EMPLOYMENT TRIBUNALS

Claimant: Mr P Wrigley

Respondent: British Telecommunications PLC

HELD AT: Manchester **ON:** 13-17 November 2017
28 - 29 November 2017;
4 and 31 January 2018
(in Chambers)

BEFORE: Employment Judge Aspden
Mrs A Jarvis
Mr W Haydock

REPRESENTATION:

Claimant: Mr M Lynch, Trade Union Representative
Respondent: Mrs C Brown, Solicitor

JUDGMENT

1. The claimant was unfairly dismissed

2. The respondent discriminated against the claimant, contrary to section 39 of the Equality Act 2010 by doing the following things, which constituted discrimination arising from disability within section 15 of the Act and a failure to comply with a duty to make reasonable adjustments:

   2.1. giving him notice of termination of employment in February 2016

   2.2. rejecting his appeal against dismissal and dismissing him in November 2016.

3. The respondent also discriminated against the claimant, contrary to section 39 of the Equality Act 2010 by doing the following things, which constituted discrimination arising from disability within section 15 of the Act:

   3.1. sending a letter to the claimant on 23 October 2014 suggesting that termination of his employment was being considered

   3.2. requiring the claimant to attend a meeting with his second line manager on 1 November 2014

3.3. sending a letter to the claimant on 26 May 2015 informing him that termination of his employment was being considered, without first considering occupational health advice

3.4. requiring the claimant to attend a meeting with his second line manager on 1 October 2015

3.5. omitting to consult 'Enable' specialists for advice in relation to the return to work plan which began in July 2015 and before giving notice to terminate the claimant's employment in February 2016

3.6. omitting to carry out any search for alternative work before giving notice to terminate his employment in February 2016

3.7. purporting to extend the claimant's notice on 16 May 2016 rather than reinstating him.

4. The respondent also failed to comply with a duty to make reasonable adjustments and thereby discriminated against the claimant, contrary to section 39 of the Equality Act 2010, by failing to allow the claimant to continue working on adjusted duties after 3 November 2016.

5. The complaints in relation to each of the above matters were brought in time and the Tribunal has jurisdiction to consider them.

6. The claimant's other complaints of discrimination arising from disability within section 15 of the Equality Act 2010 and discrimination by way of a failure to comply with a duty to make reasonable adjustments within sections 20-21 of the Equality Act 2010 are not made out and are dismissed.

7. All other claims made by the claimant are dismissed, having been withdrawn by the claimant.

REASONS

Claims and Issues

1. Following a case management hearing before Employment Judge Ryan, the claims brought by the claimant were identified as claims falling within the following three categories:

1.1. Claims of discrimination arising from disability.

1.2. Claims of disability discrimination arising from a failure to make reasonable adjustments.

1.3. A claim of unfair dismissal.

2. Any other claims made by the claimant were withdrawn at the case management hearing.

3. Judge Ryan had identified that the claimant wished to bring complaints about matters that occurred after the claimant had presented his claim. It was not clear from the note of the case management hearing, however, that the claimant had been given leave to amend his claim to add those complaints. When we raised this with the parties at the outset of the hearing Mrs Brown initially said that the respondent's position was that anything that occurred after 15 April 2016 (when the claim was presented) did not form part of the claim. In reply Mr Lynch made the following points: he had been present at the case management hearing; he had explained that the claimant wanted to add to his claim complaints about matters that occurred after 15 April 2016 and had asked if they would be allowed to amend the claim; Judge Ryan had said no amendment was necessary; the respondent's representative at the hearing had agreed; and Judge Ryan had noted the additional complaints that were being made and gave the respondent permission to amend its response to respond to those additional complaints. In light of those submissions, Mrs Brown, who had not herself been present at the case management hearing, told us that the respondent would have no objection to us allowing an amendment to the claim to include all of the complaints itemised in the note of the case management hearing. Therefore we ordered that the claim was treated as amended to include those complaints.

4. As recorded in the case management order (CMO) the claimant's case is that at the material times he had both physical and mental impairments that constituted disabilities. The physical impairment stemmed from neck and back fractures and musculo-skeletal injuries sustained in a road traffic accident, which had a long-term substantial adverse effect on the claimant's ability to move around, including such matters as bending or lifting everyday objects. The mental impairment, also flowing from the accident, was clinical anxiety/depression, which had long-term substantial adverse effects including that the claimant became short-tempered and intolerant, sought to avoid certain situations, lost interest in his customary activities, and had poor sleep, which reduced his ability to concentrate.

5. We asked Mrs Brown about an apparent contradiction in the respondent's response to the claim, at paragraphs 7 and 8. Mrs Brown explained that the respondent makes the following concessions:

    5.1. At all material times the claimant did have the physical impairments alleged and they constituted a disability within the meaning of section 6 of the Equality Act 2010.

    5.2. At all material times the claimant did have mental impairments caused by a road traffic accident and they constituted a disability within the meaning of section 6 of the Equality Act 2010. It was not conceded that the claimant had any mental impairments other than those caused by the road traffic accident.

    5.3. The respondent knew, from the date of the road traffic accident and, therefore, at all material times, that the claimant was a disabled person as a consequence of these impairments.

Unfair Dismissal

6. The respondent accepts that the claimant was dismissed, although there remains an issue for us to determine as to whether there was just one dismissal or two separate dismissals (the first taking effect in May 2016 in consequence of notice of termination given in February 2016; and the second taking effect in November 2016). The claimant's case is that if there were two dismissals they were both unfair.

7. Aside from determining the issue of whether there were two dismissals or just one, the issues and questions arising for determination in relation to the unfair dismissal claim(s) are as follows.

    7.1. What was the reason for dismissal?

    7.2. Was the reason, or the main reason, for dismissal one falling within s98(2) of the Employment Rights Act 1996 or some other substantial reason as would justify the dismissal of an employee holding the position the Claimant held? The respondent contends that the claimant was dismissed by reason of capability.

    7.3. If so, did the Respondent act reasonably in treating this reason as a sufficient reason for dismissing the Claimant, taking into account its size and administrative resources and having regard to equity and the substantial merits of the case? This question involves consideration of the issues identified in paragraphs 3.2-3.3 of the CMO.

Discrimination arising from disability: Equality Act 2010 s15

8. The CMO recorded that the Claimant alleges that the respondent was responsible for the following acts which constituted unfavourable treatment because of something arising in consequence of his disability, namely his ability to perform his contractual tasks on a full-time basis:

    8.1. the decision to dismiss him on 29 February 2016 and/ or 4 November 2016; and

    8.2. the way in which the respondent applied its absence monitoring procedures.

9. It was clear that the claimant's reference to a decision to dismiss him on 4 November 2016 also included the decision to reject his appeal against the February dismissal, should that decision not itself constitute a dismissal in its own right.

<u>Dismissal in February 2016 and dismissal/rejection of appeal in November 2016</u>

10. In relation to the complaints about dismissal and (as the case may be) the rejection of the claimant's appeal against dismissal, Mrs Brown accepted that:

    10.1. in February 2016 the respondent treated the claimant unfavourably by giving notice to terminate his employment;

10.2. in November 2016 the respondent treated the claimant unfavourably by dismissing his appeal against dismissal and confirming the termination of his employment;

10.3. this treatment was because of the claimant's inability to perform his contractual tasks on a full time basis;

10.4. that inability arose in consequence of the claimant's disability.

11. Therefore, the only issue for us to determine in relation to this aspect of the claimant's claim is whether the treatment was a proportionate means of achieving a legitimate aim. In this regard, the respondent's case is that the legitimate aim was maintaining a fit and effective workforce.

The way in which the respondent applied its absence monitoring procedures

12. In relation to the complaint about the manner in which the respondent applied its absence monitoring procedures, at the outset of the hearing we asked Mr Lynch what it was about the way the absence monitoring procedures had been applied that the claimant said constituted discrimination within section 15. Mr Lynch provided some further detail and we subsequently asked him to identify precisely what acts or omissions the claimant was complaining about, when they had occurred and who at the respondent company had done those acts/omissions. In response to that request Mr Lynch told us the claim under section 15 concerned the following acts or omissions:

12.1. On 23 October 2014 Mr Vernon sent an invitation to a resolution meeting referring to termination of employment when termination was premature.

12.2. Mr Vernon sent resolution letters to the claimant without first having or considering occupational health (OHS) advice on: 23 October 2014 and 26 May 2015.

12.3. Mr Vernon pressured the claimant to return to work in July 2015, before he was ready to do so.

12.4. Mr Vernon required the claimant to attend meetings in Stockport in July 2015 and on 1 October 2015.

12.5. Mr Murphy sent a letter inviting the claimant to an SLMR meeting before considering OHS advice on 6 January 2016.

12.6. Mr Vernon and Mr Murphy sent the letters of 23 October 2014, 26 May 2015 and 6 January 2016 without modifying them in any way to be more supportive and less threatening to the claimant.

12.7. The respondent did not consult 'Enable' specialists for advice regarding suitable adjustments to support the claimant in carrying out duties in relation to working from home from 27 July 2015 as part of a return to work plan initiated by Mr Vernon and in relation to a request for the claimant to work from Rochdale TEC for the last four weeks of that plan.

12.8. Before the claimant was dismissed by Mr Murphy in February 2016, the respondent did not consult 'Enable' specialists for advice regarding the possibility of suitable alternative work or the claimant continuing on the adjusted duties he had been undertaking up to that time.

12.9. Before the claimant was dismissed by Mr Murphy in February 2016, the respondent: did not carry out any search for alternative work; did not involve the claimant directly in any job search process that was carried out; and did not involve 'Enable' in any such job search.

12.10. Mr Hemming extended the claimant's notice rather than reinstating him on the following dates: 12 April 2016; 16 May 2016; 21 October 2016.

12.11. The respondent did not consult 'Enable' specialists for advice in relation to the requirement for the claimant to work at the Oldham exchange in the return to work plan initiated by Mr Hemmings to run from June 2016.

12.12. Prior to the claimant's dismissal by Mr Hemmings in November 2016 the respondent: did not consult 'Enable' specialists for advice in relation to continuing the work the claimant was already doing or suitable alternatives; did not carry out any meaningful job search; did not involve the claimant directly in any job search process that was carried out; and did not involve 'Enable' in any such job search.

12.13. The respondent denied the claimant a fresh appeal against dismissal by Mr Hemmings.

12.14. The respondent focused on requiring the claimant to return to his full original duties rather than considering alternatives throughout the process.

12.15. The respondent required the claimant to attend numerous SLMR (second line manager review) and 'resolution' meetings to discuss his condition, including on: 4 November 2014; 13 March 2015; 30 March 2015; 26 June 2015; 1 October 2015; 13 November 2015; January 2016; 22 February 2016; and 25 August 2016.

12.16. The respondent failed to weigh properly in the balance the known effects of the process on the claimants mental health:

12.16.1. When Mr Vernon sent a letter to the claimant in October 2014 about his future employment.

12.16.2. On 26 July 2015.

12.16.3. When dismissing him in February 2016.

12.16.4. Throughout the time when the claimant's case was being managed by Mr Hemmings.

13. In relation to each of those complaints the issues and questions arising for determination by the Tribunal are as follows:

13.1. Did the alleged treatment occur?

13.2. If so, was it unfavourable?

13.3. If so:

13.3.1. What was the reason (or what were the reasons) for the treatment?

13.3.2. Was that something arising in consequence of the Claimant's disability?

13.4. If so, was the treatment a proportionate means of achieving a legitimate aim?

Failure to comply with duty to make reasonable adjustments

14. The Claimant also alleges that in dismissing him (in February and/or November 2016) and in the manner in which it applied its absence monitoring procedures the Respondent failed to comply with a duty to make reasonable adjustments.

15. The claimant's case is that:

15.1. The respondent applied a provision, criterion and/or practice that employees should work their contractual roles and hours. We shall refer to that as 'the provision'. The respondent concedes it applied the provision.

15.2. The application of the provision put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled in that his inability to undertake his contractual role and work his contractual hours exposed him to the risk of dismissal. The respondent concedes that the claimant was so disadvantaged and that at all material times it knew, or could reasonably have been expected to know, that this was the case.

15.3. The respondent failed to take such steps as were reasonable to avoid the disadvantage.

16. The CMO itemises a number of adjustments the claimant says were reasonably required ie–

16.1. Allowing the claimant to working reduced hours carrying out administrative work at home as of 29 February 2016.

16.2. Allowing the claimant temporary reduction in contractual hours to 18 hours per week in order to continue working at home on administrative work as of 29 February 2016.

16.3. Refraining from dismissing the claimant on 29 February 2016.

16.4. Reinstating the claimant on appeal as of 12 April 2016.

16.5. Discussing with the claimant augmenting the adjustments recommended by Enable/Ability to meet the claimant's restrictions as of 31 October 2016.

16.6. Allowing the claimant to continue working on adjusted duties as of 4 November 2016 with the recommended adjustments on the basis of 32 hours per week for an agreed period increasing to full-time hours.

16.7. Allowing the claimant to continue working on adjusted duties as of 4 November 2016 with the recommended adjustments on a permanent reduced as contract for 32 hours per week immediately (or if he failed to achieve 36 hours following an agreed period).

16.8. Refraining from dismissing the claimant as of 4 November 2016.

16.9. Allowing the claimant a further appeal with regard to the decision to dismiss on 4 November 2016.

16.10. Adjusting its absence monitoring procedures to reduce the number of review meetings and associated correspondence referring to potential termination between September 2014 and 4 November 2016.

17. The issue for us to determine, therefore, is whether the Respondent took such steps as it was reasonable to have to take to avoid the disadvantage caused by the provision.

Jurisdiction – time points

18. The respondent contends that some of the complaints made by the claimant are out of time and this Tribunal does not have jurisdiction to consider them. Mrs Brown conceded that complaints about any acts or omissions that occurred in 2016 are in time but contended that complaints about acts or omissions that occurred in 2015 or 2014 are not.

19. Therefore, if any of the claimant's claims about acts or omissions that happened in 2014 or 2015 are made out, we must determine the following issues:

20. Did the Claimant bring his claim within three months of the unlawful treatment (taking into account any adjustments to that three month period time limit for early conciliation purposes)?

21. If not, were the acts to which the complaint relates an element of conduct extending over a period? If so, when did that period end and did the claimant bring his claim within three months of that period ending (taking into account any adjustments to that three month period time limit for early conciliation purposes)?

22. If not, is it just and equitable for the Employment Tribunal to extend time for the presentation of the complaint?

Remedy

23. We explained to the parties that if we found in favour of the claimant in any of his claims we would not determine issues in relation to remedy immediately but would do so at a later date after a separate hearing. This is because the claim may give rise to complex issues of causation, as identified in the CMO, which may require further evidence. In addition the case appears to involve issues in relation to pension loss, the calculation of which it appears neither party is currently in a position to address.

Evidence and Facts

24. We heard evidence from the claimant himself. For the respondent we heard evidence from four witnesses: Ciaran Harkin, who was the investigation manager appointed by BT to consider Mr Wrigley's grievance and who is no longer employed by BT; Mr Scott Vernon, a manager within BT who was a 'second line manager' in relation to the Claimant; Mr Andy Murphy, another manager with BT who took the original decision to dismiss the claimant; and Mr Matthew Hemmings, another BT manager who dealt with Mr Wrigley's appeal against the decision to dismiss him taken by Mr Murphy.

The respondent's internal policies and guides

25. The company has a number of relevant internal policies and guidance documents, including the following:

    25.1.1. An attendance procedure;

    25.1.2. A guide to making reasonable adjustments;

    25.1.3. A document entitled: 'Managing Changing Capabilities'.

    25.1.4. A guide to mental health and wellbeing and a 'two minute guide for line managers on supporting a return to work following mental health related absence'.

26. The attendance procedure sets out the roles and responsibilities of different managers and the Occupational Health Service. Those responsibilities refer to the need to seek Occupational Health advice, consider reasonable adjustments and 'actively seek… suitable alternative work within the company for people whose required permanent adjustments cannot be accommodated in their current role.' A section entitled 'Workplace Adjustments' contains examples of common adjustments, which it is suggested might include: altering working hours either the short or longer term; offering the option to work at a different location, including occasional home based working; or 'job carving', which it describes as 'the process of allocating or distributing some of the individual's duties to another person and, where this can reasonably be achieved, perhaps by swapping some elements.' In a section on extended absence the policy provides that, where it is not possible to accommodate permanent adjustments within the business unit 'a comprehensive search for alternative duties must be undertaken.'

27. The attendance procedure is supplemented by a document entitled 'Guide to Making Reasonable Adjustments'. This document refers to the need to 'always involve the individual in discussions and decisions that might affect their role or

their employment.' A section entitled, 'Obtaining Additional Support' refers to a service called 'Enable' which, the policy says, is the service developed 'to provide and consistency of approach and deliver timely reasonable adjustments where appropriate to help realise the full potential of all people'. The guidance note goes on to provide examples of possible adjustments that should be considered with the individual which include altering working hours, allocating some duties to another person, allowing time off for rehabilitation, assessment or treatment, transferring an individual to fill an existing vacancy and homeworking. There follows a section entitled 'Finding a Suitable Alternative'. This refers managers to detailed guidelines in the document entitled 'Managing Changing Capabilities'. It also directs employers to take the following steps: identify the locations in which the individual is willing to work; agree on a range of roles the individual will consider and what re-skilling may be necessary; consider positions within the individual's capabilities.

28. The policy documents outlined above make it clear that a decision to dismiss is one that should only be taken by a 'second line manager', rather than the individual's direct (first) line manager and that a first line manager should refer the matter to a second line manager if he or she considers termination of employment should be considered. The policy also provides for employees to have the right to appeal against dismissal to a third line manager.

29. The Managing Changing Capabilities document is a policy contains a description of something referred to as BT's 'MCC process' which it says has two distinct elements: Part A – making adjustments to the employee's current role; and Part B – searching for a new job if adjustments cannot be accommodated. The policy states: 'through regular open discussions managers will understand what adjustments are required to ensure everyone can be as productive at work as possible…' and 'MCC people will only move to the job search process once all reasonable adjustments have been made/considered and it proves impossible for BT to accommodate these.' It goes on to provide that in cases where it is impossible to accommodate adjustments to retain an individual in their current role 'a job search will be carried out to find an alternative job for that person' and 'people who are being managed under Managing Changing Capabilities procedure have priority for all roles'. The policy goes on to set out in some detail how the MCC job search process works. It explains that responsibility for beginning the formal job search process rests with 'the LOB [Line of Business] MCC lead' 'in agreement with the MCC person's line manager' and Accenture (whom we understand to be HR) case adviser. The policy describes the job search process as involving a number of elements including:

29.1.1. An 'informal job search' which involves: 'A thorough investigation of local and other opportunities which may not normally result in a formal vacancy'. This involves the line manager and the individual, supported by HR, networking, 'researching and following through potential opportunities.'

29.1.2. 'Formal priority job matching': this is said to involve ''the line manager helping the person concerned to register as MCC on the BT People system. This system then automatically matches people registered as MCC with the job details supplied by the hiring manager, and when a

match is made the system will notify both the individual and the hiring manager.'

29.1.3. Opportunities priority search: this is a reference to a search for wider opportunities available within BT which includes an opportunity to those registered as MCC to search authorised job vacancies on the BT People system at an early stage. The policy states: 'This is particularly valuable if a completely different type of role is being sought as people might identify roles they were not matched to by the BT People system'.

29.1.4. Considering 'agency displacement opportunities' whereby roles currently undertaken by agents or contractors which may provide a suitable alternative role can be identified as well as assignment and secondment opportunities.

30. The guidance for line managers on mental health and wellbeing directs managers to various sources of advice when distress, stress or mental health issues are apparent. One of those documents is the Two Minute Guide for Managers on returning a return to work following a mental health related absence. That guide has a section entitled 'When to consider a Return to Work Plan' which states: 'The right time will depend on the employee concerned and the nature of their MH issues. Discussing a plan too soon may put employees under pressure. Equally leaving it too late may the employee loses confidence in their ability to return when with appropriate support.' The guidance goes on to say: 'Before you put the plan into operation check the plan does not require the employee to return before they are ready.'

The Facts

31. The claimant started in employment with the respondent on 13 April 1981. In the ten years or so before his dismissal he had been working as a Service Enablement Technician. Under his normal contract of employment he worked a four day week. The respondent had around 150-160 engineers across the North West doing the same kind of work that the claimant had been doing when he was fully fit, with sickness absence rates normally running at about 4%-5%.

32. On 6 September 2014 the claimant was involved in a serious road traffic accident while driving for work duties. He was hospitalised for 11 days.

33. The claimant's injuries included a fractured neck and back, chest injuries and injuries to his pelvis and coccyx which left him with loss of feeling in both arms and hands which continues to the present day. His mobility is restricted and he is in constant physical discomfort and pain, which in turn disturbs his sleep. To help with his physical injuries the claimant has had treatment including physiotherapy and cortisone injections. He was originally prescribed Gabapentin and morphine for the physical pain and still regularly takes paracetamol and ibuprofen. The accident has had a dramatic effect on the claimant's day-to-day life. As well as the physical pain and discomfort and the effects on the claimant's mobility, since the accident the claimant has suffered from high levels of anxiety. For a while after the accident the claimant got regular flashbacks and up to the present day he still has dreams of being involved in a car accident, which results in him waking up with hot sweats.

