



EMPLOYMENT TRIBUNALS

Claimant: Mr M Strickland

Respondent: Leeds City Council

HELD AT: Leeds

ON: 21 - 24 January 2019

BEFORE: Employment Judge J M Wade
Mr D C Dowse
Mr G Corbett

REPRESENTATION:

Claimant: In person

Respondent: Mr N Newman (solicitor)

Note: The written reasons provided below were provided orally in an extempore Judgment delivered on 24 January 2019, the written record of which was sent to the parties on 29 January 2019. An oral request for written reasons was received from the parties on 24 January 2019. The reasons below are now provided in accordance with Rule 62 and in particular Rule 62(5) which provides: In the case of a judgment the reasons shall: identify the issues which the Tribunal has determined, state the findings of fact made in relation to those issues, concisely identify the relevant law, and state how the law has been applied to those findings in order to decide the issues. For convenience the terms of the Judgment given on 24 January 2019 are repeated below:

JUDGMENT

- 1 The claimant's complaint of unfair dismissal is dismissed: it was not presented within the relevant time limits and it was reasonably practicable for the complaint to have been presented in time.
- 2 The claimant's complaint that his dismissal and maintenance of dismissal on appeal were acts of discrimination arising in consequence of disability do not succeed and are dismissed.

- 3 The claimant's first, third, fourth, fifth and sixth complaints of harassment or direct disability discrimination do not succeed and are dismissed.
- 4 The claimant's second complaint (harassment or direct disability discrimination concerning the provision of a van for his work) was presented outside the applicable time limits and the Tribunal does not consider it just and equitable to extend time to decide this complaint; it is dismissed for this reason.

REASONS

Introduction and Issues

1. This is Mr Strickland's case against Leeds City Council. He was formerly employed for just over two years undertaking plastering work and some other work until his dismissal in July 2018.
2. In his claim form he indicated complaints of unfair dismissal, disability discrimination and arrears of pay. The details provided were short and difficult to understand. He attended a case management hearing where particulars were ordered. He failed to comply with that order until a further hearing was arranged to consider striking out his complaints. He then presented a document which attempted to set out a number of disability discrimination complaints, including new matters. An annex to the case management hearing recorded the following:

"The amendments to the original claim form which I have permitted in the claimant's pursuit of Equality Act complaints are set out in the identification of issues below. To the extent any matters are not set out below, the claimant has not been given permission to amend his claim form to pursue such complaints (and for the avoidance of doubt he has not been given permission by me to pursue any complaints of a failure to make reasonable adjustments):

"Section 26: Harassment related to disability

a. *Did the respondent engage in unwanted conduct as follows:*

- i. *From August 2016 inviting the claimant to hearings and ultimately his dismissal within the respondent's managing absence/performance procedure (Ms Utley);*
- ii. *Taking away the claimant's work van and allocating him a van on a day to day basis from November 2016 (Mr Reeves);*
- iii. *In November 2016, after an agreement that any letters would be sent to his home address or given to his GMB representative, Messrs Priestley, Nicholls and Reeves giving the claimant a letter;*
- iv. *On 13 December 2016 Ms Utley stopping the claimant's wages (at Christmas);*
- v. *In February 2017 Mr Reeves asking the claimant to evidence his mother's cancer;*
- vi. *In February 2017 Ms Utley saying words the gist of which was "it is not about your mum's cancer you are on a Stage 3", characterised as dismissive and rude.*

b. *Was the conduct above related to the claimant's protected characteristic?*

- c. *Did the conduct have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?*
- d. *If not, did the conduct have the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?*
- e. *In considering whether the conduct had that effect, the Tribunal will take into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.*

Section 13: Direct discrimination because of disability

- f. *The claimant relies on the allegations [2.1.1 to 2.1.6] above to the extent not found to amount to harassment.*
- g. *Has the respondent treated the claimant as alleged less favourably than it treated or would have treated staff members in the same or sufficiently similar circumstances without depression (for example other colleagues at the depot)?*
- h. *If so, has the claimant proved primary facts from which the Tribunal could properly and fairly conclude that the difference in treatment was because of the protected characteristic?*
- i. *If so, what is the respondent's explanation? Does it prove a non-discriminatory reason for any proven treatment?*

Section 15: Discrimination arising from disability

- j. *The "something arising in consequence of the claimant's disability" advanced by the claimant is: his sickness absence.*
- k. *The acts of discrimination advanced under Section 39 are the dismissal and maintenance of that dismissal on appeal.*
- l. *Does the claimant prove that the respondent's treatment of him materially influenced by sickness absence arising from disability?*

Does the respondent show that dismissal and maintaining that on appeal was a proportionate means of achieving a legitimate aim, that is appropriate and reasonably necessary?"

