EMPLOYMENT TRIBUNALS (SCOTLAND)

Case no: S/4105700/16

Held at Glasgow on 20, 21 and 22 November 2017

Employment Judge: W A Meiklejohn
Members: Ms M Fisher
Mr P Kelman

Mr Hugh Ross — **Claimant**
In Person

Toyota Material Handling UK Limited — **Respondent**
Represented by:-
Mr R Hignett - Barrister

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous judgment of the Employment Tribunal is that the claims of constructive unfair dismissal and unlawful disability discrimination brought by the Claimant do not succeed and are dismissed.

REASONS

1. This case was listed for a Final Hearing on 20, 21 and 22 November 2017. The Claimant appeared in person. The Respondent was represented by Mr Hignett, assisted on 20 and 22 November 2017 by Mr P Pepper, Solicitor. Mr Pepper had earlier represented the Respondent at the Preliminary Hearings held on 9 and 14 February and 13 April 2017.

2. The claims being pursued by the Claimant against the Respondent were constructive unfair dismissal and unlawful disability discrimination. The discrimination claims were brought under Section 13 of the Equality Act 2010 ("EqA") (direct discrimination) and Section 15 EqA (discrimination arising from disability).

3. In the course of the Final Hearing we accepted a submission from Mr Hignett that the scope of the Hearing should be restricted to liability and that, if the Claimant was successful, remedy should be considered at a separate Hearing.

4. The Respondent accepted that the Claimant satisfied the definition of disability in Section 6 EqA in respect of the period during which he had been absent from work in 2016 but not in respect of any earlier period.

5. The Respondent's position at the start of the Final Hearing was that it did not know, and could not reasonably have been expected to know, that the Claimant was disabled. Referring to ***Gallop v Newport City Council [2013] EWCA 1583*** Mr Hignett explained that the Respondent (a) accepted that the Claimant had a mental impairment at the relevant time (being the period from 29 February to 31 August 2016) and (b) accepted that the impairment had a substantial adverse effect on the Claimant's ability to carry out normal day-to-day activities but (c) did not accept that the adverse effect was long-term. At the conclusion of the oral evidence Mr Hignett advised the Tribunal that the Respondent now accepted that it knew, or ought to have known, of the Claimant's disability at the relevant time in 2016.

6. We heard evidence from the Claimant and, for the Respondent, from Mr R Fish, Senior Service Manager for the North East and Scotland regions (the Claimant's line manager) and Ms M Clark, Head of Human Resources. We had a joint bundle of documents extending to 330 pages. The parties also provided the Tribunal with a document headed "*Chronology/Agreed Facts*" which highlighted the areas of agreement and disagreement between them.

7. The Claimant agreed that his gross and net pay were as detailed on the Respondent's ET3, being £3110.42 per month gross and £2139.18 per month net.

Evidence and Findings in Fact

8. We found the following facts to be agreed or established by the evidence.

9. The Claimant commenced employment on 31 May 1988 with BT Rolatruc Ltd, a subsidiary of BT Industries who were based in Sweden. Pages 103-116 of the joint bundle were the Claimant's statement of terms and conditions of employment issued by BT Rolatruc Ltd dated 22 September 2004. The Claimant became an employee of the Respondent in 2007. With effect from 8 March 1999 the Claimant was promoted to the position of Engineering Service Manager. His job title was later changed to Service Support Manager and he remained in that role until his employment ended on 31 August 2016. As Service Support Manager the Claimant was responsible for supporting and managing customers and was line manager to the Service Team Managers who each, in turn, managed a small team of engineers.

10. The Respondent's business involves the manufacture, distribution and maintenance of material handling solutions, mainly forklift trucks, across the UK. The Claimant was based at the Respondent's office at Glasgow Business Park, Baillieston. This was described by Mr Fish as a network office for the Respondent's engineering and sales teams. The Service Team Managers and engineers used the office as a base but were often out on site. The National Sales Account Manager (Mr S Riley) was based at the Baillieston office but was frequently out meeting customers and prospective customers. Mr K Miller, Service Manager, had been based there but was not replaced when he retired some five years ago (his duties being assumed by Mr Fish). Around the same time Mr K Russell, whose role as similar to the Claimant's, was transferred from the Baillieston office to another role within

the Respondent's organisation and the Claimant inherited his workload. The Respondent had suffered some loss of business in Scotland and this resulted in a reduction in headcount.

11. The Claimant had on site responsibility for a number of the Respondent's customers and provided customer support, attended sales meetings with customers and dealers and attended customers' premises with the service team when necessary. He also had responsibility for a number of accounts based in the Aberdeen and Inverness areas.

12. Following the departure of Mr Miller and Mr Russell the Claimant was on many occasions alone in the Respondent's Baillieston office. He felt that he was becoming isolated and missed having a colleague in the office with whom he could discuss issues face to face. The Claimant described Mr Fish as "an excellent Senior Service Manager, who always treated his staff fairly and with compassion". As Mr Fish was based in Castleford he had only limited opportunities for face to face contact with the Claimant. The bulk of the internal communication was by email.

13. The Claimant's evidence included a reference to his having concerns about the Respondent's sales team in Scotland and also about the behaviour on one occasion of Mr D Clarkson, Regional Account Manager, in the Baillieston office. He reported his concerns to Mr Fish, and Mr Fish told us that he had spoken to Mr Clarkson.

14. The Claimant believed that the Respondent's management changes in Scotland had significantly increased his workload and caused increased pressure on him (and we understood his reference to the concerns mentioned in the preceding paragraph to represent an element of that pressure). When asked about the Claimant's workload Mr Fish described the Claimant as "*fully occupied but not over-stretched*". Mr Fish referred to the Respondent's "*direct/indirect ratio*", which we understood to be a measure of line management responsibilities within the Respondent's organisation, and said

that the Claimant's ratio was below average, although he acknowledged that the Claimant had other responsibilities.

15. Between 7 May and 8 June 2015 the Claimant was absent from work with a chest infection. Pages 153-155 were the Statements of Fitness for Work which he submitted to the Respondent. The Claimant contacted Mr Fish on 7 May 2015 to say that he was unable to attend work. When the Claimant had not returned to work by 12 May 2105 Mr Fish sent him a text message on that date and also tried unsuccessfully to telephone him on 13 May 2015. Mr Fish then emailed the Respondent's HR Team on 13 May 2015 (page 230) to organise a welfare call with the Claimant, saying *"I am a little concerned as Hugh is not a guy that has a lot of sickness*".

16. The Claimant telephoned Mr Fish on 14 May 2015 and said that he had been diagnosed with acute bronchitis. Mr Fish reported this to the Respondent's HR Team. Ms A Spencer of the HR Team had, a little earlier on 14 May 2015, tried unsuccessfully to contact the Claimant by telephone. Having been unable to reach the Claimant, Ms Spencer sent a letter to the Claimant on 14 May 2015 (page 235) asking him to contact the HR Team. We understood that this was in line with the Respondent's normal absence management procedures.

