EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr Dede Pali	**v**	**Metroline West Ltd**

Heard at: Watford

On: 23-25 July 2018 &
2 November 2018 (in chambers)

Before: Employment Judge Bedeau
Mr R Clifton
Ms K Charman

Appearances

For the Claimant: Ms T Ahari, Counsel
For the Respondent: Ms H Norris, Solicitor

JUDGMENT

1. The claim of failure to make reasonable adjustments is not well-founded and is dismissed.

2. The claim of unfair dismissal is not well-founded and is dismissed.

3. The provisional remedy hearing listed on Friday 30 November 2018 is hereby vacated.

REASONS

1. By a claim form presented to the tribunal on 9 November 2016, the claimant claimed against the respondent that he had been unfairly dismissed and that the respondent had failed to make reasonable adjustments by not allowing him to continue performing light duties and that alternative employment was not offered to him given that there were a number of vacancies at the time of his dismissal.

2. In the response presented to the tribunal on 15 December 2016, the respondent averred that the claimant was dismissed on grounds of capability and that a fair procedure had been followed. Alternative employment was considered. The claimant did apply for vacant positions but was unsuccessful. The claims should be dismissed.

3. **The Issues**

A preliminary hearing was held on 2 February 2017, before Employment Judge Southam, who identified the claims and issues to be heard and determined by this tribunal. They are:

3.1 Did the claimant become, at least by 24 June 2016 or by some later material date, a disabled person? That requires the tribunal to determine:

3.1.1 Whether the claimant had a physical impairment which had substantial adverse effects upon his ability to do normal day-to-day activities; and

3.1.2 Whether those effects were long-term? That is, had they already, by any material date, lasted for 12 months or were they, at such a date, likely to do so?

3.2 Did the respondent apply to the claimant a provision, criterion or practice, namely its requirements as to capability to work as a bus driver?

3.3 If so, did the application of that PCP to the claimant place him at a substantial disadvantage in relation to work as a bus driver compared with persons who are not disabled? The claimant alleges that his back condition made it difficult for him to drive, even for short periods.

3.4 Did the respondent know or could it reasonably have been expected to know that the claimant was disabled and that he was subject to that disadvantage, at any material date?

3.5 Has the claimant shown the kind of adjustments which it would have been reasonable for the respondent to make to avoid the disadvantage? The claimant proposed:

3.5.1 Appointment to the position of Garage Administration Supervisor in June 2016; and

3.5.2 Allowing the claimant to continue to work light duties in an administrative role.

3.6 In relation to the decision not to appoint the claimant to the position of Garage Administration Supervisor in June 2016, would it be just and equitable for the tribunal to hear and consider that complaint?

3.7 If so, did the respondent fail to make reasonable adjustments in June 2016?

3.8 What was the reason for the claimant's dismissal? What were the facts and/or beliefs which led the respondent to dismiss him?

3.9 By dismissing him, did the respondent fail to make reasonable adjustments in his favour?

3.10 Has the respondent established a potentially fair reason for the claimant's dismissal?

3.11 If so, was it reasonable for the respondent to treat the claimant's capability as sufficient reason to dismiss him?

3.12 Was the procedure used by the respondent in dismissing the claimant unfair? If so, what is the percentage chance that the claimant would have been dismissed in any event, if the procedure had been fair?

3.13 In particular, did either the respondents and/or the claimant fail to comply with the ACAS Code of Practice and if so, in what respect? If the claim succeeds, should there be any increase or decrease in any award made to reflect any failure to comply, and if so, by how much?"

4. The evidence

4.1 The claimant gave evidence and did not call any witnesses.

4.2 On behalf of the respondent, evidence was given by Ms Jacqui Sayandi-Carter, garage manager; Ms Samantha Smith, business support manager; and Ms Alison Mary Duberry, garage manager.

4.3 In addition to the oral evidence the parties adduced a joint bundle of documents comprising in excess of 320 pages. References will be made to the documents as numbered in the bundle.

5. Findings of fact

5.1 The respondent is a bus company with several garages and routes around London and the Home Counties. It was formed following the purchase of five garages including Willesden Junction from FirstCentreWest. It is a subsidiary of ComfortDelGro which owns Metroline Travel Ltd.

5.2 The claimant was employed as a bus driver from 14 March 2011. His place of work was at Willesden Junction Garage, North West London.

5.3 The respondent, together with Metroline Travel Ltd, employs 5,000 people.

5.4 In its long-term sickness absence policy inherited from FirstCentreWest, it sets out the approach to take in cases of permanent and temporary incapacity. In relation to disability cases, paragraph 5 states the following:

> "In all cases of sickness absence, managers must consider whether or not the employee is "disabled", within the meaning of the Disability Discrimination Act 1995 and managers should seek advice from HR in case of any doubt about this. If so, the requirements and procedures laid down in the Act will apply, and must be followed. In particular, there is a duty to consider reasonable "adjustments" to enable the "disabled" employee to return to work, in their normal – or some other – capacity. This is a much more demanding and complex requirement than mere consideration of suitable alternative employment, and in all "disability" cases managers should consult with HR at every stage." (page 29 of the bundle)

5.5 An employee who has been dismissed under the long-term sickness absence policy and who did not appeal at the time of dismissal or whose appeal was unsuccessful, may subsequently apply for re-engagement. Re-engagement must take place within 12 months from the date of dismissal. (29-37)

5.6 There is no dispute that the claimant had a good performance and attendance record. (38)

5.7 He worked five days a week, as bus driver, on the daytime shift and was managed by Mr Stuart McManus, operations support manager, who in turn was managed by Ms Jacqui Carter, garage manager.

12 June 2015

5.8 The claimant said that on 12 June 2015, while driving his bus, his seat suddenly dropped and jolted his back. He was in some discomfort but was able to complete his route as he was only five or six minutes away from the garage. He said that when he exited the cab he suddenly felt extreme pain and had to lay down on the floor of the bus. He called the roadside controller, Lukas, who attended and called the ambulance service, but they said that it would be an hour to an hour and a half before they would be able to see to the claimant. Lukas then spoke to his manager, Sanjay, roadside supervisor, who also arrived at the scene and took the claimant in his car with Lukas following on his motorcycle, to the Urgent Care Centre, Northwick Park Hospital, Harrow, where the claimant was treated.

5.9 He did not turn up for work the following day but on 19 June, he submitted a self-certificate in which he stated that he was suffering from "acute back pain with sciatica". It was signed by Ms Anna Tkaczyk, acting operations manager, as having been received by her. His general practitioner signed him off from work from 16 June to 23 June 2015, diagnosing "acute back pain with sciatica". (49 – 50)

5.10 On 19 June 2015, the claimant spoke to Ms Tkaczyk who made a note of the conversation. She wrote that the claimant told her that, "On 12 June 2015 started to have very strong pain coming down from his back to his leg. Said that could not carry on his duty and was taken to hospital by Sanjay, roadside controller. On that day Keith Ali [senior service delivery manager] was also informed." (48)

5.11 On 22 June the claimant was signed off work for two weeks by his doctor who diagnosed "mechanical low back pain". (52)

5.12 Mr Stuart McManus, operations support manager, booked an appointment for the claimant to be seen by the respondent's occupational health advisers, Medigold Health, "Medigold" on 6 July. In his referral Mr McManus specifically asked whether the claimant's condition was likely to e regarded as a disability.

