EMPLOYMENT TRIBUNALS

Claimant: Mr A Spychalski

respondent: London General Transport Services Ltd

Heard at: London South (Croydon) On: 14-17 January 2019 & 18 January 2019 in Chambers

Before: Employment Judge Tsamados

Members: Ms S V MacDonald
Mr M Sparham

Representation:

Claimant: Mr J Neckles, TU representative
respondent: Mr R Bailey of Counsel

RESERVED JUDGMENT

The unanimous Judgment of the Employment Tribunal is as follows:

1) The Tribunal has no jurisdiction to hear the complaints of unfair dismissal, disability discrimination and harassment, those complaints having been presented outside the relevant time limits;
2) In any event, the complaints of unfair dismissal, disability discrimination and harassment fail on their substantive merits;
3) The complaint of unauthorised deductions from wages is not made out and is dismissed.
4) The complaint of failure to make reasonable adjustments is dismissed on withdrawal.

REASONS

Claims and Issues

1. The claimant presented two claim forms to the tribunal. The first is in case number 2360524/2017 and was presented on 12 January 2017. The second is in case number 2301741/2017 and was presented on 1 June 2017. The

claim form brought a number of complaints against the claimant's employer, London General Transport Services Ltd, Go-Ahead London Ltd and Coombe Medical Services Ltd (the first respondent's occupational health advisers).

2. At a preliminary hearing before Employment Judge ("EJ") Andrews held on 7 September 2017, the complaint under section 64 of the Employment Rights Act 1996 was dismissed on withdrawal, the claim against the second respondent Go-Ahead London Ltd was dismissed on withdrawal, the complaint of failure to make reasonable adjustments against the third respondent, Coombe Medical Services Ltd was dismissed on withdrawal and all other complaints against the third respondent were struck out.

3. Further, EJ Andrews issued a Deposit Order against the Claimant as a precondition of him continuing to advance his allegations and arguments that a deduction from wages between September 2016 his dismissal was an act of racial harassment, that his dismissal was an act of direct race discrimination and that his referral to occupational health and/or the dismissal were acts of victimisation. The claimant did not pay the deposit as ordered and so those allegations or arguments cannot be further advanced.

4. EJ Andrews went on to identify the remaining complaints of race discrimination, disability discrimination, unfair dismissal and unauthorised deductions from wages against the remaining respondent, London General Transport Services Ltd. The complaints and issues are set out in more detail within her note of the case management discussion which is at pages 71D to 71F of the bundle (save for paragraphs 4, 8 and 9 which relate to the allegations or arguments for which the claimant was required and failed to pay a deposit).

5. The respondent presented responses to the tribunal, one on 21 May 2017 and the second on an unknown date in which it denies the claimant's complaints in their entirety.

6. At the start of the hearing the claimant withdrew his complaint of failure to make reasonable adjustments. I therefore record this complaint as dismissed on withdrawal.

Evidence

7. We were provided with a bundle of documents running to 369 pages by the respondent with additional pages provided by the claimant numbered from 373-398. We refer to this as "R1" when referring to pages within the bundle. In addition the respondent provided us with copies of the inter parte correspondence from 14 June 2018 onwards. We refer to this as "R2" when referring to pages within that bundle. The respondent also provided a chronology and opening submissions. The claimant provided us with an amended schedule of loss.

8. We heard evidence from the claimant through a Polish interpreter by way of a witness statement (which was provided in English and Polish) and in oral testimony. At the start of the claimant's evidence, Mr Neckles explained that the Polish version had been drafted first and then he translated it into English using an online tool, which version the claimant then slightly

amended. However, it was not unequivocally clear from the claimant which version he was adopting as his evidence. As we were taking the claimant's written evidence from the English version, I allowed time for the interpreter to go through it in Polish with him, so as to establish that it accurately represented his testimony before he gave evidence. Mr Neckles also gave evidence for the claimant by way of a written statement and in oral testimony.

9. We heard evidence on behalf of the respondent from Mr Daniel Corbin, Ms Angela Rider and Ms Nicola Phipps by way of written statements and in oral testimony.

Findings

10. I set out below the findings of fact the Tribunal considered relevant and necessary to determine the issues we are required to decide. I do not seek to set out each detail provided to the Tribunal, nor make findings on every matter in dispute between the parties. The Tribunal have, however, considered all the evidence provided to us and we have borne it all in mind.

11. The claimant is Polish. Despite having worked as a bus driver for 10 years he has a limited grasp of English and gave evidence through an interpreter. During his dealings with the respondent which we were asked to consider he did not have an interpreter with him.

12. The claimant was employed by the respondent as PCV Bus Operator from 14 January 2008 until his summary dismissal either on 6 February 2017 as alleged by the respondent or on 4 April 2017 as alleged by the claimant. We will deal with this matter later on in our findings. At the time of the events in question he was based at the Mandela Way Bus Garage in London.

13. The claimant has "short leg syndrome" following an operation in 2002 resulting in his left leg being shortened by 10 mm after a diagnosis set out in his Impact Statement which is at R1 298. In essence, the claimant walks with a side to side limp motion which affects running and bending. In oral evidence the claimant demonstrated his ability to bend, which we could see caused him slight imbalance on his left side. He further stated that he could walk a kilometre and after stopping for one minute he could walk a further kilometre.

14. The claimant said that he disclosed his condition in his application form for employment with the respondent. We were shown a copy of this application but this did not contain any information relating to his condition (R1 111A-D). However, it was not in dispute that the claimant has short-leg syndrome and indeed his limp is self-evident. Further, there are documents before us which indicate that the claimant was passed by the respondent's occupational health assessors, Coombe Medical Services Ltd, as fit to work subject to a cab test on 15 August 2007 (at R1 319). Also at R1 320, the claimant had a further medical examination in relation to his PCV licence renewal on 18 March 2015. Whilst this indicates that there was a medical issue we heard no further evidence on it. What was in dispute by the respondent was not the fact of the claimant's impairment but its extent and its bearing on the claimant's dismissal which is part of the claimant's case.

15. The claimant's original statement of main terms and conditions of employment with the respondent is at R1 72 and dated 29 January 2008. His main conditions of employment as a bus driver are at R1 82 dated 15 August 2007. In particular we note clause 8 as to sick pay and sick leave at R1 76-77, clause 11 relating to notice of termination of employment at R1 79 and clause 13 as to return of uniform and equipment at R1 79. The respondent's Disciplinary Policy and Procedure is at R1 89-98 with appendices at R1 99-111. We were only referred to Appendix D Guidelines for dealing with long term sickness absence at R1 105-108 and Appendix E Capability – Performance at work R1 109-111.

16. On 18 June 2016, the claimant was involved in a road traffic incident during his lunch break from work in which he was knocked off his scooter and injured. The details of this incident are set out in the Particulars of Claim dated 14 December 2016 which pertain to his County Court negligence claim against the driver of the motor vehicle which hit him (in C1). The claimant sustained injuries to his right shoulder, right elbow, right wrist and lower back and was provided with a statement of fitness to work by his GP indicating that he was unfit to work from 20 June 2016 until 20 August 2016 and needed to see his doctor again at the end of that period to assess his fitness to work (R1 138).

