



EMPLOYMENT TRIBUNALS

Claimant: Mr M Edwards

Respondent: The Secretary of State for Justice

Heard at: Cardiff **On:** 10, 13, 14, 15 May 2019 (and
16 May 2019 in chambers)

Before: Employment Judge S Davies
Mr R Mead
Mr M Pearson

Representation:

Claimant: Mr J Edwards, counsel

Respondent: Mr O James, counsel

RESERVED JUDGMENT

1. It is the unanimous decision of the Employment Tribunal that:
 - a. the claim of unfair dismissal is upheld;
 - b. the Respondent discriminated against the Claimant by dismissing him contrary to section 15 Equality Act 2010 (EqA);
 - c. the complaint of discrimination contrary to section 15 EqA with regard to repeated questions at a meeting on the 17 July 2017 is dismissed;
 - d. the complaints of harassment are dismissed; and
 - e. the claim for breach of contract is dismissed

REASONS

Issues

2. An agreed list of issues was presented jointly by the parties on day two of the hearing and is appended to this judgment.
3. It was agreed the hearing would deal with the question of liability only.

Applications

4. On day one of the hearing both parties made applications to amend their pleaded cases; both applications were granted for the reasons given at the hearing and a schedule of amendments produced on day two which is appended to this judgement.
5. On day two of the hearing an application was made by the Respondent for postponement of the hearing for non availability of witnesses. This application was refused for the reasons given at the hearing.
6. Although in the event, no application was made, the parties indicated there was a potential dispute about the inclusion in the bundle of a letter from the Claimant's solicitors to the Respondent [456-7]. The Respondent produced written submissions on waiver of privilege. In the end it was not necessary to resolve this dispute and with the agreement of the parties, the document was removed from the bundles without the Tribunal having read it.

Hearing

7. We heard evidence from the Claimant and on behalf the Respondent we heard from three witnesses: Danny Khan, former Governor HMP Cardiff, Sian Hibbs, Director Strategic Support, Administration and Assurance, HM Prison and Probation Service in Wales and Brian Ward, Deputy Governor HMP Cardiff.
8. The page numbering of the Claimant's witness statement was inaccurate and was corrected by counsel over the weekend (11/12 May 2019) and an amended version provided to the Tribunal at the start of day two.
9. The Tribunal was referred to agreed bundle of around 1000 pages (two volumes). Additional documents were produced without objection and

inserted [537a-d and 539 a-e]. In view of the large number of documents the parties were informed that the Tribunal would only read pages that they were referred to. References in square brackets in this judgement are to pages in the bundle.

10. A timetable was agreed with the parties at the outset of the hearing and adhered to. The majority of the first day was spent dealing with preliminary applications by the parties and the remaining time used for the Tribunal's reading. After preliminary applications on day two the Claimant gave his evidence. The Respondent's evidence was given on day three. The morning of day four was spent on submissions with both parties providing written submissions supplemented by oral submissions. The Tribunal reserved its decision and the remaining listed time was spent in chambers.
11. A chronology was produced by the Respondent and agreed by the Claimant on day two.

Disability and adjustments

12. The Respondent conceded that the Claimant was a disabled person by reason of mental impairment from 8 May 2017.
13. The Claimant indicated that he may require breaks during the course of giving evidence and he would indicate when a break was required. During the proceedings, mid-morning and afternoon breaks were facilitated and the Claimant did not request additional breaks.
14. The Respondent's witnesses and counsel did not require adjustments.

Summary of the case

15. This is a claim about a capability dismissal in circumstances of long-term absence of just under one year.
16. The Claimant disputes the level of compensation awarded to him upon termination under the Civil Service Compensation Scheme.
17. The Claimant also complains of discrimination in respect of repeated questioning about his return to work and a comment made regarding his mother's diagnosis with cancer.

Procedural background

18. The Claimant issued three claims in the Employment Tribunal on 12 October 2016, 16 October 2017 and 8 February 2018 (the last of which post-dated the effective date of termination).
19. The case was dealt with at preliminary hearing on four occasions:
 - a. 16 February 2017 by Employment Judge S Davies for case management;
 - b. 28 April 2017 by Regional Employment Judge B Clarke for case management;
 - c. 11 July 2017 by Employment Judge A Frazer on the question of disability; and
 - d. 17 September 2018 by Employment Judge C Ward for consideration of deposit order, strikeout and case management.
20. Judge Frazer determined in a reserved judgment promulgated on 15 August 2017, that the Claimant was not a disabled person at the material time for the purposes of his first case (1600782/2016). Judge Frazer concluded that the Claimant was disabled from 8 May 2017 with regard to anxiety and depression.
21. In her judgment of 17 September 2018, promulgated on 20 September 2018, Judge Ward dismissed all claims in case number 1600782/2016 save for the complaint of associative discrimination in respect of Mr Ward's comment about the Claimant's mother's diagnosis. Judge Ward also gave directions for preparation for the final hearing in respect of all three cases in her order of 17 September 2018.

