EMPLOYMENT TRIBUNALS

Claimant: Mr S Asson

Respondent: Karl Farrell, Dominic Gale & Christopher Saxon, executive committee of Haresfinch Rugby & Community Club

HELD AT: Liverpool **ON:** 4, 5 & 6 March 2019

BEFORE: Employment Judge Shotter

Members: Dr L Roberts
Mr R Cunningham

REPRESENTATION:

Claimant: In person
Respondent: Mr Jaffier, consultant

JUDGMENT

JUDGMENT having been sent to the parties on 12 March 2019 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. By a claim form received on 24 June 2018 (ACAS early conciliation certificate dated 6 June 2018) the claimant claimed unfair dismissal, disability discrimination under section 13, discrimination arising from disability under Section 15, failure to make reasonable adjustments under section 21 and victimisation under section 27 of the Equality Act 2010. The claimant maintains he is physically impaired as a result of a knee injury and pain suffered from 2013 onwards, and a mental impairment with mental health issues in 2013 until mid 2014, then 2015 and ongoing for which he is prescribed anti-depressant medication. The claimant has also suffered from a hernia, but this is not a condition relied upon in these proceedings.

2. The respondent denies the claimant was during the relevant period disabled, maintaining he was absent from work since 6 February 2017, his GP had confirmed he was unlikely to carry out any of his duties and was dismissed on the grounds of medical capacity after being absent from work for some 14-months.

The claimant's allegations

Unfair dismissal

3. The claimant confirmed his allegations were as follows:

3.1 A capability meeting took place on 5 April 2018. The claimant told the respondent he was waiting for a report from the consultant that would deal with his capabilities and he had a meeting with his consultant the week after the capability meeting on 19 April 2018. a reasonable adjustment would have been for the respondent to have waited for the consultant's report before the decision to dismiss was taken on 25 April 2018, as the claimant was found well enough and cleared to return to work. He obtained a cleaning job for 16 hours per week carrying out similar duties with another employer on 25 April 2018. It is notable the claimant pleaded the evidence he received from the orthopaedic consultant was "imminent only after receiving specialist opinion could a decision be made…" For the reasons set out below the Tribunal found, unbeknown to the respondent, the claimant had fabricated the evidence that he was due to and/or had seen a specialist orthopaedic surgeon and he was found to be fundamentally a less than accurate historian who gave less than credible evidence.

3.2 The claimant claims he was (a) unfairly dismissed on the basis that the decision to dismiss taken without reference to the consultant's report available before the decision was taken, fell outside the band of reasonable responses, despite the reality unbeknown to the respondent at the time, that there was no examination of the claimant by the consultant as alleged and no medical report confirming he was well enough to return to his contractual duties. The claimant at no stage informed the respondent he had found alternative employment carrying out similar duties.

Direct discrimination – S.13 EqA

3.3 The claimant alleges he had been discriminated against under Section 13 (direct discrimination) on the basis that a person who was not so disabled and required the reasonable adjustment of "working at his own pace," would not have been dismissed.

3.4 With reference to the comparator the claimant is unsure whether he would be relying on an actual or hypothetical. No actual comparator was adduced and the Tribunal formulated a hypothetical comparator based on all the evidence before it which it explored with the parties at the liability hearing.

Discrimination arising from disability – S.15 EqA

3.5 In the claim brought under section 15 EqA the claimant alleges the detrimental action was the dismissal, and he was treated unfavourably because he was disabled and required the reasonable adjustment of carrying out the cleaning job at his own pace.

Failure to make reasonable adjustments – S 20-22 EqA

3.6 The claimant's claim brought under Sections 20-22 of the EqA is that (a) as a reasonable adjustment the respondent should have waited for the consultant's report, and (b) allowed him to return to work on 25 April 2018 with the reasonable adjustment that he could work at his own pace. At the preliminary hearing, the claimant indicated he would take legal advice on the provision, criteria or practice ("the PCP"), and at the liability hearing the claimant's PCP was confirmed as follows; "the arbitrary policy for dealing with long-term sickness with no formal procedure, no attempt to trial reasonable adjustments…not waiting for the consultant's opinion."

3.7 Turning to the Section 27 EqA victimisation complaint, having considered the contents of the claim form in case number 2403387/2017 the Tribunal found that the protected act relied upon does not involve any allegation brought by the claimant against the respondent to the effect that it has contravened the EqA. Case number 2403387/2017 involved a holiday pay claim and sick pay and was a claim of automatic unfair dismissal brought under S.104 of the Employment Rights Act 1996 (the "ERA"). It appears that the claim was brought under S.104 ERA and not section 27 EqA, namely, that the claimant's dismissal was automatically unfair if the reason or principal reason for the dismissal was that he had brought proceedings against the employer to enforce a relevant statutory right wages — S.104(1)(a), and/or dismissal in connection with the entitlement to paid annual leave under the Working Time Regulations 1998 SI 1998/1833 — S.101A ERA.

4. The following issues were agreed between the parties, the claimant having withdrawn his claim for victimisation which was dismissed upon withdrawal:

Unfair dismissal

4.1 Has the respondent shown the reason for the dismissal – was it a potentially fair one? Was the claimant dismissed for incapacity after a 14-month absence?

4.2 If it was, was the dismissal procedurally fair and did it fall within the range of reasonable responses? Was it reasonable to expect the respondent, a small organisation, to wait any longer after the claimant had been absent for 14-months? Did the respondent comply with the ACAS Code? Did it carry out sufficient investigation into he claimant's medical condition? Was the respondent entitled to rely on the GP report or should it have waited for the consultant's report?

4.3 Has the claimant proved that the reason for dismissal was automatically unfair?

Discrimination arising from disability (if it is found or conceded the claimant was disabled for the purpose of S.6 EqA):

4.4 Did the respondent possess knowledge (or could it reasonably have been expected to know) the claimant was disability?

4.5 Was the claimant dismissed because he was disabled and reasonable adjustments needed to be carried out?

4.6 Can the respondent show that its dismissal of the claimant was a proportionate means of achieving a legitimate aim?

Direct discrimination

4.7 Did the respondent (a) refuse to wait for the consultant's report and dismiss the claimant?

4.8 If so, did the respondent treat the claimant less favourably than it treated or would have treated an actual or hypothetical comparator?

4.9 Who is the claimant's comparator? If there any material difference?

4.10 If the respondent refused to wait for the consultant's report and dismiss the claimant, was this because of his protected characteristic of disability?

Failure to make reasonable adjustments

4.11 Did the respondent apply a PCP that put the claimant at a substantial disadvantage in relation to his absence and consultant's report in comparison with a non-disabled person?

4.12 Did the respondent fail to comply with a duty to make reasonable adjustments by refusing to wait for the consultant's report, going ahead with the claimant's dismissal without allowing him to return to work with the reasonable adjustment of working at his own pace?

