had no notice of this matter, it was not in a position to lead evidence as to how this request was dealt with by payroll. There was no clear evidence before the Tribunal that the sum had even been deducted by the Respondent, or that the Claimant had been required to repay it to the Respondent and, if so, when that had occurred.

The law

76. S.94 Employment Right Act 1996 ('ERA') provides that an employee with sufficient qualifying service has the right not to be unfairly dismissed by his employer.
77. S.98 ERA provides so far as relevant:

(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 for 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.

78. In this case the reason relied upon by the Respondent is capability, which is defined as including ill health. A fair procedure by reason of capability would normally, depending on the circumstances, involve consultation with the employee; ascertaining the up-to-date medical position; an opportunity to improve attendance; and, where appropriate, considering the availability of alternative employment.
79. In judging the reasonableness of the employer’s conduct, the Tribunal must not substitute its decision as to what was the right course to adopt for that of the employer. It is recognised that there is a band of reasonable responses to the employee’s conduct within which one employer might reasonably take one view, and another quite reasonably take another. If the dismissal falls within that band, then the dismissal is fair; if it falls outside that band, it is unfair.
80. In a capability case, the EAT held in *Pinnington v City and County of Swansea* EAT0561/03 at [67], that the range of reasonable responses test applies equally to the way that an employer informs themselves of the true medical position, applying the Court of Appeal’s decision in *Sainsbury plc v Hitt* [2003] ICR 111. The employer is not required to ‘leave no stone unturned’.
81. It is also well-established that if an employee refuses to cooperate in providing medical evidence, the employer is entitled to base its decision on the facts available, even if those facts are insufficient to give the full medical position. For example, in *Elmbridge Housing Trust v O’Donoghue* [2004] EWCA Civ 939 it was fair for the employer to dismiss after 15 weeks’ absence where the employer had waited for eight weeks for the employee to consent to their obtaining medical evidence and the employee had not provided that consent.

82. As to the decision to dismiss, the issue is not whether, objectively speaking, the employee was or was not capable of remaining in employment, but rather whether it was within the range of reasonable responses to treat the employee's ill-health as sufficient grounds for their dismissal. The EAT in *DB Schenker Rail (UK) Ltd v Doolan* [2010] UKEAT/0053/09 noted how easy it can be for Tribunals to fall into the substitution mindset in cases of ill-health. Tribunals must therefore guard against the temptation to test matters according to what they would have decided if they had been in the employer's shoes.
83. As to whether the employer can be expected to wait any longer for the employee to recover, in *O'Brien v Bolton St Catherine's Academy* [2017] EWCA Civ. 145, Underhill LJ made the following observations at [36]:

'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.'

Submissions

84. On the first day of the hearing Mr Francis said that he would be providing written submissions in closing. I explained to the Claimant that this was not unusual and that she could prepare a written document herself, if she wished, but there was no requirement for her to do so. She said that she preferred to make oral submissions. I explained that the normal procedure would be for Mr Francis to give a copy of his submissions to her and to me at the conclusion of evidence, for us to read them and then hear any oral submissions either party wished to make. The Claimant asked if it would be possible for Mr Francis to read his submissions out loud, as she would find it easier to absorb them.
85. Mr Francis readily agreed and, when it came to closing submissions, read through his submissions at a moderate pace. While he did so, the Claimant made notes. We then broke for an hour before the Claimant made her own submissions. When she returned she asked for more time; she told me she had not been able to finish reading through Mr Francis submissions and formulating her reply. I was surprised by this, given that she had specifically asked to hear the submissions, rather than to read them.
86. I decided it would not be reasonable to allocate more time for this: the Claimant had known since the first day that she would be making closing submissions; I had agreed to the adjustment of Mr Francis reading out his written submissions; I had allowed additional time after that for the Claimant to finalise her submissions; and it was important to leave some time at the end of the day for me to begin my own deliberations. I explained that parties in Tribunal proceedings do not have an automatic right of reply to each other's submissions on the facts; I simply needed to hear the points she wished to make on her own behalf.
87. In the event, the Claimant spoke for about half an hour from her own notes, explaining why she considered that the dismissal was both wrongful and unfair.
88. When she had finished, I spent some time repeating her main submissions back to her, which were as follows: she was not paid her notice pay and the dismissal was unfair; she should not have been required to work in the lingerie department

