EMPLOYMENT TRIBUNALS

Claimant: Mrs O Valachi

Respondent: Department for Work and Pensions

HELD AT: Manchester **ON:** 15 and 16 March 2017

BEFORE: Employment Judge Franey
Mrs L Garcia
Dr B Tirohl

REPRESENTATION:
Claimant: Mr J Martin, Solicitor
Respondent: Miss H Trotter, Counsel

JUDGMENT

The unanimous judgment of the Tribunal is as follows:

1. The complaint of direct disability discrimination contrary to section 13 Equality Act 2010 succeeds.

2. The complaint of discrimination arising from disability contrary to section 15 Equality Act 2010 succeeds.

3. The unfair dismissal complaint is well-founded. The claimant was unfairly dismissed.

4. Matters relating to remedy will be determined at a remedy hearing at **10.30am** on **Thursday 4 May 2017**.

REASONS

Introduction

1. By a claim form presented on 20 October 2016 the claimant complained of unfair dismissal and of disability discrimination in relation to her dismissal from her post as a work coach with the respondent with effect from 6 July 2016. That dismissal followed a period of absence which had begun on 3 May 2016. By its response form of 18 November the respondent resisted the complaints and argued that it was a fair dismissal for capability untainted by any disability discrimination. The respondent accepted that the claimant had been a disabled person by reason of diabetes, anxiety and depression, the effects of a stroke, and her musculoskeletal conditions. However, it denied any unlawful treatment.

2. The issues were identified by Employment Judge Slater at a preliminary hearing on 20 December 2016. The claimant complained of unfair dismissal, direct disability discrimination and discrimination arising from disability. She relied on a hypothetical comparator in the direct discrimination complaint.

Issues

3. We reviewed the issues with the representatives at the start of the hearing. Some matters were no longer in dispute. The issues on liability were as follows:

Unfair Dismissal

1. Could the respondent show a potentially fair reason for dismissal, being a reason relating to the capability of the claimant to perform the work she was employed to do?

2. If so, was the dismissal fair or unfair?

Direct Disability Discrimination

3. In dismissing the claimant did the respondent treat her less favourably than it would have treated a hypothetical comparator?

4. If so, was that because of the protected characteristic of disability (relying on the claimant's disabling conditions of (1) diabetes and (2) anxiety and depression)?

Discrimination arising from disability – section 15

5. It being admitted that the dismissal was unfavourable treatment because of something (the claimant's absence and the likelihood of a return within a reasonable time) which arose in consequence of her disability, could the respondent show that the dismissal was a proportionate means of achieving a legitimate aim, namely to manage staff attendance effectively and to ensure that the respondent could continue to provide the level of service to its users, customers and associates, within budget, without an undue burden falling on other members of staff?

Evidence

4. The parties had agreed a bundle of documents which ran to just over 230 pages, and any reference in these reasons to page numbers is a reference to that bundle unless otherwise indicated.

5. Each of the witnesses gave evidence pursuant to a written witness statement which stood as evidence in chief. The respondent called Sue Williams, the claimant's line manager who referred her case to a Decision Maker; Michael Douthwaite, the Customer Service Operations Manager who decided to dismiss the claimant; and Elaine Walshe, the Senior External Manager who rejected the claimant's appeal against dismissal. The claimant gave evidence herself but did not call any other witnesses.

Relevant Legal Principles – Unfair Dismissal

6. The unfair dismissal claim was brought under Part X of the Employment Rights Act 1996. Section 98(1) places the burden on the employer to show the reason or principal reason for the dismissal and that it is one of the potentially fair reasons identified within Section 98(2), or failing that some other substantial reason.

7. The potentially fair reasons in Section 98(2) include a reason which:-

> "**relates to the capability or qualifications of the employee for performing work of a kind which he was employed by the employer to do".**

8. Section 98(3) goes on to provide that "capability" means capability assessed by reference to skill, aptitude, health or any other physical or mental quality.

9. Where the respondent shows that dismissal was for a potentially fair reason, the general test of fairness appears in Section 98(4):

> **"…the determination of the question whether the dismissal is fair or unfair (having regard to the reasons shown by the employer) –**
>
> **(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and**
>
> **(b) shall be determined in accordance with equity and the substantial merits of the case".**

10. It has been clear since the decision of the Employment Appeal Tribunal ("EAT") in **Iceland Frozen Foods Limited -v- Jones [1982] IRLR 439** that the starting point should be always the wording of Section 98(4) and that in judging the reasonableness of the employer's conduct a Tribunal must not substitute its decision as to what was the right course to adopt for that of the employer. In most cases there is a band of reasonable responses to the situation and a Tribunal must ask itself whether the employer's decision falls within or without that band. This approach was endorsed by the Court of Appeal in **Post Office –v- Foley; HSBC Bank Plc –v- Madden [2000] IRLR 827**.

11. The application of this test in cases of dismissal due to ill health and absence was considered by the EAT in **Spencer –v- Paragon Wallpapers Limited [1976] IRLR 373** and in **East Lindsey District Council –v- Daubney [1977] IRLR 181**. The **Spencer** case establishes that the basic question to be determined when looking at the fairness of the dismissal is whether, in all the circumstances, the employer can be expected to wait any longer, and if so how much longer. Matters to be taken into account are the nature of the illness, the likely length of the continuing absence, and the overall circumstances of the case. In **Daubney**, the EAT made clear that unless there were wholly exceptional circumstances, it is necessary to consult the employee and to take steps to discover the true medical position before a decision on whether to dismiss can properly be taken. However, in general terms where an employer has taken steps to ascertain the true medical position and to consult the employee before a decision is taken, a dismissal is likely to be fair.

12. More recently the EAT considered this area of law in **DB Schenker Rail (UK) Limited –v- Doolan [UKEATS/0053/09/BI**). In that case the EAT (Lady Smith presiding) indicated that the three stage analysis appropriate in cases of misconduct dismissals (which is derived from **British Home Stores Limited –v- Burchell [1978] IRLR 379**) is applicable in these cases.

13. An overview was offered by the Court of Session in November 2013 in **BS v Dundee City Council [2014] IRLR 131** at paragraph 27:

> "**Three important themes emerge from the decisions in Spencer and Daubney. First, in a case where an employee has been absent from work for some time owing to sickness, it is essential to consider the question of whether the employer can be expected to wait longer. Secondly, there is a need to consult the employee and take his views into account. We would emphasize, however, that this is a factor that can operate both for and against dismissal. If the employee states that he is anxious to return to work as soon as he can and hopes that he will be able to do so in the near future, that operates in his favour; if, on the other hand he states that he is no better and does not know when he can return to work, that is a significant factor operating against him. Thirdly, there is a need to take steps to discover the employee's medical condition and his likely prognosis, but this merely requires the obtaining of proper medical advice; it does not require the employer to pursue detailed medical examination; all that the employer requires to do is to ensure that the correct question is asked and answered."**

Relevant Legal Principles – Equality Act 2010

14. The complaints of disability discrimination were brought under the Equality Act 2010. Section 39(2)(c) prohibits discrimination against an employee by dismissing her.

