EMPLOYMENT TRIBUNALS

Claimant		Respondent
Mr A Grant	v	AA Developments Limited

Heard at:	North Shields	On: 27 and 28 February 2018, and 29 May – 1 June 2018

Before: Employment Judge O'Dempsey

Non-Legal members: Mr S Wykes and Mr Les Brown

Appearances:

For the Claimant: Dr H Kay, Solicitor
For the Respondent: Mr D Maxwell of Counsel

JUDGMENT AND REASONS

JUDGMENT

The following claims succeed:

1. **Unfair dismissal**
2. **Section 15 Equality Act 2010 (discrimination arising from disability)**
3. **Section 20 and 21 Equality Act 2010 (failure to make reasonable adjustments).**
4. **Section 26 Equality Act 2010 (harassment).**

The following claim fails and is dismissed;

5. **Section 27 Equality Act 2010 (victimisation).**

REASONS

1. This is a claim for disability discrimination, unfair dismissal, victimisation and harassment. The Claimant claims that he was subjected to disability discrimination. In hearing the evidence we had statements from the Claimant and

   Joanna Robertson Team Leader in ISTAY Department

   Amanda Robertson Head of ISTAY Department.

   Deborah Gallagher Head of Employee Relations

Ian Stokoe Director of R's sales and retention contact centre

Christopher Fay: Joanna Robertson's manager (who attended under a witness order having left the Respondent business).

2. The Claimant's evidence came at the end of the Respondent's case by mutual agreement between the parties.

3. Briefly the hearing in February had to be adjourned due to the fact that one of the panel found himself snowed in after the first witness's evidence had been heard. The parties and tribunal considered that it would be better for the case to continue before a full panel. It was not possible to reconvene the panel until late May 2018. The panel considered its decision after a meeting in chambers.

4. We received written submissions from counsel for both parties. Those are not reproduced here, but we have taken account of the arguments for which we are grateful.

The issues in the case

2.1 Unfair dismissal, contrary to Sections 94 and 98 of the Employment Rights Act 1996.

2.2 Discrimination arising from disability, contrary to Section 15 of the Equality Act 2010.

2.3 Failure to make reasonable adjustments, contrary to Sections 20-21 of the Equality Act 2010.

2.4 Harassment, contrary to Section 26 of the Equality Act 2010.

2.5 Victimisation, contrary to Section 27 of the Equality Act 2010.

The issues

3. Employment Judge Johnson identified the issues at a preliminary hearing on 14 November 2017. The issues identified there and which remain were:

Unfair dismissal

4. The claimant was dismissed on or about 9 February 2017. The Respondent contends that the reasons for dismissal related to the number, frequency and length of his absences from work. It stated that it had followed its absence management policy and that the dismissal was fair in all the circumstances.

Disability discrimination

5. The Respondent accepts that the claimant suffers from bile acid malabsorption and obstructed bowel and these amount to an impairment constituting a disability. The Claimant at the PH argued that

(i) the absences due to his disability should have been ignored and/or

(ii) the trigger points for disciplinary action in respect of absences should have been extended to take into account his disability.

5.1. It was clear before us and from the pleadings in the case, that the question of “extension” included their removal.

6. The claimant alleges that certain things were said to him which amount to "harassment" and that he was denied a fair reference because he had commenced Employment Tribunal proceedings.

Section 26 — harassment related to disability

7.1 Did the respondent engage in unwanted conduct by making comments to the claimant (namely by Joanna Robertson) about his diet and toilet habits?

7.2 Was the conducted related to the claimant's protected characteristic of disability?

7.3 Did the conduct have the purpose or effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him?

7.4 The Tribunal took into account the claimant's perception, the other circumstances of the case and whether it was reasonable for the conduct to have that effect.

Section 15 — discrimination arising from disability

8.1 Did the respondent show that it did not know and could not reasonably have been expected to know that the claimant had a disability?

8.2 The something arising in consequence of the claimant's disability advanced by the claimant is

(a) sickness absence and

(b) frequent visits to the bathroom/toilet. The Tribunal had to decide whether those arose in consequence of the claimant's disability.

8.3 The acts of discrimination advanced under section 39 were

(a) subjecting the claimant to the absence management policy,

(b) disciplining him and ultimately

(c) dismissing him.

The Tribunal had to decide whether those amounted to one or more detriments.

8.4 Do we accept that the claimant has proved that the respondent's treatment of him was because of something arising in consequence of his disability?

8.5 Has the respondent shown that its treatment of the claimant was a proportionate means of achieving a legitimate aim? By this we need to identify:

(a) the aim actually pursued;

(b) the means used; and in relation to those means:

(i) were those means an appropriate means to achieve that aim/those aims?

(ii) were those means reasonably necessary to achieve that aim/those aims? In considering that question we needed to consider:

(1) What was the discriminatory impact on the claimant?

(2) Were there alternative means of achieving the aim(s) having a lower discriminatory impact?

Section 27 — victimisation

9.1 Did the claimant carried out a protected act? The claimant relies upon the commencement of Employment Tribunal proceedings. This plainly is a protected act.

9.2 Did the respondent threaten and/or fail to provide the claimant with a fair and reasonable reference because of that protected act?

Reasonable adjustments: section 20 and section 21

10.1 Did the respondent apply the following provision, criteria and/or practice generally, namely its absence management policy? Before us it became apparent from the way in which the issues had been drawn up that the PCP also included the application of the "trigger points" under the personal time policy. This is apparent from the way in which the PH defined the subsequent questions relating to disadvantage and reasonable adjustments on this issue.

10.2 Did the application of the PCP put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled in that he was less likely to be able to comply with the trigger points and attendance targets contained in the absence management policy?

10.3 Did the respondent take such steps as were reasonable to avoid the disadvantage?

The PH noted that although the burden of proof does not lie on the claimant, he asserted that it would be reasonable

(a) to ignore absences caused by his disability and/or
(b) to extend the relevant trigger points in the absence management policy to take into account such absences.

Before us it became apparent that the parties also had (rightly) addressed a further matter which was whether it was reasonable to remove the trigger points relating to use of personal time. It seems to us that this was in any event implicit in the pleaded cases.

10.4 Did the respondent not know, or could the respondent not be reasonably expected to know that the claimant had a disability or was likely to be placed at the disadvantage set out above?

11. Based on these matters the parties produced for us a list of issues which we deal with below in our conclusions.

Findings of fact

12. The Claimant was employed as a retention advisor by the Respondent from 11 June 2011 until 9 February 2017. On that latter date he was dismissed for ill health capability/unacceptable attendance. His role entailed servicing, renewing and retaining customers who might want to amend their policies. He worked in a call centre environment. He has two physical impairments relied upon and found to be disabilities: bile acid malabsorption syndrome and obstructed bowel. These are chronic conditions. Bile acid malabsorption

syndrome results in increased frequency and feelings of bowel urgency. The combination of bile acid malabsorption syndrome with obstructed bowel means that the Claimant may need to use the toilet many times a day.

13. We accept the Claimant's account of the severity of his condition and its impact on him, which was not challenged before us, and which was to the effect that he constantly feels urgency and unrelieved feelings of needing to evacuate, without relief (due to the obstructed bowel). The combination of the two conditions is a serious life impacting combination.

14. We accept the Claimant's evidence that his anxiety and depression is generally because of his disability and the very large effect it can have on his day to day life. We also accept that, when allowed to manage his symptoms, he was able to stave off depression or anxiety. He explained that he suffers this anxiety about the impact his conditions have on his day to day routine and lifestyle.

15. We accept the evidence the Claimant gave, which was supported by what medical and occupational health advice was before the tribunal, that increases in stress would result in an increase in the debilitating effects of the Claimant's condition.

16. We accept that during the period of the events with which we are concerned the Claimant felt that he was subjected to micromanagement over his "personal time" ("PT", time away from his work function), so that his health was constantly in his mind. We accept that this worsened his physical symptoms due to the stress and anxiety. We are not sure that we accept his description of what happened as "micro-management" but we do feel that it was at times excessive and was, for the most part, avoidable and unnecessary. The Claimant described to us that he experienced feelings of powerlessness and hopelessness as he was doing everything he could to manage his symptoms.