as a customer assistant, as this was not her role; no OH assessment was carried out at any point; the Respondent did not try to resolve the issues she was having at the Thurrock store; she was not transferred to another store, even though a transfer had been agreed and the Claimant believed there were vacancies for a stylist in other stores; she believed that other people were being transferred; she should not have been required to interview for roles, but should have been slotted into them; Ms Powell was not suitably qualified to make the decision to dismiss, because she had no medical training; Ms O'Donoghue should not have heard her appeal against dismissal, because she was not a neutral person, having been involved in earlier processes relating to the Claimant; the Claimant had always provided her sick notes on time; Ms O'Donoghue had access to private information in the Claimant's personnel file, some of which she should not have seen, some of which she wrongly ignored, such as evidence relating to the Claimant's ill-health; by the time of the appeal the Claimant had given consent to an OH referral, but Ms O'Donoghue did not action it; the Claimant had always gone above and beyond her duties and was a considerable asset to the Respondent

89. I then asked the Claimant if she had any additional points. She made one further point, which was that her GP had recommended a referral to OH, which had been disregarded. She then confirmed that she had nothing to add.

Conclusions: unfair dismissal

90. I am satisfied that the sole reason for the dismissal was capability: the Claimant's ill-health and consequent absence from work. As recorded above (para 64), the Claimant did not pursue her allegation that there was an ulterior motive for the dismissal; there was not.
91. I am satisfied that the extent of the Respondent's consultation fell within the band of reasonable responses. In my judgment, Ms Powell showed considerable patience in the steps she took to engage with the Claimant and facilitate her return to work: there were multiple phone calls between them; the Claimant attended two absence review meetings on 10 May 2019 and 17 July 2019; there were then four attempts to arrange a further meeting, none of which the Claimant attended; Ms Powell then arranged a final, fifth meeting, which the Claimant also did not attend.
92. By contrast, it will be apparent from my findings above that the Claimant did not co-operate fully in the process; at various stages she failed to maintain contact, to attend meetings, and to provide documents. She can have been in no doubt as to the potential consequences of her inaction: she was repeatedly warned of the risk of dismissal.
93. For the avoidance of doubt, I was not satisfied that the Claimant's explanations for not attending the final meeting were satisfactory. In particular, even if she had a medical appointment on 20 September 2019 (proper evidence of which was not provided until after the conclusion of the appeal process), that was not the end of the matter. She could either have rearranged her medical appointment or, if that was not possible, asked Ms Powell to adjust the time of the meeting, which I have no doubt Ms Powell would have done. I am satisfied that the Claimant decided not to attend the meeting, in part because she was unhappy that it was taking place at the Thurrock store. In any event, Ms Powell

did not know that the Claimant had a medical appointment. I conclude that she acted reasonably in proceeding in the Claimant's absence, given the clear warnings she had given, the great lengths to which she had already gone to consult with, and support, the Claimant, and the opportunity she had given the Claimant to submit evidence in writing. I am also satisfied that Ms Powell acted reasonably in arranging for the final meeting to take place at the Thurrock store for the reasons given above (para 52).