Burden of Proof

15. The Equality Act 2010 provides for a shifting burden of proof. Section 136 so far as material provides as follows:

> **"(2) If there are facts from which the Court could decide in the absence of any other explanation that a person (A) contravened the provision concerned, the Court must hold that the contravention occurred.**

> **(3) But subsection (2) does not apply if A shows that A did not contravene the provision."**

The section goes on to make it clear that a reference to the Court includes an Employment Tribunal.

16. Consequently it is for a claimant to establish facts from which the Tribunal can reasonably conclude that there has been a contravention of the Act. If the claimant establishes those facts, the burden shifts to the respondent to show that there has been no contravention by, for example, identifying a different reason for the treatment.

Direct Disability Discrimination

17. Direct discrimination is defined in section 13(1) as follows:

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

18. The concept of treatment being less favourable inherently suggests some form of comparison and in such cases section 23(1) applies:

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

19. Section 23(2) goes on to provide that if the protected characteristic is disability, the circumstances relating to a case include the person's abilities. The effect of section 23 as a whole is to ensure that any comparison made must be between situations which are genuinely comparable.

20. The case law, however, makes it clear that it is not necessary for a claimant to have an actual comparator to succeed. The comparison can be with a hypothetical person without a disability.

21. Further, as the Employment Appeal Tribunal and appellate courts have emphasised in a number of cases, including **Amnesty International v Ahmed [2009] IRLR 884**, in most cases where the conduct in question is not overtly related to disability, the real question is the "reason why" the decision maker acted as he or she did.

22. Answering that question involves consideration of the mental processes (whether conscious or subconscious) of the alleged discriminator, and it may be possible for the Tribunal to make a finding as to the reason why a person acted as he or she did without the need to concern itself with constructing a hypothetical comparator – see paragraphs 41 and 42 of the judgment of Mummery LJ in **Aylott v Stockton-on-Tees Borough Council [2010] EWCA Civ 910.**

23. The relevant protected characteristic need not be the sole or predominant reason for the treatment. It is enough if it is an effective cause: **O'Neill v Governors of St Thomas More RCVA Upper School [1997] ICR 33.**

Discrimination arising from disability

24. Section 15(1) of the Act reads as follows:-

> **"a person (A) discriminates against a disabled person (B) if –**
>
> **(a) A treats B unfavourably because of something arising in consequence of B's disability, and**
>
> **(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim."**

25. As to justification in section 15(1)(b), the Tribunal must decide whether the unfavourable treatment of the claimant was justified, not simply the underlying policy on which it was based: **Buchanan v Commissioner of Police of the Metropolis [2017] ICR 184.** That requires an objective assessment which the Tribunal must make for itself following a critical evaluation of the position. It is not simply a question of asking whether the employer's actions fell within the band of reasonable responses. In **Hardys & Hansons plc v Lax [2005] ICR 1565** (Court of Appeal) Pill LJ said in paragraph 32:

> **"…I accept that the word "necessary" …. is to be qualified by the word "reasonably". That qualification does not, however, permit the margin of discretion or range of reasonable responses for which the appellants contend. The presence of the word 'reasonably' reflects the presence and applicability of the principle of proportionality. The employer does not have to demonstrate that no other proposal is possible. The employer has to show that the proposal, in this case for a full-time appointment, is justified objectively notwithstanding its discriminatory effect. The principle of proportionality requires the tribunal to take into account the reasonable needs of the business. But it has to make its own judgment, upon a fair and detailed analysis of the working practices and business considerations involved, as to whether the proposal is reasonably necessary."**

26. The same approach was reiterated by the EAT (Singh J) in **Hensman v Ministry of Defence UKEAT/0067/14** on 10 June 2014.

27. The Equality and Human Rights Commission Code of Practice also contains some provisions of relevance to this. In paragraph 4.27 the code considers the phrase "a proportionate means of achieving a legitimate aim" (albeit in the context of justification of indirect discrimination) and suggests that the question should be approached in two stages:-

* is the aim legal and non discriminatory, and one that represents a real, objective consideration?

* if so, is the means of achieving it proportionate – that is, appropriate and necessary in all the circumstances?

24. As to that second question, the code goes on in paragraphs 4.30 – 4.32 to explain that this involves a balancing exercise between the discriminatory affect of the decision as against the reasons for applying it, taking into account all relevant facts. It goes on to say the following at paragraph 4.31:-

> **"although not defined by the Act, the term "proportionate" is taken from EU directives and its meaning has been clarified by decisions of the CJEU (formerly the ECJ). EU law views treatment as proportionate if it is an "appropriate and necessary" means of achieving a legitimate aim. But "necessary" does not mean that the [unfavourable treatment] is the only possible way of achieving a legitimate aim; it is sufficient that the same aim could not be achieved by less discriminatory means."**

Relevant Findings of Fact

26. This section of our reasons records the broad chronology of events intended to put our decision into context. Any disputed issues of fact central to our conclusions will be addressed in the discussion and conclusions section.

The Respondent and its Procedures

27. The respondent is a Government department which has substantial resources compared to most private employers, even in times of austerity. It has access to specialised Human Resources ("HR") advice.

28. The Attendance Management Procedure appeared at pages 181-223. It made provision for formal action where an employee exceeded the trigger point of eight working days of absence in a 12 month rolling period. The duty to make reasonable adjustments was recognised. The procedure for continuous absence began on page 188. Stage one was an informal discussion after 14 days of absence and stage two a formal meeting after 28 days. The guidance notes said at stage two:

> **"If you are unlikely to return to work within a reasonable time period, your employment with the Department may end."**

29. Stage three provided for ongoing monthly attendance review meetings, although dismissal could be considered if at any stage the manager did not consider absence could continue to be supported. Stage four was an Occupational Health ("OH") case conference, and stage five (after six months of absence) was engagement of a member of the Senior Civil Service for help and support. Stage six was dismissal or demotion, which could occur at any time during the ongoing review.

30. The procedure said on page 189 that:

> **"The Department does not envisage anyone will be absent for longer than one year."**

31. The procedure went on at page 211 to provide for regular contact by way of attendance review meetings for absences between six and 12 months. Paragraph 4.23 made clear that if it became apparent that a return to work within a reasonable period was unlikely the manager must consider whether the absence could continue to be supported.