17. On the Claimant's unchallenged evidence, his first line manager, Gavin Tansey pointed out on occasion that his PT was often over the desired 3 percent target. However it appears that up until the events we are about to recount the Claimant often posted good statistics and received good bonuses. The claimant was not challenged over the fact that he had begun coaching new staff and passing on his skills.

18. The personal time policy was introduced in 2014 and operates instead of a system of scheduled breaks. PT can be used to go to the toilet, make personal phone calls or make and consume a drink. The amount granted varies with the shift worked. The PT the Claimant had was increased to 30 minutes at some point before he joined Joanna Robertson's team in 2015. She accepted this in cross examination.

19. The reason for this increase was that the claimant was struggling to keep to his unmodified PT of 20 minutes.

20. From a point during that year, probably around October, the PT limit was increased to 40 minutes for the Claimant. This was after the OH Report was received. We find that this was a period of high volume in any event for all of the staff, whose limit was generally raised to 30 minutes. The purpose of this general increase was to reduce staff stress levels. On that point we note that whereas the Claimant agreed that he would **only** use his PT for toiletting, all the other members of staff had greater liberty for the use they could make of this PT. The Claimant was also at a disadvantage compared to them in that they could take more frequent shorter breaks. We note that this restriction on the use he could make of his personal time was bound to have an effect on the stress of the Claimant in what was in any event a stressful environment.

21. When the Claimant moved into Joanna Robertson's team he had to go through the process of seeking to justify his higher than average absence time and PT. The Claimant did not put to Joanna Robertson that she would make frequent comments as he passed her desk or commenting on whether he had taken more than 10 minutes in the toilet. We find that these events probably did not happen. Similarly the issue of whether she questioned the Claimant about whether he had gone to the canteen during his breaks was not put to her, and we find that she did not do this.

22. However we do accept that she was vigilant regarding his use of personal time and we accept that her focus on his toilet use began to have a serious impact on his condition. We note that Joanna Robertson said that as soon as the Claimant joined the department and she began to manage him, she noted that he had a high frequency of exceeding his PT limit. We find that if he was away from his station for more than a few minutes she would send any available male colleague from his team (we think this was 2-3 of them) to check up on him. This did, we find, increase the number of people who knew about his condition. We accept that this must have caused him embarrassment and humiliation.

23. We note that this is the way he felt about this behaviour but we accept that the motive in Joanna Robertson's mind was that she had a duty of care to check on the Claimant at these times, albeit that the duty of care did not justify the extent of the interference with the Claimant's personal time.

24. We accept that the Claimant felt more pressurised because of the behaviour of checking up on him in this way and the effect of that anxiety was he was spending increased time in the toilet. JRespondent was aware of the Claimant's medical condition and the problems he had going to the toilet, but her awareness was not particularly high. She was aware that he had a condition and that he needed to go to the toilet more frequently than other people but she was not aware of his condition in any greater detail. The point that the Claimant's anxiety would increase his personal time was not challenged by Respondent.

25. Joanna Robertson frequently made comments about what the Claimant ate. In her evidence she pointed out she had a focus on the amount of time the Claimant was taking from the start of managing him. Second she had a poor understanding of his condition. Third she said that she would often talk to people about what they were eating. This was a form of relationship building and of icebreaking. Within that context we think it is likely that she did make comments such as "should you really be eating that with your stomach?". However we also find that she made comments to the effect of "you'd better not use loads of personal after that" (referring to what the Claimant was then eating). She was concerned about the amount of time the Claimant was taking as PT. We accept the Claimant's evidence about these types of comment in the context of the claimant getting chip-shop style curry and chips. Joanna Robertson was aware of the various diets the Claimant had undergone to rule out any food intolerance/sensitivity. We also note that at the meeting of 7 January 2016 JR had noted that it was the Claimants responsibility to look after his own well-being as well as needing to take reasonable steps to ensure that he was fit. From this, also, we deduce that JR had a level of concern which was focussed on the Claimant's behaviour, so we think it is likely that she made comments concerning his dietary behaviour in this context.

26. The Claimant had two periods of absence for stress and depression. The first of these was 10 May to 12 August 2012 and is irrelevant for any of the purposes of this hearing. It falls outside the Respondent's reference period in relation to the question of dismissal for absences over a rolling 2 year period. The second period was 24 January to 30 May 2015. The evidence in relation to this period was not clear. Doing the best we can to determine what was likely to have occurred, we find that up to the period of the meeting with Amanda Robertson on 7 April 2016 (p89), there had been no active suggestion that this period of anxiety and depression was linked to the impairment. However we note that when there was a welfare visit (p84) on 1 March 2016, Rachel Scollins noted that Claimant was absent for anxiety and depression, but that there were other medical problems and disabilities (he was undergoing medical investigation for BAM and bowel obstruction). She also noted that he was awaiting an appointment from the RVI to see a specialist colorectal nurse.

27. At the meeting on 7 April 2016, Amanda Robertson put to Claimant that he had had two periods of long term sickness on file, and that neither related to the medical conditions that had previously been discussed. First we note that the Respondent, at this stage, appears to have been looking at the period of long term sickness absence in 2012. Second the Claimant said that the periods of LTSA were linked to his long term physical impairments. He went on to say that as at that time, April 2016, he was "feeling in a good place" but pointed out to Respondent that he was in a "catch 22" situation because as he becomes stressed anxious or worried, that exacerbated his medical condition.

28. We note that from June 2011 until August 2012, with exception of a period of absence for stress and depression arising out of a bereavement, the Claimant had been absent from work for 9 days. From August 2012 to April

2013, he was absent for 5 days. Finally from June 2013 to June 2014 he was absent for 4 days.

29. The Claimant was given an improvement notice for absence on 28 September 2015 (p72-77), due to being absent for 4 times in the previous 12 months. We accept that the absences were due to BAMS. We also accept that the absence from 24 January to 30 May 2015 was probably linked to his impairment albeit that it was an absence for anxiety and depression. The basis for this is that on 17th May 2016 Rachel Scollins made a request for a medical report from Dr Lambie (Claimant's GP). That request stated that the Claimant in the last 12 months (to 17 May 2015) had had in excess of 140 days absence over 6 periods for "natures of depression/anxiety and gastric conditions". The report made clear that the level of attendance was a matter of concern as was his adherence to scheduled shifts. The request asked the GP to give a clinical opinion on various matters including the C"s state of health, his medical condition and its impact on him.

30. We note that at (255b), the amounts of time and reasons for absence were summarised during that period as 87 days stress/depression (January to May 2015), three days absence for a gastric condition (September 2015), 10 days for a gastric condition/stress anxiety/depression, and finally 1 December to 14 December, 9 days for cold and flu.

31. The GP on15 July 2016 responded to those questions and considered that period of time. The GP said

> "it seems however that the main reason he has been signed off sick from the practice is with anxiety and depression, often as a consequence of the bile acid malabsorption".

32. Doing the best we can on the basis of this and the fit notes and all the evidence before us on this point, we have concluded that it was likely that the GP was suggesting, as the Claimant does, that his period stress and depression absence in 2015 was linked to his impairment, as this was the tenor of the GP's analysis of the reasons for the absence. We also note that on 24 January 2017 the OH consultation report (p204) records the fact that the Claimant was telling OH that the attention placed on the Claimant's personal time was causing him stress:

> "he informed me that having to constantly focus on his condition has brought home the impact it is having on his health which has caused his low mood. He reports that he was referred by the GP to talking sessions which has improved his mood".

The likely cause of the earlier stress depression absence was what the Claimant says it was in paragraph 14 of his witness statement. We note also that the Claimant was not challenged on this passage, but make this finding independently of that observation.

33. We note that Amanda Robertson had a number of informal meetings with each of the customer advisers who had a high level of absence to find out what the Respondent could do. This was a departure from the Respondent's sickness absence policy. There is nothing to suggest that her meeting with the Claimant was set up to establish what reasonable adjustments the Respondent could make for a person who had been recognised as a disabled person. The meeting raised the question of whether there was anything that Respondent could do to help the Claimant.

34. The Claimant clearly thought that what he was being asked was whether anything could be done to help his condition. We do not regard the question "is there anything we can do" (in the context in which it was asked) as being a clear indication that Respondent was offering reasonable adjustments at that point. The Claimant (according to the minute on p 89) did not construe it in that way. He had been talking about the details of the subjective experience of his impairment. When he was asked the question he responded in relation to the nature of his impairment, saying that it was not influenced by diet or medication (it was something that one's body does regardless).