17. There was a telephone conversation between the Claimant and Ms Spencer on 15 May 2015 which was recorded by Ms Spencer on the Respondent's standard welfare call form (pages 236-237). There was a further telephone conversation between the Claimant and Ms Spencer on 27 May 2015 which was also recorded on a welfare call form (pages 238-239). Both of these forms recorded the need for "*RTW*" which we understood to mean a return to work meeting. The Claimant made no mention during these calls of not coping at work.

18. Pages 240 and 241 were copies of "*flash reports*" prepared by Mr Fish dated 8 June 2015. These were business updates – page 240 was the version

which Mr Fish sent to his line manager (Mr P Bird, After Sales Director) and page 241 was the redacted version which Mr Fish sent to the Claimant. In the version sent to Mr Bird, Mr Fish included the statement –"*Hopefully Hugh back in the morning but I have concerns about him, please see headlines*". This was a reference to the section of the report headed "*Regional Headlines*" where Mr Fish stated – "*Hugh looking at starting back tomorrow but he is intimating that he is worried about coming back, I have spoken to him and calmed him down a little and asked him to take it easy and don't worry about work. HR welfare call also asked for*".

19. Mr Fish was referring there to a telephone call he had with the Claimant on 8 June 2015 before he submitted his flash report. Mr Fish's evidence was that he sensed the Claimant was worried about returning to work because of the number of emails he would have in his inbox. These had not been redirected during his period of absence. Mr Fish told the Claimant that he should try and work through the emails as best he could and that if he needed additional support he should speak to Mr Fish. The Claimant's evidence was that he did not want to return and was considering leaving as he was extremely worried that he would not cope with his workload and the expectations placed upon him. To the extent that these versions differed we preferred the evidence of Mr Fish as it was consistent with what Mr Fish had written in the flash report he had completed on the same date as the telephone call.

20. The Claimant did not receive a welfare call on his return to work on 9 June 2015. However page 242 was a copy of an email from Ms Spencer to Mr Fish advising that she had left the Claimant a voicemail to call her back. The Claimant's evidence was that he could not recall receiving this.

21. The Claimant's evidence was that he did not receive the return to work interview referred to in the welfare calls on 15 and 27 May 2015. However there was a telephone conversation between the Claimant and Mr Fish on 9 June 2015. Mr Fish gave the Claimant an update on what had been happening during his absence. This call effectively took the place of a return

to work interview, and the Claimant made no complaint at the time about not receiving a return to work interview (i.e on a face to face basis).

22. On 23 July 2015 Mr Fish conducted the Claimant's annual appraisal. Pages 244-248 were the Claimant's Personal & Performance Development Review form. In Part 1 of this form, completed by the Claimant in advance of meeting with Mr Fish, the Claimant made reference to workload issues. He wrote – "*More being asked of all employees within the company and at times feel as if all are being taken to saturation point this can result in mistakes being made or issues not being resolved in a timely fashion*" and "*Not enough time to deal with issues properly and in a professional manner*".

23. The Claimant also wrote – "*Found last year very frustrating and difficult when dealing with Groundwater, feedback etc from them very poor as all has found*". This was a reference to an external dealer with whom the Claimant dealt where, according to Mr Fish's evidence, the Claimant's calls and emails were not being returned as quickly as he would have liked. The Claimant in his evidence referred to requests for information to Groundwater from Mr Fish and Mr Bird being "*seldom responded to*" which suggested to us that Mr Fish had probably understated the problem faced by the Claimant in his dealings with Groundwater.

24. The outcome of the review so far as the Groundwater issue was concerned was confirmation from Mr Fish to the Claimant that he would speak to the owner of the business (the father of the individual who was not returning calls or emails in a timely manner) and Mr Fish duly did this. Mr Fish and the Claimant discussed the other issues raised by the Claimant. Mr Fish then completed the Review form and sent it to the Claimant (page 251).

25. Mr Fish submitted the Claimant's Review form to the Respondent's HR department. Ms E Kellett of the Respondent's HR department emailed Mr Fish on 30 July 2015 to ask if the Claimant's reference to "*Not enough*

time…." (see paragraph 22 above) had been addressed and Mr Fish responded confirming what he had discussed with the Claimant.

26. The Claimant's evidence was that his Review form made no mention of his concerns or any actions that were proposed. We were however satisfied that the Claimant's concerns about workload and Groundwater were discussed at his Review meeting on 23 July 2015. Mr Fish dealt with the Groundwater issue as described in paragraph 24 above. So far as the workload aspect was concerned one of the Claimant's objectives recorded by Mr Fish at Part 3 of the Review form – "*Development Needs*" – was that the Claimant should *"Develop the next group of STMs and SSM*". The relevant action was recorded as "*Scott/Marc give them some minor activities*". In effect the Claimant was being encouraged by Mr Fish to delegate some of his work.

27. The Claimant did not tell Mr Fish during or after the Review meeting that he was not coping with his work or that he felt depressed or anxious, nor did he mention feeling isolated. He made no comment on the terms of the Review form as completed by Mr Fish when he acknowledged receipt of it (page 250).

28. Between June 2015 when he returned to work and February 2016 the Claimant felt constantly under pressure and described his workload as "relentless". He said that he was having to work at home at night and at weekends to try and keep on top of the job.

29. The Claimant was on holiday between 22 and 26 February 2016. He attended for an appointment with his doctor on 22 February 2016. He thought he had developed a chest infection and felt in a very low mood. The doctor's note of this consultation (page 173) refers to the Claimant's chronic obstructive pulmonary disease ("*COPD"*) and records that he was prescribed Carbocisteine (to address his chest complaint).

30. The Claimant, having discussed with his wife the probability that he might be suffering from stress and depression, consulted his doctor again on 26

February 2016 and was prescribed Citalopram Hydrobromide tablets 20mg (pages 173-174).

31. The Claimant was due to return to work on 29 February 2016 but did not feel able to do so. He spoke by telephone with Mr Fish and advised that he had been diagnosed with depression. He asked Mr Fish if the Respondent could advise on counselling. Mr Fish emailed Ms L Morley of the Respondent's HR department on 29 February 2016 (page 252) asking her to contact the Claimant for a welfare call and advice on counselling.

32. The Claimant consulted his doctor again on 29 February 2016 as he continued to feel low and was struggling to sleep (page 174). He was issued with a Statement of Fitness for Work confirming that he would be absent until 7 March 2016 because of depression (page 156).

33. Also on 29 February 2016 the Claimant received a call from Ms Morley. This was recorded on a welfare call form (pages 253-253A) including –"*Hugh asked about counselling and I explained what we offer as a Company. We agreed that he would see how he feels this week, give the medication some time to start working and then he will let me know if he thinks this would help him. I also advised it may be worth seeing if the GP will offer counselling as they may be able to offer more than we can. I advised Hugh to contact us should he need any help or support and he agreed he would call when he goes back to the GP*." The Claimant in his evidence disputed that Ms Morley had mentioned what the Respondent could offer by way of counselling. He also disputed that he had agreed to call back after he had seen his GP. However we believed it was more likely than not that Ms Morley's record of the call, made at the time, was accurate.