32. In clause 7.9 (page 216) the policy recorded matters to be taken into account in deciding whether to dismiss. The list included the employee's length of service and previous attendance record. It also said that

> **"Dismissal is not an option if there is an outstanding …..Occupational Health report."**

The Claimant

33. The claimant was first employed in February 2001. The letter recording the main terms of her employment appeared at pages 47-55. It referred to an entitlement to six months of full pay during suck leave in any period of 12 months.

34. By the time of the events with which this case was concerned the claimant was working as a Work Coach at the Alexandra Park job centre in Manchester. Her role was to assist unemployed people to get back into work. The job description appeared at pages 120-123. There were supposed to be twelve Work Coaches in the team but in the first part of 2016 there were only eight people in post including the claimant.

35. The claimant suffered from a number of longstanding medical conditions. They included anxiety and depression (which sometimes involved panic attacks), diabetes and hypertension.

Absence due to a Stroke

36. The claimant suffered a stroke in November 2013 which kept her off work until May 2014. As a consequence of the effects of her stroke, which included impairment of her short-term memory, a reasonable adjustment was made by way of allowing the claimant an additional 20% time for specific tasks within her job role.

37. She received a first written warning for that period of absence on 21 July 2014 (pages 67-68) but she maintained satisfactory attendance thereafter and the warning expired in January 2015. There was a further "substantial improvement period" ending in January 2016. During this period the claimant had two days off in June 2015 recorded (page 175) as due to "high blood pressure, swollen feet, dizzy spells and high blood sugar", but otherwise the claimant maintained satisfactory attendance and this period was successfully completed (page 80).

Spine and Shoulder Problems

38. In addition to those medical conditions the claimant developed two musculoskeletal conditions. The first was a problem in her cervical spine. This was the subject of a radiology report in November 2015 (pages 78-79). The problem was causing compression of the nerve roots resulting in tingling and pins and needles in her left hand. The second was a rotator cuff injury to her left shoulder.

39. A medical report from a speciality doctor in neurosurgery, Mr Bhat, of 17 March 2016 (pages 81-82) suggested a "wait and watch policy" for the spine problem, but recommended that there should be a separate orthopaedic opinion for the left shoulder. The claimant was subsequently given the option of surgery on her shoulder or injections (report from the consultant shoulder surgeon Mr Jeyam 28 April 2016 pages 84-85). She was willing to undergo shoulder surgery but was reluctant to have surgery on her spine unless it was absolutely necessary.

15 April 2016 - Leave Request

40. The claimant was due to start a period of annual leave on 27 May 2016 but on 15 April she submitted a note requesting time off without pay to take her through to that date. The note appeared at page 83. It said that she felt very frail mentally and physically at the moment. It went on to say the following:

> **"I have to deal with some new and serious health issues that have arisen in the last few weeks. I have found it difficult to deal with the symptoms from neck and shoulder problems that can only be resolved with two different operations.**
>
> **I am in constant pain, I am unstable on my feet and I have numbness in my fingers. I am in the process of having to arrange and attend numerous appointments with consultants, for further diagnostic tests, with the GP, nurse and rehab for pre and post operation care.**
>
> **I am suffering with panic attacks as I feel very scared and insecure regarding my health. I am attending psychotherapy sessions three times a week in order to deal with ongoing mental health issues and the present ones due to my deteriorating physical health.**
>
> **I am hoping this extra time off will allow me to calm down and concentrate on resolving the practical issues of appointments. It will also allow me to try the strong pain medication I have been prescribed and my body getting used to the side effects.**
>
> **I will be able to get extra sleep as I am constantly waking because of pain and numbness in my hands.**
>
> **I hope you will allow this time off as I find it stressful and painful getting ready for work. It is nearly impossible to concentrate in work and I am often tearful when here."**

41. It was around this time that Mrs Williams became the claimant's line manager. A decision was taken that the claimant would be allowed a week of unpaid leave, but that was superseded by the fact that the claimant went off sick on 3 May 2016. A fit note from her doctor at page 227 said she would be unfit for work until 18 July 2016 on account of cervical spinal stenosis and left shoulder tendonitis. There were no adjustments identified which would enable her to be fit for work. The claimant did not return to work prior to her dismissal.

16 May 2016 – First OH Report

42. By a letter of 16 May (pages 89-90) the claimant was invited to her 28 day stage two attendance review meeting on 31 May 2016 (later changed to 3 June 2016).

43. On 16 May 2016 the OH adviser, Ms Carroll, produced a report which appeared at pages 91-92. It recorded the advice that she should have surgery on her spine and that she was awaiting a further appointment in relation to her shoulder. It recorded that the claimant had consulted a chiropractor. The report said that the claimant was not fit to work in any capacity, but Ms Carroll expressed the hope that with chiropractic intervention her symptoms could settle to the point where a sustainable return to work was possible. She suggested a further referral in 3-4 weeks time. A longer term opinion could not be given until the treatment for the neck and shoulder was clear.

44. In the meantime Mrs Williams spoke to the claimant on each day the claimant was supposed to be working (three days per week). Her notes appeared at page 127. A workplace assessment report was produced on 20 May and appeared at pages 97-104. It recommended a special chair which was then ordered.

45. By 3 June there were two medical reports recommending that the claimant have shoulder surgery before a decision on spinal surgery. The first was from the Consultant Neurosurgeon, Mr Leach, of 20 May at pages 93-94, and the second was a report from Mr Bhat of 3 June at pages 106-107. Mr Bhat said a decision on whether there should be surgery on the spine should be deferred for 3-4 months.

3 June 2016 - 28 Day Attendance Review Meeting

46. The notes of the 28 day attendance review meeting appeared at pages 108-111. The claimant was accompanied by her union representative. The shoulder operation was discussed. The claimant did not have a date for it, but was pursuing it both privately and through the NHS. She was going to see the chiropractor and it was making a positive difference to her neck. She did not think there was anything that could be done to get her back to work. Being told about the operation had caused a panic attack. She had been prescribed valium but was only going to take it when needed. She thought the best case would be that she would be back in two and a half months (i.e. mid August 2016). The meeting ended with agreement that there would be a further OH referral.

47. After considering the matter Mrs Williams decided to refer the matter to a Decision Maker to consider termination of employment. She conveyed this in a letter of 8 June 2016 at pages 112-113. The OH referral was taken forward at the same time.

48. By a letter of 13 June the Decision Maker Mr Douthwaite invited the claimant to a meeting to discuss her absence on 21 June. That meeting was later delayed to 28 June. It was the first occasion he had acted as decision maker in such a case.

14 June 2016 - Second OH Report

49. On 14 June the second OH report was produced by the OH adviser, Ms Welburn. It was addressed to Mrs Williams but she passed it on to Mr Douthwaite. There was no date for surgery to either the neck or the shoulder but she was due to see the shoulder specialist on 17 June. The chiropractor sessions had produced some improvement. The anxiety and depression was discussed. Ms Welburn said that she could not give an exact return to work date but would arrange for a review once she had been seen by the specialist.

