EMPLOYMENT TRIBUNALS

Claimant: Mr P Sherrington

Respondent: GM Buses South Limited

HELD AT: Manchester **ON:** 31 July-2 August 2017

BEFORE: Employment Judge T Ryan
Ms J K Williamson
Mr A J Gill

REPRESENTATION:

Claimant: Ms G Abbott, non-legal representative
Respondent: Mr S Meyerhoff, Solicitor

These are the reasons for the tribunal's judgment which was previously sent to the parties. They are provided in writing pursuant to a request made under rule 62(3) of the Employment Tribunals Rules of Procedure 2013.

REASONS

1. By a claim presented to the Tribunal on 6 December 2016 Mr Sherrington, the claimant, alleged that he was unfairly dismissed by his employer, the respondent, on 29 September 2016, and brought claims of disability discrimination and in respect of a flexible working request.

2. The issues that the Tribunal had to decide were:

   2.1. whether the respondent was in breach of its obligations under section 80I of the Employment Rights Act 1996 in respect of a flexible working request;

   2.2. whether the claimant was unfairly dismissed having regard to section 98 of that Act;

   2.3. whether the claimant was a disabled person within the meaning of the Act;

2.3.1. whether the respondent failed in its duty to make reasonable adjustments, (and in particular whether that duty arose); and

2.4. whether the dismissal of the claimant was an act of discrimination because of something arising in consequence of the disability.

3. The issues remained in dispute throughout the proceedings, and we have decided them all.

4. The claimant gave evidence in support of his claim. He provided a witness statement and a disability impact statement. On behalf of the respondent we heard evidence from Mr Ian Ralph, the Assistant Operations Manager at the Wigan depot of the respondent which was the claimant's base; Mr Alex Crane, the Operations Manager; Mr Ross Stafford, Head of Service Delivery; and Mr Ben Jarvis, Commercial Director.

5. We saw in addition a bundle of documents to which we will refer where necessary by page number, and at the conclusion of the evidence Mr Meyerhoff for the respondent produced outline submissions in writing.

The Facts

6. The Tribunal makes the following findings of fact:

7. The claimant's employment started in 2005 with a bus company then known as First Manchester. His employment passed to this respondent under the provisions of the TUPE regulations in December 2012.

8. In late 2015/early 2016 the claimant made informal requests to his employer to change his shift pattern, and when those informal applications were rejected he made a formal request under the Regulations on 7 February 2016.

9. Together with the respondent's form that he completed at pages 84-86 he sent a covering letter at page 79 explaining the reasons for the request. He said that he needed a more structured working week so he could contribute more to his family's needs, and he referred to the fact that he and his partner, Ms Abbott who has represented him in these proceedings, have guardianship of their granddaughter, rather than the child's mother, his daughter. He said that his partner took care of the child, as he put it, "24/7", but he she herself had health problems, and that she had been told she needed to have two further operations for health reasons but could not commit to them because he said that they could not get childcare during the unsociable hours that he worked.

10. The claimant referred also to the fact that his son at the age of 13 had started with the Air Cadets but there was no public transport to get him home at 9.30pm during the week – apparently the Air Cadets met on Monday and Thursday – and none at all on Sundays, and the son wanted to go into the Navy so it was important for him to attend. The claimant asked, as he had done before in one of his informal requests, if he could work Monday to Friday 9.00am to 5.00pm to make it easier to arrange his domestic affairs.

11. The respondent has its own flexible working policy. That provided that a request must be made on a form, there would be a meeting to deal with it, the claimant could be accompanied at the meeting by a colleague or trade union representative, that the manager would consider the arrangements requested and weigh up the potential benefits to the employee and to the company against any adverse impact of implementing the changes. A decision would be communicated in writing within 14 days, and if it was rejected the letter would state the business reasons for refusing it, provide an explanation as to why the grounds for refusal applied and provide details of the right to appeal. There was a right of appeal within 14 days and a meeting would be arranged within a similar time period and the result again communicated.

12. The claimant's form at pages 84-86 described his current working pattern as "earlys, days, splits and lates between 4.00am and 12.30am".

13. It is common ground that the 226 drivers working at this depot did a variety of shifts. Early shifts started early in the morning and went through the day. Late shifts operated in a converse way. Say shifts or middle shifts as they were known covered the peak periods. Some drivers work split shifts.

14. The only people, on the evidence, who worked 9.00am to 5.00pm shifts were three women who worked on what was called the "F" shift. They did not work strictly 9.00am to 5.00pm but slight variations on those hours. It was the respondent's case that at no time during the period of this application was there any vacancy for anybody else to work that particular shift, in other words consistently 9.00am to 5.00pm on a Monday to Friday.

15. The claimant attended a meeting with Mr Ralph on 4 March 2016. He was represented by Mr Wetherby of the union. A note of that is at pages 89-90.

16. On 15 March 2016 Mr Ralph wrote to the claimant citing as reasons for refusing the request "insufficiency of work during the periods the employee proposes to work and the inability to reorganise work among the existing staff" and the claimant was informed of his right of appeal. It is right to say that Mr Ralph did not explain in that letter, as apparently under the policy he should have done, how the grounds for refusal apply in the circumstances, but apart from that he complied, it was agreed, with the provisions of the policy.

17. The claimant appealed by a letter of 26 March 2016 (pages 93-94) and he was invited to attend an appeal hearing on 13 April 2016 where Mr Crane would consider the appeal. Again, the claimant was represented. The minutes of the appeal are at pages 96-97. There was a discussion around the circumstances of the appeal. Mr Crane explained that he was unable to offer 9.00am to 5.00pm Monday to Friday. He discussed the claimant's domestic commitments, in particular the need that the claimant had to be able to take and collect his son from Air Cadets on two days in the week and get him to drumming lesson in Warrington on another day, and indeed try and help his daughter out because she worked as a door person and therefore would need assistance with transport, as recorded Mr Crane said there were three openings on the "F" rota. Mr Crane accepts that that is what the note said, but in fact the "F" rota was full, but what he had were openings which enabled him to offer the claimant some flexibility

with effect from the rota changes that would be implemented in the July about to follow. The proposal that was offered was that on Sunday the claimant would work a late shift; on Tuesdays and Wednesdays a middle shift; and Thursdays and Fridays a day shift, and that would accommodate the claimant who had said to Mr Crane that he needed to be home by 10.00pm on Monday to Thursday. The claimant's days off were then to be Monday and Saturday.

