Case Number: 3200387/2017

RM

EMPLOYMENT TRIBUNALS

Claimant: **Mr R Greenwood**

Respondent: **Anglia Ruskin University Higher Education Corporation**

Heard at: **East London Hearing Centre**

On: **13, 14, 15 and 16 and 20 February 2018 and (in chambers) 21 February 2018**

Before: **Employment Judge C Hyde**

Members: **Mr S Dugmore**
Ms H Edwards

Representation:

Claimant: Ms E Banton, Counsel

Respondent: Mr C Khan, Counsel

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is that:-

1. **The complaints of direct associative disability discrimination and age discrimination both under the Equality Act 2010; all allegations of whistleblowing detriment and/or dismissal; the complaint that the Claimant had been wrongfully dismissed and that he was entitled to notice pay; and the complaint under Section 100 of the Employment Rights Act 1996 in relation to automatic unfair dismissal were dismissed on withdrawal by the Claimant at the commencement of the second day of the hearing.**

2. **The complaints alleging failures to make reasonable adjustments, direct**

disability discrimination and disability discrimination under section 15 of the Equality Act 2010 were not well-founded and were dismissed forthwith.

3. The complaint of unfair dismissal under section 98 of the Employment Rights Act 1996 was not well founded and was dismissed.

REASONS

1 Reasons are provided for the above judgment as the judgment was reserved. The reasons are set out in this document only to the extent that it is necessary to do so in order for the parties to understand why they have won or lost, and further only to the extent that it is proportionate to do so.

2 All findings of facts were reached on the balance of probabilities.

Preliminaries

3 By a claim which was presented on 15 April 2017, the Claimant brought a range of complaints. As set out in the Judgment, many were withdrawn and the Tribunal accordingly dismissed them at the beginning of the hearing. The surviving claims considered at the hearing alleged unfair dismissal; disability discrimination by way of failures to make reasonable adjustments, direct disability discrimination and discrimination arising from disability under Section 15 of the Equality Act 2010.

4 The Respondent presented grounds of resistance on 30 May 2017. They indicated that they intended to resist the claim. Those grounds of resistance were subsequently amended and dated 27 October 2017 (pp 24 – 34 of the bundle).

5 Following the presentation of the claim a Case Management Order had been made by Employment Judge Gilbert. It was sent to the parties on 12 June 2017 (pp 23F – 23I). Thereafter a Closed Preliminary Hearing took place on 26 June 2017 before Employment Judge Goodrich. Each party was each represented at that hearing by the same Counsel who appeared before us. Case Management Orders were made for the preparation of the case and in particular an Open Preliminary Hearing was listed for 6 October 2017 before a Judge sitting alone to determine whether the Claimant was disabled within the meaning of the Equality Act 2010 at the material times. There were some other applications considered as well (pp35 – 39).

6 The Open Preliminary Hearing proceeded on 6 October 2017 before Employment Judge Prichard. He determined that the Claimant met the definition of a disabled person within the meaning of the Equality Act 2010 in 2017 by reason of generalised anxiety disorder. At this hearing it was confirmed that the Claimant wished to withdraw the various claims referred to above. However, although this was recorded in the case management summary, Employment Judge Prichard made no formal judgment dismissing those claims.

7 In addition to determining the question of whether the Claimant met the definition of a disabled person, there was clearly some discussion about the issues. The Tribunal may refer to those in context in due course.

8 Before Employment Judge Prichard, the Claimant relied on three diagnosed conditions as being the basis for qualifying as a disabled person. The first was anxiety, generalised anxiety disorder, the second was irritable bowel syndrome and the third was depression. It is relevant to cite the background against which Employment Judge Prichard made this determination. At paragraph 31 he recorded:

> *"We have been in the unsatisfactory position of having to judge the existence of a disability from raw data i.e. the medical records. There is no expert's report. The claimant has been dealt with throughout by his GP. He has never seen a consultant. He has been prescribed antidepressants which may be used in the treatment of generalised anxiety disorder, although they are better known as a treatment for normal depressive disorder. He has had a variety - Amitriptyline, Fluoxetine and latterly 10mg of Citalopram. If anything it seems the Claimant's condition became worse after he ceased working in March 2016 but it often does."*

9 Employment Judge Prichard continued at paragraph 33:

> *"The Claimant says since March 2016 he has had panic attacks, although they are less frequent now. He had one recently apparently since the medical reports were printed in late July 2017…."*

10 Employment Judge Prichard rejected the case that the Claimant could rely on any evidence of IBS or depressive disorder as constituting disability. He described the evidence of there being a clear and disabling condition of IBS or depressive disorder as "*shadowy and not good. It is intermittent*." He also concluded that the evidence of anxiety was "*well enough recorded in the medical report since March 2016*." He then found that at the time there was a likelihood that the anxiety would last for 12 months. He concluded that the Claimant's anxiety "*looks likely to last at least 12 months on a retrospective prognosis*."

11 Employment Judge Prichard also noted that he had not found it easy to extract information from the Claimant whom he described as "*a poor historian and an unreliable witness*". He described the Claimant as "*…over cautious and reluctant to commit himself …*".

12 Nonetheless Employment Judge Prichard concluded that the Claimant's mental impairment met the necessary statutory definition for there to be a qualifying disability under the Equality Act 2010. He concluded that it manifested itself in extreme tiredness beyond what would normally be the result of insomnia and fatigue and also isolation and social withdrawal (para 40).

13 Finally, in this context Employment Judge Prichard found (para 43) that the Claimant was a disabled person within the meaning of Section 6 of the Equality Act 2010 on the basis of the likely prognosis between September and November 2016 when he was dismissed. It was at the hearing before Employment Judge Prichard that the dates for this hearing were fixed.

Documents produced and evidence adduced

14 At the commencement of the hearing the Tribunal had the benefit of working from a List of Issues marked [R2] which had been agreed shortly before. It is set out in full below.

15 The parties had agreed on the contents of a bundle which ran to some 200 pages and which the Tribunal marked [R1]. In addition, by agreement at the commencement of the hearing further documents were added at the Claimant's request numbering approximately 50 pages. Those further documents were marked [C1]. They had been numbered previously and were obviously part of a larger bundle. The Tribunal simply retained that numbering within [C1]. In addition, during the hearing the Claimant produced a further set of documents namely the July 2015 staff handbook which was marked [C3]. A few additional documents were also added to the bundle by agreement.

16 Prior to the beginning of the hearing, there had apparently been some dispute as to whether the Tribunal could see some of the documents in the Claimant's bundle [C1] in particular in relation to what had been referred to as a "without prejudice" discussion between Mrs Lesley Haddow, Human Resources Manager and the Claimant on 30 September 2016 and which was set out in an email from Mrs Haddow to the Claimant summarising the discussion. After Ms Banton asked the Tribunal to make a determination as to the status of this evidence, Counsel for the Respondent indicated that their position was that they would not oppose the Tribunal viewing these documents, and on a pragmatic basis they did not wish to take any point as to whether or not it was a without prejudice discussion.

17 Attached to the list of issues [R2] was a chronology and cast list which together were marked [R3].

18 The Claimant gave his evidence first and relied on a witness statement which the Tribunal marked [C2]. It was some 22 pages long and contained 144 paragraphs. Further on behalf of the Respondent the Tribunal heard evidence from Mr G Dumbrell, Head of Security and Business Continuity Manager and the Claimant's previous second line manager; from Mrs Lesley Haddow, Human Resources Manager for the Claimant's area at work; from Professor Roderick Watkins, Deputy Vice Chancellor at the material times of the Respondent; and finally, from Mr Paul Bogle, University Secretary and Clerk from 3 January 2017. They all gave their evidence-in-chief by way of witness statements which were marked respectively [R4, R5, R6 and R7].

19 Finally, each Counsel presented their closing submissions in writing and each was given the opportunity to supplement them orally. The closing submission on behalf of the Respondent was marked [R8] and from the Claimant was marked [C4]. In addition, Ms Banton attached photocopies of a number of cases as follows:

O'Brien v Bolton St Catherine's Academy [2017] IRLR 547, CA

Seldon v Clarkson Wright & Jakes [2009] IRLR 267, EAT

Chief Constable of West Yorkshire Police v Homer [2009] IRLR 262, EAT

Homer v Chief Constable of West Yorkshire Police [2012] IRLR 601, Supreme Court.

The Issues

20 The Tribunal had a further discussion with the representatives in the course of our in-chambers discussion to clarify the position in relation to the period that the Claimant had been found to be a disabled person. There appeared on the face of it to be a discrepancy between the words in the reasons for the judgment of Employment Judge Prichard as to when the Claimant became a disabled person (para 43) and the statement set out by the parties in the agreed list of issues [R2] of the finding of Employment Judge Prichard as to when the Claimant was a disabled person. The former appeared to indicate that the Claimant became disabled from September 2016 onwards but the list of issues appeared to state that the Claimant became a disabled person sometime between March and September 2016. The Tribunal considered that the case had been conducted on the basis that it was not a matter of dispute that the Claimant was a disabled person at the relevant times. All the allegations save one covered a timeframe from September 2016 onwards. There was one allegation of direct discrimination which covered a time frame from April 2016 onwards. Having discussed the matter in the Tribunal, the Respondent acknowledged that the Tribunal was bound by Employment Judge Prichard's finding in paragraph 43; but asked the Tribunal to consider of its own motion if the Claimant was disabled in the period from March to September 2016.

21 Having regard to the justice of the situation which was that the Claimant was not questioned about this matter during the hearing with a view to challenging his status as a disabled person between March and September 2016; and having regard to the fact that this matter was only raised by the Tribunal after closing submissions during our in-chambers discussion, the Tribunal treated the Claimant for the purposes of this judgment as if he was a disabled person in the earlier period from March to September 2016.

Agreed List of Issues

(A) Disability Discrimination

1. By PH on 6.10.17 EJ Pritchard ruled that the Claimant was disabled in 2016[1], by reason of generalised anxiety disorder.

2. It having been found that the Claimant was a disabled person at the material times, on what date did the Respondent have, or ought reasonably to have had, knowledge that the Claimant was disabled?

   The Claimant contends the latest the Respondent knew about his disability by March/April 2016.

Failure to make Reasonable Adjustments s20 and s21 EA 2010

3. Did the Respondent apply a provision, criterion or practice ('PCP') and subject the Claimant to a substantial disadvantage in comparison with persons who are not disabled by:

[1]Sometime between March and September 2016 (paragraphs 36 and 43 of EJ Pritchard's Judgement dated 22.11.17).

(a) the Claimant return to work in November 2016 without a proper phased return and requiring him to be shown around the campus ('PCP1') which put the Claimant at a disadvantage when compared to non-disabled employees who were not off sick from work and did not require a phased return to work, causing him to be isolated, unwelcome and only work one shift? The Claimant also relies on Phil Gilbert, Mark Savage and Greg Dumbrell were not required to be shown around the campus following time off work. (Grounds of Complaint, paragraph 15).

(b) requiring the Claimant to be back at work in November 2016 ('PCP2') which put the Claimant at a disadvantage when compared to non-disabled employees who were not off sick from work and not subject to capability procedures or dismissed.

4. Did the Respondent know or should the Respondent reasonably have known that the Claimant would have been put at the substantial disadvantage relied upon compared to someone without a disability?

   The Claimant contends the Respondent knew from at least March/April 2016

5. Were there adjustments that could have been made that would have avoided the disadvantage to the Claimant? The Claimant contends for each disadvantage that the Respondent:

   a. (PCP1) should have provided the Claimant with a phased return to work on 2 November 2016 (Grounds of Complaint, paragraph 15)

   b. (PCP2) should have allowed the Claimant more time to recover before subjecting him to a capability procedure and/or dismissing him on 18 November 2016. (Grounds of Complaint, paragraphs 24, 34. The Claimant contends that implicit in his dismissal claim is a dismissal that they dismissed him too soon and should have afforded him more time to recover).

   c. (PCP2) Allowing the Claimant flexibility in his shift pattern so that he could work 12-hour night shifts and/or shorter day shifts (6 hours) and/or alternate days.