35. On the one hand this was not supposed to be a formal meeting, forming any recognisable part of a procedure with checks and balances in it, which would assist an employee to challenge any further progression within it; nor was it a meeting aimed at finding out what reasonable adjustments could be given to a person with a disability. At the end of the meeting (p 91) the upshot was not a reasonable adjustment being made, but Claimant being told that he could make a flexible working request.

36. There was cross examination on this point. Amanda Robertson's evidence was that this was simply the way in which one made a request in relation to hours and working pattern. We also note that on p 90 Amanda Robertson

> "affirmed that the business supported phased returns to work and AG understands that this comes out of his annual leave".

The tribunal comments that this appears to be a very unusual way of offering "reasonable adjustments", and the tribunal does not accept that this was a legitimate way of providing a reasonable adjustment. We do not understand why the Claimant was being forced to use his annual leave in this way. On the evidence it seems to us that the reason is that Amanda Robertson did not have a proper understanding of what reasonable adjustments are. She focused, properly, on a very broad idea of what the business could do to support the Claimant. However she does not appear to have recognised that the Claimant had rights in this area. On p 90 when the Claimant explained that in order to prevent absence from work he had been requesting annual leave, and so using up his own annual leave to prevent absence being ill health absence, Amanda Robertson simply remarked that in those circumstances the Claimant still was not present at work if annual leave is granted.

37. At the end of the meeting although Amanda Robertson said she was going to liaise with HR and they would draw up a formal monthly agreement

concerning the various matters of support, this did not happen. It appears to have been agreed that Claimant's shifts would not start before 9.30 am we note that there was a flexible working request made which was granted. At the end of the meeting (p91) AR had said she would reconvene to cover the formal monthly agreement that had been set up. Instead what appears to have happened is that there was an invitation to a review meeting in October 2016 to review the progress since April.

38. The meeting which took place in October 2016 was not a meeting to review progress since April 2016 or to deal with any formal agreement that had been reached about changes to the working arrangements. On 12 October 2016 Claimant was required to attend another meeting 'to discuss your levels of absence'. The only evidence we have of this is the 17th October (p145) letter from Chris Fay inviting the Claimant to a rearranged meeting on 19 October to discuss the Claimant's absence which "continues to be at a level that I am concerned about".

39. The letter of 5 October 2016 which "outlines the reasons for this meeting and the points to discuss" was not included in the bundle. However we note that Mr Fay wanted "to discuss your absence and personal breaks to see what we can do, if anything, to help you improve it". Once again, it appears to us that this invitation does not fall within either a formal procedure or any type of procedure aimed at gleaning reasonable adjustments that might be appropriate for the claimant's continued working.

40. P 258 summarises the absences from April to October. These appear to be mainly if not all relating to the Claimant's underlying medical condition.

41. Having sent the letter inviting the Claimant to a meeting, Mr Fay's witness statement describes this meeting as a "medical consultation meeting". Given that this is a term of art under the Respondent's long terms sickness absence procedure, it is surprising that the Claimant was not told that this was the procedure that was being applied to him (if the Respondent in fact believed that this was nature of the meeting at the time of these events). The minutes of the meeting themselves (p147) do not appear to refer to the meeting in those terms. It was aimed at discussing "recent OCH report dated 5 September 2016 and medical report dated 15 July 2016, with a view to identifying areas of improvements".

42. The minutes of the meeting state that Mr Fay said that the meeting was not a disciplinary meeting but was a "meeting to discuss your absence and attendance", "as this has now become a point of concern. We cannot sustain this level of absence/personal adherence and today is to discuss generally how improvements can be made".

43. We have already noted the contents (p 121) of the GP report of 15 July. This also dealt with the nature of the underlying impairment. The other

document was 5 September 2016 OH Report (134). This recounts the ongoing history of the underlying impairment. Specifically it notes that the Claimant has a long term condition which is responsive to changes in mood.

44. Under the heading "Management Advice" the OH Service gave very clear guidance:

"I believe Adam would be able to provide effective service in the future. Future absence of his condition, cannot be predicted. However as his is a long term condition, please be aware that his absence is likely to be above that of another colleague without an underlying condition.

I would suggest since his condition escalates with stress he is likely to benefit from freedom to take a personal break when needed. I would suggest to restrict breaks by allowing limited time scales may exacerbate stress which is negative and may make the situation worse. Management may wish to amend the restriction to current personal breaks."

45. We note also that the OH service considered that the Claimant was likely to be considered to have a disability for the purposes of disability discrimination legislation. So the OH Report identified 2 adjustments that should have been made on a reasonable reading of that report:

(A) Claimant was liable to benefit from freedom to take a personal break when needed;

(B) restricting breaks by allowing a limited time scale for breaks might exacerbate stress which is negative and might make the situation worse.

46. On page 149 Mr Fay states that the OH Report and the Medical report confirm the diagnosis of BAMS but also state that anxiety and depression "could be causing this". We think that this must be a misprint. In fact Mr Fay was accepting what was written in the report, namely that anxiety and depression could be causing an exacerbation of the underlying medical condition.

47. However Mr Fay, explored with the Claimant whether anything could be done to identify or eliminate the triggers. The Claimant said that he had been worse recently and was asked why. He said

> "it is triggered by stress and the referral to OH and requesting reports from my GP has caused me more stress".

Mr Fay then stated that he understood that the Reports do state that stress is a trigger.

48. On p 151 there appears to have been a discussion of the relationship of stress and personal time. The Claimant's union representative appears to have expressed the opinion that she could not understand why the Claimant felt

stress when extra personal time had been allowed. Apart from indicating no understanding of what Claimant had been clearly saying, about his stress levels, this led to the Claimant telling both his union representative and the Respondent:

> "because my manager has to check my personal time but I am keeping within time agreed, also my manager will send someone to toilets to check if I am ok if I have been in there a long time. I find this stressful".

49. The union representative expressed the view that the manager would be expected to do this and also to make sure that the Claimant was ok. The Claimant then said "yes, but I find it causes me more stress keeping to targets". We take this to be a reference to the targets for personal time.

50. We find that Mr Fay was aware that there was a relationship between the way in which the manager was monitoring the Claimant's personal time and the level of stress that the Claimant was experiencing. We also accept the Claimant's evidence that he was making clear that the stress was causing him to have more absences.

51. We find that Mr Fay either was aware that this was the case, or certainly should have been aware. Mr Fay said that there was a problem about lateness for the Claimant and that the business had been flexible with the Claimant's shifts and personal time, with no deductions being made from his pay. The Claimant explained that the 9.30 starts were an improvement on 8 am starts, but that his routine could be disrupted by his condition and he could be in the toilet for up to 40 minutes. Mr Fay asked whose control that was in. Claimant explained that if he was ready to leave the house and he needed the toilet he was obliged to go. It was in that context that Mr Fay explored the potential adjustment of reducing hours for the Claimant if being at work made his condition worse. However the Claimant pointed out that the hours were not the problem. Working moveable shifts was not ideal for him he said. Mr Fay did say that as a trial the Respondent could offer set shifts but explained that this might impact on the Claimant's flexibility allowance which would be stopped. Claimant said that he could not afford to lose his flexibility allowance. Claimant explained that he was already struggling with money and when cross examined on this point explained that the effect of this adjustment might have been to take him to below minimum wage rates.

52. On page 153 the minutes say that Mr Fay expressed concern at the very high volume of lates and personal time that the Claimant was using. Mr Fay said that the business was being very flexible with the Claimant's shifts, "personal time etc and was making no deduction on" the Claimant's pay. We note that Mr Fay never appears to have considered or taken seriously the idea of removing the time restriction on personal time for the Claimant. This was clearly a recommendation of the OH Report and there does not appear to have been any explanation of why this was not considered.

53. Also during that meeting, Mr Fay appears to have suggested that one of the things that the Respondent could do was to increase all targets by 50%. It appears to us that this is more evidence of the Respondent simply not considering the recommendation made by the OH report for a clear and specific

adjustments that could be made. The increases were 5 periods of absence, no more than 15 days and finally personal time increased from 20 to 30 minutes.