18. Mr Crane offered that. There was an adjournment. Mr Sherrington spoke to his partner and having done so said to Mr Crane that he was happy to accept the proposal and Mr Crane confirmed it would be done following the rota changes that were being implemented in July.

19. It is common ground that following that no letter was sent to the claimant specifying that that agreement had been put in place and that the appeal had been allowed to that extent. It is common ground, however, that the claimant understood that the alternative shift arrangement was to start upon the rota revision in July 2016.

20. Mr Crane's evidence to us was that in fact he was offering the claimant even more flexibility because he said that he would have been prepared to alter the shifts every time the rota changed if necessary, and the rota changed some three or four times a year, but that was not recorded and it was not asserted at any later stage as far as we can see in the proceedings that were to follow.

21. Be that as it may, the claimant's case is that by not having put it in writing and by Mr Ralph not having given the explanation that the policy provided for, the respondent was in breach of its obligations under the relevant provisions to which we will come in due course.

22. Before that could be implemented the claimant began, on 3 May 2016, a period of sickness. That sickness was certified and the sick notes in this case are set out at pages 98-105.

23. By way of summary, there were sick notes of 17 May 2016, which certified the claimant as being unfit for work for four weeks from 3 May to 31 May another certificate for 31 May to 30 June 2016 and further note for one month until 24 July 2016 all citing the same reason: "stress at home".

24. On 8 July 2016 the GP issued a certificate for one week citing as the reason "He has multiple stress in his life and due to that unable to attend meeting. Starting antidepressants and referral to psychology".

25. On 15 July 2016 there was another sick note signed by a different doctor signing the claimant off until 24 July 2016 with a slightly different reason: "He has multiple stress in his life and has been referred and had one session of counselling. He is also presently on medication". By that date the claimant had started medication and had the first of what proved to be eight sessions of counselling.

26. On 22 July 2016 a sick note for three months from 17 May to 17 August 2016 was issued giving the reason on this occasion as, "From 17/5/16 he started

stress at work and home and he has severe depression and PHQ9 score 24. He is taking antidepressants and waiting for psychotherapy".

27. On 16 August 2016 a two month sick note was signed citing stress related problem and depression. The last sick note in this case was signed on 14 October 2016 for one month to 14 November 2016, again citing stress related problem and depression.

28. On each occasion the doctor who certified the claimant as not fit for work did not suggest, as the form allows, that at any point the claimant could be fit for work with adjustments such as a phased return.

29. Mr Ralph wrote to the claimant on 17 May 2016 inviting him to contact him with regard to a sickness counselling interview, which was to be on 23 May 2016. The notes of that meeting record: "Mr Sherrington has to have gall bladder removed." (It is likely that was a reference in fact to Ms Abbott) and as far as Mr Sherrington was concerned, "Mr Sherrington is not sleeping, has lost weight and it is playing on his mind. There is no sign of a return to work. CMO (Company Medical Officer) appointment to be made".

30. The claimant was referred to Medgate Wellbeing Partners for an appointment which took place with Dr Kumar on 9 June 2016. Dr Kumar's report (page 115) recorded that his understanding was that the claimant had been absent for five weeks due to symptoms of stress. Mr Sherrington explained that his brother-in-law died suddenly. Mr Sherrington's evidence was that that was from gallstones and he died on the way to hospital or at hospital, without having recovered. The report contained:

> "More recently his partner has been unwell and was admitted to hospital with inflammation of the pancreas. Although the precise cause of this is unknown, she has been listed for surgery to remove her gall bladder. He has been very worried about her health and has clearly (sic) caused him stress, particularly since his brother-in-law had problems with gallstones. He reports difficulty sleeping, problems in concentrating and feeling somewhat low.
>
> Taking everything into consideration, and the impact on his concentration, I believe that Mr Sherrington is unfit to be driving a bus. I feel that he would benefit from counselling and I was wondering whether Stagecoach have any facilities to arrange this otherwise I will ask him to consult his GP.
>
> Overall the prognosis for improvement and recovery is very good but since there is still some uncertainty with regards to the stressors in his personal life, it is difficult to provide any timescales for when he will be able to return to work."

31. Mr Ralph wrote to the claimant again on 15 June 2016 suggesting a further sickness meeting which eventually took place on 24 June 2016.

32. In the meantime Mr Ralph had decided to refer the claimant to an alternative Occupational Health provider known as "Joints and Points". The reason for that was he said that a sister organisation of the respondent had found that the reports provided by that organisation were more comprehensive. There was to be

a medical appointment with that provider on 17 June 2016. The arrangements for that went wrong, the reason is not material. It was not until 1 July 2016 that the claimant saw the nurse practitioner, Rachel Lowe, at "Joints and Points". Her report set out at pages 124-131 was sent to the respondent and Mr Sherrington.

33. At the beginning of page 126 Ms Lowe set out a detailed account. She recounted the history. A lot of it is consistent with what had already been recorded by Dr Kumar. Mr Sherrington expanded upon Ms Abbott's difficulties, about being in hospital three times, and Mr Sherrington said, according to the report, if he feels he must return to work his wife might become poorly and he would not be able to get home in time. He had referred to the care of his granddaughter and the need for his son to attend the Air Cadets. He reported that he had been offered an adjustment to his shifts, although the detail given is slightly different from that we saw. That may well be due to the fact that the respondent did not send him a letter confirming the changes, but nothing turns on the differences.