6. If so, would any of the adjustments have been reasonable steps for the Respondent to have taken to avoid the disadvantage to the Claimant?

Direct Discrimination s 13 EA 2010

For each Condition:

7. Did the Respondent treat the Claimant less favourably than a real or hypothetical comparator identified in paragraph 8 by:

   a. On 12 September 2016, when, during a meeting with HR and Greg Dumbrell, they said they couldn't see much wrong with him? (Grounds of Complaint, paragraph 13)

   b. On 2 November 2016, isolating the Claimant upon his return to work? (Grounds of Complaint, paragraph 15)

c. On 2 November 2016, showing the Claimant around the campus, although it had not changed, and the Claimant had worked there for 10 years? (Grounds of Complaint, paragraph 15)

d. On 2 November 2016 and the day after the day after on telephone with PG, criticising the Claimant for working only one shift upon his return to work on 2 November 2016? (Grounds of Complaint, paragraph 15)

e. On 18 November 2016 failing to allow the Claimant more time to recover? (Grounds of Complaint, paragraphs 24, 34. The Claimant contends that implicit in his dismissal claim is a dismissal that they dismissed him too soon and should have afforded him more time to recover). (Note also a reasonable adjustment claim).

f. From April to November 2016, failing to consider alternative employment? (Grounds of Complaint, paragraph 33, 36, 37)

g. On 17 November 2016, dismissing the Claimant? (Grounds of Complaint, paragraph 21)

h. From January 2017, failing to deal with the Claimant's appeal against dismissal? (Grounds of Complaint, paragraph 31)

8. Who is/are the real or hypothetical comparator in relation to each of the above?

   a. The Claimant relies on Russell Bass and Katie H in respect of (f) above; Phil Gilbert and Mark Savage in respect of (c) and (g) above and alternatively a hypothetical comparator in respect of (a)-(h) above.

9. Has the Claimant proved primary facts from which the Tribunal could properly and fairly conclude that the difference in treatment was because of the Claimant's disability?

10. If so, what is the Respondent's explanation?

11. Does it prove a non-discriminatory reason for any proven treatment?

Discrimination Arising from Disability s15 EA 2010

For each Condition:

12. What was the alleged unfavourable treatment?

    a. On 18 November 2016, failing to allow the Claimant more time to recover? (Grounds of Complaint, paragraphs 24, 34. The Claimant contends that implicit in his dismissal claim is a dismissal that they dismissed him too soon and should have afforded him more time to recover). (Also a reasonable adjustment and direct discrimination claim).

    b. From April to November 2016, failing to consider alternative employment? (Grounds of Complaint, paragraph 33) (Also a direct discrimination claim).

    c. On 17 November 2016, dismissing the Claimant? (Grounds of Complaint, paragraph

21) (Also a direct discrimination claim).

d. From January 2017, failing to deal with the Claimant's appeal against dismissal? (Grounds of Complaint, paragraph 31) (Also a direct discrimination claim).

13. Was the treatment unfavourable because of something arising in consequence of the Claimant's disability?

    The Claimant's absence from work, failure to deal with the Claimant's appeal and failure to consider alternative employment was something arising in consequence of his disability. (The Claimant contends that it is implicit in his dismissal claim that such claims arose in consequence from his disability. It is uncontentious that his dismissal arose from his absence from work. His absence from work was caused by his disability).

14. If so, can the Respondent show that the treatment was a proportionate means of achieving a legitimate aim?

Jurisdiction (section 123 of the EqA)

15. The claim form was presented on 15 April 2017. Any acts prior to 17 November 2016 (prior to dismissal) were out of time unless extended[2]. Should any of the Claimant's claims for discrimination be struck out as brought out of time so that the Tribunal has no jurisdiction?

16. In the alternative, was there conduct extending over a period to be treated as done at the end of the period, or failure to do something to be treated as occurring when the person in question decided on it?

17. Further in the alternative, is it just and equitable to extend time?

(B) <u>Unfair Dismissal s98 ERA 1996</u>

18. Has the Respondent established a potentially fair reason for dismissal?

    a. The Respondent contends the dismissal was by reason of capability and/or

    b. for some other substantial reason.

19. In the circumstances of the case, including the size and administrative resources of the Respondent, was the decision to dismiss the Claimant for capability and/or SOSR within the range of reasonable responses?

    The Claimant contends that it was not in that the Respondent did not:

    a. take such steps as were reasonable to discover the Claimant's medical condition and likely prognosis? (Grounds of Complaint, paragraph 21, 24, 33, 34.)

[2] EJ Goodrich's clarification made on 26 June 2017 at the CMD.

b. make reasonable efforts to consult with the Claimant and take his views into account? (Grounds of Complaint, paragraph 21)

c. wait longer before terminating the Claimant's employment? (Grounds of Complaint, paragraphs 24, 34. The Claimant contends that implicit in his dismissal claim is a dismissal that they dismissed him too soon and should have afforded him more time to recover)

(C) <u>Personal Injury (Grounds of Complaint, paragraph 10)</u>

20. The Claimant contends he sustained personal injury arising from discrimination?

    The Respondent contends no such claim is brought and that the Tribunal has no jurisdiction to consider a freestanding claim for personal injury. (The Response, paragraph 8).

21. If the claim proceeds, was any injury caused by any alleged discrimination?

(D) <u>Compensation</u>

22. If the Claimant was discriminated against what should the Claimant be awarded to put him into the position he would have been had the discrimination not taken place?
23. Should the Claimant receive an award for injury to feelings? If so, what should the claimant be awarded?
24. What loss has the Claimant suffered for unfair dismissal and/or detrimental treatment?
25. If there were any procedural flaws, would the Claimant have been dismissed notwithstanding those flaws? If so, should the compensatory award be reduced? If so, by how much?
26. Does the ACAS Code of Practice on disciplinary and grievance procedures apply to the Claimant's dismissal?

    The Respondent contends that it does not apply to dismissals for capability.

If the ACAS Code of Practice on disciplinary and grievance procedures did apply:

27. Did the Respondent breach the ACAS Code of Practice on disciplinary and grievance procedures by:

    a. Dismissing the Claimant following a meeting in which he was not allowed to meaningfully participate or alternatively listened to (Grounds of Complaint paragraph 21)

    b. Failing to provide an appeal against dismissal (Grounds of Complaint paragraphs 25, 29, 30 and 31)

    c. Failing to hear or otherwise deal with the Claimant's appeal against dismissal (Grounds of Complaint paragraphs 25, 29, 30 and 31)

28. If so what percentage increase should be applied?

a. The Claimant claims an increase of 25%.

29. Did the Claimant breach the ACAS Code of Practice on disciplinary and grievance procedures by:

30. If so what percentage increase should be applied?

    a. The Respondent claims a decrease of 25%.

31. Should the award be reduced to reflect the Claimant's alleged contributory conduct?

32. Does the statutory cap apply to reduce the Claimant's compensation?

    The parties acknowledge that if the Claimant's dismissal is found to contrary to sections 103A. If the dismissal is found to be discriminatory the statutory cap will not apply.

33. If the Claimant suffered personal injury as a result of discrimination and/or detriments what compensation should he be awarded?

    a. The Claimant claims tbc

34. To the extent that the Claimant is found to have been discriminated against and unfairly dismissed, the Tribunal should discount any overlap.

Relevant Law

22 There was no dispute about the applicable law in this case. The applicable statutory provisions in the Equality Act and Employment Rights Act 1996 were identified in the list of issues. In addition, in the Claimant's closing submissions Ms Banton set out the text of the relevant statutory provisions and a summary of the relevant legal principles drawn from the cases relied upon by her. In those circumstances, they are not repeated in these reasons.

23 Further during the course of his submissions Mr Khan referred to the case of ***Gallop v Newport County Council*** [2013] EWCA Civ 1583. Neither party specifically disputed the proposition that in determining whether a party has been discriminated against, the Tribunal is bound to look at the motivation and action of the person who it is alleged did the discriminating.

24 Although there was no dispute about the applicable law, Mr Khan submitted that the facts of the ***O'Brien*** case were distinguishable from those of the current case.

Findings of Fact and Conclusions

25 The Claimant was employed by the Respondent as a security officer on a shift work pattern between 1 March 2006 and 18 November 2016. There was no dispute that the Respondent was one of the larger universities in the East of England with campuses in Chelmsford, Cambridge and Peterborough as well as in London.

26 The Claimant was based at the Respondent's Chelmsford campus. He worked as part of a wider security team which provided round the clock on–site security cover to that

campus. It was intrinsically an on-site security function.

27 At all material times the Respondent employed two supervisors at the Chelmsford campus who were described as operational duty managers. Their names were Mark Savage and Phil Gilbert. They were jointly the Claimant's line managers. They reported to Mr Greg Dumbrell, the Head of Security and Business Continuity Manager for Cambridge and Chelmsford.

28 It was agreed that the student body of the university, at all the campuses, consisted of approximately 20,000 students. At the Chelmsford campus there were over ten separate buildings spread out over a distance which entailed a walk of approximately ten minutes from one end of the campus to the other. Some of the buildings, such as the library, had 24-hour access to them during the time that the Claimant was employed. It was also agreed that certain halls of residence had 24-hour access. On any given day between 200 and a few thousand students and members of staff would visit the campus. There was no set pattern for this and it varied from day-to-day. It was agreed that the University needed round the clock reliable security to ensure the wellbeing of the users of the campus.

29 The two duty managers each worked 8-hour shifts which overlapped in the middle of the day. They worked equal numbers of these shifts. One shift started at 7.00am and finished at 3.00pm and the other started at midday and ran to 8.00pm. This shift pattern worked by Mr Savage and Mr Gilbert was well-known to the Claimant. Outside of those hours the duty managers also took turns in covering the night shifts. The operational duty managers were on call on a rotating basis to cover the night shift.

30 The Claimant was one of approximately nine security guards at all material times working at the Chelmsford campus.

31 The security officers worked on 12-hour shifts from 7.00am t0 7.00pm and then from 7.00pm to 7.00am. The shift pattern involved a security guard working four nights on, then four clear days off in a sequence of three, followed by four days on and then four clear days off in a sequence of two. In addition, the security officers were sometimes called in to work extra shifts in order to cover for illness and missing operatives.

32 The Claimant's duties as security officer included patrolling the university's premises and responding to incidents and breaches of security.

33 Each day shift was staffed by approximately two security officers supplemented by a security control officer and a receptionist. The latter worked between 8.00am and 5.00pm. The night shift was staffed by approximately 2 – 3 security officers. There were fewer security staff members overall on duty during the night shift as there were far fewer people on campus and many of the areas were secured overnight.

34 Between March 2016 and March 2017, the security department was very short staffed. The team at Chelmsford had between one and two security officers off on long term sickness absence out of a team of nine or ten officers. In addition, there were the normal day-to-day episodes of sickness absence. This meant that permanent staff were often assisted by agency staff. If this was not possible, other staff including the duty

managers, had to cover the shift at short notice. Agency staff clearly had to be paid for and the Tribunal accepted on the balance of probabilities that the estimated costs attributable to the Claimant's absences amounted to £27,042 (para 122 of Mr Dumbrell's statement).

35 It was further not in dispute, that agency staff were not always familiar with the campus and procedures and that this put pressure on the permanent staff. This was asserted by Mr Dumbrell in his witness statement (para 19) and was additionally repeated by the Claimant in his oral evidence. He had historically complained about this issue.

36 The procedure for covering shifts at short notice was that the operational duty manager would look at how many shifts needed to be covered and whether they could be covered within the existing team for example by a member of staff on a rest day. More often than not, this was not possible and so the operational duty managers would try to arrange cover via the Respondent's security sub-contractor. If this was successful and cover was arranged from the agency, this was frequently someone who was not familiar with the campus. In that instance the person would have to be trained to carry out at least some of the duties and to assist for in-house team. There were examples of internal email communications between the managers on two occasions on which the Claimant had called in sick at short notice on around 5 October 2015 and 11 February 2016 (pp88 and 94). It had taken a considerable amount of management time to arrange the cover and the cover obtained was clearly not satisfactory.