5.13 The claimant was signed off from work until 16 July by his GP. (59)

5.14 Dr Arun Iyer, occupational health physician, Medigold, after examining the claimant, wrote to Mr McManus on 6 July stating:

> "Mr Pali tells me that he has been experiencing pain in his right calf for approximately one year but this has not limited his activities. He tells me that approximately six weeks ago he experienced pain that spread from his lower back to his buttock on the right side. Whilst at work on the 12 June he experienced severe pain in the same region which caused him to terminate his duties. …..
>
> Mr Pali is not fit to perform a safety critical role. It is likely that he is suffering with a trapped nerve which may be related to a prolapsed disc or sciatic type symptoms.
>
> 3. He is not currently fit to perform his role as a Bus Driver.
>
> 4. It is not possible for me to estimate when he may be able to return to work.. He will need to be seen by an Orthopaedic Specialist and the duration of recovery will be very much dependent upon whether or not he will have an operation.
>
> 5. No adjustments can be made in order to expedite his return to work.
>
> 6. He is currently not fit for any form of work.
>
> 7. There is nothing else that the company may be able to do in order to assist Mr Pali.
>
> 8. I do not believe that he suffers from a condition that would be considered a disability within the remit of the Equality Act 2010." (61 – 62)

5.15 The claimant signed off from work on 13 July for 3 weeks and was seen by Mr McManus when he attended a sickness review meeting

on 17 July. Notes were taken by Mr McManus. The claimant said that he felt a "bit better" but could neither walk properly nor stand for long periods; the pain was down the right side of his body; he was able to sleep better than before but still found it hard to get around; he had been referred for a MRI scan as the nerve was touching a disc and it may require an operation; the pain started when he was on duty on 12 June 2015; and that at his age, 27 years, he was surprised his condition was "so bad". (65 – 66)

5.16 Mr McManus sent the claimant a letter confirming what they discussed and arranged a further sickness review meeting on 31 July 2015, if he was unable to return to work. (67 – 68)

5.17 The claimant saw Dr Huma Sethi, consultant neurosurgeon, on 29 July 2015, who sent her report to his GP the same day in which she diagnosed a "big L5/S1 disc prolapse compressing the caudia equina. I have explained to him that this disc is a relatively big disc and there is a chance to get symptoms of caudia equina, for example problems with bladder, bowels, numbness around the buttocks and genitalia, sexual dysfunction and weakness of legs."

5.18 The doctor explained to the claimant the risks and benefits of surgery and left it up to him to decide. He was again seen by her on 4 August when surgery was discussed but the claimant was not willing to undergo an operation at the time, however, she arranged for him to have a new scan. (70 - 71)

5.19 On 4 August 2015, the claimant was signed off work until 4 September 2915. (72)

5.20 On 4 August he had a sickness review meeting with Ms Jacqui Carter, garage manager, who took notes. He said that there had been an improvement in his condition but was unsure whether it was because of the medication. He was reluctant to have an operation without seeing the results of the scan to see whether there had been any improvements. He said that his GP had prescribed co-codamol medication. Ms Carter explained to him the respondent's capability procedure and how it worked. (73 – 74)

5.21 In evidence before this tribunal, Ms Carter said that she informed the claimant that the respondent was extremely short of drivers and that he needed to return to his role as a driver and that if an employee did not return to work by the 12th week of absence, the respondent would normally consider termination of their employment for capability reasons. If the employment is not terminated by that time, then the driver would remain on the respondent's books with their duties being covered by other drivers without their being a replacement.

5.22 It was not in the respondent's interests or to those of its employees, to have drivers constantly covering for each other. Four fifths of its employees being drivers. Some drivers are allocated panel

supervisory or temporary trainer role so that they could be called upon when needed.

5.23 Ms Carter told the tribunal that light duties tends to be very short-lived, such as conducting licence audits. Consequently, they are always in very high demand from drivers who are recovering or who have lost their licence for a short period. The aim is to return the driver to their normal role.

5.24 Her discussion with the claimant was confirmed in writing in which she invited him for a further sickness absence review with Mr McManus on 20 August 2015. (77)

5.25 From the notes taken of his meeting with Mr McManus, he said that he had a scan and a follow up scan with a follow up appointment on 17 August. Surgery was recommended but due to the risks involved, he decided against it. He was feeling much better and wanted to return to work but was unable to drive. He suggested amended duties on a phased return to work basis. There was some improvement on the right side of his body and he did not feel any discomfort when sitting. His fitness certificate was due to expire on 4 September 2015. (78)

5.26 The discussion was confirmed in writing by Mr McManus who arranged for a further review on 9 September 2015. (79 – 80)

5.27 On 1 September 2015, the claimant met Ms Carter and handed her a fitness note from his GP surgery in which the doctor diagnosed disc prolapse and recommended amended duties "slowly increasing work in a controlled way, paying attention to his back pain. Would benefit from an occupational health assessment." (81)

5.28 During this meeting he said that he expected to return to his full duties at the end of a phased return. It was agreed that he would work 8am to 4pm Monday to Friday until 4 October 2015. He would not be required to do his full driving duties but only to drive one rounder, that is a complete route, every other day, thereafter to assess how he was feeling. On the other days he would do office-based work to enable him to decide when to sit or stand. Ms Carter agreed to request that a risk assessment be conducted and to pay the claimant his full pay during the phased return. (82 – 83)

5.29 At the claimant's return to work meeting with Mr McManus on 7 September 2015, when asked, he said that there was nothing the respondent could do to prevent further absences. (84)

5.30 In Dr Iyer's report dated 8 September 2015, he wrote that the claimant was seen by him on 7 September and appeared more comfortable. He was taking Naproxen and Co-Codamol at regular intervals. He reported lower back pain extending to his right leg. The pain was less severe, and his walking had improved. He was observed as slow when descending the staircase but appeared to sit

more easily with an increased range of movement around the back although it had not returned to normal. In the advice and recommendation part of the report, the doctor wrote:

> "Mr Pali remains unfit to perform a safety critical role. He continues to suffer with lower back pain which has been attributed to a slipped disc in the lumber spine which had been compressing critical structures. He had been offered surgery but has currently decided to see if the condition improves by itself. He remains under the care of a Consultant Neurosurgeon and is next due to be reviewed in November 2015.
>
> Mr Pali tells me that he has already been allocated light duties at work. I feel that he would be fit to perform these as long as they do not include any lifting, carrying or driving duties. It is likely that he will be unable to resume a safety critical role until he has been followed up again in November 2015 by the Neurosurgeon to ensure that there has not been any deterioration in his condition which would warrant further intervention." (85 – 86)