54. It is somewhat surprising that Mr Fay does not appear to have been aware that the Claimant already had been granted 30 minutes and indeed that level had gone up to 40 minutes so that in fact what Mr Fay was proposing was a reduction of the time available. Indeed the Claimant had to explain during the meeting that 30 minutes personal time would give him more stress and anxiety because he was on a time limit already and had 40 minutes agreed.

55. The meeting clearly was about the amount of personal time that was being used, as well as reflecting on the amount of absence Claimant had. Mr Fay stated in that context:

> "currently you have a high amount in personal. This cannot be sustained. Therefore as a business we are doing all we can making reasonable adjustments. If you need to go beyond this, we are happy to support but this time will impact your annual leave balance and be deducted from there".

56. It is in that context that the Claimant says that having "these targets" will make him worse in that he needs more personal time. He repeats that having "these targets" will only make him more anxious. We are clear that what he was talking about are the targets on his personal time. At no point was he saying that requirements for attendance were making him anxious. However no one at the Respondent could have been in any doubt that he was talking about the effect of targets on his personal time.

57. The meeting also considered the question of home working. Mr Fay appears to have been of the view that the claimant needed to demonstrate that he could make the required improvements and sustain them before home working could be looked at as a possibility. This appears to be an odd approach to the question of making a reasonable adjustment in the context of a proposal for home working as a reasonable adjustment which might improve personal time and attendance. It amounts to saying that the person disadvantaged by the provision criterion or practice must comply with that before adjustments could be considered to that same provision criterion or practice.

58. The question of home working was something that the meeting said would be revisited, but in the event there appear to have been no vacancies for home working. On 28th October Mr Fay wrote to the Claimant something that was to be an outcome letter from that meeting. It does not refer to the meeting as a medical consultation meeting. It appears to suggest that the meeting was aimed at getting a better understanding of the Claimants conditions. That letter sets out what was supposed to be the reasonable adjustments that the Respondent was at that time offering.

59. The Respondent says that it was currently offering unlimited time when needed; that shifts would start no earlier than 9:30; that short notice on annual leave requests would be allowed, and that following the step one absence meeting in January 2016 "taken no further formal action despite no improvements being made in your attendance".

60. We note that short notice on annual leave requests was not a reasonable adjustment for the Claimant as it was available to all staff to make such requests at short notice. Second, he was using annual leave in order to take

absence relating to his impairment. So that he was in fact being disadvantaged in comparison with other members of staff in having to use his annual leave in this way.

61. Those were supposed to be the adjustments already taken. The last of them (taking no further formal action), does not appear to have been communicated to the Claimant as a reasonable adjustment. We return to the impact of failing to notify Claimant of what its status was, below.

62. The letter goes on to explain the adjustments being offered for the future:

- To extend policy and adjust targets on triggers; as a trial period all targets would be increased in the following ways:

o "five period of absence

o No more than 15 days absence

o No more than 30 minutes personal time per day"

63. Mr Fay could not have regarded the last of those as a reasonable adjustment given what he had already been told by the Claimant, namely that he was already on 40 minutes. It was a reduction in the amount of the Claimant's personal time.

64. The only effect this could possibly have had was to place more stress on the Claimant by giving him a shorter period of time within which to take his personal times.

65. At this point we think it is important to note that in cross examination, Mr Fay was clear that these targets had been given to him **before** the meeting with the Claimant on 19 October 2016, by Amanda Robertson. We accept that evidence. We therefore consider that the meeting itself was serving no useful purpose because what the Claimant was saying during that meeting appears to have had no effect at all on the adjustments that were going to be offered to him and Mr Fay appears to have had (or understood himself to have) no discretion in the matter. Those adjustments had been given it appears to Mr Fay and he simply transmitted them on to the Claimant.

66. The letter also states that if the adjustments could not be sustained "then our next meeting will be to discuss your capability which may lead to formal action under our absence policy". The significance of that in the context of having reduced the amount of personal time being offered to the Claimant must inevitably to have caused Claimant more stress over the monitoring of his personal time, which was already stressful for him.

67. The upshot of the meeting appears to have been that an improvement notice was placed on Claimant's file on 24 October 2016 (p156). The line manager actions include that Claimant's personal time would be increased from 20 to 30 minutes. Again this appears to be a very confusing given that Claimant already had more time than that. We were offered no explanation as to how it was that a figure of 20 minutes applied to Claimant at this point.

68. The summary of the meeting on p 156-7 notes that the Claimant said that he tried to make the improvements including those to his PT which he agreed was his responsibility to adhere to. He said that sometimes due to his medical condition non adherence could not be helped. The summary went on "Adam is aware that if targets above are not met, further action may take place". It is

clear to us that it was not simply the level of absence that was a matter of concern. The Respondent was clearly suggesting that if the personal time targets were not met formal action might follow.

69. There was a welfare visit meeting with the Claimant at work (p 178) on 12 December 2016. At the time his reason for absence was low mood and anxiety as well as the underlying impairment. This notes that a phased return to work was recommended.

70. As it turns out the phased return to work appears to have been a one week phased return. However even at this stage the Claimant was supposed to work 4 hours per day for three days in one week "with annual leave being used and then it will be unpaid". We find it surprising that the Respondent thought that this would be an appropriate way to approach reasonable adjustment, particularly because it effectively made the Claimant pay for the reasonable adjustments that he was accorded.

71. As a result of a non-relevant condition, the Claimant needed a specialised chair and we note that the Respondent had agreed for an assessment to be carried out and sought a quote from Posturite for a suitable chair (see p166-8). However in this meeting, apparently, it was said that an assessment had been carried out and it would be reviewed on Claimant's return to work.

72. On 20 December 2016 (185). The C was invited to a meeting on 4 January 2017 by Mr Fay to discuss his absence "which has not improved sufficiently since the last formal meeting held to discuss on 19 October 2016". The tribunal remarks that it is surprising that 19th October had now been transformed into a formal meeting when it had not been indicated prior to that meeting that it was to be a formal meeting. The letter then goes on to state "we require a reasonable attendance at work, and unfortunately I remain concerned at your absence and you capability to fulfil your role as customer adviser."

73. The Claimant was invited to come ready to discuss this and "anything you think is relevant to your continuing absence and your attendance". The letter rightly notes that they had been discussing absence for some time, but suggests that Claimant had received previous warnings. There had been one previous step 1 meeting, and outcome. We cannot therefore find that there were previous warnings, and indeed the Respondent appeared to have been suggesting that one of the adjustments it had been making was to take the Claimant out of that system.

74. The matters for discussion at the meeting were supposed to be, first, the targets set at the previous meetings and the Claimant's sickness record. The targets set at the previous meetings included targets for personal time. Second the reason for the Claimant's absences; third, discussion of all support provided and "reasonable adjustments explored and made"; fourth why improvement had not been made or was not sufficient; fifth whether the organisation could continue to sustain the Claimant's absence.

75. There was a discussion of various matters that had been changed to which reference has already been made. It is quite clear to the ET from the minutes of that meeting (for example p 189) that the question of PT was still central to the Respondents concerns. Mr Fay, asked whether it was feasible for the Respondent as a business to sustain the Claimant's level of absence and "even when you are here your adherence with your personal usage is excessive, at

times over one hour". We accept the Claimants evidence on what follows: the Claimant is, in the document, recorded as having made "no comment". However we accept that on the basis of correct or incorrect advice, he was "keeping his head down" during these meetings. On this occasion we think his non-response at this point reflects the speed with which Mr Fay went on to the next point.

76. Even at this point Mr Fay seems to have failed to have understood what adjustments were in place. In particular the Respondent's position appears to have remained that the Claimant could have no more than 30 minutes personal time per day. This was a reduction on what he had previously.

77. On p189 Mr Fay said that the business had provided flexibility around the Claimant's attendance by saying that there were no restrictions on the Claimant's personal time. This was plainly not the case.

78. Mr Fay during the meeting asked whether the Claimant felt he had the right level of support. The Claimant said

"I think the GP notes have been ignored and feel the aim or target has put a stopwatch over my head. The personal time makes me nervous."

79. It is difficult to know how the Claimant could have made this point any more clearly. Mr Fay said that "we have never said you cannot exceed it. All we have said is that any time over 30 minutes will impact your own personal balance whether this is annualised hours or annual leave. We simply cannot continue to support your daily personal time." To which Claimant responded that this was a catch 22. It was the target that was causing him to take longer on these breaks.