50. The claimant spoke to Mrs Williams the same day. She had not seen the OH report. The note kept by Mrs Williams appeared at page 129. It recorded that the claimant said that her diabetes was not under control.

17 June 2016 - Mrs Williams' Report

51. On 17 June 2016 Mrs Williams prepared her report to Mr Douthwaite. It appeared at pages 131-133. It recommended that the claimant be dismissed

because there was no reasonable prospect of achieving the required level of attendance within a reasonable timescale. The notes from the 28 day review on 3 June and the keeping in touch notes were attached.

52. A note to Mr Douthwaite at page 133 said the following:

> **"I keep in contact with [the] member of staff three times a week and keep a note of the discussions. This is time consuming and taking me away from [other work].**
>
> **I am already under resourced on work coaches and this absence is having a further impact on performance.**
>
> **I consider a decision maker will need to decide if the current absence can be supported due to no reasonable expectation of recovery in the near future."**

53. On 22 June 2016 the claimant was informed by Fairfield Hospital that Mr Shah, Consultant Orthopaedic Surgeon, would operate on 16 July. This date was conveyed to Mrs Williams the same day by telephone. On 23 June her chiropractitioner reported (page 137) that the claimant was feeling much better and was delighted by the improvement. No further sessions were planned unless there was a recurrence of numbness in her hands.

<u>24 June 2016 – Third OH Report</u>

54. The third OH report was prepared by the OH adviser, Ms McLuckie. It was dated 24 June 2016 and appeared at pages 138-140. As it was the last medical report prior to dismissal it is necessary to quote from it at some length.

55. The report began by saying it would offer an update on the matters raised in the previous report of 14 June. It provided the following as a summary of the current health situation:

> **"Mrs Valachi has seen the specialist regarding her left shoulder. She has a bony spur which has torn the rotator cuff. She is due to have surgery 16 July 2016. This condition causes high pain levels, reduced range of movement and impaired grip and dexterity. All day-to-day tasks remain challenging as a result of this.**
>
> **Regarding her spinal pain, this is relating to a prolapsed disc in the upper spine. Mrs Valachi has noticed some improvement with her hand numbness with her recent chiropractor intervention. Surgery was discussed previously and has not been ruled out as yet but she will be reviewed by the surgeon again on 16 September 2016.**
>
> **As the last report detailed Mrs Valachi has been experiencing anxiety of late. She reports this has started to ease now she has a clear treatment plan for her shoulder condition. She also feels some relief knowing her chiropractor treatment has eased some of her neck symptoms. She continues to have appropriate support measures in place to support her.**
>
> **Finally, regarding her diabetes, this unfortunately remains elevated. Her GP however yesterday increased one of her medications so hopefully this may improve this over the next few weeks.**
>
> **<u>Capability for Work</u>**
>
> **Mrs Valachi remains unfit for work due to her musculoskeletal symptoms. I am anticipating a return to work approx 3 months post shoulder surgery and I would**

> **advise management refer her back at that stage so we can reassess her and ensure she has been able to progress as expected.**
>
> **Outlook**
>
> **Surgery to repair a torn rotator cuff is usually very successful at relieving pain in the shoulder. Rotator cuff repair can require a long recovery period, especially if the tear was large. The arm will have minimal movement from weeks 6-12 but thereafter once the tendon has healed rehabilitation focuses on strengthening the joint again. This can take many months. A return to work is therefore expected approx 3 months post operative** [sic]**.**
>
> **Full recovery after rotator cuff surgery often takes 4 to 6 months and in some cases longer. The critical factors that determine the length of the recovery are the size of the rotator cuff tear, the ability to adequately repair the tendons, and the commitment to rehabilitation.**
>
> **The diabetes is long term and remains vulnerable to flare ups.**
>
> **The prolapsed neck disc treatment plan remains uncertain at this stage. We will be able to determine the progress and treatment plan when OH next assess Mrs Valachi regarding her shoulder recovery as she will have also seen the specialist for her neck at that stage also."**

28 June 2016 - Decision Maker Meeting

56. The claimant attended the Decision Maker meeting with Mr Douthwaite on 28 June 2016. She was accompanied again by her union representative. The notes of that meeting appeared at pages 141-143.

57. The claimant explained what had changed since she met Mrs Williams on 3 June. The shoulder surgery was scheduled for 16 July and there would be a possibility of a return to work within three months. As for her neck symptoms, she reported a vast improvement and the note said:

> **"So for now she has decided to postpone surgery on her neck as she feels she can manage this condition with further chiropractor treatments as and when required."**

58. The claimant went on to say that she was still in pain even with her medication, and that her conditions affected her mental health. She was being treated for depression and suffered panic attacks. She continued to have private treatment for that, as she had done for some time. An error in her medication which had caused high blood pressure had now been corrected. She said that her fit note was in respect of her neck and shoulder conditions not her known underlying conditions.

5 July 2016 - Dismissal

59. On 5 July 2016 Mr Douthwaite decided that the claimant should be dismissed. He completed a decision record form at pages 146-149 and confirmed that the claimant should receive 100% compensation because she was in no way to blame.

60. The reasons for his decision were set out in his dismissal letter at pages 152-155. It is appropriate to quote the salient parts of that letter. Mr Douthwaite said he

had carefully considered all the information and then he set out in two paragraphs the various factors to which he referred.

61. The first paragraph dealt with the question of whether the claimant was capable of achieving satisfactory attendance levels within a reasonable period of time. It read as follows:

> **"(1) Your previous attendance record and health conditions and on the balance of probability if you are capable of achieving satisfactory attendance levels within a reasonable period of time:**
>
> - **You were on a first written warning from 15/07/2014.**
> - **OHS advice that a return to work after 16/10/2016 is expected though full recovery often takes 4-6 months and in some cases longer. The critical factors being the size of the tear, the ability to adequate repair the tendons, and the commitment to rehabilitation. Your diabetes remains elevated, is long term and remains vulnerable to flare ups. The prolapsed neck disc treatment plan remains uncertain at this stage – you had hoped to try and return to work if the four chiropractor sessions helped enough to move your arm however this has not been possible.**
> - **You confirmed that there were no reasonable adjustments that would enable you to return to work in any capacity currently. Reasonable adjustments have been put in place to support you such as amendments to your diary, breaks, location of your desk and desk set up.**
> - **Your reported history of anxiety and depression and how you suffer from panic attacks of late and ongoing occasional memory issues."**

62. The second section of the letter dealt with the impact of the absence:

> **"(2) The impact of your current absence on your office/the business:**
>
> - **Your office is 3.7 work coaches under-resourced.**
> - **The next two months are the most popular for annual leave** [in] **your office.**
> - **The next two months are the most impacted by part year and term time contracts** [in] **your office.**
> - **Your line manager has stated that performance has been impacted in addition to being under-resourced and that attendance management is taking her away from conducting "business as usual" and that you remain on full pay.**
> - **Sickness levels are currently high in your office (8.12 average working days lost for June 2016) therefore more work is being done by less staff currently."**

63. The conclusion was set out in the following brief paragraph:

> **"After considering all the relevant factors, I have decided that your employment with DWP must be terminated because you have been unable to return to work within a timescale that I consider reasonable."**

64. Mr Douthwaite said in oral evidence that this paragraph did not reflect the full extent of his reasoning, because he was also concerned by the prospects of maintaining satisfactory attendance levels once the claimant had returned to work. We will return to that issue in our conclusions.