5.31 The claimant met with Ms Carter the following day, 9 September to discuss Dr Iyer's report. They agreed to await the outcome of the claimant's next assessment by the consultant 12 November 2015 to determine whether he would be fit to drive. He was also due to see his GP on 14 October who would consider his medical condition and whether he would be able to drive. In the meantime, Ms Carter agreed that he would engage in light duties pending the outcome of his appointment with his GP and consultant. (87)

Garage Administrator Supervisor

5.32 On 15 September 2015, the claimant applied for the position of Garage Administration Supervisor (GAS). It is normally drivers who apply to be on the Panel GAS. If successful, the employee would stand down from regular duties to cover the GAS role, which is to provide cover during sickness and holidays of varying duration. Their driving duties will be covered by another driver during that time. They would be given the same training as a GAS worker. They would be paid a higher basic GAS pay or their normal rostered driver earnings. Someone on the Panel GAS would then apply to become a GAS. We find that the claimant was not on the Panel GAS.

5.33 In the claimant's application, he did not mention any disabilities nor did he request any adjustments.

5.34 He also applied for one of the 20 Trainee Service Controller positions. 215 people applied. His application was not taken further because one of the requirements was that the successful candidate must have a good performance and attendance record together with a recommendation from their line manager. (94)

5.35 In relation to his application for a GAS position, he scored 78.57% which allowed him to progress to the next stage which was an

interview. He was unsuccessful but did not request feedback. On 18 December 2015, Ms Samantha Smith, human resources officer, informed him of the outcome and encouraged him to apply for other vacancies. (114)

5.36 On or around 8 December 2015, he applied for another GAS role in either Hayes or Greenford on 8 December 2015, using the information in his earlier application. As he had previously passed the assessment in his first application, he went straight to the interview stage on 14 January 2016, before Ms Alison Mary Duberry, garage manager, Greenford and Mr Stavros Heracleous, garage manager, Uxbridge. He was informed that it was to be a competency-based interview and was given an account of what would be assessed.

5.37 The tribunal heard from Ms Duberry who told us that there were between 8 to 10 interviews held with the same questions asked of the interviewees. Although not in Ms Duberry's witness statement, she told the tribunal that the claimant's grammar and spelling on his curriculum vitae was poor. As he told them that he was on a Panel GAS, they expected him to have scored highly. His assessment score was 78.57% but his total score was 64.85%. Ms Duberry wrote under "Scoring and Feedback" the following:

> "Scored 50% on competency questions; particularly poor in planning & problem solving. Lack of experience in comparison to other candidates and showed lack of research in job specific questions."

5.38 She recommended that he should spend time gaining experience. (117 – 132)

5.39 We were satisfied that the interview panel found the answers given by the claimant disappointing given that he told them that he was a Panel GAS but which they later discovered he was not. He did not seem to understand the first question about prioritising his work and had little insight into his own weaknesses. The panel felt that he could have performed better if he had researched more into the role as it would have enabled him to answer the more technical and job-specific questions better. They recommended that he gain from his experience in order to build practical examples should he reapply.

5.40 As already stated and having heard the evidence, we were not satisfied that the claimant had been selected for the role as a Panel GAS member nor was he performing a substantive GAS role. He was, however, assisting the GAS because Ms Carter was trying to find work for him to do, such as, answering the telephones and dealing with driver queries but the demand was for bus drivers.

5.41 He was notified by Ms Nayab Hafeez, human resources adviser, on 26 January 2016, that he had been unsuccessful in his application for

the GAS Greenford role and that the outcome should not prevent him from applying in the future. (133)

5.42 On 5 February 2016, Ms Carter made a further referral to occupational health. (135 – 136)

5.43 She also wrote to the claimant on 8 February advising him that a medical review appointment had been arranged on 18 February 2016 and following the appointment she arranged a meeting with him on Wednesday 24 February 2016 to:

> "..discuss the medical report that will be received and at this meeting, a resumption date to full driving duties in your role a bus driver will be sought.
>
> Please be aware that as you have not been able to carry out your duties as a bus driver since your period of sickness commenced on 12 June 2015, and should you still be unable to perform in your role, that medical capability will be one of the options to be discussed." (141)

5.44 The respondent then received two apparently conflicting medical reports. The first was from Dr Sethi dated 10 February 2016, in which she wrote:

> "…He had a big prolapse, an L5/S1 disc prolapse in July 2015. I am very pleased to report that a scan from November 2015 reveals that the disc has resorbed significantly and is not causing any pressure on the neural structures anymore.
>
> Dede is symptomatically much better and now has no neurological deficits.
>
> Dede has asked to join back his duties as a Bus Driver but obviously he is scared to do the long hours sitting in the bus again because of the fact that he has had a bad disc and there is a chance that it can recur.
>
> Obviously I cannot comment on his future at the moment but if he could be given light duties in the same industry that would help him a lot." (142)

5.45 The second was the occupational health report by Dr Iyer dated 23 February 2016, in which he wrote, amongst other things, the following:

> "Mr Pali tells me that there has been minimal improvement in his symptoms. He continues to suffer with constant pain which is exacerbated with periods of sitting, walking or standing. He tells me that all normal activities are affected and his sleep is poor due to stress and pain. He explains that he has been forcing himself to continue working although he does have difficulties due to his symptoms. He now only uses strong anti-inflammatory medications and tells me that if he does not use them his pain is significantly worse… .

> Mr Pali remains unfit to perform his normal duties as a Bus Driver. He continues to suffer with pain affecting his lower back and legs with significant weakness in the right leg. He has been under the care of the Neurological team but is reluctant to proceed with an operation to treat his condition. He is therefore due to be reviewed by the Pain team on the 23 February who may be able to offer spinal injections. They may also prescribe stronger pain killers which are likely to have sedative side effects. At present I am not able to estimate when he may be in a position to resume his normal duties and here is the concern that he is experiencing with his currently allocated light duties."