17. On 20 June 2016 the claimant met with Miss Nicola Phipps, the Operating Manager at Mandela Way Garage and provided the above mentioned medical certificate to her. Miss Phipps made a referral to the company's occupation health doctor at Coombe Medical as a result of the length of time that he had been certified as unfit to work and his level previous sick absence. The Occupational Health Referral Form is at R1 140-142.

18. Miss Phipps invited the claimant to meet with her on 6 July 2016 as part of the respondent's sickness absence procedure by letter dated 30 June 2016 at R1 143. On 5 July 2016, the claimant emailed Miss Phipps stating that he would not be able to attend the meeting because he was undergoing treatment until 15 August 2016, but would be available for a meeting and referral to the company's doctor after that date (R1 145). Miss Phipps responded enquiring where his treatment was taking place and the nature of the treatment (R1 145). However, there is no response by the claimant to this email. Miss Phipps then sent a further email later that day in which she notified him that in accordance with the "company policy" a medical appointment was scheduled for 12 July 2016. This was in her email to the claimant dated 5 July 2016 (at R1 146).

19. The claimant did not attend the meeting with Miss Phipps on 6 July 2016 or the medical appointment on 12 July 2016. As a result of his non-attendance at the medical appointment and his failure to advise of his non-attendance, Miss Phipps emailed the respondent's payroll department on 13 July 2016 instructing them to pay the claimant Statutory Sick Pay ("SSP") only (R1 147). On the same day she also emailed the claimant asking him to contact her as a matter of urgency given his lack of attendance at the medical appointment (R1 148).

20. The claimant was sent an Instruction to Attend Disciplinary hearing to take place on 27 July 2016 for unauthorised absence (at R1 149) and as set out in Miss Phipps' letter to him dated 20 July 2016 (at R1 150). The hearing was conducted by Mr Graham Johnson, the respondent's General Manager of New Cross and Peckham Garages. However, the claimant did not attend. Mr Johnson made the decision to summarily dismiss the claimant. This was communicated to the claimant in a letter dated 27 July 2016 at R1 151. That letter advised the claimant of his right to appeal.

21. The claimant contacted Miss Phipps from his personal email address the following day (28 July 2016) informing her that he had received Mr Johnson's letter, that he was not absent without authorisation but had previously supplied a medical certificate covering him for two months (at R1 155). He subsequently appealed on the ground of the severity of the award (R1 156).

22. The appeal hearing was conducted Ms Angela Ryder, General Manager (RA), and Mr Pat Mahon, General Manager (Operations) on 28 September 2016. The notification of the appeal hearing is contained in a letter to the claimant sent care of Mr John Neckles of the claimant's union, PTSC, and who is representing the claimant before us at this hearing (at R1 160-162). The minutes of the appeal hearing are at R1 174-179.

23. The claimant attended the appeal and was represented by Mr Neckles. At the end of hearing, Ms Ryder notified the claimant and Mr Neckles that she had decided to overturn the dismissal on the basis that an appointment was made for him to see the company doctor when he had already told the company that he was away and not fit (R1 178). She further indicated that she had asked Miss Phipps to make a fresh appointment for him to see the company doctor and that he would not lose any pay, terms and conditions and would also be paid for the time in between his dismissal and return to work (R1 179).

24. The decision was confirmed in her letter to the claimant dated 17 October 2016 at R1 192 (by which time the claimant had attended a medical appointment and the decision as to his fitness to return to driving had been deferred pending receipt of information from his own doctor (which we deal with below). In written evidence, Ms Ryder stated that the referral to the company doctor was made under Appendix D of the Disciplinary Policy and Procedure which states that where an employee has been on continuous sick leave for a period of 21 days or more, the company doctor must certify their fitness to return to work (R1 108).

25. At the appeal hearing, the claimant was asked by Mr Mahon whether he had returned to his doctor at the end of the two month period covered by his medical certificate to be signed off as fit for work. The claimant replied that his doctor wanted to sign him off for another month and the claimant said no because he said he was fit to return to work. He was asked if he was given a certificate to this effect and he replied no, but provided a Polish medical document relating to his treatment in Poland (R1 153).

26. In evidence, the claimant referred to a medical certificate at R1 325 which he said that he had taken to the respondent when his previous certificate expired. He said that he handed it in at the Supervisor's Office, got it signed

and asked for a copy. We can see from the copy at R1 325 that it states in handwriting "original received 19/08/16 A. Amos. This certificate states that the claimant is unfit to work due to shoulder pain from 19 August to 19 September 2016 and that the doctor will not need to see him again at the end of that period to assess his fitness to return. The respondent confirmed there is a supervisor called A Amos but the witnesses stated that the certificate was not on their file. In cross examination the claimant was asked why he had not referred to this certificate at the appeal hearing and provided the copy which he had if receipt was then in dispute. In answer he essentially stated that he was not asked and given that he had handed it in, he trusted the respondent to act upon it.

27. On 6 October 2016, the claimant attended a medical appointment with the company doctor who deferred his fitness for work pending receipt of further information from his GP (R1 184).

28. The claimant went to see Miss Phipps after his appointment and told her that he had failed his medical but did not know why. He said he thought it was something to do with his leg but that was not why he was off sick and he had been told he needed to see his GP. Miss Phipps' file note of this meeting is at R1 186.

29. On 10 October 2016, the company doctor wrote a letter to the claimant's GP Dr Rashid Kadhim at Avicenna Health Centre (R1 190) enclosing the claimant's signed consent under the Access to Medical Reports Act 1988 (R1 191). The letter states as follows:

"I write as the Occupational Health Physician contracted to supply medical opinion to Go Ahead Transport Services Limited. This gentleman has a has (sic) applied for a bus driver position with the company.

On clinical examination, I found that he has had significant restriction of movement and decreased power and flexion of the left hip, probably from a long-standing injury.

The also informed me that he had sustained injuries to other parts of his body as a result of scooter accident and that he is currently signed off work. Before I can proceed with his application I will need a full report detailing these injuries, his prognosis and what degree of recovery he has made. He will be required to drive the bus for one and a half hours at a time. As he is currently signed off work, may I ask the reason for this, as he was unable to tell me?

I have explained to Mr Spychalski that I cannot complete his medical until I have received your report and reviewed its content. I will look forward to receiving the report and I enclose Mr Spychalski's consent for you to supply it. You will see he has indicated that he wishes to read the report before it is sent to me. I will be happy to meet your reasonable fees for this report."

30. We note in particular that this letter does not indicate that the company doctor is enquiring to the claimant pre-existing condition as to his left leg.

31. The claimant requested and was granted permission to go on a pre-booked holiday from 29 October to 15 November 2016 (R1 185 & 201).