65. The letter went on to provide that the claimant would receive a payment in lieu of notice, meaning her employment would end on 6 July 2016 instead of 13 weeks' later.

Appeal Against Dismissal

66. The claimant was given the right of appeal against the decision. She exercised it by an appeal form of 15 July at pages 161-163. Amongst the points made by her appeal were the following:

(a) There had been reliance on the expired written warning.

(b) The decision had wrongly focussed on the time before a full recovery, not the time before a return to work.

(c) The neck, diabetes and mental health would not affect attendance; it was only the shoulder injury.

(d) The reliance on business needs over the summer was illogical because the claimant was due to be off on annual leave for a month anyway, and would be paid up to 6 October in any event. Further, recruitment of a new starter would require training time which would not be needed once the claimant returned to work.

67. The appeal also raised an issue of age discrimination but that was not pursued in these proceedings.

68. Mrs Walshe heard the appeal on 17 August 2016. The claimant was accompanied by her union representative once again. The notes of the appeal meeting appeared at pages 165-170. Each of the points raised in the appeal form was discussed.

69. The claimant provided an update on the shoulder surgery position. On 5 July she had seen the surgeon who was due to operate on her privately on 16 July. He declined to operate because of her pre-existing medical conditions. She needed facilities which only the NHS could provide. On 13 July the NHS Consultant, Mr Jeyam, had set a date of 23 August for that operation (page 158).

70. The claimant explained that he was going to do the procedure under local anaesthetic instead of general, and via keyhole surgery which should make the recovery time quicker. She said it would be 6-8 weeks maximum before she could return to work (i.e in mid-October). She informed Mrs Walshe that Mr Douthwaite would not have been aware of this as she did not know about it herself at the time.

71. In a passage recorded at the top of page 167 the claimant confirmed that her diabetes was under control, and that she wanted to leave any operation to her neck

until she was older as she did not feel it was necessary at the time. The adjustments which were being put in place before she went on sick leave would help reduce any neck pain.

72. Similarly, the claimant said that she had been suffering with mental health issues for many years but they did not affect her in work. The recent panic attacks had been connected to the neck and shoulder pain, partly because she did not know what was causing that pain. The claimant said she had had a panic attack the previous day caused by going to a pre-operation meeting, and had had one that day thinking about the appeal meeting. Before that it had been a month since her last panic attack. The note recorded:

> **"Olga added she was usually able to control them and wouldn't need to take time off because of them."**

73. Mr Jeyam conducted the operation on the claimant on 23 August. The operation note appeared at page 171. It provided for the claimant to be reviewed in six weeks.

74. On 31 August 2016 Mrs Walshe issued her decision letter. It appeared at pages 172-174. She concluded that Mr Douthwaite's decision that the claimant was not able to maintain an acceptable level of attendance was consistent with the facts and was fair and reasonable.

75. She noted that there was still no possibility of an immediate return to work and went on to make the following points:

(a) The first written warning had been mentioned in the letter but not taken into account.

(b) The timescale for a full recovery had been taken into account.

(c) The treatment plan for the neck was uncertain because there was still the possibility of surgery being needed.

(d) The reference by Mr Douthwaite to the mental health condition was not an illustration of prejudice but because all the medical history had to be taken into account.

(e) The agreed leave and the payment in lieu of notice were not relevant to the impact on business needs.

76. The decision was final. There was no further right of appeal.

77. After a further fit note on 22 September for six weeks (page 229) the claimant was certified fit for work on 19 October as long as there was no heavy lifting required. The fit note appeared at page 230. With hindsight, therefore, it appeared that that the claimant would have been able to return to work at the time anticipated i.e. mid October 2016.

Submissions

78. At the conclusion of the evidence each party made an oral submission.

Claimant's Submission

79. In relation to unfair dismissal Mr Martin referred to the authorities of **Spencer** and **Schenker** mentioned above. He reminded us of the oral evidence of Mr Douthwaite that if the claimant had been coming back to work in eight weeks he would have found that a reasonable period but twelve or thirteen weeks was not. He suggested that the matter had been pursued with indecent haste by the respondent. He did not challenge the genuine belief that the claimant would not be returning to work in a reasonable period and would not sustain satisfactory attendance thereafter, but said there had been no reasonable investigation because of an absence of medical evidence addressing whether a return to work would be sustained. Similarly he submitted there were no reasonable grounds for the conclusion reached. The diabetes and mental health issues had not caused the claimant any significant time off and there were no grounds for concluding that they would do so in future. The appeal could have cured this unfairness but in fact he submitted it was affected by the same flaws.

80. In relation to direct discrimination he submitted that the reliance on mental health and diabetes issues as creating a concern about future attendance was a stereotypical assumption not supported by any medical evidence. The appropriate hypothetical comparator was an employee with the neck and shoulder problems but without diabetes or mental health issues. He reminded us that those disabling conditions need not be the sole cause as long as they were an effective cause of the decision to dismiss, relying on **O'Neill**. He referred to **Aylott** paragraphs 41 and 42 in support of the hypothetical comparator. He was not suggesting there had been any intentional direct discrimination but there had been a stereotypical assumption at both dismissal and appeal.

81. As to section 15, the issue turned upon whether the means adopted were proportionate. Neither Mr Douthwaite nor Mrs Walshe had any real knowledge of the staffing situation. A less discriminatory means of achieving the legitimate aim would have been to have waited to see the effect of the shoulder operation and obtain further medical evidence at that stage. The claimant was fully skilled and did not require retraining on her return to work, unlike a new starter. He invited us to uphold all three complaints.

Respondent's Submission

82. Miss Trotter had helpfully prepared a written skeleton argument which the Tribunal read and treated as part of her submissions. Its contents will not be reproduced here.

83. In relation to unfair dismissal she emphasised the importance of applying the test of the band of reasonable responses, and emphasised that the referral to a decision maker at stage two after 28 days was contemplated by the attendance management policy and therefore more likely to be within the band of reasonable responses. She did not regard the entitlement to six months of sick pay as relevant.

