Case No: 2500714/2018

EMPLOYMENT TRIBUNALS

Claimant: Mr. D Whitmore

Respondent: Avonside Group Services Ltd.

Heard at: Kings Court, Royal Quays, North Shields

On: 28, 29, 30 August 2018

Before: Employment Judge Johnson
Members: Ms D Winship
Mr. J Adams

Representation Claimant : Mr R Gibson – solicitor
Respondent: Mr K Ali of Counsel

JUDGMENT

1. The claimant's complaint of unlawful disability discrimination (failure to make reasonable adjustments) is not well founded and is dismissed.
2. The claimant's complaint of unlawful disability discrimination (unfavourable treatment because of something arising in consequence of his disability) is not well founded and is dismissed.
3. The claimant's complaint of unfair dismissal is well-founded and succeeds. The respondent is ordered to pay to the claimant compensation for unfair dismissal in the sum of £8821.75.

REASONS

1. The claimant was represented by Mr Gibson, solicitor, who called to give evidence the claimant and his wife Mrs Julie Ann Whitmore. The respondent was represented by Mr Ali of Counsel who called to give evidence Mr Christopher Firth (regional operations director), Mr Andrew Morley (group operations director) and Mrs Emma Williams (HR consultant). There was an agreed bundle of documents, comprising 2 A4 ring binders marked A and B, containing relevant documents and the claimant's medical records respectively. The claimant and all other witnesses had prepared formal, typed witness statements which were taken "as read", subject to questions in cross examination and questions from the Tribunal.

2. By claim form presented on 5 April 2018 the claimant brought complaints of unfair dismissal and unlawful disability discrimination. The respondent defended the claims. In essence, they arise out of the claimant's dismissal on 17 November 2017 for reasons which the respondent says related to his capability to perform the duties for which he was employed. The claimant suffered a stroke on 18 December 2016, returned to work on 20 February 2017 and had not been able to resume his full duties as a branch manager by the time he was dismissed on 17 November 2017.

3. The issues to be decided by the tribunal were set out in a list of issues prepared by Mr Gibson on behalf of the claimant and submitted to the tribunal at the beginning of the hearing. They may be summarised as follows;

   a) Was the reason for the claimant's dismissal his capability to do the job he was employed to do, namely a branch manager?
   b) Did the respondent acted reasonably in dismissing the claimant for that reason?
   c) Did the respondent treat the claimant unfavourably because of something arising in consequence of his disability, contrary to section 15 of the Equality Act 2010? If so, can the respondent show that the dismissal was a proportionate means of achieving a legitimate aim?
   d) Did the respondent apply a provision criterion or practice which put the claimant at a substantial disadvantage when compared to persons who are not disabled?
   e) What was that disadvantage?
   f) Did the respondent know or could it have been reasonably expected to know that the claimant was likely to be placed at that disadvantage?
   g) What were the adjustments which it would have been reasonable for the respondent to make?
   h) Would those adjustments have removed the disadvantage?
   i) What, if any, compensation should be awarded to the claimant and should any compensation be reduced because of the claimant's alleged misconduct.?

4. At the beginning of the hearing and for the very first time in these proceedings, the respondent conceded that the claimant is and was at all material times suffering from a disability as defined in Section 6 of the Equality Act 2010 and that the respondent was aware of that disability throughout the relevant period.

5. Having heard the evidence of the claimant and the other witnesses, having examined the documents to which it was referred and having carefully considered the closing submissions of both representatives, the tribunal made the following findings of fact on a balance of probability.

6. The respondent is a privately owned a limited company providing commercial and domestic roofing services. It has 29 branches across the UK, employs approximately 1200 people and has an annual turnover of approximately £100 million.

7. The claimant was employed by the respondent from February 2008, originally as a production manager and from November 2016 as a branch manager. A detailed job description appears at pages 76 – 79 in the

bundle. The claimant's line manager was Mr Christopher Firth, regional operations director. It was accepted that the claimant had been a competent and diligent employee with a clean disciplinary record. There had been no complaints about the standard of the claimant's work or the performance of his duties.

8. On 18 December 2016 whilst at home, the claimant suffered a stroke. Mrs Whitmore was present, called the ambulance and the claimant was admitted to hospital, where he remained for two days before being discharged home. Upon discharge, the claimant was able to walk, but whilst his speech was clear, it was not fully coherent. He was assessed by a consultant physician, who stated:

"From his stroke he has been left with a high level cognitive communication impairment. He has been having community speech and language therapy input, he has occasional word finding difficulties. He has reduced recall and retention of some information. I have informed him that he should refrain from driving for the time being and revisit this after his return back from holiday in New Zealand. We will review him in the nurse specialist/review clinic in four months time."

9. The claimant was absent from work from 18 December 2016 until 20 February 2017. His GP fit notes from 21 February 2017 recommend a phased return to work, amended duties and altered hours. It is accepted that these recommendations were implemented by the respondent, although there is no written record of any meeting with the claimant, nor any written record of any specific changes to the claimant's hours of work and duties. The claimant accepts that he was permitted to work such hours as he felt able to work and that whilst at work he would only undertake those duties which he felt able to perform. It is accepted that the claimant received his full wages throughout his period of absence and indeed throughout the period of time when he undertook the phased return to work on amended duties. Mr Firth's evidence, which was not challenged, was that many of the claimant's managerial duties were removed from his remit if those required a high degree of cognitive function. Those duties were transferred to other members of staff working from the respondents Driffield branch. The intention was that the claimant be given an appropriate period of time in which to recover from his stroke in circumstances where he would not be overwhelmed during the transition period from his return to when he could undertake his full duties as branch manager. The claimant was quite happy to accept this arrangement and recalls that he worked from 9 AM until 2:30 PM or 3:30 PM during this phased return to work. The tribunal found that, to a large extent, the claimant was left to his own devices. He did not have to undertake any of the duties which he felt unable to perform or only able to perform with difficulty, because of his impaired cognitive function. He did no estimating, order-book progression or credit control and paid little attention to email correspondence. He spent most of his time collecting and delivering materials to various sites and speaking to the staff on those sites.

10. During this "phased return to work", the respondent did not implement any formal process to assess the claimant's progress. No plan was produced for the claimant to follow, so that he would gradually re-introduce those

duties which had previously formed part of his remit, but which had been transferred in the interim to the Driffield office. No targets were set for the claimant in terms of volume or quality of work, nor was there any regular appraisal of his progress. Whilst Mr Firth may well have kept in regular contact with the claimant, there was no structure to their contact. It is accepted that throughout this period, no complaints were raised by the claimant about the lack of any such structure. The tribunal found that the claimant was quite happy to continue with the arrangement whereby he effectively did what he wanted, when he wanted and how he wanted. The tribunal found that the respondent genuinely believed that it was being as helpful as possible to the claimant by effectively leaving it to him to decide what he could do, when he would do it and how he would do it.