34. The Claimant had an issue about the format of page 253A being different from the format of page 253 and also different from the format of all of the other welfare call forms in the bundle, but we did not believe there was any significance in this.

35. The Claimant had an appointment with his doctor on 7 March 2016. The note of this (page 174) refers to "*Given PCMHT info*" which the Claimant explained as being a response to his enquiry about the availability of counselling – he was given information about contacting the local Primary Care Mental Health Team. The Claimant was issued with a further Statement of Fitness for Work confirming that he would be absent from work until 14 March 2016 because of depression (page 157). The Claimant contacted the PCMHT on his return home. He was told that there was a waiting list of approximately eighteen weeks and that a telephone assessment would be arranged for 21 March 2016.

36. The Claimant then had a telephone conversation with Ms Morley. This was not recorded on a welfare call form but Ms Morley's handwritten note of the call was produced at page 254. This included –"*asked GP about counselling*" and "*phone assessment 21st March – counselling*" and "*asked if anything else we could do*". According to the Claimant's evidence, he advised Ms Morley of his discussion with his doctor and asked if the Respondent could supply counselling; Ms Morley said she would find out and the Claimant asked if she could let him know as soon as possible. We preferred the evidence of the Claimant as to what was said in the course of his telephone conversation with Ms Morley on 7 March 2016. The Claimant had asked about counselling in his previous call with Ms Morley. He had ascertained that there was a potential eighteen week wait for counselling through the PCMHT. It seemed to us probable that he would be keen to pursue the availability of counselling through the Respondent.

37. The Claimant had a further appointment with his doctor on 14 March 2016 when both his COPD and his depression were discussed (page 174). He was issued with a Statement of Fitness for Work confirming that he would be absent until 11 April 2016 because of "depressive episode, unspecified" (page 158).

38. On 15 March 2016 Mr Fish contacted the Respondent's IT department and asked them to redirect the Claimant's emails to himself (page 254A).

39. The Claimant called Ms Morley again on 16 March 2016. There was a significant divergence between the Claimant's version of this conversation and the version recorded by Ms Morley on the welfare call form (pages 255-256). According to the Claimant's evidence Ms Morley told him that no counselling was available through the Respondent. She said that she had been looking at the Respondent's private health scheme and, although she did not know if this provided cover for counselling, the Claimant could contact the scheme providers and ask.

40. The welfare call form completed by Ms Morley recorded – "*Hugh is having a counselling assessment from his GP, over the phone on the 21st March 2016. In addition I have also spoken to him regarding the private health scheme. As he is a member he is also going to contact them to see if there is any further support available.*" Ms Morley's reference to the Claimant having a counselling assessment from his GP was not accurate – the assessment was to be undertaken by the PCHMT – but otherwise we were satisfied that her account of the call was the more accurate version.

41. While the Respondent's HR Policy HR-27 – Welfare Support – Low Mood (pages 121-123) advised employees to "*contact the HR department in confidence they will arrange for you to see an independent counsellor immediately*" this applied only to employees who did not enjoy the benefit of the Respondent's private health scheme. Ms Clark's evidence was that the providers of the private health scheme (Aviva) required the employee to make direct contact for reasons of confidentiality. We were satisfied that the Claimant's assertion that the Respondent had rejected his request for counselling was not correct. The true position was that they had advised the Claimant how he should proceed to avail himself of the private health scheme.

42. The Claimant telephoned Aviva Healthcare on 16 March 2016 and was told that he could arrange six sessions of counselling which he duly did with the first session taking place on 23 March 2016. The Claimant's assessment call with the PCMHT took place on 21 March 2016 after which they wrote to the Claimant (page 213) to confirm that they could not meet his needs because he had been offered counselling under the Respondent's private health scheme.

43. The Claimant produced documentation relating to Mr R Finnie (pages 288-289), Mr A McNutt (pages 290-295) and Mr J Wilson (pages 296-302) as examples of employees who had been offered counselling by the Respondent. We understood that all of these employees were at a lower level of seniority than the Claimant and therefore did not enjoy the benefit of the Respondent's private health scheme.

44. The Claimant called Ms Morley again on 24 March 2016. Their conversation was recorded on a welfare call form (pages 257-258). The Claimant confirmed to Ms Morley (as she had asked him to do) that the private health scheme covered employees for depression and that he had arranged six sessions. Ms Morley's record of the call includes – "*He is still not sleeping and he is feeling very down and frustrated and feels he is letting people down. I have reassured him as best I can, he stated he currently feels he will find it too hard to return to work. He said his counsellor had told him these feelings were very reactive to how he is feeling now and not to make any rash decisions*." Matters were left (as they had been on earlier calls) that "Hugh to call HR".

45. Mr Fish had left the Respondent's HR department to deal with the Claimant's absence from work. He did not call the Claimant himself because he did not want to exacerbate his condition. He did however receive some calls from the Claimant.

46. Mr Fish was at the Respondent's Castleford office on 25 April 2016 and was advised by the HR Team that they planned to call the Claimant. He asked to participate in the call with Ms Morley. Pages 259-260 were the welfare call form in respect of this call. This stated as follows – "*He stated he is feeling better and he sounded much better than previous conversations. The GP has updated his dose of Citalopram up from 20mg to 40mg and he has also been seeing the Pulmonary care specialists twice a week. They suspect the issues he has been having with his chest is mild COPD, he has been given exercises and advice on how to manage this which is helping. He is feeling worried that long term he may find it difficult to do the manual side of his job. I have explained that we will send him the consent forms and request additional information from his GP/specialist and may refer to Occupational Health to get further information on the long term issues and whether any reasonable adjustments are required*." We were satisfied that this was an accurate summary of what was discussed.

47. Pages 117-120 were the Respondent's HR Policy HR-72 – Absence Capability. This stated at section 8.0 – "*Where there are general health concerns, the company will make referral/s to Occupational Health OR liaise with the team members GP. A referral to the GP or OHS will take place if a team member is off sick for longer than 4 weeks or more or earlier in the case of an industrial injury or if the leader has concerns about a team member's health. If the team member has a disability or in the case of work related stress, which may be covered by the Disability Discrimination Act, OHS will be considered and reports requested on what the team member can and cannot do, once approval and recommendations have been made by the GP*."

48. Clause 12 of the Claimant's Statement of Terms and Conditions of Employment (pages 108-110) provided for sick pay, at the Respondent's discretion, and included the following – "*Once 3 years' service is completed, the duration of sick pay is determined on a cumulative basis and 6 months is the maximum allowance in any rolling 12 month period*." The Claimant had received sick pay during his period of absence in May/June 2015.

49. Clause 14 of the Claimant's Statement of Terms and Conditions of Employment (pages 110-111) stated as follows – "*If necessary, either before or during your employment, you may be required to give permission for us to obtain a medical report from your own doctor or from a doctor nominated by us. We may require you to undergo a medical examination by a company-nominated doctor.*"

50. Clause 19 of the Claimant's Statement of Terms and Conditions of Employment included the following – "*You are obliged to adhere to the policies in the company handbook and a failure to do so may result in disciplinary action. The policies may be altered from time to time and you will be notified of any changes. It is however your duty to ensure that you are familiar with those policies*."