Background facts

22. The Claimant commenced employment on 19 November 2001 and was dismissed with notice, during a meeting on 2 August 2017, terminating with effect from 31 October 2017. At the time of his dismissal the Claimant was an assistant officer working part-time hours (22 hours per week) in HMP Cardiff as a complaints clerk. This role involved collecting complaints from prisoners, logging and processing them. This function was auditable and had to be completed in a timely fashion. The Claimant's line manager was Kevin Skinner, Business Hub Manager.

Performance issues

23. The Claimant was able to work flexible hours around set core working hours. As a part-time worker the Claimant would have preferred to work a three day week in a different role to that of complaints clerk. With the support of Mr Skinner, the Claimant made a work life balance application with regard to his hours on 22 October 2015, in the application the Claimant recognised the importance of complaints been collected on a daily basis and so accepted that he would be required to work five days per week [437]. Despite having the support of his line manager, his work life balance application was not put forward by the Respondent to the appropriate committee for consideration.
24. It is not disputed that historically the Claimant had erratic timekeeping and attendance. Although it does not form part of the issues in this claim, unsuccessful attempts to performance manage the Claimant were made. These attempts were not in accordance with procedure and were placed in abeyance pending a formal appraisal of the Claimant (staff performance and development review – SPDR).
25. During a short period of Mr Skinner’s absence from work, Mr Ward stepped in to temporarily manage the Claimant. Mr Ward was Mr Skinner’s line manager in the prison hierarchy. Mr Ward made attempts to performance manage the Claimant with regard to his attendance but once he was informed that no SPDR was in place for the Claimant the process was abandoned.

Mr Ward’s comment of 6 October 2015

26. The Claimant’s mother received a cancer diagnosis on 5 October 2015. The Claimant attended late for work on 6 October 2015. Upon attending the office, the Claimant spoke with Mr Ward and informed him of his mother’s diagnosis. It is agreed that initially Mr Ward offered his sympathies and revealed that his wife had gone through a similar situation with a cancer scare the previous week.
27. The Claimant asserted in a letter of 9 October 2015 Mr Ward said, “you’re using your mother’s condition to make excuses” Mr Ward accepts that he used words to the effect “you can’t use your mother’s condition as an excuse” (for late attendance). There is a dispute between the Claimant and Mr Ward as to whether the comment complained about took place during a second separate meeting held in the Claimant’s office. We do not find it necessary to resolve these minor factual disputes as the key is that it is agreed that Mr Ward made reference to the Claimant’s mother’s condition.

28. The Claimant's evidence is that he was upset by what he described as Mr Ward's hurtful comment. Mr Ward suggested that the comment was made in the context of the Claimant's repeated lateness over a lengthy period of time.

Grievances

29. The attempts at performance management resulted in the Claimant raising a grievance in respect of his line manager Mr Skinner on 30 October 2014 [909]. This grievance was not dealt with by the Respondent over a two-year period, resulting in a formal letter of apology being issued by Ian Evans, former governor of HMP Cardiff [936] on 10 October 2016.

30. The Claimant also raised a grievance dated 7 October 2015 in respect of Mr Ward's comment with reference to his mother's diagnosis [278 and 284]. The possibility of mediation was raised during the grievance process, but this was declined by the Claimant.

31. In all, the Claimant raised four grievances including that in respect of Mr Skinner of 30 October 2014. All grievances were finally rejected at appeal by the Respondent on 20 June 2016, albeit that management learning points had been identified [394].

32. We accept the Claimant's evidence that his working relationship with Mr Skinner was strained; in particular the failure to deal with the initial grievance made the working relationship difficult for both of them. During a grievance meeting Governor Darren Hughes made a suggestion that a resolution might be for the Claimant to abandon his grievance and move to a different department; we accept the Claimant's unchallenged evidence that he made a request for redeployment in December 2015 as a result of Governor Hughes's suggestion, but his request was refused (paragraph 11 Claimant's witness statement).

The Claimant's absence

33. An occupational health report was produced on 5 April 2016 by Ms Sheriffs [411] upon referral due to the Claimant's emergency appendectomy which led to complications during surgery. The Claimant returned to work after a period of recuperation but was signed off sick again from 5 September 2016 due to stress; the Claimant never returned to work after this date.