The reality was that the claimant had a range of medical problems, the position with her neck was unclear and could not be clarified until she had recovered from the shoulder surgery, and her mental health issues had been part of the reason she had been off since early May even though they did not appear on the fit notes. Given the constraints affecting the department it was within the band of reasonable responses to terminate her employment rather than wait and see or obtain further medical evidence. The totality of her absence had to be looked at, not simply the period remaining when Mr Douthwaite and Mrs Walshe made their respective decisions.

84. In relation to direct discrimination she submitted that it was reasonable to regard both the mental health and the diabetes as giving rise to an issue in relation to future attendance. It was not a stereotypical assumption. The last OH report recorded the risk of flare ups of diabetes and the claimant had two days off in 2015 which appeared to be related in part to high blood sugar. The mental health issues had been a factor in her absence since May and continued to affect her at the time of the appeal meeting.

85. As to section 15, Miss Trotter referred the Tribunal to **Hensman** and **Buchanan**. It was necessary to look at all the circumstances and see the decision to terminate in its proper context. The staffing position was relevant as was the continued uncertainty about the neck condition and the other medical conditions and their effect on future attendance. There was no less discriminatory means of achieving the respondent's legitimate aim.

Discussion and Conclusions

Direct Disability Discrimination

86. The first matter the Tribunal addressed in our deliberations was the direct disability discrimination complaint under section 13 of the Equality Act 2010. The claimant's case was that her disabilities of diabetes and anxiety with depression were an effective cause of her dismissal, and therefore less favourable treatment than she would have received had she not been disabled in those respects. Her argument was that a stereotypical assumption had been made that those conditions would affect her future attendance. The respondent accepted that those conditions were taken into account, but not in a stereotypical manner. They were properly taken into account because on the respondent's case there was evidence to support the conclusion that they would indeed potentially affect her future attendance.

87. The question of the hypothetical comparator and the reason for the less favourable treatment were intertwined (see **Aylott)** and we considered it appropriate to concentrate on making a finding as to the reason why Mr Douthwaite decided to dismiss the claimant.

88. It was necessary to analyse whether in relation to each of those disabling conditions there was evidence to support the conclusion that they might affect the ability of the claimant to maintain a satisfactory level of attendance following a return to work later in the year. If such evidence existed it was less likely that a stereotypical view had been taken. If it did not exist, the contrary would become more likely.

89. We considered the evidence relating to diabetes. That evidence came in four parts.

90. Firstly, the claimant had two days off in June 2015 for a range of conditions, of which high blood sugar was one. However, we noted that blood sugar was mentioned at the end of a list of other symptoms which were not necessarily connected to diabetes. In any event in cross examination Mr Douthwaite confirmed his understanding that the claimant had not had any time off due to her diabetes prior to the dismissal decision. This brief absence a year earlier did not support a conclusion that diabetes would cause an ongoing problem with attendance.

91. Secondly, the respondent relied on what was recorded in the "keeping in touch" note of 14 June at page 129 when the claimant told Mrs Williams that her diabetes was not under control. However by 24 June, as recorded in the Occupational Health report, the medication had changed. In any event the claimant did not suggest to Mrs Williams there were any symptoms which would prevent her attendance at work. It was more a matter of monitoring blood sugar levels to avoid health complications in the long term.

92. Thirdly the final Occupational Health report at page 139 recorded that the diabetes was long-term and remained "vulnerable to flare ups." That was a dramatic phrase but it was not at all clear from that report how a "flare up" would affect the claimant or her ability to attend at work. There was no clear statement in the Occupational Health report that her attendance would be affected.

93. Fourthly, at the decision maker meeting of 28 June as recorded at page 142 Mr Douthwaite asked the claimant about diabetes, but the discussion was about its impact on her readiness to undergo surgery. He did not ask her in terms whether it would affect her attendance once she returned to work following shoulder and neck problems. Nevertheless, the decision letter at page 152 mentioned diabetes and, as is common ground, it was a factor in the decision that was taken. Mr Douthwaite in cross examination said it was an important part of the Occupational Health advice.

94. Overall it was clear to the Tribunal that Mr Douthwaite treated the warning about flare ups as equivalent to a warning that time off work might be needed. There was no medical evidence to that effect and such a conclusion was contrary to the claimant's account. We concluded that his view was a consequence of a stereotypical assumption on his part about the effect on attendance for someone with diabetes as a disabling condition. It was an assumption made without evidence to support it.

95. The Tribunal then turned to the mental health condition which included anxiety, depression and panic attacks. There were four matters available to Mr Douthwaite.

96. The first point was that the request for unpaid leave in April at page 83 relied on panic attacks as well as physical symptoms. However, the request also made it clear that the claimant was saying that the panic attacks were a consequence of concerns about her physical health; she was careful to draw a distinction between her long-term mental health issues and the current panic attacks due to the

deterioration in her physical condition. Absent the current physical difficulties, therefore, that request did not suggest that attendance would be affected.

97. The second matter was that although the fit notes over the relevant period mentioned only the physical conditions, the claimant's mental health symptoms were also a factor in her inability to work. In cross-examination the claimant accepted that but was again very clear that those mental health factors were a consequence of the physical symptoms. An improvement in the physical symptoms would also reduce the mental health symptoms contributing to her absence from work. This period of absence provided no evidence that mental health symptoms independent of the shoulder and neck problems were preventing attendance at work or would do so in the future.

98. The third matter was the discussion in the decision making meeting on 28 June (page 142). The claimant said that she was undergoing treatment for depression and was suffering from panic attacks, but once again she made it clear that that was due to the physical difficulties from which she was suffering at the time.

99. Fourth and most important was the Occupational Health advice. The report of 24 at page 138 recorded that the claimant had been experiencing anxiety of late, but that had started to ease now that she had a clear treatment plan for her shoulder condition. She also felt some relief as the chiropractic treatment had eased some of the neck symptoms. The report addressed capability for work at the top of page 139. The Occupational Health adviser said that the claimant remained unfit for work due to her musculoskeletal symptoms. There was no mention in that section of the report of the mental health symptoms, nor were those mental health symptoms mentioned in the Outlook section where the prognosis was given. The medical advice supported the conclusion that the current mental health difficulties were due to the physical problems and would resolve when those physical problems were resolved.

100. Overall, therefore, we concluded that the medical evidence and the claimant's own account to the managers were consistent in saying that the long standing mental health issues did not affect her attendance. That was also supported by her employment record: there were temporary mental health symptoms affecting her ability to work but they were secondary to the physical symptoms. The chiropractic treatment had already achieved a "vast improvement" (page 142) in the neck symptoms. There was no evidence that mental health issues might affect attendance once the remaining physical symptoms were addressed by the shoulder surgery. In the absence of any evidence to support Mr Douthwaite's conclusion that the mental health issues would be a cause for concern about the sustainability of attendance, the Tribunal again concluded that he made a stereotypical assumption about the future attendance of a person with a mental health condition.