80. The upshot of that meeting was that on 6 January 2017 Amanda Robertson wrote to the Claimant as a result of his meeting with Mr Fay once again saying that 30 minutes personal time a day was an increase of 50% more than the standard allocation at that time, and that it represented a new target or trigger for the Claimant. At no point does Amanda Robertson or Mr Fay explain why the OH report recommendation concerning the removal of the stressful monitoring was not being implemented.

81. As a result of the Respondent noting that there was further absence from work and that there had been 37 days absence from work inclusive of one period of 31 days, and three periods of lateness out of 15 scheduled shifts, Claimant was told that the Respondent had "no option but to invite you to (underlined) a medical consultation meeting". The purpose of the meeting was to enable Amanda Robertson to consult with the Claimant on his current medical condition and his future with the Respondent. The letter of invitation accordingly does not put the Claimant on notice that one of the outcomes of the medical consultation meeting could be that his employment might be terminated. In particular, in the context of this case, we do not believe that the reference to the Claimant's future with the AA could reasonably have been construed as an indication that his employment was at risk. We take the view that if this is what a reasonable employer of this size and with these resources intends, it would state it explicitly. This is even more the case if the employer has purported to take the employee out of the ordinary capability management procedure and is now proposing to put the employee back into that system.

82. The minutes of the meeting of 16 January 2017 (200 and following) show that the purpose of the meeting was to consult with the Claimant about his

medical condition and his future with the AA. At the start of the meeting it was not made clear that his employment was at risk. Amanda Robertson recorded that no improvements in attendance had been seen. In response to this (200) Claimant explained that stress would make things worse for him. Amanda Robertson appears to accept that stress could increase when the situation was being discussed. This however does not indicate that she had read the OH report which made it clear that stress in general would have an effect on the Claimant. She does not appear to have registered that the OH report was saying that it would be beneficial to remove monitoring on personal time.

83. The Claimant asked for any absence that he took after a meeting to be set aside and not included in his absences. He said that it was likely there would be more absences otherwise, as the meetings "stressed him out". Amanda Robertson said in the meeting that she did not consider that this request was a reasonable one. However her evidence to the tribunal was that it was reasonable for the Claimant to ask for this. She did not think however that it was reasonable from the business's point of view.

84. What is clear from what the Claimant was saying, but more importantly from the OH Report, was that there was a link between his condition and the amount of stress he was under. The Claimant on p 200 said

> "the simple fact is that there will be less stress if not so much focus is put on my personal. It won't ever be perfect because of the condition.".

85. Amanda Robertson at the meeting stated: "it is not reasonable to think that you can just take an unlimited amount of time off, or in personal as unreliability impacts on our resourcing and ultimately on our customers". To this Claimant responded. "I think you are over estimating my impact on the department". She replied: "Not at all everyone impacts on our forecasting and on our ability to get to our customers".

86. One of the difficulties for the tribunal in this case has been that this impact has never, in any way, been quantified by the Respondent and no indication of even a vague level of impact has been given, apart from a submission made at the end of the proceedings by Counsel. This was that as the Claimant was taking substantial number of days off there therefore must have been an impact.

87. Amanda Robertson (bottom 201) poses what had become the central question for the Respondent. It is noticeable that it is not simply the question of absences. She said:

> "the meeting is not to dispute whether your medical condition is legitimate or whether your absences are genuine. But we have to now ask the question are you capable of being able to hold down your role in this business. It has to improve. I can't be any clearer than that. I feel we've been more than reasonable and flexible with our support and my only proposal now accepting that your condition is unlikely to change is that we get a new OH consultation to see whether they can offer any more advice that will help us support you in to an improved attendance and reliability".

88. The Claimant responded by pointing out that OH were horrified by his personal time being recorded and discussed. It may be that this reflects the remarks made by OH as to the relationship of stress to his condition.

89. In any event it is something that should have highlighted to the Respondent the significance of the relationship between stress, the Claimant's condition, and the amount of absence that the Claimant was having to take.

90. The Claimant explained that his absence level would improve when he was having a good patch and not being focused on, as when he had been in other teams, he explained that his time had never been the best and that he would have a few minutes late if he had to sort himself out before coming in, he also explained "more meetings will mean more absence/personal". He was consistently drawing the link between his absence and the amount of stress he was being put under as a result of the scrutiny to which he was being subjected.

91. In response to this Amanda Robertson said "I won't apologise for managing absence. We need to be fair to all. You cannot expect us not to meet with you to discuss concerns as with anyone else. I feel in previous meetings we have been patient and fair but nothing is working". Of course this had never been Claimant's position and he had pointed this out on p203. He said he understood that the Respondent had to have triggers but "knowing personal is being logged daily and being checked on in the toilet if I have been 15 minutes adds to anxiety."

92. When the question of the duty of care was raised the Claimant said that he would try to forewarn JRespondent when having a bad day, but he said that he felt guilty that his adherence impacts on JRespondent's statistics, which did not help. Once again he was pointing to the fact that he was feeling put under stress by the kind of scrutiny that was being placed on his personal time.

93. At the meeting it was agreed that there would be a change to Claimant's start time. He would start at 10 am and work to 6 pm. Time would be given for that to bed in. This may already have been in place at that meeting.

94. The further OH Report of 24 January 2017 (204) appears to be based again on an oral reference. The Tribunal finds this a slightly surprising way of conducting references for OH, particularly in an organisation of this size with the HR resource available to it.

95. The OH consultation report thought it was dealing with a referral for long term sickness absence. It records that management made adjustments to personal time "extending it to 30 minutes" and that Claimant's hours of work (10am to 6pm) was being trialed for one month.

96. Once again, the Claimant's position that the emphasis placed on his personal time caused him problems is recorded.

> "He informed me that having constantly to focus on his conditions brought home the impact it is having on his health which has caused his low mood".

97. The management advice at the end of that report is that the condition would not have an effect on the Claimant performing his duty, but could affect his time away from the work station due to the frequency and duration of needing to use the restroom.

98. Management had, it was recorded, already made a number of adjustments in relation to the Claimant's condition but "the less pressure that is placed on his personal time may reduce the amount of time taken by the Claimant".

99. Significantly in the context of what follows, the report said “stress does induce the symptoms of his Bile Acid Malabsoprtion, so it is important that any concerns are assessed and addressed to optimise his well-being while at work”

100. On 2 February 2017 AR invited (206) to a medical consultation meeting on 9th February 2017. The letter stated “the purpose of the meeting is the same as last meeting which will allow me to consult with you about your current medical condition and your future with the AA”. On this occasion it continued “you need to be aware that one of the possible outcomes of this consultation process is a decision to terminate your employment due to ill health/capability”. We do not understand why that point could not have been made in relation to the first meeting and there appears to be a disjointed approach to the meetings as this is the first time that the Claimant is told that an outcome of the meeting could be that his employment could be terminated.

101. On 9th February 2017 the meeting took place (207). Amanda Robertson, at the start of the meeting, does say that one outcome might be dismissal. The contents of the 24 January 2017 medical report were noted. Claimant pointed out that it was very similar to the previous one.

102. Amanda Robertson stated that she had noted that removing pressure on personal time might reduce the impact but went on immediately to say that she felt that Respondent had been flexible and continued to support the Claimant and asked Claimantto agree. Claimant said that this seemed accurate. We pause to comment on whether this is a rational or relevant way of going about assessing reasonable adjustments in this context. It is trite that a reasonable adjustment may have to be made whether or not the employee is asking for a particular reasonable adjustment to be made. This is significant in this case, as there was an obvious reasonable adjustment that could have been made and which it was reasonable to make. In those circumstances the fact that the Claimant may agree with a proposition put to him as to the “flexibility” of the respondent is neither here nor there.

103. Amanda Robertson noted that there had been a “late” note against the Claimant 4 times since the previous meeting, one of which related to Claimant’s car being blocked in. Amanda Robertson discounted two of the “lates” because they were based on reasons which the Respondent accepted.