34. An ACAS early conciliation certificate was issued on 3 October 2016.

35. Just over a month after the Claimant's absence commenced, Mr Khan started work as Governor of HMP Cardiff on 10 October 2016. Mr Khan's unchallenged evidence was that at that point, HMP Cardiff was experiencing high levels of staff sickness absence.
36. On 12 October 2016 the Claimant issued his first claim in the Employment Tribunal.
37. On 14 October 2016 Mr Skinner wrote to the Claimant enclosing the letter of apology from Mr Evans dated 10 October 2016 with regard to failure to deal with his initial grievance and an undated letter from Mr Khan inviting the Claimant to a meeting to discuss his sickness absence.
38. The Claimant was referred to occupational health in respect of his absence from September 2016 and a report was produced by Dr Critchley on 25 November 2016 [481]. The report states that the Claimant did not suffer from a significant medical condition but needed to address workplace issues and consider options for a return to work: "Mr Edward's continuing absence from work is related to his current perceived workplace issues and grievances rather than any specific underlying medical condition.... In my opinion Mr Edwards is fit to comply with normal departmental procedures and meet with his employers to address his concerns. There would be no medical reason why Mr Edwards cannot return to work once these issues have been addressed and it may be appropriate to consider temporary or long-term redeployment options..."

First capability meeting

39. Mr Khan met the Claimant for the first time at a capability meeting on 20 February 2017 [531]. The Claimant attended this meeting with his trade union representative and a notetaker from HR. During the course of the meeting Mr Khan asked the Claimant on a number of occasions for his views on his ability to return to work. The Claimant referred to the advice from occupational health and the fact that workplace issues needed to be addressed eg [532 and 535].
40. The question of having a stress risk assessment was discussed but the Claimant explained he felt an assessment was inappropriate with Mr Skinner due to his grievance issues. The possibility of a different line manager conducting the risk assessment was raised but the Claimant responded that he had not asked for this, and the assessment was only offered once he was already stressed [534]. Mr Khan asked whether there were any reasonable adjustments to get the Claimant back to work and he replied "no, not at this moment" [533].

41. Mr Khan concluded the meeting by deciding to adjourn so that the Tribunal process could progress. Mr Khan indicated that he would make a decision about continuing absence at the next capability hearing.
42. The Claimant was moved on to half pay and then subsequently onto nil pay in accordance with the Respondent's sickness pay policy.

Occupational health reports

43. Following the first capability meeting, the Claimant was referred again to occupational health. Mr Skinner engaged in email correspondence with Ms Hill on 22 February 2017 [537] about the contents of the referral. Ms Hill suggests additional wording for the referral which is included in the version sent to occupational health [539 b–e]. The Claimant's medical condition in the form is recorded as "perceived work-related stress".
44. We accept Mr Khan's unchallenged evidence that he had not seen the content of the email [537] previously. Mr Khan left the task of instructing occupational health to the Claimant's line manager Mr Skinner and was not directly involved. Mr Skinner was unavailable to give evidence at the hearing; in his absence Mr Khan speculated that perhaps Mr Skinner had misunderstood his instruction.
45. Although Mr Skinner has ticked the manager's declaration on the occupational health referral form of February 2017 (to the effect that the referral has been discussed with the Claimant and that he been provided with a copy), we accept the Claimant's unchallenged evidence that Mr Skinner did not in fact do so and the Claimant was not provided with a copy.
46. The referral resulted in an interim report dated 29 March 2017 from Dr Osunsanya [540]. In the report Dr Osunsanya indicates further medical evidence is sought from the Claimant's GP and confirms that the content of the interim report was discussed with the Claimant who gave his verbal consent to release this information to Mr Skinner.
47. The Claimant then consented to occupational health applying to his GP for a medical report, signing a consent form on 31 March 2017 [545].
48. Following receipt of medical evidence from the Claimant's GP and an assessment on 8 May 2017, an occupational health report dated 8 May 2017 [550] was issued to Mr Skinner. In the report Dr Arthur gives the opinion that the Claimant's mental impairment is likely to be a disability within the meaning of section 6 EqA. Dr Arthur's opinion is that the Claimant is unfit for any duties as he would be unable to concentrate. As

for outlook, Dr Arthur says the Claimant will not become fit until the Tribunal issues have been satisfactorily resolved and his trust in his employer restored.

49. The Respondent seeks further information from Dr Arthur asking four questions in an email of 31 May 2017 (which the doctor replies to in the email [561]). Dr Arthur confirms that the Claimant's symptoms are as a result of perceived unfair treatment at work and there is no unrelated cause to his symptoms.
50. A further query is raised by Ms Hill to Dr Arthur on 7 June 2017 [563]; Dr Arthur opines that once the Tribunal issues are satisfactorily resolved the Claimant will need a period of recuperation which is likely to take 3 to 4 weeks.
51. On 11 July 2017 the Preliminary Hearing to determine the question of disability was held before Employment Judge A Frazer, who reserved her decision.