11. This arrangement continued from when the claimant returned to work on 21 February 2017 until the middle of September 2017, a period of some seven months. The claimant submitted a fit note from his GP on 14 September, again recommending a phased return to work on amended duties and with altered hours and suggesting that this arrangement should continue "over the next eight weeks." This fit note was slightly different to one which had been submitted on 21 July, which had merely recommended a phased return to work. This followed on from a meeting which had taken place between the claimant and Mr Firth on 8 June, pursuant to a letter dated 31 May 2017 which is headed "long-term ill health/capability – invitation to a welfare meeting." No notes were kept of this meeting, but Mr Firth's evidence to the tribunal was that he discussed with the claimant "his fitness and of the length of time and/or likelihood of him being able to resume his full hours and duties as branch manager and whether Avonside needed to make any other reasonable adjustments to assist his recovery."

12. It was agreed at this meeting that the claimant should be referred to the respondent`s occupational health specialist, so that the claimant could be examined and a report prepared as to his fitness for work, whether any adjustments needed to be made to accommodate his return to full duties and to assess whether, and if so when, the claimant could resume his full duties. The occupational health assessment took place on 20 July and the occupational health report appears at pages 97 – 100 in the bundle. The salient points from that report were that the claimant's main concern following his stroke was his impaired speech, that he considered himself to have recovered to 80 – 85% of his full health, but accepted that there was no guarantee he would ever recover to 100% of his pre-– health state. The claimant acknowledged that he was not fully fit to return to his full-time duties, although he felt that his condition had improved significantly since his return to work. The 0/H specialist states that the claimant remained unfit to perform the role of a branch manager as he was still in the recovery phase and that there was no guarantee he would be able to perform all of the duties required of him due to his medical condition. The oil specialist states that the adjustments that in place may not be sustainable, as the role of branch manager entails estimation of roofing costs and invoicing and other challenging roles. The claimant acknowledged that he may struggle with those duties. The 0/H specialist was unable to comment upon how long it may take for the claimant to recover to the extent that he could resume those duties. Finally, the O/H specialist recommended that there be a workplace assessment and that

the claimant should contact "Access to Work" to arrange for further workplace support.

13. By this time the respondent had identified a deterioration in the financial performance of the Newcastle branch. Mr Firth's evidence to the tribunal was that the branch made a profit in 2016 of £28,000 but was operating at a loss throughout the first half of 2017. Mr Firth attributed this downturn in performance to the fact that there was no fully functioning branch manager in place. Having received the O/H report and the fit note dated 14th September and having taken HR advice from an outside consultant (Mrs Emma Williams) Mr Firth invited the claimant to a meeting by letter dated 21 September 2017, headed" Long-term ill health/capability – invitation to a formal meeting." The letter states that the matters to be discussed are;

    a) Your extended phased return to work over the past nine months due to ill-health
    b) the enclosed copy of a recent medical report from the occupational health practitioner
    c) the likelihood of you resuming your full duties as branch manager soon
    d) any other options or alternatives, such as alternative employment that would accommodate your rehabilitation better
    e) whether there are any reasonable adjustments that can be made to your job or in the workplace that would facilitate your return to full duties in the role of branch manager.

    The letter goes on to state;

    " I regret to advise you that if the outcome of the meeting indicates that there is little likelihood of a full return to work within a reasonable timescale and there are no reasonable adjustments that can be made to enable this or suitable alternative employment that is available, then a possible outcome may be forced to issue you with notice of the termination of your employment on the grounds of ill-health."

14. The meeting took place on 5 October 2017. The claimant was accompanied by his wife, with whom the claimant had prepared a document "points for meeting 05/10/17", which states as follows;

    a) Work-based assessment recommended in health report however nothing done. Would suggest that one is done as soon as possible.
    b) No actual support package put in place or structure to aid a phased return.
    c) There has been no exchange of information i.e. Derek not informed of any new work, estimates or business-related issues, totally excluded.
    d) Computer removed and not replaced for over six weeks making normal working impossible and leading to further exclusion.
    e) Possible refresher training required – time to be spent shadowing someone or actually doing estimates/invoices in order to reacquaint with job requirements.
    f) Also possibly a computer course to familiarise himself with systems etc.

g) would suggest a period of three – six months following assessment and training to allow for adjustments to be made and support to be put in place.

15. Minutes of the meeting appear at pages 119 – 121 in the bundle and the outcome of the meeting is confirmed in a letter dated 12 October at page 122. During the meeting the claimant readily accepted that he was still not able to resume his full duties at that time and his wife confirmed that they had no idea at what point he would be fully fit, stating "it could be 3 to 6 months from now. But they had not challenged that and maybe if Derek was to take up some of his old duties it might push him along a bit quicker. No one has asked Derek to take on more so they don't know if he can do more". Mr Firth took the claimant through a list of duties which he expected the branch manager to perform and Mrs Whitmore said that she thought it was unrealistic to expect the claimant to pick all of those up straightaway and that it would take three months minimum to get him back up to his full duties. Mrs Whitmore said that "with the re—training and support, Derek could perhaps do more", but also said that "they knew the company would not be able to carry on indefinitely, no company would ". In the letter which followed this meeting, Mr Firth said;

"We discussed whether you felt able to pick up some of the duties that had been taken away from you to aid with your return to work. You indicated that you would be happy to try, but not all at once and that they should be phased in over a three-month period to allow you to build up. You mentioned that you had undertaken some estimating but would appreciate some refresher training on this as you had not done much estimating in the last nine months. We discussed whether there were any reasonable adjustments that you felt would enable you to resume your full duties. You suggested retraining on estimating and that the duties that had been taken away be phased back in over three – six months to see how you coped. In principle we will carefully consider all these suggestions and whether they can be accommodated. We agreed that you will approach access to work to see if they can suggest any further support to help you carry out your full duties soon, for example technological support. We discussed whether there were any alternative roles that could be considered. At present the only other roles in the branch and that of contracts manager or quantity surveyors or roofing operatives. Lastly, we discussed the impact that your prolonged phased return is having on the day-to-day workload. We therefore must consider how best to cover for your position, given that a full return to work is not imminent and the phased return has taken over nine months so far and you are still not fully fit to resume your full duties. The business is suffering financially and the role of branch manager is pivotal in gaining new business and maintaining existing client relationships in a productive and profitable manner. At present the branch is making a financial loss, in part due to not having a fully functioning branch manager in post. You have been on phased return for almost 10 months, with still no prospect of a full return to work in the very near future. Whilst the company does want to support you and has made significant reasonable adjustments, including paying you full pay over the past 10 months, if you are unable to resume your full duties in the very near future we would need to consider alternative options, one of which could be the termination of your post on ill-health/incapability grounds."

It was agreed that a further meeting be arranged for 26 October, the purpose of which would be to revisit the matters which had been discussed, to see what progress had been made by then and what conclusion could be reached. The letter concludes by saying;

"If as a result of our meeting it is looking very unlikely that you would be able to resume your full duties because your continued ill-health will not allow this, and there are no other reasonable adjustments that would allow you to resume your full duties within a reasonably short timescale, then we may have to terminate your post because of the second ill-health meeting. We will explore the ill-health retirement option and any other roles before reaching our decision."