104. The Claimant’s union representative asked about the change from 10 to 6 and C said that he was on this, but it had “drifted back” to normal patterns. Before the tribunal he explained that the union representative had asked him if this pattern had helped, and that there was supposed to be a trial for 4 weeks but this had in fact only lasted for two weeks before he was back on the normal rota. This was done without any meeting or assessment. The explanation for this appears to be that the master rota which runs one month ahead had not been altered to show a change in his start time or finish time. As a result he went back onto the previous system.

105. He had explained that he found the change in timing helpful because morning was the worst time for his symptoms. It is a matter of some surprise that the Respondent did not think that it was worth allowing that trial to continue any longer (for example in conjunction with some of the other adjustments that could have been made).

106. Amanda Robertson does not appear to have been interested in the change to the timing of the shift pattern. However in her witness statement she said that the Claimant's response to the question of whether it had helped was not particularly positive. His response was in fact that he could also do with another minor adjustment of having a set lunch time. He explained that his body may cope better with the need to take less personal time. It seems to the tribunal that this is not being negative about the helpfulness of the shift change.

107. Amanda Robertson asked then what would help improve attendance. She stated that this was the main issue. The Claimants response is instructive and should perhaps have been evaluated more carefully by the Respondent. The Claimant said "the majority of my time off has been longer periods of stress due to the condition so it is cyclical. If I get it straight in my mind, then the longer term sick will reduce. But I admit I will still be off for a few days when it flares up." It seems to the tribunal that the burden of what the Claimant was saying again and again was "alleviate the stress that the scrutiny relating to my personal time places me under and my attendance will improve".

108. After a short adjournment in the meeting Amanda Robertson came back and said that she had looked through the documentation again, and that if one did a time line over the last twelve months Jan 2016-17 the Claimant had been absent on 107 days (15 occasions totalling 107 days). She noted also the periods of absence in 2015 to 2016. She noted that he was absent on 5 occasions, and that these totalled 113 days. She then went on to say that for the last two years the absence had been at an unacceptable level. She said that there had been many conversations around this "both informally and then formally". "I am of the view that you are unable to fulfil your contract. My decision is to dismiss you with immediate effect due to ill health capability."

109. Amanda Robertson then goes on to say that the decision had not been taken lightly and that every effort had been made to support the Claimant. The Respondent then said that the Claimant would then be paid 4 weeks in lieu of notice. This was less than his minimum entitlement (6 weeks). The pay was also going to be adjusted for leave taken.

110. On 9 February 2017 (210) the letter confirming that outcome was sent. This gave the termination of employment date as 9 February 2017. It simply stated that any outstanding monies would be forwarded in due course.

111. On 25th February 2017 Claimant appealed with an extensive appeal document which raised in detail the level of focus that he was under over his personal time. It also raised for the first time the questions of harassment that the Claimant said he had experienced. He explained in relation to those that he felt unable to speak out about the behaviour, as the years of meetings (formal and informal) regarding his personal usage had left him feeling ashamed of his condition and that speaking out at that stage might have been seen as not taking responsibility. This was a phrase used on multiple occasions. In evidence he also explained that his union advice was to "keep his head down", and this is what he had been doing. We accept that explanation.

112. The Claimant also pointed out that he had failed effectively to communicate his concerns in person on occasions. On page 214, in a passage on which he was cross examined, the Claimant started by saying that an example of the issue of not having his concerns dealt with properly was the issue of leading questions. He pointed to the minutes of 19 October 2016

meeting where questions were put as to whether the business had been reasonable and supportive and whether he agreed.

113. We agree he was asked a leading question but there is nothing wrong with that. Some people will respond fully when a leading question is asked. However it is perfectly clear from what the Claimant says in the rest of that paragraph that he was drawing attention to his failure to communicate effectively his concerns. However he says that this should

> ”have been mitigated however by the written statements in the Occupational Health Reports and by the fact that the frequency of my absences prior to having regular management meetings was much lower.”

114. Whilst the tribunal is not sure about the point made about the level of absence prior to 2014 being much lower, and we are not convinced this is relevant in any event, we do agree that whatever the Claimant was saying, the Respondent should have looked at what the OH report was saying, and this OH had on at least two occasions pointed out the need to remove the kind of stress that arose from the focus on Claimant’s personal time.

115. The appeal meeting was held on 22 March 2017 with Ian Stokoe, the head of ISAS and RSAS. At 225 the Claimant explained that the focus on targets for personal time added more stress which exacerbated the situation: “it’s difficult to go to the toilet when you’re on the stopwatch”.

116. The note records that the GP letters were “not evidenced”. However it is perfectly clear that the occupational health reports made this point, and should have formed part of the documentation Mr Stokoe had before him. Amanda Robertson had provided on 21 March 2017 an email to Mr Stokoe setting out her views on the Claimant’s appeal. Surprisingly this appears to make no reference to the OH reports’ reference to the need to remove personal time limits. It does however refer to personal time usage at length.

117. It is clear that Claimant wanted to get his job back from what he said at this meeting. However failing that he wanted to ensure that he had what he regarded as a “good reference” namely one that did not refer to him having been dismissed.

118. During the appeal, once again, the Claimant made the point that he only took personal time when he needed it and that when he was left to his own devices there was no stress to exacerbate the situation.

119. Mr Stokoe appears to have thought was that Claimant wanted to achieve a situation in which Claimant managed himself both in relation to absence and personal time. The tribunal rejects the idea that this is what Claimant was trying achieve, that anything he said indicated that this was what he was trying to achieve or that it was a reasonable conclusion for Mr Stokoe to reach.

120. A fair reading of the documentation before the Respondent at the time of the dismissal, and prior to the dismissal, and which was or should have been available to Mr Stokoe when he reviewed that decision reveals that this was clearly not what the Claimant was saying should happen. The chief claim by the Claimant was that he should not have the kind of stress that was linked to the type of monitoring that was going on in relation to his personal time, placed

upon him. If that adjustment were made, he argued, he would bring down his level of absence to an acceptable level.

121. The Respondent simply never tried to see whether that adjustment would work or have the effect predicted by the Claimant. Mr Stokoe said in cross examination that he did not accept that Claimant was asking simply for relief from this scrutiny. We do not accept that this is what he thought at the time. We find that Mr Stokoe was aware that Claimant was seeking alleviation from this type of scrutiny in relation to personal time. We find it difficult to understand why Mr Stokoe did not review the earlier documentation, noting what occupational health was saying, and we do not understand why he did not suggest that reinstatement should take place on the basis of the adjustments which had been clearly suggested by OH Report. It appears that nothing that happened during the appeal went any way to mitigate the failure of the Respondent to come up to the standards expected of a reasonable employer in this type of situation.

122. Mr Stokoe reflected his reasoning in the letter of 7 April (228) and it is clear that he had misunderstood what the Claimant had said to him, and which was recorded in the minutes of the meeting about what would help. It is simply not the case that things would only improve if he was not managed or reviewed by his line manager.

123. If the Respondent had been applying its long term absence policy (from which the idea of a medical consultation meeting comes) one of the options was to look at redeployment. Apart from being a reasonable adjustment, this is something that any reasonable employer would look at in a sickness absence case of a similar nature (and in a similar size employer).

124. No one seems to have considered redeployment at the stage of deciding whether to dismiss. Mr Stokoe's evidence was that he did not consider any roles outside the call centre. He also said that when alternatives within the call centre were considered these were effectively rejected out of hand because they all involved metrics. This is an odd response in the context of an organisation that said it was considering reasonable adjustments. We do not think that a reasonable employer would ignore the question of whether suitably adjusted posts would constitute effective redeployment opportunities. No consideration appears to have been given to whether any of the metrics in those other settings could have been adjusted and whether the claimant could have done the work, given those adjustments. In any event we were not shown any evidence of any consideration of these alternative roles and it is highly surprising that there is no email documentation surrounding any of these matters, even demonstrating that roles were considered but then rejected.

125. We also note that Mr Stokoe never did anything to pursue properly the allegations of harassment. He appeared in evidence to be suggesting that his long knowledge of JRespondent rendered it unlikely that she would have committed these acts of harassment. The Tribunal takes the view that a proper consideration should have been given to whether there had been any harassment and this simply did not occur.