Second capability meeting

52. Following a postponement, the second capability meeting was held on 17 July 2017 with Mr Khan. The Claimant was supported by his trade union representative and representatives from HR and notetaker were also present [571].
53. During the meeting Mr Khan ascertained whether the Claimant had received a copy of the additional questions and answers from Dr Arthur; he had not and was given a copy during the meeting [572].
54. Mr Khan, and on one occasion Ms Hill, asked the Claimant about when he would be able to return to work and what he would consider to be a satisfactory outcome of the Tribunal. The Claimant complains that Mr Khan asked him on 10 occasions when he could return to work and that the repetition of the question (rather than the question itself) was discriminatory. Mr Khan says he felt he was not getting answers to the question he was posing about return to work and so felt compelled to repeat the question. The Respondent's policy requires a decision maker to seek an answer to this question before contemplating dismissal (paragraph 2.86 – [768]).
55. The Tribunal finds that on three occasions Mr Kahn's questions about return to work were explicitly linked to the Tribunal process [573-574] in line with the occupational health advice. The Tribunal finds that on a further three occasions Mr Khan makes a statement rather than asking a

question – e.g. “you don’t know when you can return to work” [574]. At points in the discussion, Mr Khan’s questions were responded to with questions and both Mr Khan and the Claimant’s trade union representative felt they were going around in circles. The minutes of the meeting show Mr Khan thought a break was necessary [574] and afterwards Mr Khan summarised the discussion so far [575]. The meeting concluded with Mr Khan adjourning to consider the points raised saying “I will write and let you know by 20 August at the latest; regardless of the outcome I will make a decision. I will write you and will reconvene the meeting.”

56. It is evident from the minutes of the meeting that the Claimant’s trade union representative was vocal and participated in the meeting.
57. The Tribunal accepts Mr Khan’s evidence as to why he repeated the questions, and this must be viewed in the context of the Respondent’s policy requirements.

Dismissal meeting

58. The third and final capability meeting was held on 2 August 2017 with Mr Khan. The Claimant was supported by his trade union representative and the Respondent had representatives from HR and a notetaker [583].
59. At the outset of the meeting the Claimant raised with Mr Khan that he had asked about return to work on 10 occasions during the previous meeting and he felt that was excessive. Mr Khan responded, “if you felt that I apologise; you didn’t answer the question, I was trying to see if there was any way of supporting a return to work and what you thought may be a suitable timeframe to return following the completion of the ET” [585].
60. After an initial discussion the meeting was adjourned for an hour, after which Mr Khan informed the Claimant of his decision to dismiss: “reluctantly I’ve decided to dismiss you on the grounds of efficiency, because you have been absent from the workplace for 330 days, there is no foreseeable return to work, you do not wish to consider an alternative role and will only engage once the Tribunal is complete.” [588]
61. Dismissal was confirmed in a letter of 3 August 2017 [590]: “you are unable to return to work/return to full duties within a reasonable timescale”. The letter contained an error with regard to the date of termination, which the Claimant raised with the Respondent and which was corrected to 31 October 2017.
62. At the time of his dismissal the Claimant was on nil pay, although entitled to pension contributions.

63. The Tribunal accepts the evidence of Mr Khan that whilst an employee is on long-term sickness absence the Respondent is unable to permanently recruit to cover their role.
64. The reserved judgment of Judge A Frazer was promulgated on 15 August 2017, with the conclusion that the Claimant's disability arose from 8 May 2017.
65. When asked what consideration he gave to, or advice given about, the occupational health view that the Claimant was a disabled person, Mr Khan's evidence was that he was not given particular advice about the impact of disability when taking the decision to dismiss. Mr Khan did not make enquiries about how long the Tribunal process might take to conclude.

Appeal

66. The Claimant appealed his dismissal, and compensation payment of 75%, by way of letter of 30 August 2017. The appeal was heard by Sian Hibbs on 6 October 2017 [617]. Ms Hibbs had never met the Claimant prior to dealing with the appeal and had no knowledge of his case. The appeal was rejected by letter of 11 October 2017 [623].
67. An appeal is required to be a full rehearing of the case considering the facts afresh (paragraph 2.111 [771]). The Tribunal finds that Ms Hibbs was not provided with all of the relevant evidence and information to enable a full hearing to take place. Ms Hibbs concedes that she was not in possession of the additional questions and answers to/from Dr Arthur [561 & 563], nor did she have the minutes of the meeting heard on 17 July 2017 when she made her decision.
68. By the time of the appeal, the Respondent was aware, not only of occupational health's view that the Claimant was a disabled person but also of the Judgment of Judge A Frazer on disability. When asked what consideration she gave to the issue of disability when making a decision on appeal, Ms Hibbs responded that she did not give it particular consideration. Although she noted in her appeal outcome letter that there was no listed date for a Tribunal hearing, Ms Hibbs did not make enquiries about how long the Tribunal process might take to conclude.

Policy

69. The Respondent's internal policies and procedures are subject to negotiation with recognised trade unions and are implemented nationally.