- 3. The indicated arrears of pay complaint was advanced as a complaint of direct disability discrimination concerning a pay rise from November 2015 and permission was not granted for that amendment.
- 4. Before this final hearing an Employment Judge had decided that the claimant was a disabled person at the material times by reason of depression. The complaints before this Tribunal were therefore the disability discrimination complaints above and a complaint of unfair dismissal.
- 5. The unfair dismissal complaint had been presented outside the primary time limit and limitation was an issue in respect of that complaint, and potentially in relation to the Equality Act complaints.

Evidence

6. The Tribunal had a bundle of some 660 pages of documents and heard from the claimant. We also heard on behalf of the respondent from Mr Priestley and Mr Reeves managers in building services, Mr Nichols who was the claimant's direct supervisor, Mrs Uttley who was Mr Nichols' manager, Mr Finch who took the decision to dismiss the claimant and Mr Mulcahy who decided not to uphold his dismissal on appeal.

Findings of fact

The claimant's attendance at work

7. The claimant was employed by the respondent's building services department as a plasterer from 6 July 2015 to 31 August 2017. He had been self-employed for a period of some eight years or so prior to that. In his first year of employment between 6 July 2015 and 15 July 2016 he had nine spells of absence of the following duration and for the following reasons: one day:vomiting; flu:four days; diarrhoea and sickness:one day; earache/migraine: two days; back strain:nine days; back strain: three days; headache, kidney infection: four days; migraine:two days; back pain: one day.
8. The respondent's "Improving Attendance" procedure ("IAP") provided "triggers" for those employees who exceeded four episodes of absence or eight days in a 12 month spell. Accordingly, the claimant's manager Mr Nichols, conducted return to work meetings and placed him on Stage 1 of the procedure in February of 2016. The decision following those return to work meetings was that the claimant would move to Stage 2 of the procedure and that over the next six months from February to August 2016 he would be required to meet a half annual target: no more than two episodes or four days absence in a six months period, otherwise the next stage in the IAP would be engaged.
9. The claimant's absences for migraine and back pain in the summer of 2016 meant that he exceeded the triggers, but Mr Nichols took no action to engage Stage 2 of the procedure immediately.

The allocation of a works van

10. At the beginning of the claimant's employment, he was allocated a van as a works' vehicle to enable him to undertake assignments as a plasterer. He arranged the layout of the van to suit him and his tools, and he used it to attend all the work that he was allocated. In the first 12 months or so of employment, he was happy to bring the van to the depot for a longer spell of absence, but it was returned to him at the end of that absence (for example the back strain lasting nine days). Otherwise he was not required to return it for short absences. After a lengthier spell of absence in late 2016, when the claimant suffered depression and anxiety, and certainly by January 2017, his original vehicle was allocated elsewhere and the claimant was allocated a different van on a day by day basis.

The multiskill pay rate and the claimant's grievance

11. In July 2016 the claimant had been in discussions with Mr Nichols about benefiting from a new "multiskilled" pay rate which had been introduced for organisational reasons and was part of a collective agreement. He signed an enrolment form in July 2016 to enable him to undertake a course provided for those receiving the

multiskilled rate. Having signed the enrolment form in July 2016 the claimant was not then enrolled for the course, nor added to a cohort due to start later in July. He was told (we consider it likely) that he would not be receiving the multiskilled pay rate by Mr Nichols.

12. The claimant presented a grievance dated 18 August 2016 complaining about these events, which resulted in an investigation by Mr Priestley in October 2016.
13. After the presentation of his grievance, the claimant presented fit notes and was absent from work due to depression between 22 August and 24 October 2016. That delayed the initial investigation and grievance outcome.

Referrals to occupational health and the 15 November allegation (iii)

14. The claimant was subject to three occupational health referrals in this period. The third referral recommended a phased return to work, as did the claimant's GP, from 18 October, which took place. On 24 October the claimant had a meeting with Mr Priestley to discuss his grievance. The letter confirming the outcome of that grievance, which was to reject it in a short investigation by Mr Priestley, was handed to the claimant by Mr Nichols, his immediate supervisor, on or around 15 November 2016. The claimant had been called into the office and reacted very badly. That reaction, indicative of a mental health deterioration, was apparent both to Mr Nichols and to others within earshot, we find, on the balance of probabilities.
15. The three occupational health referrals that were sought on behalf of the claimant from August to October were completed by Mrs Uttley, who was Mr Nichols' line manager. In the first occupational health referral Mrs Uttley recorded this on Mr Nichols' behalf. "Mark has advised me as his supervisor that he suffers with depression. Mark also advised that he has been to his doctors and he is currently taking tablets for this. Mark is currently at Stage 2 and has failed his target set".
16. Had Mr Nichols approached the claimant's absence in July 2016 differently, the claimant could have been at Stage 3 of the procedure at this point.
17. Albeit the claimant had completed a successful phased return in late October and early November, the by hand delivery of a letter rejecting his grievance in an open office had such a poor effect on him that his union representative, on 15 November 2016, informed management that his member had decided he was not satisfied with the outcome, and wished to proceed to Stage 2 of the grievance procedure, involving "an intervention panel".
18. The claimant alleged that prior to 15 November there had been an agreement with Mr Fletcher, his union representative, that letters about him or for him were to go to his union representatives. His case was that the respondent's act of handing him the grievance outcome letter directly was an act of harassment or direct discrimination on grounds of disability.
19. The claimant had been undertaking return to work meetings involving correspondence from Mr Nichols, and signing forms in connection with his absence, without apparent difficulty or the arrangement he described up until 14 or 15 November. The claimant says there was an agreement was in place that