16. In their list of matters to be considered at that meeting, Mr and Mrs Whitmore had included reference to the removal of Mr Whitmore's computer together with the possibility of a computer course to familiarise him with the system. Mr Whitmore accepted that his computer had been removed some six weeks earlier and had not been returned to him, but that he had taken no steps to enquire as to its whereabouts. Mr Mr Whitmore had also suggested that the claimant be provided with some retraining on the computer programs, particularly the estimating software used by the respondent. Mr Firth could not understand why the claimant had not asked for the return of his computer or for the estimating programme to be installed. Mr Firth took this to be further evidence that the claimant was unable to properly perform his duties as branch manager. The computer was eventually returned and the estimating programme was installed. However, the claimant was not provided with any specific training or retraining in its use. Mr Firth`s evidence was that the claimant was to let him know once the computer was returned and the program installed, so that he could arrange the training, but that the claimant failed to do so. The claimant's evidence was that he understood that the respondent would arrange for the return of the computer, the installation of the software and any necessary training. The claimant was unable to show that, had he been given the appropriate training, then he would have been able to undertake the preparation of estimates to the standard required of a fully functioning branch manager.

17. Following the meeting on 5 October, the respondent did not provide the claimant with any formal plan or procedure of the kind described in paragraph 10 above. No specific targets were set, no timetable was implemented for the achievement of any target and no program was fixed for the supervision of the claimant or any appraisal of his work. The respondent made it clear that it was up to the claimant to contact "Access to Work". The claimant did so and they visited his workplace on 20 October, following which they prepared a report dated 7 November. (p141-148). That report recorded that the claimants/had resulted in memory impairment, with his short-term memory having been most affected, which meant he had difficulty in following verbal instructions. This in turn impacted upon his ability to process information which led to him feeling anxious and frustrated. The claimant had to write down everything in order to aid his memory, but often his notes were insufficiently detailed and he would often forget the context in which the notes were taken. The report

records the claimant's inability to remember smaller finer details within his work, which affected the efficiency and productivity at which he worked. This led to feelings of frustration which had a further detrimental impact upon his cognition, decreasing his processing abilities and affecting his memory further. The report recommended that he undergo or four sessions of coping strategy training, of which two would be on memory and two on stress and anxiety. The report does not state that following any such training, there would be any material impact upon the claimant's ability to perform his duties as a fully functioning branch manager.

18. The second meeting, which had provisionally been arranged for 26 October, was cancelled because no response had been received from the respondent's pension provider concerning the possibility of the claimant being considered for ill – health retirement. Meanwhile, Mr Firth tried to arrange for the claimant to undertake some of the duties of the branch manager. He asked the claimant to complete the Order Book, which shows the basic forecasted turnover for the branch. The claimant attempted to do so, but his information was not in a recognised format. Mr Firth requested additional information, but was told by the claimant to get another member of staff to do it. The claimant also refused to get involved with debtotrs or retentions, either by a straightforward refusal or by asking Mr Firth to get someone else to do it. Mr Firth became further concerned because the debt or list was rising and customers were complaining about lack of control with day-to-day processes, including material ordering and labour payments. Mr Firth became aware that the claimant was still passing on work to other members of his team. The claimant was still visiting sites, collecting and distributing materials, but little else. None of this was denied or rebutted by the claimant in his evidence to the Tribunal. Mrs Whitmore maintained in her evidence, that she felt it would have helped her husband if Mr Firth had formulated a detailed written action plan of things to do as her husband would have been able to follow a detailed written action plan. Mrs Whitmore's evidence was that the claimant's confidence had been adversely affected by the stroke, but that she had seen a gradual improvement in his well-being and an improvement in his confidence. However, Mrs Whitmore accepted that even at the date of today's hearing, the claimant is "still not back to his normal self, but is now starting to come back into a social structure".

19. The second meeting took place on Wednesday, 8 November. It was attended by the claimant and his wife, Mr Firth and the HR consultant Mrs Williams. Minutes of the meeting appear at pages 149 – 154 in the bundle. As at the date of this meeting, the report from Access to Work had not had been received by Mr Firth. When asked about his general well-being, the claimant said that he was "getting a little better" but could not advise how long he would need to recover. Mrs Whitmore confirmed that the claimant "has an ongoing disability and they are not able to give a timeframe for recovery. They cannot give definitive answers". When asked about the access to work assessment, the claimant said that it had lasted 45 minutes and that no suggestions for support had been made at the time. Mr Firth enquired as to progress with the claimant's use of the computer and particularly the estimating software programme. Claimant stated that despite his email of 24 October, the software had still not been installed. Mr Firth as the claimant what steps he had taken to do with debtors and retentions and the claimant stated that he had taken none. When asked

what roles he was doing at the time, the claimant said that he was "going to site, ordering materials, collecting materials, management of men". Mr Firth replied, stating that collecting and delivering materials was not a branch manager's job. Mr Firth pointed out that the branch had made a £23,000 loss for that year and that the business was not efficient without an effective branch manager. Mrs Whitmore again pointed out that no training plan had been set up for her husband, that Mr Firth had rarely visited the branch and that she felt Mr Firth should have made more of an effort to do so. Furthermore, there had been no effort from HR to assist the claimant. She pointed out that the claimant didn't feel supported and whilst he had been allowed to choose his working hours whilst receiving full pay, he had not seen enough of Mr Firth "face to face". She pointed out that the nature of her husband's issues caused by his/meant that physical interaction was better for him than telephone contact and that he needed more support in that respect. She asked whether the company wanted to nurture the claimant back into the business, or to get rid of him. Ms Williams pointed out that the company would have to decide whether to continue with his employment, given that he was still not fit to carry out his full duties and that there appeared to be no drive or initiative from him to drive his role forward. Ms Williams stated that the company would have to make its decision based on the information available to it at that time. She pointed out that there appeared to be a significant amount of duties which were not being undertaken, that this was not sustainable and that the company could not continue to run the branch at a loss. Mr Firth pointed out that, whilst some of the claimant's duties were being carried out by others, they were not being done to the level of a branch manager. Mr Firth's final observation was, "I will go away and speak to the Board and will write to let you know the outcome".

20. Mr Gibson for the claimant challenged Mr Firth about the basis upon which he felt it necessary to speak to the Board. Mr Firth confirmed that he had spoken to the respondents managing director, Mr Tony Burke, the following day and had kept no record of that discussion. Mr Firth insisted that he had simply been keeping Mr Burke "up to speed" and that the decision to dismiss the claimant was Mr Firth's and his alone. Mr Firth insisted that there had been no discussion about Mr Whitmore's replacement as branch manager. Mr Firth received the Access to Work report on 9 November and noted its recommendations for four sessions of coping strategy.