His sleep is also disrupted by anxiety and worry. The claimant no longer drives and even as a passenger he becomes hyper vigilant, always looking for hazards. He is acutely sensitive to noises like sirens, which make him extremely anxious. The claimant used to be a very active sociable person but because of the restrictions on his mobility he has become socially withdrawn. He used to lead an active sporting life but now tends to avoid friends that he used to share sporting or training activities with. He has become irritable and intolerant which affects his relationships with family and friends, has low motivation and experiences low and depressed mood swings. His concentration and attention skills have also been affected, and his ability to maintain conversation has been impaired by difficulties in concentrating. The claimant has been diagnosed with depression, anxiety and post-traumatic stress-disorder. He now takes antidepressants. He has also had CBT counselling and CBT therapy.

34. Because of his accident the claimant was unable to go to work. His second line manager, Mr David Lines, visited him in hospital and was aware of the extent of the claimant's injuries. Some time before 23 October 2014 Mr Lines himself took leave of absence and responsibility for managing the claimant was passed to Mr Vernon, a Senior Operations Manager.

35. On 23 October 2014, less than seven weeks after the road traffic accident, the respondent sent a letter to the claimant. On its face, the letter purported to have been sent by Mr Vernon. It said:

> 'You have been absent since 8 September 2014 and I am becoming concerned about your fitness and your potentially ability to provide regular and effective service. During your absence and in an attempt to support a return to work, we have offered appropriate BT support in the form of EAP and Rehab Works Counselling and on various occasions encouraged you attend BT's Occupational Health Service for advice on how we can best support you, however you have declined and there is no possible return to work date for you. As a normal part of the process I would like to suggest that we meet to discuss your situation in order to address any issues you may wish to be taken into consideration. One of the considerations will be termination of your employment on the grounds of impaired capability due to ill health.'

The letter went on to say that Mr Vernon would like to meet with the claimant on Tuesday 4 November at the Oldham Exchange.

36. The claimant was shocked and distressed to receive such a letter so soon after his accident. He believes the letter had a significant impact on his mental health. Mr Vernon acknowledges that the letter should not have been sent to the claimant. He explained to us that, because the claimant had been off sick for a certain amount of time, he (Mr Vernon) had received a standard email from HR identifying him as the manager responsible for dealing with the matter. Mr Vernon told us, and we accept, that although the letter sent in his name said he was considering terminating the claimant's employment, he was not in fact doing so at that time. We also accept that the letter was prepared by Mr Vernon's personal assistant and Mr Vernon did not check the letter before it was sent. The respondent company has a series of template letters for managers to use when making contact with absent

staff in these circumstances. Mr Vernon's evidence was that his PA should have sent a letter inviting the claimant to what he described as a 'second-line manager review meeting' (SLMR review meeting) but instead she had sent a different letter which invited the claimant to what was described as a 'resolution meeting' and referred to termination of employment. We infer from Mr Vernon's evidence that he asked his PA to send a letter to the claimant at that time about his absence – there was certainly no suggestion that she decided on her own initiative to communicate with the claimant about his absence. We also infer that the reason Mr Vernon asked his PA to send a letter to the claimant was that he had been absent from work for some weeks, unable to carry out his contractual role, and Mr Vernon wished to discuss his absence with him. We find, however, that Mr Vernon did not tell his personal assistant which letter to send but instead left it to her to make that decision herself. We do not know why Mr Vernon's PA chose to send the letter described as a 'resolution' letter rather than the SLMR letter. The respondent did not call her to give evidence.

37. The meeting that had been scheduled for 4 November 2014 took place by telephone. The claimant told Mr Vernon about the extent of his injuries and the treatment he was receiving. It was apparent to Mr Vernon in that meeting that Mr Wrigley was upset about the letter that had been sent to him. Mr Vernon apologised and told Mr Wrigley that the meeting was not about terminating his employment. Mr Vernon decided at that meeting that it was unnecessary to refer the claimant to Occupational Health for a report at that time since the claimant was still under medical care from hospital. He also decided that there was no need to look for alternative work at that stage or to create a return to work plan.

38. On 12 December 2014 Mr Vernon sent Mr Wrigley a letter formally apologising for sending the letter of 23 October 2014 suggesting that termination of the claimant's employment was being considered. He said he had meant to send a letter inviting the claimant to a 'second line manager review meeting' but instead had sent a letter inviting him to a resolution meeting. He described this as a 'clerical oversight'.

39. The claimant's absence from work continued. However, one of the claimant's managers, Errol Hindley, had asked the claimant if he wanted to carry out some administrative tasks from home. The claimant agreed and started doing about four hours' work a week as and when he felt able. This began late in 2014. Mr Hindley asked the claimant not to mention this work to anyone and Mr Wrigley was later told that other managers and HR were unaware that he had been asked to do it.

40. In or around March 2015 the claimant received a letter asking him to attend a 'second line manager review' (SLMR) meeting to be conducted by Mr Lines, who had by now returned to work. That SLMR meeting took place on 13 March 2015. By this time the claimant had been away from work for just over six months and it was more than four months since the 4 November SLMR telephone 'meeting' with Mr Vernon. Mr Lines completed a report following that meeting in which he recorded that the claimant 'is not in a position where he can return either with or without adjustments'. Mr Lines also recorded that the claimant had 'no issues at all with weekly calls/updates held with manager.' The claimant was due to see a physiotherapist on 22 March and a psychologist on 26 March 2015 and the claimant agreed with Mr Lines that he would update his manager or Mr Lines on the outcome of those appointments.

41. The psychologist, Dr Corrin, saw the claimant on 26 March 2015 as planned. There followed, on 30 March 2015, another SLMR meeting with Mr Lines. Mr Lines visited the claimant at home for this purpose. They discussed the claimant's accident, the injuries he had sustained and the medication he was taking. Mr Lines told the claimant that it might be possible to provide some alternative sedentary work or some work referred to as 'frames assistance work' on site, but that it would be on a short-term basis with no possibility of a permanent role in either position. The claimant told Mr Lines that he did not think he could return to full or restricted duties at that time given the lack of mobility in his neck, the discomfort in his upper and lower back and the pins and needles in his hand. He also explained that he had been referred to a clinical psychologist for depression. Mr Lines accepted that a return to work with or without restrictions at that time was not an option. However, he suggested a referral to BT's Occupational Health Service (OHS) for advice, which the claimant agreed to. Mr Lines told the claimant at that meeting that he was concerned about the claimant's absence and his future ability to provide regular and effective service and that his continued pattern of absence could not be sustained indefinitely.

42. Someone at the respondent company then arranged for the claimant to be referred to OHS for assessment and advice regarding his fitness to work. An OHS report dated 15 May 2015 was produced following that referral. The report outlined the current position in relation to the claimant's condition and the treatment that the claimant was receiving and was due to receive. It explained that the claimant had been prescribed antidepressant medication and that 'the claimant considers that he has no quality of life at the moment' and was not socialising or seeing people. The report stated: 'It is difficult to predict when he will return to work at the present moment' and that the physician could not identify 'any specific restrictions or adjustments at the present moment that would facilitate a return to work to his job'. The physician said the claimant still needed further treatment to improve his functional capability before a return to work could be considered, and that he did not foresee an imminent return to work or a return to work in less than three months' time.

43. At some point Mr Lines began another period of leave of absence and Mr Vernon once again took over from him as the second line manager responsible for matters pertaining to the claimant's absence. On 26 May 2015 Mr Vernon sent a letter to the claimant inviting him to another meeting. We find that, at the time he wrote that letter, Mr Vernon knew OHS had been asked to provide a report on the claimant but had not actually seen the OHS report, as the letter states, 'As you know we are currently waiting for an OHS report to be released to BT management'. The letter said the meeting was to 'discuss your situation in order to address any issues you may wish to be taken into consideration' and that 'one of the considerations will be termination of your employment on the grounds of impaired capability due to ill health'. On being asked during the hearing why he had referred to termination of employment when he had not yet seen the OHS report, the only comment made by Mr Vernon was: 'it depends how you want to look at it.' On being asked on cross examination why he had not thought it appropriate to do a search for alternative jobs before considering dismissal Mr Vernon replied that it is impossible to do a job search for someone who is off sick and that they would 'cross that bridge when we came to it'. At this time, in light of what the claimant had told him in November 2014 and what the claimant had told Mr Lines during meetings with him, Mr Vernon

was aware, or ought reasonably to have been aware, that the claimant had significant mental health problems.

44. The claimant was already in a fragile mental state and Mr Vernon's letter caused him considerable distress. He was becoming increasingly anxious and worried about the way he felt his situation was being managed by the company and so he sent an email to Mr Vernon on 31 May 2015 to express his concerns. In that email he questioned why nobody had asked the OHS physician to comment on whether he could complete some form of admin type work from home for a few months or about other specific role adjustments. He referred in that email to the admin work he had been doing for his line manager and asked if Mr Vernon was aware of it. He also explained to Mr Vernon that his sick pay would be repaid to British Telecom because of the legal claim he was taking against the driver responsible for the accident. The claimant suggested another OHS referral may be needed with specific questions around whether he was capable of completing admin work from home. He also expressed his concern about the suggestion that he would be dismissed as an employee. Mr Vernon forwarded the claimant's email to Dawn Wardle in HR asking for advice as to how he should reply. She told Mr Vernon that the issues raised by the claimant could be discussed at the next meeting.

45. The meeting between the claimant and Mr Vernon took place on 23 June 2015. Dawn Wardle from HR was also present, as was the claimant's trade union representative, Alan Boud. At the meeting the claimant suggested that Mr Vernon should not have invited him to a meeting before he had received the OHS report and asked why that had been done. Ms Wardle said she would make enquiries and get back to the claimant but she did not do so. The claimant told Mr Vernon and Ms Wardle about the work he had been doing for Errol Hindley; they both appeared surprised and asked the claimant about it several times during the meeting. They discussed a phased return to work. Because the claimant had been asked to attend a number of meetings with second line managers and because the letters inviting him to those meetings referred to the potential termination of his employment, he felt under some pressure to return to work as soon as possible. Mr Vernon acknowledged during cross-examination that he realised the claimant would have felt under some pressure to return to work. The claimant told Mr Vernon that he thought he would be able to return to work in four weeks.

46. On 26 June 2015 Mr Vernon sent a letter to the claimant setting out his understanding of what had been agreed at the meeting of 23 June 2015. He said:

> 'You advised that you will be ready to return to work in four weeks' time for 2½ days for the first eight weeks progressing to 4½ days at the eight week mark. You advised that you would be fit to undertake admin work from home as previously discussed in SLM reviews. However, your aim is to eventually return to full frames duty.'

47. Mr Vernon went on to say that he did still have concerns about the claimant's ability to maintain a return to work whilst providing effective service, but that he had decided to place his decision on hold pending a review of a possible fit note and return to work plan from the claimant's GP. He asked the claimant to contact his line manager, Rob Hogarth, to confirm the outcome of his discussion with his GP by 3 July 2015 and forward a fit note, if he managed to obtain one, to Mr Hogarth

for review. Mr Vernon went on to say: 'If having considered all the evidence it is decided to terminate your employment on the grounds of impaired capability due to ill health you will be advised in writing and that letter will confirm your last day of employment.'

48. That same day the claimant went to see his GP about getting a fit note for a return to work. The claimant's GP issued a fit note that said the claimant may benefit from a phased return to work with amended duties. It noted that the claimant 'will start by working from home on computer and then liaise with work re a phased return; date of starting to be agreed with work'. The claimant's GP was somewhat reluctant to provide a sick note to the claimant and this is reflected in a second note dated 9 July 2015 which stated that the claimant would not be able to do a phased return to work until 27 July but could start as per the plan on that date.

49. In the meantime, on 2 July 2015, the claimant met with his clinical psychologist, Sheila Cooper. She prepared a report recommending 15 sessions of CBT, one session per week initially and then fortnightly. Her prognosis was that the claimant was expected to 'gain a good (75%) improvement from the recommended treatment. The improvement is expected to be made over 6-9 months from the commencement of treatment'.

50. In the meeting with Mr Vernon in June it was agreed that a return to work adjustments plan would be put in place and that a meeting would be arranged with the claimant's line manager at the time, Mr Rob Hogarth, to discuss and facilitate this. Mr Hogarth drew up a return to work plan which provided for the claimant would return to work on administrative duties, initially doing two half days' work at home (using his laptop) for four weeks, followed by a four half days' work at home for eight weeks, followed by four half days (16 hours) at the BT building in Rochdale for the final four weeks, followed then by a return to full duties. The claimant and Mr Hogarth agreed that the claimant would visit the OHS between the eighth and tenth week for a further assessment. The claimant expressed concern about working at a BT building, explaining to Mr Hogarth that he could not drive at that time. During a later update meeting the claimant repeated these concerns, saying that he did not feel well enough to return to work at a BT building and that a return to a BT building had never been agreed at the original meeting when a phased return was discussed.

51. It was agreed that the return to work plan would begin on 3 August 2015. However, because the claimant had four weeks' pre-booked annual leave from 17 August 2015, the completion date for the plan had to be pushed back.

52. On 28 August 2015, less than four weeks after the claimant had started work under the return to work plan, and after he had completed just two weeks' work pursuant to that plan, Mr Vernon wrote to the claimant inviting him to another SLMR meeting to discuss his situation again. Once again, Mr Vernon opened this letter by saying: 'I am concerned about your fitness and your potential ability to carry out your full hours and duties.' The letter went on to say: 'As a normal part of the 'enabling work through adjustments' process I would like to meet with you to discuss your situation and explore any support I can provide which will assist you in returning to full duties or address any issues which are preventing you from doing so.' He went on to say: 'If your adjustments are likely to continue past the date previously agreed with her

line manager, I will need to reconsider the arrangements for covering your full duties and your own future within BT.' In that letter Mr Vernon asked the claimant to meet him on 1 October 2015 at a BT office in Stockport. The letter went on to say: 'Exceptionally, I am prepared to agree a time to discuss this with you by phone.'

53. The claimant was not happy about travelling to Stockport, which is approximately 25 miles away from where he lived. He was unable to drive himself, struggled to travel long distances as a passenger and his wife needed to take days off work to take him to meetings. He was also concerned that a further review meeting was being arranged before the adjustments plan had been completed. The claimant's trade union representative, Mr Boud, wrote to Mr Hogarth on 14 September questioning the need for another meeting with Mr Vernon at that time. Mr Boud did not say that the claimant would find it difficult to get to Stockport and there was no evidence before us that the claimant asked for the location of the meeting to be changed. Nevertheless Mr Vernon knew, or ought reasonably to have known, that it was difficult for the claimant to travel as this had been explained in the OHS report from May 2015, which said the claimant had not driven since the accident and 'feels uncomfortable and anxious when travelling as a passenger'. In response to Mr Boud's email Mr Hogarth arranged to meet with the claimant on 2 October. The claimant was told, however, that Mr Vernon still wanted to go ahead with the SLMR review meeting on 1 October. Mr Boud emailed Mr Vernon and Ms Wardle of HR, suggesting that the SLMR review meeting should be rearranged for a date after the claimant had met with his line manager on 2 October. Ms Wardle responded that the meeting arranged by Mr Vernon for 1 October would still go ahead.

54. The claimant went to the Stockport venue on 1 October for the meeting with Mr Vernon with his union representative, Mr Boud. However, Mr Vernon did not turn up. Mr Boud phoned Mr Vernon to ask him where he was, to which Mr Vernon replied that he was in Scotland and that he had thought the meeting was to be by 'phone. Mr Vernon apologised. Mr Boud then asked Mr Vernon how he could have not known about the meeting and his response was: 'Well I have apologised and if you want to make a big deal of it then that's up to you'. The claimant was very upset. He felt Mr Vernon was showing contempt for the stress he was being put under. Mr Boud emailed Ms Wardle and Mr Vernon, making clear their unhappiness that Mr Vernon had not turned up for the meeting. Mr Boud said in that email that Mr Wrigley was feeling extremely stressed and totally disrespected and that the treatment he had received was 'not helpful for depression'. Ms Wardle sent an email apologising for what she described as 'the confusion with the SLM'. She said she had now advised that they obtain OHS advice before rearranging the SLMR meeting. The following day Mr Vernon wrote to the claimant apologising for not attending the meeting on 1 October. In that letter Mr Vernon said: 'Due to my mistake the meeting was unable to go ahead as planned.'

55. The next day the claimant completed what is described as a 'STREAM' assessment. This is an online assessment that employees of the company are able to complete to identify and flag up potential stress issues. The assessment recorded that the claimant's stress rating was 'red', meaning that he was potentially under high levels of stress. The claimant sent that report by email to another manager, Mr Murphy, asking him to take over dealing with his case from Mr

Vernon. He told Mr Murphy he felt harassed and bullied and that Mr Vernon and Ms Wardle were 'on a mission to get [him] out of the company'. He made the point that the constant pressure to get him back into work was holding back his rehabilitation; that he felt pressured to come off the sick and come back to work and that his GP had taken a lot of persuading to allow the return to work plan. The claimant made it clear in that email that he felt the way he had been treated by Mr Vernon and Ms Wardle was having a severely detrimental effect on his mental health and, consequently, on his ability to recover from his physical injuries and his ability to return to work. Following the completion of the STREAM assessment, Mr Murphy agreed to take over responsibility for managing matters in relation to his capability and return to work plan and subsequently met with the claimant to discuss his assessment.

56. The claimant continued to work for four half days a week at home doing administrative work. By this time he was doing administrative work not only for Errol Hindley but also for two other managers.

57. On 10 November 2015 the claimant saw the clinical psychologist, Sheila Cooper, again. She prepared a report following that meeting which makes the following comments and observations:

    57.1. 'His job required both a high level of physical mobility and the capacity to drive long distances, neither of which he can now manage. He is very concerned that he will not be able to return to that particular job. This of course leads to worry over future employment.'

    57.2. 'On the HADS Mr Wrigley scored 10 for anxiety (clinically significant). He attributed nearly all of his stress and anxiety to worries surrounding his job and employment future. After a period of seemingly persistent pressure from his employers regarding a possible return to work this pressure was lifted as it appeared to become policy to allow him to recover further before pursuing the matter. Recently this policy appears to have lapsed with a direct detrimental impact on Mr Wrigley's psychological wellbeing.'

    57.3. 'On the General Anxiety Disorder scale … Mr Wrigley scored 17 out of a possible 21, indicative of severe anxiety.'

    57.4. 'Symptoms of PTSD: these flashbacks, and recurring dreams – still occur but have reduced in frequency, intensity and duration.'

    57.5. 'Mr Wrigley's return to work is currently under discussion. The manner of these discussions has been a cause of very considerable stress and anxiety to Mr Wrigley.'

    57.6. 'Mr Wrigley has made progress in learning to manage his pain and to undertake more activities within his current physical capacity. The final outcome of physical therapy, however, is still uncertain.'

    57.7. 'The practitioner recommends CBT treatment. The practitioner recommends at least the remaining seven sessions of the 15 requested at initial assessment. The above further treatment will be carried out at the frequency of one session per week, possibly phasing out to fortnightly towards

the end of therapy. The patient is expected to gain a moderate to good (50%/75%) improvement with the further recommended treatment. The patient is expected to gain no improvement without the further recommended treatment.'

57.8. 'The most significant factor, currently under discussion, is Mr Wrigley's future employment. It is the reported manner of these discussions and the pressure to which he feels he is being subjected that are causing Mr Wrigley significant anxiety and stress. Once this issue has been resolved, further improvement in psychological wellbeing should be possible.'

57.9. 'Future treatment details: expected completion date 31 March 2016.'

58. At some point after 1 October 2015 but before 13 November 2015 a referral was made to the Occupational Health service.

59. A review meeting was arranged to take place between the claimant and his line manager, Mr Hindley, on 13 November 2015. The meeting took place at a McDonalds' restaurant at the suggestion of the claimant. The claimant told Mr Hindley that he and his GP and counsellor were concerned that the company's treatment of him was making his condition worse. The claimant told Mr Hindley that the pressure from work was hindering his progress; that he could not do more than he was currently doing and that his condition was not improving. It was agreed that he would continue to work four days a week for 4.5 hours per day. His duties were to analyse various reports, looking at job failures and to feed back the findings to his line manager. Mr Hindley said he would like to continue receiving weekly updates from the claimant. During this meeting the claimant expressed concern about the questions that had been put to OHS in the recent letter of referral. He said the questions seemed to focus on when he would be able to return to full duties in his contracted role as a Senior Enablement Engineer. Mr Hindley's response was that these were standard questions submitted by HR. The claimant followed this meeting up with an email restating some of the points he had made at the meeting. The claimant also said in that email that he was still relying on family and friends to transport him about because he still could not drive due to the pain, adding 'So why would putting me on a job search achieve anything because I wouldn't be able to work anywhere else at the moment or travel to the location.'

60. The claimant attended an appointment with Occupational Health on 22 December 2015. The claimant passed copies of the reports from his clinical psychologist to the OHS physician at the assessment. Following that meeting the Occupational Health service produced a report dated 7 January 2016. The report said that the claimant 'continues to have significant physical and psychological symptoms' and would benefit from the current arrangements continuing. It contained the following statements and opinions:

60.1. 'He feels unable to return to the office as he cannot drive and he is worried that in his irritable state he would not get on well with his colleagues.'