51. The Claimant's Statement of Terms and Conditions of Employment was dated 22 September 2004 (at which time his employer was BT Rolatruc Ltd). The Respondent's policies HR-27 and HR-72 were both dated April 2015.

52. The Claimant contacted the Respondent on 28 and 29 April 2016 to advise that he had not received the consent forms he was expecting following the call on 25 April 2016. He was advised on 29 April 2016 by Ms C Sutton, HR Administrator, that the consent forms would be posted out to him.

53. The Claimant had a further appointment with his doctor on 9 May 2016. The note of this appointment (page 175) records that the Claimant was "*talking about possibly leaving*" his employment. The full note of this consultation was not available due to a computer issue but the Claimant's evidence was that Cognitive Behavioural Therapy ("CBT") was discussed.

54. The Claimant spoke with Mr Fish on 9 May 2016 to advise that he had received a further Statement of Fitness for Work for another four weeks – this was at page 160 and recorded the reason for absence as "*depressive*

episode, unspecified". The Claimant told Mr Fish that he felt OK physically but mentally he felt he could not cope with the job.

55. On 11 May 2016 the Claimant called his GP and asked if he could be referred to Beating the Blues. His GP agreed to refer him but advised that there could be a waiting list. The Claimant then contacted Aviva to ask if they could supply CBT. He received an email from Aviva on 13 May 2016 (pages 327-330) confirming cover for six sessions of CBT.

56. The Claimant sent a text message to Ms Morley on 13 May 2016 to advise that he had still not received the consent forms which she had told him would be sent out during the call on 25 April 2016. Ms Morley then telephoned the Claimant. Pages 261-262 were the welfare call form in respect of this call. After referring to the CBT counselling which the Claimant had arranged through Aviva, this continued as follows – "*He said he hasn't received the consent forms we posted to him so I told him we would put some more in the post to him and he will call us midweek if he hasn't received them. I said we would like to go and visit him soon and he [sic] would contact him to discuss dates. He says he is happy to meet us at Scotch Corner and says driving helps him take his mind off things for a short while. He would prefer not to go into the office as it isn't very private. I said we would discuss further when we have some dates."*

57. On 17 May 2016 the Claimant sent a text message to Ms Morley to advise that the consent forms had still not been delivered. He received a response by text saying Ms Morley would call back later but he did not receive a call from her on that date. The Claimant telephoned Ms Morley on 19 May 2016 and advised again that the consent forms had not been delivered.

58. The Claimant had a further appointment with his doctor on 18 May 2016. The note of this consultation (page 175) includes the following – "*worrying about work all the time, says feels better in first week of line and then in second week is panicking as does not feel fit for work and worries that he would not*

be able to do it, wondering if should just retire but does not really want to do this". The Claimant was issued with a further Statement of Fitness for Work (page 161) which stated that he would be unfit for work between 18 May and 6 July 2016 because of "*depressive episode, unspecified*".

59. On 20 May 2016 the Claimant spoke with Mr Fish and advised that he had still not received the consent forms. Following this call the Claimant emailed Mr Fish to provide his wife's email address (page 263). Later that day Ms Morley emailed the Claimant (page 263) attaching the consent forms. The Claimant emailed Ms Morley on 21 May 2016 to say that he was having a problem printing off one of the forms. After an exchange of texts with Ms Morley on 23 May 2016 the Claimant received the consent forms by post on 24 May 2016. He completed the consent form under the Access to Medical Reports Act 1988 (page 265) and sent this back to the Respondent. This was received by the Respondent on 26 May 2016.

60. Following receipt of the consent form signed by the Claimant Ms Clark spoke with Ms Morley and it was agreed that she (Ms Morley) would meet with the Claimant to discuss his absence and likely return and following this meeting the Respondent would decide who to approach to obtain a medical report (ie the Claimant's GP/specialist or occupational health). Ms Clark's view was that it made more sense that the Respondent should speak with the Claimant in person first. She described the obtaining of a report as "*in abeyance*".

61. The Claimant had a further appointment with his doctor on 15 June 2016. The Claimant's evidence was that he asked the doctor if there had been a request from the Respondent for a medical report and was informed no. We believed on balance that the Claimant did so but this was not recorded in the note of this consultation (page 176) which included the following – "*feels mood and sleep much better until thinks about work, is going for CBT and finding this helpful, has not heard from occ health at work yet and will phone them to chase up, thinking of early retiral as feels if goes back to work will not cope*".

62. Ms Morley contacted the Claimant on 16 June 2016 and asked if he could attend a meeting at Scotch Corner on 21 June 2016. The Claimant explained that he had a hospital appointment on that date and Ms Morley advised that she would arrange another date. Ms Morley wrote to the Claimant on 17 June 2016 (page 267) inviting him to attend a meeting at Scotch Corner Hotel on 6 July 2016 "*to discuss your absence in more detail and either a possible integration back to work or to understand your future intentions*." There was a handwritten note on the copy of this letter in the bundle bearing Mr Fish's initials and referring to "*pension info*" and someone called "*Mike*" but neither Mr Fish nor Ms Clark could explain this.

63. The Claimant had an appointment with his doctor on 29 June 2016. The record of this consultation (page 176) includes the following – "*has still not heard from occ health but work has contacted him and are going to have a meeting, he feels that he cannot go back to that job and is going to tell them this*". The Claimant was issued with a further Statement of Fitness for Work covering the period from 29 June to 27 July 2016 (page 162) which stated the reason for absence as "*depressive episode, unspecified*".

64. The Claimant met with Ms Morley at Scotch Corner Hotel on 6 July 2016. Ms Sutton was also in attendance. The Claimant's wife had accompanied him on the journey but did not attend the meeting. Pages 268-275 were the notes of the meeting which the Claimant accepted as being broadly accurate. The discussion covered the Claimant's state of health, his concern about how his job had changed and his inability to cope, his feeling of isolation, options for lighter duties or relocation, the fact that the Claimant's sick pay entitlement was due to run out, his pension position and the need to take independent financial advice in that context and the possibility of early retirement or an exit package. Ms Morley expressed concern about the Claimant's ability to make the right decision. The meeting lasted approximately 45 minutes. The Claimant said in the course of his evidence that Ms Morley was "*going through the motions*" but we were satisfied that the true position was that the

Claimant was highly regarded by the Respondent and that the Respondent genuinely did not want him to leave.

65. On 12 July 2016 the Claimant telephoned Mr Fish and told him that, having spoken with his wife, he had decided to leave the company. The Claimant did not mention a lack of support from the Respondent nor did he suggest that the Respondent had not followed the correct procedures. Mr Fish believed, based on his relationship with the Claimant, that the Claimant would have mentioned these issues if he had concerns about them.

66. Mr Fish reported the Claimant's decision to the Respondent's HR Team. Ms Clark believed it would be sensible for Mr Bird and herself to meet with the Claimant to discuss his decision to leave. Ms Morley contacted the Claimant about this on 13 July 2016 and Ms Sutton wrote to the Claimant on the same date (page 276) to propose a further meeting at Scotch Corner.