21. Mr Firth considered that the Newcastle branch was at a significant risk of financial failure without a fully functioning branch manager and that the present situation could not be sustained. It was clear that the claimant had not recovered from the effect of the stroke and there was no certainty about how long his recovery might take. He felt that the company had made appropriate adjustments in allowing the claimant a phased return to work on full salary, but with reduced hours and reduced duties. The purpose of that had been to give the claimant sufficient time in which to recover from the stroke to the extent that he could perform the duties of the branch manager. Mr Firth could not identify any further adjustments which could have been made and which would have produced the required improvement. In the period of almost 9 months since his return to work, the claimant had not shown sufficient improvement to satisfy Mr Firth that within a reasonable period of time he would be capable of

performing his role as branch manager. Mr Firth considered that there were no other roles within the business which the claimant could perform, again due to his ongoing health issues. Mr Firth concluded that he had no realistic alternative other than to terminate the claimant's employment on the grounds of incapability. Rather than simply write to him and because the claimant was on leave until the end of that week, Mr Firth telephoned the claimant on 13 November to inform him that he was being dismissed. It was agreed that the claimant would not be required to work his notice period and would be paid in lieu of notice.

22. The outcome was confirmed by letter dated 15 November, a copy of which appears at pages 157 – 159 in the bundle. The letter sets out the contents of the discussions during the meeting. Mr Firth records that the claimant would not be fully fit by the time of the expiry of his most recent fit note and that the prognosis for his recovery remained uncertain, with the possibility that it could "take weeks or months or even years to fully recover". Mr Firth recorded the claimant's ongoing symptoms of memory loss and the impact that had on his ability to retain important details. He recorded the impact that had on the claimant's productivity due to the frustration this caused. Mr Firth noted the "very limited progress made by you in picking up any of the activities" and that it was apparent to him that the claimant was "unable or unwilling to undertake most of his duties." He recorded that they had considered whether there were any other jobs which the claimant could do, that the only roles with the claimant could perform were those of contracts manager or estimator and that the company had no vacancies for those positions at that time. Mr Firth reminded the claimant that the branch had been making losses for the last six months and that the position was not sustainable as it was imperative that the company had a fully functioning branch manager to drive the business forward and into recovery mode. Mr Firth concluded that the company had no alternative positions available and that he had decided to terminate the claimant's employment on ill-health/capability grounds.

23. The claimant was advised of his right to appeal against that decision and did so by letter dated 23 November, which was followed by a detailed letter containing grounds of appeal dated 28 November, a copy of which appears at page 165 – 166 in the bundle. The appeal was heard by Mr Andrew Morley, group operations director, on 14 December. Mr Morley was aware of the deteriorating financial situation within the Newcastle branch following the claimant`s stroke and had been informed that the claimant had been dismissed. Mr Morley was well acquainted with the claimant, who had previously reported directly to him for a number of years prior to Mr Firth's appointment. Minutes of the appeal meeting appear at page 172 – 183 in the bundle. The claimant was again accompanied by his wife. Ms Emma Williams was again present. In his evidence to the tribunal, Mr Morley noted the claimant's "inability to articulate his answers during the hearing and his lack of verbal communication. He was vague in his responses and could not recall any detail. If anything he agreed with points Mrs Whitmore made on his behalf or reiterated things that had already been said." Mr Morley noted that Mrs Whitmore said that her husband had been dismissed within four days of the Access to Work report being submitted and that it must have been ignored by Mr Firth, or that her husband had been dismissed because of the contents of that report. Mrs Whitmore again focused upon what she

described as a lack of communication and support from the company, particularly because nor formal support plan had ever been prepared and implemented. She reminded Mr Morley that the claimant had been without a computer for several weeks and that the software program for estimating had not been installed. She pointed out to Mr Morley that her husband was still not yet capable of "holding his own" when discussing such matters and that it was unfair of the company to expect him to remember things which had happened before his stroke or on his return to work.

24. The general grounds of appeal were that the company had "failed to offer appropriate support or make recommended adjustments to allow me to continue to work with my disability and had these been put in place along with the requested retaining, I could have discharged the duties of a branch manager". More specifically, the claimant alleges that his ability to carry out his duties had been hampered by a lack of equipment and appropriate work programmes and that, had he had regular face-to-face support meetings in the office with Mr Firth with the retraining sessions arranged, then he would have been able to carry out his duties as branch manager.

25. Following the appeal hearing, Mr Morley met with Mr Firth to enquire as to whether he had in fact considered the contents of the Access to Work report. The claimant was not given an opportunity to comment upon what was said by Mr Firth to Mr Morley in this regard. Mr Morley concluded that he would not uphold any of the claimant's points of appeal. He considered it clear that the claimant was not fit to fully carry out his role as a branch manager and that no medical evidence had been produced which showed any reason to believe that the claimant's recovery was imminent. As to Morley concluded that even with the coping sessions recommended by Access to Work, it was impossible to say how long the claimant's recovery may take, or if he would ever recover sufficiently to be able to do his substantive duties as a branch manager. Mr Morley's decision was confirmed in a letter dated 21st of December 2017, a copy of which appears at pages 184 – 187 in the bundle.

26. It was accepted by the claimant that he was given a fair hearing by both Mr Firth and Mr Morley and that he had no complaints whatsoever about the conduct of those two hearings. In particular, the claimant accepted that he had been given a full, fair and reasonable opportunity to put forward all and any evidence which he wished the respondent to take into account at each of those hearings.

27. The claimant presented his complaints to the Employment Tribunal on 5 April 2018.

28. THE LAW

The relevant statutory provisions engaged by the claims brought by the claimant are contained in **S 94 and S 98 Employment Rights Act 1996 and S 15 and S20-21 of the Equality Act 2010.**

EMPLOYMENT RIGHTS ACT 1998

S.94 (1) An employee has the right not to be unfairly dismissed by his employer.

S.98 (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.

(4) 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.

EQUALITY ACT 2010

S.15

(1) A person (A) discriminate 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.

S.20

(1) where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes a person on whom the duty is imposed is referred to as A.

(2) the duty comprises the following three requirements.

(3) the first requirement is a requirement, where a provision, criterion or practice of A`s puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

S.21

(1) A failure to comply with the first requirement is a failure to comply with the duty to make reasonable adjustments.

(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.

29. REASONABLE ADJUSTMENTS

There was some initial confusion as to what was the provision criterion or practice (PCP) applied by the respondent. At paragraph 14 of his pleaded case the claimant alleges a "performance criteria" as the PCP. At paragraph 4 of the case management summary following a private preliminary hearing before employment Judge Nicholl on 6 June 2018, the PCP is identified as "the criteria that the respondent applied in assessing the claimant's fitness to work." In his written closing submissions, Mr Gibson states at paragraph 3.2 that the PCP is "some form of capability procedure which the respondent followed in dismissing the claimant." The PCP acknowledged by Mr Ali for the respondent
at paragraph 7 of his closing written submissions is "an expectation that the claimant should be able to undertake a large part (80% – 85%) of his role as branch manager." After some discussion it was agreed that Mr Ali's description of the PCP was correct and that the claim of failure to make reasonable adjustments would be based upon that PCP.

30. It was agreed that this PCP was applied by the respondent to the claimant and that its application put the claimant at a substantial disadvantage, in that he could not undertake a large part of his role as branch manager because of his disability. Accordingly, the duty to make reasonable adjustments would be triggered if there were adjustments which it was reasonable for the respondent to make and which would have removed that disadvantage. In his pleaded case, the claimant alleges that the following reasonable adjustments " would have enabled the claimant to remain in employment" ;

a) Providing regular refresher training upon the use of his computer and estimating.
b) Providing a mentor to guide and support the claimant.
c) Facilitating a closer working relationship with the manager at Driffield and his line manager.
d) Providing direct support as an estimator.
e) Facilitating frequent visits from line manager Chris Firth.
f) Making regular phone calls and providing regular guidance to the claimant.
g) Agreeing a detailed action plan with the claimant, complete with benchmarks and timescales for achievement of those benchmarks.