communications go to the union, and that was in place before the handing of that letter. Mr Nichols and the respondent's managers did not accept that arrangement as in place and there was no evidence from Mr Fletcher or the GMB, or other reference to the arrangement in later documents. We do not accept the claimant's evidence as a likely, or a reliable recollection in these circumstances.

20. The claimant's return to work meeting with Mr Nichols recorded absence from 14 November 2016, when he walked away from the office, having been handed the letter. The reason for that absence was said to be work related stress. It is clear from all the circumstances that there was a bad reaction, visible to others on that day, despite the respondent's witnesses lack of recall.
21. The other contemporaneous documentation from that time was the occupational health advisor's notes which read as follows: "Returned to work on 24 October 2016 on a phased return, went off sick since 22 November 2018 due to work related stress. States feels anxious and stressed most of the time. States was promised a pay rise but then refused to pay him. He was handed a letter advising in front of the office and reacted badly, walked out and not returned to office since then. Has put grievances against management about six months ago."
22. That occupational health consultation on 29 November or thereabouts resulted in further occupational health advice to the respondent, advising: "supportive, open, one to one meetings with management; a short brief phased return to work; risk assessment to identify workplace issues"; and providing a link to the management standards for the management of workplace stress.
23. The adviser further advised that stress and depression might reoccur when triggered and the offering of "regular support".

Allegation iv: stopping the claimant's December pay

24. During the Autumn and into December of that year the claimant's pay was disrupted by reason of his absence. The respondent's sick pay contractual provision was: in the first two years of employment, two months' full pay, two months' half pay and thereafter any balancing statutory sick pay. Pay disruption was, of itself, stressful for the claimant. He did not receive the required communications by letter from the respondent's payroll function (called the "BSC" or "business services centre"). He was in frequent telephone conversation with them about his wages. He was informed, as was the case, that the December pay roll had been processed and he would receive his December pay, only then to find out that it had not been paid into his bank account, but instead a much lesser amount of some £300 or £400 (rather than the expected £1200 or thereabouts).
25. The reason for the late stopping of the claimant's December pay, and replacement with a sum considered to represent his entitlement to sick pay, was that his fit note confirming absence between 21 November and 9 December 2016 had been forwarded to the BSC after the payroll and bank payment instruction had run. On receipt of the fit note indicating absence, the December pay was recalled from the bank. A calculation was done of the amount of sick pay due or thereabouts, and this was instead paid to the claimant on 19 December.

26. The claimant's case was that such a recall could not have happened without Mrs Uttley's intervention. There were clear failings in management and BSC communication to the claimant, and self evidently there was a clear failure to take heed of the occupational health advice to manage likely triggers for workplace stress at that time. However, having heard her evidence and accepted it, Mrs Uttley had no hand in a deliberate instruction to stop the claimant's pay, pay a lesser sum or recall the original full pay from the bank. These matters may or may not have been authorised by a different member of management (perhaps within buildings services or within finance or payroll), and the action may have had a further detrimental impact on the claimant, but the reason why the pay was recalled was his lack of entitlement to normal December pay because of sickness absence.
27. Rather than an intervention or letter informing the claimant of the pay disruption, as the respondent's procedure required, the management, on this occasion Mrs Uttley, wrote to the claimant on 21 December 2016 setting out his spells of absence. The total number of days between April 2016 and January 2017 was 84.5, and he was required him to attend a meeting at 10am on 4 January 2017.
28. The claimant did not attend that meeting, said to have been confirmed by Mr Nichols by telephone (even if the letter had not arrived). The respondent was expecting the claimant back to work at that point, as a result of the expiry of his covering fit note, or at least was expecting him for a review meeting. In fact he returned on 10 January 2017. There was then a review meeting and discussion of a phased return. The claimant was invited to a review at Stage 2 of the IAP by Mrs Uttley, in a letter dated 18 January 2017, for a meeting to take place in February, because his absences had exceeded the targets set.
29. A stress risk assessment was then carried out later in January, identifying potential stressors including the claimant's pay grievance concerning the multiskilled rate. The risk assessment did not identify the receipt of letters in the office as being a potential trigger.