When the Claimant's absence commenced the applicable management of attendance policy was PSO 8404 [782]. During the course of his absence a new attendance management policy, PSI 01/2017 [752], was implemented with effect from 5 January 2017.

70. The Claimant complains that the Respondent appeared to rely on both policies during the course of his capability process and that he was transferred to management under the new policy with effect from May 2017, when it was implemented in January 2017.

71. The Tribunal finds that the applicable policy was PSI 01/2017. Decisions to dismiss are governed by paragraph 2.98 of that policy [769 – 770]:

“The decision manager must dismiss the employee if all of the following apply:

the business can no longer support the employee's level of sickness absence;

downgrade or regrade is not appropriate without the employee's consent;

where appropriate, there are no further reasonable adjustments which can be made which will help the employee return to satisfactory attendance and all other considerations have been exhausted;

occupational health advice from an OHP has been received within the last 3 months...;”

Compensation under Civil Service Compensation Scheme (CSCS)

72. Upon termination, Mr Khan assessed a lump sum compensation payment for the Claimant in respect of his dismissal on inefficiency grounds. The level of compensation was determined by reference to Cabinet Office Policy “Efficiency Compensation 2016” [744] and in particular the guide for calculating compensation [750]. The guide states:

“This should not be considered a strict criteria to assess compensation as it is in the interests of the individual and the employer for there to be flexibility to consider each case on its merits. Therefore the bullet points in the table below will not necessarily be relevant in all cases; nor should they be read as specific requirements all of which must apply in respect of each level of compensation.

Employers should be aware that whilst there is an obligation on the employee to cooperate with measures to improve, make reasonable adjustments and keep in touch, there is a mutual obligation on the employer that they will make this possible.”

73. There follows a table which gives bullet point guidance to the assessment of a percentage of compensation from 100 to 0%. Mr Khan assessed compensation for the Claimant at 75% and confirmed this in the letter of dismissal but did not provide reasoning. In his witness statement Mr Khan explained his view that the Claimant was unwilling to consider options for a return to work within a reasonable timeframe, that the guidelines applicable to 100% compensation did not apply to the Claimant (paragraph 10 Mr Khan’s witness statement).
74. On appeal Ms Hibbs had the remit to reassess compensation and award a different amount however she upheld Mr Khan’s assessment of 75% compensation.

The law

75. The Tribunal referred to section 98 Employment Rights Act 1996 (ERA), sections 15, 26 and 123 EqA and article 3 of the Employment Tribunal’s Extension of Jurisdiction (England and Wales) Order 1994.

Unfair dismissal

76. The Respondent referred us to **McAdie v Royal Bank Of Scotland (2007) EWCA Civ 806** and **BS v Dundee City Council (2014) IRLR 131**. In summary, these authorities confirm that dismissal of an employee can be fair even in circumstances where the employer’s conduct has caused or materially contributed towards incapability. A key question for the Tribunal to address is whether or not in the circumstances of the case a reasonable employer would have waited longer before dismissing.

Discrimination

77. As for the correct approach when determining section 15 EqA claims the Tribunal refers to **Pnaiser v NHS England and others UKEAT/0137/15/LA** at paragraph 31.
78. When considering justification, the role of the Tribunal is to reach its own judgment, based on a critical evaluation, balancing the discriminatory effect of the act with the organisational needs of the Respondent.
79. The burden of proof is on the Respondent to establish justification.

Jurisdiction

80. On the question of the Tribunal's discretion to extend time on a just and equitable basis, the Claimant referred us to **Bahous v Pizza Express Restaurant Ltd UK VAT/0029/11/DA** in particular with regard to the submission that the Respondent had suffered no prejudice in conducting its defence of the complaint of harassment by Mr Ward; in effect that the balance of prejudice was all one-way impacting solely against the Claimant (paragraph 20).

Contract

81. With regard to the breach of contract claim the parties are in agreement that the compensation under the CSCS is contractual but discretionary. That discretion must be exercised in accordance with **Wednesbury** reasonableness; in other words, there must not be an irrational exercise of discretion.

82. The Tribunal was grateful for counsels' submissions, which are not repeated in this judgment but incorporated by reference. Counsel agreed there was no issue between them as to the applicable law.

Conclusion

83. The Tribunal concludes that the reason for dismissal was capability, a potentially fair reason. Mr Khan's decision was made on the basis of the Claimant's absence from the workplace for 330 days with no foreseeable return to work.

84. The Tribunal rejects the submission of the Respondent that dismissal was because of the Claimant's unwillingness to engage in resolution of workplace issues and that trust had irreparably broken down.