In his closing written submissions, Mr Gibson for the claimant submitted that the following were the reasonable adjustments which should have been implemented by the respondent;

a) Drawing up a detailed action plan with the claimant, assessing what they wanted from him, what he could do, adjustments that might assist, benchmarks and timescales.
b) Computer refresher training.
c) Installation of the relevant software to permit computerised estimating and training on it as an estimator.
d) Facilitating a better working relationship with Driffield.
e) Implement the four sessions of coping strategy training recommended by Access to Work.
f) More face-to-face support meetings with Mr Firth.

31 Mr Ali in his closing submissions on behalf of the respondent, submitted that the tribunal should only consider those adjustments proposed in the claimant's pleaded case, as there had been no application to amend that list. Mr Ali further submitted that, in the period immediately following the claimants return to work in February 2017, the respondent implemented the following as reasonable adjustments;

a) A phased return to work.
b) Reallocating to others nearly all the claimant's duties so he could take his time to re-familiarise himself with the working environment.
c) Reduced hours.
d) Full pay.
e) Not to work alone, or at heights.

32 In **Environment Agency v Rowan (2008 ICR 218)** and in **Spence v Intype Libra (EAT 0617/06)** it was established that the tribunal must identify the PCP, the nature and extent of the substantial disadvantage suffered by the claimant, whether there were adjustments which it was reasonable for the respondent to make and whether those adjustments would have removed that disadvantage. A summary of the relevant parts of the judgements given by Langstaff J and Elias P states as follows;

" As far as reasonable adjustment is concerned, the focus of the tribunal is an objective one. The focus is upon of the practical result of the measures which can be taken. It is not – and it is an error – for the focus to be upon the process of reasoning by which a possible adjustment was considered. It is irrelevant to consider the employers thought processes or of the processes leading to the making or failure to make a reasonable adjustment. It is an adjustment which objectively is reasonable, not one for the making of which, or the failure to make which, the employer had (or did not have) good reasons. The issue is whether the necessary reasonable adjustment has been made – whether it is by luck or judgement is immaterial. A tribunal will be fully entitled in the light of all the evidence before it to conclude that an employer has failed to make a reasonable adjustment, and his ignorance of the employee`s requirements, whether the result of indifference or ignorance, will not avail the employer one iota. He may carry out an assessment and fail to make reasonable adjustments; equally, he may fail to carry out the assessment but make all necessary reasonable adjustments. The nature of the reasonable steps envisaged is that they will mitigate or prevent the disadvantages which a disabled person would otherwise suffer as a consequence of the application of the PCP. The duty is not an end in itself, but is intended to shield the employee from the substantial disadvantage that would otherwise arise. The carrying out of an assessment does not of itself mitigate or prevent or shield the employee from anything. It will make the employer better informed as to what steps, if any, will have that effect, but of itself it achieves nothing. In short, what is envisaged is that steps will be taken which will have some practical consequence of preventing or mitigating the difficulties faced by a disabled person at work. It is not concerned with the process of determining which steps should be taken.

33 What an employer is thus required to undertake, is an assessment of the nature and extent of the disadvantage caused to the employee by the application of the PCP, so that it has a clear understanding of the nature and extent of that disadvantage. The employer must then go on to consider what adjustments could be made to adjust that working practice, whether it would be reasonable to make those adjustments and if made, whether those adjustments would avoid that

disadvantage. That involves an element of positive discrimination, in the sense that the employer is required to take steps to help a disabled employee, which they would not be required to take for other employees. The control mechanism lies in the fact that the employer is only required to take such steps as it is reasonable for them to have to take. They are not expected to do the impossible. The EAT said in **Project Management Institute v Latif (2007 IRLR 579)** that, in order to shift the burden of proof onto the employer, the claimant must not only establish that the duty has arisen, but that there are facts from which it can reasonably be inferred, absent an explanation, that it has been breached. Accordingly, by the time the case is heard, there must be evidence of some apparently reasonable adjustment that could have removed the disadvantage. It would be an impossible burden to place on an employer to prove a negative – i.e. that no adjustment could reasonably have been made.

34 The respondent's position is that it made the five adjustments set out in paragraph 31 above and that these had been agreed with the claimant as being reasonable, so as to allow him to gradually re-familiarise himself with his working environment, with a view to gradually resuming his full duties as branch manager. Of those adjustments now proposed by the claimant and set out in paragraph 30 above, only those relating to the return of the computer, the installation of the estimating software and training on their use, could truly amount to an "adjustment". The computer was in fact returned and the software installed, following the claimant's request. The respondent accepts that computer refresher training and training on the use of the estimating software were not provided, but that it had been agreed at the meeting on 5 October that such training would be made available to the claimant. However, the requirement to undertake estimating was only a proportion of the duties which the claimant was required to carry out as branch manager. There was no evidence from the claimant that any such training would have resulted in him being able to undertake estimating to the standard required of him as a branch manager. As at the date of these proceedings, the claimant informed the tribunal that his memory is still impaired – he forgets things and his concentration wanders. His use of a computerised estimating program would still require him to collate and input data and information, which the software program would then analyse and produce an estimate. The tribunal was not satisfied that the provision of such training would have enabled the claimant to carry out estimating to the required standard. The provision of such training would not have enabled the claimant to carry out the full role of a branch manager, because there were other duties which he would still be unable to perform. The claimant has not alleged that there were any other adjustments which could have been made and which would have specifically enabled him to undertake those other duties. The other adjustments proposed in paragraph 30 above do not address the avoidance of the disadvantage caused by the requirement for him to be a fully functioning branch manager. Those proposed adjustments do not identify those parts of that role which the claimant could not perform because of his impaired cognitive function. They do not state how he would be able to perform those parts of the role, had the adjustments been implemented. "Drawing up a detailed action plan", "facilitating a better working relationship with Driffield" and "implementing four sessions of coping strategy training" are no more than preparatory steps to enable the parties to consider whether any adjustments could reasonably be made which may remove the disadvantage. The same applies to the suggested "providing a mentor", "providing direct support as an estimator" and "frequent visits from line manager". The tribunal found that the implementation all or any of these proposals was highly unlikely to have produced any meaningful adjustment which would have

removed the disadvantage caused to the claimant by the requirement that he be able to undertake 80% – 85% of his role as a branch manager. The critical question is whether the respondent has taken such steps as was reasonable to have to take to avoid that disadvantage. The claimant has been unable to establish that any of the adjustments proposed by him would have enabled him to undertake 80% – 85% of his role as a branch manager, either within the foreseeable future or indeed at any time. The claimant has not proved any facts from which the Employment Tribunal could infer that the respondent is in breach of its duty to make reasonable adjustments. That claim is dismissed.