The claimant's mother's illness and evidence of it (allegations v and vi)

30. In early February the claimant was invited to a further grievance hearing at Stage 2. The day before that hearing, on 13 February, he attended the IAP Stage 2 meeting with his trade union representative, Mr Fletcher and there was a general discussion about absence, the pay issues over Christmas and a number of other matters. Mr Fletcher indicated that the claimant needed to be "paired up" and that "he was multi trade on plan". "He was enrolled in college but his name was removed", was Mr Fletcher's evidence. Mr Fletcher was told that these matters were to be dealt with by a grievance procedure. In fact the claimant was successful in securing the multiskilled pay rate on appeal in his grievance, receiving a decision in November 2017, by which time he had been dismissed for absence.
31. The claimant left that IAP meeting early, on being informed that he was to be moved to Stage 3 of the procedure by Mrs Uttley.
32. On the Monday, Tuesday and Wednesday (20 to 22 February) the claimant dropped off the keys to the works vehicle at the office and did not attend work. On

or around 23 February he attended the office to apologise for storming off on 13 February and to have a few words with Mrs Uttley directly. He advised of difficulties with his mother (who was suffering from cancer), and Mrs Uttley said words to the effect that the IAP was not about his mother, he was on a Stage 3. She may well have said more in the course of that brief discussion in the office, but the claimant's understanding was that she was less than sympathetic about his mother's illness.

33. On 7 March 2017 the claimant provided evidence of his mother's cancer diagnosis by photograph to the administrator in the department, following criticism of him by Mrs Uttley for failing to make an application for special leave in connection with the February days off, caring for his mother. The respondent's special leave policy permits the department manager, in this case Mr Reeves, to authorise special leave in circumstances one would expect, including illness of a relative. In all likelihood Mr Reeves let the claimant know that he would require evidence of his mother's illness. Later that day the claimant reported to occupational health that management continued to make inappropriate comments. In our judgment that is entirely consistent with his position that Mrs Uttley had first made inappropriate remarks dismissive of his mother's illness, and subsequently Mr Reeves had requested that he provide evidence, which the claimant considered inappropriate in all the circumstances. We do not consider Mrs Uttley's note of their conversation was sufficiently contemporaneous, or reliable, to displace the claimant's recollection of that short conversation.
34. The Stage 3 hearing took place before Mr Finch on 18 April 2017. There was again full representation for the claimant by his trade union representatives, Mr Fletcher and Mr Noble, a full time official. There was substantial discussion, recorded and transcribed, and the result of that full review by Mr Finch was, on the encouragement of Mr Fletcher, that the claimant be provided with a further three month period in which he was to try to meet a target of no more than two days' absence during that period.
35. The claimant had been at work reliably, apart from to care for his mother, between 10 January and the date of the meeting on 18 April.
36. Both targets and support were agreed and confirmed to the claimant in an outcome letter of 25 April 2017, which also recorded some procedural points that had been made by Mr Noble on the claimant's behalf. Mr Finch set out that a further Stage 3 hearing would be held on 20 July to review matters, or earlier in the event that the targets were not met. The claimant made no complaint about Mr Finch's conduct of that meeting and felt his points had been heard.
37. There was also, at around this time, an appeal of the claimant's pay grievance taking place.

Further ill health events impacting the claimant

38. At 8.15 am on Wednesday 10 May the claimant called a Mr Ellis for three days' holiday at short notice. The claimant subsequently took that leave and then on his return to work on Monday 15 May he completed a special leave absence request with Mr Ellis. The reason for the request was "diagnosis of cancer for mother,

caring for above – in hospital”. The application recorded that the claimant was part of the “planned work” team.

39. A subsequent return to work meeting with Mr Ellis also recorded that the claimant’s “mum was ill and he was caring for her and that he had submitted the special leave form”. The short notice holiday was refused by Mr Ellis because the claimant was “on a Stage 3” and there was work planned in.
40. It was then agreed that the claimant was returning to work on Monday 15 May. On 16 May the claimant sought short notice holiday for that day, and also on 17 May because he felt ill with cold and flu symptoms. Those requests too were refused. The claimant then worked Thursday and Friday of that week but from Monday 22 May, having consulted his GP, he was signed unfit for work due to visual symptoms and viral illness. Subsequent fit notes were also presented.
41. The claimant’s ill health meant he did not attend the next stage of his grievance hearing on 23 May 2017. He was again represented by Mr Fletcher. The claimant forwarded to the respondent’s administrators fit notes recording severe headache in early June. On 13 June in a return to work meeting he described that he was being tested for a suspected brain tumour. Mr Fletcher was also present at that return to work meeting on 13 June. The claimant confirmed that his suspected brain tumour and headaches had nothing to do with depression and that he was “ok to drive”.
42. The claimant was then due blood screening on 19 June. There was discussion in the return to work meeting about the claimant being in touch with the BSC to sort pay issues out. Mr Fletcher also recorded that authorised absence forms were knocked back, and were refused to be signed (that was in reference to the special leave to care for the claimant’s mother).
43. There was then a further referral to occupational health, but on or around 26 and 27 June the claimant was absent from work without contact, and did not subsequently return to work. The reason for that absence was that he had been admitted to hospital having sustained a severe injury to his arm which resulted in hospitalisation and substantial risk to his health.
44. The review hearing to assess matters took place eventually on 31 August. There was the provision of a log of absence and contact and other documents from management, the night before the hearing. The claimant sought a postponement because of the late provision of these documents but that was refused by Mr Finch.
45. At the hearing, attended by Mr Fletcher but not the claimant, there was again a fully transcribed lengthy discussion, including that Mr Finch was satisfied that the most recent absences were not connected to the claimant’s depression and that it was unlikely that he was able to deliver regular service to the respondent. That was the occupational health advice at the time, and resulted in Mr Finch’s decision to dismiss the claimant with notice to be paid in lieu. That dismissal decision was communicated to the claimant the same day; his employment terminated that day.
46. On 7 September 2017 the claimant’s GP reported that the claimant felt his memory was affected by recent events and he wanted counselling, but that he was feeling