34. As regards his current health and medical situation, Mr Sherrington described some of his health issues as a child and that he would start counting as a means of coping, and he told Ms Lowe during the interview that he was counting the lines that she was writing as a form of coping strategy. The report is detailed and extensive. Mr Sherrington disputes that it was a proper report and says that it was simply a chat. What is of significance is that, according to Ms Lowe, she told Mr Sherrington what she was saying. She said that she thought Mr Sherrington was fit for work. Mr Sherrington disputes that was said. However he accepted the next entry, which is that he reiterated the hours he was working were not suitable with the issues he had with his home life, and he accepted that Ms Lowe explained to him that that was a management issue and not one for Occupational Health.

35. The specific questions that were asked about whether the claimant was medically fit and capable of managing the role resulted in the same answer: that Mr Sherrington was fit and capable. She said that "Mr Sherrington does have issues in his personal life but he appeared to be coping well with them and he was trying to achieve hours that would accommodate the issues he has with his personal life".

36. As to the likely return date, Ms Lowe said she could see no reason why he could not return to work at the earliest date convenient, and then with regard to accommodation and adaptations she recommended access to psychotherapy, to discuss the issues he now has related to when he was a child and the stresses in the home life, and she also recommended a management meeting to discuss the contents of the report. She repeated that she had explained to Mr Sherrington that in her opinion he was fit and well to be in work with recommendations for psychotherapy intervention. Mr Sherrington disputes that that is what he was told.

37. In our judgment it is likely that that is what a practitioner who has clearly made a careful record of a number of issues is likely to have said. It is unlikely, in our judgment, that she would have said either something different or not said that if that was her opinion. Whilst we can accept that in such an interview there may be

some small details that have not been accurately recorded that does not undermine our conclusion that the claimant was told the substance of the report by Ms Lowe at the time.

38. On 5 July Mr Ralph, having seen the report, rang Mr Sherrington. Mr Sherrington was asleep and said that he would call Mr Ralph back within ten minutes and did not do so, but it is common ground that in that very first call, although the claimant may just have woken from sleep, Mr Ralph said that the report had stated that he was fit to return to work and Mr Ralph did require the claimant to come and see him that afternoon at a suitable time. Thereafter whilst Mr Ralph left messages the claimant did not revert to him so on 6 July Mr Ralph put it in writing and said he was giving the claimant a legitimate instruction, that he "must attend work tomorrow in full uniform at 10.00am and report to the depot", and that failure to comply with that instruction would lead to him being seen formally where the outcome could be dismissal.

39. On 7 July 2016 the claimant did not attend. Mr Ralph wrote to the claimant formally (page 135) putting him on disciplinary action for what he described as "unauthorised absence/failure to follow a legitimate instruction following the Occupational Health report".

40. On 8 July 2016 Mr Sherrington, or Ms Abbot on his behalf, wrote a letter explaining that he could not attend and it is likely that the sick note dated 8 July 2016 was obtained in that regard.

41. Mr Crane wrote on the same day fixing a further date for hearing on 11 July 2016 repeating the charge. There was a telephone conversation between Mr Crane and Mr Sherrington on 11 July 2016 and the claimant said he was having blurred vision and feeling dizzy, and Mr Crane advised him that he needed to inform the DVLA because of that, because he needed the DVLA to say whether the claimant was fit to drive a bus.

42. On 11 July 2016 Mr Ralph wrote again (page 140) fixing a hearing for 13 July 2016 for the claimant to attend for a long-term sick counselling interview. The claimant did attend. He was represented by Mrs Vallender of the union and Mr Ralph accepted that contrary to the policy of the respondent he did not discuss the latest Occupational Health report with him that day. He explained he was merely ascertaining whether the claimant was fit to attend the formal hearing the following day. The claimant said "yes" to that and therefore that was put off until the following day.

43. Mr Sherrington attended the depot for the disciplinary hearing with Mr Ralph. He brought with him three documents: at page 143 a subject access request; page 144 a request to make an audio recording of the meeting, which Mr Crane refused notwithstanding which Mr Sherrington tells us he did make an audio recording; and finally a document on pages 145-148 described as a "statement of fact" addressing the various allegations that were made.

44. The minutes of that meeting, which begin at page 152 were taken by Ms Kirkpatrick the acting personnel officer. Mr Sherrington attended with Mrs Vallender, his union representative.

45. It is common ground that prior to the start of the meeting that took place that day Mr Sherrington was not told that the question of his capability to continue in work would be considered. It is clear from the minutes that the charge that was to be discussed was of unauthorised absence from work and failure to follow a legitimate instruction was set out.

46. The minutes make it clear that within a very short time that this meeting began there was discussion of the claimant's capability.

47. There was a discussion of the Occupational Health report. Mr Crane went through a number of symptoms that the claimant recounted (page 158); palpitations, night terrors; insomnia, losing weight; lack of concentration; anxiety; a counting compulsion; fatigue and headaches, and then at the bottom of page 159 Mr Crane asked Mr Sherrington could he give an assurance he would be back in work within a month, and Mr Sherrington said "No". Mr Crane asked if he thought he should be a PCV driver again. Mr Sherrington said that he did not want to be on the dole and that he thought the DVLA would think he needed help and he might not be able to keep his licence. Mr Crane asked Mr Sherrington did he see himself returning to work in the short to medium term. Mr Sherrington said that maybe the tablets would kick in but he could not give a date as to return. Mrs Vallender said to Mr Crane that Mr Sherrington was depressed and he could be given a bit more time. The meeting was adjourned and reconvened.

48. Mr Crane set out the history(160-161). He concluded that the claimant had been consistently unable to advise a return to work date; he had detailed extensive health issues that DVLA would investigate and which may impact upon his suitability to hold a licence; that he had difficulty in remembering work related issues, not all of which were discussed with the company medical officer. Mr Crane said,

> "You have also failed to keep the company informed of your non-attendance at pre-arranged meetings. Therefore I am dismissing you from company service with 11 weeks' pay in lieu of notice for capability and failure to follow instructions."

49. The sanction was notified in a document that the claimant signed on 14 July 2016. Mr Crane wrote to the claimant on 21 July 2016 saying that in response to a request the reasons for his dismissal were contained within the minutes and letter from Mrs Kirkpatrick. The outcome was formally confirmed in a letter of the same date (165).