60.2. 'He is unable to return to the office, as he cannot drive and probably this is something which needs to be resolved through arrangements with Enable, to see if they would provide any transport assistance. There are also concerns

about his irritability and how he would get on with his colleagues. This would hopefully improve with having more CBT sessions.'

60.3. 'With the help of Enable and other organisations he might be able to attend the office on some days but this is not feasible at the moment.'

60.4. 'He is likely to be able to return to his substantive role as a service enablement technician in the next 8-12 weeks once he completes his rehabilitation treatment.'

60.5. 'He is still under treatment, which is likely to continue for another 2-3 months. The prognosis is unpredicted yet. I hope that by continuing his physical and mental rehabilitation he would be able to return to his duties in the period of 8-12 weeks.'

60.6. 'It might take him 8-12 weeks before he is back to his duties as a service enablement technician. You may wish to refer the case after three months if he has not made progress or if he is not back to his substantive role.'

60.7. 'If the physical and mental rehabilitation treatment were successful, I would expect him to return to his duties in the next three months.'

61. Before receiving that report, Mr Murphy sent a letter to the claimant dated 6 January 2016 asking him to attend an SLMR meeting on 21 January 2016. That letter, in its opening paragraph, said, as had previous letters from Mr Vernon: 'I am concerned about your fitness and your potential ability to carry out your full hours and duties.' The letter also said: 'If your adjustments are likely to continue past the date previously discussed at the resolution meeting held with Scott Vernon, I will need to reconsider the arrangements for covering your full duties and your own future with BT.'

62. The claimant attended the meeting organised by Mr Murphy with his union rep, Mr Boud. Dawn Wardle of HR was also present. By this time Mr Murphy had received the OHS report dated two weeks earlier. The claimant handed Mr Murphy a note setting out his views and some suggestions for moving forward, such as moving to a five day work pattern rather than four day, which he felt would give him a better chance of increasing his weekly hours. He also suggested a further referral to the Occupational Health service in 12 weeks as suggested in the Occupational Health report. The claimant told Mr Murphy that the pain management sessions which he had been relying on had been cancelled because his specialist had passed away. He also said in that note that he was being referred for cortisone injections because his consultant thought these might be helpful. In addition he gave Mr Murphy copies of the reports from his clinical psychologist dated 2 July 2015 and 10 November 2015.

63. Mr Murphy told the claimant that the current situation was no longer sustainable. We infer that Ms Wardle also made comments to that effect at the meeting, given the content of the claimant's subsequent grievance, which we refer to below. Mr Murphy suggested that Mr Wrigley could change his contract to part-time, with a corresponding reduction in pay, and that then they could look at part-time roles. He said that if the claimant agreed to change his contracted hours to part-time they

could then look for part-time home working roles but he added that it was unlikely that any such roles would be available in BT. Mr Murphy also told the claimant that any change to his hours would need to be a permanent change to enable a job search to begin. The claimant agreed to think about this.

64. The claimant wrote to Mr Murphy a few days later to say he was prepared to accept a reduction in hours to 18 hours a week as a temporary change to give him more time to recover, meaning that he would only be paid for the 18 hours a week that he worked. Until then he had been on full pay. He also told Mr Murphy in that email that he was due to see his GP on 26 January and would ask him for a referral to a private pain management clinic to try and move things on faster. The claimant said he hoped he would be able to get back to work within the 8-12 weeks suggested in the Occupational Health report. Mr Murphy responded by emphasising to the claimant that any change to the claimant's hours would need to be a permanent contractual change and that if he wanted to resume normal hours at a later date there would be no obligation for the business to accommodate that.

65. On 26 January 2016 Mr Murphy emailed the claimant with a note of the meeting that took place on 21 January 2016. He said in that email: 'The action for you is to consider the option of changing your hours to part-time and to respond to me with a final decision on this by 4 February 2016 – I am aware of your expression to do so via email to myself already but I would urge you to take advice on this, both by reviewing the information contained within the HR system and by speaking to your representative. The action for myself is to review your decision and then take the appropriate next step. I will look to review by 4 February 2016 and then arrange the next step.' After further thought the claimant decided that he did not wish to agree to a permanent reduction in his contractual hours. He feared that if he had agreed to a reduction in his hours the respondent would use this as a reason to terminate his employment because Mr Murphy had already told him that it was unlikely that any suitable part-time work would be available.

66. The claimant decided to submit a grievance about the way he believed his case was being handled. He did this on 28 January 2016. In his grievance letter the claimant expressed the view that he had been 'forced into either accepting a contractual change to permanent part-time working and I felt this was being positioned with me by HR in a forceful manner. Dawn furthermore made comment that 'we cannot sustain this situation' and on this basis was forcing me to accept the demands within five working days.'

67. On 9 February 2016 Mr Murphy wrote to the claimant asking him to attend a meeting on 19 February 2016 at Rochdale TEC. Mr Murphy emailed the claimant the following day to let him know that he would receive this letter in the post. The letter began:

'As you know you have been on an adjusted duties action plan since your return to work on 27 July 2015 and your overall absence pattern is such that I am concerned about your ability to maintain regular and effective service. During a recent SLM review you advised that you remained unable to return to full hours and/or duties and we discussed the current fit note which is valid until 14 April 2016. I explained why the current situation was unsustainable, however also asked you to consider the option to contractually reduce your hours to allow for a part-time job search to

take place. Unfortunately you have declined to discuss this with me further as per your email of 31 January 2016. As stated above I am unable to continue to accommodate your ongoing adjustments in the form of part-time hours, working from home, and I do therefore have the option to revert your fit note to a sick note and for your absence to recommence. However I have decided that I will continue to accommodate the adjustments stipulated in the fit note and OHS report whilst the resolution stage is followed. I would therefore like to suggest that we meet again to discuss your situation in order to address any issues you may wish to be taken into consideration.'

The letter went on to say: 'As part of the process, advice is required from the Occupational Health Service to determine whether the criteria for medical retirement are met.'

68. The meeting referred to in Mr Murphy's letter of 9 February eventually took place on 22 February rather than the 19th, around six weeks after the date of the latest OHS report. The claimant's union representative, Mr Boud, was again present. The claimant was very emotional at the meeting. The claimant and/or Mr Boud suggested that a referral be made to Enable to identify what adjustments could be made to help him, and also that a request to Access to Work be considered with a view to obtaining some assistance for the claimant with regard to travel arrangements to and from work. The claimant and/or Mr Boud also said the claimant would be willing to accept a temporary reduction in his hours to 18 hours a week which would assist with costs.

69. Mr Murphy decided to terminate Mr Wrigley's employment on the grounds of impaired capability due to ill health. He wrote a letter to Mr Wrigley to that effect dated 29 February 2016, which Mr Hindley handed to the claimant in person at a McDonald's restaurant where he had arranged to meet the claimant. The letter explained that the claimant's last day of employment would be 24 May 2016. Enclosed with the letter was a copy of a document entitled 'Rationale for Resolution' which purported to set out Mr Murphy's reasons for deciding to dismiss the claimant. The rationale document repeated, verbatim, a number of statements contained in an email Ms Wardle had sent on 12 February 2016 to someone at the Occupational Health Service asking them to give an opinion on whether or not the medical retirement criteria were met for the claimant.

70. Mr Murphy decided to dismiss the claimant because he considered it inappropriate to keep Mr Wrigley's job open any longer. We find that Mr Murphy had decided it was inappropriate to keep the claimant's job open any longer some weeks before he sent the letter terminating the claimant's employment and certainly before he met the claimant on 21 January 2016. At that meeting there was no suggestion by Mr Murphy that he would be prepared to wait and see how the claimant's treatment progressed and Mr Murphy and Ms Wardle both told the claimant that the situation was 'unsustainable'. For Ms Wardle to have made that comment we infer that Mr Murphy must have discussed his conclusions with her before the meeting. What is more, Ms Wardle, with whom Mr Murphy had discussed the claimant's absence, had told the Occupational Health Service in her email of 12 February that 'management…need a resolution to this situation', a statement, which we infer was informed by her discussions with Mr Murphy.

71. Mr Murphy's decision was influenced by a belief that the claimant's absence was creating burdens for the business. He estimated in his 'rationale' document that the claimant's absence meant that around 25 tasks a day had to be allocated to another engineer, or go unallocated leading to customer dissatisfaction and compensation payments. He based that assessment on the average output for a service enablement engineer. From that figure, Mr Murphy estimated that, to absorb those additional tasks, other engineers would have to work overtime at a cost to the company of between £804 and £964.50 per week. The document suggested, however, that the company could not always get other staff to work overtime, noting 'In these instances Paul's absence results in reduced output and a reduced ability to service our customers within industry agreed timescales. As a regulated business Openreach agrees to pay compensation to our customers when we fail to deliver our commitment.' Mr Murphy went on to estimate that the 'potential daily impact of circa 25 tasks not being allocated or completed within agreed timescales could be between £600 and £1,100 per day.' There was also a reference in that document to increased travel costs incurred in attempting to service the same number of customers with a reduced workforce. Mr Murphy went on to refer to the 'burden on other workers in the employee's absence', although elsewhere in the document he noted that 'overtime cannot be mandated and is based on other team members volunteering.'

72. The 'rationale' document prepared by Mr Murphy also reveals, and we find, that he believed the claimant's role could not be filled by anyone else on a permanent or temporary basis unless the claimant was either dismissed or moved permanently into a different role. Mr Murphy told us the claimant's position could not be filled by a temporary recruit because 'It is not BT policy to employ temporary people for permanent substantive roles.' He also told us that he did not have the option to replace the claimant without dismissing him because the unit did not have a budget available to do so.

73. So far as the prognosis for the claimant's recovery was concerned, Mr Murphy's evidence in chief was that 'there was no evidence of any good progress towards recovery being made' and that the OHS report's conclusion was that the claimant 'may return to full hours and duties within 3 months' but that 'the prognosis was unclear'. Mr Murphy made similar points in the 'rationale' document. In fact, as noted above, the OHS report had said that the claimant was receiving treatment and that, assuming the treatment was successful, the claimant was 'likely' and 'expected' to return to his duties within 8-12 weeks. Although Mr Murphy did not say so in his witness statement, which stood as his evidence in chief, it became apparent from the answers he gave to questions, and we find, that when he took the decision to dismiss the claimant, he did not believe that the most recent occupational health report from 7 January 2016 was reliable, in so far as it addressed the prognosis for the claimant's return to his substantive role as a service enablement technician. In particular, Mr Murphy believed the OH physician's opinion that the claimant was likely to return to work within 8-12 weeks was unreliable. Asked whether he could say specifically what it was that led him to that conclusion, he told us that his decision was informed by: the way he had seen the claimant walking when they met and the discomfort he appeared to be in when sitting down; his belief that there had not been any demonstration of progression or improvement since Mr Vernon's adjustment plan had been put in place; that there were, he claimed, only 4 weeks remaining of the 8-12 week recovery period;

and that, looking at the progress the claimant had made, he did not believe recovery would be complete in that timescale. We pause here to observe that when Mr Murphy saw the claimant on 21 January, by which time he had already decided that it was inappropriate to keep the claimant's job open any longer, it was only two weeks after the date of the OH report which had stated that, subject to the claimant's treatment being successful, he was likely, and expected, to be able to return to his full duties within 8-12 weeks.

74. Mr Murphy's responses to questions revealed, and we find, that he was also reluctant to continue the claimant's employment any longer to wait and see how his treatment progressed because he feared setting a precedent that might affect how other employees would have to be, or expect to be, treated in future cases.

75. We find, that, before Mr Murphy decided to dismiss the claimant and gave him notice to terminate his employment, nobody at the respondent company looked into whether any other jobs were available that the claimant might have been capable of doing, with or without reasonable adjustments. Mr Murphy's evidence in chief was that a search for an alternative job could not be completed until Mr Wrigley was able to return to an office or resume his contractual hours. Mr Murphy believed, at the time he took the decision to dismiss the claimant, that the claimant was unable to work anywhere other than at his own home. In fact, in his evidence in chief and the rationale document he went beyond this, stating that the claimant was 'unable to leave the house'. This claimed inability to leave the house was the reason Mr Murphy gave the claimant (in his rationale document) for not considering whether the 'Access to Work' service could help the claimant with travel to and from work locations in light of the fact that the claimant was himself unable to drive at that time. We do not accept Mr Murphy can have genuinely believed, whether at the time he took the decision to dismiss the claimant or when giving evidence, that the claimant was unable to leave his house given that he had himself had meetings with the claimant at BT premises. On being questioned about this Mr Murphy sought to qualify his statements, saying, variously, that the claimant had told him he could only work from home and that he believed the claimant was 'essentially housebound unless his wife was able to bring him to meetings'; 'was unable to leave the house on a regular basis'; 'was unable to leave the house without others being present because of his mental condition'; and had 'multiple issues with leaving his house'. Mr Murphy was unable to say whether, at that time, any home working roles were available anywhere within the respondent company, only that no-one working for him did home work.

76. In his evidence in chief Mr Murphy suggested that a job search could have been carried out if the claimant had agreed to 'switch to a part-time contract'. He told us, however, that this could only have happened if the claimant had agreed, in advance of any search, to change to a permanent part-time contract. As he put it, a job search could not be done because the claimant was not 'delivering his contracted hours'. Asked why it was necessary for the claimant to agree in advance to a variation in his contract terms to reduce his hours before a job search could be carried out, Mr Murphy could offer no explanation other than that this is what he had been told by HR. He also told us that he had been told by HR that a temporary change in hours could not be accommodated 'because of the way the business was set up'. Asked to elaborate on this Mr Murphy said he could not explain why it

was but he had been told by HR that the business would not consider it as an option.

77. Before Mr Murphy decided to dismiss the claimant and gave him notice to terminate his employment, he did not refer the claimant to the 'Enable' service for advice on adjustments that could be made that might enable the claimant to return to work. Mr Murphy said in his evidence in chief and his rationale document that this was because, in his view, 'Enable is about requesting advice on reasonable adjustments within the contracted role. Paul remains unable to consider a return to his contracted role and therefore no reasonable adjustments can be made.'

78. As noted above, before being told he was being dismissed, the claimant lodged a grievance. This was passed to a Mr Ciaran Harkin to deal with. Mr Harkin met with the claimant and Mr Boud after the claimant had been told he was being dismissed. They agreed that the basis of his complaint was that the termination of his employment was unfair; that he felt he had been bullied and harassed on the grounds of disability; that he felt he had been discriminated against on the grounds of disability and that he felt there had been unprofessional and inappropriate behaviour by Scott Vernon, Errol Hindley, Dawn Wardle, Andy Murphy and Rob Hogarth. The full details of his complaint were set out in correspondence. As part of the investigation into the claimant's allegations Mr Harkin met with Mr Vernon, Ms Wardle, Mr Murphy and Mr Hindley. At the end of his investigation Mr Harkin completed a document that he referred to as a 'grievance rationale' that set out full details of his investigation and findings. He sent a draft copy of that document to Dilip Shah of HR and asked him to read through it and 'provide comment/feedback'. Mr Harkin then used the grievance rationale document to produce what he described as the 'outcome letter' which he sent to the claimant to explain his conclusion.

79. We make the following observations about the findings made by Mr Harkin:

    79.1. With regard to the letter that was sent to the claimant on 23 October 2014 and Mr Vernon's failure to attend the meeting on 1 October 2015, Mr Harkin said, 'These two occurrences could either be viewed as genuine mistakes, or acts of unprofessionalism or perhaps a bit of both'.

    79.2. Mr Harkin also observed that 'perhaps more consideration could have been given to seeing the OHS report before making any decisions.' It is not clear precisely which decision he was referring to when he made this statement but elsewhere he said, 'I would suggest in all cases that it is a better option to delay decisions until a report from OHS is available'. He noted that this 'does feel like best practice and allows a more informed decision to be made'.

    79.3. With regard to Mr Murphy and Ms Wardle, and in particular the final meeting prior to his dismissal, Mr Harkin noted, 'When asked about making decisions without having OHS reports available, they were both very clear that they believed they already had the information they required, and that the information from the OHS was purely advisory, and not something that had to be followed or considered'.

79.4. With regard to the claimant's complaint about the volume of correspondence he received about his absence Mr Harkin noted, 'It is clear that letters to the employee are very important to ensure that the company has followed the correct process and made it clear to employees the stages of the absence management process and what they mean. I can see that the speed of which these letters can come out, particularly after an accident such as Paul was involved in, could be deemed as unreasonable and causing undue duress. Although these letters are normally a company template, there is an opportunity for the manager to ring the employee first to explain the content of the letter, which should in turn soften the impact it has, rather than it arriving as a surprise'. That statement was found in the grievance outcome letter that was sent to the claimant. However, in his rationale document Mr Harkin went further than this saying: 'Although these letters are normally a company template, they could and in this case I feel, should, have been altered to be more supportive for Paul.' Under questioning Mr Harkin offered no explanation for omitting that statement from the report he sent to the claimant.

79.5. In his rationale document Mr Harkin also concluded that: 'A more genuine effort to find Paul suitable work would also have potentially benefitted this case.' This sentence did not appear in the outcome document that was sent to the claimant. On being questioned about this Mr Harkin acknowledged that it was input from HR that caused him to omit this statement from the final conclusions that he sent to the claimant. He said HR had challenged him on that part of his rationale document. His explanation for the change was that at the time he wrote his rationale document he had not been aware that there was an appeal running, but when he was putting together the outcome letter he came to realise that there was 'more going on to find the claimant work'. He said that until then he had not realised that the company was extending the claimant's time in the business and that that only came to light when he had a conversation with HR. He confirmed in evidence that he did not look into what was in fact going on.

80. The claimant appealed against his dismissal. The appeal was referred to a different manager to deal with, Mr Hemmings. The claimant set out his grounds of appeal in a letter of 24 March 2016. In that letter:

80.1. The claimant expressed concern that Mr Murphy had not taken the opportunity to refer the claimant to Enable for advice on what adjustments could be made to help him.

80.2. The claimant said that it was unreasonable for Mr Murphy to turn down his offer of reducing his contractual hours on a temporary basis.

80.3. The claimant said his trade union representative had identified 'decongestion/frames recovery' work that could be carried out in the local BT exchange in Oldham which the claimant said was probably within his capabilities. He proposed a phased return to work based on four weeks at 24 hours per week (working four days a week) then a gradual increase to 28 hours over four weeks, then a gradual increase to full hours (36) over 8-12 weeks.

80.4. The claimant also explained that he had an appointment with a specialist in April, which would lead to him having cortisone injection which would improve his physical condition.

81. With his appeal the claimant enclosed a copy of a letter that his treating psychologist, Sheila Cooper, had written, addressed 'To whom it may concern'. In that letter Ms Cooper said that since seeing the claimant on 10 November 2015 his position at BT had remained a 'pathological concern for Mr Wrigley'. She went on to say: 'Considerable time in sessions has subsequently been spent in discussing ways of managing and containing this anxiety… It was deemed clinically necessary adopt this approach as Mr Wrigley appeared to be overwhelmed by the shear volume of work related contact (emails, text messages) and the perceived requirement to respond rapidly, fearing that a failure to do so might further jeopardise his position. Such was the evident strain upon Mr Wrigley that I sought, and gained, an extension to the number of psychology sessions authorised. In my clinical opinion the pressure of contact from his employers over the past few months has confounded our work in CBT sessions and unquestionably has had a detrimental impact on Mr Wrigley's psychological wellbeing. We have only four sessions outstanding. Again in my clinical opinion this is insufficient clinical time in which to address the psychological impact of recent events.'

82. In response to the appeal Mr Hemmings arranged for an appeal meeting to take place on 5 April 2016. At that meeting the claimant was, again, represented by Mr Boud. The claimant told Mr Hemmings, amongst other things, that he believed he could return to work with immediate effect with adjustments and that if he could be supported with transport he would be able to make a phased return basis to work in a local BT building. He mentioned again his suggestion that he be allowed to return to work on a phased basis doing work such as decongestion work. The claimant also told Mr Hemmings that he had an appointment with his consultant on 20 April 2016 and he hoped then to have a date for his cortisone injection. He said he hoped to be back to full duties after 12 weeks.

83. Following that meeting, on 12 April 2016, the claimant received a letter from Mr Hemmings. Mr Hemmings referred to what he had been told by the claimant in the meeting, including that, subject to support with transport, the claimant confirmed he would be able to undertake a return to work plan, the details of which were set out in the letter. Mr Hemmings said: 'As a business it is not normal practice to fund an individual's travel to and from their normal place of work. The expectation is this is funded by the individual. Regarding support for funding into the workplace you can contact Access to Work directly yourself to explore if they can provide funding for travel.' Mr Hemmings provided a telephone number and website with further information. He went on to say: 'I would ask that you update me by 21 April 2016 to advise how your discussion with Access to Work has gone and if they can support funding for you. I would therefore also appreciate an update on 21 April of how your specialist assessment went and the exact date for her injection and proposed timescales for knowing how effective the injection has been and timescales for as return to work at a BT building to your substantive role.' In that letter Mr Hemmings also said: 'I will submit a referral to Enable with immediate effect and I would ask you to engage with them whilst you are off so that we can obtain advice and guidance from them at the earliest opportunity.' He concluded: 'I will therefore place my decision on hold until after I hear from you on 21 April.'