101. The fact that the claimant was a disabled person by reason of diabetes and by reason of anxiety and depression was a material influence on the decision to dismiss. A hypothetical comparator with the same period of absence due to shoulder and neck problems, and the same historic absence record, but who was not disabled by reason of diabetes or anxiety and depression, would not have been dismissed.

102. It followed, therefore, that the direct discrimination complaint succeeded..

Discrimination Arising from Disability

103. The second matter the Tribunal addressed was the complaint of discrimination arising from disability contrary to section 15 of the Equality Act 2010. Almost all the constituent parts of section 15 were not in dispute. The respondent accepted that it knew that the claimant was a disabled person at the material time. The respondent also accepted that dismissal was unfavourable treatment and that the reason for dismissal was something which arose in consequence of the disability, namely the claimant's absence from 3 May, the fact that absence was predicted to continue until mid October at the earliest and the concern after that point of the likelihood of future attendance being impaired.

104. For the claimant's part she accepted that the respondent was pursuing a legitimate aim, namely to manage staff attendance levels effectively to ensure levels of service within budget without undue burden on other members of staff.

105. The sole question for the Tribunal, therefore, was whether the dismissal of the claimant (not the attendance management policy generally – **Buchanan**) was a proportionate means of achieving a legitimate aim. We had regard to the case law on this, particularly **Hardys and Hansons Plc v Lax**, and to the Equality and Human Rights Commission Code of Practice. After undertaking a critical evaluation the Tribunal must weigh the discriminatory impact on the claimant of being dismissed against the benefits to the respondent in pursuit of its legitimate aim. Ultimately the Tribunal is concerned with identifying whether there was a less discriminatory way of achieving that aim.

106. The claimant's case was that a less discriminatory way of achieving the legitimate aim would have been to have waited for further medical advice once she had recovered from her shoulder operation and the appropriate treatment for her neck and spine condition had been identified. By the end of June the shoulder surgery was scheduled for 16 July 2016, a review of the neck and spine condition planned for late September or early October (page 106-107), and a return to work anticipated for mid October. That would have meant delaying a decision by a further twelve weeks or so from early July. By the time of the appeal decision the surgery had taken place on 23 August, five weeks later than planned, but the nature of the procedure had changed and the reduced recovery time meant that a return to work was still anticipated in mid October 2016.

107. The Tribunal considered first of all the impact on the claimant of the dismissal. We concluded it was an extremely significant impact. Although the claimant worked three days per week, this was her main job. She had been there 15 years and had shown a considerable degree of dedication in lasting so long despite the variety of medical conditions from which she suffered. She had returned to work after approximately six months off following a stroke. Further, this was not the sort of job that can easily be found elsewhere. It was a specialist role and one might think that the DWP is perhaps unique in providing this role. The prospects of the claimant finding other work were bound to be adversely affected by her age and health conditions. It followed, therefore, that the loss of her livelihood in these circumstances was an extremely significant matter for her.

108. Set against that we considered the various benefits which the respondent considered flowed from the dismissal decision.

109. The first was a financial benefit: the saving in pay given that the claimant was being paid whilst off sick, and on the medical evidence available would have continued to have been paid whilst off sick until mid October. That was a substantial saving, but it was reduced in weight by the fact that the claimant was in receipt of payment in lieu of notice until 6 October. The real saving was perhaps only two or three weeks' pay.

110. The second benefit arose out of staffing considerations. We accepted the evidence of Mrs Williams about the staffing levels in the department and the fact that there were only eight people in post when there should have been twelve. It was an advantage to the department to be able to recruit a replacement (internally) to start in early August rather than have no one there until mid October. However, we also heard unchallenged evidence about how long it takes to train a new recruit (even an internal person if unfamiliar with this work) and how long it takes before that person becomes fully operational - possibly three or four months in total. The benefit of dismissing and recruiting a replacement in August was therefore reduced, since had the respondent not dismissed the claimant she would have been coming back fully operational (save for reasonable adjustments) in mid October; her replacement might not be fully operational until November or even December.

111. A third perceived benefit for the respondent was to have a person in post about whom there were no concerns about future attendance, but as explained above those concerns were not well-founded so in our judgment did not weigh in favour of the respondent.

112. The fourth benefit was the saving in management time. Mrs Williams clearly found it time consuming to manage the claimant's sickness absence. The regular contact by way of "keeping in touch" (as recorded in the telephone log at page 124 onwards) was impressive and showed an admirable degree of commitment to supporting an employee on sick leave. Mrs Williams should be commended for that. However, in so far as that frequency of contact became a negative matter detracting from her ability to devote her attention to other aspects of the job, and ultimately counting against the claimant, it should have been discussed with the claimant. No-one asked the claimant whether the frequency of that contact could be reduced. In fact had she been asked she would have been happy to have agreed to reduced or no contact, in effect, until after the shoulder surgery and the spinal review that followed it. Had that course of action been taken the management burden on a day-to-day basis would have been significantly reduced in a way which did not have any negative impact on the claimant.

113. Putting those matters together, and balancing the discriminatory effect on the claimant against the benefits to the respondent of dismissal rather than waiting until late September, we concluded that the respondent had failed to prove that this was a justified step. The legitimate aim could have been achieved in a less discriminatory way by waiting until the claimant had her surgery in July (or, by the time of the appeal, on 23 August), waiting to see the outcome of the spinal consultation in late September or early October 2016, and then taking a decision in early October with

up-to-date Occupational Health advice which properly addressed the two key questions:

(1) would the claimant return to work in mid-October as anticipated?

(2) was there cause for concern about future attendance?

114. Miss Trotter understandably emphasised that there is no certainty in these cases. That makes it all the more important that the employer gets up to date medical evidence addressing the key points before a decision to dismiss a long serving employee is taken. Although it was not certain the claimant would be back at work by mid-October, the medical evidence before the decision makers pointed to that as a strong possibility and there were no grounds for reaching the opposite conclusion. The possibility that she would require spinal surgery was simply that: a possibility which the doctors had not ruled out but which the claimant was determined to avoid if she could. The "vast improvement" (page 142) in her neck symptoms even before surgery to her shoulder was an encouraging sign. Nor were there proper grounds for concluding that attendance thereafter might be unsatisfactory because of the underlying disabilities resulting from diabetes, mental health impairments and the effects of the stroke. There was no medical evidence to that effect. These conditions were all being managed by the claimant without substantial sickness absence prior to the difficulties caused by her neck and shoulder symptoms.

115. For those reasons we concluded that the decision to dismiss the claimant was not justified at either dismissal or appeal stage and therefore the complaint under section 15 succeeded.

Unfair Dismissal

116. The first question for the Tribunal was whether the respondent had shown a potentially fair reason for dismissing the claimant. We were satisfied that the respondent had done this. The reason clearly related to the claimant's capability and was a combination of three factors:

(1) The absence from 3 May to 5 July 2016;

(2) the predicted length of absence before the claimant was able to return to work in mid-October, and

(3) the concern that even once she returned to work she would not be able to maintain satisfactory levels of attendance.

117. Although the wording of the dismissal letter at page 153 read literally suggested it was only the first of those which was the reason for dismissal, we were satisfied that Mr Douthwaite in fact took all three matters into account.

118. The respondent having shown a potentially fair reason for dismissal we turned to the test of fairness under section 98(4). The legislation requires the Tribunal to have regard not only to the size and administrative resources of the employer but also to equity and the substantial merits of the case. We reminded ourselves of the

legal framework summarised above and the need for quite a different approach from a Tribunal. The question here was not what the Tribunal made of the medical evidence or the information before the respondent, but rather whether the employer's approach fell within the band of reasonable responses.

119. It was common ground between the parties based on **Schenker** that the **Burchell** test with appropriate modifications could be applied.

120. The first question under the **Burchell** test is whether the respondent had a genuine belief in the matters which caused it to dismiss the claimant. This was not challenged by Mr Martin and we were satisfied that Mr Douthwaite (and, on appeal, Mrs Walshe) genuinely believed that the combination of those three matters meant that the position was no longer acceptable.

121. The second question was whether the respondent had carried out such investigation into the matter as was reasonable in all the circumstances. The conclusion in relation to the first two elements, namely that the claimant had already been off for two months and was likely to be off until mid-October, was one which was reasonably investigated and was clearly addressed by the medical evidence. However, in relation to the likelihood of satisfactory attendance upon return to work we concluded that the respondent failed to conduct as much investigation as it would have been reasonable to have undertaken. There were two particular failings which took the respondent outside the band of reasonable responses.

122. The first was that Occupational Health were not asked to advise on the position on likely attendance once the claimant returned to work in mid-October. This was an important issue and to make that decision without any medical advice was outside the band of reasonable responses.

123. The second was the failure to accept the Occupational Health advice to wait and see in relation to the neck symptoms. The recommendation in the report of 24 June was to review the matter following the shoulder surgery and the review by the spinal doctor. Despite the respondent's own policy (clause 7.9 at page 216) saying that dismissal was not an option if there was an outstanding OH report, a clear hint as to the importance of establishing the medical position, Mr Douthwaite chose not to accept this recommendation. Given the size and resources of the employer, even in times of austerity, and given that the sick pay arrangements and the attendance management policy envisaged that there may well be cases where employees are off sick for six months or even longer, and given the claimant's length of service, it was outside the band of reasonable responses to dismiss instead of waiting a few weeks for medical clarity as to likely future attendance.

124. The next element of the **Burchell** test is whether there were reasonable grounds for the conclusion that had been reached. There were clearly reasonable grounds for the conclusion that the claimant had been off for two months already and would not be back until mid-October. Were there reasonable grounds for the conclusion that if she did come back sustaining satisfactory attendance would be a concern? We were satisfied that there were no reasonable grounds for that conclusion. Apart from her discrete period of absence following the stroke at the end of 2013, the claimant's attendance record was very good. There was no medical evidence available to say that the diabetes would affect attendance going forward.

There was no medical evidence to say that the exacerbation of her mental health symptoms caused by her shoulder and neck problems would affect her attendance once she had returned to work after the shoulder operation. There was no suggestion by the claimant that any of these matters would affect future attendance. We found that there were no reasonable grounds for an important part of the reason for dismissal.

125. The flaws at the dismissal stage were not corrected on appeal by Mrs Walshe. The medical position had moved on in the sense that the operation had been delayed, but the type of operation had been modified and the return to work period shortened so it was still the position that the claimant was expected to return to work in mid-October. No additional medical evidence was sought at the appeal stage.

126. Adopting the language of **Spencer** and **Daubney** (see paragraph 11 above) the employer could reasonably have been expected to have waited a little longer to enable it to ascertain the true medical position. The third step identified by the Court of Session in **BS v Dundee City Council** (paragraph 13 above) had not been undertaken in a reasonable way. In **Burchell** terms, an important part of the reason for dismissal was a conclusion which was not based on reasonable grounds, and for which the respondent had not undertaken a reasonable investigation. As a result the dismissal was unfair. The complaint of unfair dismissal was well founded.

127. It is appropriate to address briefly two hypothetical situations.

128. Firstly. had the likelihood of satisfactory attendance in future played no part in the decision, so that the claimant had been dismissed simply because she was going to be absent for five and a half months between early May and mid-October 2016, we would have found that unfair too. The **Burchell** test would have been satisfied, but dismissal would have been outside the band of reasonable responses. Miss Trotter rightly emphasised that the policy does not rule out a dismissal of someone having been on sick leave for only two months. However, whether such a decision falls within the band of reasonable responses depends on the particular circumstances of each case. Here the claimant had 15 years' service and apart from her absence due to a stroke had a good attendance record. Mr Douthwaite properly took account of the information before him from Mrs Williams about the effect of the claimant's absence, but he said in cross examination that he would not have dismissed the claimant on 5 July if she had been coming back in a further 6-8 weeks, namely by early September. He would have regarded that as a return within a reasonable period. Yet recruiting of a replacement takes at least a month (even for an internal candidate) and training to full effectiveness takes between three and four months. Waiting for the claimant to return would have been quicker than dismissing and replacing her, and in this hypothetical situation dismissal would have been outside the band of reasonable responses.

129. Secondly, had there been a reasonable investigation in relation to the likelihood of satisfactory attendance in future, the fairness of a decision to dismiss would have depended upon the resulting medical advice before the decision maker. That may be an issue for the remedy hearing.

Case Management Orders on Remedy

130. Following delivery of oral judgment with reasons there was insufficient time to determine remedy. The Tribunal made the following case management orders.

131. If either party wishes to rely on any additional witness evidence it must be served on the other party by 4.00pm on **Friday 21 April 2017**.

132. The claimant must serve an updated Schedule of Loss on the respondent by 4.00pm on **Friday 21 April 2017**.

133. The remedy hearing was fixed for **Thursday 4 May 2017** with a time estimate of one day. The oral hearing will start not before 10.30am but five copies of any additional material required must be provided by 9.30am on the day.

Employment Judge Franey

24 March 2017

JUDGMENT AND REASONS SENT TO THE PARTIES ON

30 March 2017

FOR THE TRIBUNAL OFFICE