positive (less stress) since he lost his job, and had reduced to 20mg of citalopram and wished to decrease further. He was advised to maintain 20 mg for one more month.

47. There was then an appeal against his dismissal presented by the claimant within a few days. The appeal raised two grounds: the failure of the adjournment upon the late submission of the documents; and asserting that “all recent sicknesses are related to my arm injury eg headaches etc which was overlooked. Could you please forward any appeal dates or documents to Darren Travis at the GMB Civic Hall who will be dealing with my appeal”. The appeal was received by the respondent on or around 11 September 2017.
48. The claimant’s appeal hearing took place before Mr Mulcahy one of the respondent’s chief officers on 5 November, at which two trade union representatives attended on behalf of the claimant and there was again a full hearing of all the matters. Mr Mulcahy decided to seek occupational health advice in connection with the claimant’s assertion, as put by his union representatives in the appeal, that his subsequent period of ill health may well have been connected to his depression. That question was answered in the negative, but the gist of the occupational health advice, Dr Miranda having seen the claimant and reported by December, was that his arm injury was sufficiently recovered by November for him to be fit to return to work. He further advised and that the arm injury and vision and headache matters were not connected to the claimant’s depression, albeit Dr Miranda advised that the claimant’s arm injury could well exacerbate his depression. Dr Miranda did not indicate that there were health issues at that time preventing the claimant from, for example, presenting his complaints to the Tribunal.
49. Having reviewed that occupational health advice Mr Mulcahy decided to maintain the claimant’s dismissal and confirmed that in a letter to him on 10 January 2018.
50. On 15 January 2018 the claimant commenced early conciliation and received a certificate the same day, and on 23 January 2018 presented his claim form which said as follows, asserting both disability discrimination and unfair dismissal: “I worked for LCC for over two years. At some point I became aware of mental health problems. I reported these and therefore was taken down the disciplinary route. This continued to the end. The currently Mental Health Act is there for a reason. I was told at my Stage 3 hearing not to have more than two days off and that’s that. There was an incident with a breach of confidence which was noted at the time. I then became seriously ill, maybe a brain tumour, loss of sight. I then suffered compartment syndrome. I awoke in hospital and I was still taking huge amount of painkillers etc into the November. I received a letter to say that I had been dismissed even though I had spoken to HR to explain that my mental health problems were quite difficult so could not attend. And also a document was provided 46 pages and I asked for time to look at this. Still no mental health help. I appealed my dismissal and was told three days I would have my decision. I didn’t receive it for three months. At no point was I told about ACAS services or what I should be doing. I now seek to go to a Tribunal. My rights and my dignity have been abused”.

Discussion and conclusions

51. The unfair dismissal complaint. It is convenient to deal with that first. The chronology is that the complaint was presented on 23 January 2018 and the effective date of termination of the claimant's employment was 31 August 2017 when he was forwarded Mr Finch's dismissal decision. Entering 31 October 2017 as the date when his employment ended in his claim form, was an error. The claimant commenced ACAS conciliation on 15 January and he was given an ACAS early conciliation certificate the same day.
52. The law: the Employment Rights Act 1996 relevantly provides at Section 111 (2) that "an employment tribunal shall not consider a complaint under this section unless it is presented to the tribunal – (a) before the end of the period of three months, beginning with the effective date of termination, or (b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months".
53. The claimant was represented by the GMB union throughout the various hearings in this matter. His claim form appears to contain a complaint that the GMB did not tell him about the need to contact ACAS or, by inference, present a complaint. In correspondence he also said that he was unwell and had suffered a breakdown after his dismissal. On the other hand he also said he felt a weight had been lifted and was living with his mother. The assertion of a breakdown between August and November were not mentioned in the appeal, nor was the medical evidence to that effect (either the GP note in September, or Dr Miranda's report in December). We do not accept the claimant's chronology of his health and prefer the documented medical evidence in this respect.
54. We ask ourselves was it reasonably practicable for the claimant to present the complaint of unfair dismissal within the relevant time limits, which were not extended in this case by ACAS conciliation because the primary limitation period expired at the end of November. The 1996 Act test amounts to, was it practically doable for the claimant to present his complaint in time, given the circumstances at the time?
55. We have found that at the relevant time the claimant had faced a number of unfortunate events and was disabled by depression but not in a state of breakdown. We also note that he was supported fully by the GMB throughout and that he was able to appeal his dismissal within days and in January present his complaint, albeit in very concise terms, but also indicating that he realised limitation was an issue. We also note that in Dr Miranda advised the claimant was fit to return to work in December. In our judgment, it simply cannot be said in these circumstances that it was not doable for the claimant to have presented his unfair dismissal complaint before the end of November, given his access to a well respected union, the advice available to him, the union's apparent willingness by their attendances at hearings and the like, to act for him, and his relative health at the time. We therefore dismiss the unfair dismissal complaint.