37 Although a considerable amount of the Claimant's witness statement covered what the Tribunal considered were historical matters, and which were not directly the subject of any complaint, it was agreed that prior to the Claimant going off sick in March 2016, there were periodic strains in the relationship between himself and one of his line managers, Mark Savage. It was further agreed that each had raised grievances against the other in that timeframe. As a result, in about 2013 the Respondent arranged for an external mediator to work with them both. At the end of the mediation day, the mediator asked for a further day of mediation on which both the Claimant and Mr Savage would be present in the same room. The Claimant declined to participate in that further exercise.

38 The Claimant went off sick for 14 days between 11 and 25 February 2016 (p94). Then on 22 March 2016 he informed the Respondent that he would not attend for his rostered shift the following day due to anxiety (p96A). He alleged when he spoke to Mr Gilbert about this, that a conversation he had had with his line manager, Mr Savage on 18 March 2016, had increased his anxiety.

39 The Claimant submitted sickness certificates for the two-week period from 23 March to 6 April 2016 indicating that he was not fit for work due to stress/anxiety (pp102D and 103).

40 At the end of this two-week period the Claimant submitted a further fitness for work statement excusing his presence from work in the next two-week period from 6 to 20 April 2016 (p104). This was also said to be due to stress/anxiety.

41 By a telephone call to the Claimant on Friday 8 April at 5.15, the Respondent invited him to attend a meeting on Monday 11 April at 4.00pm also with Human Resources to discuss his concerns. The telephone call was made by Mr Dumbrell. The Claimant

wrote to Mr Dumbrell by email cancelling the meeting at 10.57am on 11 April (p107). The Respondent agreed to reschedule the meeting and to refer the Claimant to Occupational Health.

42 Ms Haddow, the Human Resources Manager who had responsibility for this area of work invited the Claimant to attend a rescheduled meeting on 20 April 2016. She communicated this to the Claimant by way of a letter sent by email (p105) dated 13 April 2016. The Claimant responded on 19 April informing Ms Haddow that he would not be attending the meeting the following day (p110).

43 Also on 19 April the Respondent made an Occupational Health referral in respect of the Claimant in relation to his long-term absence for stress/anxiety. It was not in dispute that absence of four weeks or more was defined as long term absence under the Respondent's sickness absence monitoring processes (pp112 – 113).

44 Mr Greenwood submitted a further fitness for work statement covering a further two-week period citing anxiety. This was due to expire on 5 May 2016.

45 Before Mr Dumbrell contacted the Claimant on Friday 8 April to arrange the meeting on Monday 11 April, the Claimant and Mr Gilbert had been in touch with each other (p103A) about the Claimant's absence and when he was going to be back on duty and what his doctor would be indicating about the Claimant's fitness to work. The Claimant had apparently told Mr Gilbert that he was quite unwell as he was now suffering from gastroenteritis. This was relevant to the Tribunal's findings below about the timing of the Respondent's knowledge that the Claimant was disabled by reason of generalised anxiety.

46 The Claimant then attended a telephone Occupational Health appointment. There was no dispute that it was a matter for the Occupational Health Service which the Respondent used to exercise their discretion as to whether they believed the consultation could properly take place by way of a telephone call or by way of a face to face meeting. The telephone consultation took place on 26 April 2016 following the earlier referral. In the report, which was prepared by Ms Gail Collins (RGN SCPHN) (p118), she informed the Respondent that the Claimant was unfit either to attend the meeting with his managers or to return to work and suggested that a review should take place in four weeks.

47 On the expiry of the previous fitness to work statement on 5 May 2016 the Claimant submitted a further statement covering the next two weeks to 19 May 2016 (p119).

48 The Respondent made a further Occupational Health referral on 11 May 2016. Just before he attended the next Occupational Health appointment on 24 May 2016, the Claimant submitted another fitness for work statement which indicated that he was not fit for work for a further one month due to anxiety. This was the first statement which covered a one-month period (p125) from 20 May to 20 June 2016.

49 The second Occupational Health consultation was with a specialist nurse practitioner (OH) by the name of Jane Pitt (p123). This consultation also took place by telephone (p122D).

50 Having used a well validated assessment tool, Ms Pitt reported that the Claimant had moderately severe depression with severe anxiety. She repeated the earlier opinion that the Claimant was unfit to attend a meeting and suggested a further review in four weeks. She advised management that when discussing with the Claimant the issue of his attendance at a management meeting "*the increase of his anxiety was apparent*". She continued that she explained the benefits of attending such a meeting in assisting with recovery but stated "*as his issues are not solely work related and due to his current mental health I do not consider him to be fit to attend a meeting. Once Richard has had a medication review and any changes have had time to be effective then it is likely he will be fit to attend a meeting, with representation and allowing time for breaks. I would anticipate this to be within the next four – five weeks*."

51 By a letter dated 15 June 2016 (p126) the Claimant was informed by the Respondent's Human Resources Department that as he had been absent on sick leave since 23 March 2016, his entitlement to receive full sick pay would expire on 18 July 2016 and that thereafter he would be entitled to receive half of full pay until 16 January 2017, should his absence continue into the future.

52 The next fitness to work statement submitted was dated 20 June 2016 and covered a further month until 18 July 2016. It once again cited anxiety (p126A). The Claimant was invited by a letter from Charlotte Blackman, Human Resources Adviser, to a further Occupational Health meeting on 30 June 2016. The letter from her was dated 20 June 2016.

53 The Claimant cancelled his attendance at what was the third Occupational Health appointment on the morning of the appointment on 30 June 2016 (p129).

54 A further Occupational Health appointment was made for 12 July 2016 and the Claimant was given notice of this by a letter dated 30 June 2016 (p130A). The Claimant was uncertain in the course of his oral evidence whether it was he who had cancelled the appointment for 12 July 2016. The Tribunal reviewed the contemporaneous documentary evidence about this. It appeared that certainly there was communication between Mrs Haddow and the Claimant on 8 July 2016 confirming details of a re-arranged appointment (p130C). This was followed by a letter in the same form as previously from Mrs Haddow to the Claimant dated 11 July 2016 in which she wrote to him confirming that she understood "*from our Occupational Health provider that you are unable to attend your appointment scheduled on 12 July 2016, that you have arranged another appointment for next week*". After setting out the details of the location, date and time of the next appointment, she confirmed that she had already received a copy of the Occupational Health referral and also that he had verbally confirmed to the Occupational Health provider that he would be able to make the appointment on 21 July 2016. The Tribunal considered on the balance of probabilities that it was the Claimant who had cancelled the fourth Occupational Health appointment which was fixed for 12 July 2016.

55 A few days later the Claimant submitted a further fitness for work certificate covering the period from 15 July to 14 August 2016 indicating that he would not be fit for work for a further month (p133). It appeared therefore that the Claimant had obtained a fresh fitness to work certificate before the previous one had expired on 18 July. This latest statement of fitness for work expressly excluded the template options of a return on modified duties, a phased return to work on altered hours, or a return with workplace

adaptations or amended duties.

56 The fifth Occupational Health appointment arranged for the Claimant was on 21 July 2016, following the referral by the Respondent dated 20 June 2016. The reason for the referral in broad terms was to follow on from the earlier replies given in the previous Occupational Health report to the effect that the Claimant's inability to attend the meeting for 4-5 weeks needed to be reassessed. The Respondent asked for Occupational Health assistance specifically on the question of whether the Claimant would be fit to attend a meeting as they explained: "*Richard has been suffering from work related stress and anxiety and it's important that we meet with him to understand specifically what the work issues are that are contributing towards his stress and anxiety in order that we can address these to support Richard's recovery*" (p127). They also sought advice in relation to the Claimant's current fitness for work and likely date of return to work, what effect this condition would have on the Claimant's ability to carry out his duties and whether there were any modifications or adjustments which would alleviate the condition or aid rehabilitation. They asked if there were any particular duties that the Claimant could not do and what duties he could perform and whether the condition was likely to reoccur in the future.

57 As in the previous Occupational Health referrals, a summary of the Claimant's absence was set out. This covered the period from May 2013 to the date of the report. The Claimant had been absent:

for two days in May 2013 by reason of cold/cough/flu;

eye, ear, nose and mouth for five days from the end of November to the beginning of December 2013;

bereavement for one working day between 14 and 16 June 2014;

stress/anxiety/depression/psychiatric for 22 working days from 19 June to 27 October 2014;

for gastro-intestinal problems for five working days between 9 and 15 June 2015;

stress/anxiety/depression/psychiatric for one month from 2 October to 5 November 2015;

for gastro-intestinal problems for 16 working days from 4 February to 25 February 2016; and

for stress/anxiety/depression/psychiatric from 23 March 2016 to the date of the referral.

58 This consultation was held face to face with Ms Nordia Lynn, Occupational Health Adviser. Under the heading 'Current Issues', her report (p134) stated "*as management is already aware Mr Greenwood states that the trigger for his absence is both personal and due to work related issues*". The former cause was a reference to the ill health affecting both his parents. It continued: *"he also alleges that he had been bullied by a colleague for*

many years and that management is fully aware of these issues. He perceives that nothing has been done. He told me that he is still on medication for management of his symptoms and that his GP wanted to increase his medication but that he wanted to persevere with the current dosage as well as weekly counselling. He states that he initially had counselling through MIND but that he is now paying for private counselling which he is finding to be beneficial. However, he states that he is still experiencing regular panic attacks and this has prevented him attending appointments and leaving the house." The Occupational Health Adviser recorded that she advised the Claimant to see his GP again for further assessment of his symptoms.

59 She recorded in the report that on assessment the Claimant was noted to be "*visibly shaking at times*" although Ms Lynn's opinion was that his emotional state appeared regular. She continued that in her opinion *"he does not appear to be making expected progress"*. Having assessed Mr Greenwood by way of a well validated mental health questionnaire, she noted that he appeared to still have *"moderately severe ongoing psychological symptoms. Due to this he may likely be vulnerable to further relapse. I would therefore be unable at this stage to give a timeframe for full improvement of symptoms or for him to meet with management to discuss the work related issues. It is also not clear if he is receiving full therapeutic interventions. This is his first episode of psychological ill health so it is hoped that he would be able to return to work at some stage with the appropriate medical advice and interventions however I would not be able to predict at this stage how long this is likely to take. I have sought his consent to write to his General Practitioner for a report which may help to clarify his current health situation however consent to do so was refused."*

60 When we considered the issue of the Respondent's knowledge of the Claimant's disability this paragraph was highly material. It records that this was the Claimant's first episode of psychological ill health and that the Occupational Health professional hoped that he would be able to return to work at some stage with the appropriate medical advice and interventions. She also made the comment about not being able to predict how long this was likely to take. That certainly left open the possibility that the Claimant's absence might not be indefinite or at least not long enough to fulfill the criteria for being a disabled person. Also important was that despite asking for the Claimant's consent to get more information from his General Practitioner which could have helped to clarify the position, the Claimant refused to give this consent. This meant therefore that the Respondent was not put in the picture to the extent that they might had been if they had seen the more detailed information which the GP had which was also available to Employment Judge Prichard when he made the assessment about the Claimant's disability and which was also available during this Tribunal hearing.

61 Ms Lynn, (OHA) a registered general nurse with a diploma in OH concluded her report by advising the Respondent's management that Mr Greenwood was currently unfit for work in any capacity and that there was no return to work date at this time and that there were no adjustments that she could suggest which would facilitate a return.

62 When making the referral, the Respondent had indicated that they would like a discussion with the Occupational Health adviser both before and after the assessment. This is referred to in their standard referral form as a 'pre-consultation briefing' or a 'post consultation briefing'. It was unclear in this instance whether that took place. The Tribunal was satisfied that the reason for asking for this was because the management

wished to have the opportunity to put further questions to the expert to obtain a clearer picture about what their advice entailed.