5.46 In answer to some of the questions asked by Ms Carter, Dr Iyer wrote:

> "3. I do not feel that he will be fit to drive even for short periods as he has difficulties sitting. Additionally he has weakness in his right leg which would pose safety implications for safe control of the vehicle. …
>
> 6. At present he is not fit to undertake his role as a Bus Driver.
>
> 7. I am unable to estimate when he may be in a position to resume his normal duties.
>
> 8. He is currently performing light duties on the counter but tells me that he has difficulties performing these duties due to prolonged periods of standing. If he finds that his symptoms are getting worse even when allocated alternative duties then it may be prudent to restrict him completely.
>
> 9. I do not feel that there is anything else the company can do to assist Mr Pali.
>
> 10. At present I do not feel that his condition would be considered a disability within the remit of the Equality Act. .." (143 – 144)

5.47 Ms Carter relied on Dr Sethi's report as she had been treating the claimant.

5.48 The claimant applied for another GAS position at West Perivale, on 1 March 2016. (173 – 175)

Medical capability

5.49 On 2 Mach 2016, he met with Ms Carter for a medical capability meeting and was represented by a trade union representative. He was questioned by Ms Carter. He said that the diagnosis was a prolapsed disc and that the specialist advised that an operation would resolve the problem but he wanted to get better without an operation due to the risks involved; a scan showed a mild improvement in his condition; his condition meant that he was unable to sit down or stand for long periods; and he was in pain but was trying to keep his job. When asked whether his condition was work

related, he replied, "I think so yes, and because I have been driving for a long time." He did not know whether if he returned to driving it would aggravate his condition. He repeated that he did not want to lose his job but there had not been sufficient improvement in his condition to enable him to drive. He was unable to give a date when it was likely that he would be able to resume drive buses.

5.50 Ms Carter concluded the meeting by informing the claimant that she would adjourn the process to await the outcome of his application for the GAS role. (179 – 180)

5.51 The substantive GAS role the claimant applied for changed to a Panel GAS position but as the West Perivale garage had just re-opened, his application was considered for the GAS role. The assessment mark for the position was 80% and as the claimant had previously achieved a score of 78.57%, he was informed by Ms Samantha Smith, human resources adviser, by letter dated 9 May 2016, that he would need to re-do the assessment scheduled to take place on 19 May 2016. (188 – 189)

5.52 As the benchmark of 80% was considered too high as only two candidates achieved over 79%, it was lowered to 70%. The claimant scored 70.97% and went through to the interview stage. (199)

5.53 Ms Carter and Ms Yvonne Dawson, garage manager, conducted interviews on 7 June 2016. The claimant did not perform well. His responses to specific questions were very general and did not give detailed examples as required by some of the questions, for example,

> "What place empathy played in your work? Give an example where you need to show empathy."
>
> Answer: "Treat everybody equal and with respect".
>
> "Tell us about your biggest failure. How did you recover and what have you learned from that incident?
>
> Answer: "Use to play football and I let the team down because I didn't play well." (200 – 209)

5.54 He was notified by Mr Jerry Wang, human resources intern, by letter dated 24 June 2016, that he had been unsuccessful. (211)

5.55 The claimant said that letters dated 11 March 2016 and 13 April 2016 from his GP's surgery were handed by him to Ms Carter which she denied receiving. She said in evidence that she only saw them for the first time in the hearing bundle. The earlier letter referred to the threat of dismissal impacting on his progress. The second, expressed the view that he may be able to drive buses in the future and was able to engage in light duties. (182, 186)

5.56 We find that there was no other evidence to confirm that Ms Carter had received the letters. From the documents in the hearing bundle, it is clear that the respondent's record keeping is very good. Had she received the letters it would have either been acknowledged or referred to in correspondence. In any event, they do not reveal, at the time, any new information.

5.57 The outcome of the claimant's application for the GAS position caused him some upset and on 27 June 2016, after he attended work but complained of back pains and stress and left at 0900 to see his doctor. At 11.45am he called the respondent to say that he had been prescribed medication for back pain and depression. He self-certificated his absence. (212)

5.58 On 5 July 2016, he attended a sickness review meeting with Ms Tkaczyk, operations manager, and told her that he was having difficulty sitting, sleeping and walking and was taking a lot of medication. (214 – 215)

5.59 Ms Tkaczyk later wrote to him on 15 July summarising their meeting. In particular, she noted that he was unable to give a date when he could return to driving duties and light duties. She informed him that the capability hearing adjourned on 2 March 2016, would resume. An appointment was arranged to see the respondent's occupational health advisers, Medigold, on 21 July 2016. (219 – 220)

5.60 On 8 July 2016, the claimant was signed off to 8 August 2016, suffering from depression and back pain. This was the first indication that the claimant was suffering from depression. (216)

5.61 In the report prepared by Dr Rajeev Srivastava, consultant occupational physician, dated 28 July 2016, it is recorded that the claimant said that he had been doing regular physiotherapy exercises as well as swimming and that "..his back is much better." Further, "Mr Pali is adamant that he is not fit to return to work at present due to his depression."

5.62 Under "Summary and Recommendations" Dr Srivastava wrote the following:

> "Whilst I agree that Mr Pali is not fit at present to return to work due to various stress related symptoms he is experiencing, I am not entirely certain to what extent his back condition is preventing a return to normal duties. It is quite clear that he has been on modified light administration duties for almost a period of ten months, by when his back symptoms had significantly improved, including as demonstrated on an MRI scan and therefore it raised a question whether Mr Pali would, in that situation, have been able to return to his normal role albeit with some modifications for adjustments, for example the logical ones being that he could or was able to do drive duties for periods, as opposed to sitting for long hours at least in the beginning, but this it hypothetical now because clearly the depression has taken over and he is not fit to return to work at present."

5.63 The doctor also stated that it was "..uncertain as to when he would be able to return to work as that would depend upon an improvement in his depression symptoms and even then we are not certain whether he would be able to resume bus driving duties." (221 – 223)

5.64 We find that by 28 July 2016, the respondent became aware that the claimant's depression was preventing his return to work and not his back condition and there was no date given as to when he would be able to return to bus driving duties.

5.65 Ms Carter told the tribunal that given that there was no indication of when the claimant might return to work or if he would be able to once his symptoms of depression had improved, as it was by then over a year since he had not been performing bus driving duties, he was invited by her by letter dated 3 August 2016, to a reconvened medical capability hearing on 16 August 2016. He was informed that if he was unable to undertake bus driving duties and if there was no suitable work for him, his employment may be terminated. He was advised of his right to be accompanied at the hearing. (224)

5.66 A further fit note was sent in which it stated that he would be on sickness absence from 4 August to 15 September 2016, due to low back pain and depression. (226)

5.67 We find, having regard to the documents in the bundle, that Ms Carter did request light duties for the claimant but the replies from the managers were all negative. (230 – 247)

Reconvened medical capability meeting on16 August 2016

5.68 The claimant attended the meeting with Ms Joan Campbell, trade union representative. He said that his back was much better but for the first time he asserted that it was the driver seat adjustment that caused his back problems; the threat of dismissal had caused his depression and had not helped his back to recover; he blamed Ms Carter for his depression; he was not fit to drive; if he had not been pressured he would have been driving, and that he had been unsuccessful in his applications for the GAS positions because of his back condition being a disability.

