EMPLOYMENT TRIBUNALS

Claimant: Mr R Carnall
Respondent: Iceland Foods Limited

HELD AT: Sheffield **ON:** 10 and 11 July 2017

BEFORE: Employment Judge Little
Members: Mr D Crowe
Mr G Corbett

REPRESENTATION:

Claimant: In person (accompanied by Miss R Roberts – Personal Support Unit Day 1 and Miss C Blackburn – Personal Support Unit Day 2)
Respondent: Mr R Hignett, Counsel (instructed by Shakespeare Martineau solicitors)

JUDGMENT

The unanimous Judgment of the Tribunal is that:-

1. At the material time the Claimant was a person with a disability within the meaning of the Equality Act 2010.
2. The Respondent had actually and/or constructive knowledge of the Claimant's disability at the material time.
3. The complaint of discrimination arising in consequence of disability fails and is dismissed.

REASONS

1. Although full reasons were given when the Tribunal delivered it's Judgment, we felt that this was an appropriate case for written reasons as well.
2. **The claim**

   At a Preliminary Hearing for Case Management conducted by Employment Judge Rostant on 22 March 2017 it was clarified that the only complaint before

the Tribunal was in respect of the Claimant's dismissal which he believed had been discriminatory. The reason for dismissal was the Claimant's long-term absence and the Claimant contended that that absence arose in consequence of his disability. Accordingly it was a complaint brought under the provisions of section 15 of the Equality Act 2010. The clarification referred to above was in the context of what amounted to an amendment application by the Claimant, as when the claim had been presented (to the Employment Tribunal in Cardiff) on 28 September 2016, it appeared that the only complaint was in respect of holiday pay.

The Claimant had also wanted to amend his claim so as to add a discrimination complaint involving a supervisor Wayne Skelton and in respect of an incident which had allegedly occurred in June 2015. Employment Judge Rostant did not permit that amendment but explained to the Claimant that he would be allowed to refer to the Skelton matter and a grievance which the Claimant had lodged – in each case as background. At that stage the Claimant was contending that the incident with Mr Skelton had made him too ill to work and had triggered a period of depression.

The holiday pay claim itself had been settled via ACAS and a Judgment was issued on 17 March 2017 which dismissed that complaint on withdrawal.

3. **The issues**

On the first day of the hearing agreement was reached that the following issues needed to be decided by the Tribunal:

3.1. Was the Claimant a person with a disability within the meaning of the Equality Act 2010 (section 6 and schedule 1)?

3.2. If so did the Respondent know that the Claimant was disabled or should it reasonably have known?

3.3. Was the unfavourable treatment of being dismissed because of absence from work something which arose in consequence of the Claimant's disability?

3.4. If so was the dismissal a proportionate means of achieving a legitimate aim – including consideration of whether the Respondent's treatment of the Claimant had either caused or contributed to the illness which led to the absence.

4. **The Claimant as a litigant in person**

The Claimant has had no legal advice until very recently. He explained that in the last couple of weeks he had had some assistance from Howells solicitors and it would seem that they have helped him in the preparation of his witness statements. Whilst the Claimant has not been professionally represented he has had the benefit of being accompanied at the hearing by a member of the Personal Support Unit (PSU) a charitable organisation who provide moral support and non legal assistance to litigants in person.

5. **The evidence**

The Claimant had sent an email to the Tribunal on 8 May 2017 with embedded in it what appeared to be the Claimant's witness statement. However following the involvement of Howells solicitor a different witness statement was prepared and this is dated 27 June 2017 and runs to 19 paragraphs. The Claimant had then

prepared a further witness statement which had the sub heading "Disability Impact Statement" – although it also set out the Claimant's position in relation to various grievances that he had brought prior to his dismissal. This witness statement had only been sent to the Tribunal and the Respondent on 6 July 2017. At the beginning of the hearing the Respondent's barrister objected to that statement being considered by the Tribunal – we deal with this matter below.

In addition to these statements the Claimant's partner Laura Lowe and the Claimant's father Steve Carnall had also prepared witness statements. In the event neither attended the hearing. Mr Hignett indicated that he would not have needed to ask any questions of Mr Carnall senior in respect of the brief witness statement he had given, but he would have asked questions of Miss Lowe if she had attended. On day one we explained to the Claimant that it was likely to help his case if Miss Lowe was able to attend on day two but if not (and subject to any objection by the Respondent) the Tribunal would probably read her statement and then give it such weight as it felt it could. As we have noted, Miss Lowe could not attend on day two and there was no objection from the Respondent to us reading her statement.

The sole witness for the Respondent was Jayne Putnam who at the relevant time was an HR manager for the Respondent and was the person who decided to dismiss the Claimant. Ms Putnam had subsequently left the Respondent's employment and as she was only available for the first day of the hearing we heard her evidence first.