85. The Claimant complains that the Respondent sought to influence the content of the occupational health report and denied him the opportunity to review the Respondent's terms of reference. Although the Claimant was not provided with a copy of the terms of reference to occupational health the Tribunal does not consider this affected the fairness of the dismissal. The purpose of an occupational health referral is to provide specialist medical opinion and advice to an employer. Whilst it is good practice to discuss the content and provide a copy to the employee in question, the Tribunal considers that the terms of reference are properly matters for the Respondent. The Tribunal rejects the submission that the Respondent sought to influence the content of the occupational health report, so as to

- affect the fairness of dismissal. The Respondent is entitled to frame the terms of reference to an independent medical expert in a manner that is helpful to them to support their decision-making with regard to long-term absence. We do not consider that Mr Khan sought to influence occupational health in any way that affects the fairness of dismissal. In any event occupational health advisers are independent and have their own professional duties and the Claimant did not challenge the content of the occupational health reports.
86. The Tribunal is satisfied that the Claimant gave his consent for the medical examinations and information provided to the Respondent. We do not consider that he has been prejudiced such that dismissal can be considered unfair on this basis.
87. The Claimant suggests that Mr Khan and Ms Hibbs did not consider the report of Dr Arthur of 8 May 2017. As a matter of fact, this was a document available to both decision-makers at the dismissal and appeal stages. However, the Tribunal finds that both Mr Khan and Ms Hibbs failed to properly engage with the opinion provided by Dr Arthur that the Claimant was a disabled person. This medical opinion appears not to have affected their decision-making, which is puzzling in circumstances where the medical view had changed. Whilst a doctor's opinion on disability is not definitive it carries weight as an expert opinion, otherwise there seems little point asking the question when seeking OH advice. Mr Khan did not take particular advice with regard to the impact of potential disability and neither did Ms Hibbs, despite the Tribunal judgment on the question of disability being known by the Respondent by the time the appeal decision was made.
88. With reference to the Respondent's policy on when a decision to dismiss must be made [769], the Tribunal refers to its conclusions on justification below, in particular to whether the 'business could no longer support absence'. In the circumstances of this particular case, the Tribunal considers that the failure of the Respondent to consider the discriminatory impact of the dismissal impacts the fairness of that dismissal.
89. In the circumstances we do not consider the decision to dismiss was within the band of reasonable responses. The occupational health advice specifically connected the Claimant's ability to return to work to the conclusion of the Tribunal proceedings. In reaching the decision to dismiss Mr Khan did not make enquiries as to the likely duration of the Tribunal process; the conclusion that the Respondent could no longer sustain absence was not made on a fully informed basis. This was not an open-ended situation; a point in time had been identified (at dismissal stage the Tribunal involved only one case - 1600782/2016). The cost to the

Respondent of retaining the Claimant as an employee was minimal due to his nil pay status and there was an identifiable return date in sight. The Respondent should have waited longer before proceeding to dismiss.

90. The unfair dismissal decision was not cured at appeal stage; the appeal was not a rehearing on a fully informed basis. Key documents were not provided to Ms Hibbs upon which to base a decision. Ms Hibbs was aware that a meeting had taken place on 17 July 2017, as it was referenced in the minutes of the dismissal meeting however she did not have those minutes or ask for them. This is a significant omission because the meeting on 17 July 2017 contain the substance of the discussion upon which Mr Khan made his dismissal decision, adjourned to 2 August 2017. Perhaps even more crucially, Ms Hibbs did not have the additional questions and answers from Dr Arthur which gave a more definitive answer with regard to the period of recuperation the Claimant might need after the conclusion of the Tribunal hearing and confirmed that his illness was a reaction to the workplace issues.
91. The Tribunal rejects the submission that inaccuracy in the notes of the appeal meeting affected the fairness of the dismissal. The Claimant did not give evidence as to the way in which the minutes were inaccurate or indeed how that affected fairness.
92. The Tribunal understands it may have been confusing that the Respondent appeared to rely on two different absence management procedures, however the Claimant was unable to articulate why this occasioned unfairness to him in the decision-making process. The Claimant did not identify relevant differences between the two policies that were said to affect any issue of fairness. Other than missing documents at appeal stage, at surface level the capability process adopted had the appearance of fairness and was in line with PSI 01/2017. The matters affecting fairness were substantive rather than procedural.
93. The Tribunal relies in particular on the industrial experience of the members in making the following findings in respect of redeployment. The Tribunal does not consider that raising the possibility of redeployment without offering particular roles to the Claimant was sufficient in the circumstances. The Claimant had been absent from work for a significant period of time and so was reliant on the Respondent to inform him of what potential roles were available. A manager in a capability meeting should engage with the absent employee to explore with them potential options which might encourage them to consider redeployment and this can only sensibly be achieved with discussion of the specifics of available roles. The Tribunal was mindful of the particular context for the Claimant; his grievances against his current line manager and that he had previously

requested a move but was rejected. The Respondent is a large organisation and Mr Khan's evidence was that he had a general awareness of available roles; in the circumstances the steps taken to explore redeployment were insufficient and contribute to the unfairness of the dismissal.