5.69 After hearing submissions Ms Carter adjourned for 1 hour 10 minutes. When she returned she gave her decision. She said:

> "Now, I have had to consider your current state of health and whether you are fit to carry out your role as a bus driver. You went off sick from work in June 2015 with back pain, you were diagnosed with a prolapsed disc for which surgery was recommended. You did not want to proceed with the surgery because you felt you may be putting yourself at risk and were concerned about your age and its effect on the rest of your life. On your return to work in September 2015, as you were still undergoing consultations, and following a recommendation by your GP for a period of amended duties, I allowed you to carry out light duties. Initially this

was to be until 14 October 2015 and then your medical capability was to be considered. However, during this time, you decided to apply for the role of GAS which had been advertised. It was also a time of the year when we were having an additional route brought into the garage to commence operation and there were several tasks to be carried out to coincide with this. The other main reason for the availability of light duties at this time was the October licence audit which was taking place. Your 1st application for the GAS role was unsuccessful and it was advertised shortly afterwards and you applied once more. This process delayed my decision to convene a capability hearing and you were allowed to carry on light duties. I advised you that capability would still have to be discussed as I could not allow you to carry on doing light duties indefinitely as there was no budget for this and our staff on books figures meant that we needed all available staff driving.

At the start of 2016 we again spoke about the likelihood of medical capability, but you then applied for the role of GAS a 3rd time which was notified to me when we started your capability hearing on 2nd March. I took the decision to allow you to complete this process one final time and advised you that we would reconvene at the conclusion of your application when you were advised of its outcome. You subsequently went sick on 27th June with depression and prolapsed disc. You claimed to the company doctor that your depression was being caused by managerial action at work and have submitted a further medical certificate up to 15th September 2016. My notes from 4th August 2015 when I met with you, refer to discussion regarding the capability process, and this was due to the length of time that you had already been off from work at that stage. Today you have further claimed that your back problem has been impacted by the stress and depression you are feeling. I have to say now that I am very disappointed in your claim and I do believe that the Company and specifically myself have done as much as we could to aid your return to the role which you were employed as a Bus Driver. You were allowed to carry out light duties for 10 months which is longer than would usually be allowed and we as a Company have fulfilled our obligation to you and I find no basis for your claim of any member of the management team at Willesden Junction causing you to be depressed or that your condition has been caused by a specific incident on the day you were unable to complete your duty. We cannot allow an indefinite period of time for members of staff to regain full health and as such the proceedings for dealing with long term sickness and capability are in place. I do believe that we have acted within these procedures. At no time were you given any false information regarding the meaning of medical capability or that it would not be considered. In fact there are occasions today when you reminded me that I had mentioned it to you at several meetings. This you have taken as a threat to your job, however, it is within the guidelines of dealing with staff who are unable to fulfil the requirements of their role.

I have sought to obtain further light duties for you in other locations, but all responses have returned as none available. Our records show that since June 2015 you have been off work for a total of **134 days**, in addition you have been unable to drive a bus on return to work for a further period of **10 months**. This is a vast amount of time that we have been covering your driving duties and cannot be sustained.

> Medial termination of your employment is a process that is normally only considered when dealing with long term sickness and an employee does not seem likely to return to work in the near future. I consider your circumstances to warrant this action, and I therefore have to base my decision on the current information that I have and what you have provided. I conclude that you cannot guarantee a return to work at anytime in the near future, even within the next month or by the end of your current certificate.
>
> Based on this information, I have no other option today but to dismiss you on capability grounds because you are currently unable to fulfil your role as a PCV driver for which you are employed due to your medical condition.
>
> You last day in service will be today, Tuesday 16th August 2016. You will be entitled to one week lieu of notice for each completed year of service plus any holidays that you have accrued that have not been taken, these monies will be paid to you on Friday 26th August 2016 subject to any appeal submitted and the return of all items of equipment. I would like to wish you well for the future.
>
> (248 – 254)

5.70 She wrote to the claimant on 16 August confirming the outcome and informing him of his right to appeal. (256 – 257)

The claimant's appeal

5.71 He appealed on 17 August 2016, setting out his grounds. In summary, he felt that he was likely to return to work as a bus driver because his back condition was improving but had been delayed by depression but was getting over his depression; the respondent failed to make reasonable adjustments to enable him to continue to work; when his current fit note expired he believed that he would be fit enough to undertake an alternative role; if he was offered a permanent role, he would no longer be depressed, and he wanted to return to work as a GAS or in another position. (261 – 262)

5.72 The appeal hearing was held on 30 August 2016. In attendance were: Ms Duberry and Mr Bernie McWeeney, deputy operations director, co-chairing; the claimant and Mr B Swann, union convenor representing the claimant. Mr Swann said that the claimant had an accident at work; that the fit note dated 26 August 2015, recommended amended duties which meant that the claimant should have been on driving duties but instead was given light duties; the respondent was not assisting the claimant with his sickness; that the claimant was performing a full-time GAS role for 10 months without any problems and did not get the GAS role because of his bad back which amounted to disability discrimination, and when the claimant was diagnosed with depression, there was no effort made to get him back to work.

5.73 Mr McWeeney interjected saying that the appeal was concerned about the claimant's fitness to drive buses and that the claimant had never been appointed to a GAS role or to light duties. He also said that the claimant could only be on Panel GAS if he was able to drive. He expressed surprise that the claimant did not ask his doctor when he would be able to return to bus driving duties.

5.74 Mr Swann said that the claimant did not know when he would be able to return to work and suggested that proceedings be adjourned until 15 September 2016 to enable him to obtain medical advice. This was agreed to by the panel. (268a – 268c)

5.75 The claimant said in evidence before us that his GP provided a medical report dated 31 August 2016, which was shown to the respondent. It is addressed "To Whom it May Concern" similar to the reports at pages 182 and 186 of the bundle. We accepted Ms Duberry's evidence that she had not seen the report by the date of the reconvened hearing as the respondent keep meticulous accounts of the documents received and sent and there was no mention of it during the appeal hearing. In any event, the report stated that there had been improvement in his back condition and his symptoms were being managed by physiotherapy and pain relief. This was information which had been previously disclosed to Ms Carter. (269)

5.76 The reconvened appeal hearing was held on 16 September 2016 with the same people as before in attendance. As before, notes were taken. Mr Swann said that the claimant's doctor had not cleared him to work as a bus driver as he was not fit for driving duties. Ms Duberry offered to the claimant, in line with the respondent's policy, the opportunity of coming back to work for the respondent within 12 months, if he became fit and further offered to let him know of any future advertised administrative roles. Mr McWeeney confirmed the decision to dismiss the claimant and dismissed his appeal. (37, 268d)

5.77 He wrote to the claimant on 16 September 2016, confirming the appeal outcome. In addition, the claimant was informed that the respondent had made a number of people engaged in non-driving roles redundant. (274 – 275)

<u>Director's review</u>

5.78 Mr Swann, as Unite convenor, had the option of asking for a director's review if he believed that there was a miscarriage of justice or a failure to follow the correct process in dismissing someone. In this instance, he did not invoke this procedure.