126. The Claimant sought a reference from the Respondent. Deborah Gallagher did not provide one for him. Negotiations broke down over a

settlement of the whole case which has subsequently come before us. We were told that this was because the Claimant asked for the notes of a meeting. Deborah Gallagher said that her role was to explore negotiation and explore it solely with regard to the content of the reference. She was not expecting interaction with the Claimant. We consider that in the course of a negotiation over this matter it was a reasonable request from the Claimant to have the appeal minutes. The tribunal was baffled as to why Deborah Gallagher did not do anything to obtain the appeal minutes, when the Claimant appeared to be stating that this was a barrier to a commercial settlement of the case. In fact the Claimant had said (233) that he would gladly withdraw once he had received the unedited version of the minutes.

The law

127. We do not propose to set out the sections of the Employment Rights Act 1996 nor those of the Equality Act 2010 which are relevant to this case in full. We were referred to case law to which we make reference in the discussion which follows.

Discusson

128. **Unfair dismissal**: We considered the terms of section 98(4) ERA 1996. We considered the Respondent's submission concerning **Spencer v Paragon Wallpapers** [1976] IRLR 373. The basic question to be answered when looking at the fairness of the dismissal is, in all the circumstances, whether the employer can be expected to wait any longer before dismissing, and if so how long? We have concluded that the Respondent acted unreasonably in treating the reason for dismissal, capability, as a sufficient reason for dismissal having regard to the size and administrative resources it possesses, equity and the substantial merits of the case.

129. In summary the Respondent switched between procedures without reasonable warning being given to the Claimant that it was going to do this, or as to when the procedure that was being applied started to be applied by it. It claimed to be having meetings under a procedure which was never notified to the Claimant as being applied by it to the claimant, namely the "medical consultation meetings" claimed by the Respondent to be taking place before January 2017. The investigation of the Claimant's capability ignored medical advice which a reasonable employer would have evaluated and or followed in the circumstances of this case. In those circumstances it would have been reasonable for the Respondent to have waited longer before dismissing. The tribunal considers that the reasonable employer would have waited for a further 6 months to see whether, with adjustments, the situation would improve sufficiently.

129.1. The tribunal considers that the reasonable employer, aware of its duties to make reasonable adjustments, would at least have tried to make relevant reasonable adjustments before making a decision to dismiss. The reasonable employer would have given sufficient time for adjustments to have bedded down so that their effects could be seen in practice. Here we think that a reasonable employer would have made a trial of, say, 6 months so that the effect of removing monitoring personal time could have been seen.

130. We have concluded that the dismissal was unfair by reference to the following factors:

130.1. whether the employer has consulted with the employee about their ill health and the effect this has on his ability to do the job. We find that there was some consultation in that there were some meetings. However the Respondent repeatedly ignored what the Claimant was saying about his ill health and as importantly what the doctor and occupational health were saying about the ill health, namely that it was affected by stress. We do not consider that the consultation was genuine because we accept that Mr Fay's meeting had pre-determined outcomes in terms of what adjustments would be made. These outcomes were pre-determined by Amanda Robertson who instructed Mr Fay concerning what would be offered to the Claimant. We do not consider that such an approach constitutes genuine consultation over the ill health and its effects.

130.2. Equally we do not consider for the same reasons that the Respondent consulted over whether the ill heath would change in the future. The Respondent held meetings at which the question of the prognosis for the claimant was considered, but given the relationship between stress and the effects of the Claimant's impairment we consider that any reasonable employer would have considered with the claimant what the relationship was and whether there were steps that could be taken by the employer to ensure that an identified stressor could be avoided.

130.3. We accept that the Respondent did at one point consider home working, but placed unnecessary conditions which were unreasonable in this context on taking that further. The Respondent appears to have insisted that there should be improvements to both attendance and personal time before home working would be considered. An employer of the size of the Respondent and with its resources should have considered the issue of redeployment at the point of dismissal. It did not do this.

130.3 The Respondent did take the common sense steps of trying to clarify the nature of the claimant's ill health, and early on obtained a prognosis. This was not going to change. However having taken the common sense step of obtaining an occupational health report, it did not then take the equally common sense step of considering the contents of the report and its recommendations. A reasonable employer, we find would have considered the question of suitability for alternative employment and would have considered whether the claimant could, with appropriate adjustments, have done any of the jobs which apparently were available, but which required metrics.

130.4. We consider that the Respondent did not consider the effect the employee's absence has on other employees in the business, or at least gave no evidence of what it thought that impact was, apart from saying that there was an impact. Similarly although the Respondent stated several times that the absences had an effect on the needs and resources of the business, at no time was this impact identified in evidence, and none of the Respondent's evidence indicated the nature of that impact. We accept, of course that the Claimant's absence meant that someone else needed to do the work he was not available to do. However the extent of the impact was never properly considered it

seems by the Respondent apart from a suggestion that the absence might affect over all statistics.

130.5 This was a case where it became apparent (or would have become apparent to the employer) that the behaviour of the Respondent was causing an exacerbation of the Claimant's symptoms as a result of the stress of the way in which he was being monitored. We note in passing that this does not appear to have inspired the Respondent to have gone any further in seeking alternative employment, or doing anything else for the Claimant. We do not think that it would be right to take into account the fact that this exacerbation existed as a separate issue, but we do consider that it would be right to consider what a reasonable employer confronted with an exacerbation of a condition by its behaviour (of which it was aware) would do. We do not think that we can say that absent a duty to make a reasonable adjustment a reasonable employer would have reached any particular conclusion, but we do think we can say that a reasonable employer would have considered and evaluated the impact of the known exacerbation on the ill health and would have considered what it could do in those circumstances. We find that the Respondent simply did not consider that known exacerbation.

130.6. We remind ourselves that our function is to review the reasonableness of the employer's decision and not to substitute our own view. When asking ourselves the question whether the Respondent's decision fell within the band of reasonable responses and considering whether a reasonable employer would have considered it sufficient to dismiss in the circumstances of this case we answer "no". We note that the Respondent was inconsistent in its use of its policies. We do not consider that a reasonable employer would have started using one policy, then fail to tell the employee that it was stopping the use of that policy, then decide to use a different policy and only subsequently tell the employee that there was to be a meeting using a term of art under that other policy which had not been previously notified. This is what we find the Respondent did in this case.

130.7. We also consider that a reasonable employer would have considered the medical advice, in the circumstances of this case. This Respondent appears to have ignored the recommendations of the Occupational Health and GP which might well have avoided dismissal. The employer created the continuing problem of stress feeding into increase of symptoms which in turn fed into increased absences. A reasonable employer would have listened to what the Claimant was saying during the meetings and to what the occupational health and GP reports were telling it.

131. We have concluded therefore that the Claimant was unfairly dismissed.

Discrimination arising from dismissal

132. Section 15 of the Equality Act 2010 provides: (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."

133. This requires us to identify unfavourable treatment of the Claimant. We have found that the Respondent treated the Claimant unfavourably by its inconsistent procedural treatment of the Claimant, by the process it in fact adopted in relation to his personal time and his absence and by its dismissal of the Claimant. Any reasonable worker would have regarded these as detriments, but in any event they are clearly unfavourable treatment of the Claimant. Plainly therefore the acts of discrimination advanced under s.39 EqA by the Claimant, namely, subjecting the Claimant to the absence management policy, disciplining him and ultimately dismissing him, amounted to detriments for the purposes of that provision.

134. Did that unfavourable treatment occur because of something? Yes, it arose because of the amount of personal time that the Claimant was taking and because of the absence of the Claimant from work due to directly related conditions or conditions such as stress anxiety and or depression which we consider were probably related to the disability of the Claimant during the reference period.

135. Did that something arise in consequence of the Claimant's disabillity? In the list of issues this was put as whether the Claimant's sickness absence and frequent visits to the bathroom/toilet arise in consequence of his disability? The tribunal was surprised that this was in issue between the parties. There was no active challenge by the Respondent and the tribunal concludes that they did arise in consequence of the Claimant's impairment found to be a disability. We find therefore that they were something in consequence of his disability.

136. The Claimant had the burden of proving these elements. The Respondent has the burden of proving justification. For this the Respondent has to be able to show

(A) what aim was being pursued;

(B) what means were used to achieve that aim?

(C) were those means appropriate to achieving the identified aim?

(D) were those means reasonably necessary to achieve that identified aim?