The Equality Act complaints

56. In relation to the Equality Act complaints of disability discrimination, the last of these was an allegation that the maintenance of the dismissal on appeal was an act of disability discrimination, and that complaint was presented in time. The Tribunal

therefore had to consider limitation issues in relation to the earlier complaints, but we had to address their substance to be able to consider whether there was continuing discriminatory conduct such that they were presented in time.

57. Section 26 of the Equality Act 2010 relevantly provides as follows:

“(1) A person (A) harasses another if –

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) The conduct has the purpose or effect of –

(i) Violating B’s dignity, or

(ii) Creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account –

(a) the perception of B

(b) the other circumstances of the case

(c) whether it is reasonable for the conduct to have that effect.

58. Section 13(1) of the Equality Act 2010, relevantly provides:

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.

Allegation i: from August 2016 inviting the claimant to hearings and ultimately his dismissal within the respondent’s managing absence/performance procedure (Mrs Uttley) (harassment/direct discrimination)

59. We consider that our chronological findings of fact reflect three clear phases of management of the claimant’s absence. In the first year of employment, before there was any absence known to be related to depression, there are nine absences of varying lengths all of which would have been sufficient at the end of that first year to have progressed through the absence management procedure, potentially to dismissal. Mr Nichols was dealing with Stage 1 and Stage 2 of the procedure at that time and he progressed it, but not very quickly: when Stage 3 was triggered in the summer of 2016 Mr Nichols did not progress the claimant to such a hearing. He had been dealing with short intermittent absences for unrelated reasons. This was phase 1.

60. The claimant then experienced longer term absence for depression and Mrs Uttley started to manage matters because, we accept, she was better able to cope with the paperwork associated with longer term absence. She completed four referrals to occupational health between 24 August 2016 and 29 November 2016 and she attended meetings including a meeting in February when she decided to refer the claimant for a Stage 3 hearing. This was the second phase where there was some support provided in relation to mental health in the form of a phased return to work and occupational health reviews.

61. In the third phase of the chronology the claimant was impacted by a series of unfortunate matters: his mother's ill health, the onset of headaches and investigation for a brain tumour, and then the very serious arm injury. To be affected by such matters within one year is outside the normal range of bad luck, and it was during this period that the consideration of his dismissal took place in April 2017 by Mr Finch, the management case for that being presented by Mrs Uttley, but ultimately rejected at that time in favour of a further review period.
62. We accept against this background that Mrs Uttley's conduct over the second and third phases was unwelcome to the claimant. Was it in any way related to the fact of his mental impairment, his disability? In our judgment it was not. Her conduct was the continuance of the management of his absence, in line with the procedure, in the context of previous poor attendance for unrelated reasons. There was no evidence at all that a person with a similar absence record, but without the claimant's disability of depression would have been treated more favourably.
63. The real case being put by the claimant was that Mrs Uttley set out to harass and dismiss him because of his depression, whereas Mr Nichols had not done so in relation to earlier absences. The difficulty with the claimant's belief is that the claimant's situation in phase 1 is not properly comparable with phase 2: Mr Nichols was dealing with short intermittent absences for unrelated reasons and he managed the workload accordingly. A much longer spell of absence for mental illness required a different approach, more paperwork and advice from occupational health. When the full chronology is set out, including the reason for Mrs Uttley's involvement, and the fact that dismissal arose after phase 3 when there had been further events unrelated to depression (or at least there was no evidence they were so related), the claimant's complaint of harassment or direct disability discrimination by Mrs Uttley must fail.

Allegation iii: in November 2016, after an agreement that any letters would be sent to his home address or given to his GMB representative, Messrs Priestley, Nicholls and Reeves giving the claimant a letter

64. Our factual findings determine this complaint. We consider that the agreement to which the claimant referred might well have arisen after the claimant's outburst on 14 November or thereabouts, but up to that point there was no such agreement; the contemporaneous documents and evidence are against him and we do not consider his recollection reliable. The complaint must fail. The reason why the letter was given to him was because it was a convenient way of letting him know the first level outcome of his grievance, and nothing more.
65. Notwithstanding these conclusions we do weigh in our discussion in the round that the claimant had his enrolment for the multi trades course stopped in July 2016 before any suggestion of mental ill health, by some member of management, and that the investigation into the grievance at this early stage was wholly inadequate, and that there was incorrect information provided by management in that investigation. Given this poor treatment, handing an outcome letter to the claimant dismissing his grievance in these circumstances was entirely unwelcome and unhelpful, but it was not harassment connected with disability.