63 The Tribunal was also satisfied on the balance of probabilities that on each occasion a referral to Occupational Health was made by the Respondent, the Claimant had contemporaneous sight both of the referral and of the Occupational Health report apart from the report which was given subsequently at the end of September 2016. The reason the Tribunal reached this conclusion was because of the procedure which was described in the referrals and also because in relation to the report in September 2016, the Claimant specifically wrote to his manager asking for a copy of that report and indicating that he had not received it. There was no similar correspondence in relation to any of the earlier Occupational Health reports.

64 Somewhat out of the blue the Claimant wrote to Mr Dumbrell by email dated 12 August 2016 requesting a meeting with him to discuss his return to work. The Tribunal found that this was out of the blue because the Tribunal did not consider that there was any evidence whatsoever to suggest that the Claimant was being pressurised to return to work at this stage by the Respondent. The Occupational Health referral and report which immediately preceded this have been cited from above in some detail. Indeed, the Tribunal considered that the tone of Mr Greenwood's communication to Mr Dumbrell was also consistent with this finding. He wrote:

> *"Morning Greg,*
>
> *Just to inform you I have an appointment to see a doctor on Monday and it is most likely I shall be extending my absence if required. I do hope for a return as soon as possible, I was planning on a meeting before today but perhaps we could schedule a meeting end of August time for a September return.*
>
> *Please confirm you have received this email at your earliest convenience.*
>
> *Kind regards,*
>
> *Rich."*

65 At the time this email was sent Mr Dumbrell was on annual leave and did not return until later in August. He then wrote to the Claimant by email dated 25 August 2016, copied to Mrs Haddow, acknowledging receipt of the Claimant's email and apologising for the delay. He also acknowledged that the Respondent had received a fit certificate by then which covered the period of sickness absence until 11 October 2016. This had been submitted by the Claimant dated 15 August 2016. It must have been given when he went to the doctor as he indicated he planned to, in his email to Mr Dumbrell. Mr Dumbrell stated (p135A):

> *"if you feel well enough to attend a meeting before that date [i.e. 11 September 2016] both myself and Lesley Haddow are free next Thursday 1 September 2016 at 10.00. We would like to talk about how we can support your return to work as well as discussing the issues you raised prior to this recent period of absence.*

Please let me know ASAP if this time/date is convenient to you. if you feel that you would like to bring a friend or colleague with you to the meeting that would be fine.

Regards,

Greg"

66 The Claimant had not responded to that message by 30 August 2016 and therefore Mr Dumbrell wrote a short email to him just questioning whether he would be attending the meeting he had proposed for 1 September 2016 (pp135B – A).

67 At about that time, by letter dated 1 September, Mr Greenwood also received notification from the Respondent's HR department that statutory sick pay would expire on 16 September 2016 (p136).

68 By a letter dated 2 September 2016 Mrs Haddow wrote to the Claimant following up the email correspondence between the Claimant and Mr Dumbrell. It appeared that the Claimant had not attended the meeting on 1 September 2016 nor had he communicated with the Respondent to inform them what his intentions were as far as that meeting was concerned. In her letter to the Claimant Mrs Haddow listed Mr Dumbrell's attempts to contact the Claimant both by way of emails as referred to above but also some further emails and several telephone calls to the Claimant's home and mobile numbers on 31 August 2016 in order to ascertain his intentions. The Claimant apparently failed also to respond to a message left on the home number. Mrs Haddow indicated that the Respondent needed to speak to the Claimant as soon as possible and asked him to contact either herself or Mr Dumbrell to confirm his current contact details and to rearrange an alternative date and time for the meeting. She explained that it was important that the Respondent was able to contact him during his absence from work so he must ensure that he kept them up to date with any changes in his circumstances or to his contact details (p137).

69 It appears that around about 7 September the Claimant got in touch and a meeting was set up for 12 September 2016 with Mr Dumbrell and Mrs Haddow in attendance. She confirmed this to him in an email (p137A) sent on 7 September 2016 in which she set out that the purpose of the meeting would be to discuss (1) the Claimant's current health and any arrangements to be in place before his return to work; and (2) the allegations and issues that the Claimant raised immediately prior to his absence. He was also informed that should he wish to bring a companion to this meeting that would be fine and that he was not required to be in work prior to this meeting.

70 At the time Mrs Haddow wrote that email to the Claimant he had confirmed his intention of returning to work and his current sick certificate was due to expire on 11 September 2016.

71 There was no evidence before the Tribunal of the Claimant objecting to or disagreeing with the Respondent's plans for the meeting in terms of the timing or the attendees at the meeting or indeed the subjects to be discussed.

72 The Tribunal had a note prepared by Mrs Haddow apparently contemporaneously (pp138 – 139) for her own benefit. The Claimant was accompanied by a friend Mr Campbell. There was no note produced by them of the proceedings. The Respondent did not suggest that they had shared a copy of Mrs Haddow's notes with the Claimant at the time. There was no substantial disagreement with any of the matters set out by Mrs Haddow in her note. In the circumstances the Tribunal considered that on the balance of probabilities it was an accurate record of the discussion. Although the Claimant indicated during his evidence that he did not recall certain things which were being said he did not put forward a positive case of a different account and as stated above, there was no alternative note produced taken by the Claimant or his friend.

73 There were a number of significant pieces of information which the Tribunal derived from Mrs Haddow's note.

74 First the Claimant stated to the Respondent that he was "*feeling the fittest* [that he had been] *for a long time*". The Tribunal considered that this was yet another piece of evidence which was relevant to the consideration of the Respondent's knowledge that the Claimant was a disabled person at this time. Mr Greenwood was told by Mrs Haddow that they would require him to see the Occupational Health adviser as previously the Claimant had been unfit even to talk with his managers and suddenly he was saying that he was fit to work. The Claimant agreed to that referral taking place. He then gave the Respondent some information which could have accounted for the improvement in his health by saying that he was seeing a counsellor and he was on medication which was better than it had previously been.

75 Mrs Haddow also noted that Mr Greenwood stated he did not wish to remain in security (as in doing security work) as he had now completed his degree but he was tied by his fee waiver and he had been unsuccessful in applying for other roles internally. There was a dispute during the hearing as to whether the Claimant had indicated that he was hoping to leave the Respondent's employment altogether. The Claimant would only accept that he had expressed an interest in other roles within the Respondent. However, the Tribunal considered that it was clear that the fee waiver issue had been discussed and both parties were clear at the time that the Claimant would have to repay his fees to the employer if he left their employment within the timeframe that was being discussed. It therefore followed that both parties understood that the Claimant was talking about the fact that if he left the Respondent's employment to work outside of the university he would then have a substantial debt to the Respondent in terms of repaying his tuition fees.

76 As to his ability to carry out his work, the Claimant was noted as saying that he would be concerned about attending incidents and would prefer initially to stay in the control room or to work with a partner.

77 There was also a discussion during the hearing about whether the Respondent carried out a stress risk assessment. The Respondent readily accepted that they had not done one formally by way of completing a form, but their case, which the Tribunal accepted, was that the issues which the stress risk assessment required them to examine with the Claimant had indeed been discussed both at this meeting and in subsequent communications with the Claimant.

78 Another area of dispute during the hearing was the Claimant's contention that he

had been asked to return to work "out of the blue" by Mr Dumbrell on 29 September 2016. Mr Dumbrell sent an email to the Claimant just after midday on 29 September 2016 in which he informed the Claimant that he had been trying to contact him and that in the light of the Occupational Health report which suggested that a return to work might aid his recovery he wished to discuss with the Claimant a planned return to work on 30 September.

79 The context to this was the discussion which had taken place at the meeting on 12 September 2016 against the background which was agreed that because of the set pattern of shifts, the Claimant would have been aware even on 12 September 2016 of his shift pattern and thus when his next working day was due to commence. The notes of the meeting of 12 September record a conversation about unused accrued holiday from the previous holiday year which had expired a short time previously, and about it being agreed that the Claimant would use his holiday from the previous year to cover the two weeks from 12 to 23 September 2016, that he would then expect to return to work in the week commencing Monday 26 September. In that week, the Claimant's first day at work according to the shift pattern was to be 30 September 2016. It was also relevant that the last fitness certificate which the Claimant had produced expired on 11 September 2016. The parties also discussed that the two-week delay to the return to work would also allow time for the Claimant to attend an Occupational Health appointment before his actual return to work.

80 There was no evidence that prior to the contact with Mr Dumbrell on Thursday 29 September which is recorded in the email from Mr Dumbrell to the Claimant (p148C) that the Claimant had made any attempt to contact either Mr Dumbrell or the Respondent in the week commencing 26 September. The only contact that the Tribunal had evidence about was an email from the Claimant to Mr Dumbrell on Thursday 28 September just after 2.00pm acknowledging that Mr Dumbrell had contacted him. He informed Mr Dumbrell that he had unfortunately not heard anything back from the Occupational Health Service after his telephone appointment with them as to any proposed schedule. He asked Mr Dumbrell to let him know what the options were and Mr Dumbrell's plan. In response Mr Dumbrell wrote back to the Claimant within half an hour indicating that he had been trying to contact him over the past couple of days in relation to the proposed return to work and that he wanted to speak to him about the recommendations from the Occupational Health Department for a phased return to work by the Claimant. Mr Dumbrell gave the Claimant two numbers - a mobile and an office number - on which the Claimant could contact him and also informed him that he had tried to call him on his mobile but that the phone was not being answered.

81 Mr Greenwood's response also by email the following morning was, he accepted, somewhat sarcastic. He also asked for Mr Dumbrell to send him a copy of the latest Occupational Health report from the telephone interview and for Mr Dumbrell's proposals to be sent to him in writing. That email was sent at 6.44am.

82 Mr Dumbrell then responded by the email on 29 September at 12.28 referred to above. He outlined that as part of the phased return to work the Respondent would like the Claimant to attend the following day for 6 hours with a start time of 11.00am. Again although this was not expressed in the letter or the email, both parties understood that this was a later start time than the usual shift start time of 7.00am. This was also the first day shift that the Claimant was due to work on his normal shift pattern in the week

commencing 26 September. Mr Dumbrell also explained that he would arrange a meeting at the start of the shift so that he, Mrs Haddow and the duty managers could welcome the Claimant back and discuss how they proceeded with his return. Mr Dumbrell then asked the Claimant to contact him to confirm receipt of the email and his attendance the following day.

83 The Claimant confirmed in an email sent at about 3.00pm on the same day that he had a doctor's appointment for 8.50am the following day so the times that Mr Dumbrell had provided were "*favourable*". He then thanked Mr Dumbrell for this. He concluded his email as follows:

> *"I look forward to seeing you tomorrow morning.*
>
> *Kind regards"*

84 The Tribunal considered therefore rejected the suggestion that the return to work on 30 September was sprung on the Claimant.

85 The Tribunal then returned to consideration of the note of the meeting of 12 September. It was also relevant that Mrs Haddow noted that the meeting concluded with confirmation to the Claimant that a meeting would be held with both team leaders, Mr Dumbrell and himself on the first morning of the Claimant's return to work so that everyone knew what was going on (p139).

86 Finally, Mrs Haddow's note of the discussion on 12 September shows that the Respondent attempted to address with the Claimant his stated concern, back in March 2016 at the beginning of his absence, that difficulties with his colleagues were triggering his ill health. It was notable that on at least two occasions during this meeting Mrs Haddow recorded that the Claimant was basically happy to draw a line under any issues that he may have had in the past. He indicated that he certainly did not want to raise any issues formally and explained that he had expressed his reservations in what Mrs Haddow noted him describing as a "*private conversation with Phil Gilbert*". The Respondent pointed out that in the meeting the Claimant and his friend indicated that "*many of RG's comments at the time were more a reflection of his state of mind as he was not well*." He specifically reassured the Respondent that Mr Savage who he had described as being a trigger to his anxiety had not raised his voice, but had taken him quietly to one side to remind him to tap in. Mrs Haddow noted that the Claimant kept referring back to previous historical incidents and that he felt that Mr Savage picked on him but that he was unable to provide recent examples. The Tribunal has already referred to the fact that there were mutual grievances and that the Respondent had tried to address these issues by way of mediation. It appeared also that there was a valid reason for Mr Savage's intervention in the situation the Claimant was describing as Mr Savage was the Claimant's line manager and his actions in March 2016 fell within the proper ambit of his role.