Evidence

5. The claimant gave evidence on his own behalf and his brother, Ian Asson also gave oral evidence under oath. In Ian Asson's witness statement he referenced the claimant's appointment to see a specialist on 1 May on the basis that this was what he had been told by the claimant. Despite the clear evidence that the specialist appointment was a fiction, the Tribunal accepted on the balance of probabilities Ian Asson's recollection of what had taken place on the at the medical capability meeting as this was supported by contemporaneous documentation, in contrast to the evidence of Dominic Gale, which was selective, not supported by the contemporaneous documentation and contradictory.

6. The claimant was not found to be a credible witness and the Tribunal was unable to rely upon his evidence unless it was supported by contemporaneous evidence or by other witnesses. Ian Asson gave no evidence which suggested he

knew the claimant's appointment with the consultant was fabricated, and there was no evidence he was part of the claimant's fabricated version of events.

7. On behalf of the respondent Christopher Saxon and Dominic Gale gave oral evidence. Dominic Gale did not give credible evidence in that he denied the claimant had referred to his forthcoming appointment with a specialist/consultant on a number of occasions during cross-examination when the note taken of the meeting when this had been said. It is notable that on cross-examination the claimant's position was that he had informed Dominic Gale he was going to see the doctor on the 1st and then "I'd know more about my capabilities" despite the fact the claimant had no such appointment, and the Tribunal finds that words to this effect were said by the claimant in full knowledge that they were not true The Tribunal found Dominic Gale was selective in his evidence, as was the claimant, and it was less than straight-forward to unravel the events that had taken place. There were no issues of credibility in relation to Christopher Saxon.

8. The Tribunal was referred to an agreed bundle of documents presented by the parties, having considered the oral and written evidence and oral and written submissions presented by the parties (the Tribunal does not intend to repeat all of the oral submissions, but has attempted to incorporate the points made by the parties within the body of this judgment with reasons), it has made the following findings of the relevant facts resolving a number of the conflicts in the evidence.

Facts

9. The respondent is Rugby and Community Club primarily run by volunteers, and it employs between two to three bar persons and one cleaner, turning over approximately £100,00.00 (one-hundred thousand pounds) per annum largely generated by the sale of alcohol and various other social events. The club was run by an executive committee of three consisting if a chairperson, secretary and treasurer who were and remain unpaid volunteers. They dealt with all staffing and employee issues, in addition to the day-to-running of the club.

10. Ian Asson, the claimant's brother, previously acted as the chairman having been involved in the club one way or another since 1973 until in or around 6 February 2017 following a breakdown in the relationship between him and the executive members including Christopher Saxon, treasurer, and Dominic Gale, secretary. Karl Farrell took over from Ian Asson as chairman. The whole situation was political and it impacted on the claimant who took his brother's side.

The claimant's employment and knowledge of the respondent of disability status

11. The claimant's commenced his employment on 1 November 2014 as a cleaner, having been made redundant from his employment with a different employer in 2013. During his previous employment the claimant maintains he suffered an injury to his right knee, he underwent surgery in 2017 which was unsuccessful and the knee injury caused problems to his hip.

12. The claimant maintains during the relevant period he had a mental impairment, and suffered from stress and depression which continued to date. Counselling and medication was provided, and the Tribunal accepted the claimant

was prescribed and took anti-depressant medication over a number of years. It accepted the claimant's evidence despite its reservations concerning his credibility and lack of expert medical evidence on this point, given the extent and time over which the claimant took anti-depressant medication that on the balance of probabilities, there existed satisfactory medical evidence by way of the GP records before it that his mental impairment would have been exacerbated and in turn this would have worsened the long-term adverse effect on his ability to carry out normal day-to-day activities had he not taken the medication. The Tribunal accepted the claimant experienced pain in his knee, but it did not necessarily follow that he was disabled by a physical impairment as required under section 6 of the Equality Act 2010 ("the EqA"). Given the contradictions in the claimant's evidence and his lack of credibility, the Tribunal was unable to give him the benefit of the doubt when it came to his knee condition and without an expert medical report, it was unable to find the claimant was so disabled.

13. The Tribunal found on the balance of probabilities that the claimant was disabled with a mental impairment but not disabled with his knee condition in accordance with section 6 of the EqA as alleged, given the long-term adverse effect relied upon was the claimant's inability to move heavy objects such as tables by himself. It is uncontroversial immediately either before or after his dismissal (depending on which version of the claimant's story can be believed) the claimant could carry out all the work of a cleaner, unaided, except for the use of a litter stick, long-handled pan and brush to minimise his bending down.

14. The Tribunal accepted submissions put forward by the respondent that the claimant had been off work14-months. During the relevant period the respondent relied upon a medical report that confirmed the claimant was unable to vacuum, dust, mop, empty bins, remove rubbish, clean bathrooms and move tables and/or chairs back into position, all of which are normal day-to-day activities, and it must follow that theoretically based on the medical evidence the claimant could have been disabled in accordance with section 6 of the EqA in respect of his knee condition, and yet the claimant was in a position to start a new cleaning job carrying out all of the duties the medical expert confirmed he was unable to carry out, which suggests the adverse effect on day-to-day activities was minimal in comparison with opinion set out in the claimant's GP report, and for this reason on the balance of probabilities, the Tribunal did not find the claimant, who was an unreliable witness, had a physical impairment that fell under section 6 on the balance of probabilities.

15. It is notable the claimant worked as a cleaner without issue until 6 February 2017 when Ian Asson no longer acted as chairman, following the personality clashes referred to above. Prior to this the claimant worked closely with his brother, and he used an extended brush, pan and stick to avoid too much bending, which he found painful at times. The claimant did not take time off due to any medical conditions, and did not request any reasonable adjustments until the aftermath of 6 February 2017. The claimant did not inform the respondent he believed he was disabled either by his knee condition or mental health, and nor did he put the respondent on notice he had a mental health issue until the capability hearing referred to below. As at 6 February 2017 the claimant was waiting for a hernia operation, which is not relied upon as a disability, and the respondent believed this was largely the reason for his absence.

The respondent's knowledge of disability

16. Despite the Tribunal's finding that on the balance of probabilities the claimant was disabled with a mental health condition and it had the jurisdiction to consider the claimant's claims of disability discrimination for the reason set out, it is satisfied as at 6 February 2017 there was nothing to put the respondent on notice that the claimant was disabled with a physical or mental impairment in accordance with section 6 of the EqA, and the respondent did not possess actual or imputed knowledge of the mental impairment until much later in or around 16 November 2017.

Employment Tribunal proceedings case number 2403387/2017

17. Following ACAS early conciliation that took place between 15 May to 29 June 2017 the claimant issued Tribunal proceedings on 18 July 2017 claiming holiday pay and sick pay. On behalf of the respondent, Christopher Saxon filed the ET3 maintaining the claimant was not an employee but a self-employed contractor engaged to provide cleaning services registered with HMRC as self-employed with no contractual documents. Eventually, the parties settled on terms favourable to the claimant, and a judgment was entered accordingly and promulgated on 29 September 2017. It appears that this litigation was the only contact between the claimant and respondent during this period, apart from the MED3's submitted. The claimant relied on these proceedings in his complaint brought under section 104 of the ERA as a basis of his victimisation claim, which he subsequently withdrew during this liability hearing.