84. In his evidence to us, Mr Hemmings insisted he had submitted the referral to Enable in April 2016. However, on 14 April 2016 Sarah Bunn of HR emailed Mr Hemmings asking him to complete the referral to Enable. Mr Hemmings replied on 22 April 2016, 'This has been submitted'. In reply to that email Sarah Bunn responded on 25 April, 'Do you recall when you submitted the Enable referral, as I cannot see a case has been created by the WISH team to date'. We have not been referred to any response by Mr Hemmings to that email. In cross examination Mr Hemmings suggested there was no follow up to that email because Sarah Bunn 'had realised it had been submitted' although he did not say how she had come to 'realise' this or how he became aware that she had done so; he certainly did not say that he himself had any further communication with her, or anyone else, about the matter. We infer from the emails sent by Ms Bunn that, if a referral had been made to Enable as suggested by Mr Hemmings then, in the ordinary course of events, the 'WISH team' should have 'created a case' by 25 April and that they had not done so. Furthermore, it is common ground that no assessment by Enable/AgilityNet took place until 31 October 2016. Had the referral been made by Mr Hemmings as he suggests, it is highly unlikely that it would have taken over six months for an assessment to take place. What is more, as will become apparent from our further findings of fact, in the weeks prior to that assessment the claimant's line manager and Mr Hemmings both told the claimant they were making a referral to Enable, which suggests the appointment came about as a result of a new referral at that time, rather than being a delayed assessment triggered by a referral more than six months earlier. Looking at the evidence in the round we infer that a referral to Enable was not properly made by anybody in the respondent's organisation until September 2016. We are satisfied, however, that Mr Hemmings had intended to refer the claimant to Enable: he told the claimant he would, HR were expecting that he would and he said nothing to HR to suggest he had changed his mind about doing so. We also find that Mr Hemmings genuinely, albeit mistakenly, believed that he had referred the claimant to Enable in April.

85. On 20 April 2016 the claimant attended the Pain Clinic and was referred for the injections procedure 'on an urgent basis'. The consultant said the waiting time was about 6-8 weeks. In the meantime he was started on other medication.

86. The claimant had by this time contacted Access to Work. They said they were confused about the claimant's referral to them because they were unable to help without a definite return to work date and an identified place of work. They said they needed this information in order to get an estimate from a local taxi company. The claimant emailed Mr Boud to update him. Mr Boud left a voice message for Mr Hemmings on 21 April 2016 updating him on the claimant's current position. In response Mr Hemmings sent a letter to the claimant dated 25 April 2016 asking him to contact him direct by Tuesday 3 May 2016.

87. The claimant went to a pain management appointment at Fairfield General Hospital on 25 April 2016. This information was relayed to Mr Hemmings and in response Mr Hemmings told Mr Boud that he would delay his decision on the appeal. The claimant asked the NHS clinic for a letter explaining the delay in his pain management and asking for a timescale for treatment. He also asked Mr Boud to contact Mr Hemmings to update him again, which he did on 28 April 2016. Mr Boud also explained to Mr Hemmings that Access to Work needed a return to work date before they could arrange for transport. The claimant then received a letter dated

4 May 2016 from the Pain Clinic confirming that his cortisone injection would take place on 20 June 2016. The claimant relayed this information to Mr Hemmings.

88. Around this time the claimant also received a report from a Dr McAuley of the Occupational Health Service in response to the company's request to consider whether the claimant's medical condition entitled him to medical retirement. In that report Dr McAuley noted that recovery had been slow but there had been some improvement. His report concluded that: 'At this stage it cannot yet be concluded that permanent incapacity has resulted. Further specialist treatment and appropriate interventions may lead to better control of both his physical and mental symptoms as they are likely to be interdependent. In turn, improvement may be possible to enable him to return to his normal duties with appropriate adjustments or suitable alternative work, at some time in the future.' Mr Boud sent a copy of that report to Mr Hemmings on 5 May 2016. Mr Hemmings replied saying he would consider the outcome of the OHS report as well as the information he had received about the treatment the claimant was receiving. He also emailed the claimant on 10 May saying he would speak to both the HR and legal teams and revert back to the claimant and Mr Boud as soon as possible.

89. The claimant emailed Mr Hemmings on 10 May asking to be allowed back to work on the passed return to work plan that had previously been suggested. The claimant said: 'I am committed to this course of action if you could return me back into work without any further delay.'

90. On 16 May 2016 Mr Hemmings responded to the claimant by an emailed letter. He referred again to the return to work plan and said: 'I am placing my decision on hold pending both a return to work, and completion of a successful return to work, for both hours and full duties to your substantive role over the timescale agreed. I will extend your notice period to reflect the current situation. After the 12 weeks' rehabilitation plan I will reconvene with you to discuss how the return to work has gone. I will be in a better position to make a decision, taking into consideration the mitigation presented to me at the hearing, together with your return to work. You will be advised on my decision in writing.'

91. After the claimant received Mr Hemmings' letter confirming that he would be permitted to return to work on the phased basis that he and his union representative had suggested, the claimant was telephoned by Mr Hogarth who told the claimant he was expecting him back at work on 2 June 2016. The claimant duly reported back to work on 2 June 2016 and started working four six hour days per week as planned.

92. In the meantime, on 18 May 2016. the respondent wrote to the claimant with regard to a claim he was bringing against the driver of the vehicle that had caused his accident. The letter said that £19,823.22 would be payable to BT in respect of sick pay advanced to him.

93. The agreed return to work plan was for the claimant to work on what was described as 'A1024 uplift work' and 'bed decongestion' work at the Oldham exchange. The claimant explained these two different types of work as follows.

93.1. A1024 uplift work involves an investigation into any hazards or broken components on a frame. It is work that would form part of the substantive role of a Service Enablement Technician. Each frame has a 50v supply looped at different parts of the frame and if any of the parts are not working the claimant would repair it if he could. If it was not possible for him to carry out a repair himself he would note the location of the problem and input details of the problem on a system called 'Artisan', detailing the location and nature of the problem.

93.2. Bed decongestion work involves recovering redundant cables at an exchange (described by the claimant as 'dead jumpers'). Because Oldham was one of the largest exchanges there was a lot of this kind of work to be done there. This is work that Service Enablement Technicians would do as part of their usual role, but normally only if there was not enough 'business as usual' work to do.

94. We accept that these explanations given by the claimant were accurate.

95. In his evidence in chief Mr Hemmings said that this work was 'non essential'. On being questioned about his evidence on this point, however, Mr Hemmings conceded that this was work that has to be done at some point by somebody. Indeed it is evident from the document beginning at page 113 of the bundle – a presentation explaining the company's approach to decongestion work- that if decongestion work is not carried out this can lead to problems for the company. We were also referred to a document at page 879 of the bundle that demonstrated that at some time (we were not told when) the respondent company allocated a specific budget of £89,000 to carry out bed decongestion work at its Failsworth exchange in 2017/18. This appears to post-date the events with which we are currently concerned, and the evidence before us indicates that there was no specific budget allocated for work at the Oldham exchange, at least when the claimant was doing the work. Nevertheless, the fact that the company sometimes specifically allocates resources for this particular type of work further suggests that bed decongestion work is important to the company. Looking at all the evidence in the round, and notwithstanding what appeared to us to be attempts by Mr Hemmings to downplay the significance of the work the claimant was carrying out, we find that it was essential that telephone exchanges were cleansed of old redundant tie cables sooner or later.

96. We were told there were ten different levels at which this work had to be carried out. Levels 1 to 5 or 6 could be accessed without using a ladder but higher levels could only be accessed using a ladder. Because of his physical injuries the claimant was unable to use ladders at this time. Therefore the claimant was unable to carry out this kind of work at the higher levels. Mr Hemmings' suggested when giving evidence that, because the claimant could not use ladders and work at the higher levels, this had an impact on the value to the company of the work the claimant was doing. However, in answer to questions, Mr Hemmings acknowledged on being questioned that the work the claimant was doing was 'useful' to the company and agreed that the fact that the claimant was doing some of this work (albeit at lower levels) meant that there was less of it for other engineers to be programmed to do. Asked whether this meant that it freed up the time for engineers to do other things Mr Hemmings said he didn't know. Although

the claimant could not work on the higher levels in the exchange doing this work he could work on the lower levels and, in cleansing redundant tie cables at those levels and carrying out A1024 uplift work, the claimant was performing a useful function for the company.

97. Mrs Brown in her submissions suggested that Mr Hemmings' evidence was that, because the claimant could only work at lower levels someone else had to come in and 'finish the job' and that this involved repetition. We acknowledge that Mr Hemmings did refer to the need for someone else to 'finish the job' but we do not accept that this meant there was duplication of work. That was not what Mr Hemmings said. If it is what he meant to imply we reject that evidence as he did not explain how the need for someone else to complete a job would entail any duplication of effort in the sense of having to go back over work that had already been done by the claimant.

98. The claimant was assessed in August 2016 as carrying out the work he had been asked to perform to the required standard.

99. The claimant was referred again to Occupational Health and had an appointment on 5 August 2016. There followed a report dated 9 August 2016. The physician made the following comments in the report:

99.1. 'I understand his substantive role involves him being on his feet for the majority of his shift, with regular periods of repetitive kneeling, squatting, bending, climbing and working from fixed or no bars steps and also driving a vehicle across exchange areas within the North West, working alone.'

99.2. 'He tells me at present he does not drive because of pain and anxiety.'

99.3. 'Despite therapy he continues to experience significant symptoms with pain, involving his lower back, shoulder and neck with headaches and migraine and pins and needles in his arms and hands. He admits to feeling under a degree of psychological pressure at this time and mentioned a diagnosis of PTSD. Despite his recent injection therapy, he tells me there has been only a marginal improvement in his pain symptoms…He had significant symptoms of impaired psychological wellbeing at the clinic today….The gentleman indicated at the consultation today that matters concerning his employment were coming to a head. I sense this is adding to his psychological stress at this time.'

99.4. 'In my opinion your current adjustments and restrictions will need to be maintained, on the basis of his response to treatment to date, they are likely to be long-term and possibly permanent. My usual advice in these circumstances would be to obtain a report from his treating specialists.'

99.5. In response to the question, 'Is the employee likely to render reliable service and attendance in the future?' the physician said, 'there would appear to be some doubt, on the basis of his response to treatment to date, hence my suggestion that a report of his treating specialist would be helpful'.

99.6. In response to the question, 'Is performance significantly affected by ill health and how long is it likely to continue?' the response was, 'It is likely to be for some time, possibly permanently'.

99.7. When asked, 'Is the employee fit to continue in their current post?' the response was 'he tells me he is managing with the current adjustments and restrictions you have in place, although I sense he is still struggling'.

99.8. The physician said that third party information from the claimant's treating specialist would be likely to be helpful, in enabling Occupational Health to provide advice on his long-term prognosis and the permanency or otherwise of any adjustments or restrictions he might wish to obtain.

100. On 8 September 2016 another Occupational Health report was produced. By this time the OHS physician had reviewed specialist reports from the Pain Clinic dated 26 August 2016 and a report from Sheila Cooper, the clinical psychologist, dated 28 August 2016. The physician made the following comments in the report: 'Mr Wrigley appears to have had persistent pain following a road traffic accident about two years ago. He has had a number of psychological inputs and presently has also been referred for a tier 2 multidisciplinary team assessment to ascertain suitability to access mental health services within the persistent pain pathway. The prognosis at this stage is therefore not clear and will remain guarded. Hopefully with the treatment that has been planned, there may be some degree of improvement but this can only be known as the treatment goes on…Therefore at this stage it is difficult to be specific on the duration of any adjustments that you have in place. … you may wish to consider an Enable assessment to understand any further adjustments that can be put in place for him.'

101. A couple of weeks before that report, the claimant attended another SLMR meeting on 25 August 2016. This meeting took place with another manager, Christian Ray. At this meeting the claimant suggested he could do some additional work which he described to us as 'tapping and verifying internal tie cables' which he said was causing a big problem on a daily basis at Oldham. That suggestion was not taken up Mr Ray. The claimant told Mr Ray that he was open to being referred to Enable to identify what support and adjustments could be provided to help him at work. There was also a discussion at that meeting of doing a local job search.

102. In mid September 2016 Mr Spalding, then the claimant's line manager, sent an email to five managers within BT in the North West asking them to let him know whether they had any temporary or permanent roles available that the claimant might be able to do. He said: 'Coaching/surveying/office or diagnostic/analytic base roles working from a PC would be suitable for Paul'. He listed some skills he said the claimant had. The email said: 'Paul is unable to meet his objectives within his current role due to health issues, which prevent him from working as a frames engineer.' One of the managers, Lynsay McLean, replied: 'Sorry Kev, nothing at the moment. We have the WEMS project that comes in from time to time, I will mention this to Alan about Paul potentially taking this on, but it is project work only.' Another manager, Richard Lygo, responded that there would soon be a need for more controllers at Stockport and that the company would be advertising for suitable candidates in the near future. We infer that none of the other managers replied. On 5 October 2016 Mr Spalding sent a follow up email to those other managers saying: 'I would be grateful for your reply in the below job search, even if no response.' One of the managers replied that he was now based in London.

We infer that the other managers did not reply and that Mr Spalding made no further attempts to persuade them to respond to his original enquiry.

103. By 22 September 2016 the claimant was working for 7½ hours a day, 6.00am to 1.30pm, including a lunch break, for four days a week. This was what the claimant told Mr Spalding at a meeting on that date. The claimant told his line manager that working from Oldham suited him because he has transportation as his wife brought him to work as she works in Oldham herself. The note of that meeting also records that the claimant told Mr Spalding that if there was any alternative work available in Stockport or Ashton it would be 'impossible' for him to get there. The claimant's line manager explained to the claimant in that meeting that he had organised an Enable referral, which the claimant had requested.

104. On 4 October 2016 Sarah Bunn of HR emailed Mr Hemmings to say that a local job search was being conducted by Mr Spalding and that 'the location which Paul feels he is able to travel to is Oldham only. He has been advised this may reduce roles. So far no positive responses'. She also told Mr Hemmings that an Enable referral had been submitted and the assessment was awaited.

105. We find that at that time, looking at the evidence in the round, it is more likely than not that the claimant could not do his full substantive role, at least not without adjustments being made and there was no suggestion by or on behalf of the claimant that there were reasonable adjustments that could have been made at that time that would have enabled him to do his full substantive role.

106. The following day the claimant attended a meeting with Mr Hemmings, along with his union rep. This was described as a 'reconvened appeal meeting'. By this time the claimant was working four days a week for eight hours per day – a total of 32 hours per week as against his contractual hours of 36 per week. The claimant was very emotional at the meeting. Mr Hemmings told us, and we find, that he had made it clear to Mr Wrigley that he needed to return to both full hours and full duties for his substantive role over the agreed timescale of the return to work plan, a point that was also referred to repeatedly in the adjustments plan document at page 666 onwards of the bundle.

107. .Mr Hemmings' evidence to us as to what the claimant said that he didn't think he could return to his substantive role. We find it more likely than not that the claimant did say this to Mr Hemmings at this meeting.

108. The claimant and/or his union rep also told Mr Hemmings at this meeting that they felt that the job search or redeployment process had not been followed properly and that there were many different roles within the wider BT group that the claimant should be considered for, although no specific roles were identified by the claimant at that time. Mr Hemmings raised with the claimant the possibility of him doing an office-based role at Ashton under Lyne. There was a conflict between the evidence given by Mr Hemmings and that of the claimant as to how the claimant responded to this suggestion. Mr Hemmings' evidence in chief was that the claimant had 'categorically' told him that he was not prepared to carry out a desk based role from Ashton-under-Lyne as he was 'not prepared to sit in an office environment.' However, the claimant's evidence in chief was that he had told Mr Hemmings he could not perform a desk based role full-time. In answer to questions,

Mr Hemmings qualified his evidence somewhat saying: 'He specifically told me he couldn't work behind a PC for an extended period of time.' This is closer to what he said in a document that he sent the claimant at the beginning of November setting out his reasons for confirming the claimant's dismissal. In that document Mr Hemmings stated that the claimant had 'confirmed that he would not be able to work in a desk based role or behind a computer screen for any real duration, whilst confirming that travelling to the desk based locations in the North West would not be an option for him.' The claimant himself told us, in answer to questions, that he could not recall word for word what he had said to Mr Hemmings but that he had felt it was a 'bridge too far to go and sit there at a computer for eight hours.' He also referred to the 'call centre environment' there. And, in addition, told us he felt at the time of that meeting that he would find it difficult to get to Ashton-under-Lyne under his own steam. Looking at the evidence in the round, we find it more likely than not that, at this meeting, the claimant told Mr Hemmings that he did not think he could sit at a desk for long periods at a time and expressed doubts about his ability to work at the Ashton-under-Lyne site at that time, referring to his mental impairment and the difficulty he would have travelling to that site. As for whether the claimant 'categorically' said that he was 'not prepared to carry out a desk based role', we found Mr Hemmings' evidence unconvincing. Our assessment of Mr Hemmings was that he was not a reliable witness; he made a number of assertions in his witness statement which he qualified when his evidence was probed; and we found his responses to some questions to be somewhat evasive. We find that the claimant did not 'categorically' say he was 'not prepared to carry out a desk based role.'

109. The claimant subsequently received a letter from Mr Hemmings dated 21 October 2016. Mr Hemmings said in that letter that he was still carrying out investigations and that he was 'extending the claimant's last day of service to 4 November 2016.'

110. On 3 November 2016 the claimant was visited by his line manager and Mr Ray. When they arrived they handed the claimant a letter confirming the termination of his contract of employment. That letter was dated 2 November 2016 and was from Mr Hemmings. In that letter Mr Hemmings said: 'I have…decided that the decision made by Andy Murphy on 29 February 2016 should stand, and your appeal is declined. Your employment is therefore terminated on the grounds of impaired capability due to ill health with retirement in the interests of efficiency benefits and your last day of employment will be 4 November 2016.' Attached to the letter was a document entitled 'Appeal Rationale' in which Mr Hemmings purported to set out the reasons for his decision. Mr Hemmings said in that document 'It is clear his ability to do the tasks required for his role or any other possible substantive role do not appear to have improved much at all.' He also recorded that the claimant had requested a permanent role doing inter-frames ties at the Oldham exchange but said 'This is not a permanent role and is not one that exists within the company. The work is extremely limited in scope, it is not a recognised work stream and is not work that needs completing.' The claimant was not permitted any further appeal against Mr Hemmings' decision.

111. Mr Hemmings' evidence to us was that a job search had been completed before he confirmed the claimant's dismissal. On being asked whether the MCC job search process in the respondent's policy had been followed, Mr Hemmings'

replies were evasive. His initial response was that he felt the claimant and his representative had said he wanted to return to work as a service enablement technician and steps had been taken to facilitate a return to work and that it was only at the end of the process that the claimant said he did not feel he was able to return to that role. Mr Hemmings added that he was comfortable he had 'explored every avenue to find alternative work.' When directed to Parts A and B of the MCC policy on job search and asked specifically whether this had been followed, Mr Hemmings said that 'part B only applies if the individual or a medic says he cannot undertake the role in the future, but nobody had said that so part A was followed.' To ensure we understood Mr Hemmings' evidence we asked him whether he was saying part B of the policy had not been followed. His response was 'It was confirmed to me in October that he couldn't do the role. I explored options.' Again this did not answer the question that was asked and it was only when asked to be clear as to whether part B of the policy had been followed that Mr Hemmings said, 'No' then 'I don't know'. He acknowledged then that he himself had not followed part B of the policy personally and that he did not know whether anybody else had. Yet he then went on to say: 'It's primarily around job match and job searches. I made sure it had taken place before I made my decision.' This appeared to contradict what he had said moments before when he acknowledged that he had not followed part B of the job search policy himself and did not know whether anyone else had. He then referred to a change of policy having taken place at some point and questioned when that had happened, but continued by saying that he felt they were largely the same. This diversion appeared to us to be another attempt to avoid giving a clear answer to the question about whether part B of the MCC policy had been followed, or perhaps justify the company's failure to follow that policy, by seeking to imply that the policy might not have even been in place at the material time.

112. It was abundantly clear to us that Mr Hemmings himself did not carry out any aspects of a job search for the claimant. He had simply been told by someone in HR that a job search had been carried out. We find that the only job search that was carried out by any of the respondent's managers or by HR was the informal exchange of emails initiated by Mr Spalding to which he received three replies. None of the steps set out in Part B of the MCC policy were taken.

113. When the claimant met with Mr Hemmings on 5 October, Mr Hemmings told the claimant that he would refer him to Enable. The Enable assessment was carried out on 31 October 2016, three days before the claimant was told his appeal against dismissal had been unsuccessful. A report was prepared, which Mr Hemmings had sight of before he told the claimant his appeal was dismissed and indeed before he finalised the rationale document enclosed with his letter of 2 November 2016. The report focused on the work the claimant had been doing for the past five months. It noted that the claimant would benefit from some 'minimal adjustments' in that role including lighter weight safety shoes, which would be more comfortable to wear for longer periods, a coccyx wedge cushion and an adjustable lumbar support, which would help provide comfort and support when seated, and a cushioned kneeling pad, to help reduce the pain he can experience if required to kneel for longer periods. The report noted that being based at the Oldham BT exchange was ideally suited to the claimant as, being close to his home, it meant he could be dropped off and picked up each day by members of his family. However, the report went on to say that, if required, the claimant would be willing

to work from other BT locations carrying out the same or similar job role but which may require travel assistance due to him not driving at present. We find that the claimant had told the person carrying out the assessment that this was the case.