137. The Respondent identified the following aims in its pleadings:

(1) following the Respondent's internal policies and procedures in a fair and consistent way to all employees;

(2) ensuring certainty over the size of the Respondent's workforce so that it can meet its customers' needs; and

(3) entering certainty over the business need for the Respondent to arrange cover to carry out the Claimant's duties.

138. Deborah Gallagher, who might have been thought to be the logical person to give evidence for the Respondent on the existence of its generic aims of this

nature, said nothing about this aspect of the case. None of the other witnesses for the Respondent dealt with these aims in this, or any other, articulation.

139. Nevertheless, the tribunal is prepared to accept that in general terms a sickness absence policy (or policies) have the aim of securing the attendance at work of an employee. No evidence was given as to the purpose referred to as "personal time" adherence. However we are prepared to accept that the Respondent sought to regulate its employee's breaks, and evidence was given to the effect that "personal time" was introduced as a way of allocating breaks. So we conclude that the legitimate aim was regulation of breaks for staff. "personal time adherence" appears to us to be a description of a means to the aim of regulating breaks for staff. So redescribed, we accept that both of these are legitimate aims. The Respondent's aim in subjecting the Claimant to the treatment was in each case the legitimate aim of ensuring attendance at work, and ensuring his personal time adherence.

140. In general terms the tribunal accepts that the means adopted, subjecting the Claimant to the absence management policy, disciplining him and ultimately dismissing him are appropriate means of ensuring that an employee attends work and adheres to break times.

141. We conclude that the means were not proportionate in the sense that they were not reasonably necessary to achieve the aims set out above. We reminded ourselves that the test is not whether a reasonable employer would have adopted these means but whether on the evidence provided to us, we conclude that they were reasonably necessary. In considering that issue we have to consider whether there were alternative means available to the Respondent of achieving its aims. The Respondent's counsel in his closing submission rightly accepted that the approach we should adopt in this field is to ask whether all reasonable adjustments have been carried out. If they have not been carried out we need to consider whether the discriminatory impact of the Claimant losing his job and being managed in the way he was is outweighed by achieving the legitimate aim. We consider that there were alternative means of achieving the legitimate aims which had a lower discriminatory impact on those with the Claimant's disability. The Respondent could have removed the monitoring of the Claimant's personal time. It accepted that there was no question about whether the Claimant would have abused this adjustment. He would not have done so. The medical evidence suggested that the Claimant's stress would have reduced in those circumstances and this would have had an impact on his absence level. Without having to discipline or dismiss the claimant, the Respondent could have achieved its aim of securing his attendance at work.

142. We conclude therefore that the Respondent has not discharged the burden of proving on a balance of probabilities that the treatment of the Claimant was reasonably necessary.

143. We also mention the issue identified before us, but agreed between the parties that the Respondent knew or could reasonably have known that the Claimant was disabled. Had it not been agreed the tribunal would in any event the tribunal have found that the Respondent did know, or could reasonably have been expected to know at all material times that the Claimant was disabled on the basis of the regular communication by the Claimant with the Respondent about his condition throughout the material period.

144. In those circumstances the Claimant's claim that he was treated unfavourably by the Respondent as a consequence of his sickness absence and or frequent visits to the toilet by subjecting him to the detriments of application of an absence management policy/disciplinary treatment and ultimately by dismissing him, succeeds.

Failure to make reasonable adjustments (s.21 EqA)

145. The issue for the tribunal was whether the Respondent applied the following provision, criterion and/or practice generally, namely its absence management policy and policy on personal time targets. The Respondent accepted that this issue covered the practices of the Respondent in relation to personal time targets. It therefore covers how the personal time targets were monitored. The Tribunal concludes that the Respondent did apply those. It might be more accurate to say that the Respondent applied its absence management policies (as it applied its absence policy, and apparently from the evidence before the tribunal, sought also to apply its long term absence policy at some stage). We have noted above that we find the application of these policies to have been inconsistent.

146. The application of these arrangements put the Claimant at a substantial disadvantage in comparison with persons who are not disabled in that he was less likely to be able to comply with the trigger points and attendance targets contained in the absence management policy and personal time targets.

147. In particular the Claimant was, because of his disability, put at a substantial disadvantage in relation to compliance with the personal time trigger points, and in relation to attendance targets as a consequence. He was manifestly less likely to be able to comply with the trigger points and attendance targets contained the absence management policy and personal time targets.

148. The Tribunal needed to determine whether the Respondent took such steps as were reasonable to avoid the disadvantage.

149. The tribunal has concluded that the Respondent did not take such steps as were reasonable for it to have to take in the circumstances of this case in order to avoid the substantial disadvantages suffered by the Claimant.

150. We do find that it would have been reasonable for the Respondent to ignore absences caused by the Claimant's disability. These included both those directly attributable on paper to the physical impairment, but also those attributed on the medical evidence to that impairment, but constituting anxiety stress and depression.

151. We find that, on the basis of the GP and occupational health reports which were before it, the Respondent should have removed the personal time targets altogether in this case. At the very least it should have tried whether the removal of such monitoring would have had the effect which the Claimant, and their own medical advisers, together with the GP were suggesting: namely that if his stress levels came down this would affect his disability beneficially. That in turn would probably have resulted in a lower absence rate. We do not

understand why this was never tried. We are not aware of any evidence from the Respondent which shows that it attempted to engage with this adjustment at any point.

152. As to the Respondent's state of knowledge, on the evidence which was not disputed before us, the Respondent had actual knowledge of the Claimant's disability and that he was likely to be placed at the disadvantage(s) we have identified. We also think that even if it had not had actual knowledge, via its OH report and direct contact with the Claimant noted above, it could reasonably have been expected to know that the Claimant was a disabled person.

Harassment

153. We consider that the Respondent, via Joanna Robertson, did engage in unwanted conduct by making the comments we have found above concerning the Claimant's dietary and toilet habits. That conduct was clearly related to the protected characteristic of disability, which the Claimant has. The conduct did not have the purpose, but did have the effect, of violating the Claimant's dignity and creating for him an intimidating hostile and humiliating environment for him. We do not think that it created a degrading environment or that it created an offensive environment for him. We have considered all of the circumstances of this case in asking whether it was reasonable for the conduct to have those effects we have identified. We have concluded that it is reasonable for the conduct to have those effects. We had regard to the Claimant's perception as given in evidence, and our findings are above.

154. The Claim for harassment succeeds. We were told at the start of the case that the question of whether this aspect of the case was within our jurisdiction was still in issue. It appears to have remained in issue. However we were not addressed by either side on this issue.

155. We conclude that the claim for harassment must be seen as part of a continuing state of affairs, which includes the breaches of section 15 and the breaches of section 20 and 21 of the Equality Act 2010. As such we consider that the claim for harassment was presented timeously.

Victimisation

156. The Claimant claims that the Respondent treated him unfavourably because he brought these tribunal proceedings (the protected act) because it failed to provide, or threatened to provide the Claimant with a fair and reasonable reference.

157. We find that this claim is not well founded. We accept that there was a gap in the minutes of the meeting, and that inexplicably Ms Gallagher failed to follow up on the request for the minutes. Mr Stokoe, we find did promise the Claimant a "good" reference. However the Claimant was not provided with a reference of this nature due to the Respondent's general policy on references and not because the Claimant had brought these proceedings. For those reasons the Claimant's claim for victimization fails.

Conclusion

158. The Claimant's claims for unfair dismissal, discrimination under section 15 and under section 21, and 26 of the Equality Act 2010 succeed. However his claim for victimization under section 27 fails.

159. In the Respondent's original pleading (para 35) the Respondent indicated that it would submit that any compensatory award should be reduced by 25% to take account of what is said to be the Claimant's unreasonable failure to comply with the ACAS Code of Practice on disciplinary and grievances by failing to raise a grievance about the matters which he now brings before the Tribunal either during or after his employment. We did not hear any submissions on this point. We take the view that it is open to the Respondent to make submissions concerning this issue at the remedies hearing which is to be fixed, taking account of the findings already made by the tribunal regarding the ways in which the Claimant did bring matters to the attention of his employer.

160. The parties are urged now to attempt to reach a settlement of the remedy in this matter, thereby avoiding the need for further hearings, and in accordance with Rules 2 and 3 of the Tribunal rules.

Employment Judge O'Dempsey

Date 3 September 2018