18. In April 2017 the claimant underwent surgery on his knee that revealed a small medial meniscal tear which was removed, and the claimant continued to experience knee pain for which he was prescribed painkillers to be taken as and when necessary.

19. In a letter dated 16 November 2017 Christopher Saxon sought the claimant's consent for a medical report, which the claimant agreed to and duly signed the consent form.

The claimant's absence and MED3's.

20. Christopher Saxon wrote to Dr Gupta, the claimant's GP, on 23 November 2017 requesting a medical report in relation to the claimant's health, particularly "severe knee pains, hernia awaiting operation, low mood." The claimant's cleaning duties were set out together with a number of questions including how long the conditions would last and reasonable adjustments that could be implemented. The respondent's description of the claimant's duties was not disputed by the claimant. The Tribunal finds in or around 23 November 2017 the respondent had no knowledge and nor could it have obtained that knowledge that the claimant could be disabled under section 6 of the EqA by way a mental impairment.

21. The Tribunal were not referred to all of the MED3's, which were not included in the trial bundle. The claimant remained absent off work having provided MED3's from his GP, and the Tribunal considered the documents set out in the bundle that revealed the claimant was signed off on the 18 January 2018 unfit for work following surgery on his hernia, which did not put the respondent on notice the claimant could

be disabled for the purpose of section 6 of the EqA. Thereafter as of 29 January 2018, the respondent was put on notice.

MED3 29 January 2018 for depression.

22. On the 29 January 2018 the claimant was signed off with "depression, severe knee pains" and hernia. The Med3 dated 1 March 2018 for 12-weeks confirmed the same medical conditions existed. In relation to all MED3's no adjustments were advised, and were crossed out. During this period the claimant gave no indication that he was well-enough to return to work, even with adjustments, and the medical evidence before the respondent was that he was not fit for work. The respondent did not ask the claimant whether he had been prescribed and was taking anti-depressant medication despite references to depression in the MED3's and had it done so, it would have learnt the claimant had been taking medication for a substantial period of time and it would have bene put on notice that the claimant could possibly be disabled by way of a mental impairment.

23. It took Dr Gupta 3-months to respond to Christopher Saxon's request for a medical report, during which time the claimant remained absent with no indication of any return to work.

Medical report 8 February 2018

24. Dr Gupta in a report dated 8 February 2018 confirmed the claimant had experienced problems with his knee since July 2013 that was ongoing, and in July 2014 he had complained of work related stress, and prescribed medication for stress and depression in April 2017. Following an arthroscopy "he continued to have anterior knee pain and the consultant orthopaedic surgeon advised that not much could be offered in the form of surgery…**he is unlikely he would be able to carry out any of the duties you have listed** [the Tribunal's emphasis]." A number of the duties set out by the respondent were day-to-day activities such as vacuuming, dusting, mopping and emptying bins and removing rubbish, cleaning bathrooms, moving tables and chairs back into position. Dr Gupta confirmed looking at the claimant's records and symptoms that **"it is unlikely he will be able to carry out any of the duties you have listed…the knee pain is unlikely to improve"** [Tribunal's emphasis]. Dr Gupta could not say how long the condition was expected to last other than the knee pain was unlikely to improve. He enclosed a letter from Mr Pidesetty, consultant orthopaedic surgeon specialising in lower limbs and sport knee injuries dated 5 June 2017. Mr Pidesetty had discharged the claimant on 30 May 2017 and confirmed **"at this moment in time there is nothing much I can offer him.**"

25. Dr Gupta also attached a list of the claimant's medication as at 8 February 2018 that the claimant confirmed today he continued to take which included Capsaicin cream for his knee, Citalopram 40 mg per day (anti-depressant), promethazine hydrochloride, (sleeping tablet) and Zapain providing pain relief "when required" for the knee pain. Dr Gupta did not deal with the claimant's medical condition relating to his depression and nor was he asked to do so; the respondent and Dr Gupta concentrated on the claimant's knee condition in the belief that it was this that prevented the claimant from returning to work.

26. Once members of the respondent's executive committee had seen Dr Gupta's report and the attachments, the Tribunal found the respondent was put on notice that the claimant could have been disabled, but they did not address their minds to this possibility and can be criticised for their omission although this does not assist the claimant's claim in any way.

27. As indicated earlier, from the doctor's advice it appeared the claimant was disabled by way of a physical impairment; however, under cross-examination and in evidence in chief the claimant maintains that Dr Gupta was wrong as he could do all of the jobs considered by Dr Gupta, with the exception of moving tables by himself. The claimant's disability status in relation to his knee condition was not straight-forward, and in deciding that the claimant was not physically impaired as a result of his knew condition the Tribunal took into account the claimant's oral evidence and lack of medical evidence addressing the conflicts as to what the claimant said he could do and the opinion expressed by Dr Gupta. Taking into account the fact the only activity the claimant could not carry out was moving heavy objects by himself, such as tables, the claimant was not disabled under section 6 EqA and so the Tribunal found.

<u>The respondent's failure to provide the claimant with a copy of Dr Gupta's medical report dated 8 February 2018.</u>

28. Dr Gupta's 8 February 2018 report was not shown to the claimant because the claimant had not ticked the relevant box in his consent form with the result that the respondent had read the report prior to the capability meeting, and the claimant had not, and nor had he the opportunity to absorb its contents beforehand. A reasonable employer acting within the bands of reasonable responses would have ensured an employee was provided with a copy of the medical evidence in good time for a capability hearing arranged to address the medical position and the independent medical evidence. For the reasons set out below, the Tribunal found the respondent's production of Dr Guptas' report at the capability hearing itself, and its failure to provide the claimant with a copy either before or after, was a procedural unfairness, as it did not give the claimant time to understand and absorb the report prior to a hearing at which he was dismissed on the basis of it.

29. On the 6 March 2018 the claimant wrote to his GP requesting a "re-assessment to find out what the diagnosis and prognosis is, as I am unable to work presently. I am now in debt and this makes my depression worse." The Tribunal accepted the claimant had been prescribed medication during his work-related absence, and in a GP record dated 9 April 2018 it was confirmed the claimant had been prescribed 5 different drugs, including pain relief and an anti-depressant. The clear evidence before the Tribunal was that the claimant believed he was not well-enough to return to work, and the respondent's intention was to explore this state of affairs with the claimant at a capability meeting, the claimant having been absent since 6 February 2017, a period of approximately 13-months, in a small organisation where he was the only cleaner. The Tribunal found it difficult to resolve the conflict between the claimant's 6 March 2018 communication to his GP and the evidence before the Tribunal that he could have been working as a cleaner within a matter of weeks.