6. **The Claimant's late impact statement**

Mr Hignett objected to this being introduced. He pointed out that the Claimant had failed to produce copies of his relevant GP notes and the absence of those documents was now aggravated by the late service of this impact statement. Had the GP notes been available there would have been a better opportunity to cross-examine the Claimant on the impact statement. The Claimant explained that the reason for the late service of the statement was that he had only recently obtained advice from solicitors. We should add that the Claimant had sent emails to the Tribunal on 19 and 25 April (copied to the Respondent) in which he had endeavoured to explain how his condition affected his day to day activities. However the recently served witness statement covered somewhat different areas.

Having retired to consider the position the Tribunal decided that the impact statement would be admitted. We noted that the Claimant was unrepresented and had only recently received some limited legal advice. Whilst it was not ideal that there were no GP records either we noted that this matter had been considered by Employment Judge Cox who had made an order on 6 June 2017 refusing the Respondent's application for an Unless Order. She had pointed out in her reasons for that decision that the onus was on the Claimant to prove that he was a disabled person and the failure to provide GP records was a matter which the Respondent could bring to the Employment Tribunal's attention at the hearing. Whilst we considered that there was some prejudice to the Respondent by allowing the impact statement, we considered that a respondent's ability to challenge a claimant's evidence about what they did outside of work and within their home or private life would often be limited. We considered that there would be greater prejudice to the Claimant if he was denied opportunity to rely upon a statement which he had prepared with legal assistance. Accordingly we granted

permission for the Claimant to have served this impact statement when he did and it was therefore material that we would consider.

7. **Documents**

The Tribunal had a bundle before it which comprised 300 pages.

8. **The relevant facts**

8.1. The Claimant commenced employment with the Respondent on 9 June 2015. That was as a part-time home delivery driver working out of the Respondent's Crystal Peaks depot.

8.2. During the first month of the Claimant's employment he became concerned about the number of deliveries he was given for his shift. In particular there was an occasion when he had 15 deliveries and he believed his colleagues had no more than 9 each. During a discussion about this issue the Claimant alleges that his then supervisor Wayne Skelton either grabbed the Claimant's arm or attempted to.

8.3. On 22 July 2015 the Claimant raised a grievance about these matters and a copy is at page 107 in the bundle.

8.4. A hearing in respect of that grievance was conducted on 12 August 2015 by Mr Andy Peel. The notes of that hearing are at pages 110 to 129. The hearing took some two and a half hours.

8.5. On 14 August 2015 the Claimant commenced a period of ill health absence. He submitted a fit note which signed him off work for one week because of the condition of "Depression. Work related stress". A copy of the fit note is at pages 78 to 79 in the bundle. In the event the Claimant would never return to work.

8.6. On 1 September 2015 Mr Peel wrote to the Claimant giving his decision about the grievance. A copy of that letter is at pages 153 to 159. Most of the grievance was rejected but Mr Peel did uphold part of the grievance because he had found evidence that drivers had been swapping orders and that should not have taken place. However he found no evidence that the Claimant had been given 15 orders on one slot when the other drivers only had 9.

8.7. In relation to the allegation that Mr Skelton had attempted to grab the Claimant's arm in an aggressive way, Mr Peel recorded what the Claimant's account of that had been and that the Claimant had requested Mr Peel to view some CCTV footage. Mr Peel had interviewed a witness put forward by the Claimant, Craig Samson. Mr Samson had accepted that he had heard the Claimant say to Mr Skelton "don't touch me" but had not seen any touching. Mr Samson also said that the Claimant himself had then become aggressive. Mr Peel explained that he had reviewed the CCTV footage and from what he could see at no point had Mr Skelton appeared to grab the Claimant's arm. Nor did it appear that at any point the Claimant had stepped away from Mr Skelton.

8.8. On 16 October 2015 the Claimant went to a welfare meeting which was conducted by a manager called Wayne Leatherland and that took place at the Respondent's Parkway depot. A note of that meeting is at pages 162 to 166. The Claimant confirmed that the reason for his absence was stress and he had been prescribed medication. He explained that he had suffered

some six years ago from a similar problem when the trigger had been becoming homeless. He was asked about how the medication or "treatments" were impacting on his day to day activities. The Claimant replied that there was an impact which he thought was because of the medication. He is recorded as saying "I don't finish things I've started and move on to other things" (see page 163). The Claimant felt that he would be able to return to work in the near future.

8.9. On 2 November 2015 the Claimant lodged an appeal against the grievance outcome. A copy is on page 167.

8.10. On 11 December 2015 there was a second welfare meeting. On this occasion it was conducted by Mrs N Chambers of HR – who has been present at the Tribunal but who has not given evidence. This meeting was conducted at the Claimant's home and also present was his partner Miss Lowe. Notes of that meeting are at pages 173 to 180. The Claimant said that he was feeling better and wanted to return to work but "want grievance sorted". During the course of the meeting Mrs Chambers asked the Claimant what he was struggling with day to day and his reply was:

> "Not much, social worker asked that, don't know".

However Miss Lowe added:

> "Not just work, personal things which is why I'm going to meetings too. Ryan finding hard" (see page 177).

Subsequently in the meeting Mrs Chambers said the Respondent wanted to ensure that the Claimant was supported but noted that he had been off for four months and so they wanted to write to the Claimant's GP so that they could understand his condition better. Mrs Chambers was to send a consent form to the Claimant.

8.11. Following the meeting Mrs Chambers wrote to the Claimant confirming what had been discussed and a copy of her letter dated 17 December 2015 is in the bundle at pages 184 to 185.

8.12. The 17 December 2015 was also the date which had been set for the Claimant's grievance appeal. However he failed to attend. In fact there had been two previous dates arranged, 19 and 25 November and the Claimant had not been able to attend on either of those occasions either.

8.13. On 7 January 2016 there should have been a further welfare meeting but it seems that was cancelled at the Claimant's request.

8.14. As it had not been possible to arrange a hearing of the grievance appeal the Respondent proceeded to deal with that on paper. The Claimant had been warned that would happen if he did not attend the hearing. The appeal was considered by Mr Ashley Hawkings an area manager. On 12 January 2016 he wrote to the Claimant and a copy of that letter is at pages 190 to 193. Mr Hitchings had also reviewed the CCTV footage but had concluded that at no point did it show Wayne Skelton grabbing the Claimant's arm. Overall Mr Hawkings had found no evidence which contradicted or changed the findings which Mr Peel had made and so the appeal was not upheld.

8.15. In the written submissions which the Claimant had provided on 22 December 2015 for the paper consideration of his appeal he had also referred to a new matter which he was complaining about. This was in

respect of text messages received from Craig Samson, a supervisor, that allegedly made lewd comments about the Claimant's girlfriend. Mr Hawkings explained that that would have to be dealt with as a separate exercise.

8.16. On 28 January 2016 a third welfare meeting did take place. Again this was conducted by Mrs Chambers. The notes are at pages 197 to 199. On this occasion the venue was the Respondent's Sheffield Parkway store. The Claimant said that he was feeling a lot better and wanted to come back to work. When Mrs Chambers asked him what was preventing him being at work the Claimant referred to his grievance and his appeal having been stopped. Mrs Chambers explained that the appeal had not been stopped but it had been decided. The Claimant again referred to the CCTV footage and contended that the original grievance outcome had been manipulated. After the Claimant had spoken at some length about his grievance Mrs Chambers stated that they were not able to go back over his grievance and that they needed to find a way to get the Claimant back into work. The Claimant's response to this was:

> "Not a chance not until it is done fairly".

The Claimant had not yet returned the medical consent form but expressed the view that that would not make any difference because "the only way to get me back to work is to sort this properly" – that was a reference to the grievance.

8.17. On 5 February 2016 there was a hearing in respect of the Claimant's grievance – that is his second grievance against Mr Samson. This investigation meeting was conducted by Anthony Hitchen a manager and the notes are at pages 208 to 213. The Claimant was now contending that Mr Samson had lied in evidence he had given in respect of the first grievance. Because Mr Hitchen wanted to look at some text messages which the Claimant had referred to the grievance hearing was adjourned.

8.18. The resumed grievance hearing took place on 19 February 2016 and the notes are at pages 223 to 225.

8.19. On 23 February 2016 the Claimant sent an email to the Respondent (page 226) in which he stated:

> "I am willing to drop everything and I am willing to come to an agreement to leave my job with Iceland but want all loss of earnings, potential future earnings and compensation for what I have been put through".

The Respondent chose to make no response to this invitation.

8.20. Having received the consent form from the Claimant Mrs Chambers wrote to the Claimant's GP, Dr Bowers, on 26 February 2016. A copy of that letter is at pages 230 to 231. She requested Dr Bowers to prepare a medical statement "to assist us in assessing Ryan's current condition and how it is affecting him in particular in relation to work". Mrs Chambers then posed 13 questions for the doctor to answer. She did not ask the doctor to give her opinion on whether or not the Claimant was a person with a disability under the Equality Act. Instead the questions are limited to seeking a diagnosis and prognosis and other questions in relation to the likelihood of the

Claimant returning to work. There is a question asking whether reasonable adjustments should be considered and if so what. Unfortunately, and apparently due to pressure of work, Dr Bowers was not able to provide her answers to those questions until a letter dated 5 April 2016 (pages 257 to 258). She referred to a current diagnosis of depression and stress but said it was impossible to give a prognosis or a return date. She noted that there was a risk of a recurrence of the Claimant's condition. It would only be possible to comment on adjustments at work once the Claimant was fit to return which was not the case at present.

8.21. Mr Hitchen sent his outcome letter in relation to the Claimant's second grievance on 21 March 2016 (although the letter is dated 11 March 2016). A copy of that letter is at pages 236 to 237. The grievance was upheld in that Mr Hitchen accepted that Mr Samson had sent messages to the Claimant which contained offensive comments of a sexual nature about the Claimant's sister and girlfriend. However Mr Hitchen also found that the Claimant had made the first contact with Mr Samson and whilst he could not determine which of the two had first made inappropriate comments he nevertheless found that the Claimant had made inappropriate comments in his messages to Mr Samson. That would be discussed with the Claimant as part of his probation review – that is on his return to work.

8.22. On 22 March 2016 Mr Carnall sent an email to the Respondent indicating that he wished to appeal the second grievance outcome. He contended that he had only been offensive towards Mr Samson after Mr Samson had been offensive towards him.

8.23. During April 2016 the Claimant raised further grievances in which he contended that he was being bullied because colleagues were ringing him at home asking him where missing shopping had gone. The Respondent endeavoured on three occasions to have a grievance hearing with the Claimant about these matters but on each occasion the Claimant failed to attend. Subsequently the Claimant was asked to put in a written submission but he failed to do that as well and the Respondent reached a conclusion that he no longer wished to pursue those matters.

8.24. Having received the Claimant's GP's report, Mrs Putman an HR manager who had taken over from her colleague Mrs Chambers in relation to the Claimant's absence, wrote to the Claimant on 8 April 2016 (page 259). That was an invitation to a further welfare meeting for 14 April 2016.

8.25. In the event the Claimant failed to attend that meeting and Mrs Putman made two further attempts to arrange a meeting and in each case the Claimant failed to attend those meetings.

8.26. On 10 June 2016 Mrs Putman again wrote to the Claimant and a copy of that letter is on page 272 to 273. She was now inviting the Claimant to a meeting on 16 June.

Within the letter is the following passage:

> "Based on the information provided in the medical report we have received from your GP, the current assessment of your health is that it is unlikely that will be able to return to your role in the foreseeable future. Based on this information, I would like to meet with you to discuss the possible options available, together with any suggestions

> or ideas you may have that we can consider in relation to your ongoing employment with us".

She also wrote:

> I must make you aware that if you are unable to return to your role and we are unable to identify any reasonable adjustments or alternative roles that may be suitable, one possible outcome of this meeting may be dismissal, with notice on the grounds of incapability through ill health".

8.27. The Claimant was able to attend on 16 June 2016 and the notes of that meeting are at pages 276 to 282. Those present at that meeting are described as Mrs Putman, Simon Cawar a store manager who was taking notes and the Claimant himself. However in Miss Lowe's written statement she says that the was present at this meeting and that it took place in their home. Mrs Putman's evidence was that it took place at the Respondent's Parkway store. Miss Lowe's evidence goes on to allege that during the course of this meeting Mrs Putman "twice dug a hole in our kitchen floor" meaning that Mrs Putman had (literally) dug her heels in. As Miss Lowe did not attend the hearing we were not able to clarify these matters with her. If she was at the meeting the notes do not record her making any contributions to it. It may well be that Miss Lowe was referring to a different meeting.

8.28. The meeting begins with the Claimant requesting to view the CCTV footage – this is dating back to his first grievance. Mrs Putman had brought a disc with that footage to the meeting but she explained that was not the primary purpose of the meeting. That was to assess whether the Claimant was capable of returning to his role or an alternative role. The Claimant confirmed that he had read the GP's report. Mrs Putman asked him what he wanted in terms of coming back to work. The Claimant explained that he couldn't come back to the same store and wanted to go to a Tribunal due to his grievances not being resolved. However he went on to confirm that he was well enough to return to work, but not willing to return to work until, as he saw it, the issues raised within his grievance had been dealt with. Mrs Putman explained that it was necessary to deal with the sickness separately but she knew that there was a link, although the grievances had been dealt with through a process. Subsequently the Claimant agreed with his GPs opinion that an imminent return to work could not be anticipated.

Having taken a break to consider her decision, the meeting was reconvened and the Claimant was informed that, after taking everything into consideration and the Claimant's level of absence being 11 months with no foreseeable return date, she had made the decision to terminate the Claimant's employment on grounds of ill health.

Towards the end of the meeting attempts were made to enable the Claimant to view the CCTV footage on the disc. Unfortunately Mrs Putman had not brought any device on which the disc could be played. She explained that in any event her work laptop did not have that function. The Claimant had brought along a game console but that was not compatible with the disc. The Claimant was not permitted to take the disc away with him but Mrs Putman explained that it would be possible for the Claimant to visit the Parkway store and view the CCTV footage there. The Claimant's evidence

on this was that he had made two visits to the Parkway store subsequently to do this but on each occasion had been unsuccessful. On one occasion the person who he saw could not work the CCTV playback system.

8.29. On 20 June 2016 Mrs Putman wrote to the Claimant confirming his dismissal. She noted that the Claimant was currently signed off by his GP and that the GP's report could not foresee a return to work at that time. The doctor had not been able to comment on adjustments. She noted that the Claimant had agreed with what his GP had said apart, from the GP's opinion that the Claimant's continued medication would not affect his duties at work. The Claimant had disagreed and felt that he would not be able to drive under medication. Mrs Putman went on to note that the Claimant had been absent since 12 August 2015 and the company was unable to sustain that level of absence indefinitely with no foreseeable return to work date. The Claimant was offered the right of appeal against the decision but in the event he did not appeal.

9. **The parties' submissions**

9.1. <u>The Claimant's submissions</u>

The Claimant spoke at some length about the grievances he had raised and how they had been dealt with, or not dealt with, by the Respondent. He believed that that had caused him to struggle more with his illness. He believed that if he had been allowed to see the CCTV footage he would have had peace of mind. However he had realised that the Respondent was hiding something.

The Claimant reminded us that the evidence that he had given in cross-examination was that the Respondent had employed someone called Reece to undertake the work he had done and so he disputed Mrs Putman's evidence that the arrangement was for various members of staff including supervisors to cover the driving duties of the Claimant.

In terms of his condition, the Claimant said that he had not been able to be candid with his own doctor about how that was affecting him because he could not get things out. He felt that a different job role could have been considered. Whilst the Respondent accused him of not attending meetings he referred to a meeting which he had attended but which the Respondent had failed to attend.

He thought that the Respondent should have realised that he had a disability because during welfare meetings he was stuttering and shaking. The Claimant queried why there was only evidence from Mrs Putman and no one to give evidence about the grievance process which the Claimant still considered a significant part of his case. Why had he not been allowed to see the CCTV? What the Claimant had told us was a true version of events.

9.2. <u>The Respondent's submissions</u>

On the issue of whether the Claimant was a person with a disability Mr Hignett reminded the Tribunal that there were two GP reports for us to consider. The onus to establish a disability was on the Claimant. We were reminded that no GP records or notes had been provided. Other than that Mr Hignett did not wish to submit further and left the matter for us to decide.

In terms of knowledge of any disability, Mr Hignett referred us to the case of **Gallop v Newport City Council** [2013] EWCA Civ 1583 and in particular to paragraph 36 of that Judgment which clarified that before an employer could be answerable for disability discrimination the employer must have actual or constructive knowledge that the employee was a disabled person. That meant knowledge whether actual or constructive of the facts which constituted the legal definition of disability. Those facts were physical or mental impairment and substantial and long-term adverse effect on the employee's ability to carry out normal day to day duties. It was accepted that the employer did not need to know that as a matter of law the consequence of such facts was that the employee was a disabled person within the meaning of the Act. Mr Hignett accepted that the Respondent knew that there was an impairment, but contended that they did not know of the effect of that impairment. The Claimant had not told the Respondent at the time what he was now saying in his impact statement. The Respondent had asked sensible questions of the Claimant's GP and it seemed that the Claimant had not been candid with his GP. In relation to the long-term issue and knowledge of that, Mr Hignett accepted that at the material time the Claimant had been absent for some 10 months and so it could be said that the Respondent should inferred that the effects were likely to last for at least 12 months.

If the Tribunal was against the Respondent on the issues of disability status and knowledge, the Respondent conceded that the Claimant had been dismissed for absence and that that arose in consequence of such disability as might be found.

In terms of justification, the Respondent had a legitimate aim which was the regular attendance of employees and managing attendance under it's attendance policy so as to ensure that the business ran effectively.

In terms of the proportionality of the means for achieving that aim Mr Hignett referred us to the case of **Monmouthshire County Council v Harris** UK EAT/0332/14/DA. That Judgment made reference in the context of unfair dismissal to the case of **Mcardie v Royal Bank of Scotland** which was authority for the proposition that even if the incapacity had been caused or exacerbated by the employer's conduct that did not mean that a dismissal by reason of incapacity was thereby rendered unfair - although such background might be relevant in the context of the range of reasonable responses which applied in an unfair dismissal case.

We were not of course dealing with an unfair dismissal case and in the **Harris** case there was a review of the Tribunal's approach in a section 15 case by reference to observations made in the case of **Hensman v MOD.** There it was pointed out that the exercise was not the same as the role conducted in an unfair dismissal case, as the exercise was to be performed objectively by the Tribunal itself in a section 15 case. The Employment Tribunal had to reach it's own Judgment upon a fair and detailed analysis of the working practices and business considerations involved. In particular it must have regard to the business needs of the employer. Reference was also made in **Harris** to the case of **Hardy and Hansons Plc v Lax** where the Court of Appeal had said that it was for the Employment Tribunal to weigh the real needs of the undertaking, expressed without exaggeration,

against the discriminatory effect of the employer's proposal. The proposal must be "objectively justified and proportionate".

Mr Hignett said that the question boiled down to how long was the employer required to wait. There was no medical evidence to suggest that the way in which the grievances had been dealt with had caused or contributed to the Claimant's illness.

Mr Hignett then set out the factors which he felt we should take into account when considering proportionality.

First there was the length of the absence and that was in the context of the Claimant having only physically worked in the business for eight weeks prior to going off sick.

Secondly the Respondent had not been hasty. It had waited 10 months. During that time there had been regular dialogue with the Claimant and four welfare meetings had taken place. The Claimant's position had been that he would not be able to return to work either due to being on medication and so not able to drive or because his grievances had not been dealt with to his satisfaction.

In that regard the Respondent had made a proper effort to resolve those grievances although the Claimant believed otherwise. The Claimant had been allowed to appeal against the first grievance outcome considerably out of time and careful consideration had been given to both grievances. The Respondent had done all that it was required to in terms of dealing with those grievances.

In terms of medical evidence the Respondent had requested a report from the Claimant's GP but she had not been able to provide a prognosis or a likely return to work date. Again the central question was how long must the employer wait? Judging by the medical report that had been prepared for these proceedings it seemed that if the Claimant had not been dismissed he would still not have been able to return to work by the date of this hearing.

The Respondent's approach to the 26 June meeting had been correct because the Claimant had been warned that dismissal was a possibility. Broadly the Claimant had agreed with the medical evidence. There had been no need for Mrs Putman to consider the Claimant being moved to another site or another role in circumstances where at the material time he was certified not fit to return to any work by his GP. Mrs Putman's evidence was that those questions could be considered down the line if the Claimant became fit.

In relation to the CCTV footage issue the Claimant had said that seeing it would give him peace of mind and end the grievance process. Mr Hignett suggested that that was an overstatement by the Claimant. In any event there had been no references in the medical report at the time, or for that matter the one for these proceedings, to the CCTV footage issue. It was accepted that it was unfortunate that there had not been a device to play the disc on at the 16 June meeting, but that did not diminish the proportionality of the decision to dismiss. There was no prospect of an earlier return to work. We were reminded that the Respondent's case was that the Claimant's absence caused continuing inconvenience and inefficiency.

10. **The relevant law**

10.1. The disability status issue

The statutory definition of disability for the purposes of the Equality Act is contained in section 6 and schedule 1 of the Equality Act 2010. Accordingly it is necessary for there to be either a physical or mental impairment. That impairment must have a substantial and long-term adverse effect on the person's ability to carry out normal day to day activities.

'Substantial' means more than minor or trivial (see section 212) and 'long-term' means that it has lasted for at least 12 months, is likely to last for at least 12 months or is likely to last for the rest of the life of the person affected (see schedule 1). The Secretary of State has issued Guidance on matters to be taken into account in determining questions relating to the definition of disability and the Tribunal had regard to that guidance.

10.2. Discrimination arising in consequence of disability

Section 15 of the Equality Act 2010 provides that:

> "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".

In terms of what is to be regarded as a legitimate aim and what are proportionate means we have of course been referred to the authority of **Harris** and the cases mentioned therein. The Tribunal have also (having given notice of this to the parties) given consideration to the Equality and Human Rights Commission Code of Practice on Employment 2011 which at paragraphs 4.2.5 to 4.3.2 and paragraphs 5.11 and 5.12 give guidance as to when objective justification can be established.

10.3. Knowledge of disability

Section 15(2) provides:

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

We have been referred to the case of **Gallop** as mentioned above in this context.

11. **The Tribunal's conclusions**

11.1. Was the Claimant a person with a disability at the material time?

1.1.1. Impairment

The medical evidence before us is not extensive. We have the report of 5 April 2016 (page 257) which was before the Respondent when it was considering dismissal and we have a further report from the same GP that

was obtained for these proceedings. That is the report dated 1 June 2017 and it is at page 62 in the bundle. We note that there is a very similar report to this one which is dated 27 January 2017 and that is at page 287 in the bundle. As noted above, we do not have copies of the GP medical notes.

The June 2017 report refers to the Claimant own account of a long history of depression which was getting worse. It provides the diagnosis of depression secondary to post traumatic stress disorder. It also refers to comments in a letter (which we have not seen) from a psychotherapist who observes that "having experienced childhood trauma Ryan may have developed possibly complex post traumatic stress". The extract from that letter as given in the June report refers to the 'incredible challenge' for the Claimant to function day to day.

The April 2016 report gives a diagnosis of depression and stress. It also refers to the risk of a recurrence of the Claimant's condition.

On the basis of this evidence we are satisfied that at the material time (the date of dismissal) the Claimant had the mental impairment of depression secondary to post traumatic stress disorder.

2.1.2. Did that impairment have a substantial effect on the Claimant's ability to carry out normal day to day activities?

We have to assist us here the impact statement which the Claimant has recently prepared. In this the Claimant refers to not being able to get out of bed; a disinclination to wash or change his clothes; loss of appetite; not being able to share cooking duties with his partner; no longer playing football as a hobby; not wishing to mix or socialise and not being able to deal with domestic paperwork and administration resulting in bills not being paid on time. The Claimant also says that he is unable to use public transport.

We are satisfied that this evidence establishes that there was a substantial effect. Moreover we also take into account the provisions of paragraph 5 of the first schedule to the Equality Act 2010 which provides that an impairment is to be treated as having a substantial adverse effect if measures are being taken to treat or correct the impairment and but for that it would be likely to have that effect. We are mindful that at the material time the Claimant was still having the effects mentioned above even though he was being prescribed anti-depressants.

3.1.3. Was the effect long term?

In his impact statement the Claimant says that the relevant episode started around July 2015. We know from the doctor's letter that he first saw his GP in August 2015. In those circumstances, at the material date of 16 June 2016, effects had only been present for some 11 months. However analysing the position as of 16 June 2016 we find that the effects were likely to last for at least 12 months. We note that "likely" in these circumstances means "could well happen" – see the guidance at paragraph C3

Conclusion on disability

On the basis of our findings and analysis above we conclude that at the material time the Claimant was a person with a disability within the meaning of the Act.

11.2. Did the Respondent know that the Claimant had a disability or should it reasonably have known that?

That is the question posed by section 15(2) and it is a pre-condition of liability. We have taken into account the guidance given in the **Gallop** case which Mr Hignett has referred us to. We also note from that case that it is acknowledged that an employer will usually want guidance from medical advisors as to whether or not it's employee is disabled but that the ultimate decision is that of the employer not the advisor. We observe that in this case the Respondent did not refer the Claimant to it's own occupational health service, although of course it did seek and obtain a report from the Claimant's GP. However when sending the letter of instruction to that GP, Mrs Chambers did not ask the GP whether the doctor considered that the Claimant was disabled. We regard it as odd that this question was not asked. The Respondent was aware of the diagnosis as given in the fit notes (depression and work related stress) and as of the date of the letter of instruction the Claimant had been absent from work for a little over six months. We have noted that one of the 13 questions asked of the GP related to reasonable adjustments. When the sole witness for the Respondent Mrs Putnam was giving evidence, the Tribunal asked her whether that reference should lead to the conclusion that the Respondent suspected that the Claimant was disabled. Mrs Putman of course was not the author of that letter but her evidence was that that would be a standard enquiry and did not have the connotation. We have also taken account of the questions which the Claimant was asked at the first welfare meeting and the answers he gave as to the effect that he thought the medication was having on him "I don't finish things I've started" (see page 163).

At the second welfare meeting, as we have noted, the Claimant was asked what he was struggling with from day to day and had replied 'not much'. However we have also taken into account Miss Lowe's comments which follow that where she adds "not just work, personal things which is why I'm going to meetings too". We note that in the letter which Mrs Chambers wrote to the Claimant after that meeting this comment is recorded as "your partner stated that there were personal issues that were affecting you also and she was attending meetings with you as you found it difficult to talk about some things" (see pages 184 to 185).

We also observe that we have not heard evidence from Mrs Chambers who was the HR professional with a significant involvement in the Claimant's case as she conducted the second and third welfare meetings. For that reason we have not had the opportunity to assess what her first hand knowledge or background understanding was.

Returning to the "knowledge of the relevant facts" test as approved in **Gallop,** Mr Hignett has conceded that the Respondent had actual

knowledge of the fact of the impairment. On the basis of the matters we have referred to in the preceding paragraphs we find that it had constructive knowledge of the fact that there was a substantial and long-term effect on the Claimant's ability to carry out normal day to day activities. Indeed the Respondent has gone some way towards conceding that it was aware or should have been aware of the fact of the length of the effect.

We therefore conclude that the Respondent had actual knowledge of some of the factual ingredients and constructive knowledge of the others with the result that overall it did have the requisite knowledge of the Claimant's disability at the material time.

11.3. Was the Claimant dismissed in consequence of his disability related absence?

This is the first limb of section 15(1). There is no dispute that the Claimant was dismissed because of his lengthy absence from work. As we have found that the Claimant was disabled and as it is clear that his absence arose in consequence of his disability, the attention of the case must now turn to the question of justification.

11.4. Objective justification

1.4.1. Did the Respondent have a legitimate aim?

Mrs Putman's evidence was that the legitimate aim was to alleviate what she described as "the undue pressure upon the business and colleagues of having to provide long-term cover for the Claimant's absence". There was also the need to manage regular attendance within the business. Mr Hignett in his closing submissions referred to the need for regular attendance of employees. We agree that the Respondent had this legitimate aim – which can be put simply as needing it's employees to attend work.

1.4.2. Was the Claimant's dismissal a proportionate means of achieving that legitimate aim?

'Proportionate' is to be understood as meaning appropriate and necessary. The exercise which we are required to carry out is an objective assessment. It is not the same exercise as would occur in an unfair dismissal complaint, when the reasonable band doctrine is considered. What we are required to do is consider whether *we* regard the means as proportionate, instead of considering whether a reasonable employer would do so. The factors that we have taken into account in making this assessment are as follows:-

(a) The Claimant had only actually attended work for some two months.

(b) He had then been absent for a period of some 10 months prior to dismissal. In those circumstances he cannot be regarded as an employee with long service where there could be a higher hurdle to the justification question.

(c) The Respondent had maintained contact with the Claimant by holding welfare meetings – four in all.

(d) Those meetings enabled the Respondent to get the Claimant's point of view and discuss with him his health and how that was likely to affect his ability to return to work.

(e) Whilst we have been critical in another context of the Respondent not obtaining occupational health advice, nevertheless the Respondent did seek and obtain medical evidence and so was in receipt of the Claimant's GP's report of 5 April 2016, so that that could inform it's approach. As we have noted that report informed the Respondent that it was impossible to give a prognosis or a likely return date. It also informed the Respondent that the Claimant was not fit to return to work and that it was impossible in those circumstances to comment on adjustments at that stage.

(f) Whilst it is clear that the Claimant felt that he could not return to work until "the issues raised within (his) grievance was resolved" we are satisfied that the Respondent had done all that could reasonably be expected of it to determine the Claimant's grievances – albeit that that had not been so as to uphold the bulk of his complaints. As we have found, the Claimant's first grievance had been heard and determined and he was then permitted to appeal the decision much later than normally would have been allowed. The Respondent seems to have taken a stoical approach to the various grievance appeal hearings which the Claimant was not able to attend – often it seems without informing the Respondent of the fact. Ultimately the appeal was dealt with on paper. It then held two grievance meetings in respect of the subsequent 'Samson' grievance. In respect of the further grievances which the Claimant raised it had endeavoured unsuccessfully to get the Claimant to a meeting to discuss those.

Much has been said by the Claimant in this case about his inability to view CCTV footage in relation to the alleged incident with Mr Skelton in June 2015. However we note that that footage had been seen by both Mr Peel who dealt with the first grievance and Mr Hitchings who dealt with the appeal in respect of the first grievance. Despite this it was an issue which was still troubling the Claimant as late as 16 June 2016 meeting - which was a welfare meeting albeit one considering the Claimant's continued employment rather than being a continuation of a grievance process which had, as far as the Respondent was concerned, concluded some five months earlier.

Despite it not being a matter exactly on the agenda for the 16 June meeting, Mrs Putman had brought to that meeting the disc containing the CCTV footage. We consider it most regrettable that she did not also bring with her a device on which that could be played. We are not quite sure what the arrangements were which led to the Claimant bringing a games console to the meeting, but as we have noted, that device proved to be incompatible. However, despite that criticism, we are satisfied that even if the Claimant had seen the footage prior to his dismissal that would not have had resulted in the peace of mind the Claimant told us he wished to achieve. Nor in our judgment would it have resulted in his imminent return

to work as he now also suggests. To the contrary, and whatever was or was not on that footage, it would in our judgment merely have fuelled the Claimant's attempts to re-open the already determined grievance and to re-enforce his reluctance to return to work until, to his way of thinking he was vindicated. There would have been an impasse as clearly the Respondent had no intention of re-opening the grievance and nor do we think it had any need to do so.

We therefore do not consider that the position the Respondent took on the Claimant's grievances both at the time, or as of 16 June, diminished in any way the proportionality of the action they took in dismissing him.

We find that the CCTV issue clearly did not cause the Claimant's mental impairment. It could have aggravated it, but of course we have no medical evidence about that. The GP reports are silent on the issue. We have been referred in passing to the **Mcardie** decision and we have set out the basic principle. We observe that in that case the Court of Appeal approved the analysis conducted by the EAT. In a case where it was proven that the employer's actions had caused the injury or illness that would be a factor to be taken into account and, admittedly in the context of an unfair dismissal case might require the employer to "go the extra mile" in considering alternatives to dismissal. Insofar as that principle can be applied to a section 15 case we do not consider that this employer was required to do anything further to justify it's decision to dismiss.

11.5. Ultimate conclusion

Taking all these factors into account we are satisfied that the unfavourable treatment of dismissing the Claimant was a proportionate means of achieving a legitimate aim. Accordingly the complaint fails and is dismissed.

Employment Judge Little

Date: 25 July 2017