87 There was also further discussion about three other members of staff and the Claimant repeated that he did not want to formalise or take matters any further in relation to them. He was also unable to provide specific details of the difficulties. None of the issues recorded in the Respondent's note appeared to be matters which would warrant criticism of the fellow member of staff. Despite that there were a couple of incidents raised by the Claimant of what might have been breaches of duty by his supervisor and

colleague which Mr Dumbrell said that he would look into.

88 The Respondent also discussed with the Claimant the importance of raising any issues at the time they occurred rather than bottling them up and that if he felt he could not speak to his duty managers about any issue which arose, he should talk to Mr Dumbrell.

89 The Respondent then referred the Claimant to Occupational Health in a document dated 14 September 2016. As before, they outlined the recent history from the beginning of the Claimant's sickness absence on 23 March 2016. They also asked questions along the lines of those previously set out in these reasons and also asked for pre- and post-consultation briefings from the clinician.

90 The Claimant had a telephone consultation with a Senior Occupational Health Adviser, Ms Rachel Johnson on 21 September 2016. She prepared a two-page report (pp144 – 145). Under the hearing "Current Issues", Ms Johnson reported that the Claimant advised that he continued to experience symptoms including sleep disturbances, anxiety, panic attacks, altered appetite and low mood. However, she stated that he also advised that these symptoms had "*reduced significantly from his initial OH assessment*". He told Ms Johnson that he had been accessing support from his GP, had been prescribed medication and reported that he had been self funding counselling. The Tribunal noted that the Claimant was recorded (in earlier OH reports) as having taken up and paid for private counselling since at least July 2016. This was recorded in the Occupational Health report at 21 July 2016 (p134) in which he reported to Ms Lynn that he did not want to increase his medication as his doctor was suggesting because he wanted to persevere with the current dosage as well as the weekly counselling which he was "*finding to be beneficial*". It appeared therefore that this was a consistent position as far as the counselling was concerned.

91 It was also noted that the Claimant advised the Occupational Health Adviser on 21 September 2016 that he had met with management and believed that he was now ready to consider a return to work on a phased basis. However, he reported to the Occupational Health Adviser that he continued to have some worries about his return to work. The Tribunal considered that this was an example of the difficulties that the Claimant presented in terms of declining to pursue fully with the Respondent his concerns about the work place but on the other hand he reported to the Occupational Health Adviser that he had these worries. It may however be that she was reflecting his worries about dealing with a stressful situation. It did not necessarily follow that his worries about his return were related to working with any of his colleagues.

92 The Occupational Health opinion was in summary that the return to work was likely to be an aid to recovery. There was no difference in the Claimant's symptoms in the sense that he was assessed as still suffering at times from moderate to severe anxiety and depression. However, the Occupational Health Adviser reported that the Claimant had reported that his symptoms had significantly reduced. She continued "*a return before symptoms have settled completely is entirely reasonable and in most cases will reflect the fact that there is an overlap between 'fitness' and 'non-fitness' and that an individual needs the help of work to help regain their confidence, their stamina and to return to normal routine*."

93 She then set out what she believed to be an "operationally feasible" phased return to work. This was to phase the return to work over four working weeks with the first week entailing working half days only and increasing between the second and fourth weeks to a full return to work after the fourth week.

94 She also indicated that regular 'one to ones' were recommend from a welfare perspective and would provide the ideal forum to monitor progress and to address hours and duties in line with recovery. She did not identify any specific duties that the Claimant would be unable to complete. She advised that the stress risk assessment was completed to assist in identifying any issues which the Claimant believed may have contributed to his absence. She then concluded the section on management advice as follows:

> *"As his symptoms are essentially reactive to his perception of a situation within the workplace, his prognosis and chance of future occurrence will ultimately be influenced by steps taken to resolve these issues."*

95 On behalf of the Respondent, after the Claimant had told Mr Dumbrell that he had not received a copy of the report, Ms Blackman sent a copy of the Occupational Health report of 21 September 2016 to the Claimant at 11.51am on 29 September 2016 (p48A).

96 Thus, when the Claimant confirmed by email to Mr Dumbrell on 29 September 2016 that he was content with the arrangements for meeting and returning to work the following day in an email sent just after 3.00pm on 29 September, the Claimant had received the copy of the Occupational Health report from Ms Blackman.

97 On the morning of 30 September 2016, the Claimant sent an email to Mr Dumbrell (p148H) to inform him that he had not been well overnight "*including no sleep and other anxiety issues*". He reiterated to Mr Dumbrell that he had a doctor's appointment booked anyway at 08.50 on 30 September and that he would do his best to attend. He indicated that he would contact Mr Dumbrell once that session was completed. This was taken as a reference to the doctor's appointment. It was unclear exactly when this occurred, but at some point later that day, the Claimant confirmed that he had been signed off sick by his doctor for a further period of one month.

98 It was unclear at exactly what point after the Claimant's appointment with his GP he called the Respondent to confirm that he would not be attending work. Certainly, the Respondent would have known this when the Claimant failed to attend for the 11 o'clock start of his shift. Thereafter Mrs Haddow made various attempts to contact the Claimant to invite him to give her a call back. In the end a telephone conversation was set up between them for 3.00pm (pp148 I and J).

99 The Tribunal noted that the fit note for four weeks from 30 September 2016 signed the Claimant off from work completely. There was no suggestion from the Claimant's GP that the Claimant would be fit to return to work on a phased basis. There was no reference in the fitness statement to the doctor having seen the Occupational Health report and there was no explanation of the GP's advice beyond the compulsory parts of the form being filled out.

100 A conversation took place between the Claimant and Mrs Haddow at about 3.00pm as arranged by them. After the discussion Mrs Haddow sent an email to the Claimant setting out a summary of the conversation and also setting out some further points. This record was in the Claimant's bundle C1 at pages 252 – 253. This was the email which the Claimant wished to adduce as an indication that the Respondent had tried to treat him detrimentally by making an offer to him that he should terminate his employment and that in turn they would waive the right to recover the tuition fees.

101 The email from Mrs Haddow to the Claimant sent at 16.33 was the only contemporaneous record that we had of that conversation. Whilst there were some questions asked about what she had recorded, the Tribunal considered that on the balance of probabilities the email set out a fair account of the conversation that had taken place approximately an hour earlier. There was no response from the Claimant at the time challenging the accuracy of Mrs Haddow's account.

102 The Tribunal accepted Mrs Haddow's evidence that she had taken up the suggestion made by her manager when she discussed Mr Greenwood's position with her that day and put to the Claimant a number of options one of which was that he may wish to leave the Respondent's employment free of the debt of his tuition fees. The Tribunal accepted her evidence that when she realised that the Claimant was not going to be attending work and had been certified off sick completely on 30 September, she was at a loss to think of what else the Respondent could do to assist the Claimant to return to work. The Tribunal took into account that she had asked the Occupational Health Adviser to have a conversation with her before and after the consultation because she wished to understand the change in the Occupational Health advice. The Tribunal noted that there were contemporaneous emails recording both Mrs Haddow's and Mr Dumbrell's surprise at the Occupational Health recommendation for a phased return to work and the advice that a return to work would aid recovery given that they had been advised in Occupational Health reports previously that the Claimant could not even meet with his employers to discuss outstanding matters (p148). It was against that background that although the Occupational Health Adviser had not complied with the management requests to have pre- and post-consultation briefings that Mrs Haddow contacted them and spoke to Ms Johnson and received the explanation from Ms Johnson that whilst she did not criticise her previous colleagues' approach to the matter, her professional view was that a return to work would be of assistance.

103 It was also highly material that the Claimant had as set out above indicated at the meeting of 12 September that he did not wish to remain in the security role but felt restricted by the requirement to repay his degree fee if he left. Thus, the suggestion among the four options put to the Claimant by Mrs Haddow that the Claimant could leave without the burden of the fees debt flowed directly from an issue that the Claimant himself had raised at the previous meeting. It was not an idea which Mrs Haddow initiated. The Tribunal also considered it in the circumstances to have been intended as a helpful suggestion to the Claimant.

104 It is also important that when she wrote the email to the Claimant Mrs Haddow recorded that the terms of this "exit package" would entail resignation by the Claimant and pay during his notice period with the Claimant being on garden leave. She noted that they agreed that the Claimant would think about this offer over the weekend, this being a Friday, and that the Claimant would let Mrs Haddow know before 10.00am on Monday

morning whether he wished to accept it.

105 Certainly, in the three-paragraph email which the Claimant sent back to the Mrs Haddow on 3 October 2016 ([C1] p252) he did not suggest that her account of the conversation was inaccurate. Nor indeed did he express any indignation at the offer or any suggestion that the offer was detrimental to him. He merely indicated that he believed he had been given too short a time to consider his position. He stated that he preferred to be "*cautious*" and perhaps get some legal advice before making a rushed decision. He referred to the fact that he had not yet received his degree qualification certificate although it was not in dispute that he had completed the course several months previously. He then referred to the fact that other members of staff had left the Respondent's employment on settlement terms which included fairly substantial payment after having faced issues with management also. He was clearly drawing an analogy with the circumstances of his own case and suggesting that this was an outcome that he desired. Indeed, he confirmed in cross-examination that when he described the stage that they were at as "embryonic" it was a reference to this being an opening or early stage of negotiations.

106 In fact, the Respondent did not continue with any negotiations as the Claimant did not accept the offer that they made to forego the recovery of fees. The Tribunal considered however that Mr Greenwood's attitude to the offer at the time was in marked contrast to the indignation that was attributed to him during the course of the hearing. It was also the way he put the case in his witness statement.

107 Mrs Haddow also recorded that the Claimant informed her that he had been signed off from work for two weeks but that he was "*not sure this was necessary*". She stated in her email to him that her opinion was that it would not be wise to go against medical advice, but that if he wished to return to work on Monday 3 October he needed to discuss this with his doctor otherwise she asked him please to forward to her a copy of the fit note. The Tribunal considered that this was also relevant evidence in the light of the case which was put at the hearing about whether the Respondent had rushed the Claimant into, among other things, a return to work. This was an occasion specifically when the Respondent acted completely appropriately and, if anything, it was the Claimant who was suggesting that he should return to work before the time frame indicated by the medical advice given by his doctor.

108 Mrs Haddow then continued that if the Claimant decided that he wished to continue in the security officer role and his doctor confirmed that he was fit to return to work on Monday 3 October, they would meet at 10.00am for a back to work meeting before he started. This initial shift would be for six hours. This was effectively then a postponement of the return to work which had been planned for 30 September 2016, if the Claimant and his doctor agreed that it was the appropriate thing to do.

109 Mrs Haddow also recorded in the email, discussion about the Claimant's requests about the possibility of "being moved to another job". In the context the Tribunal was satisfied that this was a reference not to another security officer role but to another job within the Respondent. She confirmed that the Respondent could not simply move the Claimant to another role, but that the Claimant was free to apply for any post which was vacant in respect of which the Respondent was recruiting. She gave the Claimant in the email the link to the Respondent's current vacancy list.

110 It was not in dispute that the Claimant did not make any further applications for vacancies. By the time of the meeting on 12 September he had made applications for other posts outside of the security role. Those were unsuccessful.

111 The fourth matter discussed was a sabbatical, again at the Claimant's instigation. Mrs Haddow set out in the email that the position was that staff could apply for a period of unpaid leave under the Respondent's flexible working policy but that this should be for a defined period. She advised him that it would not be used as a way of extending an employee's sickness absence. There was no suggestion that this was inaccurate advice from Mrs Haddow.

112 She concluded her letter by inviting Mr Greenwood to contact her again if he had any queries and that she looked forward to hearing from him on Monday morning.

113 In an email dated 3 October 2016 and sent at 3am on the Monday morning, Mr Greenwood responded to Mrs Haddow by informing her that among other matters he would not be attending work on the morning and that this was because the certificate would cover him for that period of absence. The Tribunal has already set out above the summary of the issues he raised as well about the exit package offer made by the Respondent.

114 He stated further towards the end of the email that he believed that he should concentrate on his health at that stage "*after suffering another anxiety attack along with sleep disorder*" and that he would submit a statement of fitness to work to Mrs Haddow immediately. He thus did not appear to have taken up the option which was discussed of discussing with his doctor a return to work on the phased basis which had clearly been discussed with Mrs Haddow on the Friday over the telephone. He indicated that he intended to return to work on the expiry of the current sickness certificate and wanted a written rota to be sent to him before the certificate expired so that he could prepare accordingly and reduce "*unwanted apprehension*".

115 Mrs Haddow wrote back to the Claimant later that morning ([C1] p251) indicating that the offer of the of the exit package was made without prejudice and in good faith and that she noted that he had declined the offer and stated his intention to return to work at the end of the current fit note. She asked for sight of the fit note and indicated that she could then arrange for a copy of a return to work rota to be forwarded to him before the fit note expired. She also confirmed to him that the arrangements that had been put in place for his return on Friday 30 September and Monday 3 October would still apply i.e. on his first day back there would be a meeting with Mr Dumbrell, herself and the duty managers at the beginning of his shift.

116 Finally, she advised him that if he had a grievance that he was not able to resolve informally, he should consider the grievance process and she gave him a link to the relevant policy. She concluded by reminding him about the fit note and that he should revert to her if he had any other queries.

117 The fitness for work statement expired on 28 October 2016. There was a short chain of emails between Mr Dumbrell and the Claimant in the run up to the Claimant's return to work on the expiry of the current sick note on 28 October. In particular this started with an email from Mr Dumbrell on 24 October 2016 four days before the expiry of

the sick note but over a week before the Claimant would be due to return to work on the roster. That was due to be on Wednesday 2 November. He informed Mr Greenwood of this in the email. He then went over in more detail the arrangements for the first day back at work giving the location that the Claimant should report to namely his office, the time namely 10.00am on 2 November and the intention that on both the first and second days back the Claimant would be working from 10.00am to 4.00pm mostly within the Control Room. The Tribunal noted that this had been the location that the Claimant had asked to work at in the meeting on 12 September. Mr Dumbrell explained to the Claimant that this arrangement was designed to give the Claimant "*the maximum opportunity to settle back into the work place and return to speed on the current operation*". He then indicated that the Claimant would then move on to 12 hour days from 7.00am to 7.00pm on the next two days of the four day cycle of days. He asked Mr Greenwood to confirm receipt of the email and his attendance as soon as possible so that the Respondent could make the necessary arrangements prior to his return. He also invited the Claimant to contact him if he had any further queries and looked forward to seeing Mr Greenwood the following week.

118 Mr Greenwood responded the following day also by email (p151) thanking Mr Dumbrell for his most recent email. He confirmed that he could attend on 2 November at 10.00am as Mr Dumbrell had indicated. He expressed some reservations about the third and fourth days of work as being too quick a transition to 12 hour shift and that this could possibly cause an issue. He expressly stated however that he felt that the first two shifts were appropriate.

119 This correspondence was forwarded by Mr Dumbrell to Mrs Haddow asking for her advice on the Claimant's expressed concerns about the transition to 12 hour shifts.

120 Mrs Haddow advised Mr Dumbrell that the Respondent might need to be a little more flexible. She indicated in the email reply to Mr Dumbrell on 1 November 2016 at 2.47pm that she had been planning to ask the Claimant what he thought might be more appropriate. Also, she indicated that the Respondent would in any event be monitoring and adjusting the return to work schedule if they needed to. The Tribunal noted that this was the approach also advised in the Occupational Health report which recommended the phased return to work. Further Mrs Haddow referred to the content of that Occupational Health report and reminded Mr Dumbrell that it had recommended a phased return over a longer period. She suggested in the circumstances that the Respondent might want to consider four half days for the first week followed by alternating full and half days for the second week with four full days in the third week.

121 The Tribunal also accepted the evidence of Mrs Haddow and Mr Dumbrell (paragraphs 70 and 96 respectively of their respective witness statements) that this was an issue which they discussed with the Claimant at the initial meeting when he returned to work on 2 November 2016.

122 The Claimant attended as previously arranged on the morning of 2 November 2016. The discussion took place as anticipated between the Claimant, Mrs Haddow, Mr Dumbrell and the two duty managers; and then the Claimant was engaged in various activities during the remainder of his shift. The Tribunal considered that the allocation of duties to the Claimant by the Respondent on 2 November was consistent with the fact that the Claimant had not been at work at all for some 8 ½ to 9 months. Here again there was

no contemporaneous record from the Claimant available to the Tribunal about what had transpired during the shift. The two duty managers however compiled an email note for Mr Dumbrell because Mr Dumbrell was engaged in some other activities and he asked them to inform him of how things had gone. These were respectively at pages 154 – 157. The accounts were both sent to Mr Dumbrell and Mrs Haddow on the morning of 3 November 2016. They were thus relatively contemporaneous.

123 The Claimant telephoned at just after 8 o'clock on 3 November 2016 to inform Mr Gilbert that he would not be in to work that day. Mr Gilbert noted in the email to Mr Dumbrell that Mr Greenwood said that it was not because he was anxious but because he had not slept that night.

124 The following day (4 November) the Claimant also failed to attend for work. He went to his doctor's surgery and was given a statement of fitness for work dated 4 November 2016. His appointment with his GP was for about 10.20am on 4 November 2016. This was sent to the Respondent covering the period 4 November to 18 November 2016 (p158).

125 The Tribunal then had the benefit of contemporaneous email correspondence between the Claimant's managers and Mrs Haddow in which she advised that the appropriate next step was the holding of a capability hearing.

126 Human Resources wrote to the Claimant inviting him to a meeting on 14 November 2016 (p167). The letter was sent by Mrs Haddow. The Claimant was advised that the purpose of the meeting was to consider the impact of his continued absence on performance of his contract of employment and that the outcome may be to recommend his dismissal from the Respondent. He was informed of who would be chairing the meeting and who would be present and that Mr Dumbrell would present a summary of the current situation and action taken to date. The letter indicated that the summary document from Mr Dumbrell and the Occupational Health reports that would be discussed at the meeting were enclosed. The Claimant's position at the Tribunal hearing was that he had not received these documents at the time. There was no evidence however that he asked for them either before the date of the meeting which eventually took place on 17 November nor indeed was there any explicit indication in the grounds of appeal letter that he had not received these documents although there was some reference to unspecified documents not having been received. In all the circumstances, and given that on previous occasions the Claimant had been able to request copies of documents that he had not got (such as the OH report in late September 2016) and that the enclosures were expressly referred to in this letter, the Tribunal considered on the balance of probabilities that the enclosures had indeed been sent and that the Claimant had received them. In addition, the Tribunal took into account the evidence of Professor Watkins who chaired the meeting and that of Mrs Haddow on this issue. Professor Watkins gave compelling evidence that these documents were discussed at the hearing and that it was his practice to check if all the participants had copies any documents referred to.

127 The Claimant was informed in the letter advising him of the meeting that he was entitled to be accompanied and in the event, he was accompanied by a trade union representative. He commented during the Tribunal hearing that the trade union representative was inexperienced. However, the Tribunal noted that there was no suggestion in the notes of the meeting or in any subsequent correspondence from the

Union that the relevant documents which the Respondent had said they would be discussing had not been made available.

128 The meeting which was originally fixed for 14 November 2016 was postponed at the Claimant's request. The Claimant attended the meeting on 17 November 2016 with his trade union representative who was erroneously referred to as being from the UCU union. It was not in dispute that he was a Unison representative. The Tribunal had the benefit of notes of the meeting compiled by the Respondent at pages 172 – 174 of the bundle. Once again there was no other contemporaneous record of what had transpired and the Tribunal accepted on the balance of probabilities that these notes were a fair reflection of the discussion.

129 The meeting commenced at 2.30pm and lasted about one hour in total. The Claimant obtained a further statement of fitness for work on 17 November 2016 which signed him off for work for a period of two months due to expire on 17 January 2017. The statement however indicated that he may be fit for work on a phased return to work basis. The comment in the statement was as follows:

> *"Mr Greenwood may be fit for work if he can reduce his hours to 4 – 6 hours per day and working on alternate days. This is to be negotiated with his employers."*

130 The panel concluded that the appropriate course was to terminate the Claimant's employment and after the panel reconvened on 17 November 2016 Professor Watkins informed the Claimant of this decision. He was told that he was entitled to appeal and that a letter with more details about his notice would be sent to him. The dismissal letter was dated 22 November 2016 (pp175 – 176) and confirmed the termination of the employment with effect from 18 November 2016. It was a termination on ten weeks' notice. Specifically, in relation to the appeal the Claimant was informed that if he wished to appeal he should submit this in writing to Steve Bennett, University Secretary and Clerk with a copy to the Denise Thorpe, Director of HR setting out the grounds of appeal within ten working days of receipt of the letter.

131 Solicitors acting on behalf of the Claimant, Messrs Stewart Law sent a letter dated 2 December 2016 to Mr Bennett marked "by email only" (pp179 – 180). Ms Julie Stewart who introduced herself as the solicitor with conduct of the case indicated first that she had taken limited initial instructions from the Claimant but from these it was readily apparent that his ill health had been seriously exacerbated by recent events. She also asserted that it was clear that his dismissal was a discriminatory one in contravention of the Equality Act 2010. The Tribunal pauses there to note that the claim form which was eventually presented by the Claimant brought complaints of both disability and age discrimination. There was no reference to what type of discrimination was being considered at this stage.

132 The letter from Stewart Law continued that Mr Greenwood wished to appeal against the decision to dismiss him and that by the letter the firm notified the Respondent of that fact and thereby lodged an appeal for and on his behalf. It continued

> *"As to the detailed grounds which he wishes to lodge his appeal under, he reasonably needs longer to formulate these, given that he is disabled and impaired as a result."*

They indicated that they would be meeting with their client "*… over the next few days..*" and that once they had done this and had a better opportunity to review the documentation, they would write again to the Respondent to set out the grounds of appeal in detail. As indicated this letter was sent by email to Mr Bennett but also copied, in accordance with the dismissal letter's instruction about appeals, to the Respondent's Director of HR, Ms Denise Thorpe.

133 By email sent on the same day (2 December) Mr Bennett informed Ms Stewart that he would be retiring at Christmas and so it was unlikely he would be dealing with this matter but that he was happy to receive any further correspondence until 21 December and he informed Ms Stewart that after 21 December any further correspondence should be addressed to Mr Bogle. It was not in dispute that Mr Bogle was Mr Bennett's successor in the post of University Secretary and Clerk.

134 The address that he gave for Mr Bogle was only an email address.

135 There was an automatic reply generated by the letter that was sent to Ms Thorpe (p180B). The reply informed the sender that she would be out of the office until Monday 5 December and would not be responding to emails but that if there was an urgent issue there were two addresses of the Assistant Director and her PA given as alternatives. These were both email addresses as well.

136 On 21 December 2016, following discussion and correspondence between Mrs Haddow and Mr Bennett about the fact that the Respondent had still not received the grounds of appeal, Mr Bennett wrote to Ms Stewart and copied it to Mrs Haddow (p182) acknowledging receipt of the letter of 2 December and expressing surprise that almost three weeks later the Respondent had still not received the additional information promised about the appeal. He then indicated that if Mr Greenwood wished to pursue his appeal, this information would be required by the Respondent by the close of business on Friday 6 January 2017 as the Respondent took the view that this was more than sufficient time for the Claimant to have formulated his response.

137 He reminded Ms Stewart that he was retiring on 21 December and therefore his successor Paul Bogle should be contacted in relation to this matter. Once again this was sent "by email only". The letter was stated to have been copied to Mrs Haddow only but Mr Bennett's member of staff, Ms Andrews who sent the email to Ms Stewart also copied it to Mr Bogle. There was thus yet another reference to Mr Bogle's email address (p181).

138 One of the factual issues the Tribunal had to decide was whether the Claimant then sent a letter of grounds of appeal which was in the hearing bundle at pages 182A – H. It was dated 4 January 2017 and it was notable for a number of reasons. For the avoidance of doubt the Respondent denied ever having received this document. It appeared to the Tribunal that it was relevant that it purported to have been sent to Mr Bogle's actual address not by email, as had been requested by the Respondent previously. This method of communication was also different from all the previous correspondence between the Respondent and the firm of solicitors. There was no explanation why this was done especially as it purported to have been sent only two days before the expiry of the deadline which Mr Bennett had communicated to the Claimant's solicitors on 21 December 2016.

139 The next notable point was that the grounds of appeal letter contained an anachronism. This appeared on the seventh page of the letter (p182G) in which it was stated that Mr Greenwood's personal property had been emptied from his locker and returned to him severely damaged. There was email correspondence before the Tribunal between the Claimant and Mr Dumbrell about the return of his personal property in which it was clear that as of 10 January 2017, Mr Dumbrell was asking the Claimant whether he was now in a position to collect his belongings from the university, or whether he would prefer that the university destroyed them. He also mentioned that there was property of the university which Mr Dumbrell was happy to collect if necessary but which should be returned by the Claimant as soon as possible. There had been earlier correspondence between Mr Dumbrell and the Claimant on this issue dating back to the end of November 2016, shortly after the termination of the Claimant's employment. The Tribunal accepted as eminently credible the evidence of Mr Dumbrell that sometime after sending the email of 10 January 2017 (p182I) to the Claimant, he himself had seen to collecting the Claimant's personal belongings and boxing them up and taking them to the university's post room for them to be sent to the Claimant. The Tribunal accepted that evidence because it was eminently consistent with the contents of that email. The Claimant did not suggest that he had not received the email of 10 January 2017. In those circumstances therefore on the balance of probabilities the Tribunal accepted the Respondent's submission that as a matter of fact it appeared impossible for the Claimant to have included in his letter of appeal complaint about the condition in which the property was returned to him and emptied from his locker on a date which purported to precede the date on which that act could have been done i.e. it could not have been referenced in a letter of 4 January 2017.

140 The Tribunal was shown correspondence between the solicitors in the context of the Respondent's solicitors having been made aware of the 4 January 2017 letter in December 2017. The 4 January letter purporting to contain the grounds of appeal was not included in the Claimant's original list of disclosure and only materialised when the Respondent's solicitor asked for it. On seeing this letter, the Respondent's solicitor also asked for confirmation about what was being said about when the letter had been written and generated and they asked for the relevant metadata to verify the Claimant's case on this. Eventually on about third day of the hearing the Tribunal was shown correspondence between the two solicitors on this issue. The Tribunal indicated during the hearing that it would not be in a position to reach any definitive decisions as to precisely what the Claimant's solicitor had done in relation to this letter, based on the scant evidence before us up to that point. However, it appeared on the inconvertible evidence of the 10 January 2017 email sent by Mr Dumbrell, that whenever the 4 January letter was generated, on the balance of probabilities it must have been after the date it bore of 4 January 2017. How this came about the Tribunal was unable to determine. This finding however also was consistent with the Respondent's case that they had not received the letter at all.

141 The final issue that tended to undermine the authenticity of the date of the letter was the absence of any proof of posting or any other such evidence to substantiate the claim that it was sent contemporaneously with the 4 January 2017 date. Also related to this point was the contention in correspondence by the Claimant's solicitor that the letter was posted, when it was apparent from all the previous correspondence as outlined above that the Respondent had requested contact by email, and that this was the method that both parties had used up to that point. Despite the Claimant's solicitor stated indignation in the inter partes correspondence about the Respondent's solicitor questioning the authenticity of the date of the letter, the Tribunal considered that the questions raised by

the Respondent's solicitors were valid in the circumstances.

142 A further circumstance which undermined the Claimant's case that this letter had been sent at all was the absence of any evidence whatsoever that the Claimant or his solicitor (who currently still acted for him) had taken any steps whatsoever to chase up a response from the Respondent in relation to an appeal which they maintained had been lodged by the email of 2 December 2016 and in respect of which grounds had been provided apparently by post on 4 January 2017.

143 In all the circumstances therefore, the Tribunal concluded that the letter dated 4 January 2017 setting out the grounds of appeal had not been sent to the Respondent by the Claimant's solicitor or anyone else on behalf of the Claimant.

144 The Tribunal was also satisfied from the evidence of the Respondent's witnesses that they had perfectly satisfactory systems for handling incoming mail. The other surprising element was that the letter setting out the grounds of appeal was apparently not sent or not copied to Mrs Thorpe. Not only had this been requested by the Respondent in the dismissal letter, it was apparent that this had been done earlier by Stewart Law when the letter of 2 December indicating the intention to appeal had been sent by email. The Tribunal has referred to the automatic reply that was generated by Mrs Thorpe's email account.

145 The Tribunal was satisfied that if grounds of appeal had been received the Respondent would have organised for an appeal to be heard by the relevant body but because there was no indication from the Claimant that he wished to pursue his appeal further, this step was not taken. The Tribunal considered that the Respondent acted appropriately and sensibly in the circumstances. It would have been a waste of everyone's time to assemble an appeal panel when the evidence before the Respondent was that the appeal was not being pursued. The Tribunal was also satisfied that the Respondent had done more than was required of them in terms of chasing the grounds of appeal prior to the New Year.

146 In relation to the discrimination allegation about the appeal therefore, the Claimant had failed to establish the primary facts on which his complaint was based. That complaint was therefore dismissed.

147 The following is a consideration of the remaining issues and claims.

148 The first matter which had to be considered, in the context of the disability discrimination complaint, was whether the Respondent had, or ought reasonably to have had, knowledge that the Claimant was disabled; and if they did, the relevant date of that actual or presumed knowledge. The Claimant contended that the latest that the Respondent should have had this knowledge was by March/April 2016.

149 The Claimant's first position as set out in the list of issues at para 2 and in Ms Benton's written closing submissions at paragraphs 32 and 33 was that the Respondent had knowledge of the Claimant being a disabled person by March/April 2016. The Tribunal rejected that submission. By March/April 2016, albeit the Claimant had taken 22 days of sickness absence between June and October 2014, there was no further sickness

absence until he took one month off sick from 2 October to 5 November 2015. Then between November 2015 and March 2015 there was no further absence again for any matter which could be related to stress, anxiety or depression.

150 It was also important to note that the stated reasons for the previous absences included both the condition by reason of which the Claimant has found to be disabled, but also depression, which was not found to have amounted to a disability for the Claimant. Further the Claimant's current sick leave started on 23 March 2016. Thus, even by the end of April 2016 he had only been off sick for some six weeks. In order for the Claimant to be considered to be a disabled person he would have needed to have been substantially adversely affected by a condition which was likely to last a year. The Tribunal did not consider that it was reasonable to expect that this employer should have suspected after only six weeks that the Claimant's ill health would last for a year. It was also important to note that at this stage the Claimant was presenting successive fitness certificates of two weeks each. The first fitness for work statement which was presented for a longer period was the one dated 20 May 2016. This was for a period of a month.

151 The Tribunal also took into account in reaching this finding, the information that was known by or disclosed to the Respondent as set out in the first Occupational Health report dated 26 April 2016. First the Claimant declined to consent to clinical matters being reported to the Respondent therefore the report included only management advice. Thus, the diagnosis which appeared later identifying the degree of severity of the Claimant's mental ill health was not set out. The Respondent management was advised that the Claimant would require absence from work for "*possibly a further four weeks in order to achieve a beneficial therapeutic level in treatment in order to resume a level of wellbeing consistent with attending a meeting or a return to work*". There was no reason therefore based on this opinion why the Respondent should have considered that the Claimant was likely to suffer from mental ill health to such an extent that the adverse effects would last for a year and that the effects would be substantial.

152 In all the circumstances therefore, the Tribunal rejected the contention that the Respondent should have had constructive knowledge of the Claimant being a disabled person by the end of April 2016. Further, they had no actual knowledge that this was the case.

153 The next case put by the Claimant which was not the position put in the list of issues but which was argued in Ms Benton's closing submission, was that the very latest point at which the Respondent ought to have known that the Claimant was a disabled person was by the time the Occupational Health report of July 2016 was produced for them (p134).

154 By 21 July 2016 the Claimant had apparently consented to some more information being passed on to his employers by Occupational Health. The earlier report of 24 May 2016 had also diagnosed the Claimant with moderately severe depression with severe anxiety and had not given any date on which the Claimant might be expected to be fit to return to work although it was suggested that he might be fit to attend the meeting with management within the following four to five weeks.

155 The information about the Claimant's mental wellbeing was expressed in similar terms in the 21 July 2016 report. However, at this point it was indicated that the Claimant

was finding counselling through a private organisation beneficial, the Respondent was informed that this was the Claimant's first episode of psychological ill health and so the hope was expressed by Occupational Health that the Claimant would be able to return to work at some stage with the appropriate medical advice and interventions. Although Ms Lynn did not indicate how long this would be, the Tribunal reminded itself that in terms of fulfilling the definition of long term there had by now been a period of four months absence and the definition long term requires that an employee's condition is likely to disabling them for a period of 12 months or more ("long term"). Further the Tribunal took into account the findings of Employment Judge Prichard as to the Claimant's disability and the basis of it in the context of assessing the previous absences for apparently psychologically related matters.

156 Four months however was less than half of the period that a Claimant would need to be sufficiently adversely affected or likely to be so, before the threshold in the definition was met. Further, the Claimant was indicating that he was finding treatment beneficial which could reasonably have been taken by the Respondent to indicate a realistic prospect of a sufficient recovery within a reasonable time.

157 The Tribunal considered that it would be premature for the Respondent to have considered that their employee was a disabled person such that they had constructive knowledge of it as of July 2016.

158 The Tribunal has specifically considered this as a date by which constructive knowledge was to be attributed to the Respondent despite the fact that this was not the case that was put in the list of issues.

159 We could not find any other date by which the Claimant in closing submissions was saying that the Respondent should have had constructive knowledge that the Claimant was a disabled person.

160 As the Tribunal outlined in its findings of fact above, the July 2016 OH report was fairly quickly followed by the Claimant's indication in writing that he wished to return to work, as of 12 August 2016. He then persisted in that contention through to the termination of his employment. That certainly tended to point away from a conclusion that he was a disabled person. The Tribunal was aware that the Respondent had concerns about the Claimant's presentation but the Tribunal did not consider that the overall picture as of July 2016 indicated that the Claimant should have been seen as a disabled person by then.

161 The Claimant dealt with the issue of the Respondent's knowledge in the section headed "Disability and medical evidence" at paragraphs 32 – 37 of Ms Banton's closing submissions. There was additional reference elsewhere to the Respondent's constructive knowledge of the Claimant as a disabled person for example at paragraph 49. There also, Ms Banton referred to the relevant timeframe as the Respondent having that knowledge "certainly by late Spring/Summer 2016". This appeared to the Tribunal to be a reiteration of the expanded case put in closing to cover the period from March/April as pleaded in the list of issues through to the Occupational Health report in July 2016.

162 In the alternative even if the Tribunal were mistaken as to it findings about the Respondent's lack of constructive knowledge of the Claimant as a disabled person by

March/April 2016, the Tribunal records that it accepted Mr Khan's submissions as set out in his closing submissions about the individual disability discrimination complaints. The allegations would therefore have been dismissed in any event on their merits.

163 The Tribunal found that the Respondent did not have constructive knowledge of the Claimant being a disabled person by either April 2016 (as pleaded in the list of issues) or July 2016 (as was argued in the Claimant's closing submissions). It followed therefore that the Respondent had a defence to all the disability discrimination complaints affecting those timeframes. On that basis therefore, the remaining disability discrimination complaints were not well-founded and were dismissed.

164 Despite that finding, the Tribunal considered that it was appropriate to set out our findings of fact about many of the matters complained of in the disability discrimination complaints because they overlapped with the matters which needed to be determined in relation to his unfair dismissal complaint.

165 Having rejected the contention that the reason for the dismissal was because the Respondent discriminated against the Claimant under the Equality Act by reference to the protected characteristic of disability, the Tribunal was satisfied that the reason for the dismissal was capability and/or some other substantial reason, on the basis that was put forward by the Respondent. The Claimant had put no alternative reason forward. The Tribunal reminded itself of the applicable case law which has long established that the reason for dismissal is the set of facts on which the Respondent based its decision to dismiss: ***Abernethy v Mott, Hay and Anderson*** [1974] ICR 323. The reasons were expressed in sufficient detail in the dismissal letter in which Professor Watkins informed the Claimant that the panel did not believe that the Claimant was yet well enough to return to the demands of the role of security officer. He acknowledged that it was a complex case and he stated they had taken account of the challenges faced by the security team as a result of the Claimant's continued absence and the impact upon the university's business.

166 During the hearing and as set out in the amended grounds of resistance, Mr Khan confirmed that the Respondent's position was that the labels of either capability or some other substantial reason could be applied to the facts. The Tribunal agreed that the facts and matters relied upon constituted a potentially fair reason under Section 98 of the Employment Rights Act 1996. The Tribunal next had to consider whether the dismissal for this reason was fair having regard to the size and administrative resources of the Respondent.

167 It was important also in considering issue of the fairness of the dismissal that Professor Watkins had no prior knowledge of the Claimant. As there was no evidence to contradict his assertion that he had no indication of the exit package having been put to the Claimant or indeed any of the other options that were discussed with the Claimant by Mrs Haddow, the Tribunal accepted his evidence to that effect. To the extent that it was said on behalf of the Claimant that the proposals indicated a desire on the part of Mrs Haddow or the Respondent to dispense with the Claimant's services, the Tribunal was satisfied that Professor Watkins could not be accused of such motives. In short, we concluded on the balance of probabilities that he assessed the case along with Mr Bennett on the basis of the evidence which was included in Mr Dumbrell's summary and the Occupational Health reports and the answers and matters discussed at the meeting of 17

November. The parties agreed that as a matter of law, it was the state of knowledge of the decision maker which was relevant in assessing liability for unfair dismissal.

168 The list of issues identified a number of respects in which it was said that the Respondent's decision could be criticised such that it would render the dismissal unfair. These were helpfully batched together under four headings having been extracted from the grounds of complaint.

169 The first was that it was said that the Respondent did not take such steps as were reasonable to discover the Claimant's medical condition and likely prognosis.

170 The Tribunal considered that the Respondent had taken reasonable steps to discover the Claimant's medical conditions and likely prognosis by way of the numerous referrals to Occupational Health outlined above. In addition, after the Claimant indicated his desire to return to work on 14 August 2016 the Respondent met with him as set out above on 12 September 2016 and discussed the Claimant's health and also the other issues which were said to have been encountered by him and to have been detrimental to his health. They then quite properly referred the Claimant to Occupational Health. The Tribunal noted that at no stage in the period from March to November 2016 did the Claimant produce any other medical evidence or ask the Respondent to seek any further medical evidence. Indeed, the Respondent only had the details from the Occupational Health report and the statements of fitness for work produced by the Claimant. There were no reports however from his GP or anyone else. The Respondent had the information about the Claimant's medical condition from the report prepared in May 2016 which was repeated in the July 2016 report. There was no suggestion from the Claimant either in the final meeting or indeed before this Tribunal that the diagnosis the Respondent had been told about was inaccurate.

171 The issue then arose as to whether some further steps should have been taken by the Respondent to make further enquiries when the Claimant attended at the hearing on 17 November with the latest fit note signing the Claimant off as sick for a further month. This fit note indicated that the Claimant "*may*" be able to work with reduced hours. There was no indication whatsoever that the GP recommending this had seen the Occupational Health reports. There was no explanation as to the basis for this advice and there was no indication that the GP was aware that a phased return to work had been tried on two occasions already, namely at the end of September and at the beginning of November 2016 on just this basis. On the first occasion the Claimant had not been able to attend at all (30 September) and on the second occasion the Claimant had attended for six hours on the first shift and then had been unable to return to work thereafter.

172 The next point at Issue 19(b) was that the Respondent did not make reasonable efforts to consult with the Claimant and take his views into account. The Tribunal also considered that this complaint was without substance. The Tribunal has already set out above the numerous attempts made by the Respondent both at the outset of the Claimant's period of ill health back in March and April 2016 and subsequently through to the meetings on 12 September 2016 and on 17 November 2016 to discuss with the Claimant outstanding issues of concern to him and what adjustments if any he would like made and how he could be assisted to return to work. The Tribunal also accepted that a discussion of this happened at the meeting at the beginning of his shift on 2 November 2016.

173 Further in issue 19(c) it was said that the Respondent should have waited longer before terminating the Claimant's employment. The Claimant contended in the list of issues that it was implicit in his dismissal complaint that the Respondent dismissed him too soon and that they should have afforded him more time to recover.

174 The Tribunal considered in this context the Claimant's reliance on the statement of fitness for work which he produced on the morning of the capability hearing. The findings about that statement are set out above. The Tribunal considered that the statement was no more than a tentative request by the doctor for consideration of a return to work on the basis that was proposed in the statement. There was no indication to the employer that this was a position which had been recommended or that it was authoritative advice in the light of the available evidence such as the Occupational Health report and knowledge that attempts to return to work had previously been made and had been unsuccessful. The Tribunal considered that the Respondent had indeed tried a return to work at that point and it had been an almost complete failure.

175 Much was made by the Claimant of the Respondent acting in their own interests in terms of seeking to save costs or not having to pay for a replacement. The Tribunal considered that it was not in the Claimant's interest to continue to subject him to attempted returns to work in circumstances where he was not able to cope.

176 Also the Tribunal noted that in contending that the Respondent should have waited longer before dismissing the Claimant, the Claimant had failed to identify what further period the Respondent should have waited for. There was further no evidence before the capability panel of any timeframe which was likely to lead to a different result.

177 The Tribunal adopted Mr Khan's submissions about the sick note of 17 November 2016 as set out at paragraph 17 of his submissions. The sick note followed a run of ten consecutive sick notes all of which had said that the Claimant was not fit for work as identified above. Any reasonable employer would be entitled to be sceptical of the latest note and not simply accept it at face value.

178 In fact, the latest sick note did not contain any new information at all. It gave no explanation or indication in its contents as to why anything would be different if the Respondent were once again to try having the Claimant back on reduced hours. It was an extremely tentative statement "may be fit for work…".

179 The Tribunal did not adopt the comment in paragraph 17.3 of the submissions about the Claimant's "chosen GP" but adopted the later proposition contained in that statement as set out above about there being no evidence that the GP was aware that the Claimant had attempted a phased return and failed twice or that the GP knew when writing the statement that the Claimant had already tried a six-hour shift.

180 The Tribunal also agreed that Professor Watkins' evidence and the notes of the hearing supported the contention that he had probed the Claimant's apparent reversal in health and was looking for a reasonable basis and grounds for the Claimant to be allowed to come back to work. The simple assertion by the Claimant that the phased return to work would be successful on what would be third attempt was not sufficient.

181 Finally, the Tribunal agreed with the Respondent's contention that an employer in this situation is entitled to critically evaluate the totality of the evidence. The Tribunal was satisfied that Professor Watkins based his decision on the Occupational Health reports, the history including the two failed attempts of phased returns, the Claimant's recent track record of absence which by now amounted to just over 7 ½ months, and his assessment of the Claimant at the capability hearing. The Tribunal readily acknowledged the point made on the Claimant's behalf that Professor Watkins was not medically qualified. However, the Tribunal considered that it was appropriate, taken with the remaining evidence, for the manager's perception of the employee's presentation to be a relevant consideration.

182 The Tribunal accepted the Respondent's submission that they were entitled to weigh the need to achieve consistently high-quality provision of security services in a way that was fair to the security team as a whole and with as little recourse as possible to agency workers. The Claimant's absences were unpredictable both in terms of their onset and their duration. It was not appropriate to look back with hindsight and to say that this was a long term continuous absence. At each point when the Respondent received the sickness notes, they would not have been aware whether that was to be the final note. The absences were therefore not sustainable going forward given the pressure these put on the Claimant's colleagues, their financial costs to the Respondent organisation and the fact that they compromised the quality of the service as a whole. The Tribunal found as set out in its findings above that the Claimant himself had previously complained about the difficulty of working alongside agency staff who were covering for absences of others. He repeated this in his oral evidence.

183 The Tribunal had made its findings above about the failure of the Claimant, through his solicitors or directly, to pursue an appeal having lodged one on 2 December 2016. The Tribunal was also satisfied as set out above that the Respondent had acted reasonably in chasing this up after 2 December 2016. The failure to do so again in 2017 after the Claimant had missed the deadline for presentation of the grounds did not render the dismissal unfair. The Respondent knew or was entitled to believe at that point that the Claimant had the benefit of specialist legal advice.

184 The Tribunal also took into account that in terms of what was contained in the letter of 2 December 2016 the Claimant made not just age discrimination complaints under the Equality Act but in his claim form he asserted associative disability discrimination which was based on his parents' condition.

185 The Tribunal also noted that when the claim form was presented on 15 April 2017 the form completed by the solicitors on behalf of the Claimant indicated at section 12 that the Claimant did not have a disability (R1 P9).

186 The Claimant ticking the box that he did not have a disability on the claim form was then inconsistent with the content of the grounds of complaint where on more than one occasion (e.g. at paragraph 9(p14) he talked about suffering from severe work-related anxiety a text which he asserted to be a disability. Unfortunately, the Tribunal found that this was the way in which he presented himself and his case throughout the time that we were concerned with.

187 Although it was not a matter directly relied upon in the list of issues, in the claim

form, in the witness statement nor indeed in the letter which purported to have been sent on 4 January 2017, the Claimant criticised the Respondent for the fact that Mr Bennett replied to the appeal letter of 2 December 2016 by saying that as he was retiring at Christmas it was unlikely that he would be dealing with the matter. First, the Tribunal did not consider that to be a fair record of what Mr Bennett said. He simply put the Claimant's solicitors on notice that after 21 December 2016 his successor would be dealing with matters. The Tribunal considered it likely that Mr Bennett anticipated in early December 2016 that he would have had the grounds from the Claimant before his departure date of 21 December. However, the Claimant appeared to be complaining that he was left with no doubt that no appeal would be progressed before Christmas and most probably not until the New Year. The Tribunal did not understand how this complaint could be made, given that the Claimant even on his best case did not present the details of his grounds of appeal until 4 January 2017.

188 The Claimant included in the Issues, the question of whether the Respondent had acted in breach of the ACAS CODE OF PRACTICE in respect of disciplinary proceedings. The Tribunal was satisfied that the Code did not apply to consideration of capability dismissals: ***Holmes v Qinetiq Ltd*** [2016] IRLR 664.

189 In conclusion, the Tribunal did not consider that either the processes followed by the Respondent, or the decision taken to dismiss fell outside the permissible band of reasonable responses for an employer. The dismissal was thus not unfair, and the complaint of unfair dismissal was dismissed.

Employment Judge Hyde

26 April 2018