Medical capability hearing

30. In a letter dated 28 March 2018 the claimant was invited to a medical capability meeting by the respondent. Reference was made to Dr Guptas' report and he was warned "if there are no suitable alternatives or reasonable likelihood of your return to work then dismissal may be an option." Dr Gupta's report was not attached, and the claimant did not have an opportunity to read through it in the cool light of day as opposed to at the hearing itself and the respondent's failure resulted in a procedural unfairness, but not a substantive unfairness given the contents of the medical report was not disputed by the claimant at the time or at this liability hearing.

31. The claimant responded on 1 April 2018 stating he would not be attending because the meeting would be with the secretary and treasurer "and nothing would be achieved." The claimant did not ask for a copy of Dr Gupta's report and nor did he put the respondent on notice that he did not have copy. The claimant requested a sub-committee be set up to explore the possibility of a financial settlement of his claim, as this had occurred previously in case number 240387/2017 when the matter settled with damages paid to the claimant. There was no hint that the claimant wanted to return to work, or could physically do so despite the fact the claimant knew he could be dismissed. The Tribunal took the view that the claimant's sole motivation was not to return to work but to seek settlement, hence the less than truthful account the claimant gave at the medical capability hearing which he did not expect ever to come to light.

32. During this period the claimant applied for and obtained alternative employment as a cleaner.

Alternative employment

33. In oral evidence the claimant contradicted himself as to when he had obtained alternative employment with Aerosol as a cleaner carrying out similar duties to those he had carried out with the respondent. The claimant gave a variety of dates ranging from between March and May 2018, and in this regard, he was not a credible witness. The Tribunal took the view that the claimant would have known when he started his new job, at the very least the month in which he had started. He was asked to go away and check on the date during an adjournment and yet failed to clarify this any further despite the fact the claimant continues to work for Aerosol. In oral evidence the claimant confirmed he had started work in March 2018, then May 2018 and in a hand-written statement his new job had started on the 29 April 2018.

34. At a preliminary hearing case management, the claimant confirmed he had obtained a similar job carrying out similar duties with another employer on the 25 April 2018, and this date was never amended despite the case management order making it clear the claimant would inform the Tribunal within 7-days if the Tribunal's record or understanding was incorrect. The Tribunal was clear from the evidence before it that at no stage did the claimant indicate to the respondent he was well enough to return to his cleaning duties and he obtained a similar job within weeks whether it was in March, April or May 2018. It was apparent from the 6 February 2017 the working relationship between the claimant, his brother and the executive committee had broken down, and the Tribunal found this fact contributed to the claimant's absence and his desire to obtain a financial settlement.

35. The respondent responded on 11 April 2018 making it clear that the purpose of the meeting was to discuss the medical report and the likelihood of the claimant returning to work in the future, and suitable employment alternatives. The claimant was aware one of the outcomes was that he could be dismissed, and this makes it all the more surprising that the claimant did not mention to the respondent the fact he believed he was well enough to return to work. The Tribunal has inferred from this that there was no intention on the part of the claimant to ever return to work for the respondent due to the conflicting personalities and this also accounts for the historically inaccurate evidence given by the claimant that he was to see and had been examined by an orthopaedic consultant on 1 May 2018. The Tribunal found the claimant to be an wholly unreliable witness who was not credible when giving this evidence.

36. By a letter dated 4 April 2018 the claimant agreed to attend the capability meeting at a time suitable for his childcare arrangements, and the meeting went ahead of the 19 April 2018.

19 April 2018 Medical capability meeting

37. The respondent used a pre-prepared form drafted by legal advisors setting out the procedure it was to follow. It was completed by Karl Farrell, and the decision maker was Dominic Gale. The claimant was accompanied by his brother, Ian Asson.

38. The document completed was not a full minute of the meeting, and the notes taken were very poor for which the respondent can be criticised. It can also be criticised for not providing the claimant with a copy. Dominic Gale's recollection of what had transpired was not credible, and he contradicted himself despite the notes confirming the claimant had raised there was to have been a further examination on 1 May 2018 of his knee at St Helen's hospital. Dominic Gale denied that this had been said on a number of occasions when he was cross-examined by the claimant, and yet on being taken to the relevant passage he then accepted the claimant had provided this information. The central feature in the claimant's case was the respondent's refusal to wait until the 1 May medical appointment and resulting medical report before taking the decision to dismiss, and it was not credible Domic Gale did not grasp this, or understand the relevance of what had transpired at the 19 April meeting. The Tribunal found Domoic Gale was, like the claimant, an unreliable witness and inaccurate historian. Karl Farrell did not give evidence at the liability hearing.

39. The claimant was referred to Dr Gupta's report, which he read and did not challenge. No adjournment was requested. The claimant explained there may be further treatment, he could not give a timeframe when he was fit to return to work and he was due to have a further examination of the knee on 1 May 2018 at St Helen's hospital. Reasonable adjustments were discussed and the notes indicated that claimant confirmed he could not carry out heavy lifting or kneel, and he did not know given "all the issues with health and knee" when he would be fully fit to return to work. The medication taken by the claimant was discussed, the claimant confirmed his health was not improving and he was undergoing counselling for depression at St Helen's hospital. In cross-examination the claimant conceded that it was reasonable for the respondent to have relied upon the report of Doctor Gupta, and as he had been absent for 14-months there were "good grounds" for calling him

to a capability meeting. There was no reference in the meeting to the claimant working or intending to work as a cleaner for a new employer, and the thrust of the information provided by the claimant was that he was not fully fit and could provide no timeframe in which he would return in the future and so the Tribunal found.

40. Both parties were aware that the only possible alternative employment was bar work, and it is not disputed that this was discussed as a possibility with the proviso that the claimant had difficulty lifting heavy items. The bar work had been one of the issues which led the claimant and his brother to question the respondent's committee that resulted in the breakdown between personalities. The issue was that bar staff were paid more in one weekend that a cleaner earned during a week. It is thus surprising to the Tribunal that the claimant did not make it clear that the bar work, carried out with a reasonable adjustment of no heavy lifting, would have been an acceptable alternative to him. In oral evidence the claimant stated he had told Dominic Gale he would come back and do bar work, but couldn't lift a table, and yet his evidence was also that he was waiting for a report on his capabilities after a consultation due to be held on the 1 May, and on this basis the respondent should have waited for this report. On the balance of probabilities, considering the conflicts in the evidence and the less than reliable statements made by the claimant and Dominic Gale, the Tribunal concluded bar work had been raised by Dominic Gale as a reasonable alternative, and the claimant had not indicated one way or another whether he would return to work in that capacity and this was left in the air as the claimant had no intention of ever returning to work in any capacity and according to his oral evidence, he was seeking a compromised settlement via a sub-committee and so the Tribunal finds. The Tribunal is supported in its view by the contemporaneous correspondence which followed when the claimant did not raise with the respondent the possibility that he could return working in the bar, even in his appeal letter. The Tribunal is in no doubt that had the claimant indicated he wished to take up the role of bar worker, this would have been made available to him by the respondent as a reasonable adjustment.