35 DISCRIMINATION ARISING FROM DISABILITY

It is accepted that dismissal amounts to unfavourable treatment. The respondent accepts that it dismissed the claimant because he was unable to perform the role of a fully functioning branch manager and that his inability to do so was a consequence of his disability. The requirements of S.15(1)(a) of the Equality Act 2010 are therefore made out. The respondent relies upon the statutory defence in S 15(1)(b), namely that its dismissal of the claimant was a proportionate means of achieving a legitimate aim. This is what is commonly known as the "justification" defence. The aim put forward by the respondent is that of having a branch manager capable of performing 80% – 85% of his role. This was not challenged by the claimant, nor was it challenged that it was a legitimate aim. The tribunal accepted the evidence of the respondent's witnesses, which was that its national structure required a branch manager who was effectively the figurehead in each branch and who was responsible for all aspects of the performance of that branch, particularly its profitability. The tribunal found that to be a legitimate aim.

36 It is for the respondent employer to demonstrate that dismissal of the claimant was a proportionate means of achieving that legitimate aim. The employer must sure that the means chosen for achieving its objective correspond to a real need on its part, are appropriate with a view to achieving the objective in question and are necessary to that end. The true test involves striking "an objective balance between the discriminatory effect of the condition and the reasonable needs of the party who applies the condition". **(Hampson v Dept of Education and Science – 1989 ICR 179**). It is sufficient for the employer to demonstrate that the reasons for the discriminatory action would be "acceptable to right-thinking people as sound and tolerable". **(Ojutiku v MSC – 1982 ICR 661).** The role of the employment tribunal in assessing the employer`s justification for the purposes of section 15 (1) (b) was considered by the EAT in **Hensman v MOD – UKEAT/0067/DM**) as follows ;

" The role of the employment tribunal in assessing proportionality is not the same as its role when considering unfair dismissal. In particular, it is not confined to asking whether the decision was within the range of views reasonable in the particular circumstances. The exercise is one to be performed objectively by the tribunal itself. The tribunal must reach its own judgement upon a fair and detailed analysis of the working practices and business considerations involved. In particular it must have regard to the business needs of the employer. The tribunal must weigh the real needs of the undertaking without exaggeration, against the discriminatory effect of the employer's proposal. That proposal must be objectively justified and proportionate."

37 The claimant has not challenged the respondent's description of the duties required to be undertaken by the branch manager, nor has he challenged the importance of the branch manager's role in the respondent's general structure. The claimant has not alleged that the respondent's witnesses having any way exaggerated the importance of having a fully functioning branch manager. In a recent decision of the Court of Appeal in **O`Brien v Bolton St Catherine`s Academy (2017 EWCA CIV 145)** Underhill LJ reiterated that it is well-established that in an appropriate context a proportionality test can, and should, accommodate a substantial degree of respect for the judgement of the decision taker as to his reasonable needs, provided he has acted rationally and responsibly, whilst insisting that the Tribunal is responsible for striking the ultimate balance. There is no rule that justification has to be limited to what was consciously and contemporaneously taken into account in the decision-making process. The task of the Employment Tribunal when considering S. 15 is to use its common sense and knowledge as an industrial jury to ask whether the dismissal was proportionate, as the respondent maintains it was.

38 The claimant suffered a stroke on 18 December 2016 and did not return to work until 20th of February 2017. Although being paid his full salary he was unable to undertake the vast majority of the normal duties of the branch manager. That position had not changed by the time of the first capability meeting on 5 October 2017. There had been no improvement in the situation by the time of the final capability meeting on 8 November 2017. As at that date the claimant was unable to provide any meaningful indication either as to a gradual improvement and resumption of his duties or when he expected to be able to undertake all of those normal duties. The tribunal accepted the evidence of the respondent's witnesses, namely that the lack of a fully functioning branch manager was having a seriously detrimental impact upon the operation of the branch and its profitability. Estimates could not be prepared and provided to potential clients; the order book was not being properly progressed; debts were not being chased and there was a general lack of supervision and control within the branch. The majority of the claimant's duties were transferred to other employees in other offices. That had been the position for some nine months and there was no foreseeable prospect of those duties transferring back to the claimant`s branch. It was unreasonable to expect those employees at other branches to accommodate this additional work for a further prolonged period of time. Meanwhile the claimant continued to be paid his full salary, yet was performing very few of his managerial duties. Mr Gibson for the claimant valiantly sought to persuade the Tribunal that a company of the respondent`s size and financial strength could easily absorb the cost of continuing to employ the claimant, at least until such time as he had either made a full recovery or it became clear that he would be unable to resume his full duties. Mr Gibson argued that the respondent had failed to give the claimant sufficient time to show that he would eventually be able to resume his full duties and also that it had failed to take reasonable and proper steps to support him and ensure that the claimant was given a fair and reasonable opportunity to show that he could eventually resume those duties. The Tribunal was not persuaded by these arguments. **S.15** requires the Tribunal to consider whether the **treatment** was justified, not whether the **underlying procedure** was justified**. (Buchanan v Commissioner of Police for the Metropolis (UKEAT/0112/16/RN).** The tribunal accepted the evidence of the respondent's witnesses as to the real impact upon its business of the claimant's continued incapacity. The Tribunal accepted as a reasonable need, the requirement that it's branch manager be able to perform 80% - 85% of his normal duties. It was reasonable and proportionate for the

respondent to conclude in November 2017 that the claimant was unable to do so and that it was unlikely that he would be able to do so within the foreseeable future, or at all. It was unrealistic of the claimant to expect to continue to be employed in circumstances where there was no real prospect of him being able to undertake his full duties within the foreseeable future. The Tribunal was satisfied that right-thinking people would accept as sound and tolerable, the respondent's decision to dismiss the claimant at that time. In all of those circumstances, the respondent's dismissal of the claimant was a proportionate means of achieving a legitimate aim. Accordingly, the claimant`s complaint of unlawful discrimination arising from disability is not well-founded and is dismissed.

39. **UNFAIR DISMISSAL**

S98 ERA 1996 places upon the respondent, the burden of proving what was its reason for dismissing the claimant and that the reason proffered is one of the potentially fair reasons in S.98 (1). In the present case, the respondent states that its reason for dismissing the claimant was a reason related to his capability for performing work of the kind for which he was employed. The claimant accepts that this was the respondent's real reason for dismissing him. The claimant accepts that at the date of his dismissal in November 2017 he remained incapable of performing the duties of a fully functioning branch manager. As at that time he was not undertaking any estimating, orderbook control, debt collection or general management and supervisory duties. Although on full salary, he was still working reduced hours and his duties comprised mainly collecting and delivering materials to sites and speaking to staff. That had been the position since he began his phased return to work in February 2017. Where an employer seeks to rely on in capability as a ground for dismissal it is not necessary to objectively establish that the employee actually lacked capability. It is sufficient that the employer honestly believes on reasonable grounds that the employee is incapable. The questions to be asked are;

(a) does the employer honestly believe this employee is incapable or unsuitable for the job?
(b) Are the grounds for that belief reasonable?

40. The Tribunal is therefore required to decide whether there was material in front of the employer which satisfied the employer of the employee`s inadequacy or unsuitability and upon which it was reasonable to dismiss him stop it remains the employer to set its own standards to be asked of employees – the Tribunal cannot substitute its own view of an employee`s competence. In the claimant's case, the Tribunal was satisfied that at the date of his dismissal the claimant remained incapable of performing the duties required of a fully functioning branch manager. Even at the respondent's required level of 80% – 85%, the claimant`s level of performance fell considerably below that standard.

41. Having established capability as the reason for dismissal, the question of whether the dismissal was fair or unfair in the particular circumstances of the case must be judged in accordance with the "reasonableness" test in S.98(4) ERA 1996. The tribunal must consider not only what steps a reasonable employer would have taken when faced with an employee whose performance falls below the required standard, but also what steps the employer should have taken to minimise the risk of poor performance and to create the conditions that allow the employee to carry out his duties satisfactorily. It is generally accepted

that proper training, supervision and encouragement are essential, especially where the employee has been promoted to a new job. If the employer fails to provide instruction and support at the outset, or sets unrealistic standards for an employee, then a subsequent dismissal for incapability may be unfair. The general concept of fair play inherent in disciplinary procedures should also guide management in considering a dismissal for inefficiency or incapability.Iin general terms, an employer should be slow to dismiss an employee for incapability "without first telling the employee of the respect in which he is failing to do his job adequately, warning him of the possibility of a likelihood of dismissal on this ground and giving him an opportunity of improving his performance." **(James v Waltham Holy Cross UDC – 1973 ICR 398)**.

42. The requirement to follow a fair procedure in dismissals for incapability usually includes the following steps;

a) A meeting (of which the employee is given prior written notice containing an outline of the matters to be considered) should be arranged with the employee and his representative.
b) The respects (in detail) in which he falls short of the required standards.
c) The time within which his performance must improve.
d) The fact that if he fails to improve he may receive a written warning/final written warning/or may be dismissed.

If the employee's performance fails to improve, then it should be invited to a second meeting by letter which should set out;

a) The respects in which he has failed to improve.
b) His opportunity to explain the shortcomings.
c) A further timescale for improvement
d) The possibility of further sanctions in the event of insufficient improvement.

If the employee's performance still fails to improve to the required standard, then the second step may be repeated in appropriate circumstances or the claimant invited to a final meeting where dismissal will be considered.

43. The ACAS code of practice states that a warning should set out what improvement in performance is required, together with a timescale. Providing the employee with an opportunity to improve is necessary in the great majority of cases if the employer is to act reasonably. What constitutes a reasonable opportunity to improve will differ greatly and depend on the individual circumstances of each case. Factors may include length of service, performance during that service, the extent to which the employee`s performance has fallen below the expected standard and how long the employee has known of the employer's dissatisfaction. Longer periods to improve are often appropriate in situations where the employee has been asked to do new kinds of work. Employers should not set unrealistic targets during the improvement period, particularly if they have waited for some time before acting and kept their doubts about the employee to themselves. It is equally important that the employer does not simply "go through the motions" when presenting an employee with an opportunity to improve his performance. An employer may find it difficult to show that it acted reasonably if the capability procedure which was put in place lacks any objective basis by which improvement could be measured, or that the employer has neglected to provide any support to the employee in his efforts to

improve. The employer should monitor the employee's progress during the improvement period and the fact that an employee has shown at least some capacity to improve may be taken into account by the Tribunal when determining whether the dismissal for failing to make sufficient improvement falls within the band of reasonable responses.

44. The tribunal found that, in the claimant's case, he was essentially left to his own devices from when he returned to work in February 2017 until the first capability hearing on 5 October 2017. He was allowed to work such hours as he wished and to perform only those duties which he felt comfortable to perform. The respondent described this as a "phased return to work" and genuinely believed that it was acting in the claimant's best interests by doing so. The claimant in turn was more than happy to return to work on that basis and to continue in that vein for an indefinite period. The respondent believed that it was being supportive of the claimant by putting no pressure upon him in terms of targets or timescales. The respondent simply hoped that, given time, the claimant would gradually resume his full duties as the branch manager. The claimant did not actively take steps to increase his hours or workload, nor did he request any specific programme or plan of action designed to gradually reintroduce him to the duties he had previously undertaken as the branch manager. The claimant now alleges that those steps described as "reasonable adjustments" in paragraph 30 above, were steps which should reasonably have been undertaken by the respondent to support the claimant during his rehabilitation period and to gradually reintroduce him to his normal duties. In particular, Mr Gibson submitted that the respondent failed to devise and implement an action plan which contained achievable targets, within a reasonable period of time and with appropriate support and retraining to enable the claimant to achieve those targets within that timescale. Mr Gibson pointed out that nothing had been done in this regard from the 20th of every 2017 when the claimant returned to work until the first capability hearing on 5 October 2017. Mr Gibson submitted that the claimant was effectively given from 5 October 2017 until 8 November 2017 in which to achieve the necessary improvement. That was a period of only five weeks, which Mr Gibson submitted to be wholly inadequate in all the circumstances of this case. Furthermore, the claimant was effectively told that within that short space of time he must progress from simply collecting and delivering materials and speaking to staff, to not less than 80% – 85% of the full duties of the branch manager. Again, Mr Gibson submitted that this was a totally unrealistic target in all the circumstances of the case. Finally, Mr Gibson submitted that it was unreasonable for the respondent to require the claimant to achieve that level of improvement, within that period of time, without any meaningful training, re-training or other means of support. There were no arrangements made for the claimant's performance to be monitored during the improvement period and thus no means by which the claimant or the respondent were able to measure his performance. Mr Gibson's case was simply that the steps set out in paragraphs 41 and 42 above were never addressed by the respondent, let alone implemented. Gibson pointed out that the claimant had only been promoted to the position of branch manager in November 2016 and had therefore all you been in post for a few weeks when he suffered a stroke on 18 December. That, said Mr Gibson, was another factor which should be taken into account.

45. Mr Ali's submissions were that the respondent had between 20 February 2017 and 5 October 2017, offered the claimant an opportunity to find his feet, familiarise himself with the business and gradually grow back into his role as

branch manager. Mr Ali described this as "a considerable period of time during which the claimant was offered support and assistance." The Tribunal found that no such support and assistance was provided. Simply removing the majority of his duties and allowing them to be undertaken by other employees at a different office could not in the circumstances of this case be described as "support and assistance." Mr Firth insisted that he had face-to-face meetings with the claimant on at least 10 occasions during this period. The claimant`s recollection was that he had not seen Mr Firth anywhere near as often as that. The tribunal found that the number of meetings was nowhere near as significant as the content of any such meetings. The tribunal found that at no stage during the claimant's first return to work was he given any retraining, targets for improvement, timescale for improvement, assessment or appraisal of any improvement or any indication whatsoever as to what was required of him in the short term or the long term. Mr Firth accepted that there was no written record of any of these meetings and at no stage was the claimant informed in writing as to what was expected or required of him. In cross-examination Mr Firth`s position was that the claimant was a senior employee and thus one who was expected to be able to access help for himself. Mr Firth believed that the claimant should have arranged to have his computer repaired and returned and to have the estimating software installed. Mr Firth believes that the claimant should have taken it upon himself to gradually increase his workload so that eventually he was undertaking the full duties of the branch manager.