5.79 Of note, within the following 12 months, the respondent did not receive any information that the claimant was fit and able to return to work.

5.80 The respondent's position during this hearing, was that if the claimant was fit to drive, it would welcome an application from him as there is an acute shortage of bus drivers.

5.81 The claimant obtained employment on 16 October 2017, as a bus driver until 27 November 2017. On 28 November 2017, he started employment with the Go Ahead bus company as it was more convenient for him. In March 2018, his back condition suddenly deteriorated and his doctor advised that the recovery period would be considerable. He, therefore, resigned on 28 March 2018. He was not medically fit for work by the date of this tribunal hearing.

6. Submissions

6.1 The tribunal heard submissions from Ms Ahari, counsel on behalf of the claimant and from Ms Norris, solicitor on behalf of the respondent. We do not propose to repeat their submissions herein having regard to rule 62(5) Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, as amended. We have, however, taken their submissions into account, as well as the authorities referred to, in our conclusions.

7. The law

7.1 Section 6 and Schedule 1 of the Equality Act 2010, "EqA" defines disability. Section 6 provides;

> "(1) 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."

7.2 Section 212(1) EqA defines substantial as "more than minor or trivial." The effect of any medical treatment is discounted, schedule 1(5)(1) and where a sight impairment is correctable by wearing spectacles or contact lenses, it is not treated as having a substantial adverse effect on the person's ability to carry out normal day-to-day activities, schedule 1(5)(3).

7.3 Under section 6(5) EqA, the Secretary of State has issued Guidance on matters to be taken into account in determining questions relating to the definition of disability (2011), which an Employment Tribunal must take into account as "it thinks is relevant."

7.4 The material time at which to assess the disability is at the time of the alleged discriminatory act, Cruickshank v VAW Motorcast Ltd [2002] IRLR 24.

7.5 In Appendix 1 to the Equality and Human Rights Commission, Employment: Statutory Code of Practice, paragraph 8, with reference to

"substantial adverse effect" states,

> "A substantial adverse effect is something which is more than a minor or trivial effect. The requirement that an effect must be substantial reflects the general understanding of disability as a limitation going beyond the normal differences in ability which might exist among people."

7.6 The time taken to perform an activity must be considered when deciding whether there is a substantial effect, Banaszczyk v Booker Ltd [2016] IRLR 273.

7.7 Section 20, EqA on the duty to make reasonable adjustments, provides:

> "(1) Where this Act imposes a duty to make reasonable adjustments on the person, this section, sections 21 and 22 and the applicable Schedule apply; for those purposes a person on whom the duty is imposed is referred to as A.
>
> (2) The duty comprises the following three requirements.
>
> (3) The first requirement is a requirement, where a provision, criterion of practice of A's put a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as is reasonable to have taken to avoid disadvantage."

7.8 An employer's failure to adhere to its own time limits during a disciplinary procedure could not amount to either a provision , criterion or practice and "taking care" cannot amount to a reasonable step. "Incompetence, a lack of application or a failure to stick to time limits cannot be properly be characterised as a provision, criterion or practice.", Carphone Warehouse Ltd v Martin [2013] EqLR 481.

7.9 Langstaff J, President, Employment Appeal Tribunal, Nottingham City Transport Ltd v Harvey [2013] EqLR 4, held,

> "Practice" has something of the element of repetition about it. It is, if it relates to a procedure, something that is applicable to others than the person suffering the disability…disadvantage has to be by reference to a comparator, and the comparator must be someone to whom either in reality or in theory the alleged practice would also apply.", paragraph 18.

7.10 Guidance has been given in relation to the duty to make reasonable adjustments in the case of Environment Agency v Rowan [2008] IRLR 20**,** a judgment of the EAT. An employment tribunal considering a claim that an employer had discriminated against an employee by failing to comply with the duty to make reasonable adjustment must identify:

(1) the provision, criterion or practice applied by or on behalf of an employer, or

(2) the physical feature of premises occupied by the employer;

(3) the identity of a non-disabled comparator (where appropriate), and

(4) the identification of the substantial disadvantage suffered by the claimant may involve a consideration of the cumulative effect of both the provision, criterion or practice applied by or on behalf of an employer and the physical feature of premises. Unless the tribunal has gone through that process, it cannot go on to judge if any proposed adjustment is reasonable because it will be unable to say what adjustments were reasonable to prevent the provision, criterion or practice, or feature, placing the disabled person concerned at a substantial disadvantage.

A tribunal deciding whether an employer is in breach of its duty under section 4A, now section 20 Equality Act 2010, must identify with some particularity what "step" it is that the employer is said to have failed to take.

7.11 The employer's process of reasoning is not a "step". In the case of General Dynamics Information Technology Ltd v Carranza [2015] ICR 169, the EAT held that the "steps" an employer was required to take by section 20(3) to avoid putting a disabled person at a disadvantage, were not mental processes, such as making an assessment, but practical actions to avoid the disadvantage. In order to decide what steps were reasonable, a tribunal should, firstly, identify the pcp. Secondly, the comparators. Thirdly, the disadvantage. In that case disregarding a final written warning was not considered to be a reasonable step.

7.12 In O'Hanlon v Revenue and Customs Commissioners [2007] EWCA Civ 283, [2007 ICR 1359, the Court of Appeal held that increasing the period during which the disabled employee could claim full pay while on sick leave to alleviate financial hardship following a reduction in pay, would not be a reasonable step to expect the employer to take as it would mean that the employer would have to assess the financial means and stress suffered by their disabled employees.

7.13 In the earlier case of Meikle v Nottinghamshire County Council [2005] ICR 1, the Court of Appeal held that where the disabled employee's sickness absence was caused by the employer's failure to implement a reasonable adjustment, it may be a reasonable adjustment to maintain full pay.

7.14 On sick pay, paragraph 17 of the EHCR Code 2011, states:

> "Workers who are absent because of disability-related sickness must be paid no less than the contractual sick pay which is due for the period in question. Although there is no automatic obligation for an employer to extend contractual sick pay beyond the usual entitlement when a worker is absent due to disability-related sickness, an employer should consider whether it would be reasonable for them to do so., 17.21.

> However, if the reason for absence is due to an employer's delay in implementing a reasonable adjustment that would enable the worker to return to the workplace, maintaining full pay would be a further reasonable adjustment for the employer to make." 17.22.

7.15 In relation to the shifting burden of proof, in the case of Project Management Institute v Latif [2007] IRLR 576, EAT, it was held that there must be evidence of a reasonable adjustment that could have been made. An arrangement causing substantial disadvantage establishes the duty. For the burden to shift;

> "…it would be necessary for the respondent to understand the broad nature of the adjustment proposed and to be given sufficient detail to enable him to engage with the question of whether it could reasonably be achieved or not.", Elias J (President).