94. For these reasons, and our conclusions on disability discrimination, the claim of unfair dismissal is upheld.

Contribution

95. The Claimant has not contributed to his dismissal by way of culpable or blameworthy conduct.

96. Whilst the Claimant remained on extended sickness absence, he did not respond to all attempts to contact him by Mr Skinner. In circumstances where the Claimant was experiencing poor mental health as a result of his perception of workplace difficulties with Mr Skinner and other managers, the Tribunal does not consider that failing to respond to an email inviting him to submit an expression of interest to act up in a managerial post can be considered culpable or blameworthy conduct [497].

97. Although the possibility of redeployment was raised by Mr Khan during the capability meetings, for the reasons given above the Claimant's response cannot be considered culpable or blameworthy.

98. Mr Khan asked the Claimant whether reasonable adjustments were required during the capability meeting on 20 February 2017; at that stage the Claimant could not identify anything. The Respondent did not make any suggestions as to potential adjustments that might have assisted a return to work. At the time the Claimant's stress related to his perception of workplace events and he believed that a 'fair hearing' at the Tribunal would be a satisfactory outcome for him. We do not consider, in the circumstances, that his inability to think of an adjustment that might enable him to come back to work, in the absence of any suggestion from the Respondent, can be considered to be culpable or blameworthy behaviour.

Polkey

99. For the reasons outlined above the Tribunal cannot conclude that there was no realistic prospect of the Claimant returning to work, particularly if redeployment with a different line manager was available. The parties will be invited to make submissions at the remedy hearing with regard to whether and when a fair and non-discriminatory dismissal may have taken place.

S 15 EqA discrimination

100. The Claimant accepts that the Respondent pleaded a potentially legitimate aim of 'managing workforce and budget to deliver service' in respect of both allegations of s15 discrimination. The Tribunal concludes that this is a legitimate aim.
101. The Respondent did not raise any issue on knowledge of disability.

Dismissal

102. There is no dispute that dismissal is unfavourable treatment by the Respondent. Dismissal was for absence, which is something that arises from disability.
103. The focus for the Tribunal is on whether dismissal was a proportionate means of achieving the legitimate aim.
104. The discriminatory impact of dismissal is severe for the Claimant.
105. The Respondent did not make enquiries, at dismissal or appeal, as to how long the ET process would take to conclude; in circumstances where the Claimant said that he felt resolution would come with the ET hearing and the Respondent had OH advice that the Claimant would need 3-4 weeks recuperation after the ET process concluded to allow his mental health to settle and allow him to concentrate. There was evidence available to the Respondent that a return to work was possible and foreseeable contingent on the outcome of the ET hearing.
106. It is recognised that austerity measures have impacted on public services and the Respondent cannot permanently recruit to replace employees on long term sickness absence. Mr Khan referred to the costs of agency staff in general terms (paragraph 51) but no evidence of actual costs incurred was provided. Mr Khan also referred to the impact on morale for remaining staff but again this evidence was given in generalised terms which did not detail the particular impact on individuals.
107. The Claimant was not being paid at the point of dismissal and therefore the costs of keeping him employed whilst awaiting the outcome of the ET process would have been minimal. The Respondent is a large organisation. The Claimant's role must have been covered in his sickness absence, as it was when he was on leave, and it is not clear why the ability to cover his role became unsustainable at the point of dismissal.

108. The Respondent has not shown justification; balancing the organisational needs of the Respondent against the severe discriminatory impact of dismissal on the Claimant.
109. The complaint is upheld; dismissal was an act of discrimination arising from disability.

Repeated questioning at meeting on 17 July 2017

110. The Tribunal does not consider the repeated questioning was unfavourable treatment.
111. The question about return to work is legitimate; this is accepted by the Claimant. The Respondent's policy requires the question to be asked. The Claimant complains about the repetition of the question and raised this with Mr Khan at the subsequent meeting.
112. The Tribunal relies on its findings that in three instances Mr Khan made a statement rather than asking a question and a further three instances the question was explicitly linked to the ET proceedings. As such there was repetition of the question on 4 occasions, in circumstances where Mr Khan felt the question was not answered and the meeting was 'going around in circles'. The Claimant did not complain about a similar level of questioning at the capability meeting on the 20 February 2017.
113. Even if the repeated questioning was unfavourable treatment, and is because of something arising from disability (absence), the Tribunal concludes that it is justified. Mr Khan was required to ask the question by policy and did so in order to elicit a response upon which to make a decision and to understand when the Claimant might be well enough to return after the conclusion of ET proceedings.
114. The complaint is dismissed.