41. The notes of the 19 April 2018 meeting, which are not in dispute, reflect the claimant asking, "what safeguarding issues would [you] be able to provide?" Dominic Gale responded, "we could not answer that until we no [know] his capabilities" In response the claimant stated that he could be classed as disabled. By the end of the 19 April meeting, had the respondent been in any doubt that the claimant could have been disabled following Dr Gupta's report, it would have known disability was an issue and the claimant was due to be examined at St Helen's hospital on 1 May, reasonable adjustments were necessary either in the claimant's existing role or as a bar person and some light may have been cast on what reasonable adjustments were applicable after the claimant's examination on 1 May 2018, approximately 3-months after Dr Gupta provided his report. Unbeknown to the respondent the claimant was not telling the true story; there was an appointment on the 1 May with the physiotherapy and not an orthopaedic consultant as confirmed in the medical records, and there was no possibility of a consultant's report dealing with the claimant's capabilities being provided. In evidence before the Tribunal the claimant stated he was due to see the consultant Dr Howard, however, this was not reflected in the medical evidence which the claimant was taken through by the Tribunal with a view to assessing his disabilities, and he accepted that there had been no review booked for 1 May 2018, the alleged review had not taken place and no medical report had been prepared.

The outcome letter 25 April 2019

42. Throughout this process the respondent was guided by an employment consultancy, and Dominic Gale indicated a decision would be made within 14-days of the capability hearing. In a letter dated 25 April 2018 Dominic Gale dismissed the claimant for being absent since 6 February 2017 due to knee pains, depression and hernia. He wrote "your responses to the report were that you agreed with the GP's conclusions that there were no reasonable adjustments to make due [to] this [and] depending on the issues with your knee and that you felt you would be unable to return to your current position of cleaner because of your condition. The GP has confirmed pain is unlikely to improve, consultant orthopaedic advised that not too much could be offered in from surgery." It is notable in his letter of appeal the claimant did not dispute Dominic Gale's analysis of what had been said at the capability hearing and the Tribunal found that it reflected the reality of what had transpired.

43. With reference to reasonable adjustments there was no mention of bar work having been discussed with the claimant in the letter of 25 April in which it was stated, "we do not have any alternative roles which would not involve lifting or kneeling, therefore we have no alternative but to dismiss you from your employment due to medical capability reasons because of the unlikelihood of your return to work within a reasonable time."

The claimant's appeal

44. In a letter dated 27 April 2018 the claimant set out his appeal; "I have an appointment **today** [the Tribunal's emphasis] with my doctor and you haven't even waited to hear what the outcome of this will be." The claimant accepted in oral evidence that on the 27 April 2018 he did not have an appointment with any medical practitioner, and further, it contradicted his medical evidence and the later date he had given of 1 May 2018. The Tribunal took the view that the claimant had intentionally sought to deceive the respondent in the hope of catching it out, fully aware that he had no appointment and there was to be no report.

45. In his grounds of appeal, the claimant repeated his request that a sub-committee should be set up to consider his case. The Tribunal finds that the claimant was intentionally misleading the respondent about the medical position and his appointments with a view to obtaining a settlement via the sub-committee. According to the claimant's undated written statement, by the 29 April the claimant had "managed to get another job with an agency doing the same job" as he did with the respondent, which points to the fact that he was well enough to return to work as a cleaner. The claimant's objective was not to return to work for the respondent; it was to negotiate a settlement and continue in his original role as a cleaner working for a different employer. The Tribunal's view is supported by the manner in which the claimant conducted his appeal, he refused to proceed with it either in person or by written submissions, was silent about the fact that he had either been working or was due to start work depending on which of the dates given by the claimant ranging between March, April and May were true, when he returned to work as a cleaner for a new employer via an agency.

46. The claimant was informed the appeal hearing would be conducted by Karl Farrell, who took no part in the earlier process apart from taking the minute. He was not the decision maker, and ideally should not have heard the appeal but as the respondent is a small organisation there was no other option apart from outsourcing it.

47. On the 8 May the claimant advised the respondent he would not be attending the appeal hearing due to stress. He did not refer to the fabricated medical appointment or report, and this fact was unknown by the respondent who did not ask for an update. Despite the claimant's appeal letter being clear about the grounds i.e. the respondent had not waited for the outcome of a consultant's appointment, the appeal was not decided by the respondent who had informed the claimant the hearing could proceed in his absence. Karl Farrell in the letter of 10 May 2018 expressed his concern and encouraged the claimant to participate, indicating "if we do not hear from you to rearrange the hearing or with written submissions within the next 7-days **we will have no option than to investigate based on the details you provided in your appeal letter. We will then send you an outcome and this will end out internal process**" [the Tribunal's emphasis].

48. The respondent did not consider the claimant's appeal, and nor did it investigate the outcome of the claimant's appointment with his doctor on 27 April or 1 May 2018. Had the respondent done so it would have discovered there had been no appointment, no report and there was no outcome, the claimant's dismissal would have been confirmed and his appeal rejected. This accounts for the position adopted by the claimant during this period, as he was aware of the reality. Nevertheless, the respondent did not complete its own process and was unaware of the true situation. An employer acting reasonably within the band of reasonable responses would have decided the claimant's appeal based on the information before it as Karl Farrell had indicated he would do; the respondent did not and this gave rise to an unfair dismissal. The internal process was ended without the appeal being heard in breach of the ACAS Code.

49. The claimant was wrongfully dismissed in that he was paid two weeks payment in lieu of notice when it should have been three weeks' notice, which he eventually received after these proceedings were issued. The effective date of termination was 27 April 2018.

Law

Disability

50. S.6(1) of the Equality Act 2010 ("EqA") provides that a person, 'P', has a 'disability' if he or she 'has a physical or mental impairment, and the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.'

51. Schedule 1 of the EqA 2010 sets out factors to be considered in determining whether a person has a disability. S.6(5) of the EqA 2010 provides for the issuing of guidance about matters to be taken into account in deciding any question for the purposes of determining who has a disability, and such guidance came into force on 1 May 2011.

52. When considering whether a person is disabled for the purposes of the EqA regard should be had to Schedule 1 ('Disability: supplementary provisions') and to the Equality Act (Disability) Regulations 2010, and the 'Guidance on matters to be taken into account in determining questions relating to the definition of disability' under 6(5) of the EqA should be taken into account.

53. The relevant time to consider whether a person was disabled is the date of the alleged discrimination; see McDougall v Richmond Adult Community College [2008] IRLR 227, [2008] ICR 431.

54. The view of doctors on the nature and extent of claimed disability is certainly relevant, at the end of the day the crucial issue is one for the tribunal itself to decide on all the evidence. It is not appropriate to have an examination for the purposes of discovering the causes of an alleged disability, since, whatever the cause, a disability which produces the effects specified in legislation will suffice. In considering what amounts to an 'impairment', its effect, not cause is what is of importance. This approach is set out in the Guidance issued under the EqA 2010, where (at para A8) it is stated that 'it is not necessary to consider how an impairment is caused, even if the cause is a consequence of a condition which is excluded.