7.16 Paragraph 6.10 of the Code 2011 provides:

> "The phrase 'provision, criterion or practice' is not defined by the Act but should be construed widely so as to include, for example, any formal or informal policies, rules, practices, arrangements or qualifications including one off decisions and actions."

7.17 In relation to the comparative assessment to be undertaken in a reasonable adjustment case, paragraph 6.16 of the Code states:

> "The purpose of the comparison with people who are not disabled is to establish whether it is because of disability that a particular provision, criterion, practice or physical feature or the absence of an auxiliary aid disadvantages the disabled person in question. Accordingly and unlike direct or indirect discrimination - under the duty to make adjustments there is no requirement to identify a comparator or comparator group whose circumstances are the same or nearly the same as the disabled person's."

7.18 The proper comparator is readily identified by reference to the disadvantage caused by the relevant arrangements. It is not with the population generally who do not have a disability, Smith v Churchills Stairlifts plc [2006] IRLR 41, Court of Session.

7.19 In the case of Griffiths v Secretary of State for Work and Pensions [2016] IRLR 216, a judgment of the Court of Appeal, Elias LJ gave the leading judgment. In that case the claimant, an administrative officer, was employed by the Secretary of State for Work and Pensions. She started to experience symptoms of a disability identified as viral fatigue and fibromyalgia. She was absent for 62 days for a disability related sickness. After her return to work her employer held an attendance review meeting. Its attendance management policy provided that it would consider a formal action against an employee if their absence reached an unsatisfactory level known as "the consideration point". "The consideration point" was 8 days per year but could be increased as a reasonable adjustment for disabled employees. The employer decided not to extend the consideration point in relation to the claimant and gave

her a written improvement notice which was the first formal stage for regular absences under the policy. She raised a grievance contending that the employer was required to make two reasonable adjustments in relation to her disability, firstly, that the 62 days disability related absence should be disregarded under the policy and the notice be withdrawn. Secondly, that in future “the consideration point” be extended by adding 12 days to the eight days already conferred upon all employees. Her employer rejected her grievance and proposals.

7.20 Before the Employment Tribunal the claimant argued that her employer failed to make the adjustments and was in breach of the section 20 EqA 2010, the duty to make reasonable adjustments. It was conceded that she was disabled within the meaning of the Act. The tribunal, by a majority, found that the section 20 duty was not engaged as the provision, criterion or practice, namely the requirement to attend work at a certain level in order to avoid receiving warnings and possible dismissal, applied equally to all employees. The Employment Appeal Tribunal dismissed the claimant’s appeal upholding the tribunal's findings and adding that the proposed adjustments did not fall within the concept of "steps". It further held that the comparison should be with those who but for the disability are in like circumstances as the claimant.

7.21 The Court of Appeal held that the section 20 duty to make reasonable adjustments had been engaged as the attendance management policy had put the claimant at a substantial disadvantage but that the proposed adjustments had not been steps which the employer could reasonably have been expected to take. The appropriate formulation of the relevant pcp in a case of this kind is that the employee had to maintain a certain level of attendance at work in order not to be subject to the risk of disciplinary sanctions. Once the relevant pcp was formulated in that way, it was clear that a disabled employee's disability increased the likelihood of absence from work on ill health grounds and that employee was disadvantaged in more than a minor or trivial way. Whilst it was no doubt true that both disabled and able-bodied alike would, to a greater or lesser extent, suffer stress and anxiety if they were ill in circumstances which might lead to disciplinary sanctions, the risk of this occurring was obviously greater for that group of disabled workers whose disability resulted in more frequent, and perhaps longer, absences. They would find it more difficult to comply with the requirements relating to absenteeism and would be disadvantaged by it.

7.22 The nature of the comparison exercise under section 20 is to ask whether the pcp puts the disabled person at a substantial disadvantage compared with a non-disabled person. The fact that they are treated equally and may both be subject to the same disadvantage when absent for the same period of time does not eliminate the disadvantage if the pcp bites harder on the disabled, or a category of them, than it does on the able-bodied. If the particular form of disability means that the disabled employee is no more likely to be absent than a non-disabled colleague, there is no disadvantage arising out of the disability

but if the disability leads to disability related absences which would not be the case with the able-bodied, then there is a substantial disadvantage suffered by the category of disabled employees. Thereafter the whole purpose of the section 20 duty is to require the employer to take such steps as may be reasonable, treating the disabled differently than the non-disabled would be treated, in order to remove a disadvantage. The fact that the able-bodied are also to some extent disadvantaged by the rule is irrelevant. The Employment Tribunal and the Employment Appeal Tribunal were wrong to hold that the section 20 was not engaged simply because the attendance management policy applied equally to everyone.

7.23 There is no reason artificially to narrow the concept of what constitutes a "step" within the meaning of section 20(3). Any modification of or qualification to, the pcp in question which would or might remove a substantial disadvantage caused by the pcp is in principle capable of amounting to a relevant step. Whether the proposed steps were reasonable is a matter for the Employment Tribunal and has to be determined objectively.

7.24 In the case of Kenny v Hampshire Constabulary [1999] IRLR 76, a judgment of the Employment Appeal Tribunal, it was held that the statutory definition directs employers to make reasonable adjustments to the way the job is structured and organised so as to accommodate those who cannot fit into existing arrangements.

7.25 The test under is an objective test. The employer must take "such steps as….is reasonable in all the circumstances of the case." Smith v Churchills Stairlifts plc [2006] IRLR 41.

7.26 We have considered the time limits in section 123 and, in particular, the just and equitable extension of time under section 123(1)(b), equality Act 2010. The tribunal must be satisfied that the claimant has established that it is an exceptional case in which it is just and equitable to extend time, Robertson v Bexley Community College t/a Leisure Link [203] IRLR 434.

7.27 In relation to long- term sickness absence, we have taken into account the case of East Lindsey District Council v Daubney [1977] ICR 566, in which the Employment Appeal Tribunal held that before an employee is dismissed on grounds of ill health, they should be consulted; the matter should be discussed with them; and there should be up to date medical evidence on their condition. The employer should also consider other options, for example, the possibility of alternative employment within the business.

8. **Conclusions**

Disability

8.1 Having regard to the issues in the case, the respondent has conceded disability by reason of the claimant's back condition he suffered from a disability at the relevant time but ultimately it is for the tribunal to determine. The claimant's depression did not last nor was it expected to last at least 12 months. He was first diagnosed with depression on 27 June 2016 and at the time, the medical evidence did not state that it was likely to last for at least 12 months. The List of Issues, only refer to a physical and not a mental impairment.

8.2 From the evidence, however, the claimant was unable to sit or stand for long periods following his attendance at hospital on 12 June 2015. It resulted in him being taken off bus driving duties. He was not a Panel Gas as that role requires the person to engage in bus driving duties, nor was he a GAS as he did not satisfy the requirements for the role. His inability to sit or stand continued until July 2016 when it became his depression that prevented his return to work as a bus driver according to Dr Srivastava.