32. The company doctor did not receive any response from the claimant's GP. A further copy of the company doctor's letter was faxed to Dr Kadhim on 24 October 2016 by Ms Dodson at Coombe Medical stating "please can you let

us know when we can expect a reply" (R1 195). Whilst there is no fax receipt included we have no reason to believe it was not sent and received.

33. Miss Phipps wrote to the claimant by email to his personal email account and copied to Mr Neckles on 25 October 2016 setting a meeting for 16 November 2016 at 11 am for a sickness interview (at R1 201). The letter also notified the claimant that he would receive his backdated sick pay on 28 October 2016.

34. We note that Miss Phipps refers to the company doctor's request for more information as to the claimant's leg. We note from the evidence that her understanding that the information was related to the claimant's leg appears to have simply come from the claimant and we refer to the exchange of emails at R1 118-189. Ms Phipps was not given any further information by the company doctor and at the time had not seen the letter sent to the claimant's GP. On balance of probability we find that she could only be aware of the issue regarding his leg from the claimant. However, the claimant's understanding that the information required was related to his leg is not supported by the company doctor's letter to the GP.

35. On 16 November 2016, the claimant attended the meeting, but Mr Neckles did not attend. Ms Phipps advised the claimant that the company doctor had yet to receive a report from his GP and asked him to call his doctor to chase for the report as the letter requesting it had been faxed again just before the claimant went on holiday. The claimant refused saying that he had already done this and that he would take the case to his solicitor. Miss Phipps advised the claimant that she could not chase his GP and that she was unable to return him to work without the company doctor's authority. She again asked him to chase his doctor and he again refused. The meeting was adjourned and rescheduled for 1 pm on 23 November 2016 (as Ms Phipps was aware that the respondent was already seeing the claimant with Mr Neckles with regard to a separate grievance at 2 pm that day).

36. On 23 November 2016, the claimant attended this meeting but Mr Neckles did not and so the meeting did not take place. However, Mr Neckles did arrive for the grievance hearing in the afternoon, which was about the claimant's entitlement to full sick pay during a period of absence following an earlier assault by a customer.

37. On 24 November 2016, Miss Phipps wrote to the claimant at his personal email address advising him that she had spoken to the company doctor's surgery who informed her that he needs to make an appointment to see his GP so that the GP can carry out an assessment and give the responses to the company doctor's letter (R1 214). We also refer to the email from Ms Dodson (the company doctor's secretary) to Miss Phipps as to her conversation with the claimant's GP's surgery (R1 213).

38. Miss Phipps emailed the claimant again on 2 December 2016 indicating that she had telephoned him and left a message and she asked him to contact her by telephone (R1 215). Her evidence is that the claimant telephoned back that same day stating that his GP does not need anything and has not received anything from the company doctor. She told him that she had spoken to the company doctor's secretary who had spoken with the GP's

surgery and confirmed that the letter had been received. She referred to her email informing him to see his GP and he replied that he had done so a week ago. This is referred to in her Progress Sheet notes at R1 181.

39. By January 2017, the respondent's company doctor had still not received anything from the claimant's GP. Miss Phipps wrote to the claimant by letter dated 6 January 2017 (at R1 218) as follows:

"I write regarding your present period of absence which commenced on 23rd November 2016, following your re-instatement on appeal. I have asked you several times to chase up the report from your GP in order for the company doctor to make a decision on your ability to resume normal driving duties. As yet the report has not been received and I do not have a realistic date in order for you to safely return to work. Therefore, your case must now be referred to the General Manager.

As part of the Company's established procedure for dealing with employees with health issues, I have arranged an interview for you with Daniel Corbin, the Garage General Manager, at ***12:30hrs on Thursday 12th January 2017*** *at Mandela Way Garage.*

The meeting is to monitor the progress of your recovery and rehabilitation, with a view to establishing a realistic date on which you might be able to safely return to work. Included in this progress is a prognosis from the Company Doctor, whose report plays an important part in the decision-making process.

The General Manager has a responsibility to individual employees in particular and the Company as a whole and it is the best interests of neither to allow periods of ill health to drag on indefinitely. At your interview, he will review the history of your illness, including professional medical opinion, and listen to your own assessment of the likelihood of a return to work. I am sure you will understand that it is not possible or reasonable to extend sick leave for an indefinite period and he would therefore consider the following options;

- *Extend your sick leave*
- *Send you for a further medical*
- *Review the possibilities of alternative employment*
- *Termination of employment on medical grounds should your return to work be uncertain in the foreseeable future*

It may be possible that you are able to carry out alternative employment. If you are able to carry out alternative employment duties this will be discussed at your meeting on Thursday"
.

40. The meeting took place on 13 January 2017 in front of Mr Daniel Corbin, the General Manager. The claimant attended with Mr Neckles representing him. Ms Phipps was there as notetaker. We were referred to the typed notes of the meeting at R1 220-221.

41. At that meeting Mr Corbin advised that the Company Doctor had requested a report from the claimant's GP some time ago and still had not received a reply. The claimant responded that he had been to his GP and they had told him he did not need an assessment. He also said that he had a medical when he was 45 years old and was told he was fit to drive. Mr Neckles offered to contact the claimant's GP the following Monday in order to move things forward. He also said he was happy to attend the claimant's GP with him, but he needed to have a copy of the questionnaire (by which he meant the Company Doctor's letter to the GP) and the consent form that the claimant had signed. Mr Neckles also stated that it looked as if the reason preventing the claimant from returning to work was something to do with his disability. Mr Corbin assured him and the claimant that this was not the case. A further meeting was scheduled for 19 January 2017.

42. On 17 January 2017, Miss Phipps sent an email to the claimant at both his work and personal email addresses and to Mr Neckles. She explained that she had been told by Coombe Medical that she was not able to be provided with copies of the letter to the GP or the consent form herself, and that therefore the claimant needed to contact Pat Dodson at Coombe Medical direct to request them. She provided the claimant with a telephone number on which to do so (R1 222). The email reminded the claimant of the forthcoming meeting on 19 January 2017 and that the information from his GP would form a vital part of that meeting. Therefore it was in both of their interests that he request the copy documents as a matter of urgency.

43. In oral evidence the claimant initially stated that he had not seen this email, that his access to his email account with the respondent at the time was blocked and he did not look at his personal email account regularly. Subsequently, the claimant said he had telephoned the number shown in Miss Phipps' email and spoken to a woman, but she could not understand what he was saying. The claimant did not seek Mr Neckles' assistance with this matter and Mr Neckles could not recall if he made any enquiries.

44. The claimant and Mr Neckles went to see the claimant's GP, Dr Kadhim, on or about 16 January 2017. Mr Neckles' evidence was that the GP was not helpful and said that he had not received the information from the Company Doctor but if he does he will respond. The GP went on to say that he did not understand why the Company Doctor was seeking information about the claimant's hip and leg when it was nothing to do with the scooter accident. In terms the claimant said the same thing in his evidence.