50. We record that Mr Crane said that he did not dismiss the claimant for unauthorised absence because it was clear to him during the disciplinary hearing or dismissal hearing that the claimant's absence was in fact not unauthorised because he had submitted sick notes that covered his absence. Although the outcome letter does not make the point explicitly, by omission it is clear that was not a matter that Mr Crane was relying on in dismissing the claimant. Mr Crane confirmed that in evidence.

51. Mr McDonald and Mrs Vallender, who were officials of Unite the Union, wrote an appeal on the claimant's behalf on 26 July 2016 saying that the grounds for

appeal were “more time” by which was meant and understood to be more time in order for the claimant to recover and be able to return to work.

52. An appeal hearing was fixed in front of Mr Stafford for 19 August 2016 and it took place on that day(177 to 185). The claimant accepted in evidence that the hearing in front of Mr Stafford was fairly conducted, that the notes were a reasonably accurate record of what was said, and that he had had a reasonable opportunity to put forward his point of view.

53. Mr McDonald who spoke for him said expressly, and it is recorded on page 177, that the grounds for appeal are “more time for Mr Sherrington to make a recovery and return to work”. The union also took the point that the claimant had been dismissed partly for capability but that had not been raised before the disciplinary hearing or the dismissal hearing.

54. There was a lengthy discussion in front of Mr Stafford beginning halfway down page 177 and continuing throughout almost the entirety of the rest of the notes about the claimant being able to return to work.

55. It is clear that Mr Stafford asked Mr Sherrington about all the symptoms that Mr Crane listed and we have quoted, and significantly by this time the claimant had made contact with DVLA and had been told, and Mr McDonald reported this, that he was fit to drive as far as the DVLA was concerned. He also reported that his stress levels had been reduced. By this point he had been on medication and he had had the eight sessions of counselling that the GP had arranged. Having discussed the medical position Mr Sherrington also explained he would need time off after his wife had her operation to help her, and Mr Stafford said the company would do everything they could to support that.

56. Mrs Ellis, the acting personnel manager, asked the claimant about the timescale for returning to work, and Mr Sherrington said that he was not sure he knew it was up to him. He could not explain in evidence what he meant by that. In the passages that followed Mr Sherrington did report that he had had the counselling and had been told that he could go back if he felt he needed some more. Mr Stafford said it was clear that Mr Sherrington did need more and asked Mr Sherrington to make further appointments with the psychotherapist plus the GP as Mr Sherrington needed treatment. He asked Mr Sherrington when he had last spoken to his GP, and Mr Sherrington was not sure. He explained about the sick note that was due to expire in October 2016. Mr Stafford said that it was important that Mr Sherrington receive additional care and not seeing his GP for four weeks was not really doing that, and he asked Mr Sherrington how soon he could get an appointment with his GP. Mr Sherrington said that he had to phone up and get an appointment. Mrs Ellis said that Mr Sherrington should do that as a matter of urgency.

57. There was then a discussion as to the circumstances of the dismissal. Mr Sherrington confirmed he had been off sick since 3 May 2016 and Mr Stafford pointed out that he had already been off sick for four months with no likely return to work. Mr Sherrington said that it was the way he was dealt with that caused him problems and that as at that day he was unable to give Mr Stafford a date when he could resume work although he was feeling better and he knew that the

date was close. Mr Sherrington went on to say that he thought the dismissal was unfair and discriminatory and that procedures had not been followed.

58. The claimant had previously referred to discrimination in the informal request for flexible working, saying that it was women who were allowed to work 9.00am to 5.00pm and he was a man and that was discrimination. He asked Mr Stafford to reconsider the decision to dismiss. Mr Stafford said he would certainly consider the points but failed to see how it was discrimination, and he pointed out that a person needs to prove he has been dismissed for one of the following: age, race, sex, religion and disability. He queried why Mr Sherrington thought that was the case and he confirmed that Mr Sherrington had been dismissed due to capability, long-term sickness but under 12 months. He said he needed to understand why Mr Sherrington was saying these things, and that to say discrimination was a significant allegation and Mr Sherrington should be certain before he made that claim.

59. Mr McDonald said that he would like more time and asked for an adjournment to discuss the claim of discrimination and there was a break.

60. It appears that in this adjournment Mr Sherrington also spoke to his partner again and when the meeting resumed Mr Sherrington said it was discriminatory due to his mental health problems. Mr Stafford said he needed to know when the mental health problems had started. Mr Sherrington said it was some time before, and Mr Sherrington was asked whether he had mentioned this to the GP when he first went off sick. Mr Sherrington said he had not, he was suffering and just assumed it was his working pattern and it was his wife who advised him to see the GP.

61. According to the notes, Mr Sherrington said that he was a lorry driver working the same shifts. Mr Sherrington denied that he said that.

62. Of some concern to the Tribunal was that the respondent produced during the course of the hearing a further document, namely Mr Sherrington's LinkedIn profile, which appears to suggest that he may have been a lorry driver for a company that was named there. Mr Sherrington was unable to explain how that profile came about. It was only made aware to the respondent's advisers because, shortly before this hearing. Apparently one of the solicitors acting on behalf of the company had had her profile searched from Mr Sherrington's profile, otherwise the respondent would not have known about it.

63. Be that as it may, whether the claimant is right or wrong about having said that does not affect the outcome of the case. It was a matter of some suspicion on the part of the respondent but we do not feel we can or need place any particular reliance upon it in deciding any issues of credibility.

64. Mr Stafford decided at the end of this meeting not to make a decision there and then, feeling he did not have all the facts. He told Mr Sherrington that he would adjourn the appeal hearing to allow Mr Sherrington to attend his GP so that he could explain any issues. An appointment would be made with the company medical officer when further questions would be asked regarding the stress at home. Mr Stafford said that he would also need to know how much more time

would be required before Mr Sherrington could return to work. He urged Mr Sherrington to follow any advice that his GP offered and pointed out that the company had a confidential counselling service that was available. Mrs Ellis confirmed that she would make the referral to the medical officer and the appeal hearing would be reconvened.