55. For any claim to succeed, the burden is on the claimant to show, on the balance of probabilities, something in the nature of an 'impairment' whether it is a mental or physical condition. In the case of Millar v ICR [2005] SLT 1074, [2006] IRLR 112, the Court of Session held that a physical impairment can be established without establishing causation and, in particular, without being shown to have its origins in any particular illness.

Unfair dismissal

56. Section 94(1) of the Employment Rights Act 1996 (“the 1996 Act”) provides that an employee has the right not to be unfairly dismissed by her employer. Section 98(1) of the 1996 Act provides that in determining whether the dismissal is fair or unfair, it is for the employer to show the reasons for the dismissal, and that it is a reason falling within section 98(2) of the 1996 Act. Section 98(2)(a) includes capability as being a potentially fair reason for dismissal. A fair dismissal for long-term illness requires consultation, medical investigation and consideration of options such as alternative employment. Capability can be assessed with reference to health or other physical or mental qualities – Section 98(3)(a) of the ERA.

57. Section 98(4) provides that where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal if fair or unfair (having regard to the reasons shown by the employer) depends on whether in the circumstances (including the size and administrative resources of the respondent’s undertaking) the employer acted unreasonable or reasonably in treating it as a sufficient reason, and this shall be determined in accordance with equity and the substantial merits of the case.

58. The question for the Tribunal is the reasonableness of the decision to dismiss in the circumstances of the case, having regard to equity and the substantial merits of the case. The Tribunal will not substitute its own view for that of the respondent. In order for the dismissal to be fair, all that is required is that it falls within the band of

reasonable responses open to employer. It is necessary to apply the objective standards of the reasonable employer – the "band of reasonable responses" test – to all aspects of the question of whether the employee had been fairly dismissed, including whether the dismissal of an employee was reasonable in all the circumstances of the case.

59. The Tribunal will consider the procedure the employer has adopted, in particularly, consultation, a thorough medical investigation and consideration of other options i.e. alternative employment within the company business. Reference to consultation with the employee, these should include consideration of the medical evidence and of the employee's opinion on his condition, what can be done to get the employee back to work and offering alternative employment.

60. the Court of Appeal decision in Taylor –v- Alidiar Limited [1978] IRLR 82 where Lord Justice Lane clarified the following questions as issues in capability claims:

(i) does the employer honestly believe this employee is incompetent or unsuitable for the job.

(ii) are the grounds for that belief reasonable? In the case of Mr Asson the Tribunal found in the affirmative for both of these questions; it was reasonable for the respondent to find due to the length of the claimant's absence and the fact he could not return to work in the foreseeable future he was unsuitable for the job, there was prospect of re-deployment as the claimant did show interest in the possibility of working behind the bar.

61. Employers have a duty to consider redeploying employees who are unable to carry out their duties due to ill health although there is no onus on the employer to create a job where none exists.

62. The High Court decision in Merseyside and North Wales Electricity Board –v- G A Taylor confirming that the circumstances which must be considered in determining whether the employer acted reasonably or unreasonably in treating the reason as sufficient for dismissing the employee are the circumstances applied at or prior to the date of the dismissal and what happened subsequent to the date of the dismissal cannot be relevant. This case was particularly relevant given the respondent's lack of knowledge about the non-existent medical examination relating to Mr Asson and non-existent medical report.

Burden of proof: discrimination

63. In determining whether the respondent discriminated the guidelines set out in Barton v Investec Henderson Crossthwaite Securities Limited [2003] IRLR 332 and Igen Limited and others v Wong [2005] IRLR 258 apply. The claimant must satisfy the Tribunal that there are primary facts from which inferences of unlawful discrimination can arise and that the Tribunal must find unlawful discrimination unless the employer can prove that he did not commit the act of discrimination. The burden of proof involves the two-stage process identified in Igen. With reference to the respondent's explanation, the Tribunal must disregard any exculpatory explanation by the respondents and can take into account evidence of an

unsatisfactory explanation by the respondent, to support the claimant's case. Once the claimant has proved primary facts from which inferences of unlawful discrimination can be drawn the burden shifts to the respondent to provide an explanation untainted by sex [or in the present case age], failing which the claim succeeds.

64. Section 136 of the Equality Act provides:

"(1) This section applies to any proceedings relating to the contravention of this Act.

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provisions concerned, the court must hold that the contravention occurred.

(3) Subsection (2) does not apply if A shows that A did not contravene the provisions.

(4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule.

(5) This section does not apply to proceedings for an offence under this Act."

Direct discrimination

65. The House of Lords in the well-known case of Shamoon v Chief Constable of Royal Ulster Constabulary [2003] ICR 33C that the question of less favourable treatment than an appropriate comparator and the question of whether treatment was on the relevant prohibited ground may be so intertwined that one cannot be resolved without the other being determined at the same ground. There is, essentially a single question, "Did the claimant, on the prescribed ground, receive less favourable treatment than others".

Disability discrimination arising from disability

66. Section 15(1) of the EqA provides-

"(1) A person (A) discriminates against a disabled person (B) if –

(a) A treats B less favourably 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.

67. Paragraph 5.6 of the Equality and Human Rights Commission: Equality Act 2010 Code of Practice provides that when considering discrimination arising from disability there is no need to compare a disabled person's treatment with than of another person. It is only necessary to demonstrate that the unfavourable treatment is because of something arising in consequence of the disability.

Disability discrimination – failure to make reasonable adjustments

68. The duty to make reasonable adjustments is set out in S 20 of the Equality Act 2010 ("EqA"). Section 20(3) sets out the first 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. Section 21(1) provides that a failure to comply with the first, second or third requirement is a failure to comply with the duty to make reasonable adjustments. Schedule 8 of the EqA 2010 applies where there is a duty to make reasonable adjustments in the context of 'work' and the Statutory Code of Practice on Employment (2011) is to be read alongside the EqA. The Code states that a PCP should be construed widely so as to include, for example, informal policies, rules, practices, arrangements, criteria, conditions and so on.

69. In the EAT decision in Secretary of State for Work and Pensions (Job Centre Plus) v Higgins [2013] UKEAT/0579/12 it was held at paragraphs 29 and 31 of the HHJ David Richardson's judgment that the Tribunal should identify (1) the employer's PCP at issue, (2) the identity of the persons who are not disabled in comparison with whom comparison is made, (3) the nature and extent of the substantial disadvantage suffered by the employee, and (4) identify the step or steps which it is reasonable for the employer to have to take and assess the extent to what extent the adjustment would be effective to avoid the disadvantage.

70. The Court of Appeal decision in Smith v Churchill Stairlifts Plc [2006] ICR 524, the judgment of Maurice Kay JC reference was made to Archibald v Fife Council [2004] IRLR 651, a House of Lords decision in which it was held that the duty to make reasonable adjustments is triggered where an employee becomes so disabled that she can no longer meet the requirements of her job description.