45. On 18 January 2017 the claimant made a Subject Access Request under the Data Protection Act 1998 to the respondent. He said in oral evidence that this was to get a copy of the Company Doctor's letter and consent form. Quite why he did not specifically ask for those documents (which in any event the respondent did not have at that time) or enlist Mr Neckles' assistance, who was representing him and had been copied into Miss Phipps' email, we do not know.

46. The further meeting took place on 19 January 2017. We do not have a note of the meeting but it is referred to in a letter of that date to the claimant (R1 224A-B). In that letter Mr Corbin states:

> *"At our meeting on 12th January your representative asked for some time to go and speak with your GP to see if he could get the information required sent back to the company doctor.*
>
> *I allowed this and this week your representative and you have seen your GP, he did not understand why the information was relevant as you were employed with a problem relating to your left leg but told both you and your representative that he would respond.*
>
> *Unfortunately, he did not give you a time frame for a response which is disappointing considering you were seeing me today."*

47. This reflects what Mr Corbin said in his evidence.

48. In conclusion Mr Corbin agreed to give the claimant a further seven days to provide the GP report and scheduled a further meeting for 9 am on 26 January 2017 (R1 224B).

49. During the meeting Mr Neckles stated that the claimant had not been offered light duties. Mr Corbin responded that there were none available. With his letter he included a current list of alternative employment. Following this, the claimant identified a position as Garage Administrator that he was interested in applying for and was given guidance on how to set up an online profile in order to do so (R1 231-231N). The claimant said in evidence that did not apply for the position because the application process was closed. The respondent said this was not the case. In oral evidence it became clear that the claimant had attended an aptitude test but had been unsuccessful.

50. The further sickness review meeting did not take place until 6 February 2017. We were referred to the notes of that meeting at R1 232-236. Mr Corbin and Miss Phipps gave evidence that Miss Phipps was at this meeting. The claimant and Mr Neckles gave evidence that she was not. Her attendance is shown on the notes of the meeting although she is not recorded as saying anything. Miss Phipps said in oral evidence that this was not unusual. She was there to provide information if required. The significance of whether she was present or not goes to the issue in dispute as to whether Mr Corbin told the claimant at this meeting that he was dismissed as the respondent claims and which the claimant denies.

51. The nub of the meeting was that the claimant's GP had still not responded to the Company Doctor's letter of 10 October 2016 and Mr Neckles repeated his account of his meeting with the GP in January 2017. He then raised the issue of the claimant's short-leg syndrome and that this was a permanent disability. He asked for the precise reason why the respondent was raising the alleged health issue regarding the claimant's leg disability when it was never an issue. Mr Corbin's response was that the claimant could not be allowed to drive unless he was confirmed fit to work. He stated that the Company Doctor had requested information from the claimant's GP and it has not been received. He said there was no allegation.

52. We would note that at this stage neither the claimant nor the respondent knew what information the GP had been requested to provide because they had not seen the Company Doctor's letter. The claimant only knew what he believed the Company Doctor wanted but this was mistaken and may well have been affected by language issues.

53. Mr Corbin made it clear that the situation would not change until the documentation had been received from the claimant's GP. There is then what is in essence a circular discussion around the above points.

54. The meeting notes end with the following (at R1 236):

"Conclusion:

Medical dismissal

See letter for full summary."

55. In evidence Mr Corbin said that at the end of the meeting he gave his decision to summarily dismiss the claimant with payment in lieu of notice on the terms that were set out in the letter of dismissal dated 8 February 2017 that was posted to the claimant by ordinary mail at R1 237-238). Miss Phipps confirmed this. Mr Corbin said in oral evidence that his usual practice was to make his own notes as to a disciplinary decision and the reasons why, rather than the note taker making these notes, and this is why the notes of the meeting refer to his letter. He stated that the claimant had agreed at the meeting that he would return his uniform and equipment to the respondent by 8 February 2017, as stated in the dismissal letter. He also stated that Mr Neckles indicated that the claimant would be appealing his dismissal, although we note that the letter of dismissal states that the claimant had not indicated whether he wanted to appeal or not (at R1 238).

56. The respondent's policy was that if a uniform and equipment were not returned then deductions would be made from an employee's final salary in respect of them. Mr Corbin believed that the claimant returned these items. This is based on the Equipment Return Form – Leavers at R1 238A which relates to the return of the claimant's uniform and equipment, but is undated. It is also based on the Leavers Notice at R1 239 which shows the claimant's last day of service as 6 February 2017 by virtue of medical discharge and records the items that the claimant returned without deduction or charges. It is further based on the final payment of monies in lieu of notice to the claimant without deduction in respect of the non-return of any of these items. We were referred to the claimant's pay slip dated 10 March 2017 at R1 292. This was paid into the claimant's bank account on 10 March 2017. We were referred to the claimant's bank statement reflecting this at R1 330. The respondent also relies on the P45 which was sent to the claimant dated 8 March 2017 showing a date of leaving as 6 February 2017 (at R1 247).

57. The claimant and Mr Neckles gave evidence that not only was Miss Phipps not present at the meeting on 6 February 2017, but Mr Corbin did not give a decision as to dismissal. Mr Neckles stated that Mr Corbin only said that was he was minded to dismiss but needed to take legal advice first. The claimant agreed with this in terms.

58. The claimant's position is that he did not receive the dismissal until 4 April 2017 when he received the dismissal letter. Whilst he had received his P45 he thought it was an annual statement of payment of income tax and did not appreciate the significance of it. Whilst he had received a payment of nearly £5,000 from the respondent on 10 March 2017 he said that he did not know what this was for and made no enquiries as to what it might represent. He stated that the respondent was always making mistakes as to his pay and then later adjusting them. The claimant also stated that he did not return his uniform or equipment until after he got the letter of dismissal in April 2017. Mr Neckles in essence supported the claimant's evidence that he was unaware of a dismissal until receipt of the letter of dismissal on 4 April 2017.

59. We were provided with a copy of an exchange of emails between the respondent's officers and Mr Neckles which are at R2. Mr Corbin sent an email at 19:21 hours on 6 February 2017 to various people within the respondent, including Sindy Yeo, who arranges appeal hearings and Miss

Phipps (R2 1). In this email he states that he has medically dismissed the claimant, he will be appealing and is yet to return any equipment, but agreed to do so by Wednesday (8 February 2017). Ms Yeo emailed Mr Neckles on 8 February 2017 stating that she understood that the claimant had just been medically dismissed and will be appealing and offered three dates for an appeal hearing to be held (R2 2). Mr Neckles was reminded on 21 February 2017 by email form Ms Yeo that the meeting had been arranged for 23 February 2017. Mr Neckles responded on 22 February 2017 seeking a postponement of the planned date until 27 February 2017 due to unavailability of TU officials to attend and discharge the grounds of appeal and Ms Yeo changed the date of the meeting to 27 February (R2 5). Ultimately, Mr Neckles emailed Ms Yeo asking that the appeal meeting be cancelled until further notice of his dates of availability after he has taken instructions from the claimant (R2 7).

60. The claimant's evidence is that he never appealed. The respondent's position is that Mr Neckles had indicated that an appeal would be forthcoming at the meeting on 6 February 2017. Mr Neckles denied this. We note that at no point in the email correspondence at R2 does Mr Neckles query why an appeal is being arranged and for all intents and purposes is accepting that there is an appeal and this presupposes that a decision had been made at the meeting on 6 February 2017. Mr Neckles states that he is taking instructions from the claimant. One would then have expected, if it was the case that there was no decision and the claimant had not appealed, that Mr Neckles would have responded, the claimant does not know anything about this or why he would be appealing.

61. On 30 March 2017 Mr Neckles sent an email to Mr Corbin headed *"Re: Disciplinary Decision & P45 of Mr Arkadiuez Spychalski"* in which he asked for a copy of the claimant's disciplinary decision and P45 which have not been received (R1 249A). Mr Corbin replied on 1 April 2017 at R1 249C that both documents have been sent to the claimant's home address, that he cannot issue a duplicate P45 but he could issue a statement of earnings to confirm the P45 figures. Mr Neckles sent a further email to Mr Corbin on 2 April 2017 asking for the decision because he has been instructed to prepare an appeal on behalf of the claimant who is currently in Poland (R1 249E). Mr Corbin responded asking Mr Neckles to ask the claimant to provide written authority (R1 249F). Mr Corbin provided the claimant and Mr Neckles with a copy of the dismissal letter by email of 4 April 2017 (R1 249I & J). In his email to Mr Corbin dated 3 April 2017 the claimant stated that he did not get any dismissal letter, just his P45 (R1 249I).

62. The significance of these events is that the claimant submitted a Claim Form (in case number 2301741/2017) to the Tribunal on 1 June 2017 having commenced ACAS Early Conciliation on 30 May 2017 and the ACAS Certificate ending Early Conciliation being issued on 31 May 2017. In as far as the complaints raised within this claim relate to his dismissal, the claimant did not commence Early Conciliation within the original time limit in which to present complaints if dismissal was communicated on 6 February 2017 as the respondent asserts. If the dismissal was not communicated until 4 April 2017 then the claim was submitted to ACAS Early Conciliation within the original time limit, he obtains the benefit of the extension of time and so the claim was present within one month of the ACAS certificate.

63. The claimant has not presented any evidence as to why it was not reasonability practicable to present his complaint of unfair dismissal within the original time limit, his case being that he was unaware of his dismissal until 4 April 2017. Equally he has not presented any evidence on which we could exercise our discretion to extend time in respect of the complaints falling under the Equality Act 2010.

64. We heard submissions from both parties and were provided with copies of authorities which we have taken into consideration in reaching our findings and conclusions.

65. After the hearing, Mr Neckles sent the Tribunal and Mr Bailey a copy of Edwards v Chesterfield Royal Hospital NHS Foundation Trust [2011] UKSC 58 14 December 2011.

Relevant Law

66. Section 13 of the Equality Act 2010:

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

… (3)If the protected characteristic is disability, and B is not a disabled person, A does not discriminate against B only because A treats or would treat disabled persons more favourably than A treats B."

67. Section 15 Equality Act 2010:

"1) A person (A) discriminates against a disabled person (B) if—
(a) A treats B unfavourably because of something arising in consequence of B's disability, and
(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.
(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."

68. Section 26 of the Equality Act 2010:

"(1) A person (A) harasses another (B) 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.

(2) A also harasses B if—
(a) A engages in unwanted conduct of a sexual nature, and
(b) the conduct has the purpose or effect referred to in subsection (1)(b).

(3) A also harasses B if—
(a) A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex,
(b) the conduct has the purpose or effect referred to in subsection (1)(b), and
(c) because of B's rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.

(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."

69. Section 98 (1), (2) and (4) of the Employment Rights Act 1996:

'(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—
(a) the reason (or, if more than one, the principal reason) for the dismissal, and
(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it—
(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,
(b) relates to the conduct of the employee,
(c) is that the employee was redundant, or
(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

(3) In subsection (2)(a)—
(a) "capability", in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and
(b) "qualifications", in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.

(4) [In any other case where] the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—
(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
(b) shall be determined in accordance with equity and the substantial merits of the case.'

70. Section 104 of the Employment Rights Act 1996:

'(1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee—

(a) brought proceedings against the employer to enforce a right of his which is a relevant statutory right, or

(b) alleged that the employer had infringed a right of his which is a relevant statutory right.

(2) It is immaterial for the purposes of subsection (1)—

(a) whether or not the employee has the right, or

(b) whether or not the right has been infringed;

but, for that subsection to apply, the claim to the right and that it has been infringed must be made in good faith.

(3)It is sufficient for subsection (1) to apply that the employee, without specifying the right, made it reasonably clear to the employer what the right claimed to have been infringed was.

(4) The following are relevant statutory rights for the purposes of this section—

(a) any right conferred by this Act for which the remedy for its infringement is by way of a complaint or reference to an [employment tribunal…"

71. Section 13 of the Employment Rights Act 1996:

"(1) An employer shall not make a deduction from wages of a worker employed by him unless—
(a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or
(b) the worker has previously signified in writing his agreement or consent to the making of the deduction.

(2) In this section "relevant provision", in relation to a worker's contract, means a provision of the contract comprised—
(a) in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or
(b) in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.

(3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion…"

Our Conclusions

Time limits

72. Section 111(2) of the Employment Rights Act 1996 states that:

"… [Subject to the following provisions of this section] 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.
[(2A)Section 207A(3) (extension because of mediation in certain European cross-border disputes) [and section 207B (extension of time-limits to facilitate conciliation before institution of proceedings) apply] for the purposes of subsection (2)(a).]"

73. There are two limbs to this formula. First, the employee must show that it was not reasonably practicable to present his/her claim in time. The burden of proving this rests firmly on the employee (Porter v Bandridge Ltd [1978] IRLR 271, CA). Second, if s/he succeeds in doing so, the Tribunal must be satisfied that the time within which the claim was in fact presented was reasonable.

74. Whether it was reasonably practicable for the employee to submit her claim in time is a question of fact for the Tribunal to decide having looked at all the surrounding circumstances and considered and evaluated the employee's reasons.

75. The Court of Appeal in Palmer & Anor v Southend on Sea Council [1984] IRLR 119 considered the meaning of the words 'reasonably practicable' and concluded that this does not mean 'reasonable', which would be too favourable to employers and does not mean 'physically possible', which

would be too favourable to employees, but means something like 'reasonably feasible', ie 'was it reasonably feasible to present the complaint to the [employment] tribunal within the relevant three months?'

76. May LJ in Palmer stated that the factors affecting an employee's ability to present a claim within the relevant time limit are many and various and cannot be exhaustively described, for they will depend on the circumstances of each case. However, he set out a number of considerations from the past authorities which might be investigated ([1984] IRLR at 125). These included the manner of, and reason for, the dismissal; whether the employer's conciliation machinery had been used; the substantial cause of the employee's failure to comply with the time limit; whether there was any physical impediment preventing compliance, such as illness, or a postal strike; whether, and if so when, the employee knew of his rights; whether the employer had misrepresented any relevant matter to the employee; whether the employee had been advised by anyone, and the nature of any advice given; and whether there was any substantial fault on the part of the employee or his adviser which led to the failure to present the complaint in time.

77. When considering whether or not a particular step is reasonably practicable or feasible, it is necessary for the Tribunal to answer this question 'against the background of the surrounding circumstances and the aim to be achieved'. This is what the 'injection of the qualification of reasonableness requires' (Schultz v Esso Petroleum Ltd [1999] IRLR 488, CA)

78. It may not be reasonably practicable to present a claim in time if the employee, at a late stage, discovers some important fact which transforms his/her existing belief that s/he has no cause of action into a belief that s/he does or may have a valid claim.

79. The leading case is Machine Tool Industry Research Association v Simpson [1988] IRLR 212, in which the Court of Appeal set out the principles that apply in such a situation. Purchas LJ, giving judgment, said that the determination of the issue of reasonable practicability in such a situation involves a study of the employee's subjective state of mind. The employee is not, therefore, required to prove the truth of the facts that led him to bring his claim. The employee must establish three things: Firstly, that it was reasonable for him/her not to be aware of the factual basis upon which s/he could bring a claim during the three-month limitation period (it being accepted that it cannot be reasonably practicable to bring a case based on facts of which he is ignorant); secondly, that the knowledge gained has, in the circumstances, been reasonably gained by him/her, and that that knowledge is either crucial, fundamental or important to his/her change of belief from one in which s/he does not believe that s/he has grounds for a claim, to a belief which s/he reasonably and genuinely holds, that s/he has a ground for making a claim; and thirdly, that the acquisition of the knowledge is crucial to the decision to bring the claim in any event. These principles were also summarised by Underhill J in Cambridge and Peterborough Foundation NHS Trust v Crouchman [2009] ICR 1306, EAT, at para 11.

80. Where the employee satisfies the Tribunal that it was not reasonably practicable to present his/her claim in time, the Tribunal must then proceed

to consider whether it was presented within a reasonable time thereafter. The Tribunal must exercise its discretion reasonably with due regard to the circumstances of the delay.

81. Section 123 governs time limits under The Equality Act 2010. It states as follows:

"(1) [Subject to sections 140A and 140B,] Proceedings on a complaint within section 120 may not be brought after the end of—
(a) the period of 3 months starting with the date of the act to which the complaint relates, or
(b) such other period as the employment tribunal thinks just and equitable…

…(3)For the purposes of this section—
(a) conduct extending over a period is to be treated as done at the end of the period;
(b)failure to do something is to be treated as occurring when the person in question decided on it.

(4)In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—
(a) when P does an act inconsistent with doing it, or
(b)if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it."

82. However, an act of discrimination which *"extends over a period"* shall be treated as done at the end of that period under section 123(3) Equality Act 2010. In some situations, discrimination continues over a period of time, sometimes up to the date of leaving employment. If so the time limit in which to present a Claim Form to the Employment Tribunal runs from the end of that period. The common, although technically inaccurate, name for this is 'continuing discrimination'.

83. In Hendricks v Commissioner of Police of the Metropolis [2003] IRLR 96, the Court of Appeal held that a worker need not be restricted to proving a discriminatory policy, rule, regime or practice, if s/he could show that a sequence of individual incidents were evidence of a *"continuing discriminatory state of affairs"*.

84. An Employment Tribunal may allow a claim outside the time limit if it is just and equitable to extend time. This is a wider and therefore more commonly granted discretion than for unfair dismissal claims. The Tribunal must weigh up the reasons for and against extending time and explain its thinking. Tribunals have been directed to consider the checklist contained with section 33 of the Limitation Act 1980, suitably modified, although a Tribunal will not make a mistake as long as it does not omit a significant factor.

85. The factors to take into account under the Limitation Act 1980 (as modified) are these:

85.1 the length of, and reasons for, the Claimant's delay;

85.2 the extent to which the strength of the evidence of either party might be affected by the delay;

85.3 the respondent's conduct after the cause of action arose, including his/her response to requests by the worker for information or documents to ascertain the relevant facts;

85.4 the extent to which the worker acted promptly and reasonably once s/he knew whether or not s/he had a legal case;

85.5 the steps taken by the worker to get expert advice and the nature of the advice s/he received. A mistake by the worker's legal adviser should not be held against the worker and appears to be a valid excuse.

86. The Tribunal should also consider whether the respondent is prejudiced by the lateness of the complaints, ie whether the respondent was already aware of the allegations and so not caught by surprise, and whether any harm is done to the respondent or to the chances of a fair hearing by the element of lateness.

87. Where the delay is because the Claimant first tried to resolve the matter through use of an internal grievance procedure, this is just one factor for the Tribunal to take into account.

88. If the delay was because the Claimant tried to pursue the matter in correspondence before rushing to an Employment Tribunal, this should also be considered.

89. Case law also suggests that a Tribunal ought to take into account the apparent strengths of the case in gauging the degree of prejudice that would be caused to the claimant in finding claims to have been presented out of time.

90. In the case before us, the matter centres on the date on which the dismissal was communicated to the claimant (the effective date of termination for purposes of unfair dismissal and the alleged unlawful acts reliant on dismissal). If the dismissal was communicated on 6 February 2017 as the respondent contends then the complaints of unfair dismissal, both ordinary and automatic, disability discrimination and harassment, in as far as they relate to the dismissal are all out of time. If it was communicated to the claimant on 5 April 2017, as the claimant contends, then those complaints have been presented within the primary time limit as modified by the entering into Early Conciliation.

91. The difficulty we have is that we have not been presented with any evidence on which to consider the exercise of our discretion to allow in a late claim either under the Employment Rights Act 1996 or the Equality Act 2010 should we find that the dismissal was communicated on 6 February 2017. This would also apply to those elements of the discrimination and harassment claim related to earlier events, namely the referral to occupational health made at the meeting on 28 September 2016.