65. The result of that was that Dr Kumar saw the claimant again on 26 September 2016 and produced a report (page 187) the same day. He recounted what had occurred leading to his initial opinion that the claimant was unfit for work. He recorded that the claimant had started on antidepressant medication three months earlier and he had had counselling. He said this:

> "He reports there has been no real change in his condition. He continues to experience stress with anxiety and low mood as well as poor sleep and tiredness. He mentions that as a child, he was constantly be counting things behind people (sic). This settled when he was in his teens, but this has now returned again.
>
> With regards to his job he feels that he may be unsafe to drive and is worried about a risk to passenger, particularly if he is distracted by this constant counting, as well as other symptoms as described.
>
> As you mention he has recently also cited work related stress which is said to be longstanding going back to when Stagecoach took over the business. He informs me that he has mentioned these issues to his managers in the past. He has, he says, not sought any specific medical advice on this matter in the past.
>
> Following my assessment I felt that he is suffering with a moderate to severe depressive illness. Taking everything into consideration, including his own beliefs I believe that he is unfit at the present moment to carry out the duties of his role. The prognosis for improvement and recovery remains good, but it is difficult to provide any foreseeable timescales of when this is likely to occur."

66. The appeal hearing was reconvened by Mr Stafford on 7 October 2016. The same people were present. The claimant accepts that the note is reasonably accurate.

67. Mr Stafford asked the claimant whether he had seen the report from Dr Kumar and Mr Sherrington confirmed that he had, although he was uncertain about that in evidence before us. He asked Mr Sherrington whether there was any change in his health and whether there had been any improvement since his first meeting, and whether his stress balance (70% work/30% home) had changed since the first appeal hearing. Mr Sherrington said he just wanted to know the decision. He said he agreed with the capability but not with the conduct. It is possible that that was mis-described in the notes. We sought to clarify it with witnesses but it was not clear to us whether the note was right or not. In the end we decided that it was not a material factor.

68. Mrs Ellis asked Mr Sherrington what he wanted from the outcome and the notes record this: "Mr Sherrington said that he was not able to return to work. He said

he should have been asked about his health before any formal interview took place."

69. Mr Stafford pointed out that the claimant had been dismissed on the grounds of capability. He said the CMO had reached the conclusion that "currently Mr Sherrington is not fit to return to work but this is not a permanent condition and hopefully a recovery will be made". Mr Stafford asked whether there was anything else he needed to consider and Mr Sherrington again said he just wanted to know the outcome.

70. There was an adjournment of 45 minutes and then Stafford read out a script that he had prepared which is set out in full (184).

71. The material passages are these:

> "Your appeal was lodged on the basis of requesting more time to allow your recovery. I was minded to defer the decision and allow extra time for your recovery and to seek additional medical evidence from the Company Medical Officer. … Sadly, it would appear there has not been any further recovery and that you remain unfit for work. The Company Medical Officer has indicated that you will make a recovery from this illness but that no immediate timescale can be placed on this. As such a recovery may be made in two months, or four or six, but it does place me and the Company in a difficult situation. Both I and the Company like to support members of staff and give them every opportunity to recover and maintain their employment; however on the other hand we do also have to ensure the Company has sufficient resources to deliver services. If a specific timescale of recovery were available I would be happy to decide whether the company could allow more time for recovery, as it is, that is not available to me.
>
> When an employee is unfit on a long-term basis this is classed as a 'capability' issue and this was part of the reason Mr Crane dismissed you.

72. Mr Stafford went on to record that he considered whether the claimant fell under the remit of the Equality Act as having a disability. He did not make a conclusion about that but went on to say he was:

> "minded to consider whether there was any appropriate alternative employment which may be suitable. Regrettably, I conclude that even subject to your fitness there are no positions at all in the Wigan area, and any positions in Manchester require the ability to drive a PCV vehicle or be a trained engineer. As such, with regret, there are no alternative employment opportunities for you."

73. Mr Stafford said he had decided on a twofold decision:

> "Firstly, regarding the failure to follow instructions part of the decision, while indicated by the Company Medical Officer that you were fit to return to work, I acknowledge that you remained in possession of a GP's sick note and as such I overturn the aspect of the dismissal relating to this aspect - what you have termed the 'conduct' aspect.

> In relation to your ongoing capability, i.e. fitness to discharge your duties, your long-term absence from work and the lack of a defined date/timescale for recovery, I have found that nothing has substantially changed in this regard. As no other forms of alternative employment are available, I do agree with Mr Crane's decision to dismiss you with notice and as such I do reject your appeal, despite having allowed you additional time to recover."

74. He informed the claimant of his right to a final stage, or second stage, appeal and that should he wish to exercise that it would be arranged.

75. The claimant did seek to exercise that right of appeal. It was heard by Mr Jarvis on 20 October 2016. Ms Ellis and Ms Kirkpatrick were both present. Mr McDonald was there with another trade union representative, Mr Sheffield, and Mr Sherrington. Mr McDonald again said that the grounds of appeal were more time. That is a matter with which the claimant, through Ms Abbott, does not agree, but that was what was recorded. There was a reference to the flexible hours. Mr Jarvis asked Mr Sherrington how he was feeling that day. Mr Sherrington said he felt worse that day. He was unable to give a return to work date. He was unable to say how much more time he needed to get better and return to work. Mr Jarvis said that the CMO report said that he was not fit for work.

76. Mr Jarvis asked what type of help Mr Sherrington required. Mr Sherrington said he needed flexible hours "as the shifts were killing him". Mr Jarvis asked Mr Sherrington what his shift patterns were. Mr Sherrington said he did not know. He needed to finish at certain times of the day.

77. Mr Jarvis said that if Mr Sherrington was to be given the duties he required with immediate effect would he be able to give a return to work date? Mr Sherrington replied "No", he could not as his health had deteriorated now and it was not so simple.