94. I have also concluded that Ms Powell acted reasonably in terms of her attempts to establish the up-to-date medical position. She tried to make a referral to OH, and asked the Claimant to give consent on more than one occasion; the Claimant did not do so until after she had been dismissed. The fact that she was well enough to write two letters on 4 September 2019 (paras 50 and 51) and a further letter on 20 September 2019 (para 59) is inconsistent with any suggestion that she was not able to complete the OH form - or the questionnaire - as she had been asked to do. She had been warned (para 53) that the meeting would proceed without further OH advice, if she did not provide consent. In my judgment it was reasonable for Ms Powell to proceed on the basis of the information available to her, i.e. such information as the Claimant had provided in the course of their various discussions.
95. I am also satisfied that the decision not to make an OH referral at the appeal stage fell within the band of reasonable responses. In circumstances where the Claimant had had every opportunity to give consent before the dismissal, and given that her own position at the appeal stage was that there was no foreseeable return date, it was reasonable to conclude that a referral at that stage would be neither appropriate nor necessary. For the reasons I have already given (para 67), I reject the Claimant's submission that Ms O'Donoghue was not an impartial decision maker. I am satisfied that she conducted a careful and thorough appeal and reached a reasonable conclusion, which was open to her on the material before her.
96. Turning to the Respondent's attempts to explore alternative roles, the starting-point must be that the Respondent was entitled to conclude that there was no possibility of the Claimant continuing to work in the VM team in the Thurrock store. The Claimant's own position was that she found the working environment to be 'unbearable' and 'hostile' (paras 16 and 19); the relationships within that team had clearly broken down beyond repair. The Claimant was adamant that she would not work at Thurrock in any other department, or in any other role (para 22). The interim solution of working in the lingerie department at Thurrock under Ms Powell, which in my judgment the Respondent was entitled to regard as a reasonable alternative, was short-lived; the option of returning to that role remained open, but the Claimant did not take it up, because it was not a purely VM role (para 22). The Claimant rejected proposed opportunities in the Marble Arch store (para 27) and the Thurrock outlet store (para 33). The only solution which was acceptable to her was a transfer to a VM role in another store of her own choosing. Ms Powell explained to the Claimant that there was no such role available, notwithstanding the Claimant's firm, but mistaken, belief to the contrary. I am satisfied that the Respondent acted reasonably in exploring alternative opportunities, which might have enabled the Claimant to return to work. The Claimant rejected them all.

97. I have concluded that the Respondent acted reasonably in treating the Claimant's ill-health as sufficient reason to dismiss her: she had been absent from work for just over five months, at significant cost to the business (para 57); the Respondent could not continue to expect colleagues to cover her duties; the process of managing the Claimant's absence had taken up a great deal of management time; despite the Respondent's best efforts to encourage the Claimant back to work, no potential return date was ever provided by the Claimant, or her GP, either at the dismissal or the appeal stage. I accept Mr Francis's submission that the Respondent had reached the point where it could no longer be expected to wait any longer for the Claimant to return. The dismissal was fair.

Conclusions: wrongful dismissal

98. The Respondent paid to the Claimant the notice pay to which she was entitled (para 74). Accordingly, she was not wrongfully dismissed.
99. The claim advanced by the Claimant, for the first time at the hearing, was a different claim: that she had been required to repay a sum to the Respondent post-dismissal, and it was this sum that she was seeking. She produced the DWP document for the first time at the hearing (para 75). It was not even clear how a claim in respect of that transaction (which on the face of it appeared to be entirely proper) could be pursued in the Tribunal, given that it arose after the termination of her employment. In any event, there was no pleaded claim in respect of this repayment, and no application to amend the claim form. Accordingly, it was not a claim that I was required to determine.

Final observations

100. The Claimant conducted herself in a courteous manner throughout the three days of the hearing. It is right to record, however, that she frequently did not answer the questions asked of her, preferring to make statements reiterating her position more generally. She also declined to accept matters, which were clearly recorded in contemporaneous documents, for example that Ms Powell's letter to her of 17 July 2019 warned of the possibility of dismissal, which it plainly did. This had an impact on the extent to which I felt I could rely on her evidence, where there was no documentary evidence to support it.

Employment Judge Massarella

4 January 2022