71. The EAT in Environmental Agency v Rowan [2008] IRLR 20 set out guidance as to the steps to be taken before a Tribunal can say what adjustments were necessary to prevent a PCP placing the disabled person at a substantial disadvantage.

Applying the law to the facts

Disability status

72. The claimant relies on the physical impairment of his damaged and painful knee, and mental impairment of stress and depression. 6(1) of EqA provides that a person, 'P', has a 'disability' if he or she 'has a physical or mental impairment, and the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.' The relevant time to consider whether a person was disabled is the date of the alleged discrimination i.e. before and during the claimant's absence from work that extended beyond 14-months. The Tribunal took into account the claimant's impact statement dated 3 October 2018.

73. Dealing with the claimant's knee condition; he had suffered from it since 2013 and the Tribunal accepts the claimant had been in a great deal of pain, which required medication. He had been signed off work since February 2017. Within the MED3's no reasonable adjustments were suggested and the view of Dr Guptas is relevant as to the extent of what the claimant could and could not prior to termination

of his employment. The February 2018 report makes the position very clear; activities such as vacuuming, cleaning, mopping, empty bins are day-today activities which Dr Gupta believed, in his professional opinion, the claimant was unable to carry out. The claimant's evidence on his disabilities was in direct contrast to the medical evidence and it is notable the claimant obtained the same type of work a few months after Dr Gupta's report in which Dr Gupta was of the view that the claimant was unlikely to be able to carry out any of the duties and the knee pain was unlikely to improve. It is uncontroversial the claimant has been taking medication for the pain as and when required, and he has been prescribed sleeping tablets partly due to his sleepless nights caused by the pain. There is no reason for the Tribunal to disbelieve the claimant on this, it would have been preferable for the Tribunal to have before it some form of medical evidence dealing with deduced effect and expert medical orthopaedic evidence on whether the claimant would still be able to carry out normal day-today activities had he not taken medication, undergone operations and physiotherapy, the claimant's evidence was not that he his knee condition had a substantial and long-term effect on his ability to carry out normal day-to-day activities at work. The Tribunal accepts the claimant's knee condition was ongoing, and whilst he gave evidence that it prevents him from cycling and playing football with his son, which the Tribunal accepted, on the balance of probabilities given the claimant's less than credible evidence concerning his alternative employment and medical condition, found the claimant was not disabled under section 6 of the EqA during the relevant period leading up to his dismissal on the grounds of capability by way of his knee condition.

74. Turning to the claimant mental health condition, this has been ongoing since 2013 and the claimant has been taking anti-depressant medication and taken part in counselling and "talking therapies" for many years. The claimant's evidence was that he suffers from loss of appetite, feels stress, cries in public, has difficulty sleeping (for which he is prescribed sleeping tablets) and waking up, feels anxious and gets argumentative over small things. There existed evidence before the Tribunal from the claimant and which could be inferred via the medical records documentation that the claimant's stress and depression had a long-term adverse effect on his ability to carry out normal day-to-day activities in the absence of medication and/or therapy. In arriving at this decision, the Tribunal accepts the claimant has a mental health condition that has and continues to be treated, and the claimant has suffered particularly because of stress arising from debt having lost a £30,000 job before being employed by the respondent on minimum wage. The burden is on the claimant to prove that his mental health condition had a long term adverse effect on his ability to carry out normal day to day activities during the relevant period, and he has discharged this burden. The claimant provided an impact statement, and was asked questions by the Tribunal about this condition and what would happen if he stopped taking medication. The Tribunal would have been assisted by an expert medical report dealing with whether the claimant's mental health condition had a long term adverse effect on normal day-today activities with or without medication, however, given the long history if the claimant's depression since 2013 through to 2019 the Tribunal has been able to take a realistic and pragmatic view of the medical condition before concluding the claimant was disabled in accordance with section 6 EqA.

75. In conclusion, the balance of probabilities the Tribunal does find the claimant was disabled as a result of his mental health condition, under section 6 of the EqA in

respect of a mental impairment and not the physical impairment of his knee condition, which the respondent concentrated on during the capability proceedings to the exclusion of the claimant's long-standing depression. If the Tribunal is wrong on this point, in the alternative, it proceeded to make findings on the claimant's substantive claims of unlawful disability discrimination based on the physical and mental impairments.

Discrimination arising from disability (if it is found or conceded the claimant was disabled for S.6 EqA):

76. With reference to the first issue, did the respondent possess knowledge (or could it reasonably have been expected to know) the claimant was disability, the Tribunal found that it did prior to the decision being made to dismiss the claimant. Mr Jaffier submitted that the respondent could not reasonably have been expected to know on the basis that the claimant carried out his duties unaided before he went off sick in February 2017. Mr Jaffier is incorrect, because the claimant used special equipment to avoid him kneeling and bending, as confirmed by Ian Asson. Once the claimant submitted the MED3's citing his knee and depression as the reason for such a lengthy absence, coupled with Dr Gupta's February 2018 report and the claimant's reference to his conditions as amounting to a disability at the capability hearing held on 19 April 2018, the respondent could easily have been expected to know that there was a possibility the claimant was disabled prior to dismissal.

77. With reference to the second issue, namely, was the claimant dismissed because he was disabled and reasonable adjustments needed to be carried out, the Tribunal found he was dismissed solely because he had been absent for 14-months and there was no foreseeable date for his return to work according to the GP's report and the claimant's statement given at the 19 April 2018 capability meeting. In short, had the claimant not suffered from his knee injury, mental health condition and hernia, he would not have been absent from work for 14-months and thus he would not have been dismissed. The claimant was dismissed on the grounds of capability. The position was further complicated by the fact that the claimant would not have returned to work in any event due to the conflicting personalities within the respondent organisation, and his sole intention of negotiating an exit settlement. Had the claimant succeeded in his disability discrimination claim, which he did not, this finding by the Tribunal may have affected the claimant's injury to feelings damages claim, as the Tribunal took the view based on the evidence before it and reflected in the finding of facts above, that the claimant was seeking a settlement against a background of manipulating the medical information to support his own ends, with no intention of ever returning to work and every intention of carrying out the same type of cleaning work with another employer.

78. With reference to the issue can the respondent show that its dismissal of the claimant was a proportionate means of achieving a legitimate aim, the Tribunal took the view that it could given the fact it was a small employer, employed only the one cleaner and the claimant had been absent for 14 months without any indication of any return in the foreseeable future, as supported by Dr Gupta's medical report. And the clear indication given by the claimant at the time. The Tribunal took the view that whilst the aim was legitimate, for the means to have been proportionate the respondent should have waited until the 1 May 2018 medical evidence as requested by the claimant. Had it done so, by 1 May 2018 the information before it would have

been that there was no medical opinion and no foreseeable return to work as the claimant had not informed the respondent he was well enough, and indeed, had or intended to work in the same job for another employer. Taking all the evidence in the round by 1 May 2018 the Tribunal found the dismissal would have been a proportionate means of achieving a legitimate aim, and the Tribunal's observations about the claimant never intending to return to work for the respondent remains the case.