67. The Claimant had a further appointment with his doctor on 28 July 2016. The record of this consultation includes the following – "*has appt with HR and service director at work on 9/8/16 as has decided to leave work through ill health*". The Claimant was issued with a further Statement of Fitness for Work covering the period from 27 July to 24 August 2016 which stated the reason for absence as *"depressive episode, unspecified".*

68. Ms Morley wrote to the Claimant on 29 July 2016 (page 277) inviting him to meet with Ms Clark and Mr Bird at Scotch Corner Hotel on 9 August 2016. The letter advised the Claimant that his wife could attend the meeting "*for additional support*".

69. The Claimant duly attended the meeting with Ms Clark and Mr Bird on 9 August 2016 accompanied by his wife. He felt agitated and nervous. No notes were taken of this meeting but Ms Clark wrote to the Claimant on 10 August 2016 (pages 278-279) to record what had been discussed, as follows –

- "*You advised us that you wanted to resign as you could not see yourself returning to work due to your health.*

- *We advised you that due to your length of service and loyalty to the business we wanted you to consider a less demanding role or maybe working lesser days; to ensure you were absolutely sure about your decision.*

- *We also spoke about other options such as a mutually agreed departure (on the basis of capability) from the company which would involve you leaving the business due to ill-health or us accepting your resignation in exchange for a goodwill payment (proposed details are set out below).*

- *As we confirmed, we are unable to make you redundant as we need to replace your position if you were to leave.*

- *We have agreed that your leave date would be 31st August 2016.*

- *We discussed your role and our need to put someone in place very soon due to business demands.*

- *We would need you to make a decision regarding your employment in the next few weeks, and whether you wished us to progress the agreed departure option. As you know your company sick pay has expired and statutory sick pay expires in September 2016*".

Ms Clark's letter then set out the financial details of the two options referred to at her third bullet point, and advised the Claimant to take advice before

making any decision. We were satisfied that Ms Clark's letter was an accurate summary of the meeting.

70. There was a marked contrast between the evidence of the Claimant and that of Ms Clark in relation to this meeting. Ms Clark referred to the meeting being "*very relaxed*". She said that the Claimant did not make any mention of "any failings on behalf of the company" nor "*any failure to obtain an occupational health report*". She also said that the Claimant "*was complimentary about the Company and how much he had enjoyed working for us*".

71. The Claimant said that he was feeling "*extremely agitated and nervous*". He described what Ms Clark had said about her own knowledge of depression as "*very patronising, flippant and totally disrespectful*". He was critical of Ms Clark asking if he still had a mortgage on his home, and speaking about her property abroad. He said that the offer of alternative roles or reduced hours was not discussed in any detail and that the only offer made to him was to take up a service engineer's role which he said was just as stressful as his own. He did not understand why he had been told that the Respondent could not make him redundant. He referred to Mr Bird asking if he knew he had been paid too much sick pay. There was a break of 10-15 minutes during which the Claimant had to be persuaded by his wife not to leave and return home, but to stay and finish the meeting.

72. On 19 August 2016 the Claimant telephoned Mr Fish and then Ms Morley to advise them that he would be leaving the Respondent "*via the capability route*" as discussed with Mr Bird and Ms Clark at the meeting on 9 August 2016.

73. The Claimant had a further appointment with his doctor on 23 August 2016. The record of this consultation (page 176) included the following – "*has decided to leave work through capability route and finish date 31/8/16, showed me letter that he is sending to them, discussed meeting he had with HR, found it very stressful, wife was with him – great support*". The Claimant

was issued with a further Statement of Fitness for Work covering the period from 23 August to 1 September 2016.

74. The Claimant then submitted a letter dated 23 August 2016 to Ms Clark which was in the following terms –

> "*As per my welfare meeting with Phil Bird and yourself, on 9th August, and written confirmation received on 11th August 2016 I would like to depart my role as Service Support Manager, on 31st August 2016, via the capability route.*
>
> *As you are aware I have been absent from work due to depression for six months and although this has improved in the last two months I firmly believe that a return to work, in any role, would only cause my depression to worsen.*
>
> *During the last six months of my illness I have tried my utmost to get better to allow me to return to my job. I have attended numerous appointments with my doctor, have been prescribed 40mg of Citalopram per day, six sessions with a counsellor and six sessions with a clinical psychologist to try and improve my health, but sadly to say although this has helped I cannot envisage returning to my job now or in the future.*
>
> *I was off for 5 weeks last year and during this time had similar issues. On returning to my position, over a period, I began to feel the symptoms returning.*
>
> *It is with great difficulty and sadness that I have come to the decision to leave the company 31 August 2016 due to my ill health*."

In response to a question from the Tribunal, the Claimant confirmed that he did think rationally about leaving his employment, and took a long time to think about it.

75. On 31 August 2016 Mr Fish visited the Claimant at his home to collect various items of company property and to say goodbye. Mr Fish's evidence was that there was no animosity from the Claimant about the Respondent and no reference to any poor treatment or lack of support, failure to obtain an occupational health report or offer private counselling.

76. Ms Morley replied to the Claimant's letter on 1 September 2016 (pages 286-287). Her letter detailed the final payment to be made to the Claimant, being 12 weeks' salary of £8829 in respect of the "*agreed capability departure route*" plus 21.5 days' accrued holiday entitlement producing a total payment of £11993.

77. As a consequence of his depression the Claimant had not applied for any jobs since his employment with the Respondent ended on 31 August 2016. He had been in receipt of Employment Support Allowance until September 2017.

78. The parties had commissioned two reports from Dr P Srireddy, Consultant Psychiatrist in March and April 2017. The conclusion of the first report was that the Claimant had been suffering from a mental impairment in the period between 29 February and 31 August 2016 which had a substantial adverse effect on his ability to undertake normal day-to-day activities which had (as at March 2017) lasted for at least 12 months. The conclusion of the second report was that the Claimant had been suffering from mental impairment during the period between May-June 2015 but this did not have a substantial or long-term effect on his ability to undertake normal day-to-day activities. The prognosis in the first report was that the Claimant was likely to make a full recovery and be able to return to work in the future with an anticipated timescale of 12-18 months for this to occur.

79. The Respondent has five core values, one of which is Genchi Genbutsu which means "*going to the source*" to establish the facts and make the correct decision. The Claimant believed that the Respondent had failed to adhere to this in dealing with his absence between February and August 2016. Ms Clark disagreed.

Comments on the Evidence

80. All of the witnesses were credible and did their best to give an accurate account of events. Differences between their versions of events were generally a matter of perception. A good example of this was the evidence given by the Claimant and Ms Clark about the meeting in Scotch Corner Hotel on 9 August 2016. Ms Clark described the meeting as "*very relaxed*" and her evidence concentrated on the positive outcomes as recorded in her letter to the claimant of 10 August 2016. The Claimant was clearly far from relaxed and his version focused on what he saw as the negative aspects of the meeting.

81. The Claimant believed that the Respondent had not been supportive of him following his diagnosis of depression. There had been two welfare calls made during his absence of some five weeks in May/June 2015 whereas, in the Claimant's view, only two welfare calls were made during his absence of six months in February/August 2016. The Claimant regarded only those calls initiated by the Respondent as being welfare calls. The Respondent treated calls where the Claimant's health issues were discussed as welfare calls and recorded these (with the exception of the call on 7 March 2016) on welfare call forms irrespective of who had initiated the call. It did not seem to us unreasonable to describe any telephone call during which the Claimant's health was discussed as a welfare call, irrespective of whether the call was initiated by the Respondent or the Claimant.

82. We noted that clause 12 of the Claimant's Statement of Terms and Conditions of Employment (at page 110) placed the onus on the Claimant - *"…in cases of longer term sickness, you must keep your line manager informed of your progress on a weekly basis throughout the duration of your absence and you should indicate your likely date of return to work as soon as you know it*". The Respondent had not required the Claimant to adhere to this, and that was in our view sensible where there was a diagnosis of depression. It had also been sensible of Mr Fish to allow the Respondent's HR department to "take the lead" in dealing with the Claimant's absence from 29 February 2016.

83. The Claimant was somewhat conflicted in his attitude towards Mr Fish. He described Mr Fish as "*an excellent Senior Service Manager, who always treated his staff fairly and with compassion*" (see paragraph 12 above). However he was critical of the fact that he had no face-to-face meetings with Mr Fish when he was ill (although that may have been more a criticism of how his absence was managed by the Respondent's HR department than of Mr Fish). It was clear that Mr Fish held the Claimant in high regard and was sorry to see him leave the Respondent's employment.

Submissions

84. We agreed that Mr Hignett would make his submission first. Mr Hignett referred to ***Western Excavating (ECC) Ltd v Sharp [1978] IRLR 27*** – for the Claimant's claim of constructive unfair dismissal to succeed, he must have resigned in response to a fundamental breach of contract by the Respondent, but he had not done so. He had resigned because of his health. This was clear from the terms of his letter of resignation. There was no reference in that letter to the matters of which the Claimant was now complaining.

85. The Tribunal needed to be confident that it was an unambiguous resignation. The evidence showed that the Claimant had been seriously thinking about leaving for a long time before he did so. The Claimant had said in evidence

that he was thinking rationally when he wrote the letter of resignation. He had attended two face to face meetings with the Respondent. He had discussed matters with his wife and his doctor. He had shown his letter of resignation to his doctor before submitting it. It could not be said that the Claimant's resignation was ambiguous or that he had rushed into his decision.

86. Mr Hignett suggested that something had made the Claimant believe that he had been treated unfairly. He had "*reverse engineered*" events to persuade himself that the Respondent had been at fault.

87. There was no evidence that the Respondent's actions had caused the Claimant's depression. The Claimant had not resigned because he was overworked. He had raised certain work issues but had made no complaint of overwork. The Respondent had attempted to explore reduced duties/hours with the Claimant but he had not been interested.

88. Mr Hignett referred to the Claimant's allegations of unlawful direct discrimination under Section 13 EqA, following the numbering in the Position Statement (pages 71-79). Allegation 1 related to the failure to make a welfare call and conduct a return to work interview after the Claimant's absence in 2015. Mr Hignett submitted that this had to fail because (a) the Claimant was not disabled at that time (under reference to Dr Srireddy's second report), (b) the Respondent had no knowledge at that time that the Claimant might be disabled and (c) it was in any event out of time.

89. Mr Hignett submitted that this added nothing to the Claimant's constructive unfair dismissal claim. The failure to conduct a return to work interview could not amount to a breach of contract. Mr Fish had in fact spoken to the Claimant on 8 and 9 June 2015. There was nothing to indicate that the events of 2015 had been in the Claimant's contemplation at the time of his resignation.

90. Allegation 2 related to the welfare calls. The Claimant's position appeared to be that a call was only a welfare call if (a) he was told that it was a welfare call and (b) it was a call by the Respondent to the Claimant. That did not sit comfortably with the general principles of unfair dismissal law which required that the employer should maintain reasonable dialogue with the employee – ***BS v Dundee City Council [2013] CSIH 91***.

91. The Claimant was contrasting the frequency of welfare calls in 2015 and 2016. He had received two calls over a 5 week period when absent with a physical illness in 2015, and seven calls over a 26 week period when absent with a mental illness in 2016. There was no material difference in the frequency of calls and it could not be said that any difference was due to the Claimant's mental illness.

92. Allegation 3 related to the provision of counselling. Where there was a conflict in the evidence about this, Mr Hignett urged us to prefer the written records of the welfare calls which had been made contemporaneously to the Claimant's oral evidence. He referred to the welfare call forms relating to the calls on 29 February and 16 March 2016 as examples. The Claimant's comparators were junior to him and therefore accessed counselling by a different route to the Claimant who had the benefit of private health cover.

93. If a comparison was warranted, there had been no unreasonable delay in providing the Claimant with access to counselling. The Claimant's absence began on 29 February 2016 and his counselling started on 23 March 2016. He had suffered no detriment and there had been no breach of contract.

94. Allegations 4, 5 and 6 related to similar issues – the Respondent's alleged failure to follow their own Absence Capability policy and their failure to obtain a report from the Claimant's doctor or occupational health. Mr Hignett highlighted the tension between the language of the contract of employment and the policy. The Statement of Terms and Conditions of Employment at clause 14 (page 110) stated that the Claimant "*may*" be required to give

permission for the Respondent to obtain a medical report from his doctor or a doctor nominated by the Respondent, and that the Respondent "*may"* require him to undergo a medical examination by a company-nominated doctor.

95. The Absence Capability policy stated at Section 8.0 (page 118) that a referral to the GP or OHS "*will"* take place if a team member is off sick for longer than 4 weeks or more or earlier in the case of an industrial injury or if the leader has concerns about a team member's health. Mr Hignett pointed out that the clause in the policy was not specific as to when the referral for a report should be made.

96. Under reference to ***Alexander and Wall v Standard Telephones and Cables Ltd (No 2) [1991] IRLR 286*** Mr Hignett submitted that the policy was not contractual and there could therefore be no breach of contract. If there had been a breach of an implied term of the Claimant's contract, it had not been without reasonable cause. The Respondent knew why the Claimant was absent from work from his doctor's certificates and had reasonable cause to hold any referral to occupational health "*in abeyance*". The Respondent was also aware that the Claimant was on medication, that his condition was being managed by his GP and that he was receiving counselling – if a report had been sought too early it might well have indicated that the position should be reviewed after the Claimant's treatment and it had therefore not been unreasonable of the Respondent to delay. Having waited until the meeting on 6 July 2016, it was understandable that the Respondent did not obtain a report when the Claimant said he was considering leaving his employment (unless they had a concern about his mental capacity to make a decision).

97. Even if the Respondent's failure to obtain a report was capable of being a fundamental breach of contract, Mr Hignett submitted that this was not the reason why the Claimant had resigned. He had not complained about the absence of a referral to occupational health at the meetings on 6 July and 9 August 2016.