Harassment

Repeated questioning at meeting on 17 July 2017

115. The Tribunal relies on its conclusions above.
116. Repetition of the question is the alleged unwanted conduct; the Tribunal finds that the Claimant experienced this as unwanted conduct (he raised the issue at the subsequent capability meeting with Mr Khan).

117. The conduct is related to the Claimant's protected characteristic; his absence arises from his disability.
118. The Tribunal does not consider that it was Mr Khan's intention to harass the Claimant; when the Claimant raised the issue with him at the subsequent meeting, he apologised immediately. This appeared to us a genuine response.
119. The Tribunal does not consider, taking into account the circumstances of the case, that it is reasonable for the repeated questions to have had the prohibited effect on the Claimant. In the Tribunal's assessment the repeated questions were reasonably felt necessary by the Respondent and varied in their form, to include those which specifically related to the conclusion of the Tribunal procedure and summarising statements rather than questions. In order to understand the Claimant's position, in light of the occupational health advice, it was necessary to try to elicit the information before making a decision.
120. The complaint of harassment is dismissed.

Comment of Mr Ward on 6 October 2015

121. The Claimant accepts that this complaint is brought out of time. It is for the Claimant to persuade the Tribunal to extend its discretion on a just and equitable basis to consider the complaint.
122. Whilst the Respondent has been able to defend the complaint by calling Mr Ward to give evidence, in all the circumstances the Claimant has not persuaded the Tribunal that it should extend its jurisdiction on a just and equitable basis. The Claimant gave no evidence as to why the Tribunal should extend its discretion. The Tribunal takes into account the fact that the Claimant is an educated individual who was formerly a trade union representative and is experienced in workplace matters, he was supported by his trade union official and instructed solicitors whilst still employed. He had the opportunity to seek professional advice about time limits and may have had some awareness himself as a union representative. The complaint is distinct in character from the remainder of the Claimant's case and the Claimant has not lost the opportunity to pursue his other complaints on jurisdictional grounds.
123. The complaint of harassment with regard to Mr Ward's comment is dismissed for lack of jurisdiction. The Tribunal's view is that had it had jurisdiction to consider this complaint, it would have been upheld.

124. There is no dispute that a comment making explicit reference to the Claimant's mother's cancer, a deemed disability, was made. The Claimant's evidence that this was a hurtful comment and unwanted by him is accepted; the act complained of fulfils the requirement of unwanted conduct. We consider that the comment has the capacity to create an offensive environment and that it did so for the Claimant; this is supported by the fact that he almost immediately raised a grievance about the comment.
125. Mr Ward offered his sympathies and shared a similar situation his wife had faced. The Tribunal does not consider that he intended to cause the Claimant offence. However the test for harassment goes wider than intention and covers actions which have the effect of causing offence. Having concluded on a subjective basis that the Claimant was offended, the Tribunal must objectively assess the context and all the circumstances to consider whether that offence was reasonably occasioned. It was unnecessary of Mr Ward to link the Claimant's lateness to his mother's disability; it is reasonable for the offence and upset complained of to have been experienced by the Claimant.
126. The complaint of harassment is dismissed for lack of jurisdiction.

Breach of contract - CSCS

127. The parties agree that entitlement to payment under the CSCS is contractual. The level of payment being a discretionary matter.
128. The Claimant must persuade the Tribunal that the Respondent's decision to award 75% compensation was irrational (**Wednesbury**). This is a high hurdle to clear.
129. Mr Khan and Ms Hibbs did not set out their reasoning in the dismissal and appeal outcome letters; instead they give their reasoning in their witness statements for the ET. It would have been preferable had they committed their reasons to writing at the time, not least so that the Claimant could understand their thinking. Both say now, that they felt that the Claimant's level of cooperation and participation fell short of the highest level specified in the policy.
130. The Claimant submitted that the Tribunal should take into account the context of his poor working relationship with Mr Skinner when considering his failure to keep in touch with work. This is reflected in the conclusions on contribution above. However it is an agreed fact that not all attempts at contact were responded to and the Tribunal concludes that Mr

Khan and Ms Hibbs legitimately viewed this as not demonstrating the highest level of engagement.

131. The Claimant had understandable reason for refusing a stress risk assessment whilst absent and not engaging with the suggestion of a change of line manager, made in July 2017. However the decision makers were entitled to take these matters into account when faced with the criteria against which to make an assessment on the level of compensation; it cannot be said that doing so was irrational.
132. Compensation at 75% is self evidently at the upper end of compensation available. The Tribunal finds that there is no basis upon which to conclude the decision makers exercised their discretion irrationally based on the suggested criteria in the Cabinet Office policy.
133. The claim of breach of contract is dismissed.

Employment Judge S Davies
Dated: 5 June 2019

JUDGMENT SENT TO THE PARTIES ON

.....6 June 2019.....

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FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS