



EMPLOYMENT TRIBUNALS

Claimant Ms C Merchant
Respondent British Telecommunications plc
Heard at: Bristol **On:** 10 January 2012
Before: Employment Judge Christensen
Ms SM Pendle
Mr P Ellix
Representation
Claimant: Mr Tom Cooper, union representative
Respondent: Ms Helen Welton, in-house solicitor

RESERVED JUDGMENT

1. The claimant has been unfairly dismissed.
2. The claimant has suffered direct sex discrimination in relation to the decision taken by Mr Dagless to dismiss her but not in relation to her performance management by Mr Kiernan.
3. The claim for age discrimination is dismissed on withdrawal.

REASONS

1. The claimant has presented a claim for unfair dismissal, sex discrimination and age discrimination.

Claims and Issues

Age Discrimination

2. The claimant has confirmed that she is not pursuing a claim for age discrimination and this claim is therefore dismissed by us on withdrawal.

Sex Discrimination

3. The claimant has confirmed that her claim for sex discrimination is pursued as one of direct discrimination only. The claimant does not pursue a claim for indirect discrimination nor one for

sexual harassment. The claimant has confirmed that any harassment or bullying complained of is instead relevant to the unfair dismissal claiming being relevant to the question of the fairness of the procedure followed to dismiss her.

4. This claim is one pursued as a continuing course of direct discrimination in relation to the performance management procedures applied to the claimant that started in December 2008 with a Personal Development Plan instituted by her manager Mr Kiernan and ended with her dismissal by Mr Dagless in March 2011. The claimant was dismissed by reason of capability on 29 March 2011.

5. The respondent does not accept that there is a continuing course of conduct and argues that the earlier events are out of time.

6. If this is a continuing course of conduct – the applicable law for all events will be that in the Equality Act 2010 as the last event complained of takes place in March 2011. If this is not a continuing course of conduct events that post-date 1 October 2010 will be governed by the Equality Act and those before that date will be governed by the Sex Discrimination Act.

7. On either analysis the burden of proof provisions will be relevant. S136 Equality Act. S63A Sex Discrimination Act.

8. The claim relates to the claimant's menopause – her case being that the reasons for her deterioration in performance related to health issues around her menopause, this causing her to experience lapses in memory and performance and which were either not taken seriously by the respondent or were responded to in a way inconsistent with a response to other non-female specific health conditions.

Hypothetical Comparator

9. It was agreed with the parties that the correct comparator for this claim was a hypothetical man who had significant performance concerns and an underlying health problem which was understood to be able to effect his concentration at times and be relevant to his poor performance.

Unfair Dismissal

10. The respondent says that it dismissed the claimant by reason of capability. That being so in issue before us in accordance with *Alidair-v-Taylor* 1978 ICR is the determination of the following:

- Did the respondent honestly believe the claimant to be incompetent or unsuitable for the job?
- Are the grounds for that belief reasonable?

11. Apart from the test set out in *Alidair Ltd v Taylor* [1978] 82 CA and [1976]420 the claimant also complains that the dismissal was unfair in that:

- She was bullied and harassed in the performance improvement process – in this sense the process was unfair to her
- She was not given adequate opportunity to improve

12. That Mr Kiernan and Mr Dagless had known that she was suffering from menopause problems, these were not taken seriously by them in terms of providing an explanation for her poor performance.

13. Mr Dagless was not a properly impartial person – he made the decision in March 2011 to dismiss her and yet had earlier, on 14 October 2010, rejected her grievance against Mr Kiernan and her appeal against an earlier Final Written Warning relating to performance. This issue arose during the currency of the hearing and parties agreed that it would be an issue for determination by the tribunal. The respondent argues that Mr Dagless was a proper person to make the

decision to dismiss but that if her were not – then that fault was remedied by virtue of the fact that the claimant's appeal was heard by Mr Nunney who had had no direct previous involvement in the history of the management of the claimant's poor performance.

14. The claimant applied to amend her claim at the outset of the hearing to include an issue in the unfair dismissal claim to include a failure by the respondent to conduct a proper search for alternative employment. We did not grant the claimant permission to amend her claim in this way. This potential issue had been addressed in clear terms in the Case Management Order of 23 August 2011 – and at that stage Employment Judge Tickle had declined to permit the claimant to so alter her claim. The claimant's further application to amend was made on the morning of the first day of the hearing and the tribunal determined that to allow the amendment at that juncture would cause unnecessary and unfair prejudice to the respondent who had not appeared at the hearing to address that issue in any particular detail as part of the claim. Although the respondent did have some evidence about its search for alternative jobs for the claimant this evidence was limited in its extent.

Background

15. We heard evidence from the claimant and for the respondent we heard evidence from Mr Kiernan and Mr Dagless.

16. We found the claimant to be an individual who had difficulty in accepting that she was underperforming but we are satisfied that she was. We find that the claimant was reluctant to talk openly about her menopausal health problems. We are satisfied that Mr Kiernan's concerns about her performance were genuine and that they existed throughout the period that he was managing her.

17. We found Mr Kiernan to be a manager who was genuinely concerned for the claimant's welfare during the period that he managed her but also that he had genuine concerns about the claimant's performance. His method of managing her underperformance was not perfect – it can be criticised – but his method falls easily within what is reasonable. We accepted his evidence that although he knew the claimant had had some blood loss, anaemia, kidney and gynecological health problems that he did not know that these were connected with her menopause and that this possibility did not occur to him. We find that the claimant did not discuss her menopause with Mr Kiernan.

18. We found Mr Dagless to be a manager who focused only on process and who appeared to have no particular concern for the claimant's welfare regarding her concerns about her menopause revealed for the first time on 9 March 2011 and was improperly dismissive of the medical information regarding her menopause that had not previously been disclosed by the claimant and supplied to him for the first time on 9 March 2011. He was not alert to the need to properly inform himself in relation to this underlying health condition – or at least to the extent that he was alert to the need to do so failed to do so.

19. Part of what the claimant complains of is that the respondent made approaches to her to see if she might want to negotiate an exit package rather than continue with the underperformance procedure. We are satisfied that there is nothing improper, unfair or sinister in the approaches made to the claimant.

Underperformance Procedure

20. The respondent is a nationwide organisation employing about 85000 people. It has dedicated HR support and a comprehensive suite of policies relating to the management of underperformance – this is managed online through a procedure called ePerformance. The underperformance policy recognises in its introductory paragraph that managers must find out from employees whether there are health factors that might assist in understanding the reasons for underperformance. This is consistent with normal principles of fairness in handling matters of underperformance.

21. The underperformance procedure envisages that it will only be invoked when an individual is not achieving their personal current development plan. If this is the case the procedure sets out that there are the following stages:

- Stage one – issuing of Initial Formal Warning (IFW) in conjunction with a formal Performance Improvement Plan (PIP). The policy currently allows an appeal against an IFW – this did not form part of the policy when applied to the claimant. We are satisfied that had she been given a right of appeal against her IFW it would ultimately have made no difference to the outcome and does not of itself render the dismissal unfair.
- Stage two – Final Formal Warning in conjunction with a PIP. When a PIP is issued and an employee performs to the required standard they are advised that they should sustain that performance improvement. There is a right of appeal against the FWW – this was invoked by the claimant but was unsuccessful.
- Stage three – 2nd Line Manager Decision. This will be invoked if following a FWW the required standard is not achieved and maintained. In this case the line manager (Mr Kiernan) will take HR advice and make a recommendation to a 2nd Line Manager (Mr Dagless) that consideration be given either to moving the employee to a suitable alternative role or termination of employment. It was at this stage that a decision was taken to dismiss the claimant. The respondent's procedure offers no other option at this stage other than to dismiss or move the employee to alternative employment.
- Stage four – Appeal 3rd Line Manager. This is an appeal against the outcome of stage three. The claimant invoked her right of appeal – her appeal was heard by Mr Nunney

22. The claimant had been employed by the respondent since 13 October 1986 and therefore for something a little over 24 years when she was dismissed. There was no evidence of any earlier performance concerns.

Claimant's work

23. The claimant worked as a Learning and Development Trainer in the respondent's Wholesale business. Her primary role was the training and design of training packages in Wholesale and BIA (Business Interactive Assistance) – this was a providing fixed and mobile phone services on a wholesale basis to internet service providers and other communications companies. The created an environment that was ever changing and fast paced. The claimant's base was in Bristol. She was the only Learning and Development Trainer in Bristol.

24. Mr Kiernan was the Training Manager for Wholesale and the claimant's line manager from February 2006. Mr Kiernan's base was Swansea.

25. Mr Kiernan managed a team of about 12 trainers – of whom about 5-7 were in Swansea and the others were variously at different times in Chester, Coventry, Bristol and Gatwick.

26. Mr Kiernan was made aware of some performance concerns about the claimant when he became her manager in 2006. Mr Kiernan quite properly determined that as a new manager he would observe the claimant's performance for a while before determining whether he could observe any performance problems and how to manage them. Mr Kiernan became concerned that the claimant was disorganised in her work, atrocious at completing her monthly reports, slow in submitting her expense claims and that there were issues around confidence in the quality and timeliness of her completion of tasks. Although part of the claimant's case is that Mr Kiernan's concerns were not genuine we find that they there were. Taken one by one none of the concerns were catastrophic – however cumulatively they caused a significant and real performance issue that Mr Kiernan needed to manage. Mr Kiernan properly tried to encourage the claimant to improve by highlighting areas of good achievement with her but also properly continued to endeavour to improve those areas that were causing concern.

27. Mr Kiernan gave the claimant a GS (Generally Satisfactory) score in her 2006/2007 & 2007/2008 Appraisals. Mr Kiernan gave the claimant and NI (Needs Improvement) score in her 2008/2009 Appraisal.

28. Throughout this period the claimant on occasion managed an improvement in her performance but this improvement was never sustained.

Initial Formal Warning and 1st PIP

29. Mr Kiernan issued the claimant with an IFW on 11 September 2009. A rationale for that decision was prepared by Mr Kiernan and sent to the claimant. Mr Kiernan made a commitment to spend more time in Bristol to assist the claimant improve but was unable to do so. Instead he made regular contact with the claimant by telephone. A Performance Improvement Plan was put in place. That PIP was never formally signed off because towards the end of the relevant period Mr Kiernan took some annual leave and then the claimant started a period of sickness absence.

Sickness absences

30. The claimant was away on sickness absence suffering from stress and anxiety from 11 November 2009 to 25 March 2010. During this period she had proper support from the respondent and home visits took place. Mr Kiernan understood this absence to relate to stress and anxiety associated with the claimant's mother's illness and the claimant's caring responsibility for her mother.

31. The claimant had had a previous episode of sickness absence for stress and anxiety from 16 January 2008 to 4 July 2008. Mr Kiernan understood this to relate to the stress caused because of the claimant's caring responsibilities for her mother.

32. The claimant had had another period of sickness absence in 2008, for about 2 months. Mr Kiernan understood this to relate to an operation that the claimant had relating to kidney problems and blood loss.

Referral to OH – February 2010

33. Because of the prolonged sickness absence from November 2009 to March 2010 the claimant was referred to the respondent's Occupational Health. This confirmed that the claimant "was under a degree of pressure mainly associated with the significant factors surrounding her mother's medical condition and long term welfare" That report confirmed that the claimant was taking medication, but did not say what it was or what it was treating, and confirmed that she had indicated a history of gynaecological related illnesses. The OH report recommended a phased return to work plan which was implemented by Mr Kiernan upon the claimant's return on 25 March 2010.

Second PIP – 3 June 2010

34. Following the completion of the return to work programme Mr Kiernan commenced a fresh PIP. By the time that plan ended on 29 July 2010 Mr Kiernan remained concerned that the claimant was failing to take ownership of tasks, meet timescales, complete tasks and projects and overcome problems with minimal supervision from her team leader or manager. He remained concerned that the claimant was not performing consistently at the level at which he needed her to perform.

35. The claimant started to have a perception that Mr Kiernan was bullying and harassing her. This, it seems likely, was being caused by her inability to be able to deliver consistently to a sufficiently high standard to satisfy Mr Kiernan. It also seems likely that the claimant's inability to perform to that standard may have been being caused by factors in her personal life – some of these were her own health problems and some were problems associated with her mother's ill health. We are satisfied that Mr Kiernan did not bully or harass the claimant – he instead was endeavouring to get the claimant to improve her performance – he was properly entitled to do so. The claimant however seemed unable to do so other than over fairly short time scales – although her performance did improve on occasions that improvement was not sustained. This was a requirement of the underperformance procedure.

Final Formal Warning (FFW) & 3rd PIP

36. Mr Kiernan wrote to the claimant on 2 August 2010 to invite her to a meeting to discuss whether a FFW may be appropriate. That meeting took place on 12 August 2010 and the claimant was issued with a FFW on 6 September 2010. A PIP was issued which ran from 7 September 2010 to 5 October 2010.

37. Another manager Mr Wright was present at the meeting on 12 August to take notes. Mr Wright ended up participating in the meeting and asked some questions of the claimant. We criticise Mr Kiernan for allowing this to happen – Mr Wright was present to be a note taker and we are satisfied that the claimant was unsettled by the fact of his starting to ask questions in that meeting. The claimant was represented in that meeting by her union representative.

38. The claimant made good progress under this PIP – Mr Kiernan was satisfied with her progress and performance and signed the PIP off as satisfactory. The claimant made a very particular effort in the PIP to meet the objectives set for her by Mr Kiernan and was successful in doing so.

Grievance & Appeal against FFW

39. The claimant raised a grievance against Mr Kiernan on 10 August 2012. This related to the way in which he had handled her performance to date. The claimant's grievance highlighted her concern that Mr Kiernan was being unduly harsh, was not recognising her achievements and was not properly supporting the claimant. The claimant raises in her letter the difficult personal circumstances of being a carer for her mother and also her 85 blind and disabled aunt and that her previous good record with the BT was not being properly recognised.

40. The claimant also appealed against the issuing of her FFW.

41. Mr Dagless was put in charge of both the grievance and the appeal against the FFW. Part of what the claimant complains of is a delay by Mr Dagless in processing the grievance. Mr Dagless convened a meeting to consider the grievance on 14 October 2010 – some 2 months after the grievance was raised. This is outside the time parameters set down in the respondent's procedures for handling grievances which would in normal circumstances require a grievance to be determined in a shorter time frame. Mr Dagless could provide us with no explanation for this delay beyond that HR were responsible for the setting up the meetings. Although we do criticise the respondent for this delay we do not consider that it created any particular unfairness to the claimant.

42. Mr Dagless did not uphold the claimant's grievance regarding breach of policy by Mr Kiernan in his managing of her underperformance. He wrote to her on 10 November 2010 to confirm this and also to highlight 3 learning points to try and improve matters for the claimant – including that the claimant might consider re-locating to another office where she did not work on her own and that more face to face meetings take place between the claimant and Mr Kiernan.

43. The claimant's appeal against the FFW was also dismissed by Mr Dagless.

January/February 2011 – referral to Stage 3

44. Through January and February Mr Kiernan became concerned again about a number of performance issues. None were particularly significant of themselves but taken together built a picture of low to medium level continuing performance concerns. It seems that he had moved to a zero tolerance of any underperformance by the claimant. Although we consider that his response sits at the far end of what some managers might do – we do not go as far as to say that his concern or level of intolerance was improper. He had decided to move to a rigid and robust approach to the claimant's underperformance and as the claimant's manager was entitled to do so.

45. The claimant says that Mr Kiernan became rude and abrupt with her in January 2011 and shouted at her. We are not satisfied that he did do this – we judge Mr Kiernan to be a relatively

calm and mild mannered individual. We are however satisfied that by this stage his approach to the claimant did move to one in which he would not tolerate anything other than perfection. The claimant sensed that she was under scrutiny and under pressure.

46. We consider that the first event that triggered Mr Kiernan's concern was remarkably trivial and we consider that Mr Kiernan's reaction to it is indicative of what we have described as him moving to a zero tolerance policy. This related to the preparation of some slides on the Enigma project that were delivered on time by the claimant shortly before Christmas. Mr Kiernan's concern related to a relatively trivial matter relating to the wording of a disclaimer on the slides.

47. Thereafter there were a number of other events in January and February— none of any particular magnitude which resulted in Mr Kiernan referring the matter to Mr Dagless under the Stage 3 Procedure to give consideration to the claimant being offered a suitable alternative role or to her dismissal.

48. Mr Dagless wrote to the claimant on 23 February 2011 and invited her to a meeting to discuss whether she should be moved to a different role at a lower rate of pay or to be dismissed on the ground of inefficiency arising from unsatisfactory performance.

Meeting 9 March 2011

49. The claimant attended the meeting with her union representative. Mr Dagless was present as the decision manager and Ms Reeve HR specialist was also present. We are satisfied that Mr Dagless's focus was principally on achieving one of the only options that the respondent's procedure offered – namely dismissal or being moved to alternative employment. He understood nevertheless that his decision at that meeting did not necessarily need to be constricted by those two options.

50. The claimant's performance history was reviewed.

51. During that meeting the claimant presented a letter from her GP. This letter was not produced in the bundle prepared for the hearing – although in evidence Mr Dagless accepted that the claimant had brought the letter to the meeting and he took a copy of it for his records. It was produced by the claimant during the hearing and it was agreed by the parties that it was relevant to the extent that it formed part of the information available to Mr Dagless when he made the decision to dismiss the claimant and that it should be included as part of the bundle.

52. Mr Dagless prepared a rationale document to explain his decision to dismiss the claimant. This does not make reference to the fact that medical evidence was handed to him by the claimant informing him for the first time that the claimant was suffering from an underlying health problem that he had previously known nothing about. Mr Dagless accepted in his evidence that menopausal problems were underlying health problems.

53. The rationale document confirms that the claimant told Mr Dagless several times in the meeting that she was going through the menopause but had not previously mentioned this to Mr Kiernan. It also states that Mr Dagless found it difficult to assess whether the claimant's menopause had impacted on the claimant's performance.

54. The GP letter was dated 1 March 2011 and confirmed that in addition to the stress suffered by the claimant in relation to being a carer for her mother and aunt "on top of that she is going through the menopause which can affect her level of concentration at times"

55. Mr Dagless determined that it was not necessary to perform any further investigations into the significance of the claimant's menopause in terms of understanding whether it had impacted on her performance, whether she was receiving any medication for this and what its prognosis was. He instead determined that he had sufficient information to make a decision. This is inconsistent with what he wrote in the rationale document which confirms that it was difficult for him to assess whether the menopausal problems revealed for the first time on 9 March had impacted on the claimant's performance.

56. Mr Dagless instead determined that because his wife had gone through the menopause and because his HR advisor had also gone through the menopause that notwithstanding his difficulty in assessing the significance of the information provided to him by the claimant's GP he knew enough and that no further investigations were needed.

57. Mr Dagless accepted in evidence that before dismissing for poor performance linked to ill health it would normally be important to have as much information as possible to understand that condition and what its prognosis was. This is consistent with the respondent's policy in relation to management of underperformance. Mr Dagless provided no proper explanation for not referring the claimant to OH at this juncture to ensure that he had a properly informed understanding of this health issue, how and whether it had impacted on performance and what its prognosis might be.

58. Mr Dagless accepted in evidence that he had no knowledge of when the claimant's menopause had started, whether HRT had been prescribed or whether it might assist. Mr Dagless could provide us with no explanation for his failure to do what he accepted he normally would when an underlying health issue became known to him – beyond that because his wife and his HR advisor had themselves been through the menopause.

Bias

59. Mr Dagless's involvement in the determination of the grievance and the appeal against the FWW left him having already formed an opinion regarding the claimant's underperformance. We are therefore of the view that the respondent should not have appointed him to be the decision maker in March 2011 at the Stage 3 referral to a second line manager. The respondent is an organisation of some magnitude – and no explanation was provided to us that would establish that it was in any way necessary for the respondent to have so obviously jeopardised the cardinal principle of justice that a decision maker should not have any appearance of bias or partiality.

60. Mr Dagless's handling of the decision to dismiss in March 2011 seemed to indicate a closed mind in that he was wholly unreceptive to the normal principles applicable before dismissal regarding the investigation of new matters relating to ill health presented at that meeting. Mr Dagless accepted in his evidence that it would be normal before dismissing in relation to underperformance to obtain medical evidence to ensure that any health problems were properly understood. He did not do this for the claimant and did not provide a proper explanation for this failure.

61. Because of this we conclude that it is right to find that because of his prior involvement in her grievance and her appeal against her FWW in October 2010 – both of which were not upheld by him – he did not have a properly open mind to the possibility that the new health problems introduced in March 2011 might be impacting on the claimant's performance and had predetermined that the claimant's underperformance was such that she should be dismissed, once it was established that no suitable alternatives were available, without stopping to consider whether he had properly understood or considered the potential relevance of the new health related evidence to the claimant's underperformance.

Comparators

62. Mr Dagless had previously dismissed about 4 people for performance concerns. In two of these cases the employee had raised health issues as being relevant to underperformance.

63. In one case the employee had arrhythmia (heart condition) and psychological problems. Mr Dagless had sought information from the local hospital.

64. In another case the employee had a blood disorder – referrals were made to Occupational Health and were available to Mr Dagless.

65. Mr Dagless decided that because his wife and his HR advisor had gone through their menopause that no further investigations were needed to understand either the claimant's current menopausal condition or prognosis for the future, how and when the menopause may have

started to have impacted on her ability to concentrate and thus on her performance or might continue to do so in the future.

66. Some enquiry was made on 21 March to determine whether any alternative jobs may be available for the claimant in a downgraded role. This confirmed that no such vacancies were available.

67. Mr Dagless wrote to the claimant on 28 March 2011 to inform her that her "employment will be terminated on the grounds of inefficiency arising from unsatisfactory performance" Mr Dagless appended a rationale document to his letter of dismissal referred to above.

Appeal

68. The claimant appealed the decision to dismiss her. Her appeal was heard by Mr Nunney on 9 June 2011. Mr Nunney was a senior manager in the Wholesale business. The claimant was unhappy that a senior manager in the same division was to hear her appeal. We find that there was nothing improper in Mr Nunney hearing the claimant's appeal. Although within the same division he had had no previous direct involvement in the events surrounding the management of the claimant's performance issues.

69. We are therefore satisfied that the hearing of the appeal by Mr Nunney remedies the procedural defect relating to the fact that Mr Dagless was not a properly impartial person at the second stage.

70. The claimant was represented at the appeal by her union.

71. The claimant's appeal was not upheld.

72. At the appeal the claimant raised her concerns that although she had told Mr Dagless several times about her menopause in the meeting on 9 March and had expected him to look into this that he had not done so. Mr Nunney was asked by the claimant's representative whether he had failed to do so because the claimant was a woman and whether Mr Dagless had been right to make a dismissal decision without exploring the health issues that had been raised.

73. In the rationale document produced after the appeal hearing Mr Nunney confirmed that:

- The issue of the claimant's menopausal health problems had been raised with Mr Dagless at the meeting on 9 March.
- Mr Dagless had confirmed to him that he did not need any clarification on the health issue because he had a good understanding of the menopause through a personal experience which he took into account when deciding to dismiss.
- Mr Dagless had confirmed to him that he believed the adjustments that had been made for the claimant by Mr Kiernan were sufficient.

74. Mr Nunney did not take any steps to gather medical evidence on the significance of the claimant's menopause to her performance problems.

Determination of Claims

Unfair Dismissal

75. We are satisfied that Mr Kiernan had genuine and proper concerns regarding the claimant's performance. He was managing these adequately and reasonably if not perfectly through the respondent's performance management procedures.

76. We are satisfied that no unfairness was caused to the claimant in relation to his handling of her performance concerns. The claimant may have been upset that he was determinedly managing her performance but he was properly entitled to do so. There is no unfairness caused to the claimant in terms of any part of that process. The claimant was not bullied or harassed by Mr Kiernan and the claimant was given proper and adequate opportunity to improve.

77. Mr Kiernan had been supportive of the claimant in relation to what he understood to be sickness absences caused by stress and anxiety associated with the claimant's caring responsibilities for her mother and her aunt. There had been a proper referral to OH in February 2010 which had confirmed that the claimant's pressures were mainly associated with her caring responsibilities.

78. This report refers to other gynaecological illness but does not state what that might be. The claimant had in fact been suffering blood loss associated with fibroids. Mr Kiernan did not know the claimant was going through her menopause and gave no thought to this possibility. Any adjustment he had made related to his understanding that she was finding it stressful to support her mother and were aimed at supporting the claimant in her need to support her mother and aunt.

Did the respondent believe that the claimant was incompetent or unsuitable for the job?

79. We are satisfied that the decision to dismiss the claimant, after the meeting on 9 March 2011 was by reason of capability. Mr Dagless honestly believed the claimant to be incompetent or unsuitable for her job. There was a full audit trail from Mr Kiernan regarding his management of her underperformance since 2009.

80. Although we are satisfied that Mr Dagless was not a properly impartial person to make that decision we are satisfied that this fault is remedied by the fact that Mr Nunney reviewed the decision to appeal. Mr Nunney was a properly impartial decision maker. There is therefore no unfairness created by this procedural defect.

81. Mr Dagless made enquires at that time to explore alternative job possibilities but none were available. This is consistent with normal principles of fairness and with the respondent's own procedures. He therefore determined that he would dismiss the claimant.

Were there reasonable grounds for that belief?

82. We are satisfied that there were not reasonable grounds for that belief. We reach this conclusion because of Mr Dagless's failure to have properly investigated a highly relevant new feature relating to ill health that emerged for the first time at the meeting on the 9 March. He seemed to have closed his mind to the possibility that he should properly inform himself by further investigation as to whether there was any relevance to this new feature to the decision that he now needed to take. His approach was contrary to that which he told us he understood to be the correct approach.

83. Without the new health feature being introduced at the meeting on 9 March – at which point Mr Dagless understood that he had all options available to him and that he could perform more investigations if that seemed necessary – we would have been satisfied that it was reasonable for Mr Dagless to conclude that the claimant was incompetent or unsuitable for her job. That is a determination which would have been reasonably available to him on the basis of the performance management by Mr Kiernan.

84. Mr Dagless was however presented with new evidence from the claimant herself that she was suffering from the menopause and that she had previously not told Mr Kiernan about this. He was presented with evidence from the claimant's GP that her menopause could affect her level of concentration and he accepted in evidence that problems with concentration were likely to impact on performance. The claimant was an employee with 24 years service and no previous record of performance problems.

85. Mr Dagless's rationale document records that it was difficult for him to assess if the menopause had impacted on the claimant's performance.

86. All of those features point towards Mr Dagless being in a position on 9 March of having identified a lacuna. That lacuna being that he was not properly in a position to know whether and if so to what extent the claimant's menopause might explain her recent underperformance nor

what her particular menopausal problems might be, whether they were treatable and what the prognosis for return to full concentration might be.

87. Mr Dagless therefore never reached the point of being reasonably in a position to have concluded that the claimant was incompetent or unsuitable for the job such that a decision to dismiss her was a reasonable one. He was missing some important information which there was no proper reason not to have paused to have obtained. If he had obtained OH or other medical advice that would have put him properly in a position to have factored this to his decision the relevance of the claimant's menopausal health problems and her prognosis.

88. Instead however, Mr Dagless wholly improperly relied upon his own personal knowledge of his wife's menopause and his HR advisor's menopause to determine that he knew enough to discount the relevance of menopause or perhaps to believe that enough had been done already and to move to determine that it was proper to dismiss the claimant. Mr Dagless told Mr Nunney as part of the appeal process that he believed that Mr Kiernan had made sufficient adjustment to take the claimant's menopause into consideration. This is perverse and without any basis as it was accepted that Mr Kiernan did not know that the claimant was suffering from the menopause because she had only given this piece of information to Mr Dagless. Mr Dagless did not know anything about what the claimant's particular menopausal symptoms may have been as he had no information on this – other than from the claimant's doctor who confirmed that she was going through the menopause and that it can affect her concentration.

89. It is self evident that all women will experience their menopause in different ways and with differing symptoms and degrees of symptoms. Some may be symptomless. Some will seek treatment for symptoms – some will not. Some will experience symptoms over a very short period of time – others will experience symptoms over longer periods of time. Mr Dagless however wholly improperly made a generalised assumption about how women experience the menopause and seems to have applied this to the claimant. He felt he needed to know no more. This would tend to suggest that he did not take menopause seriously – as his evidence was that he understood it to be proper to, and had in the past, sought medical input before dismissing for performance concerns where underlying health problems appeared relevant. He failed to do this for the claimant and that failure creates a gap in his knowledge that satisfied us that his belief in her unsuitability for continued employment particularly for an employee of such long standing, although real was not reasonably held.

90. That gap was not closed by any further investigations performed at the appeal stage.

91. The decision to dismiss is therefore unfair.

Sex Discrimination

92. The claim for sex discrimination is brought as a continuing course of conduct encompassing both Mr Kiernan's management of underperformance and continuing to Mr Dagless's decision to dismiss. We therefore examine both elements.

Mr Kiernan's management of performance

93. We have considered the burden of proof provisions and whether, in terms of S63A Sex Discrimination Act or S136 Equality Act the claimant has either proved facts or we have found facts from which we could conclude that the treatment was on the ground of the claimant's sex in that the claimant was suffering from a health condition specific to women which was handled differently to other sorts of health conditions that were not female specific.

94. Both the claimant and Mr Kiernan gave evidence that the claimant had not told Mr Kiernan that she was suffering from the menopause. We have found that he did not know that the claimant was going through her menopause, nor did he know that she was experiencing any problems with her menopause that may have impacted on her ability to concentrate and thus her performance. Mr Kiernan did know that the claimant had had some periods of stress related absence that were associated with her mother's medical condition.

95. Mr Kiernan was concerned with managing the claimant's underperformance. There are no facts from which we could conclude that the management of the claimant's underperformance was on the grounds of her sex – in that she was suffering from a specific health problem associated with women, namely the menopause.

96. We are satisfied that Mr Kiernan would have treated a hypothetical male comparator in the same way in which he treated the claimant. That person is a man with significant performance concerns and an underlying health problem which was understood to be able to effect this concentration at times and be relevant to his poor performance.

97. We are satisfied on this because Mr Kiernan did take care to ensure that his management of the claimant properly factored in the health problems that he did understand her to be suffering from – namely stress associated with caring for her mother given her mother's ill health. A referral to OH was made and the advice of OH was followed in relation to a phased return to work. Mr Kiernan took the claimant's ill health seriously and processed her ill health absence and need for support properly in line with the respondent's procedures.

98. There are no facts from which we could conclude that Mr Kiernan's management of the claimant had anything to do with her being a woman or that she was suffering from a specific female health problem. The burden therefore does not shift to the respondent to prove that it did not treat the claimant less favourably on the grounds of her sex.

99. However even if it did lead to the burden shifting to the respondent we would in any event be satisfied that Mr Kiernan's explanations for his actions in handling the claimant's underperformance were in all senses explained by factors which had nothing to do with the claimant's sex – his focus was simply to manage the claimant's underperformance. He did not bully or harass her in the process – he was firm and robust and followed the respondent's performance management procedures.

100. That part of the claim that relates to sex discrimination in the period leading up to the meeting with Mr Kiernan therefore does not succeed.

Mr Dagless's decision to dismiss

101. We again consider the provisions of the burden of proof in the Equality Act. As the dismissal took place in March 2011 we are concerned only with the provisions of that act.

102. Are there facts from which we could decide, in the absence of any other explanation, that Mr Dagless treated the claimant less favourably than he treated or would treat others because of her sex? Might it be right, as the claimant says, that his failure to follow the acknowledged normal process is because he did not taken menopause seriously as an underlying health condition?

103. We are satisfied that Mr Dagless's response to the revelation about menopausal issues could be explained by a failure on his part to have taken this issue seriously – that he did not consider this female-specific problem to be comparable to other health issues. If the claimant is stood next to the hypothetical male comparator the facts support the proposition that that person would, in the normal course of things, have been referred by Mr Dagless, once he became aware of those issues, for some medical investigation to enable Mr Dagless to understand the significance, if any, of that employee's underlying health problem to his poor performance and what his prognosis was, before making a decision regarding whether to dismiss.

104. There was after all a proper reason to believe that her menopause may have been impacting on her performance as the fact of her menopause was raised several times by the claimant in the meeting of 9 March and the letter from the claimant's GP produced at that same meeting confirmed in clear terms that it may affect concentration. Mr Dagless accepted in evidence that problems with concentration were likely to impact on performance.

105. Mr Dagless's evidence was that he understood in a general sense that it was proper for there to be a medical referral when underlying health problems were revealed that might impact on performance – and that he had ensured that medical investigations had been carried out on the

- two earlier occasions of poor performance and ill health issues arising in the context of employees suffering from non female specific health problems. This is consistent with the respondent's own procedure which confirms that it is important for a manager to understand whether health problems might underlay poor performance. It is also consistent with general principles of fairness that a manager properly informs himself regarding the significance of any health problems and what's its prognosis might be before taking a decision to dismiss.

106. The facts therefore reveal that Mr Dagless did something that appears quite contrary to normal expectations in the context of a health issue and that he did this in the context of a health issue that was particular to women. It therefore seems proper to us to conclude that this could be because he did not take menopausal health problems seriously or because he believed that they did not need the same response to other non-female specific health conditions.

107. We are therefore satisfied that these facts shift the burden of proof to the respondent to provide an explanation that would disprove this possibility.

108. Mr Dagless's explanation was that he considered that there was no need to conduct any further medical investigation after the meeting on 9 March, because his wife had gone through the menopause and that his HR advisor had done so – this on his evidence putting him properly in a position to judge the significance of this new feature, linked directly to concentration problems by the GP, but nonetheless without having to perform any further medical enquiry. Mr Dagless provided us with no assistance in understanding how his knowledge of his wife's menopause or the menopause of the HR advisor might have made this a proper thing for him to do.

109. His explanation to us for dispensing with normal procedure is irrational as it does not follow any logic as there is no link provided between the fact of his wife and HR advisor having gone through the menopause and any assistance that fact might provide to him in the judgment he needed to make regarding the significance of the claimant's menopause and issues with concentration in the decision he needed to make regarding the claimant's future employment. The explanation to us is also contrary to what he records in the rationale document following that meeting where he acknowledges that he is in difficulty in knowing how to assess the significance of the claimant's menopause on her performance. He wrote "it is therefore difficult to assess if this [menopause] did impact on Christine's performance".

110. As Mr Dagless's explanation for his actions do not provide any proper explanation for his actions in failing to follow the normally expected procedure of further medical investigations we return to the original proposition that the explanation is that he did not take menopause, a strictly female condition, seriously as a medical condition and that he would never have adopted this bizarre and irrational approach with other non-female related conditions. His willingness to rely upon whatever it was that he knew about menopause from watching his wife go through it and whatever it was that the HR advisor told him about her menopause is strongly suggestive of him not taking this condition seriously – nor the possibility that it could be part of the explanation for the claimant's poor performance after 24 years of service. In fact Mr Dagless never told us what it was in his wife's menopause or the HR advisor's menopause that was relevant; instead he simply provided the bland statement that this left him understanding enough. This also would tend to suggest that he was making improper generalised assumptions about menopause without any focus on the particular problems that the claimant was suffering from.

111. Making such assumptions is less favourable treatment than the hypothetical male comparator would have experienced as it left Mr Dagless not properly informed about the condition, its link if any to concentration problems and its prognosis – he simply assumed that the claimant could never improve and dismissed her. The evidence satisfies us that for all health situations potentially impacting on performance, whether those conditions were specific to men or not, the hypothetical male comparator on the brink of being dismissed for poor performance would have been referred for medical investigation to provide a proper understanding of the potential link between that health condition and the poor performance and prognosis before reaching a decision on dismissal.

112. We therefore find that the failure by Mr Dagless to have referred the claimant for medical investigation after the meeting on 9 March and his decision instead to dismiss without more investigation to be direct sex discrimination.



Employment Judge Christensen

RESERVED JUDGMENT SENT TO THE PARTIES ON

27 FEB 2012

ASMIT

FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS