EMPLOYMENT TRIBUNALS

Claimant: Mr M Shah

Respondent: Leicester City Council

Heard at: Leicester

On: 24, 25, 26, 27 April 2017

Before: Employment Judge Moore
Ms J Dean (panel member)
Mrs C Pattisson (panel member)

Representatives:

Claimant: Mr Nicholas Bidnell-Edwards, Counsel
Respondent: Ms D Masters, Counsel

RESERVED JUDGMENT

1. The claimant's claims for unfair dismissal and disability discrimination were presented in time.
2. The respondent's request for reconsideration of the judgment that the claimant's claims were presented in time is refused.
3. The unanimous decision of the Tribunal is that the claimant's claims of disability discrimination contrary to Section 15 (discrimination arising from disability) and sections 20 and 21 (failure to make reasonable adjustments) of the Equality Act 2010 fail and are dismissed.

REASONS

1. This is a claim for unfair dismissal, indirect discrimination on the grounds of disability, discrimination arising from disability and a failure to make reasonable adjustments. The ET1 was presented on 21 September 2016. The case was heard at Leicester Employment Tribunal on 24 – 27 April 2017.

2. The Tribunal heard evidence from the claimant and had a written statement from Andy Betts, GMB Officer. The Respondent's witnesses were Steve King, (Revenue and Benefits Team Leader and the Claimant's line manager), Caroline Jackson (Dismissing Officer and Head of Revenue & Customer Support), Councillor Paul Westley (Chair of the Appeal Panel), Carolyn Joseph (HR Adviser) and Nicola Graham (HR Team Manager).

Issues

3. **Unfair Dismissal (Section 98 Employment Rights Act 1996 ("ERA 1996"))**

a) Has the respondent shown the reason for dismissal? It was accepted by the claimant that the reason for dismissal was capability which is a potentially fair reason.

b) Was a fair procedure followed under Section 98(4)? If not what was the percentage change of a fair dismissal?

c) Was the dismissal within the range of reasonable responses?

d) Was there a failure to comply with the ACAS code?

e) Did the claimant contribute to his own dismissal?

4. **Disability**

The respondent conceded the claimant was disabled within the meaning of Section 6 EA 2010 save they did not concede that obesity was a disability.

5. **Indirect disability discrimination (Section 19 Equality Act 2010 ("EA 2010"))**

a) What are the detrimental actions relied upon? These were

i. The claimant's dismissal ("the first detriment")
ii. Not being given a final written warning ("the second detriment")
iii. Not being given a further six month period of time to improve his attendance prior to considering the question of dismissal ("the third detriment")
iv. The refusal of his appeal ("the fourth detriment")

b) Has the respondent applied a provision, criterion or practice ("PCP")? The PCP relied upon by the claimant was (i) a policy of dismissing people as a result of high absence levels and (ii) the process by which employees are dismissed for high absence levels.

c) Were the PCP's "valid" PCP? The respondent submitted the first PCP was not valid as it was not neutral and incorporated the disadvantage (**Onu v Akwiwu** [2013] IRLR 523 at paragraphs 54-56 and Court of Appeal [2014] IRLR 448 at paragraph 58. The respondent submitted that the second PCP was not valid as the decision to consider the Occupational Health report from January 2016 was entirely individual to the claimant, since it related to him, and cannot be extrapolated to others. (**British Airways plc v Starmer** [2015] IRLR 862 at paragraph 18. Where a PCP is invalid and the claimant has failed to identify the PCP the claim must fail (**Allonby v Accrington and Rossendale College** [2001] ICR 1189 at paragraph 12).

d) If so did the respondent apply or would apply the PCP to persons whom do not have the Claimant's conditions amounting to a disability?

e) If so did the PCP put persons who had the same disabilities as the claimant at a particular disadvantage compared to people who do not have those disabilities?

f) Does the PCP put the claimant at that disadvantage?

g) If so can the respondent show the PCP is a proportionate means of achieving a legitimate aim? The legitimate aims relied upon by the respondent are a need for employees who can provide reliable and consistent attendance at work, a need for a procedure to enable the respondent to judge the extent to which an employee can provide reliable and consistent attendance at work and in respect of the decision to refuse the appeal only a need to safeguard the claimant's health.

h) Are the claims set out at paragraph 5 (a) (ii) and (iii) above in time? If not is it just and equitable to extend time?

i) Should the Tribunal's decision on 24 April 2017 that the dismissal was in time be reconsidered under rules 70-72 of the ET Rules?

6. **Failure to make reasonable adjustments (Section 20 and 21 EA 2010)**

a) What were the detriments relied upon by the claimant (the claimant relied upon the same four detriments as set out in paragraph 5 above).

b) Does a PCP applied by the respondent place the claimant at a substantial disadvantage in comparison with non disabled persons. The claimant relies upon the same PCPs as the indirect discrimination claim.

c) Does the respondent have the required knowledge about the claimant as a disabled person?

d) Has the respondent take such steps as it is reasonable to take in all the circumstances in order to prevent the PCPs having that disadvantageous effect? The claimant says it would have been reasonable to have been given a final written warning and extended a review period for the purposes of triggering dismissal by 6 months.

e) Are the claims set out at 5 (a) (ii) and (iii) above in time? If not is it just and equitable to extend time?

f) Should the Tribunal's decision on 24 April 2017 that the dismissal was in time reconsidered under rules 70-72 of the ET Rules?

7. **Discrimination arising from disability (Section 15 EA 2010)**

a) What were the detriments relied upon by the claimant (the claimant relied upon the same four detriments as set out in paragraph 5 above).

b) Has the respondent treated the claimant unfavourably because of something arising in consequences of his disability?

c) If so can the respondent show that its actions were a proportionate means of achieving a legitimate aim? The same legitimate aims are relied upon by the respondent as with the indirect discrimination claim.

d) Are the claims set out at 5 (a) (ii) and (iii) above in time? If not is it just and equitable to extend time?

e) Should the Tribunal's decision on 24 April 2017 that the dismissal was in time be reconsidered under rules 70-72 of the ET Rules?

<u>**The relevant law**</u>

8. The relevant statutory provisions are contained in Section 98 Employment Rights Act 1996 and the Equality Act 2010 Sections 15, 19, 20, and 123.

S98 ERA 1996 provides:

98 General

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it—

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

(b) relates to the conduct of the employee,

(c) is that the employee was redundant, or

(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

(3) In subsection (2)(a)—

(a)'capability', in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and

(b) 'qualifications', in relation to an employee, means any degree, diploma or other academic, technical or

professional qualification relevant to the position which he held.

(4) [Where] the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) **shall be determined in accordance with equity and the substantial merits of the case**.

9. Section 15 EA 2010 provides:

15 Discrimination arising from disability

(1) 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.

(2) 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.

10. Section 19 EA 2010 provides:

19 Indirect discrimination

(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.

(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—

(a) A applies, or would apply, it to persons with whom B does not share the characteristic,

(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,

(c)it puts, or would put, B at that disadvantage, and

(d) A cannot show it to be a proportionate means of achieving a legitimate aim.

11. Sections 20 and 21 EA 2010 provide:

20 Duty to make adjustments

(1)Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.

(2)The duty comprises the following three requirements.

(3)The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

(4)The second requirement is a requirement, where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

(5)The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid.

(6)Where the first or third requirement relates to the provision of information, the steps which it is reasonable for A to have to take include steps for ensuring that in the circumstances concerned the information is provided in an accessible format.

(7)A person (A) who is subject to a duty to make reasonable adjustments is not (subject to express provision to the contrary) entitled to require a disabled person, in relation to whom A is required to comply with the duty, to pay to any extent A's costs of complying with the duty.

(8)A reference in section 21 or 22 or an applicable Schedule to the first, second or third requirement is to be construed in accordance with this section.

(9)In relation to the second requirement, a reference in this section or an applicable Schedule to avoiding a substantial disadvantage includes a reference to—

(a)removing the physical feature in question,

(b) altering it, or

(c)providing a reasonable means of avoiding it.

21 Failure to comply with duty

(10) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.

(11) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.

(12) A provision of an applicable Schedule which imposes a duty to comply with the first, second or third requirement applies only for the purpose of establishing whether A has contravened this Act by virtue of subsection (2); a failure to comply is, accordingly, not actionable by virtue of another provision of this Act or otherwise.

We made the following findings of fact

12. The claimant commenced employment on 20 January 2003 and was employed initially as Admin Support. He subsequently became a Revenue and Benefits Officer on 21 November 2005. He initially worked full time 37 hours per week. His role involved dealing with Council tax enquiries, setting up direct debits, collecting and billing payments, processing data and supporting customers with queries regarding Council tax and benefits either in person or on the phone. There were approximately 50 other colleagues in the department. Mr Steve King line managed the claimant and a team of nine other staff.

13. The respondent used a policy called Impairment Related Sick Leave ("IRSL") until 1 April 2015 when it was replaced by a Health & Wellbeing Passport. IRSL would be granted to an employee when they had an ongoing and recognised health condition and the effect was to set aside absences relating to the medical condition in relation to trigger points for absences. The claimant was granted 8 days in 2006/7, 10 days for each year between 2007 and 2013 and 15 days from 2013-15. 15 days was over and above the usual maximum of ten days.

14. In April 2015 the respondent introduced a new Attendance Management Policy. This provided that high levels of sickness can have a significant impact on the council's services and that the council may therefore need to take appropriate action which could lead to dismissal. There were two procedures depending on whether the employee was on short term or long

term absence. The relevant procedure to the claimant was long term. This procedure could be implemented flexibly. It set out steps the manager should take including meeting with the employee, discuss reasonable adjustments and seeking advice from occupational health. It provided that the manager should meet with the employee and advise that as return to work within an acceptable timescale appears unlikely his employment will be terminated with notice.

15. The claimant's absence levels between 2011 and 2015 were as follows.
    - 2011 – 5.5%
    - 2012 – 48.6%
    - 2013 – 31.4%
    - 2014 – 24.3%
    - 2015 – 89.3%

16. From September 2010 the claimant was permitted to work exclusively at home and was provided all equipment including specialised furniture and all IT equipment. He was released from attending the office for team meetings or counter duties.

17. The claimant's performance targets were adjusted from 85% to 80% success rate for fundamental account changes and 75% to 70% for secondary account changes. He was provided with significant management support by his team leader who spent in excess of 20 times more on HR issues for the claimant than other team members. Despite these adjustments the claimant did not meet his targets but no formal action was taken against him.

<u>Health issues of the claimant</u>

18. The claimant suffers from a number of chronic health conditions. It was accepted that the claimant was a disabled person within the meaning of the EA 2010 for the following conditions:
    - Type 2 Diabetes
    - Chronic renal failure
    - Ischemic heart disease
    - Renal (kidney failure)

19. The respondent disputed that gross obesity is a disability within the meaning of Section 6 of the Equality Act 2010.

20. The claimant had been diabetic since 1996. The condition had been latterly managed by insulin and is recorded as having poorly controlled in 2013. The claimant also suffered with anaemia, underactive thyroid, cardiovascular problems and a common mental health condition. According to an occupational health report which we accept, a combination of these issues is likely to lead to reduced immunity which would invariably make the claimant more vulnerable for self-limiting viral illnesses. From 2015 the claimant had very poorly controlled diabetes, significant problems with cataracts requiring surgery, reported hypos, and diabetic nephropathy (advanced renal failure), water retention and swellings requiring hospitalisation and various other health problems.

21. On 13 July 2015 the claimant returned to work on a phased return and attended work regularly albeit on reduced hours. By 12 August 2015 the phased return started to break down and further absences occurred. After a period of annual leave in early September 2015 and 4 further days of absence the claimant suffered a very serious gallbladder infection which resulted in him being hospitalised from 12 October 2015.

22. There was no supporting evidence before the Tribunal that the gallbladder infection was caused by any of the Claimant's disabilities. The Tribunal had sight of a letter from a Dr Medcalf dated 20 February 2017 that stated that the claimant's starting dialysis was precipitated by him presently acutely with abdominal pain and acute cholecystitis which went on to a perforated gall bladder. However there was not sufficient evidence for us to find that that the gall bladder infection was caused of any of his disabilities. We make this finding of fact as it was much in dispute between the parties.

23. We have no hesitation in finding that the claimant's absences were wholly linked to his disabilities and the myriad of his physical impairments which had a substantial and adverse effect on his ability to carry out day to day activities. It was not possible on the evidence before us to make findings on the cause of each and every absence and nor did we need to. We return to this under our conclusions below.

24. Following a long period of hospitalisation between October and December 2015, it was not clear when the claimant came out of hospital but the claimant discharged himself at some point before 11 January 2016. Mr King had made a referral to Occupational health who were due to see the claimant in hospital but this was delayed due to the claimant discharging himself.

25. The claimant requested and was granted a period of annual leave in December 2015 and was due to return to work on 4 January 2016. He was off sick 4 – 8 January 2016 with breathing problems. He returned to work on 11 January 2016. Mr King had spoken to the claimant in December 2015 and in the first week of January 2016 regarding a phased return to work. It was agreed that this would be structured as follows. 25% week 1, 50% week 2, 75% week 3, 50% week 4 (as the Claimant had struggled with 75%), 75% week 5. The overall phased return equated to 11.8 days lost during that period.

26. An Occupational Health report was requested to consider whether the claimant would qualify for ill health early retirement. The report was dated 8 January 2016. The doctor cited a GP report from 18 December 2015 which reported that the claimant listed "significant problems" impacting on the claimant including awaiting surgery on his gall bladder. The report also states that the claimant was at significant surgical risk due to his comorbidities. The report concluded that it was premature to confirm the claimant was permanently incapable of discharging efficiently the duties of his current employment but also acknowledged he was unfit for work at that time and there was no likely date of return in the foreseeable future.

27. The claimant had the following further periods of absence due to being unwell during his phased return:

- 29 January 2016 – 2 hours
- 1 March 2016 – 6 hours
- 9 March – 3.5 hours

28. Between 12 January 2016 and 20 April 2016 the claimant had a further 16 medical appointments, paid and during work time totalling 48 hours. Further, not included or counted in this 48 hours provided for medical appointments was twice weekly in work time dialysis where the Claimant was permitted to finish work at 3.30pm paid time. In total the claimant had 51.2% absence for the year 2016 up to April 2016.

29. Following the Occupational Health report dated 8 January 2016 a meeting was arranged on 12 February 2016 between Mr King and the claimant. Also in attendance was his union representative Andy Betts. The claimant told Mr King he had to attend dialysis treatment three times a week on Tuesdays Thursdays and Saturdays at 4pm which required time off from work during the week. He also informed Mr King that he would be requiring (separate) surgery to remove his gall bladder, remove a legion on his rib and a cataract operation. The claimant was struggling with the phased return and it was therefore agreed he could revert to 50% hours for a further fortnight then be reviewed. At no time did the claimant or Andy Betts raise any issues of concern regarding the phased return to work plan or that Occupational Health should have been involved with this planning.

30. On 4 March 2016 Carolyn Joseph wrote to the claimant inviting him to a meeting on 10 March 2016. In attendance were the claimant, Mr King, Andy Betts and Carolyn Jospeh. This meeting discussed time off for medicals, taking time out, recording of sick and quality of work. The claimant was then informed that a formal review would be held to consider his continuing employment.

31. On 13 April 2016 Mr King wrote to the claimant inviting him formally to the meeting and he was warned dismissal was a potential outcome. He was also given a right to be accompanied and information was included namely a statement of case prepared by Mr King and was also informed the 8 January 2016 Occupational Health report would be given attention.

32. Mr King's statement of case set out a detailed history of the claimant's employment, absences, medical history, appointments and his understanding of the future potential absences. It also included a number of attachments including notes of home visits and the Occupational health reports. The statement of case, which we accept, provided that the claimant's absences from 2014-2016 resulted in a loss of 9700 work items which was costed at £24,000. We also accept that the claimant's absences had a significant impact on other employees as they had to cover the claimant's duties and the department as a whole.

33. The meeting on 21 April 2016 was conducted by Caroline Jackson, head of Revenue and Customer Support. Both management and the claimant's case were presented. Mr Betts set out a précis of the claimant's current situation. He advised that the claimant had lost substantial weight and his diabetes had improved as a result. It was not in dispute that the claimant would need continued dialysis, cataract operation and potentially a gastric band operation as well as gall bladder surgery. Mr Betts suggested that

there be a review in six months where the claimant's progress could be assessed and a more informed decision taken at that stage.

34. Ms Jackson rejected this suggestion. She concluded that it was highly likely the claimant would require a significant time to convalesce which could not be sustained in light of his already significant absences and that the six month review could not be considered due to the operational pressures. The notes of the hearing record that Ms Jackson informed the claimant his employment would be terminated with effect from today. The claimant agreed that he was informed at the hearing he was being dismissed but neither Ms Jackson or the claimant dealt with the issue of notice in their evidence. We find that although the claimant was informed he was dismissed on 21 April 2016 the issue of notice was not addressed at that meeting.

35. Ms Jackson sent the claimant a letter dated 27 April 2016. It stated "…I have no alternative but to terminate your employment on the grounds of capability due to ill health with effect from today's date." It further referred to an appeal needing to be lodged against the ill health retirement decision within six months of your dismissal "..i.e. not later than 27th October 2016." The letter stated that the claimant would be paid in lieu of notice at the end of May 2016. This denotes that the respondent considered the date of dismissal to be 27 April 2016. The claimant's employment ceased on this date.

36. Both the ET1 claim for and ET3 accepted the date of dismissal was 27 April 2016. We find that the effective date of dismissal was 27 April 2016. This was the date the claimant was unequivocally informed of his dismissal and that he would be paid in lieu of notice.

37. An appeal took place on 10 August 2016. Under the respondent's procedures this was a review rather than a rehearing. It was heard by a panel chaired by Councillor Wesley.

38. The grounds of appeal were set out in a letter from Andy Betts. In summary they were that the claimant was back at work at the time of dismissal and did not have a final sickness warning hence the respondent had "jumped the gun"; the occupational health report dated 8 January 2016 concluded he was fit for work and was premature to conclude he was incapable of performing his duties for the purposes of ill health retirement; that management had overly dwelt on the past and there was a positive prognosis and that he should have had a final written warning and review in six months.

39. Caroline Jackson presented the management case for dismissal in a report. Ms Jackson added in a new reason for dismissal (in addition to returning an FTE post to the service to ensure effective service deliver and effect an improvement in team morale) into her report which had not been present in the dismissal letter. This was explained as to "give Mr Shah his life back to enable him to concentrate on his health and recovery".

40. At the time of the appeal the claimant said his overall health had improved but he was having dialysis three times per week two sessions of which would have needed 1.5 hours time of work. He also still needed gall

bladder surgery and a gastric band which may have then led to a kidney transplant.

41. The panel concluded that the dismissal should be upheld. The reasons given were that the panel were of the view management had done everything possible to support the claimant in his employment and during long periods of sickness and nothing further could be done. The proposal to be issued with a final written warning and review in six months was rejected and the reason given was that the panel thought this would put pressure on the claimant to attend work when he should be focussing his energies on improving his health.

42. The panel were not provided with a copy of the Occupational Health report dated 8 January 2016. The only medical evidence before the panel was in the management statement of case which quoted sections of the report.

43. Councillor Wesley was challenged under cross examination concerning the lack of medical evidence available at the appeal, failure to apply the long term absence policy and also the failure to take into account the claimant's length of service. Councillor Wesley considered that there was sufficient evidence in the management report to base the decision on.

44. We find that although the panel accepted at face value what was in Caroline Jackson's report, this needs to be considered in the context of the purpose of the appeal that was a review rather than a rehearing. Further neither the claimant nor Mr Betts raised the issue of length of service or a lack of an up to date Occupational Health report.

45. We find that the respondent did not fail to follow their absence management procedure. Whilst the January 2016 occupational health report was requested for the purpose of ill health retirement it still set out details in respect of the claimant's health upon which a decision about his prospect of being able to sustain a reasonable level of attendance could be made. The situation had changed from the date of the report in that the report concluded the claimant was unfit for work and there was no likely date of return in the foreseeable future whereas by the time of the claimant's dismissal he was back at work albeit on much reduced hours. We find that the panel were entitled to conclude on the basis of the evidence before it that the management had done all they could to support the claimant and nothing further could be done. We further find that this was the main reason for upholding the appeal. The comments made in respect of the claimant focussing energies on improving his health were in our view extraneous comments and not the substantive reason for refusing the appeal.

Conclusions

Time points and amendment to claim

46. These matters arose between the parties at the start of the hearing and required the Tribunal to make some preliminary decisions which are set out as follows.

47. The respondent's case was that the claims were out of time. The respondent, despite having accepted the date of dismissal was 27 April

2016 on the ET3, asserted at the hearing that the dismissal was effective on 21 April 2016. This was detriment 1. The claimant asserted the dismissal was effective as of 27 April 2017 that detriments 2 and 3 crystallised on 27 April 2016 as this was the date Caroline Jackson wrote to the claimant with her decision.

48. Early Conciliation did not commence until 22 July 2016 (Day A). Day B was 22 August 2016. Accordingly if 21 April 2016 was the last date of the discriminatory acts then the early conciliation was lodged out of time and the Tribunal needed to consider whether it was just and equitable to extend time.

49. The failure to uphold the appeal (detriment 4) occurred on 10 August 2016. It was in dispute between the parties whether this detriment formed part of the pleaded claim. This was material as if it did; it could cure the time points if it could be held to have been the last act in a series of discriminatory acts.

50. We determined that the fourth detriment relied upon namely that the Claimant's appeal was refused did not form part of the pleaded case. The claims were set out at paragraphs 6 – 10 of the Statement of case. (Paragraph 7 which pleaded a direct discrimination claim was subsequently withdrawn). Nowhere in any of these paragraphs does it state that the refusal of the appeal formed part of his claim. The dismissal and the failure to give a final written warning and have a six month review were all set out. The appeal was pleaded at paragraphs 26 – 27 under a heading of "Background". Paragraph 26 is concerned with alleged procedural unfairness at the hearing itself. It is not contained in any of those paragraphs or elsewhere in the Statement of Case that the appeal being refused was in itself a free standing detriment. A Case Management Hearing took place on 23 November 2016 and set down Orders for the preparation of the case for hearing. It is recorded in that Order that Counsel for the claimant had indicated that the focus of the claimant's case would be on the narrow issue of whether there should have been a further adjustment in 2016. There was no mention of the fourth detriment in the record of the hearing or the orders. It is important to also note that whilst it was recorded that counsel would not be held to that indication at that stage, at no point following the Case Management Hearing did the claimant clarify that in fact there was an additional matter that should be an issue namely the fourth detriment.

51. The claimant made an application to amend the claim so as to add in the fourth detriment.

52. The Tribunal granted the application to amend the claim so the fourth detriment could be relied upon by the Claimant. We had regard to the Presidential Guidance and the case of **Selkent Bus Co Ltd t/a Stagecoach v Moore** [1996] UKEAT151/96 and the guidance therein.

53. The application to amend was granted as there were no new factual allegations, no new separate head of claim, no new documents would be needed, the claimant was not seeking to amend the PCP's and a witness was already attending (Mr Westley) who could give evidence. We therefore concluded that the claimant would be far more prejudiced than the respondent if the amendment was refused.

54. We determined that the refusal of the appeal on 10 August 2016 was the last in a series of acts or conduct extended over a period of time and accordingly all of the claimant's discrimination claims were in time in accordance with Section 123 (3) (a) EA 2010.

55. In relation to the unfair dismissal claim we concluded that the claim was presented in time as the effective date of termination was 27 April 2017. We do not accept that the claimant was told unequivocally that he was dismissed with immediate effect on 21 April 2016. This communication occurred on 27 April 2016.

56. In relation to a discriminatory dismissal time does not start to run until notice expires and employment ceases. We found that the date that notice expired was 27 April 2016. Accordingly, even if the amendment to the claim had not been permitted the claimant's claims would have been presented in time.

57. Whilst we did not need to address the issue of whether it would have been just and equitable to have extended time, had we done so, we would have concluded that the claimant did not adduce sufficient evidence to persuade us it would have been just and equitable to extend time. We heard some oral evidence about the instruction of union solicitors but nothing of any substance as to why the claim had been presented when it was.

<u>Application for reconsideration of decision that dismissal was presented in time</u>

58. Following the decision given orally on 24 April 2017 that the claimant's claims were presented in time, Counsel for the respondent made an application for reconsideration of that decision. The application was made in the interests of justice in that the respondent did not get an opportunity to make complete submissions on the time point on the afternoon of 24 April 2017 as counsel for the respondent thought claimant's counsel had conceded the time point in respect of the unfair dismissal claim. The respondent made further submissions on the time point that the dismissal was out of time because on the claimant's case it was the manifestation of a discriminatory policy. In those circumstances time starts to run from the point at which the respondent applied the policy under Section 123 (1) (a) EA 2010. In this case it was the decision to dismiss on 21 April 2016 which was the application of the discriminatory policy. The application was addressed in closing submissions and both parties had the opportunity to address the Tribunal on the application.

59. The Tribunal agreed to consider this application when considering the reserved judgment.

60. The application for reconsideration is refused and the original decision that the claimant's claims were presented in time is confirmed for the original grounds as set out in paragraphs 55 and 56 above. Further, as the claimant was permitted to amend his claim so as to add the fourth detriment namely the refusal of his appeal, which took place on 10 August 2016 this was the last in a series of acts and resulted in all of the claims being in time.

Unfair Dismissal

61. It was common ground that the reason for dismissal was capability and this is a potentially fair reason under Section 98 (2) ERA 1996. The issue in dispute was whether the respondent had acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the claimant.

62. The claimant's case in this regard was that the position in respect of his health had changed by the time of his dismissal. The procedural and substantive defects were failure to obtain up to date Occupational Health Report or other medical prognosis. Counsel submitted that the claimant had returned to work full time and had not had any absences after 9 March 2017.

63. Whilst we agree that an up to date medical report might have been helpful we have concluded that there was sufficient evidence for the respondent to have reasonably concluded that the claimant was unlikely to be able to sustain a regular pattern of attendance in the foreseeable future. We are of the view that the respondent was entitled to look at the claimant's past attendance record when making this assessment. The respondent did not just look at the past though. The report from 8 January 2016 set out in detail, based on reports from the claimant's GP and various consultants, the claimant's medical issues. The report states that the claimant had multiple medical problems including diabetes, chronic renal failure, ischemic heart disease and gross obesity amongst others. It also set out various surgical procedures that the claimant was awaiting none of which had changed by the time of dismissal or even appeal.

64. The claimant had managed to return to work at the time of dismissal but we do not accept that this was sufficient enough of a change in position to have rendered the dismissal procedurally unfair. The relatively short period of time between 9 March 2016 and his dismissal where he managed to attend work without any absence was not in our view sufficient to outweigh the very lengthy and prolonged periods of absences that had gone before nor was it anywhere near enough to support a contention the claimant was somehow going to be able to provide a level of attendance that was reasonable to the respondent. In reaching this conclusion we also take into account the medical appointment absences and dialysis time off that was not included in the 51% absence rate for 2016 up to April.

65. In addition, the claimant himself accepted that he would need time off in the future for further surgical procedures.

66. The cost to the respondent of the claimant's absences and potential future absences and the impact of his absences on his colleagues and the service were such that it was within the range of reasonable responses to conclude these could not be sustained further.

67. Given the level of past absence and likely future absence we find that the decision to dismiss was fair and within the range of reasonable responses. The unfair dismissal claim is therefore dismissed.

Disability Discrimination

Disability – gross obesity

68. We were not able to try and assess whether gross obesity in itself was a free standing disability as there was not sufficient evidence before the Tribunal to do so. We also found that it was not possible to assess each absence and reach a conclusion for each absence and we do not accept that that is necessary in any event given the claimant's satisfaction of the definition of disability in relation to his other health issues.

The PCP for the Section 15, 19, 20 & 21 claims

69. Counsel for the respondent submitted that the first PCP was invalid as it was not neutral. The first PCP was put as the policy of dismissing employees as a result of high absence levels and was agreed in the list of issues. Further the second PCP; put as the process by which employees are dismissed for high absence levels i.e. dismissing on past attendances and an occupational health report from January 2016, was also invalid as it was entirely individual to the claimant and since it was related to him could not be extrapolated to others.

70. It is for the Tribunal to identify the PCP. We concluded that whilst the first PCP may have been put in reverse in the list of issues it was readily understood by all parties to be the requirement by the respondent for employees to sustain a regular and consistent level of attendance and is a valid PCP. That PCP applied to all employees of the council. That was the policy that put the claimant at the disadvantages set out as he was unable to comply with that policy due to his disability and the effect the disability had on his ability to regularly attend work. The disadvantages were the four identified above in paragraph 5.

71. In relation to the second PCP we have concluded as follows. The second PCP was the process by which the employees are dismissed for high absence levels. We have identified that PCP as the policy that was used by the respondent to manage their requirement of a regular level of attendance which was the respondent's absence management procedure.

72. We did not accept that this was an invalid PCP as it was individual to the claimant. The policy applied to all respondent employees. The dismissal on past attendances and an occupational health report from January 2016 were factors taken into account when applying the policy. Each case managed under the policy may have individual factors but this does not change the overall application.

Indirect Discrimination

73. Counsel for the respondent submitted that the claimant was unable to establish group disadvantage as there was no evidence that people with the same disabilities as the claimant would have faced the same difficulties as him. Counsel for the claimant submitted that the group disadvantage could be established as someone with his disability and overlapping conditions would have received the same treatment. We preferred counsel for the claimant's submissions in this regard as we concluded that it was

obvious someone with the claimant's disability and overlapping conditions would have been subjected to the same treatment as the claimant.

Objective justification

74. Turning now to the issue of whether the respondent can show that its actions were a proportionate means of achieving a legitimate aim. These are set out at paragraph 5 (g) above.

75. We conclude that the first two legitimate aims correspond to a real need which was a need for employees who can provide reliable and consistent attendance at work and a process by which to judge that need. We accept that dismissal of the claimant, not giving him a final written warning, not giving him a further six month period to improve attendance and refusing his appeal were all proportionate means of achieving those aims. The reason they were all proportionate means were that the respondent had at the time of dismissal reached a point where in our view they had already provided a significantly high level of support to keep the claimant in work. these included:

- Allowing the claimant to work from home and providing all necessary equipment to do so;
- Adjusting the trigger levels so as to enable the claimant to have more time off than the usual procedure would allow thus delaying application of the previous absence management procedures
- Allowing paid time off to attend medical appointments
- Providing additional management support
- Adjusting performance standards

76. We found above that the respondent did not just look at past attendance when considering if the disadvantages were a proportionate means of achieving a legitimate aim. The respondent looked at the claimant's future prognosis including bouts of surgery and reasonably in our view concluded that he was unlikely to be able to achieve regular and consistent attendance in the future.

77. Notwithstanding these adjustments the claimant was unable to meet the requirement to attend work on a regular and consistent basis. We make no criticism of the claimant in this regard; he is patently seriously disabled and suffers from a range of chronic health conditions. Whilst we sympathise with the claimant, we find that the disadvantages complained of were a proportionate means of achieving those aims.

78. The other legitimate aim relied upon in respect of the decision to refuse the appeal was described as a need to safeguard the claimant's health. It was common ground that this only related to the decision not to uphold the appeal or the fourth detriment even though the appeal letter referenced need to safeguard the claimant's health as reason for rejecting the suggestion of the final written warning and six month extension as an alternative to dismissal.

79. Whilst we could accept in abstract that a need to safeguard and employee's health might amount to a legitimate aim we do not accept that the respondent achieved it by way of proportionate means in this case. It was not proportionate to conclude that the claimant's health would be

safeguarded by ruling out this option as there was simply no medical evidence upon which to base such a conclusion. The conclusion appears to have emanated from Caroline Jackson's management case to the appeal hearing and was accepted and taken on board by the panel. Had this been the only or primary legitimate aim relied upon by the respondent then we would have concluded that the claimant would have succeeded in this element of his claim. However we are satisfied that the appeal was not refused on these grounds. The primary and main reason for rejecting the appeal was that management had done everything possible and nothing further could be done was a proportionate response. The claimant's claim of indirect discrimination is therefore dismissed.

Discrimination arising from disability

80. Having already dealt with the validity of the PCP's we accept counsel for the claimant's submissions that the four detriments relied upon were effectively caused by the claimant's absences. The absences were the "something" arising from his disability. We were not required in our view to break down each absence and decide whether it was related to obesity and in any event this was not possible given the evidence before the Tribunal. A common sense approach has to be taken in cases such as this where there are multiple and lengthy absences for a myriad of medical reasons, all of which may be inter-related. We conclude that the claimant's absences were on the whole both disability related and the cause of the detriments complained of. That therefore left the issue of whether the detriments could be objectively and we conclude that they can be for the same reasons as set out above. The claimant's claim for disability arising from discrimination is therefore dismissed.

Failure to make reasonable adjustments

81. The same PCP's and legitimate aims were relied upon for this head of claim as the S15 and S19 EA 2010 claims.

82. The reasonable adjustments contended were that the respondent should have given the claimant a final written warning and extended the review period by six months. It was submitted this would enabled the claimant the opportunity to maintain improved attendance and time for a further Occupational health report to be obtained.

83. We have considered carefully whether the respondent took such steps as it was reasonable to take in all the circumstances in order to prevent the PCPs having the disadvantageous effect? We have concluded that the respondent did indeed such steps. We accept that it would not have been reasonable for the respondent to have issued a final written warning or granted the claimant a further six months. In doing so we refer to the already considerable and extensive adjustments that had been made by the respondent to date which are set out in our findings of fact and paragraph 75 above. The respondent was at the point of dismissal entitled to say enough was enough in light of the level and past and potential future absence and the impact financially and to the organisation. They were also entitled to conclude that the claimant's attendance had not improved sufficiently to warrant making the adjustments sought. There had been no change in the claimant's prognosis and the respondent was aware that further potentially prolonged absences would happen in the future due to

the various surgical procedures that were planned. Although the claimant had sustained a level of attendance for a period of 4 weeks or so it was in our view was reasonable to judge that against the previous 4 years of poor attendance. The claimant's claim for failure to make reasonable adjustments is dismissed.

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Employment Judge Moore

Date 27 June 2017

JUDGMENT SENT TO THE PARTIES ON

...............20 July 2017..

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FOR THE TRIBUNAL OFFICE