46. The occupational health report was received by the respondent by not later than 7 August 2017. By that time respondent had noted that the financial performance of the Newcastle branch had deteriorated significantly, when compared to the previous year. Mr Firth concluded that the principal reason for the downturn was the lack of a fully functioning branch manager. It was this that triggered the invitation to a formal capability meeting by letter dated 21st of September. The meeting did not take place until 5 October. Even at that stage, the respondent did not provide any description of the shortfall in the claimant's performance, what level of improvement was required and over what period of time. The claimant submitted his "Points for Meeting" document (P118) but none of those matters were particularly addressed, either at the meeting or in the outcome letter. That letter states;

"We discussed whether you felt able to pick up some of the duties that had been taken away from you to aid you with your return to work. You indicated that you would be happy to try, but not all at once and that they should be phased in over a three-month period to allow you to build up. You mentioned that you had undertaken some estimating but would appreciate some refresher training on this as you had not done much estimating in the last nine months. We discussed the impact that your prolonged phased return is having on the day-to-day workload. The business is suffering financially. At present the branch is making a financial loss in part due to not having a fully functioning branch manager in post. You have been on phased return for almost 10 months, with still no prospect of a full return to work in the very near future. As a result of our meeting we have discussed and agreed the following actions;

a) You will approach Access to Work via your local Jobcentre to see what help they can offer you.
b) We will consider whether there are any alternative rules that you could be offered and revert.
c) We will consider whether ill-health retirement is an option and revert.

d) We will consider the reasonable adjustments you have suggested as well as our own suggestions.

47. The claimant was told in that letter that a further meeting would be arranged for the end of October, although in fact it did not take place until 8 November. No mention is made in a letter of any specific target or standard of improvement required, nor is there any mention of how such improvement would be assessed. The tribunal found that the respondent's position when this letter was sent, was that by the time of the next meeting the claimant would be required to show that he was carrying out 80% – 85% of the normal duties of the branch manager, or at least show that he would be able to do so. In adopting that approach, the tribunal found that the respondent had failed to observe or implement the basic steps described in paragraphs 42 and 43 above. The claimant was effectively given only five weeks in which to improve and yet was not provided with any meaningful target, assistance or assessment. The implementation of the respondent's capability procedure between 5 October and 8 November was carried out with what can only be described as indecent haste. Whilst it is correct that the claimant had been back at work since February, the Tribunal found that the implementation of the capability procedure which led to the claimant's dismissal did not begin until the letter of 21 September 2017, inviting the claimant to the first meeting. Bearing in mind the claimant's seniority, length of service and previous exemplary record, this was an unreasonable process. The respondent's dismissal of the claimant was procedurally unfair, contrary to S. 98 (4) ERA 1996.

48. Having arrived at that conclusion, the tribunal then had to consider the likelihood of the claimant being dismissed in any event, had the respondent followed a fair procedure. The tribunal found (and it was never denied by the claimant) that as at the date of his dismissal, he remained in capable of performing the role of a fully functioning branch manager. As at that date, there was little, if any, prospect of the claimant ever being able to do so. As at the date of these Employment Tribunal proceedings, the claimant remains incapable of performing that role. The tribunal had to consider what was likely to have happened, had the respondent followed a fair procedure as described in paragraphs 42 and 43 above. The tribunal found that the respondent would probably have been able to dismiss the claimant fairly within a period of approximately six months from commencing its capability procedure. If that procedure began with the letter of 21 September 2017, then the claimant was likely to have been dismissed by not later than 21 March 2018. In those circumstances, the claimant's compensatory award should be limited to his loss of earnings for that period.

49. The claimant's schedule of loss appears at page 38 – 39 in the bundle. The claimant makes no application for reinstatement or re-engagement. The claimant has accepted throughout these proceedings that there were no alternative roles within the respondent's undertaking which could or should have been offered to him as an alternative to dismissal. The claimant's remedy is therefore limited to compensation for unfair dismissal. The claimant is entitled to a Basic Award, based upon his age and length of service, which is agreed to be in the sum of £6,601.50. The claimant was paid 9 weeks wages in lieu of notice and his loss of earnings for the relevant period is therefore 17 weeks at £626 per week (£2700 per month), which totals £10,642. In addition, the tribunal awarded the claimant the sum of £400 for loss of his statutory rights (the right not to be unfairly dismissed.)

50. Finally, during the disclosure process for these Employment Tribunal proceedings, the respondent discovered that in August 2017 the claimant and his wife had taken preparatory steps to set up a business which was capable of acting in competition with the respondent. Furthermore, the claimant had prepared a quotation for a roofing contract for a potential client of the respondent and had instructed his wife to type the quotation on letterhead which was to indicate that the quotation was from the claimant and not from the respondent. In cross-examination, the claimant conceded that he had done so and that ordinarily this was a breach of the specific terms of his contract of employment and also a breach of the implied terms of fidelity and trust and confidence. The claimant was unable to provide a meaningful explanation for his conduct. The claimant accepted that some reasonable employers may well dismiss their employee for this kind of behaviour. Mr Firth and Mr Morley for the respondent both confirmed that they would have dismissed the claimant had this conduct come to light during his period of employment. Mr Morley confirmed that he was aware of three other employees of the respondent who had been dismissed in similar circumstances. Mr Ali for the respondent invited the tribunal to make a deduction from any compensation payable to the claimant pursuant to the provisions of S. 122 (2) S.123 (7) ERA 1996, on the grounds of the claimant's conduct. Mr Gibson for the claimant submitted that it would not be just and equitable to make any deduction from either the basic award of the compensatory award, as this was a one-off incident which had caused no financial loss to the respondent and which was committed by an employee who are not previously received any kind of warning or of the disciplinary sanction. Mr Gibson submitted that it was unlikely that the claimant would have been dismissed for this behaviour. Furthermore, Mr Gibson submitted that the incident had only come to light because the respondent had been conducting a detailed examination of the claimant's email account because of these Employment Tribunal proceedings and would not have done so at the claimant not been dismissed on capability grounds and that it was unlikely that the misconduct would ever have been discovered.

51 The Tribunal found that this was conduct which was properly categorised as gross misconduct, for which the employee was highly likely to have been dismissed, had that misconduct been discovered. The tribunal had to assess the prospects of the misconduct having been discovered during the extended period for the respondent to carry out its capability procedure. The tribunal also must consider the extent to which it is just and equitable, having regard to those facts, for there to be a reduction in compensation. Having carefully considered those matters, the tribunal was satisfied that the claimant would probably have been dismissed during the extended period of the capability procedure and that in all the circumstances it is just and equitable for there to be a reduction of 50% in both the Basic Award and the Compensatory Award. The Basic Award is reduced to £3300.75 and the Compensatory Award to £5521.00. The total compensation awarded is therefore £8821.75.

Employment Judge Johnson

Date 11 September 2018

Note
Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.