98. The Claimant had been off sick for more than four weeks in 2015 and no report had been obtained. It could not therefore be inferred that the reason for not obtaining a report in 2016 was that the Claimant had a mental impairment.

99. Allegation 7 related to the delay in holding the first face to face meeting with the Claimant. Mr Hignett submitted that the Respondent had had to strike a balance between maintaining a dialogue with the Claimant and not harassing him. There was no evidence that the Claimant had wanted an earlier meeting. When the meeting did take place on 6 July 2016 the Claimant had not complained that it should have been earlier. In relation to the constructive unfair dismissal claim, the Respondent had reasonable cause to delay the initial meeting. In relation to the claim of unlawful discrimination, the Claimant could not argue that there was no earlier meeting because of his disability.

100. Allegation 8 related to the Respondent's core value of Genchi Genbutsu. The Claimant was complaining about a lack of support from the Respondent but it was apparent from Dr Srireddy's report that there had been no further support which the Respondent could have offered to assist the Claimant to return to work. Accordingly the Claimant could not succeed on this point.

101. Mr Hignett submitted in respect of the claim under section 15 EqA that the evidence did not establish what the "*something arising*" in consequence of the Claimant's disability was. The Claimant was alleging a lack of support and regular contact during his absence but these were properly characterised as part of his direct discrimination claim. It could not be said that in consequence of his disability the Claimant did not get more support or contact and it was therefore difficult to see how this claim could be made out.

102. Mr Ross referred to his resignation letter. He had had a fear of going back to work. He could not be certain that his work had been the cause of his depression but there had been a build up of pressure in his job.

103. Mr Ross disputed the evidence of Mr Fish that he had not been overworked. He referred to the difficulties with the Groundwater account. He had thirteen engineers calling him for technical advice. He had to cope with paperwork including problems with invoices and also had to go out to help the engineers. He was, as he put it, "*at the forefront*".

104. The Claimant maintained that he had received two welfare calls when absent from work in 2015 and two when absent from work in 2016. The other calls in 2016 had been his. He had not been aware that these had been logged as welfare calls.

105. Referring to the absence of a return to work interview in 2015, the Claimant stressed the importance of this. He submitted that he had spoken to Mr Fish on numerous occasions about not coping. He acknowledged that Mr Fish did not agree. He said that if there had been a welfare call following his 2015 absence he would have brought this up.

106. The Claimant referred to the fact that Ms Morley has asked for his consent to obtain a report in April 2016 and his subsequent efforts to have the necessary forms sent to him. He pointed out that when the forms had been received by him, it was the day after they had been posted. The same applied to the Respondent's letter of 9 August 2016.

107. The Claimant saw the case as a matter of right against wrong. He believed that he had been wronged by the Respondent and that this would affect him for the rest of his life.

Applicable Law

108. The definition of disability is found in Section 6(1) EqA –

"*A person (P) has a disability if –*

(a) P has a physical or mental impairment, and

(b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities."

109. Direct discrimination is defined in Section 13 EqA –

"(*1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."*

110. Section 23(1) EqA provides –

"*On a comparison of cases for the purposes of section 13…there must be no material difference between the circumstances relating to each case*".

111. The statutory provision for reversal of the burden of proof is found is Section 136 EqA –

"(1) This section applies to any proceedings relating to a contravention of this Act.

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision".

112. Discrimination because of something arising in consequence of disability is defined in Section 15 EqA –

"(1) A person (A) discriminates against a disabled person (B) if –

(a) A treats B unfavourably because of something arising in consequence of B's disability, and

(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim".

113. The time limit within which discrimination complaints should be brought is set out in section 123 EqA –

"(1) …Proceedings on a complaint…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;

(b) failure to do something is to be treated as occurring when the person in question decides on it.

(4) *In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something –*

(a) when P does an act inconsistent with doing it, or

(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it."

114. Section 95(1) ERA provides that an employee is dismissed by his employer if –

"(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct."

115. Section 98 ERA provides as follows –

"*(1) In determining…whether the dismissal of an employee is fair or unfair, it is for the employer to show –*

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

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

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

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

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal was 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".

Discussion and Disposal

116. We will deal firstly with the claim of constructive unfair dismissal. We had to consider whether there had been a fundamental breach of contract by the Respondent in response to which the Claimant had resigned. That entailed examining whether there was an express or implied term of the Claimant's contract of employment which had been breached by the Respondent.

117. The express terms founded on by the Claimant were contained in the Respondent's Absence Capability policy HR-72 quoted at paragraph 47 above and in the Respondent's Welfare Support – Low Mood policy HR-27 quoted at paragraph 41 above. Mr Hignett had sought to persuade us that these did not form part of the contract – see paragraph 96 above.

118. The case of ***Alexander*** required us to look at the contractual intent of the parties – did they intend these policies to form part of the contract of employment? In the absence, as here, of any express words of incorporation of the policies into the contract of employment, were the policies apt to be a term of that contract?

119. We considered that the part of clause 19 of the Claimant's contract of employment quoted at paragraph 50 above was relevant – if the Claimant was obliged to adhere to the Respondent's policies, as altered from time to time, under pain of disciplinary sanction if he failed to do so, that was in our view indicative of an intention that those policies were to have effect as part of the Claimant's contract of employment. While we recognised that there was some force in Mr Hignett's argument that the terms of the Capability Absence policy were aspirational – "*The Company will endeavour to assist team members in achieving the performance standards required of their role*" – we considered that the language of the policy, and section 8.0 of policy HR-72 in particular, was sufficiently clear to be construed as a term of the Claimant's contract of employment.

120. Having said that, we recognised that the phrase "*off sick for longer than 4 weeks or more"* in section 8.0 created a degree of ambiguity. If the trigger for there being an obligation on the Respondent to make a referral to the employee's doctor was not precisely 4 weeks, when did that trigger occur? It seemed to us that the right approach was to consider whether a reasonable employer would have made a referral in similar circumstances to those which existed in the present case. In our view, a reasonable employer would have done so. We did not think it was necessary for us to decide precisely when such a referral should have been made but sufficient to find that it should have been made prior to the date upon which the Claimant intimated his resignation. It followed that, as at 23 August 2016, we found that the Respondent was in breach of the Claimant's contract of employment by having failed to make a referral to his GP/specialist or occupational health.

121. While we considered that the Respondent's policy Welfare Support – Low Mood also had contractual effect for the reason set out in paragraph 118 above, we did not believe the Respondent had breached this. The provision in section 4.0 that directed an employee to contact the Respondent's HR department and stated that they (the HR department) would arrange for the

employee to see an independent counsellor immediately had in our view to be interpreted in line with what might be expected of a reasonable employer. Counselling could not be arranged "*immediately*" in the literal sense and the Claimant had been able to access counselling within a reasonable period.

122. We accepted Ms Clark's explanation (see paragraph 41 above) that in the case of employees, such as the Claimant, who had the benefit of private health cover it was necessary for the employee to access this by contacting the provider directly. This was what Ms Morley had advised the Claimant to do and he was afforded access to counselling as soon as he did so.

123. We then considered whether the Respondent's breach of their Absence Capability policy was a fundamental breach of the Claimant's contract of employment. We decided that it was not a fundamental breach. It was not conduct on the part of the Respondent such as would entitle the Claimant to resign without notice. If it had been a matter of such concern to the Claimant he might have been expected to raise it at the meeting with Ms Morley on 6 July 2016, but he did not do so.

124. The Claimant contended that the Respondent had acted in breach of the implied term of mutual trust and confidence. Mr Hignett's submission was that the Respondent had not acted without reasonable and proper cause and was therefore not in breach. We agreed with that. It had been reasonable for Mr Fish to let the respondent's HR department take the lead when the Claimant's period of absence with depression began. It had been reasonable for the Respondent to conduct regular welfare calls with the Claimant even if the Claimant did not recognise the nature of these calls when initiated by himself rather than Ms Morley. It had been reasonable to delay the first face to face meeting until the Claimant began to report some improvement in his mental health. We found no breach by the Respondent of the implied term.

125. Our conclusion that the Respondent had not been in fundamental breach of the Claimant's contract of employment, entitling the Claimant to resign

without notice, meant that the claim of constructive unfair dismissal could not succeed.

126. We deal next with the claim of direct discrimination under Section 13 EqA. For this to succeed we would require to find that the Claimant had, because of his disability, been treated less favourably than an actual or hypothetical comparator. We considered each of the Claimant's eight allegations (as set out in the Position Statement – pages 71-79) in turn.

127. Allegation 1 related to the Claimant's period of absence in May/June 2015, and in particular the Respondent's failure to conduct a welfare call and a return to work interview. We understood that welfare calls were part of the Respondent's absence management procedures and we were not convinced that an alleged failure to conduct such a call after the Claimant had returned to work in June 2015 could amount to less favourable treatment. In any event, the evidence indicated that Ms Spencer had attempted to contact the Claimant. Further and more materially, we were not satisfied that the Claimant was disabled at the relevant time. This conclusion was supported by paragraphs 4.02 and 4.03 of Dr Srireddy's second report (at page 149) where he expressed the opinion that the mild depressive episode experienced by the Claimant had a limited effect on his ability to undertake normal day-to-day activities during the period between May-June 2015 and that, on the balance of probabilities, the effects experienced by the Claimant over this period were neither substantial nor long-term in their impact and impairment. Had it been necessary for us to determine the point, we would also have found that this part of the claim was out of time.

128. Allegation 2 related to the welfare calls. The Claimant complained that he had not received a welfare call between 25 April 2016 and the meeting with Ms Morley on 6 July 2016, a period of ten weeks. That was not entirely accurate. Details of the contact between the Respondent and the Claimant in this period are set out in paragraphs 52, 54, 56, 59, 60 and 62 above. The telephone conversation between Ms Morley and the Claimant on 13 May

2016 was a welfare call even if not recognised as such by the Claimant. The face to face meeting was originally proposed to take place on 21 June 2016 but this was not possible because the Claimant had a hospital appointment on that date. We did not find any treatment of the Claimant by the Respondent in the period in question which was less favourable than would have applied in the case of a non-disabled comparator or a comparator who did not have the same impairment as the Claimant.

129. Allegation 3 related to the provision of counselling. The Claimant's comparators were Mr Wilson, Mr Laidlaw and Mr Finnie. All of these comparators were junior to the Claimant. They did not enjoy the benefit of private health cover as the Claimant did. It did not in our view amount to less favourable treatment of the Claimant that instead of offering counselling as they had done in the case of his comparators, the Respondent had directed him to the private health cover provider. We accepted Ms Clark's evidence that this was how the private health cover required to be accessed. We noted that arrangements for counselling had been put in place as soon as the Claimant contacted Aviva.

130. Further, we believed having regard to section 23(1) EqA that there was a material difference between the circumstances of the Claimant and those of his comparators. The Claimant had access to private health cover whereas his comparators did not.

131. Allegations 4, 5 and 6 related to the Respondent's alleged failure to follow their own Absence Capability policy and their failure to obtain a report from the Claimant's doctor or occupational health. The Claimant identified Mr Finnie as his comparator in relation to allegations 5 and 6. The Respondent was willing to offer counselling in Mr Finnie's case when he had marital difficulties (pages 288-289). From the documentation available to us, the issue of obtaining a report from a GP or occupational health did not arise in Mr Finnie' s case. While we had found that the Respondent should have done so by 23 August 2016, the terms of the Respondent's Absence

Capability policy allowed the Respondent a degree of discretion as to when a report should be obtained. It was not mandatory to do so immediately after four weeks' absence. That discretion made it impossible in our view to hold that the Claimant had been treated less favourably than a hypothetical comparator, as each case would turn on its own circumstances.

132. Allegation 7 related to the delay in holding the first face to face meeting with the Claimant. His comparators were Mr Finnie and Mr Wilson. The circumstances of Mr Finnie are referred to in the preceding paragraph. In Mr Wilson's case the reasons for absence were shingles, general debility and lethargy and neuralgia. Neither Mr Finnie nor Mr Wilson had a mental impairment similar to the Claimant. Once again, having regard to section 23 EqA, we found that there was a material difference between the circumstances of Mr Finnie and Mr Wilson and those of the Claimant.

134. Allegation 8 related to the Respondent's alleged failure to follow their core value of Genchi Genbutsu. Again the Claimant's comparators were Mr Finnie and Mr Wilson. Our finding in the preceding paragraph that their circumstances were materially different to those of the Claimant was equally relevant here. We also agreed with Mr Hignett's submission as recorded at paragraph 100 above.

135. In view of our findings in paragraphs 127-134 above, the Claimant's claim of unlawful direct discrimination under Section 13 EqA could not succeed.

136. We deal finally with the claim of discrimination arising from disability under Section 15 EqA. For this claim to succeed there required to be unfavourable treatment of the Claimant by the Respondent because of something arising in consequence of the Claimant's mental impairment. The Claimant referred in his further and better particulars to (a) the lack of support from the Respondent during his absence by reason of depression in 2016 compared with his absence due to a chest infection in 2015, (b) the Respondent's delay in sending out consent forms for a report from his GP and/or a referral to

occupational health and (c) the Respondent's delay in holding a face to face meeting with him. He also alleged that he had been treated unfavourably in relation to the lack of regular contact from the Respondent due to the nature of his illness, compared with what would have happened in the case of someone with a physical injury.

137. In our view these were restatements of the Claimant's direct discrimination claim. We could find nothing here that constituted "something arising in consequence" of the Claimant's disability so as to bring the case within the scope of Section 15 EqA. Accordingly the claim of unlawful discrimination under that section could not succeed.

138. We recognise that our decision will be disappointing for the Claimant. As we explained at the Final Hearing, our task has been to make findings in fact based on the evidence presented to us and to apply the law to the facts as we found them to be. It is regrettable that the Claimant's long and valued service with the Respondent should have ended in acrimony and that the Claimant should be left with such a negative view of a company to which he gave a large part of his working life.

Employment Judge: W A Meiklejohn
Date of Judgment: 29 November 2017
Entered in register: 11 December 2017
and copied to parties

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