78. There was an adjournment at Mr McDonald's request. Mr Jarvis again asked after the adjournment whether Mr Sherrington could give any possible timeframe and Mr Sherrington said he could not give anything and asked if he could read his final statement out. He had prepared a written note and he read out part of that.

79. Mr McDonald asked if Mr Sherrington could come back to work when his current sick note had run out. Mr Jarvis said they could do a phased "back into work" which could mean working one day/half a day or anything else that was agreeable, but Mr Sherrington said he still could not give a date. Mr Jarvis said the company could not wait forever. Mr Sherrington acknowledged that. Mr Sherrington repeated, he could not say whether it would be weeks or months as every day was different. He reiterated again that he had gone into a disciplinary for unauthorised absence but when he came out capability had been added.

80. At the end of hearing (196-7) Mr Jarvis gave Mr Sherrington the outcome, he summarised the thrust of the matters we have set out above and he said this:

"In conclusion you are unable to return to work due to your condition. You have been off work for almost 6 months. You have given us no indication of a return to work. Therefore your appeal has not been successful and the decision to dismiss you still stands."

81. Because there had been some inconsistencies with sick notes, as Mr Jarvis recorded, and there had been some payments of company sick or statutory sick pay withheld, Mr Jarvis arranged for payments of those to be made, notwithstanding the position on the sick notes.

82. Respondent's Submissions

83. The respondent's submissions were set out in writing.

84. In summary the respondent's position was as follows.

84.1. There was no breach of the flexible working arrangements; the claimant had at appeal been offered a proposal for flexible working which he had accepted. Whilst Mr Ralph had not recorded the explanation for his reasoning, that was not a breach of the statutory requirement and whilst the claimant had not received a confirmatory letter after the appeal meeting there was no breach because the working arrangements were not in place at that time, namely between April and July 2016 by which time the claimant had gone on sick.

84.2. So far as unfair dismissal was concerned. Mr Meyerhoff submitted that the reason was capability; that the respondent had carried out reasonable consultation, had obtained as much medical evidence as was reasonable in the circumstances and in the light of the history they had reached the point where they could legitimately say that they could not wait any longer to have the work that should have been done by the claimant performed at the depot.

84.3. The respondent continued to dispute that the claimant was at the material time a disabled person; and so far as the disability arising in consequence was concerned (section 15 of the Act) they submitted that whilst the dismissal was something in consequence of any disability if the Tribunal was to find there was a disability, the dismissal was a proportionate means of achieving a legitimate aim. The legitimate aim was said to be the need to have the work done and the proportionate means being waiting for a period of nearly six months to try and ascertain return to work date before dismissing and then dismissing on notice.

84.4. So far as the claim for reasonable adjustments was concerned, the provision, criterion or practice relied upon was consistent attendance at work. The claimant's case was that he should have been redeployed to a non-driving role. The respondent's case on that was that there was no non-driving role available and therefore it was not reasonable to expect them to create one.

84.5. The next adjustments were permitting the claimant to work daytime hours or implementing a phased return to work. Mr Meyerhoff submitted that

those were not reasonable adjustments at a time when the claimant was not fit to return to work, but might have been reasonable adjustments when that point arose.

84.6. The final adjustment proposed was seeking medical opinion from the claimant's General Practitioner or an independent assessor. Mr Meyerhoff's submission was that whilst those are things the company might have done they were not in themselves reasonable adjustments as defined within the Act.

Claimant's Submissions

85. On behalf of her partner Ms Abbott submitted that the respondent had not dealt with the flexible working request in a reasonable way because Mr Ralph failed to give an explanation when he refused, and Mr Crane failed to communicate the decision within the relevant period.

86. The claim for disability discrimination appears to have been the reason why Ms Abbott submits that the dismissal was unfair. She submitted that dismissing the claimant was unfavourable treatment and it was not a proportionate means of achieving a legitimate aim.

87. In relation to unfair dismissal Ms Abbott referred to the respondent's failure to follow its own procedure and the failure to notify the claimant in advance of Mr Crane's hearing that he might be subject to dismissal because of capability related reasons. She also submitted that the respondent had failed to make reasonable adjustments in not redeploying the claimant.

The Law

88. So far as the legal provisions are concerned, under the Employment Rights Act 1996 the relevant sections are 80F, 80G and 80H. There is no doubt that the claimant was a qualifying employee under section 80F. Under section 80G, which sets out the employer's duties, subsection (1) provides:

> "An employer to whom an application under section 80F is made –
>
> (a) shall deal with the application in a reasonable manner;
>
> (aa) shall notify the employer's decision on the application within the decision period;
>
> (b) shall only refuse the application because it considers that one or more of the following grounds applies…" (and a list of 8 grounds follow).

89. Subsection (1A provides) :

> "If an employer allows an employee to appeal a decision to reject an application, the reference in subsection (1)(aa) to the decision on the application is a reference to
> (a) the decision on the appeal."

90. By subsection (1B) the decision period applicable is the period of three months beginning with the date on which the application is made or such longer period as may be agreed by the employer and the employee.

91. A breach of those provisions may be made the subject of an application to this tribunal under section 80H and under subsection (5):

> "An employment tribunal s of your hall not consider a complaint under that section unless it is presented—
> (a) within the period of three months beginning with the relevant date, or
> (b) such further period as the tribunal considers reasonable where it is satisfied that it is not reasonably practicable for the complaint to be presented before the end of the period of three months."

92. We pause to observe that Mr Meyerhoff also submitted that the tribunal had no jurisdiction to consider this complaint because, even if the tribunal were to hold that the respondent had not dealt with it reasonably, at the latest that date was 13 April 2016 and the claim was not presented until 6 December 2016 the claimant having started only conciliation on 7 October and a certificate had been issued on 7 November 2016. In those circumstances the complaint was presented out of time and there was no evidence from the claimant to show it was not reasonably practicable for him to have presented it within time.

93. So far as the claim of unfair dismissal is concerned, we refer to section 98 of the Act and it is not necessary, in our judgment, to recite the provisions.

94. Disability is defined under the Equality Act 2010. A person as a disability if they have a physical or mental impairment which has a substantial and long-term adverse effect on the person's ability to carry out normal day-to-day activities.

95. A long-term adverse effect is defined by paragraph 1 of schedule 1 to the Act as an effect that has lasted or is likely to last 12 months or the whole of the person's life. 10

96. Section 15 provides that a person discriminates against a disabled person if they are treated unfavourably because of something arising in consequence of the disability and the perpetrator cannot show that the treatment is a proportionate means of achieving a legitimate aim. The section does not apply if the person shows they did not know and could not reasonably be expected to know that the employee had the disability.

97. The duty to make adjustments is defined under sections 20 and 21. This is claim that falls within section 20(3): "A provision, criterion or practice placing a person at a substantial disadvantage in relation to a relevant matter requires the employer to take such steps as it is reasonable to have to take to avoid the disadvantage."

98. A failure to comply with that duty by section 21 is an act of discrimination.

99. The provisions of the burden of proof regulation apply to all claims of discrimination under the Act having regard to section 136.

Conclusions

100. The Tribunal reached the following conclusions.

Flexible working

101. In respect of the complaint with regard to the flexible working request is concerned we reject the claimant's argument.

102. He was entitled to make a flexible working request. He did make it. It was refused in the first instance. Whilst it would have been good practice for Mr Ralph to set out, as the policy required, the explanation of how the business reasons applied to the circumstances of the case, in our judgment they were self evident. They did not disadvantage the claimant because he lodged an appeal to which the company had afforded him the right.

103. At the appeal the flexible working request was met to the extent that whilst Mr Crane did not give him 9.00am-5.00pm work he gave him work that accommodated his home based needs and which the claimant accepted at the time.

104. Again, whilst it would have been good practice for the respondent to notify that in writing, again the failure to do so did not disadvantage the claimant in the circumstances, regrettably by reason of the fact that before they could come into effect in July he had gone off sick.

105. In those circumstances we say that the decision was communicated to him orally within the period provided by the section and that the respondent did not act unreasonably in dealing with the request.

106. We add that we accept also the alternative argument of the respondent that we have no jurisdiction to consider that complaint for the reasons submitted by Mr Meyerhof recorded at paragraph 92 above.

Disability discrimination

107. So far as the claims for disability discrimination are concerned the Tribunal reminds itself that it has to look at the position at the time at which the acts of discrimination took place.

108. For the purposes then of the date at which the claimant might be thought to be a disabled person it seemed sensible to the Tribunal to take the date of Mr Crane's decision, namely the date of dismissal. At that point in time the claimant has to establish that the impairment, which clearly he suffered, anxiety/stress/depression, had a substantial and long-term adverse effect on his ability to carry out day-to-day activities.

109. The respondent at that point was aware that he had work related issues in the sense of flexible working, but we are far from satisfied that given the contents of the GP sick notes and the first report of Dr Kumar, and indeed the report of Ms Lowe, that the respondent would be aware that the claimant had work related stress issues.

110. But even if we are wrong about that, in our judgment it would be a counsel of perfection for the Tribunal to hold that the employer could at that point have predicted, in the view of the opinion of the company medical officer and Dr Kumar, that the claimant would have been likely to be substantially impaired and carry out day-to-day activities for a period of 12 months at that stage.

111. At that stage only some four months had passed and the indications from Dr Kumar, taking the most pessimistic point of view from the company's point of view, was that there was a good prospect of recovery but the timescale was uncertain. To say therefore that it was likely that it would be 12 months at that stage in our judgment is simply not borne out by the evidence.

112. Beyond that, Mr Meyerhoff makes the submission that in reality what the claimant was saying at that stage was that he could not cope with home activities as reported by Ms Lowe and that so far as other activities are concerned he said he could drive a car but he could not drive a bus. If that is right and that appears to be the way in which the case was put forward on behalf of the claimant, in our judgment it seems hard to say that driving a bus or a PCV is a day-to-day activity. Driving a car would be, driving generally might be, but if it is restricted as it appears to be on the evidence to driving a bus for the reasons we have explained it seems hard to the Tribunal to suggest that that itself would amount to an adverse on a day-to-day activity.

113. But even if we are wrong in that and the claimant, having regard to the fact he was taking medication and had received counselling, the effects of which we must ignore, means that he was at that point in time a disabled person, then we have to consider the separate complaints of disability discrimination.

114. So far as the failure to make reasonable adjustments is concerned, it is difficult to identify the time for those having regard to the fact that the claimant was certified as not fit for work throughout the relevant period from 3 May to the end of his employment, but if we deal with the position in respect of the reasonable adjustments, on the assumption that the claimant establishes that he was a disabled person, even though we hold to the contrary, it was not a failure to make a reasonable adjustment to redeploy him to a non driving role. An employer in the circumstances is not acting unreasonably in failing to provide an employee with work in a role that either does not exist or in which there is no relevant vacancy at that time.

115. We refer to the evidence of Mr Crane that in this depot there were 226 drivers and only a further 20 administrative and engineering posts. It was not suggested by the claimant at any stage that he should have an engineering post. One of the matters that we recall was suggested by the claimant was that he might be involved in washing buses. But in fact at that stage there was no additional requirement for that, and the claimant was in possession of a sick note. It cannot

be sustained that the failure to redeploy him to a non-driving role at that point was a failure to make a reasonable adjustment.

116. Permitting the claimant to work daytime hours or have a phased return to work would, in our judgment, have been reasonable adjustments if the claimant was at the point at which he was fit to return to work. They were not reasonable adjustments when he remained unfit for work. Had he been fit and the respondent had not done either of those things it might be a different picture.

117. Finally, so far as the statutory definition is concerned, we are not satisfied that saying that the company should seek a medical opinion from his GP or independent assessor satisfies the test of being a reasonable adjustment. It might be something that could lead to a reasonable adjustment, but it is not in itself a reasonable adjustment under the Act.