Direct discrimination

79. The claimant relies on a hypothetical comparator which the Tribunal explored with the parties who agreed was in the same position as the claimant working in the role of a cleaner, absent from work for 14-months but who was not disabled with a knee or mental health condition. The hypothetical comparator may have had other medical conditions that did not amount to disabilities under section 6 EqA, for example a hernia.

80. The respondent refused to wait for the consultant's report and dismissed the claimant. There was no evidence the respondent treated the claimant less favourably than it treated or would have treated a hypothetical comparator, and the Tribunal took the view on the evidence before it a hypothetical comparator would have been treated exactly the same due to the length of time the claimant had been absent, and the evidence before the respondent that no foreseeable return to work was likely. Having heard oral evidence from Dominic Gale, taking into account his motivation the Tribunal concluded (a) he did not cross his mind that the claimant was disabled, and (b) the sole reason for the dismissal lay with the fact the claimant had been absent for 14 months and this could not continue into the foreseeable future bearing in mind the size of the business and small number of employees that included one cleaner, namely the claimant.

Failure to make reasonable adjustments

81. With reference to the first issue, did the respondent apply a PCP that put the claimant at a substantial disadvantage in relation to his absence and consultant's report in comparison with a non-disabled person, the Tribunal noted the claimant's PCP confirmed after the preliminary hearing case management the claimant having taken legal advice, was "the arbitrary policy for dealing with long-term sickness with no formal procedure, no attempt to trial reasonable adjustments…not waiting for the consultant's opinion." In oral evidence the claimant confirmed that the PCP was the respondent's practice of dismissing after a 14-month absence and "not waiting for the expert's opinion on 1 May 2018 before taking the decision to dismiss." He confirmed that the adjustment referred at the case management preliminary hearing relating to allowing him to return to work with the reasonable adjustment of working at his own pace was not a reasonable adjustment he now relied upon in these proceedings.

82. Mr Jaffar correctly submitted the claimant had "struggled" to find the PCP, and the evidence before the Tribunal was that as at the 19 April 2018 capability hearing the claimant was working at the same time as alleging the respondent was under a duty to make reasonable adjustments. The Tribunal found as set out above, on the balance of probabilities, the claimant was working as a cleaner given the claimant's

oral evidence and the variety of dates offered up by him from March onwards. As a consequence, it is a matter of logic that no reasonable adjustments were necessary because the claimant could carry out the duties of a cleaner with the same equipment he had used before the 6 February 2017. Mr Jaffar's submissions have considerable force on the basis that the claimant did work and continues to work without any adjustments. The Tribunal finds that no adjustments were necessary, and the PCP's suggested by the claimant in themselves would not have prevented any disadvantage allegedly caused to the claimant when carrying out his role of cleaner. It appears to the Tribunal that the relevant PCP and reasonable adjustment according to the claimant's oral evidence were more akin to using a long-handled brush and pan, not lifting heavy tables by himself or kneeling, and apart from this, there was there no evidence before the Tribunal that the claimant could not have carried out his cleaning role in its entirety given the fact that he had and continues to work in that role. The evidence before the Tribunal was that when the claimant was working these adjustments had been put in place, and the claimant's claim in this regard is dismissed.

Victimisation

83. The complaint of victimisation was withdrawn by the claimant during the proceedings, and dismissed. For the avoidance of doubt, had it not been withdrawn the Tribunal would not have found any causal connection between the claimant issuing proceedings for holiday pay and statutory sick pay and his dismissal on the grounds of capability as it was undeniably the case the claimant had been absent for 14-months, with no foreseeable return to work and this was the sole motivation of Dominic Gayle, the dismissing officer.

Unfair dismissal.

84. With reference to the issue, namely, has the respondent shown the reason for the dismissal, the Tribunal found the claimant dismissed for incapacity after a 14-month absence and this was a potentially fair reason on the basis of the evidence before Dominic Gayle at the time both from the claimant and his GP. For the avoidance of doubt, incapacity was the only reason for dismissal.

85. With reference to the issue if it was, was the dismissal procedurally fair and did it fall within the range of reasonable responses, the Tribunal found the procedure was procedurally unfair because (a) the claimant was not provided with a copy of the GP report until the day of the capability meeting when he was expected to read and absorb its contents at the meeting, (b) the respondent's refusal to wait until the 1 May 2018 as requested by the claimant when he gave the impression that on this date further information would be available on his capabilities and (c) the respondent did not consider the claimant's appeal, despite the clarity of his grounds, and their indication in correspondence that a decision would be made on it. It was reasonable to expect the respondent, a small organisation, to wait less than 2 weeks after the claimant had been absent for 14-months given the possibility that the claimant's consultant may have confirmed he was able to return to full cleaning duties, which was the evidence given by the claimant to this Tribunal. As found by the Tribunal in its findings of facts, had the grounds of appeal been investigated and/or the respondent waited until 1 May 2018 the respondent would have discovered the claimant had not seen the consultant as alleged, and the consultant had not

confirmed the claimant could return to full cleaning duties. In short, the medical evidence had not changed and as far as the respondent was concerned there was still no foreseeable return to work. It is notable the claimant did not inform the respondent he was well-enough to work as a cleaner for another employer.

86. The Tribunal found the respondent had largely complied with the ACAS Code of Practice except for the points raised above. At the time of dismissal, it had not carried out sufficient investigation into the claimant's medical condition given the indication given by the claimant that he was to see his consultant on 1 May. The respondent was entitled to rely on the GP report but a reasonable employer acting within the band of reasonable responses would have waited for the consultant's report. It is encumberant upon an employer to take reasonable steps to find out the true medical position if the dismissal related to capability. An employee's views as to their likely return should not be given any less weight than medical evidence to the contrary and the clear evidence before the respondent was that both the claimant and Dr Gupta were of the view he was unlikely to return to work in the foreseeable future. It is also encumberant upon the employer to discuss with the employee the medical condition and consult, which can include a number of matters ranging from consideration of the employee's opinion of his own condition, the medical evidence and the possibility of alternative employment in addition to other matters, taking into account the claimant's likely future level of fitness and the respondent complied with this duty.

87. With reference to the "no difference rule" set out in Pokey the Tribunal held, following oral submissions made by both parties, the claimant would have been fairly dismissed by reason of capability by 1 May 2018, given by that date it would have become apparent the claimant had not been to see his consultant and there would be no information forthcoming about his capabilities. The Tribunal found the claimant was unfairly dismissed and his claim for unfair dismissal well-founded, the claimant would have been fairly dismissed on 1 May 2018 and this will be reflected in the compensatory award under S.123(1) ERA. Following a discussion between the parties dealing with remedy, by consent the respondent was ordered to pay to the claimant compensation for unfair dismissal in the sum of £300.00 that included all the claimant's claims arising out of the unfair dismissal.

14.5.19_____

Employment Judge Shotter

JUDGMENT SENT TO THE PARTIES ON

31 May 2019

FOR THE TRIBUNAL OFFICE