92. We face the difficulty that we have been presented with conflicting testimony by the parties, but we are aided by the documents provided to us. We have to decide the matter on the balance of probability. Having considered the findings set out above, we conclude that it was more probable than not that

the claimant was told of his dismissal and the reasons for it by Mr Corbin at the end of the meeting on 6 February 2017. This is consistent with the documents relating to the return of uniform and equipment and the payment of final salary with no deduction for non-return of such items, the emails that were sent immediately afterwards regarding an appeal and the belated email correspondence from Mr Neckles starting on 30 March 2017, seeking a copy of a disciplinary letter when he was aware from at least 8 February 2017 by virtue of the email from Ms Yeo that the claimant had been medically dismissed notwithstanding his claimed lack of knowledge. We find it difficult to accept that the claimant would not have been put on enquiry as to why he had received a payment of nearly £5,000 in March 2017 notwithstanding his claimed lack of knowledge of dismissal. Whilst we accept that there are language issues it does seem unlikely that he would not understand the significance of the P45 given what it states at the top of that document. We also take into account that in its Response to the first claim form (in case number 2300524/2017), the respondent stated at paragraph 1 of its Grounds of Resistance received by the Tribunal on 21 March 2017 by email, a copy of which was emailed to Mr Neckles on 24 March 2017, that Mr Neckles would have been aware, notwithstanding his claimed position, that the claimant had been dismissed on 6 February 2017 (R1 24 and at box 4 of the Response form at R1 21). We also find that Ms Phipps was present at the meeting at the meeting on 6 February 2017.

93. We have not taken into account the evidence provided to us by Mr Bailey as to events taking place in other Tribunal claims involving Mr Neckles.

94. For the sake of completeness, if we are wrong, and to the extent that it is relevant to the issue of prejudice, we go on to consider the substantive claims.

Discrimination - Burden of Proof

131. Under section 136 of the Equality Act 2010:

> *"…(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.*
>
> *(3) But subsection (2) does not apply if A shows that A did not contravene the provision…"'*

132. This wording whilst slightly different from that used in the previous legislation (section 54A of the Race Relations Act 1976 and section 63A of the Sex Discrimination Act 1975) is identical in terms of its meaning.

133. What it boils down to is the following: where the Claimant proves facts from which the Employment Tribunal could conclude in the absence of an adequate explanation that the Respondent committed an unlawful act of discrimination, the Tribunal must uphold the complaint unless the Respondent proves s/he did not commit that act.

134. With regard to the previous legislation, the Court of Appeal in Igen Ltd and others v Wong; Chamberlin Solicitors and another v Emokpae; Brunel University v Webster [2005] IRLR 258 set out guidance on the stages which

an Employment Tribunal should follow. Although these guidelines were expressed in terms of a sex discrimination case, the same would apply to the other types of discrimination.

135. The Court of Appeal said the Tribunal must go through a two-stage process. At stage 1, the Claimant must prove facts from which the Tribunal could conclude, in the absence of an adequate explanation from the Respondent, that the Respondent had discriminated against the Claimant. In deciding whether the Claimant has proved these facts, the Employment Tribunal can take account of the Respondent's evidence. At stage 2, the Respondent must prove s/he did not commit that discrimination. Although there are two stages, Employment Tribunals generally hear all the evidence in one go, including the Respondent's explanation, before deciding whether the requirements of each stage are satisfied.

136. The full guidelines (as adapted for the Equality Act 2010) are as follows:

    136.1 It is for the Claimant to prove, on the balance of probabilities, facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the Respondent has committed an act of discrimination against the Claimant which is unlawful under the 2010. These are referred to below as 'such facts'.

    136.2 If the Claimant does not prove such facts s/he will fail.

    136.3 It is important to bear in mind in deciding whether the Claimant has proved such facts that it is unusual to find direct evidence of sex discrimination. Few Respondents would be prepared to admit such discrimination, even to themselves. In some cases the discrimination will not be an intention but merely based on the assumption that "s/he would not have fitted in".

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

    136.5 It is important to note the word 'could' in section 136(1). At this stage the Tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a Tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.

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

    136.7 These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw from an evasive or equivocal reply to a questionnaire or any other questions that fall within the Equality Act 2010.

136.8 Likewise, the Tribunal must decide whether any provision of any relevant code of practice is relevant and, if so, take it into account in determining, such facts. This means that inferences may also be drawn from any failure to comply with any relevant code of practice.

136.9 Where the Claimant has proved facts from which conclusions could be drawn that the Respondent has treated the Claimant less favourably on grounds of a protected characteristic or act, then the burden of proof moves to the Respondent.

136.10 It is then for the Respondent to prove that s/he did not commit, or as the case may be, is not to be treated as having committed, that act.

136.11 To discharge that burden it is necessary for the Respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of a protected characteristic or act, since 'no discrimination whatsoever' is compatible with the Burden of Proof Directive 97/80/EC.

136.12 That requires a Tribunal to assess not merely whether the Respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that sex was not a ground for the treatment in question.

136.13 Since the facts necessary to prove an explanation would normally be in the possession of the Respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof. In particular, the Tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice.

137. We have also looked at the events in question as a whole as well as individually so as to form an overview of the situation that the Claimant faced at work during the relevant times.

<u>Discrimination complaints</u>

Disability

138. We accept that the claimant was a disabled person for the purposes of section 6(1) and Schedule 1 of the Equality Act 2010 at the material times and that the respondent was aware of this.

139. The claimant has structural short leg syndrome, a physical impairment which is clearly long-term and has a substantial effect on his ability to carry out day to day activities. We note that substantial is defined as being more than minor and we accept that the claimant walks with a pronounced limp and has some difficulty bending his left leg and bending down to pick objects up with his left hand. This is sufficient to meet the statutory definition taking into account the relevant guidance.

Direct disability discrimination

140. The claimant alleges that he was treated less favourably by reason of his disability by the respondent referring him to the Company Doctor or by dismissing him.

141. We find that the claimant was dismissed under the respondent's long term sickness procedure because he had been certified as absent from work for more than 21 days, referred to the Company Doctor in order to ascertain his fitness to return to work driving a bus and that the Company Doctor had reasonably requested confirmation of certain matters from his GP and that for whatever reason this was never received. The claimant accepted that as a driver he was responsible for driving a vehicle containing a large number of passengers and he accepted that he needed to be fit to do so.

142. We therefore conclude that the claimant was not treated less favourably because of his disability by the respondent referring him to the Company Doctor. He was referred to the Company Doctor because he had been absent from work for more than 21 days and that it was a mandatory requirement under the long term sickness policy for a manager to seek the Company Doctor's opinion in determining whether he was fit to return to work. He was dismissed because his GP did not respond as requested by the company doctor, not because of his disability.

143. Whilst we are concerned that the claimant was criticised for not doing more to obtain this information from his GP we do not see that he has any control over this ultimately and we do feel that the respondent should have looked for alternative ways of intervening directly in order to resolve this impasse. On a common sense basis we find it very sad that the claimant should lose his employment over this. However it does not amount to unlawful discrimination.

Discrimination arising from disability

144. A complaint of discrimination arising from a disability is essentially where a claimant is alleging that he has been treated unfavourably as a result of something arising from his disability. In the issues identified by EJ Andrews, the unfavourable treatment was the referral by the respondent to the Company Doctor or the dismissal. It would appear but was never made clear by or on behalf of the claimant that the something relied upon arose from his short-leg syndrome, most likely his pronounced limp and that this led to the alleged unfavourable treatment. But it was unclear.