Law

Unfair dismissal

114. An employee has the right, under section 94 of the Employment Rights Act (ERA) 1996, not to be unfairly dismissed (subject to certain qualifications and conditions set out in the Act).

115. Reason for dismissal

116. When a complaint of unfair dismissal is made, it is for the employer to prove that it dismissed the claimant for a potentially fair reason ie a reason falling within section 98(2) of the 1996 Act, or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the claimant held.

117. Under ERA 1996 section 98(2)(a) the employer will have a potentially fair reason for dismissal where it can show that it dismissed the employee for a reason which relates to the capability of the employee for performing work of the kind which he was employed by the employer to do.

118. Reasonableness

119. If the respondent shows that it dismissed the claimant for a potentially fair reason the Tribunal must then decide if the employer acted reasonably in dismissing the employee for that reason applying the test in section 98(4) of the Employment Rights Act 1996.

120. Section 98(4) of ERA 1996 provides that: '… the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –

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

b. shall be determined in accordance with equity and the substantial merits of the case.'

121. In assessing reasonableness, it is not for the Tribunal to substitute its view for that of the employer: the test is an objective one and the Tribunal must not fall into the substitution mindset warned against by Mummery LJ in London Ambulance Service NHS Trust v Small [2009] EWCA Civ 220, [2009] IRLR 563. The objective approach requires the Tribunal to decide whether the employer's actions fell within the range of reasonable responses that a reasonable employer in those circumstances and in that business might have adopted (Iceland Frozen Foods Ltd v Jones [1982] IRLR 439).

122. The EAT has held that, in deciding whether or not an ill health capability dismissal is fair 'The basic question which has to be determined in every case is whether, in all the circumstances, the employer can be expected to wait any longer and, if so, how much longer?": Spencer v Paragon Wallpapers Ltd [1976] IRLR 373, [1977] ICR 301. The relevant factors to be scrutinised include: the nature of the illness and the job; the likely length of the continuing absence; the need of the employers to have done the work which the employee was engaged to do; the effect on other employees; how the illness was caused; the effect of sick-pay and (if relevant) permanent health insurance schemes; length of service and whether there is alternative work that the employee could do.

123. Before deciding to dismiss an employee because they are incapable of performing the job they were employed to do, an employer might reasonably be expected to try to fit the employee into some other suitable available job. However, it was said in the judgment of O'Connor J in the High Court decision in Merseyside and North Wales Electricity Board v Taylor [1975] IRLR 60, [1975] ICR 185: "… when one comes to consider the circumstances of the case, as to whether they make it reasonable or unreasonable to act upon his incapacity and to dismiss him, it cannot be right that, in such circumstances, an employer can be called upon by the law to create a special job for an employee however long-serving he may have been.' We note, however, that that case predates the introduction of legislation on disability discrimination, including the duty on employers to make reasonable adjustments.

124. In East Lindsey District Council v Daubney [1977] IRLR 181, [1977] ICR 566 the EAT stressed the importance of consulting with the employee and discovering the true medical position before an employee is dismissed on the ground of ill health. As the EAT said in Spencer v Paragon Wallpapers, what is required is 'a discussion so that the situation can be weighed up, bearing in mind the employer's need for the work to be done and the employee's need for time in which to recover his health'.

125. Defects in the initial decision to dismiss may be remedied on appeal if, in all the circumstances, the appeal is sufficient to cure any earlier unfairness (Taylor v OCS Group Ltd [2006] IRLR 613). The Court of Appeal noted that the Tribunal must 'determine whether, due to the fairness or unfairness of the procedures adopted, the thoroughness or lack of it of the process and the open-mindedness (or not) of the decision-maker, the overall process was fair, notwithstanding any deficiencies at the early stage.'

Discrimination

126. It is unlawful for an employer to discriminate against an employee in the way it affords him access, or by not affording him access, to opportunities for transfer or for receiving any other benefit facility or service, by dismissing him or by subjecting him to any other detriment: section 39(2) of the Equality Act 2010.

<u>Discrimination arising from disability</u>

127. An employer discriminates against a disabled employee if it treats that person unfavourably because of something arising in consequence of his disability and the

employer cannot show that the treatment is a proportionate means of achieving a legitimate aim: EqA 2010 s15.

128. Unfavourable treatment within the meaning of s15 is a concept which is distinct from a 'detriment', or 'less favourable treatment' and is to be measured against 'an objective sense of that which is adverse as compared to that which is beneficial': Trustees of Swansea University Pension & Assurance Scheme v Williams [2015] IRLR 885, EAT – upheld by the Court of Appeal [2017] EWCA Civ 1008 .

129. Simler P in Pnaiser v NHS England [2016] IRLR 170, EAT, gave the following guidance as to the correct approach to a claim under EqA 2010 s 15:

129.1. A tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B.

129.2. The tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a s.15 case. The 'something' that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.

129.3. The tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is 'something arising in consequence of B's disability'. That expression 'arising in consequence of' could describe a range of causal links. The causal link between the something that causes unfavourable treatment and the disability may include more than one link. In other words, more than one relevant consequence of the disability may require consideration, and it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability.

130. For an employer to show that the treatment in question is justified as a proportionate means of achieving a legitimate aim, the legitimate aim being relied upon must in fact be pursued by the treatment.

131. The principle of proportionality requires an objective balance to be struck between the discriminatory effect of the measure and the reasonable needs of the undertaking. The Tribunal must weigh the reasonable needs of the undertaking against the discriminatory effect of the employer's measure or treatment and make its own assessment of whether the former outweigh the latter: Hardys & Hansons plc v Lax [2005] IRLR 726, CA. In doing so the Tribunal must keep the respondent's workplace practices and business considerations firmly at the centre of its reasoning (City of York Council v Grosset UKEAT/0015/16) and in appropriate contexts should accommodate a substantial degree of respect for the judgment of the decision-taker as to his reasonable needs (provided he has acted rationally and

responsibly): O'Brien v Bolton St Catherine's Academy [2017] EWCA Civ 145, [2017] IRLR 547.

Failure to make reasonable adjustments

132. Under section 39(5) of the Equality Act 2010 a duty to make reasonable adjustments applies to an employer. A failure to comply with that duty constitutes discrimination: EqA 2010 s21.

133. Section 20 of the EqA 2010 provides that the duty to make reasonable adjustments comprises three requirements, set out in s 20(3), (4) and (5). This case is concerned with the first of those requirements, which provides that where a provision, criterion or practice of an employer's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, the employer must take such steps as it is reasonable to have to take to avoid the disadvantage. Section 21(1) provides that a failure to comply with this requirement is a failure to comply with the duty to make reasonable adjustments.

134. In considering whether the duty to make reasonable adjustments arose, a Tribunal must consider:

134.1. whether there was a provision, criterion or practice ('PCP') applied by or on behalf of an employer;

134.2. the identity of the non-disabled comparators (where appropriate); and

134.3. the nature and extent of the substantial disadvantage in relation to a relevant matter suffered by the employee: Environment Agency v Rowan [2008] IRLR 20.

135. There will not have been a breach of the duty to make reasonable adjustments unless the PCP in question placed the disabled person concerned not simply at some disadvantage viewed generally, but at a disadvantage which is substantial and which is not to be viewed generally but to be viewed in comparison with persons who are not disabled: Royal Bank of Scotland v Ashton [2011] ICR 632, EAT.

136. The predecessor to the Equality Act 2010, the Disability Discrimination Act 1995, contained guidance as to the kind of considerations which are relevant in deciding whether it is reasonable for someone to have to take a particular step to comply with the duty. Although those provisions are not repeated in the Equality Act 2010, the EAT has held that the same approach applies to the 2010 Act: Carranza v General Dynamics Information Technology Ltd [2015] IRLR 43, [2015] ICR 169. This is also apparent from Chapter 6 of the statutory Code of Practice on Employment (2011), which repeats, and expands upon, the provisions of the 1995 Act.

137. The 1995 Act provided, as does the Code of Practice, that in determining whether it is reasonable for an employer to have to take a particular step in order to comply with a duty to make reasonable adjustments, regard shall be had, in particular, to—

137.1. the extent to which taking the step would prevent the substantial disadvantage;

137.2. the practicability of the step;

137.3. the financial and other costs of making the adjustment and the extent of any disruption caused;

137.4. the extent of the employer's financial and other resources;

137.5. the availability to the employer of financial or other assistance to help make an adjustment;

137.6. the type and size of the employer.

138. The Code of Practice goes on to set out examples of steps which an employer may need to take in relation to a disabled person in order to comply with a duty to make reasonable adjustments. Those examples include: allowing a disabled worker to take a period of disability leave; allowing an employee to be absent for rehabilitation, assessment or treatment; and transferring an employee to fill an existing vacancy.

139. The Court of Appeal has explicitly confirmed that, in some circumstances, it may be a reasonable adjustment NOT to dismiss a disabled employee: Aylott v Stockton-on-Tees Borough Council [2010] EWCA Civ 910, [2010] IRLR 994.

140. In Tarbuck v Sainsbury's Supermarkets Ltd [2006] IRLR 664 the EAT held that there cannot be 'an obligation on the employer to create a post specifically, which is not otherwise necessary, merely to create a job for a disabled person.' That does not mean that the creation of a new post will never be a reasonable adjustment for en employer to be expected to make. This is illustrated by the case of Southampton City College v Randall [2006] IRLR 18, where the EAT held that the creation of a new post in substitution for an existing post may, in an appropriate case, be a reasonable adjustment. Those two cases were compared in the later case of Jelic v Chief Constable of South Yorkshire Police [2010] IRLR 744, the EAT saying: 'The facts of [the Randall] case reveal the reasons for what might, at first blush, be regarded as a surprising result. It was not being suggested that the employer should have created a post which was not otherwise necessary. In fact, the college had embarked upon a substantial reorganisation and restructuring process. The claimant's line manager conceded in evidence that he had had 'a blank sheet of paper' for this process and for the job specifications which resulted. The tribunal held that it would have been possible in these circumstances to devise a job which would both take account of the employee's disability and harness the benefits of his successful career and experience, but the employer was found not to have taken this or any other reasonable step to accommodate a long-serving and valuable employee. The EAT found that this conclusion was open to the tribunal on the specific facts of the case.' Accordingly, the EAT held in Jelic that 'a tribunal is not precluded, as a matter of law, from … holding that it would be a reasonable adjustment to create a new job for a disabled employee, if the particular facts of the case supported such findings.'

141. The case of *Tarbuck* makes clear that there is no separate and distinct duty of reasonable adjustment on an employer to consult a disabled employee about what adjustments might be made.

142. If there is no prospect of the proposed step succeeding in avoiding the disadvantage, it will not be reasonable to have to take it; conversely, if there is some prospect - even if considerably less than 50 per cent - it could be: Birmingham City Council v Lawrence UKEAT/0182/16/DM applying Romec Ltd v Rudham UKEAT/0069/07. The uncertainty of a prospect of success will be one of the factors to weigh in the balance when considering reasonableness (see per Elias LJ in Griffiths at para 29 and per Mitting J at para 18 in South Staffordshire & Shropshire Healthcare NHS Foundation Trust v Billingsley UKEAT/0341/15).

Burden of proof

143. The burden of proof in discrimination cases is dealt with in section 136 of the 2010 Act, which sets out a two stage process.

144. Firstly the Tribunal must consider whether there are facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an unlawful act of discrimination against the claimant. If the Tribunal could not reach such a conclusion on the facts as found, the claim must fail.

145. Where the Tribunal could conclude that the respondent has committed an unlawful act of discrimination against the claimant, it is then for the respondent to prove that it did not commit, or as the case may be, is not to be treated as having committed, that act.

146. The Court of Appeal in Igen Ltd v Wong [2005] EWCA Civ 142, [2005] IRLR 258 made the following points in relation to the application of the burden of proof:

146.1. It is important to bear in mind in deciding whether the claimant has proved facts from which the Tribunal could conclude that there has been discrimination that it is unusual to find direct evidence of … discrimination: few employers would be prepared to admit such discrimination, even to themselves and in some cases the discrimination will not be an intention but merely based on the assumption that 'he or she would not have fitted in'.

146.2. In deciding whether the claimant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal.

146.3. It is important to note the word 'could' in the legislation. At this stage the tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.

146.4. In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts.

147. Where the claimant has proved facts from which the Tribunal could conclude that the respondent has treated the claimant less favourably because of disability, it is then for the respondent to prove that it did not commit that act, or as the case may be, is not to be treated as having committed that act.

Conclusions

Unfair Dismissal

One dismissal or two?

148. Neither party addressed us on this issue in their submissions.

149. As a matter of law, the purported unilateral extension of the claimant's notice period by the respondent was not in itself effective to extend the claimant's notice period. The question is whether the termination of the claimant's employment did, therefore, take effect in May in accordance with the original notice of termination and, if it did, what was the status of the claimant's relationship with the respondent thereafter ie did the claimant enter into a new contract of employment which was subsequently the subject of a second termination by Mr Hemmings in November 2016?

150. Looking at the circumstances that led to the purported extension of the notice period and the claimant's subsequent return to work, we have concluded that Mr Hemmings' letter to the claimant purporting to extend his notice period and the subsequent communication from the claimant's line manager about his return to work constituted an implied offer to the claimant to extend his notice period and retain him in employment until such time as his appeal was finalised. The claimant agreed to return to work. In doing so he impliedly accepted that offer, albeit that clearly he would have preferred to have been reinstated. The claimant's original contract therefore remained in place until Mr Hemmings confirmed that the appeal was rejected, whereupon the original notice of termination took effect. In other words, there was just one dismissal. It was a dismissal on notice given by Mr Murphy in February 2016, which notice expired in November 2016.

Reason for dismissal

151. The respondent's case is that the claimant was dismissed because of capability.

152. As is reflected in our findings of fact, Mr Murphy dismissed the claimant because, due to his ill health, Mr Murphy considered him incapable of doing the job he was employed to do. Mr Hemmings rejected the claimant's appeal against dismissal and confirmed the claimant's dismissal for the same reason. The reason for dismissal was the capability of the claimant for performing work of the kind which he was employed by the respondent to do. This was a potentially fair reason for dismissal, falling within section 98(2)(a) of the Employment Rights Act 1996.

Reasonableness

153. We must next determine whether the respondent acted reasonably or unreasonably in treating the claimant's capability as a sufficient reason for dismissing the employee, taking all the relevant circumstances into account.

154. The claimant was a long-serving employee, of almost 35 years' service at the time of the decision to dismiss, who had been injured in the course of his duties. At the time Mr Murphy gave the claimant notice of dismissal he had been unable to perform his substantive role for just over 18 months. Although he had returned to work some six months previously, he was carrying out a limited range of duties, confined to admin work from home, and was only able to work for around 18 hours a week, which amounted to half the hours he was contracted to work.

155. Despite his reduced duties and hours the company had been paying him his usual contractual rate of pay, although before his termination the claimant offered to take a reduction in his pay to reflect the hours he was able to work. The claimant's absence and subsequent inability to perform his contracted role came at a cost to the respondent: the company paid his salary when absent and continued paying his full salary when he returned to work carrying out restricted duties on a part-time basis; in addition other engineers had to absorb the work the claimant was not able to do. Mr Murphy estimated the costs incurred by the company in his rationale document. We do not accept that those very broad brush estimates necessarily reflected the actual costs of the company, given especially the large number of other engineers who worked in the region and amongst whom the claimant's work could be distributed. In addition the estimates did not take account of the fact that some of the claimant's sick pay was to be repaid or was potentially repayable. Nevertheless we accept that the claimant's incapacity is likely to have resulted in additional costs to some extent in respect of overtime payments. We are less persuaded that the claimant's colleagues were negatively affected by the need to work overtime in order to absorb the additional work – Mr Murphy's evidence was that overtime was voluntary.

156. We accept that the respondent needed to have the work for which the claimant was employed done: the company had obligations to customers and could have faced financial sanctions and lost profits if the work was not done. We also accept that the respondent could not reasonably have been expected to recruit a permanent replacement for the claimant whilst still keeping the claimant's job open for him. We do not, however, accept that the only way in which the respondent could have covered the claimant's work was through the recruitment of a permanent replacement. An alternative option was to continue the existing arrangements of absorbing the claimant's work amongst the existing workforce. A further option was for the respondent to recruit a temporary replacement – the only reason Mr Murphy could give for not doing so was that this was 'not BT policy' and there was 'no budget' to do so. Neither of these are convincing explanations for not being able to take on a temporary recruit and we infer that there is no compelling reason why the company could not do so.

157. Mr Murphy decided to dismiss the claimant because he considered it inappropriate to keep Mr Wrigley's job open any longer. He had reached that decision by 21 January 2016. At that time, the most recent expert evidence the

company had about the claimant's likely recovery was that contained in an OHS report dated two weeks' previously. That report said that the claimant was receiving treatment and that, assuming the treatment was successful, the claimant was 'likely' and 'expected' to return to his duties within 8-12 weeks. Mr Murphy had decided, however, that this prognosis was unreliable.

158. On 21 January Mr Murphy learned that the claimant's treating specialist had passed away. This could have given him reasonable grounds for believing that the claimant's treatment, and therefore, recovery might be delayed for a period, although not for believing the claimant's treatment programme had been derailed completely or that any delays to his treatment would be substantial. But it is notable that, on being questioned about his reasons for considering the OHS report was unreliable, Mr Murphy did not claim that his conclusion was based on the fact that the claimant's specialist had passed away. Instead he referred to the way he had seen the claimant walking when they met and the discomfort he appeared to be in when sitting down and his belief that there had not been any demonstration of progression or improvement since Mr Vernon's adjustment plan had been put in place. Mr Murphy did not claim that he possessed any medical qualifications or expertise. In contrast we infer that the OHS physician who met with the claimant and reviewed his medical history did have such expertise. Nevertheless, Mr Murphy preferred his own assessment of the claimant's medical condition, his likely response to treatment, including CBT treatment and the other pain management treatment he was receiving, to that of a qualified Occupational Health professional who had access to the claimant's medical history and had discussed matters with the claimant. No reasonable employer in Mr Murphy's position would have considered he was in a better position to assess the claimant's likely return to work date than an OHS consultant and no reasonable manager would have preferred his own inexpert assessment of the claimant's prognosis for a return to work over that of the OHS physician in these circumstances. Any reasonable employer who had doubts about the reliability of the OHS report would have made further enquiries of the OHS physician or sought a second opinion. Mr Murphy's unreasonable treatment of the claimant in this respect was compounded by the fact that he did not make the claimant aware of his reservations about the OHS report and give the claimant an opportunity to comment. Any reasonable employer would have done so.

159. The evidence available to Mr Murphy at the time he took the decision to dismiss the claimant suggested it was likely that he would be able to return to his substantive role by early April, or possibly a little later in light of the potential delays to the claimant's treatment occasioned by his specialist passing away. This was a relatively short period. The claimant had been off for some time but, by January 2016, the prognosis appeared optimistic. As noted above, the EAT has said the basic question which has to be determined in a case like this is whether, in all the circumstances, the employer can be expected to wait any longer. Balancing the needs of the employer to maintain a fit and effective workforce that can get the work done against the interests of the claimant in being allowed a longer recovery period, we conclude that any reasonable employer would have refrained from dismissing the claimant and waited longer to see if the treatment the claimant was receiving had the desired effect. Mr Murphy's decision that he could no longer keep the claimant's job open for him and would therefore dismiss him was outside the

range of reasonable responses that a reasonable employer might have taken at that time.

160. Furthermore, even if it had not been reasonable to keep the claimant's job as a service enablement technician open for him any longer, as an alternative to dismissal Mr Murphy could have looked for an alternative role for the claimant. Any reasonable employer would have made a genuine effort to see if there were other jobs that may have been suitable and available and that the claimant could have been fitted in to. The respondent did not do so. The respondent did not look into what jobs were available and whether the claimant might be able to do any of those jobs with appropriate adjustments. The respondent's own policies contain a comprehensive set of steps that it is suggested will be followed to find suitable alternative work for an employee who is no longer able to perform their usual job. Nobody at the respondent company made any genuine effort to take those steps before the decision was taken to terminate the claimant's employment. The only reason Mr Murphy gave for a job search not being carried out was that the claimant would not agree, in advance of any job search, to a permanent variation in his contract to reduce his hours to part-time. Mr Murphy could not give any reason for this condition other than that it was what he was told by HR. We can see no cogent reason why it should have been necessary for the claimant to agree to such a variation in his contract in advance of the company following its own job search process and before anybody had made any enquiries as to what jobs were available, where and on what hours, and no reason was proffered by Mr Murphy.

161. There has been a suggestion that there would have been no point carrying out a job search as the claimant's limitations were so severe that none would have been available. We reject that suggestion. The respondent is a very large organisation and we infer that its workforce must carry out a very large variety of roles across the different areas of the business. Mr Murphy was familiar with his own division of the business but appeared to us to have little if any knowledge of what jobs might be available elsewhere. The claimant had already demonstrated that he was capable of doing admin work, for example. There were obstacles to Mr Murphy working other than from home at the time the decision to dismiss him was taken but the medical evidence showed that the claimant was receiving treatment for his mental health difficulties that was expected to enable a return to work elsewhere within a relatively short period of time. Furthermore the Access to Work scheme is available to assist with transport costs for those we are unable to transport themselves to work. No reasonable employer would have concluded that the claimant could, or would, only consider home-based alternative work. In any event, no reasonable employer of the size of the respondent would have ruled out the possibility of finding work for the claimant that he could do from home without actually making enquiries to identify what jobs were available across the company.