8.3 Having regard to our findings of fact, the claimant was disabled from 12 June 2015 because of his back pain up to July 2016 as he was unable to either sit or stand for long periods.

Failure to make reasonable adjustments

8.4 Did the respondent apply a provision, criterion or practice, requiring the claimant to work as a bus driver? We are of the view that this was a pcp. The respondent made it known to the claimant that his substantive role was that of a bus driver and that as it was short of drivers it required him to return to that role within the time allowed under its long-term sickness absence policy.

8.5 Although the claimant's substantive role was that of a bus driver, he was unable to engage in bus driving because of his back condition. The pcp was not, however, applied to him because he was given alternative work in assisting the GASs.

8.6 The difficulty here is that by the date of Dr Srivastava's report on 28 July 2016, the claimant's back condition was not preventing his return to normal duties as the doctor was of the opinion that he could return to driving duties though not for long periods. There was no suggestion that the respondent was not going to comply with the report. It was the claimant's depression that prevented his return to work.

8.7 We have come to the conclusion that the pcp did not apply to the claimant.

8.8 We further conclude that the respondent did not know nor could it reasonably have known that the claimant's back condition was a disability. The occupational health advice was that he was not covered under the Equality Act 2010 as a disabled person. Dr Sethi wrote on 10 February 2016, that the claimant was "symptomatically much better" and that he asked to return to bus driving duties but "obviously he is scared to do the long hours sitting in the bus again because of the fact that he has had a bad disc and there is a chance that it can recur."

8.9 Dr Iyer wrote on 23 February 2016, that he did not consider that the claimant's back pain was a disability. By July 2016, it was his depression that prevented his return to bus driving.

8.10 Even if the claimant was disabled whether by reason of his back condition or his depression, he was taken off bus driving duties. It would not have been a reasonable adjustment to have offered him the GAS role in June 2016 as he was not qualified to perform such an important role because he did not perform well during the selection process. We are satisfied that a GAS position is a safety critical role being responsible for the supervision of drivers. He was aware of what the GAS role entails, and the respondent expected him to perform much better than he did.

8.11 There was no position the respondent could have created for him.

8.12 It was not a reasonable adjustment to have left the claimant to engage in light duties, as it was not a substantive position but a temporary measure in the hope that his condition would improve and, according to the respondent, it did. He could have engaged in driving duties but not for prolonged periods.

8.13 Ms Carter did enquire about administrative posts, but none was available. This was not surprising as the respondent was making non-driving roles redundant although it is a large employer.

Out of time

8.14 As the act relied upon by the claimant was in June 2016 when it is alleged that the respondent failed to appoint him to a GAS position, it is out of time. We do not exercise our discretion to extend time as the claimant was represented by his union and we were not provided with a good reason for the delay in pursuing this claim. The exercise of a tribunal's discretion must be exceptional, Robertson v Bexley Community College t/a Leisure Link. The claimant had not established why the tribunal should exercise its discretion exceptionally in this case.

8.15 We have come to the conclusion that the claimant's claim of failure to make reasonable adjustments is not well-founded and is dismissed.

Unfair dismissal

8.16 Having regard to the meeting held on 16 August 2016 and the letter of that date, we are satisfied that the respondent has established that the claimant was dismissed by Ms Carter on grounds of capability. She informed him that he would be dismissed "on capability grounds because you are currently unable to fulfil your role as a PCV driver for which you are employed due to your medical condition."

8.17 Had the respondent, at the time of the claimant's dismissal, held a genuine belief in the claimant's ill health; were there reasonable grounds for sustaining that belief; and did it carry out a reasonable investigation?

8.18 Applying the guidance in the case of Daubney, the respondent's policy is to allow an employee 3 months to recover before returning to their substantive duties. In this case the claimant was engaged in light duties for over a year and there was no indication of when he would be able to return to bus driving duties.

8.19 The respondent had all the medical evidence sent and received. The most recent was from Dr Srivastava dated 28 July 2016, in which is was stated that the claimant was fit for bus driving duties though not for long periods, but the claimant felt that he could not return due to his depression. Dr Srivastava was uncertain when the claimant would be able to return to work.

8.20 Ms Carter and Ms Tkaczyk met with the claimant to review his sickness absence and medical capability. He was warned that the absence of a return to work date may lead to his dismissal.

8.21 Options other than dismissal were considered. He was given light duties on a temporary basis and of applying for a GAS position. Enquiries were made about availability of light work which the claimant could do but the responses were negative.

8.22 The respondent needed fit and able drivers in order to perform its contractual duties as a public transport provider. Non-driving posts were being made redundant. We are satisfied that the there was no non-driving role vacancy that the claimant could fulfil.

8.23 We are further satisfied that the respondent genuinely believed on reasonable grounds having regard to the medical evidence and its consultations with the claimant, that by the 16 August 2016, he was incapable of carrying out his role as a bus driver and could not be re-deployed to a non-driving position. The claimant's position did not change by the date of his appeal.

8.24 With no other role available the respondent decided to dismiss the claimant and Mr Swann did not seek a director's review of the decision.

8.25 The ACAS Code of Practice do not apply to capability ill-health dismissals but section 98(4) Employment Rights Act 1996 is applicable.

8.26 We do not substitute our views for those of the reasonable employer but having regard to our findings and the above conclusions, the decision to dismiss was not outside the range of reasonable responses. The claimant's unfair dismissal claim is not well-founded and is dismissed. His effective date of termination was 16 August 2016 as he was paid in lieu of notice.

8.27 A peripheral issue in the case was whether the claimant's back condition was sustained at work. The claimant's case is that he injured his back on while at work on 12 June 2015 when he was driving a bus and his seat suddenly dropped jolting his back.

8.28 The respondent's case is that the first time the claimant said that his back condition was because his driver seat had dropped was on 16 August 2016. It does not accept that he was injured at work.

8.29 Having heard the evidence and having considered the documentary evidence, we do find that the evidence does not support the claimant's contention that he was injured at work. He told Ms Tkaczyk on 19 June 2015, that on 12 June, he began feeling a strong pain "coming down from his back to his leg" and was unable to carry anything and went to the hospital. He told Dr Iyer, occupational health physician, who wrote on 6 July 2015, that approximately six weeks prior to seeing Dr Iyer, he was experiencing pain that spread from his lower back to his right buttock. This would mean that he began to have the pains in his back from late May 2015. This is supported by the account he gave Dr Sethi on 27 July 2015, namely that he had "a history of lower back pain and severe right leg sciatica for the last two months".

8.30 For the above reasons we find that the claimant did not sustain a back injury at work on 12 June 2015.

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Employment Judge Bedeau

Date: ……20 November 2018…..

Sent to the parties on: .20 November 2018

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For the Tribunal Office