Allegation iv: on 13 December 2016 Mrs Uttley stopping the claimant's wages (at Christmas)

66. The Tribunal was assisted in its findings by some late documents provided by the respondent. We consider our findings of fact demonstrate extremely poor

treatment of the claimant in the round by both the customer service centre and by line management including Mrs Uttley: there was a complete failure by line management to communicate with the claimant on one the most important aspects of the employment relationship: entitlement to payment. We have not found that Mrs Uttley gave any direct instruction that the pay must be stopped. We accepted her evidence about that. She was not, after all, the claimant's direct line manager.

67. The reason why pay was stopped by the customer service centre, or pay roll, was, on the balance of probability, simply its duty to look after the public purse. There was no entitlement to a full wage for December because of sickness absence. And payment was stopped after the instruction had been sent to the bank, which resulted in things changing after the claimant had been told by telephone by payment would be made by the CSC. That is not conduct related to disability in our judgment, or less favourable treatment because of disability. There was no evidence that such communication failures would not have arisen in relation to an employee with similar absence but without the claimant's disability. On the other hand we accept this state of affairs was entirely unwelcome, unhelpful and very poor treatment of the claimant at the time.
68. The complaint fails because the facts are not as the claimant believed them to be, notwithstanding that as before, the communication with him on this issue was unwelcome and poor.

Allegation v: in February 2017 Mr Reeves asking the claimant to evidence his mother's cancer;

69. We have found on balance that Mr Reeves requested this evidence, albeit his evidence was he had not. We do not infer anything from that denial; these events were long ago and he considered it unlikely because he had his own family member affected by cancer. Was this unwanted conduct related to the claimant's disability? It was not. It was simply a request because special leave was seeking to be authorised. There was no evidence to suggest that an employee without his disability would not have been asked to provide evidence. That complaint fails as both harassment and direct discrimination.

Allegation vi: in February 2017 Mrs Uttley saying words the gist of which was "it is not about your mum's cancer you are on a Stage 3", characterised as dismissive and rude.

70. We have accepted that the gist of these words were said to the claimant, but in the context of our findings of fact above. The claimant had gone to apologise to Mrs Uttley for leaving a meeting with her earlier on. Was this conduct related to disability or less favourable treatment because of disability? No, it was not. It was not necessarily the most sympathetic approach, nor the best way of communicating that the claimant's absence was problematic when he was at Stage 3 of the attendance procedure, but in our judgment in all the context of the circumstances at the time, it was not conduct related to disability.

The Section 15 complaint

71. Section 15 of the Equality Act 2010 relevantly provides:

A person (A) discriminates against a disabled person (B) if—

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

73. (b) *A cannot show that the treatment is a proportionate means of achieving a legitimate aim.*
74. (2) *Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.*
75. The direction the Tribunal gave itself about this Section is as follows.
76. The “something arising in consequence of B’s disability” sometimes has to be proven by a claimant, or sometimes is accepted by an employer. Often, the “something” is a sickness absence or absence record.
77. In T-Systems v Lewis (UKEAT/0042/15/JOJ) His Honour Judge Richardson sets out a four stage test for Section 15 discrimination:
- 1 There must be a contravention within Section 39(2)
 - 2 There must be unfavourable treatment
 - 3 There must be “something arising in consequence of the disability”; and
 - 4 The unfavourable treatment must be because of the “something”.
78. This means at stages 3 and 4 the Tribunal sometimes has to look at two different ways in which facts in the case relate to each other. The first is: does the “something” arise in consequence of disability. Stage 4 is whether the unfavourable treatment was because of the “something”.
79. “Because of” at stage 4 means that the “something arising” operated on the mind of the person making the decision (consciously or sub-consciously) to a significant (that is material) extent. See Lord Justice Underhill at paragraph 17 of IPC Media Limited v Millar UKEAT/0395/12 SM and at paragraph 25. The Tribunal, as its starting point, has to identify the individual(s) responsible for the decision or act or behaviour or failure to act which is being complained about.
80. There is also often a “Stage 5” in a Section 15 claim: the employer in the example above can say that the disciplinary action was appropriate and necessary to achieve its legitimate aim.
81. This type of “justification” defence in section 15(2) is common to many other types of discrimination, including direct discrimination because of age, and indirect discrimination. Whether the employer’s “means” are “proportionate” requires the Tribunal to determine whether they were “appropriate and necessary” (taking into account less discriminatory measures) (see Homer v Chief Constable of West Yorkshire [2012] UKSC 15 paragraphs 22 to 25). Section 15 does not derive directly from the European Equality Directive, but there is no judicial decision that the Homer approach should not be applied to Section 15 (2). Even on the bare statutory language, a structured approach is required to considering whether an employer has made out the defence.
82. Adopting the five stage approach, it is clear that the claimant’s dismissal and maintaining that dismissal on appeal in January 2018 were potentially contraventions within Section 39 and unfavourable treatment.
83. We are also satisfied that when looking at the three phases of absence we describe above, the presence in the second phase of absence for disability related reasons is sufficient to conclude that the dismissal materially influenced by something arising in consequence of disability.

84. The stage 5 question for us, both on dismissal and appeal is whether the unfavourable treatment was appropriate and reasonably necessary to achieve the respondent's legitimate aim. Mr Finch and Mr Mulcahy both made their decisions on the basis that the claimant was disabled by reason of depression, and they had to carry out the balancing exercise required to meet the respondent's obligations under the Equality Act. They were both sympathetic towards the claimant's difficulties.
85. On the one hand, we have to consider the claimant's broad submission: how can it be right or fair or lawful to dismiss somebody who has disability in these circumstances? In his favour, we recognise the series of terrible events which affected him in 2017. Equally we recognise that the respondent has an attendance improvement procedure, which has been applied carefully and consistently throughout this period. The standards were set and Mr Finch has applied an extra step, a further chance for the claimant to be able to sustain attendance from April to August. We also note that the claimant was not progressed through the stages as quickly as he might otherwise have been.
86. The respondent's aim was: .."sustained attendance so that the provision of corporate services can be maintained and provided with a minimum of disruption". A matter for which there has been little time in this hearing is that building services undertook work in the homes of people, who presumably needed those works to be completed. That social housing will include people with disability and in all sorts of difficult circumstances. Weighing the respondent's obligations to fulfil those services against the events that had impacted the claimant and his disability, and the particular impact of dismissal on an employee with disability, as Mr Finch and Mr Mulcahy accepted was considerable, we have dismissed his complaint. We consider that in all the circumstances of this case, it was appropriate and reasonably necessary to dismiss the claimant, to subject him to that unfavourable treatment, and to maintain that treatment on appeal. The only matter that troubled us about the appropriateness of the treatment in the round was the presentation of the late documents. For the reasons that were explained by Mr Finch, and indeed on appeal by Mr Mulcahy, to the effect of a lack of prejudice to him given the information provided, we do not consider this renders dismissal inappropriate and unnecessary. The complaint is dismissed.

Allegation ii: taking away the claimant's work van and allocating him a van on a day to day basis from November 2016 (Mr Reeves)

87. It will be apparent that having completed our analysis, which in summary was that there was no discriminatory conduct by Mrs Uttley, Mr Finch or Mr Mulcahy, and that allegations (iii) and (v) fail on their facts, we cannot say that this allegation against Mr Reeves about a works van from, in effect November 2016 to June 2017, when the claimant last attended work, was continuing conduct such that it was presented within the Equality Act three month time limit. The claimant did not present a complaint or even a grievance that he was not being provided with a van other than on a daily basis until it appeared in his particulars in April 2018.
88. We have made findings about some very unhelpful and poor treatment of the claimant, which was entirely unhelpful to him given his condition at the time. It made his life more difficult and it made matters worse. We have dismissed those complaints on the facts or because we do not consider that disability played any

part in the minds of those involved at the time. In order to decide this complaint, we must decide it is just and equitable to extend time to do so. We have rejected Mr Reeves' evidence that he played no part in van allocation, as he suggested, as we did in relation to his evidence about the claimant needing to evidence his mother's cancer. We know from our findings and the documents concerning college enrolment issue that Mr Reeves was involved, for example, in the enrolment of people on courses, which you might think at that level of management he might not be, but he was. We also know that he had to sign off on special leave. We accepted the claimant's evidence that frankly, he ran this department and anything of importance went to him, and we do consider that he made the decision concerning the van, albeit an administrator dealt with the day to day administration. The effect of his decision was that the claimant was not to be given a van until he attended work each day. We appreciate there might be three good reasons for his decision: he is not sure the claimant is coming in, which is a fair reason; the second possible reason, albeit unfair, was that the claimant's had a grievance against the department in relation to pay which was subsequently upheld, and should have been upheld from the outset; and thirdly the claimant's disability, which had demonstrated itself in an outburst in November.

89. This case was not put to Mr Reeves as fairly or straightforwardly as it might have been, had the claimant had a representative present. We do not consider we can say, on the balance of probabilities, that disability played no part in Mr Reeves' van decision. And equally we cannot find that it was a material influence, or conduct related to disability. For these reasons we do not extend time to decide it. It is not just to do so when our deliberations have been extended and we have kept you waiting as a result.
90. For these reasons all the complaints are dismissed. The van complaint for limitation, the unfair dismissal for limitation, and the other complaints on merit.

Employment Judge JM Wade

Date 8 March 2019

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.