162. In all the circumstances, the company's failure to follow its own job search policy before taking the decision to dismiss the claimant was outside the range of reasonable responses open to a reasonable employer.

163. For the reasons set out above we find that Mr Murphy acted unreasonably in treating the claimant's inability to do the job he was employed to do as sufficient reason for dismissing the claimant.

164. Further and separately, Mr Murphy's decision to dismiss the claimant was influenced by a desire to avoid setting a precedent that might affect how other employees would have to be, or expect to be, treated in future cases. No reasonable employer would have allowed such a consideration to influence their decision.

165. We must consider next whether the appeal was sufficient to cure any earlier unfairness.

166. As part of the appeal process, Mr Hemmings effectively gave the claimant an additional period of time in which to recover and potentially return to work. To some extent, therefore, the process did mitigate some of the unfairness of the original decision to dismiss.

167. By the time Mr Hemmings confirmed the dismissal decision the claimant's position had changed considerably since Mr Murphy's original decision. On the one had, he had managed to get back to work as an engineer, at a BT site, and working 32 hours a week, just four hours short of his contracted hours. On the other hand, he was still unable to perform his substantive role in full. And what is more, his prognosis for being able to return to that role was considerably more negative than it had been in January 2016. Whereas in January the OHS physician was expecting a return within 3 months, by August 2016 it was being suggested that the claimant might never return to his substantive role. Mr Hemmings therefore had reasonable grounds for thinking that the claimant would not be able to return to his full substantive role in the foreseeable future.

168. The claimant's case is, however, that the respondent should have allowed him to continue doing the A1024 and bed decongestion work that he had being doing since June that year, that this would have been a reasonable adjustment under the Equality Act 2010 and that the respondent's failure to allow him to do so fell outside the range of reasonable responses open to a reasonable employer. The respondent's case, on the other hand, is that this was not a job that needed doing and would essentially involve creating a new, unnecessary role for the claimant.

169. The tasks that the claimant was performing were, we have found, tasks that needed to be performed. The fact that the claimant could not work at higher levels does not mean that the work he could do was not effective, productive or valuable to the company. We readily accept that those tasks did not need to be performed by an individual specifically employed for that purpose. Indeed the company generally managed to schedule the work in engineers' downtime and this obviated the need for anyone to be employed specifically to do that work. Nevertheless, it is clear that this work did form part of an engineer's workload, albeit not being work they would have carried out every day. Although this kind of work made up only a relatively small portion of each individual engineer's workload, there were many engineers in the region and so that the total amount of work of this kind that was available be done by the claimant was significant. At the time of the claimant's dismissal there was clearly enough such work available to keep him occupied for 32 hours a week and we infer there would have been enough to keep him occupied for 36 hours a week at that time had he been able to work those additional hours, given that this is what he was expected at the time to work towards. There was no suggestion that this work would be exhausted in the near future and in any event,

with assistance from the company or from Access to Work there is no reason to think the claimant would not have been able to do similar work at other sites. With the claimant carrying out this work, other engineers could be freed up to do other work, including potentially work that the claimant would have done had he been able to return to his substantive post. On balance, we accept that requiring the respondent to allow the claimant to continue doing A1024 and bed decongestion work would not have required the employer to create a post specifically, which was not otherwise necessary, merely to create a job for the claimant. Having the claimant perform that work was effectively a reallocation of duties from other engineers to the claimant. The respondent's policies recognise that this can be a reasonable adjustment. It is described in the policies as 'job carving – the process of allocating or distributing some of the individual's duties to another person and, where this can reasonably be achieved, perhaps by swapping some elements.'

170. The claimant was a long-serving employee and an experienced engineer. Adjusting his contractual duties to permit him to continue doing this work, while it was available, would have avoided the need for his dismissal, the consequences of which were severe for the claimant. As we explain below, we find that refraining from dismissing the claimant and allowing the claimant to continue doing A1024 and bed decongestion work were reasonable adjustments that would have avoided the substantial disadvantage that the claimant was put at by the requirement to work his contracted hours and duties. The respondent's failure to take that step fell outside the range of reasonable responses open to a reasonable employer.

171. Even if that were not the case there was still no reasonable attempt made by the respondent to find an alternative job for the claimant. The claimant's line manager made a cursory effort to contact a handful of managers locally but two of those managers failed to respond and the effort to chase for a response was, at best, half-hearted. Beyond that, the respondent again failed to follow its own job search policy. It had no reasonable grounds for that failing. It has been suggested that the claimant shut down attempts to find alternative work. We reject that suggestion. The claimant expressed doubts about his ability to work in an office environment, in an emotionally charged meeting, but he did not, as was suggested, categorically refuse to do so. What is more, when the claimant expressed his doubts about working in an office environment he did so without knowing what work might be available at the time and what support might be available to him. And at the time he expressed those views it is clear he was still making the point that he wanted to continue in the adjusted role. Nor did he say he was unprepared to do other jobs. Indeed when the claimant met with Mr Hemmings in early August the claimant and/or his union rep specifically challenged the respondent's failure to carry out a job search in accordance with its policy. In all the circumstances no reasonable employer would infer that, by expressing a preference to remain on adjusted duties, and voicing doubts about working in an office environment, the claimant was not prepared to consider other roles as an alternative to dismissal. We find that the respondent's failure to take the steps set out in its own policies to try to secure an alternative role for the claimant fell outside the range of reasonable responses open to a reasonable employer.

172. For these reasons we find that the appeal did not remedy the unfairness.

173. Further and separately, we find that any reasonable employer would have allowed the appeal in April or May 2016 rather than deferring a decision for six months. It would have been clear to any reasonable employer in Mr Hemmings' position at that time that the original decision to dismiss was flawed and should not have been taken. That conclusion could and should have been reached in April or May, before the claimant's notice was due to expire. Having reached that decision, as any reasonable employer would have, the only reasonable option open to a reasonable employer was to uphold the appeal. Doing so would not have prejudiced the respondent in any way. It could still have put in place the return to work plan suggested by the claimant and continued to manage the claimant's capability, just as occurred over the months that followed. Instead Mr Hemmings purported to unilaterally 'extend' the claimant's notice period, a step that the company had no legal right to take under the terms of the claimant's contract. The effect of this was that the claimant understandably felt he had the sword of Damocles hanging over him, which caused him further anxiety. We recognise that even if the claimant had been reinstated he would have continued to experience some anxiety given that his capability would still have been monitored and he must have known the respondent could not be expected to keep his substantive job open indefinitely. Nevertheless, we are satisfied that the purported extension of his notice caused additional anxiety that would have been lessened somewhat if he had been reinstated. Furthermore, the failure to reinstate the claimant meant that when Mr Hemmings eventually decided to uphold the dismissal decision the claimant had no right, under the employer's policies, to challenge that decision, notwithstanding that the claimant's circumstances had changed significantly in the interim period to the extent that he was by now doing engineering work at a BT site and working just four hours a week less than his contracted hours.

174. This is a further reason for our conclusion that the appeal did not remedy the unfairness of the original decision to dismiss.

175. We find, therefore, that the respondent acted unreasonably in treating the claimant's incapacity as sufficient reason for dismissing him. It follows that the claimant's dismissal was unfair.

The complaint of discrimination in relation to the claimant's dismissal in February 2016 and the rejection of his appeal against dismissal in November 2016

By dismissing the claimant, did the respondent discriminate against him within section 15 of the Equality Act 2010 (discrimination arising from disability)?

176. As recorded above, the respondent accepts that:

176.1. in February 2016 the respondent treated the claimant unfavourably by giving notice to terminate his employment;

176.2. in November 2016 the respondent treated the claimant unfavourably by rejecting the claimant's appeal and confirming the termination of his employment;

176.3. this treatment was because of the claimant's inability to perform his contractual tasks on a full time basis;

176.4. that inability arose in consequence of the claimant's disability;

176.5. the respondent knew at all material times that the claimant had the disability in question.

177. Therefore, the only issue for us to determine in relation to this aspect of the claimant's claim is whether the respondent has shown that the treatment of which the claimant complains, ie his dismissal by Mr Murphy and/or the rejection of his appeal against dismissal and confirmation of his dismissal by Mr Hemmings, was a proportionate means of achieving a legitimate aim.

178. So far as the aim of the treatment is concerned, the respondent's case is that its actions pursued the legitimate aim of maintaining a fit and effective workforce. Mr Lynch did not dispute the respondent's contention that it is legitimate for an employer to aim to maintain a fit and effective workforce. We accept that this is a legitimate aim for an employer to pursue.

179. The question, then, for this Tribunal is whether Mr Murphy's act of giving notice to terminate the claimant's employment in February 2016 and Mr Hemmings' act of rejecting the claimant's appeal and confirming the termination of his employment in November 2016 were proportionate means of achieving that aim.

<u>Mr Murphy's act of giving notice to terminate the claimant's employment in February 2016</u>

180. As recorded above, we have found that the decision to dismiss the claimant in February 2016 fell outside the range of responses open to a reasonable employer. For essentially the same reasons we conclude that Mr Murphy's act of giving notice to terminate the claimant's employment in February 2016 was not a proportionate means of achieving the aim of maintaining a fit and effective workforce. In summary, and wishing to avoid repeating large tracts of this already lengthy judgment our reasoning is as follows:

180.1. At the time Mr Murphy gave the claimant notice of dismissal he had been unable to perform his substantive role for just over 18 months and was carrying out a limited range of duties from home, and was only able to work for around 18 hours a week. The claimant's absence and subsequent inability to perform his contracted role came at a cost to the respondent: the company paid his salary when absent and continued paying his full salary when he returned to work carrying out restricted duties on a part-time basis; in addition other engineers had to absorb the work the claimant was not able to do and the claimant's incapacity is likely to have resulted in additional costs to some extent in respect of overtime payments. The respondent needed to have the work for which the claimant was employed done and could not reasonably have been expected to recruit a permanent replacement for the claimant whilst still keeping the claimant's job open for him. It was not the case, however, that the only way in which the respondent could have covered the claimant's work was through the recruitment of a permanent replacement. An alternative option was

to continue the existing arrangements of absorbing the claimant's work amongst the existing workforce. A further option was for the respondent to recruit a temporary replacement.

180.2. The evidence available at the time Mr Murphy took the decision to dismiss the claimant suggested it was likely that he would be able to return to his substantive role by early April, or possibly a little later in light of the potential delays to the claimant's treatment occasioned by his specialist passing away. This was a relatively short period.

180.3. Balancing the needs of the employer to maintain a fit and effective workforce that can get the work done against the interests of the claimant in being allowed a longer recovery period, any reasonable employer in these circumstances would have refrained from dismissing the claimant and waited longer to see if the treatment the claimant was receiving had the desired effect.

180.4. Furthermore, the respondent's own policies contain a comprehensive set of steps that it is suggested will be followed to find suitable alternative work for an employee who is no longer able to perform their usual job. Even if it had not been reasonable to keep the claimant's job as a service enablement technician open for him any longer, as an alternative to dismissal the respondent could have looked for an alternative role for the claimant and any reasonable employer would have done so. The respondent did not and its failure to do so was unreasonable.

180.5. Balancing the effect of dismissal on the claimant against the respondent's reasonable needs we conclude that the former outweigh the latter: giving notice to terminate the claimant's employment was not a proportionate means of achieving a legitimate aim.

181. In the circumstances this aspect of the claim of disability discrimination under section 15 is made out.

<u>Mr Hemmings' act of rejecting the claimant's appeal and confirming the termination of his employment in November 2016</u>

182. As recorded above, we have found that the decision to reject the claimant's appeal and confirm the termination of his employment in November 2016 fell outside the range of responses open to a reasonable employer. For essentially the same reasons we conclude that Mr Hemmings' act of rejecting the claimant's appeal and confirming the termination of his employment in November 2016, thereby effecting the dismissal of the claimant, was not a proportionate means of achieving the aim of maintaining a fit and effective workforce. Again we wishing to avoid repeating large parts of this judgment so set out our reasoning here only in summary form:

182.1. By the time Mr Hemmings confirmed the dismissal decision the claimant had managed to get back to work as an engineer, at a BT site, working 32 hours a week, just four hours short of his contracted hours. However, he was still unable to perform his substantive role in full. As already recorded, the claimant's inability to perform his contracted role came at a cost to the

company and the medical evidence suggested the claimant might not be able to return to his full substantive role in the foreseeable future.

182.2. However, the respondent could have allowed the claimant to continue doing the A1024 and bed decongestion work that he had being doing since June that year: this would have been a reasonable adjustment under the Equality Act 2010. The claimant was a long-serving employee and an experienced engineer. Adjusting his contractual duties to permit him to continue doing this work, while it was available, would have avoided the need for his dismissal, the consequences of which were severe for the claimant.

182.3. Even if that were not appropriate the respondent could have taken the steps set out in its own policies to try to secure an alternative role for the claimant – it had no compelling reason for not doing so.

182.4. Balancing the effect of dismissal on the claimant against the respondent's reasonable needs we conclude that the former outweigh the latter: rejecting the claimant's appeal against dismissal was not a proportionate means of achieving a legitimate aim.

183. In the circumstances this aspect of the claim of disability discrimination under section 15 is made out.

By dismissing the claimant and/or rejecting his appeal against dismissal, did the respondent discriminate against him within sections 20-21 of the Equality Act 2010 (failure to make reasonable adjustments)?

184. In light of our conclusions on section 15 it is not necessary for us to consider the alternative submission that the dismissal and/or rejection of his appeal were discriminatory because of a failure to make reasonable adjustments. Nevertheless, we have, for the sake of completeness, considered that matter.

185. As recorded above, the respondent has conceded that:

185.1. it applied a provision, criterion and/or practice that employees should work their contractual roles and hours;

185.2. the application of the provision put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled in that his inability to undertake his contractual role and work his contractual hours exposed him to the risk of dismissal; and

185.3. the respondent knew, or could reasonably have been expected to know, that this was the case.

186. The issue for us to determine, therefore, is whether the Respondent took such steps as it was reasonable to have to take to avoid the disadvantage caused by the PCP.

187. The claimant submits that the respondent should have refrained from dismissing him in February 2016. We accept that doing so would have avoided the disadvantage identified above by removing the risk of dismissal, at least for a

temporary period while the claimant's response to treatment was monitored. For the reasons identified above in relation to the section 15 claim, we conclude that refraining from giving notice of termination to the claimant in February 2016 was a reasonable adjustment for the respondent to take.

188. The claimant submits that the respondent should also have allowed him to continue doing the A1024 and bed decongestion work that he had being doing since June that year. The respondent's case, on the other hand, is that this was not a job that needed doing and would essentially involve creating a new, unnecessary role for the claimant.

189. We accept that making this adjustment would have avoided the disadvantage identified above by removing the risk of dismissal, at least for so long as there was work of this kind available for the claimant to do.

190. As recorded above the tasks that the claimant was performing were tasks that needed to be performed. Those tasks did not need to be performed by an individual specifically employed for that purpose and the company generally managed to schedule the work in engineers' downtime and this obviated the need for anyone to be employed specifically to do that work. Nevertheless, this work did form part of an engineer's workload, albeit not being work they would have carried out every day. Although this kind of work made up only a relatively small portion of each individual engineer's workload, there were many engineers in the region and so that the total amount of work of this kind that was available be done by the claimant was significant. At the time of the claimant's dismissal there was enough such work available to keep him occupied for 32 hours a week and we infer there would have been enough to keep him occupied for 36 hours a week at that time had he been able to work those additional hours. There was no suggestion that this work would be exhausted in the near future and in any event, with assistance from the company or from Access to Work there is no reason to think the claimant would not have been able to do similar work at other sites. With the claimant carrying out this work, other engineers could be freed up to do other work, including potentially work that the claimant would have done had he been able to return to his substantive post. On balance, we accept that requiring the respondent to allow the claimant to continue doing A1024 and bed decongestion work would not have required the employer to create a post specifically, which was not otherwise necessary, merely to create a job for the claimant. Having the claimant perform that work was effectively a reallocation of duties from other engineers to the claimant. The respondent's policies recognise that this can be a reasonable adjustment. It is described in the policies as 'job carving – the process of allocating or distributing some of the individual's duties to another person and, where this can reasonably be achieved, perhaps by swapping some elements.' In all the circumstances we find that allowing the claimant to continue doing A1024 and bed decongestion work was a reasonable adjustment for the respondent to have to make.

191. In light of that conclusion it follows that we also consider that it was a reasonable adjustment for the respondent to allow the claimant's appeal against dismissal and refrain from dismissing the claimant as of 4 November 2016.

192. The respondent's failure to take these steps breached its duty to make reasonable adjustments and constituted discrimination contrary to section 39 of the Equality Act 2010.

The complaints of discrimination in relation to the application of absence monitoring procedures

Did the respondent discriminate against the claimant within section 15 of the Equality Act 2010 (discrimination arising from disability)?

<u>The complaint that on 23 October 2014 Mr Vernon sent an invitation to a resolution meeting referring to termination of employment when termination was premature.</u>

193. It is not in dispute that on 23 October the respondent sent the claimant a letter purportedly from Mr Vernon which asked the claimant to attend a 'resolution meeting' and that the letter said that termination of the claimant's employment was being considered. Nor is it in dispute that the letter was premature and should not have been sent.

194. The sending of that letter was unfavourable to the claimant. He had recently been involved in a serious road traffic accident in which he had sustained both physical and psychological injuries and was unable to return to work. The tone and content of the letter led him to believe his job was at risk and caused him distress.

195. The respondent's case is that the letter was sent to the claimant by mistake and that was not something arising in consequence of the claimant's disability.

196. Mr Vernon asked his PA to send a letter to the claimant at that time about his absence. Mr Vernon's PA sent the resolution letter to the claimant in response to that request. The reason Mr Vernon asked his PA to send a letter to the claimant was that he had been absent from work for some weeks, unable to carry out his contractual role, and Mr Vernon wished to discuss his absence with him. Therefore the sending of the resolution letter was causally connected to the claimant's absence.

197. Mr Vernon did not tell his personal assistant which letter to send but instead left it to her to decide for herself which of the company's template letters to send the claimant. For some reason Mr Vernon's PA chose to send the letter described as a 'resolution' letter rather than the SLMR letter. We do not know why that was. On the one hand it could be that Mr Vernon's PA decided, or assumed, that the resolution letter was the one Mr Vernon intended her to send in his name; in other words she may have consciously and deliberately chosen to send the resolution letter. If this were the case then the fact that she made the wrong choice would not, in our view, break the causal link between the claimant's absence and the sending of the letter. On the other hand, it is not inconceivable that the claimant's PA might have intended to send an SLMR letter but opened the resolution template letter by mistake and filled in the claimant's details without noticing she had picked the wrong letter. If that had been the case we could see that there might be merit to the respondent's submission that the letter was not sent because of the claimant's absence. Another possibility is that she might have given very little thought to which

letter she was supposed to send and just picked one without being aware there were other options.

198. This is a case in which there are facts from which we could conclude that Mr Vernon's PA consciously and deliberately sent the letter she did because she decided, or assumed, that the resolution letter was the one Mr Vernon intended her to send in his name. The respondent has produced no evidence to suggest that was not the case and it has certainly not produced any evidence that might suggest Mr Vernon's PA intended to send an SLMR letter but sent the resolution template letter by accident. In the absence of any evidence from the respondent as to the reason why Mr Vernon's PA chose to send a resolution letter rather than an SLMR letter we infer that her choice was deliberate rather than accidental. That being the case, regardless of any error of judgment on the part of Mr Vernon's PA, we find that the reason the letter was sent was because of the claimant's absence from work. This was something arising in consequence of the Claimant's disability.

199. Given that the respondent's case was that the letter should not have been sent, it can hardly be said that its sending was a proportionate means of achieving the legitimate aim of maintaining a fit and effective workforce. We conclude that sending this letter was not a proportionate means of achieving a legitimate aim.

200. It follows that the respondent discriminated against the claimant within section 15 of the Equality Act 2010 by sending the letter of 23 October 2014 to the claimant suggesting that termination of his employment was being considered. In so doing the respondent contravened to section 39(2) of the Equality Act 2010 by subjected him to detriment.

<u>The complaint that Mr Vernon sent resolution letters to the claimant without first having or considering occupational health (OHS) advice on: 23 October 2014 and 26 May 2015.</u>

201. We have found that the respondent unlawfully discriminated against the respondent by sending the 23 October letter for the reasons given above. Therefore our focus here is on the letter of 26 May 2015.

202. On 26 May 2015 Mr Vernon sent a letter to the claimant inviting him to another meeting. The letter said Mr Vernon was considering terminating the claimant's employment. At the time he wrote that letter, Mr Vernon knew OHS had been asked to provide a report on the claimant but had not actually seen the OHS report so he did not know what the prognosis was for the claimant's recovery and return to work.

203. The sending of that letter was unfavourable to the claimant. The tone and content of the letter led him to believe his job was at risk, and would be at risk whatever the contents of the OHS report. The claimant was already in a fragile mental state and this letter caused him considerable distress.