118. Section 15 makes it discriminatory to treat a person unfavourably because of something arising in consequence of a disability. On the assumption that he was disabled the "something arising in consequence" was his absence, there is no argument about that, and if he was a disabled person that absence undoubtedly arose in consequence of the disability. That requires the respondent to establish that dismissal was a proportionate means of achieving a legitimate aim. Having people attend consistently at work fit to perform their duties in our judgment is a legitimate aim, and it is one which is to the advantage both of employers and employees.

119. Was the decision to dismiss a proportionate means of achieving that legitimate aim? Insofar as it would enable the respondent to make permanent arrangements to cover the claimant's duties in our judgment it was. As to the fact that the claimant could have been offered revised duties in July, we have no doubt that had he been fit to return to work both Mr Stafford and Mr Jarvis would have seen to it that he was provided with such duties. But that is nothing to the point. The test for "proportionate means" is different from the test of unfair dismissal, but the answer to the unfair dismissal question undoubtedly can inform the question of whether the means are proportionate. Our conclusion on that issue is set out at paragraph 137 below.

Unfair dismissal

120. We turn to the complaint of unfair dismissal.

121. The dismissal of a claimant for a reason connected with capability is a potentially fair reason. Was he dismissed on that ground? In our judgment he was. Albeit that Mr Crane wrongly included it at that stage, in the sense that the claimant had not been given fair warning it was being considered, it was clearly part of his reasoning. Capability was clearly the characterisation of the reason Mr Stafford and Mr Jarvis gave when they upheld the decision to dismiss. Any suggestion to the contrary, and we are not sure there is any, is unsustainable.

122. The test of fairness then requires us to consider section 98(4). Insofar as the claimant was called to a hearing by Mr Crane at which he was dismissed for something of which he had not been informed, that was unfair. It should not have

occurred at the hands of a reasonable employer and Mr Crane acknowledged that.

123. Whether it was appropriate for Mr Ralph to summon him for an unauthorised absence hearing in mind that he had a GP sick note at the time is also very much open to doubt, but that was not a matter in respect of which the decision to dismiss was made. Mr Crane, in our judgment, rightly disavowed it.

124. In our judgment Mr Crane's error, if error it was, was in dismissing him for any conduct related reason because if he was not fit to attend work it was, in our judgment, unfair to dismiss him for the conduct allegation at all. However, that matter was corrected on appeal by Mr Stafford and confirmed by Mr Jarvis.

125. In deciding then whether the decision to dismiss was fair the Tribunal must look at the procedure carried out by the respondent as a whole and decide whether it was one which a reasonable employer could reasonably have carried out in the circumstances.

126. For the reasons that we have described we are satisfied that it was overall a fair procedure notwithstanding there were faults along the way. The very purpose of having an appeal or appeals is to enable, at an informal stage, the employer to remedy errors in its procedure at an earlier stage, and for the claimant (the employee) to have a chance to point them out and have them addressed and rectified. Looked at in the round the process was one which a reasonable employer could reasonably have carried out in that errors in the process were corrected.

127. So far then as the final question is concerned was the dismissal fair or unfair, as the authorities on capability dismissals for long-term absence indicate, the overarching question is: can the employer reasonably be expected to wait any longer?

128. Had the decision been made solely at Mr Crane's stage when the claimant had only been off work as we think some 2½ months we very much doubt whether that could have been sustained.

129. But the decision is not just to be considered at that point but at the point of the appeals. This is an employer that has a procedure which allows for a first and a second stage appeal. This gives the employee two chances to raise issues in support of maintaining his employment and it gives the employer two chances to rectify any procedural or other defects. By its three stage nature the procedure also prolongs the period at which relevant matters may be considered.

130. By the time the dismissal decision was considered at the first stage appeal by Mr Stafford which was then adjourned for further enquiry the claimant had been off sick from 3 May to 19 September 2016, something in the order of 4½ months had passed. By the time it came back to Mr Stafford and then went to Mr Jarvis it was at 5 months and 5½ months respectively.

131. It is not enough simply to say "you can dismiss fairly after x or y months". The question is: what reasonable decision can be made at the relevant stage.

132. It is clear that Mr Stafford and Mr Jarvis both bent over backwards to afford the claimant an opportunity to persuade them that he could, within a reasonable period of time, be in a position to start back to work on some basis. We commend them both as witnesses but Mr Jarvis in particular was an impressive witness who clearly was prepared to try and afford the claimant access back to the workplace if at all possible when he was fit.

133. It is regrettable that the claimant did not make the most of the opportunity afforded to him by Mr Stafford on 19 September of going back to his GP. Whether he did not do so because he did not think of it or whether he was not advised to by the union we do not know. It seems to us unlikely that those around him would not have been encouraging him to do so in order to keep his job. It might be the case that the claimant focussed too much on the question of conduct as against capability as the reason for the the dismissal in the internal hearings and was not able to concentrate on what Mr Stafford was urging him to do. But that is not any criticism that can be made of Mr Stafford. He could not have explained what was required more clearly.

134. Be that as it may, it is the case that at no point prior to 7 October 2016 with Mr Stafford or 20 October with Mr Jarvis did the claimant get anything from his doctor other than a sick note to say he was not fit for work without qualification.

135. In those circumstances, it seems to us that it would be open to a reasonable employer knowing the facts that appeared to this employer at that stage to make a reasonable decision that the employment should end. Put in another way, the claimant cannot sustain the argument that no reasonable employer could have reasonably dismissed at this point in time for this reason.

136. In those circumstances, the unfair dismissal claim itself must fail.

137. Referring back, we find also that the process adopted by the employer and the ultimate decision to dismiss after that length of time analysed in that way was a proportionate means of achieving a legitimate aim for the purposes of the section 15 claim under the Equality Act 2010.

138. For those reasons the claims are dismissed.

139. We add an apology to the parties for the length of time it has taken to prepare the written version of these reasons.

Employment Judge Tom Ryan

Date 15 November 2017

JUDGMENT AND REASONS SENT TO THE PARTIES ON
17 November 2017

FOR THE TRIBUNAL OFFICE