145. Mr Bailey suggested if he were arguing the case that it might be the need to verify the claimant's fitness work to work. However, he went on to say that if that were the case then the respondent would have the legitimate aim of ensuring the safety of passengers and the proportionate means by which to achieve this is by referral to occupational health. He submitted that the claimant could not be put back to work without clearance, he had been off work a considerable amount of time and there were attempts to get him back to work but these were unsuccessful.

146. We have already found that he was referred to the Company Doctor and dismissed for reasons unassociated with his disability.

147. In any event, we agree with Mr Bailey's submissions. The respondent is entitled to assess a driver's fitness for work by referring him for an occupational health assessment and dismissing him if he did not provide satisfactory answers or indeed any response to enquiries made by occupational health of his own doctor. This is what happened in the case of the claimant.

148. In addition, the respondent made some attempt to retain the claimant's services in another capacity by providing him with a list of alternative employment and assisting him in setting up an online profile to apply for an identified vacancy. Whilst there is some confusion as to whether or not the claimant was able to apply for the vacancy, he did in fact undergo an aptitude test but unfortunately was unsuccessful.

Harassment

149. The claimant alleges that referring him to the Company Doctor or dismissing him amounted to unwanted conduct related to his disability which had the purpose or effect of violating his dignity or creating an intimidating, degrading or humiliating or offensive environment. This is based on his belief that this action was taken because of his pre-existing impairment of short leg syndrome which did not affect his ability to drive and was simply not relevant. It was apparent in oral evidence that he felt very strongly that the reasons put forward by the respondent were simply untrue and they were setting about finding a way of dismissing him. However, on balance of probability we do not find this to be the case.

150. Whilst the claimant may genuinely believe this, it is not supported by the other circumstances of the case (that is, the findings that we have set out above) and it is not reasonable for the conduct to have had that effect as required by section 26(4) of the Equality Act 2010.

<u>Unfair dismissal</u>

Automatic

151. The claimant claims that he was automatically unfairly dismissed for the assertion of a statutory right. The statutory right is said to be the assertion of the right not to be unfairly dismissed. We were not told in evidence or submissions where this assertion was made but it would appear to have been within an email from the claimant to Mr Corbin dated 25 January 2017 (at R1 228A).

152. This was not something that was put to Mr Corbin, the dismissing officer. In any event, from our findings we conclude that the claimant was not dismissed for making this assertion and there is nothing to support this allegation.

Ordinary

153. We first considered whether the respondent had shown a potentially fair reason for the claimant's dismissal within section 98(1) and (2) ERA 1996. We find that the Respondent has shown that the potentially fair reason is to do with capability

154. We then turned to consider whether this was a sufficient reason for the Claimant's dismissal within section 98(4) ERA 1996. This involves an examination of both the way in which the Respondent dismissed the Claimant (the process followed) and the reason for the dismissal (the substance).

155. We find that the respondent has shown that the potentially fair reason for the claimant's dismissal is capability and not conduct as the claimant alleged. The claimant was required to satisfy the Company Doctor of his fitness to return to work by his GP providing requested information. This was a mandatory requirement under DDP Appendix D specifically at R1 107 "Termination of the employment contract".

156. In addition, we remind ourselves that we must be careful not to substitute our own decision for that of the employer when applying the test of reasonableness.

157. We had regard to the provisions of the ACAS Code of Practice 1: Disciplinary and Grievance Procedures (2015) as well as the respondent's own procedures as set out above.

158. We find nothing procedurally unfair about the dismissal. The respondent postponed meetings, extended time and gave the claimant a number of opportunities to produce the requested information. Mr Corbin was perfectly entitled to investigate the matter and to make a decision. He was hampered by not having sight of the Company Doctor's request but this was not something he was entitled by the Company Doctor to see and the claimant was at liberty to obtain a copy from the Company Doctor and provide it to the respondent.

159. We also had regard to the test contained within BHS v Burchell (1979) IRLR 379, EAT relating to conduct dismissals. This requires us to consider the following:

    159.1 Whether the employer believed that the employee was guilty of misconduct;

    159.2 Whether the employer had in mind reasonable grounds upon which to sustain that belief; and

    159.3 At the stage at which the employer formed that belief on those grounds, whether s/he had carried out as much investigation into the matter as was reasonable in the circumstances.

160. When assessing whether the Burchell test has been met, the Tribunal must ask itself whether what occurred fell within the "band of reasonable responses" of a reasonable employer. This has been held to apply in a conduct case to both the decision to dismiss and to the procedure by which the decision was reached. (Sainsbury's Supermarkets v Hitt [2003] IRLR 23, CA).

161. As to the substantive unfairness or otherwise. The respondent was attempting to determine, following referral to the Company Doctor, whether the claimant was fit to be returned to his job as a driver of a public vehicle. The Company Doctor reasonably required information from the claimant's GP but this was never forthcoming. The respondent gave the claimant a number of opportunities to obtain the information but to no avail. It was therefore not able to determine whether the claimant could return to his driving duties and there were no alternative job opportunities available for the claimant.

162. It reasonably follows in these circumstances that if an employee cannot confirm their ability to return to work after a reasonable period of time, dismissal is one of the ways in which a reasonable employer could deal with the situation and it was contained within the respondent's procedure at Appendix D. As Mr Corbin said, not only had the situation gone on for so long, there was no indication of when it would be resolved, the claimant's doctor having given no date on which he would provide the information requested.

163. We therefore find that the claimant was not unfairly dismissed.

Unlawful deduction from wages

164. In the issues identified by EJ Andrews, the claimant sought outstanding wages that he should have been paid in full from 28 September 2018 until his dismissal. He alleged that his dismissal did not take effect until 5 April 2017, which is a date after the presentation of the claim form.

165. The respondent wanted to know whether the claimant was fit to drive his bus and because he could not satisfy them of this, he was kept on sick pay only.

166. The claimant maintained that he had fit note from his GP which stated that he was fit for work from 20 October 2016 onwards. He was then on annual leave from work and paid full pay during that time. On his return from holiday his wages were reduced back to sick pay only. On this basis his claim can only run from 15 November 2016 until the date on which his Claim Form (2300524/2017) was presented on 12 January 2017 although Mr Neckles submitted that it could run to the date of dismissal, which we have found was on 6 February 2017. The claim can only extend to include unlawful deductions made within 3 months plus the Early Conciliation extension ending on 12 January 2017.

167. In the circumstances we conclude that the claimant was absent from work due to sickness because he had not satisfied the respondent that he was fit to return to his job, and even if we were to assume that the respondent had received the last sick note as the claimant contends that was not sufficient to satisfy the respondent of his fitness given the outstanding request from the Company Doctor who needed to specific confirmation of the claimant's his fitness to work driving a bus. The Company Doctor's role was to ascertain the claimant's ability to drive a bus and not his general state of fitness. As a result the claimant was being paid sick pay only as per the terms and conditions of employment.

168. We therefore find that the claimant was not entitled to payment of full wages as pleaded and so has suffered no authorised deductions from his wages as alleged. This complaint is dismissed.

Employment Judge Tsamados

Date: 7 March 2019