204. Mr Vernon wrote to the claimant in these terms and at this time because he was absent from work. That was something arising in consequence of the Claimant's disability. We reject Mrs Brown's submission that because this step was, on the

respondent's case, required by the respondent's procedure, that means it was not done because of the claimant's absence. We were not taken to any part of the respondent's policies and procedures that positively required Mr Vernon to contact the claimant in the terms that he did at the time that he did and in any event, even if that step had been required by the company's policies, it was clearly the claimant's continued absence from work and inability to carry out his duties that triggered the sending of the letter – had the claimant been back at work performing his duties it goes without saying that the letter would not have been sent.

205. We turn then to the question of whether sending this letter to the claimant at this time was a proportionate means of achieving a legitimate aim. The respondent maintains that the sending of the letter pursued the legitimate aim of maintaining a fit and effective workforce. As recorded above, we have found this to be a legitimate aim for the respondent to pursue.

206. In pursuit of that aim, it is appropriate and reasonably necessary for an employer to seek to have discussions with absent employees about matters such as the circumstances that are preventing their return to work and the likely prognosis for their recovery and return to work. It is also appropriate and reasonably necessary for an employer to make an absent employee aware that they may not be able to keep the job open indefinitely. What is more, in the case of some absences the time may come when it is appropriate for an employer to consider dismissing an absent employee and, when that stage is reached, it would clearly be appropriate and reasonably necessary to let the employee know that termination is being considered and to meet with the employee to discuss the matter with them before reaching any final decisions.

207. In this case, by the time Mr Vernon sent the letter of 26 May 2015 to the claimant, the claimant had already been made aware by Mr Lines that the respondent could not keep his job open indefinitely. The letter sent by Mr Vernon went further than that. It told the claimant that Mr Vernon was actively considering dismissing him. That warning came notwithstanding the fact that Mr Vernon had not yet received the OHS report which had been commissioned. At that stage, therefore, Mr Vernon was not in a position to judge whether dismissal was an appropriate step to consider. That being the case, it was premature for Mr Vernon to write to the claimant in terms that suggested his employment was at imminent risk of being terminated. For someone in robust psychological health, it is possible that jumping the gun in this way may have had little impact. But the facts of this case are that the claimant was in poor health psychologically and Mr Vernon knew, or at least ought to have known, that was so. Looking at all the circumstances, we find that it was neither appropriate nor reasonably necessary for Mr Vernon to write to the claimant in the terms he did on 26 May. That letter was not an appropriate means of achieving a legitimate aim.

208. It follows that the respondent discriminated against the claimant within section 15 of the Equality Act 2010 by sending the letter of 26 May 2015 to the claimant without first considering occupational health advice. In so doing the respondent contravened to section 39(2) of the Equality Act 2010 by subjecting him to detriment.

The complaint that Mr Vernon pressured the claimant to return to work in July 2015, before he was ready to do so.

209. We accept the claimant felt under pressure to return to work in July 2015 at a time when he did not really feel ready to do so. We find that that pressure was, in part, a consequence of receiving the letter of 26 May 2015, which was sent by Mr Vernon, and the earlier letter from October 2014, which was sent by Mr Vernon's PA on his behalf. We have already found that the sending of those letters constituted discrimination contrary to section 15.

210. We were, however, not directed to anything else that was specifically said or done by Mr Vernon that put the claimant under pressure to return to work. To the extent that the claimant is suggesting that Mr Vernon did something other than sending those letters that put him under pressure to return to work, we hold that such claim is not made out.

The complaint that Mr Vernon required the claimant to attend meetings in Stockport in July 2015 and on 1 October 2015.

211. There was no evidence before us that Mr Vernon required the claimant to attend a meeting in Stockport in July 2015. The claimant did not suggest he was required to attend any such meeting and nor did Mr Vernon. The claimant's complaint that he was discriminated against by being required to attend such a meeting is not made out and is dismissed.

212. On 28 August 2015, Mr Vernon did, however, send the claimant a letter asking him to attend a meeting in Stockport on 1October to discuss his absence and return to work. Although the letter was framed as a request, in reality it was a requirement that the claimant attend -effectively it was an instruction. Although there was a reference to the possibility of a meeting being held by telephone, Mr Vernon qualified this by saying he would be prepared to hold the meeting by telephone 'exceptionally'. We infer he meant that he would be prepared to hold a meeting by 'phone if the circumstances were exceptional. Mr Vernon knew when he wrote this letter that the claimant had difficulty travelling. A reasonable inference, therefore, for someone in the claimant's position was that Mr Vernon did not consider the claimant's inability to transport himself to be an exceptional reason that would justify him not travelling to Stockton for the meeting.

213. The treatment of the claimant in this regard was unfavourable because the claimant's disability meant it was difficult for him to travel to places like Stockport.

214. Mr Vernon required the claimant to attend this meeting because he was still not performing his full contractual duties. That was something arising in consequence of the claimant's disability.

215. We must, therefore, consider if the respondent has shown that requiring the claimant to attend this meeting was a proportionate means of achieving a legitimate aim. We have accepted that maintaining a fit and effective workforce was a legitimate aim for the respondent to pursue. The issue here is whether requiring the claimant to attend the meeting was a proportionate means of achieving that aim.

216. No explanation was given by the respondent as to why this meeting had to be held in Stockport, and indeed we find that no compelling reason was given by the respondent as to why it had to be held at all. As to the first of those two points, the respondent knew the claimant had difficulty travelling. The fact that Mr Vernon himself did not attend the meeting suggests he felt he could appropriately deal with whatever issues he felt needed to be discussed over the telephone and so there was no need for the claimant to go to Stockport. As to the second point, it is pertinent to note that Mr Vernon arranged this meeting less than four weeks after the claimant had started work under the return to work plan, and after he had completed just two weeks' work pursuant to that plan. Mr Vernon claimed in evidence that he set up this meeting to explore with the claimant whether there was anything more that could be done to support his return to work. But the effect on the claimant was to increase the sense of pressure he felt he was being put under by the company. The respondent refused to postpone the meeting notwithstanding the fact that the claimant was due to meet his own line manager just one day before the meeting scheduled with Mr Vernon. No explanation was given as to why the claimant's line manager could not discuss with the claimant whether any more could be done to support his return to work. In all the circumstances we do not accept that the purpose of the meeting was simply to offer support to the claimant. Furthermore, after Mr Vernon failed to turn up for the meeting, the respondent decided not to reschedule it at the time but instead to make a further OHS referral for expert advice. In all the circumstances we conclude that requiring the claimant to attend this meeting was not a proportionate means of achieving the aim of maintaining a fit and effective workforce.

217. It follows that the respondent discriminated against the claimant within section 15 of the Equality Act 2010 by requiring the claimant to attend a meeting in Stockport on 1 October 2015. In so doing the respondent contravened to section 39(2) of the Equality Act 2010 by subjecting him to detriment.

<u>The complaint that Mr Murphy sent a letter inviting the claimant to an SLMR meeting before considering OHS advice on 6 January 2016.</u>

218. We have found as a fact that Mr Murphy did send a letter to the claimant on 6 January 2016 asking him to attend an SLMR meeting and that he did so without having considered the contents of the OHS report that had been commissioned. It is clear that Mr Murphy sent this letter because the claimant was unable to carry out his full contractual duties at that time. That was something arising in consequence of the claimant's disability.

219. We note, however, that the tone of this letter was different from the letter previously sent by Mr Vernon in May 2015 in that, although it suggested that the claimant's future with BT was under consideration, it did not contain an explicit statement that termination of the claimant's employment was being considered.

220. Setting aside for the moment the question of whether the sending of this letter was unfavourable treatment of the claimant, we have considered whether the respondent has shown that sending this letter was a proportionate means of achieving the legitimate aim of maintaining a fit and effective workforce. By now the claimant had been absent from his full duties for 15 months. In the case of such long term absence we accept that it was appropriate and reasonably necessary for

the respondent to expect the claimant to meet with second line managers occasionally so that his situation could be discussed and reviewed, notwithstanding that such meetings increased the anxiety that the claimant felt. The last time a second line manager had met with the claimant for a review meeting had been in June 2015, more than six months previously. Since then the claimant had not managed to return to his full duties in accordance with the aspirations of the return to work plan that had been put in place. It was appropriate for Mr Murphy to ask to meet with the claimant to discuss his progress. Although Mr Murphy had not at this time seen the Occupational Health report he knew one had been commissioned and would be available shortly. Whatever was in the report it was appropriate for Mr Murphy to want to meet with the claimant at that time to discuss his situation.

221. In all the circumstances we accept the respondent's case that Mr Murphy sending a letter to the claimant on 6 January 2016 asking him to attend an SLMR meeting was a proportionate means of achieving a legitimate aim.

222. This complaint by the claimant is not made out and is dismissed.

<u>The complaint that Mr Vernon and Mr Murphy sent the letters of 23 October 2014, 26 May 2015 and 6 January 2016 without modifying them in any way to be more supportive and less threatening to the claimant.</u>

223. This is a complaint about the failure to modify the standard wording of the company's template letters. It is not suggested by the respondent that those letters were adapted in any way by Mr Vernon or Mr Murphy and we find that they were not.

224. We find it difficult to see, however, on what basis the claimant contends that this failure was due to something arising in consequence of his disability. The claimant's section 15 claims were put on the basis that the treatment complained about happened because the claimant was unable to perform his full contractual duties and/or work his contracted hours. Whilst it is clear that these letters were sent because the claimant was not performing his full duties, it does not follow that either Mr Vernon's or Mr Murphy's failure to modify those letters was also because of the claimant's inability to perform his duties and/or work his contracted hours. It was not put to Mr Vernon or Mr Murphy that they were influenced not to alter the template letters because of the claimant's inability to work in accordance with his contract. There was no evidence that either of them would ever amend such letters in any circumstances when dealing with employees, or that it even occurred to them that they could, and we consider that there are no facts from which we could infer that they might have modified the letters in other circumstances. Looking at the evidence before us we find that the failure to modify the letters referred to in this complaint was not treatment because of something arising in consequence of the claimant's disability.

225. This complaint by the claimant is not made out and is dismissed.

<u>The complaint that the respondent did not consult 'Enable' specialists for advice regarding suitable adjustments to support the claimant in carrying out duties in the following respects: in relation to working from home from 27 July 2015 as part of a</u>

return to work plan initiated by Mr Vernon; and in relation to a request for the claimant to work from Rochdale TEC for the last four weeks of that plan.

The complaint that, before the claimant was dismissed by Mr Murphy in February 2016, the respondent did not consult 'Enable' specialists for advice regarding the possibility of suitable alternative work or the claimant continuing on the adjusted duties he had been undertaking up to that time.

226. We shall consider these complaints together as they are related.

227. 'Enable' is a service made available to managers within the respondent company in order to provide expert advice and guidance as to what, if any, adjustments could be made to an employee's role or working conditions in the case of disability.

228. The respondent did not consult 'Enable' specialists for advice regarding suitable adjustments to support the claimant in carrying out duties when the return to work plan was being considered or devised in the Summer of 2015, notwithstanding that the claimant and/or his union rep suggested that this should be done. Nor did the respondent consult Enable specialists for advice on suitable alternative work that might have been available for the claimant to do before Mr Murphy decided to dismiss the claimant.

229. We have considered whether this omission was unfavourable treatment of the claimant in an objective sense and have concluded that it was. This was not a case of failing to afford the claimant some kind of advantage. By failing to seek advice from Enable about the adjustments that could be made to assist the claimant in carrying out his duties in relation to the phased return to work and in regard to alternative work that the claimant might have been able to do with adjustments, the respondent deprived both itself and the claimant of the benefit of expert advice which could have identified adjustments that they had not themselves considered. This is illustrated by the fact that when the Enable service was eventually asked to advise on adjustments, its experts identified that the claimant could be provided with a coccyx wedge cushion and an adjustable lumbar support, which would help provide comfort and support when seated, something that could have enabled the claimant to carry out admin work for longer periods. Omitting to take advice from Enable also deprived the company and the claimant of expert advice on adjustments that could potentially be made to other roles, or equipment that could be obtained, that could have enabled the claimant to do other jobs or other types of work from home as well as adjustments that could have assisted the claimant with travel to work elsewhere.

230. Mr Murphy said the reason the claimant was not referred to Enable was that the claimant could not do his contracted role – Mr Murphy told us, and we find, that he had taken advice on this from HR and this is what he had been told. Given that Mr Vernon was also guided by HR throughout the time he was dealing with the claimant in relation to his absence we find it more likely than not that Mr Vernon was told the same thing by HR and infer that the reason he did not refer the claimant to Enable was also because the claimant was unable to carry out his contracted role.

231. The reason the claimant could not do his contracted role arose in consequence of his disability. It follows that Mr Vernon and Mr Murphy omitted to refer the claimant to Enable because of something arising in consequence of his disability.

232. We must, therefore, consider if the respondent has shown that this failure to consult Enable was a proportionate means of achieving a legitimate aim. As already recorded, we accept that maintaining a fit and effective workforce was a legitimate aim for the respondent to pursue. The issue here is whether omitting to consult Enable was a proportionate means of achieving that aim.

233. It is not at all clear to us how omitting to take advice from Enable could possibly have helped the respondent to maintain a fit and effective workforce and we find that it did not – it was not a means of achieving that aim.

234. It follows that the respondent discriminated against the claimant within section 15 of the Equality Act 2010 by omitting to consult 'Enable' specialists for advice in relation to the return to work plan which began in July 2015 and before giving notice to terminate the claimant's employment in February 2016. In so doing the respondent contravened to section 39(2) of the Equality Act 2010 by not affording the claimant access to opportunities for receiving a benefit, facility or service and/or subjecting him to detriment.

<u>The complaint that before the claimant was dismissed by Mr Murphy in February 2016, the respondent: did not carry out any search for alternative work; did not involve the claimant directly in any job search process that was carried out; and did not involve 'Enable' in any job search.</u>

235. We have found that no search for alternative work was carried out before Mr Murphy wrote to the claimant giving him notice to terminate his employment.

236. This was unfavourable treatment of the claimant: it deprived him of the chance of being fitted into an alternative role instead of being dismissed in accordance with the company's own policy.

237. The reason no search for alternative work was carried out was because the claimant could not work the full hours he was required to work under the terms of his existing contract and he would not agree to a contractual variation reducing his working hours on a permanent basis. Had the claimant been able to work for 36 hours per week, as he was contracted to do, a job search would have been carried out by the respondent. The claimant's inability to work 36 hours per week arose in consequence of his disability. We find, therefore that the claimant was treated unfavourably because of something arising in consequence of his disability.

238. The respondent's case is that this unfavourable treatment was a proportionate means of achieving the legitimate aim of maintaining a fit and effective workforce. Whilst we accept that it was legitimate for the respondent to seek to maintain a fit and effective workforce we do not accept that the respondent's failure to follow its own job search policy was a means of achieving that aim. In any event, it was certainly not a proportionate means of doing so. The only reason given by the respondent for not carrying out a job search was that the claimant would not agree, in advance, to a permanent reduction in his contractual hours of work. No

explanation was given, however, as to why that was necessary. The respondent's own policies contain a comprehensive set of steps that it is suggested will be followed to find suitable alternative work for an employee who is no longer able to perform their usual job. The policy makes no reference to any requirement for the employee to agree to a contractual variation in their hours, on a permanent basis, before that could be undertaken. It was not suggested to us that the respondent would have been disadvantaged in any way were it to instigate a job search without the claimant agreeing in advance to a permanent reduction in his contracted hours and we infer that it would not have been disadvantaged. In all the circumstances we find that the respondent's unfavourable treatment of the claimant was not justified.

239. It follows that the respondent discriminated against the claimant within section 15 of the Equality Act 2010 by omitting to carry out any search for alternative work before giving notice to terminate his employment in February 2016. In so doing the respondent contravened to section 39(2) of the Equality Act 2010 by not affording the claimant access to opportunities for transfer or for receiving a benefit, facility or service and/or subjecting him to detriment.

240. The complaints about failing to involve the claimant and Enable in any job search fail on the facts given that no such job search took place.

<u>The complaint that Mr Hemmings extended the claimant's notice rather than reinstating him.</u>

241. Mr Hemmings purported to extend the claimant's notice period by letter of 16 May 2016.

242. The effect of this was, as recorded above, that the claimant understandably felt he had the sword of Damocles hanging over him, which caused him further anxiety. That anxiety would have been lessened somewhat if he had been reinstated even though it is inevitable that his capability would still have been monitored and the claimant would have been aware that his future employment was still not secure. In addition, the failure to reinstate the claimant meant that when Mr Hemmings eventually decided to uphold the dismissal decision the claimant had no right, under the employer's policies, to challenge that decision, notwithstanding that the claimant's circumstances had changed significantly in the interim period to the extent that he was by now doing engineering work at a BT site and working just four hours a week less than his contracted hours. In the circumstances we find that Mr Hemmings' decision to extend the claimant's notice rather than reinstating him on 16 May 2016 constituted unfavourable treatment.

243. The claimant's case was that the 'something' arising in consequence of disability that gave rise to the unfavourable treatment was his inability to perform his full contractual duties and/or hours. It appears clear to us that if the claimant had, at this time, been able to perform his full contractual duties and hours then Mr Hemmings would have allowed his appeal and reinstated him, rather than extending the claimant's notice. We accept, therefore that the reason for the unfavourable treatment was something arising in consequence of the claimant's disability, that is his inability to perform his full contractual duties and/or hours.

244. We accept that maintaining a fit and effective workforce was a legitimate aim for the respondent to pursue. We must consider, therefore, whether extending the claimant's notice rather than reinstating him was a proportionate means of achieving that aim.

245. We have found, as recorded above, that any reasonable employer would have allowed the appeal in April or May 2016 rather than deferring a decision for six months. It would have been clear to any reasonable employer in Mr Hemmings' position at that time that the original decision to dismiss was flawed and should not have been taken. Allowing the appeal would not have prejudiced the respondent in any way. In contrast, deferring a decision on the appeal disadvantaged the claimant by causing additional anxiety and depriving the claimant of the ability to appeal Mr Hemmings' subsequent decision that his employment should be ended, notwithstanding that his circumstances had changed significantly since Mr Murphy had made his decision. In all the circumstances we are not persuaded by the respondent that the failure to uphold the appeal was a proportionate means of achieving the aim of maintaining a fet and effective workforce.

246. The respondent discriminated against the claimant within section 15 of the Equality Act 2010 on 16 May 2016 by extending the claimant's notice rather than reinstating him. In so doing the respondent contravened to section 39(2) of the Equality Act 2010 by subjecting the claimant to detriment.

247. In light of this conclusion it unnecessary for us to consider the alternative submission that the dismissal and/or rejection of his appeal were discriminatory because of a failure to make reasonable adjustments. Nor is it necessary to consider the alternative submission that failing to allow a further appeal against Mr Hemmings' decision to dismiss the claimant's appeal was a further act of discrimination given that it follows from our conclusion on reinstatement that had the respondent not discriminated against the claimant then the claimant would have had a further appeal against any subsequent dismissal on 4 November 2016.

<u>The complaint that the respondent did not consult 'Enable' specialists for advice in relation to the requirement for the claimant to work at the Oldham exchange in the return to work plan initiated by Mr Hemmings to run from June 2016.</u>

248. No referral to Enable was properly made by the respondent until September 2016, with the assessment not taking place until 31 October 2016.

249. By failing to seek advice from Enable when the return to work plan was put in place, the respondent deprived both itself and the claimant of the benefit of expert advice which could have, and indeed we find would have, identified adjustments that they had not themselves considered. When the Enable service was eventually asked to advise on adjustments, its experts did identify adjustments that could have helped the claimant perform the work he was doing over the Summer of 2016 and ease the pain and discomfort associated with that work which, in turn, could have enabled him to work his full contracted hours.

250. This unfavourable treatment will only amount to discrimination within section 15 if the reason for that treatment was something arising in consequence of the claimant's disability. We have found that Mr Hemmings genuinely intended to refer

the claimant to Enable in April 2016 and genuinely, albeit mistakenly, believed that he had done so. For some reason, however, the referral was ineffective. We are satisfied that this failure to make an effective referral came about by accident rather than design. The fact that claimant was unable to perform his duties was not the reason Mr Hemmings failed to consult Enable specialists for advice in relation to the return to work plan that ran from June 2016.

251. It follows that this complaint that the respondent discriminated against the claimant within section 15 of the Equality Act 2010 is not made out and is dismissed.

<u>The complaint that, prior to the claimant's dismissal by Mr Hemmings in November 2016, the respondent: did not consult 'Enable' specialists for advice in relation to continuing the work the claimant was already doing or suitable alternatives; did not carry out any meaningful job search; did not involve the claimant directly in any job search process that was carried out; and did not involve 'Enable' in any job search.</u>

252. Although Mr Lynch referred to 'the claimant's dismissal' by Mr Hemmings it is clear that what he was referring to was the rejection of the claimant's appeal against his dismissal by Mr Hemmings.

253. We accept the claimant's submission that the respondent failed to carry out any meaningful job search before Mr Hemmings dismissed the claimant's appeal against dismissal. As already recorded, the claimant's line manager made a cursory effort to contact a handful of managers locally but two of those managers failed to respond and the effort to chase for a response was, at best, half-hearted; beyond that, the respondent failed to follow its own job search policy. This was unfavourable treatment of the claimant by the respondent.

254. To amount to discrimination within section 15, the reason for that treatment must have been something arising in consequence of the claimant's disability. The claimant's case was that the 'something' arising in consequence of disability that gave rise to the unfavourable treatment was his inability to perform his full contractual duties and/or hours. There was no direct evidence that this was the reason for the failure to do any meaningful job search once Mr Hemmings had decided that it was not appropriate for the claimant to continue doing the work he had being doing over the Summer and that it was inappropriate to keep his substantive post open. Nor, looking at the evidence in the round, are we satisfied that there are facts from which we could infer that this was the reason. It seems to us that omitting to carry out a job search happened despite, rather than because of, the claimant's inability to perform his substantive role at this point.

255. As for the allegation that the respondent did not consult Enable specialists for advice prior to the dismissal of the appeal by Mr Hemmings, we find this was not the case. A referral to Enable was eventually arranged and a report was produced before Mr Hemmings confirmed that the claimant's appeal against dismissal had failed.

256. It follows that these complaints that the respondent discriminated against the claimant within section 15 of the Equality Act 2010 are not made out and are dismissed.

257. This is an appropriate place to deal with the separate complaint that the respondent failed to comply with its duty to make reasonable adjustments by failing to discuss with the claimant 'augmenting the adjustments recommended by Enable/Ability to meet the claimant's restrictions as of 31 October 2016.' We reject that complaint as the case of *Tarbuck* makes clear that there is no separate and distinct duty of reasonable adjustment on an employer to consult a disabled employee about what adjustments might be made.

<u>The complaint that the respondent denied the claimant a fresh appeal against dismissal by Mr Hemming.</u>

258. The claimant was not permitted to appeal against Mr Hemmings' decision to reject his appeal against his dismissal by Mr Murphy. The claimant's case is that the reason he was not permitted a further appeal was because he was unable to perform his full contractual duties and/or hours. We reject that contention. In refusing a further appeal, the respondent was simply following its own policy, which did not provide for a further level of appeal. There are no facts which could lead us to conclude that the claimant's inability to perform his contracted role had any bearing on that decision.

259. It follows that this complaint that the respondent discriminated against the claimant within section 15 of the Equality Act 2010 is not made out and is dismissed.

<u>The complaint that the respondent focused on requiring the claimant to return to his full original duties rather than considering alternatives throughout the process.</u>

260. The prohibition against discrimination by employers is set out in section 39(2) of the Equality Act 2010. An employer only contravenes that provision if it discriminates against an employee in one of the ways set out in that provision ie as to terms and conditions, in relation to access to opportunities for transfer, promotion or receiving a benefit, facility or service, by dismissing the employee or by subjecting him to any other detriment. There will only have been discrimination within section 15 of the Act if the employer not only treated the claimant unfavourably but did so because of something arising in consequence of his disability.

261. This complaint fails to identify any specific act or omission on the part of the employer that could constitute unfavourable treatment of the claimant. Rather it simply criticises the 'focus' of the respondent over a two year period, without identifying who at the respondent company was responsible for this 'focus' (the respondent itself being a corporate entity) and when and how that 'focus' manifested itself as unfavourable treatment of the claimant. Mr Lynch did not explain in his submissions how this general criticism of the respondent fits within the framework of section 15 and we conclude that it does not.

262. This complaint that the respondent discriminated against the claimant within section 15 of the Equality Act 2010 is not made out and is dismissed.

<u>The complaint that the respondent required the claimant to attend numerous SLMR (second line manager review) and 'resolution' meetings to discuss his condition,</u>

including on the following dates: 4 November 2014; 13 March 2015; 30 March 2015; 26 June 2015; 1 October 2015; 13 November 2015; January 2016; 22 February 2016; 25 August 2016.

263. Between the date of his accident and the date his employment ended the claimant attended a number of formal meetings that had been arranged by second line managers in order to discuss matters pertaining to his ability to do his job. In BT parlance, some of these meetings were known as 'SLMR' meetings whilst others were categorised as 'resolution' meetings. The main difference between the two appears to have been that a resolution meeting was convened specifically to discuss the possible termination of an individual's employment. There were eight such meetings in total, which took place on 4 November 2014, 13 and 30 March 2015, 26 June 2015, 1 October 2015, 21 January 2016, 22 February 2016 and 25 August 2016 (the meeting in November 2015 was a meeting between the claimant and his line manager – it was neither an SLMR meeting nor a resolution meeting). Although the respondent purported to 'invite' the claimant to these meetings, in reality he had little choice but to attend.

264. The claimant was required to attend these meetings because he was either absent from work or, having returned to work, was not performing his full contractual hours or duties. This was something arising in consequence of the claimant's disability.

265. We have already found that the respondent discriminated against the claimant by requiring him to attend a resolution meeting on 1 October 2015.

266. With regard to the other SLMR and resolution meetings, the conclusion of the majority (Mr Haydock and Employment Judge Aspden) is as follows.

267. The respondent maintains that these meetings were a proportionate means of achieving the legitimate aim of maintaining a fit and effective workforce.

268. In order to maintain a fit and effective workforce employers often have to make difficult decisions about whether they can keep an employee's job open when they have been, or are likely to be, absent for a significant period of time. That kind of decision requires a balance to be struck between the employer's reasonable needs and the interests of the employee. As such it needs to be made by someone of sufficient seniority and authority. In the respondent's case the company had identified that such decisions should only be taken by a second line manager. That is an entirely reasonable position to take. Where an absence is prolonged it is proper for such a manager to meet with the employee to gather the best information available about the claimant's condition and prospects of a return to work, and to ensure the claimant is given an opportunity to have their say before decisions are made that might affect their future employment and this is reflected in the respondent's policies.

269. The first formal 'meeting' with a second line manager took place on 4 November 2014. It was telephone 'meeting'. In the letter asking the claimant to attend this meeting it was suggested that termination of the claimant's employment was to be considered at this meeting. We have accepted that was not the case and found that sending a letter in these terms was discriminatory. It does not necessarily

follow from that conclusion that requiring the claimant to attend a formal meeting with his second line manager at that time was discriminatory: that is a separate issue that we must now consider.

270. As to whether requiring the claimant to meet with Mr Vernon at that time constituted unfavourable treatment we find that it was. Whatever Mr Vernon's intention may have been, the claimant was led to believe that termination of his employment was being considered. The claimant was a long serving employee who had been seriously injured in a road traffic accident while at work. He had been keeping managers informed of his injuries since then. Now, less than two months after his accident he was being told his employer was considering terminating his employment. This came as a shock to him and was the cause of significant anxiety and worry, understandably.

271. As for whether requiring the claimant to meet with Mr Vernon was a proportionate means of achieving a legitimate aim, the respondent seeks to justify the treatment on the basis that it was a proportionate means of achieving the legitimate aim of maintaining a fit and effective workforce. Mr Vernon said in evidence that this meeting, which he had intended to be an SLMR meeting, was 'very informal' and that he 'just wanted to check Mr Wrigley's health and wellbeing'. If that were the case it is difficult to see why Mr Vernon felt the need to hold a formal SLMR meeting. We also note that the claimant was having regular, informal discussions with his line manager who was perfectly able to report back on the claimant's health and wellbeing. We have noted above that In order to maintain a fit and effective workforce employers often have to make difficult decisions about whether an employee's job can be kept open and that it is appropriate for the manager charged with making that kind of decision to meet with an employee to gather the best information available about the claimant's condition and prospects of a return to work, and to ensure the claimant is given an opportunity to have their say, before decisions are made that might affect their future employment. But there was no suggestion by the respondent that this was the purpose of this particular meeting or that the claimant's future employment was under consideration at that point. In all the circumstances, the respondent has not persuaded us that it was either appropriate or reasonably necessary for Mr Vernon to require the claimant to meet formally with him so soon after his accident.

272. The meeting on 13 March was initiated and conducted by Mr Lines. By the time of that meeting the claimant had been absent from work for over six months and it was more than four months since the 4 November SLMR telephone 'meeting' with Mr Vernon. In that time he had kept his line manager informed about the state of his health. Given the prolonged absence, however, it was appropriate for Mr Lines, as the claimant's second line manager, to arrange a more formal meeting with the claimant to review his progress. The meeting on 30 March was a follow up to the first meeting so that the claimant could update Mr Lines on the outcome of the appointments the claimant had with his physiotherapist on 22 March and a psychologist on 26 March and, again, we find it was appropriate to hold that meeting. We acknowledge that these meetings were stressful and distressing for the claimant as they served to remind him that the company would not be prepared to keep his job open indefinitely. Nevertheless, we find that it was appropriate and reasonably necessary for Mr Lines to require the claimant's attendance at these meetings so that Mr Lines could gather the information he needed to make

informed decisions about the claimant's continued employment and so that the claimant himself would have an opportunity to have his say before such decisions were made. We are satisfied that, even if requiring the claimant to attend these meetings constituted unfavourable treatment, this treatment was a proportionate means of achieving the legitimate aim of maintaining a fit and effective workforce.

273. The next formal meeting with a second line manager took place in June 2015. By this time an OHS report had been obtained. The claimant was invited to that meeting by a letter of 26 May 2015 in which Mr Vernon said the termination of employment was being considered. We have found that sending that letter to the claimant in those terms at that time, without first considering occupational health advice, constituted discrimination. It does not follow, however, that holding a meeting to discuss the OHS report was itself discriminatory. The report had said 'It is difficult to predict when he will return to work at the present moment' and that the physician could not identify 'any specific restrictions or adjustments at the present moment that would facilitate a return to work to his job'. Furthermore, he physician said the claimant still needed further treatment to improve his functional capability before a return to work could be considered, and that he did not foresee an imminent return to work or a return to work in less than three months' time. Given the contents of the report, we find that, notwithstanding the claimant's anxiety at having to attend such meetings, it was appropriate and reasonably necessary for Mr Vernon to require the claimant to meet with him to discuss the report. We are satisfied that, even if requiring the claimant to attend this meeting constituted unfavourable treatment, this treatment was a proportionate means of achieving the legitimate aim of maintaining a fit and effective workforce.

274. The next formal meeting with a second line manager was scheduled to take place on 1 October. We have already found that requiring the claimant to attend that meeting was discriminatory.

275. There then followed another SLMR meeting on 21 January 2016, this time with Mr Murphy. We have already found that requiring the claimant to attend this meeting was a proportionate means of achieving the legitimate aim of maintaining a fit and effective workforce.

276. After this there was a 'resolution' meeting in February 2016. Given that Mr Murphy had decided that it was not appropriate to keep the claimant's job open any more and was considering terminating the claimant's employment it was appropriate and reasonably necessary to require the claimant to attend a formal meeting to discuss his future. Again, even if requiring the claimant to attend this meeting constituted unfavourable treatment, this treatment was a proportionate means of achieving the legitimate aim of maintaining a fit and effective workforce.

277. The final SLMR meeting took place on 25 August 2016. This meeting took place with another manager, Christian Ray. By this time the claimant had been working at Oldham on adjusted duties for nearly three months and the respondent had recently received an OHS report that strongly suggested the claimant might never be able to return to his substantive role. Given the contents of the OH S report and the fact that the claimant was almost three months into his return to work plan, we find that, notwithstanding the claimant's anxiety at having to attend such meetings, it was appropriate and reasonably necessary for Mr Ray to require the claimant to

meet with him. Even if requiring the claimant to attend this meeting constituted unfavourable treatment, this treatment was a proportionate means of achieving the legitimate aim of maintaining a fit and effective workforce.

278. It follows that the respondent discriminated against the claimant within section 15 of the Equality Act 2010 by requiring him to attend meetings with Mr Vernon on 1 November 2014 and 1 October 2015.

279. The respondent did not, however, discriminate against him by requiring him to attend meetings with second line managers on 13 and 30 March 2015, 26 June 2015, 13 November 2015, 21 January 2016, 22 February 2016 and/or 25 August 2016. And for the same reasons we reject the claimant's submission that the respondent failed to comply with a duty to make reasonable adjustments by failing to adjust its absence monitoring procedures to reduce the number of review meetings and associated correspondence referring to potential termination between September 2014 and 4 November 2016.

280. Mrs Jarvis agrees with the conclusion that the respondent discriminated against the claimant within section 15 of the Equality Act 2010 by requiring him to attend meetings with Mr Vernon on 1 November 2014 and 1 October 2015. She also agrees with the conclusion that the respondent did not discriminate against the claimant by requiring him to attend the meeting on 13 November 2015 as this was neither an SLMR meeting nor a resolution meeting as alleged. Mrs Jarvis disagrees, however, with the conclusion that the respondent did not discriminate against the claimant by requiring him to attend meetings with second line managers on 13 and 30 March 2015, 26 June 2015, 21 January 2016, 22 February 2016 and/or 25 August 2016. By way of a very brief outline of Mrs Jarvis' reasoning: she considers that requiring the claimant to attend these SLMR and resolution meetings with a second line manager constituted unfavourable treatment, because it caused the claimant additional stress and anxiety; furthermore, she considers that the treatment was not a proportionate means of achieving a legitimate aim because the respondent's policies only provided for the involvement of a second line manager when termination was considered appropriate – until such point it was unnecessary for a second line manager to become involved as any discussions could have taken place between the claimant and his own line manager on a less formal basis; and consideration of termination was premature and given that reasonable adjustments and alternative employment had not been properly considered.

281. The decision of the majority stands as the decision of this Tribunal pursuant to rule 49 of the Employment Tribunal Rules of Procedure.

<u>The complaint that the respondent failed to weigh properly in the balance the known effects of the process on the claimants mental health: when Mr Vernon sent a letter to the claimant in October 2014 about his future employment; on 26 July 2015; when dismissing him in February 2016; throughout the time when the claimant's case was being managed by Mr Hemmings.</u>

282. We have already found that the respondent discriminated against the claimant by sending the letter of 23 October 2014, by requiring him to attend a meeting with the claimant on 4 November 2014 and by giving him notice to terminate his

employment in February 2016. It is therefore unnecessary to consider whether this alternative basis on which the complaint is put is made out. Nevertheless we observe that had we not found these acts to be discriminatory on other grounds, we would not have found them to have been acts of discrimination in the way the claim is put here. We doubt whether a 'failure to weigh properly in the balance the known effects of the process on the claimant's mental health' could constitute 'treating the claimant unfavourably' within section 15 of the Equality Act 2010 given that the complaint does not identify any particular 'treatment' of the claimant. Even if it could constitute unfavourable treatment, there is no direct evidence that the reason either Mr Vernon (in relation to the October letter) or Mr Murphy (in relation to the dismissal) failed to weigh properly in the balance the claimant's mental health was because of the claimant's absence from work or because of his inability to carry out his contractual hours or duties or, for that matter, because of anything else arising in consequence of the claimant's disability. Nor are there facts from which we could conclude that, if they did fail to take proper account of the claimant's mental health, the reason they did not do so was because of something arising in consequence of the claimant's disability.

283. The complaint that the respondent discriminated against him by failing to weigh properly in the balance the known effects of the process on the claimant's mental health 'throughout the time when the claimant's case was being managed by Mr Hemmings' suffers from the same defects and more. In respect of this complaint it is even more difficult to identify what it is that is said to constitute 'unfavourable treatment' and when it occurred. In any event, we are not persuaded that Mr Hemmings did, as a matter of fact, fail to 'properly weigh in the balance' the effects of 'the process' on the claimant's mental health 'throughout the time' that he was managing the claimant's case.

284. As for the complaint in relation to 26 July 2015, Mr Lynch did not elaborate on this complaint and we can see no basis on which we could find that the respondent failed to take proper account of the claimant's mental health on that date and that the reason fro this was something arising in consequence of the claimant's disability.

285. It follows that this complaint that the respondent discriminated against the claimant within section 15 of the Equality Act 2010 is not made out and is dismissed.

Jurisdiction

286. The Equality Act 2010 sets out time limits for bringing claims of discrimination at section 123, which provides as follows:

'123(1) Subject to sections 140A and 140B proceedings on a complaint within section 120 may not be brought after the end of—

(a) the period of 3 months starting with the date of the act to which the complaint relates, or
(b) such other period as the employment tribunal thinks just and equitable.

…

(3) For the purposes of this section—

(a) conduct extending over a period is to be treated as done at the end of the period.

287. The Court of Appeal has held that, in cases involving numerous allegations of discriminatory acts or omissions, it is not necessary for a claimant to establish the existence of some 'policy, rule, scheme, regime or practice, in accordance with which decisions affecting the treatment of workers are taken'. What he or she has to prove, in order to establish conduct extending over a period, is that (a) the incidents are linked to each other, and (b) that they are evidence of a 'continuing discriminatory state of affairs': Hendricks v Metropolitan Police Comr [2002] EWCA Civ 1686, [2003] IRLR 96. It is also important to distinguish between conduct extending over a period and single acts with continuing consequences Sougrin v Haringey Health Authority [1992] ICR 650.

288. We have found that the respondent discriminated against the claimant in 2014 and 2015 by doing the following things:

288.1. sending a letter to the claimant on 23 October 2014 suggesting that termination of his employment was being considered

288.2. requiring the claimant to attend a meeting with his second line manager on 1 November 2014

288.3. sending a letter to the claimant on 26 May 2015 informing him that termination of his employment was being considered, without first considering occupational health advice

288.4. requiring the claimant to attend a meeting with his second line manager on 1 October 2015

288.5. omitting to consult ‘Enable’ specialists for advice in relation to the return to work plan which began in July 2015.

289. The claimant’s claim form was presented more than three months after these acts and omissions (taking into account any adjustments to that three month period time limit for early conciliation purposes).

290. Each of the acts or omissions complained of were taken in the context of an absence management process. Each of the events complained of concerned decisions made as part of that process when Mr Vernon was responsible for its management. It was Mr Vernon who took the decision that the claimant should be required to attend a meeting in November 2014 and who instructed his PA to send a letter inviting him to that meeting (albeit that his PA decided which letter to send), it was Mr Vernon who wrote the letter of 26 May 2015, who required the claimant to meet him in Stockport in October 2015 and who omitted to consult Enable specialists for advice on the return to work plan in the Summer of 2015. From November 2015, however, Mr Vernon was no longer involved in the management of matters relating to the claimant’s absence as responsibility was passed to Mr Murphy. Nevertheless, even though Mr Vernon was not involved, the absence management process continued up to the point at which the claimant was given notice to terminate his employment. Indeed, it was part of the respondent’s case, as put by Mrs Brown, that matters of which the claimant complained, both the

acts/omissions or Mr Vernon and those of Mr Murphy, occurred because the respondent's policies and procedures required them. It is inconsistent with that submission for the respondent to now seek to contend that the discriminatory acts in 2014 and 2015 and those that occurred in January and February 2016 did not all form part of the same conduct extending over a period. Furthermore, whether or not the acts or omissions were expressly required by the respondent's policy, both Mr Vernon and Mr Murphy were very closely guided by Dawn Wardle of HR throughout the absence management process. They both took advice from her before making decisions and we infer were influenced by her in the decisions they took.

291. The acts of discrimination that occurred in 2014 and 2015 and in January and February 2016 were all acts or omissions that occurred in the course of the respondent's capability procedure. By pursuing that process the Respondent created an ongoing state of affairs that. The acts on 2014 and 2015 were not merely one-off acts with continuing consequences and nor did they comprise 'a succession of unconnected or isolated specific acts' as per the decision in Hendricks.

292. We conclude that the acts of discrimination that occurred in 2014 and 2015 and in January and February 2016 were all elements of conduct extending over a period which continued up to the date Mr Murphy gave the claimant notice to terminate his employment in February 2016, if not beyond. As such, all of the claimant's complaints were brought in time and we have jurisdiction to consider them.

293. Even if this were not the case we would have found it just and equitable to extend time for the presentation of the complaints. The claimant was suffering from a significant mental impairment at the time of these events. It would be unreasonable to expect him to have engaged his employers in adversarial litigation at that time. Doing so is likely to have worsened his mental state and would have done nothing to improve the relationship between him and his managers. Furthermore, given that the acts or omissions complained of were made in the course of an ongoing process of absence management, it would be unreasonable to require him to bring a claim each time the respondent acted unlawfully, rather than waiting to see how that process progressed. In the event he was dismissed and brought proceedings promptly after being given notice of termination. What is more, there has been no suggestion by the respondent that it has been in any way prejudiced by the delay in bringing a claim and we find that it has not been. The balance of prejudice lies entirely in favour of time being extended.

Remedy

294. Before fixing a date for a remedy hearing we consider it appropriate to hold a case management hearing with the parties to identify and discuss the issues that will need to be determined at a remedy hearing and any steps that the parties need to take to prepare. The parties should come to that hearing ready to discuss matters such as: whether the claimant is still seeking reinstatement or re-engagement; whether either party intends to rely on medical evidence to prove or disprove the extent of the claimant's losses caused by the respondent's unlawful acts; related to this, whether the claimant still contends that he sustained a psychological injury as a consequence of discrimination and, if so, what evidence

will be put before the Tribunal on this issue; whether the claimant sustained any pension loss. The claimant should prepare an updated schedule of loss at least 2 weeks before the hearing and send a copy to the respondent. That schedule should identify whether the claimant is seeking reinstatement or reengagement.

_____

Employment Judge Aspden

Date 16 February 2018