EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr W Mohammed	**v**	Cummins Limited

Heard at: Bury St Edmunds **On:** 12, 13, 14, 15 and 16 August 2019

Before: Employment Judge Cassel

Members: Mrs S Morgan and Mr B Smith

Appearances
For the Claimant: Mr J Carter, Counsel
For the Respondent: Mr O Holloway, Counsel

RESERVED JUDGMENT

1. The claim of Discrimination arising from Disability succeeds.

2. The claim of Unfair Dismissal succeeds.

3. The remaining claims are dismissed.

4. The hearing is adjourned until **13 November 2019** for evidence, if appropriate, and submission on remedy.

RESERVED REASONS

Background

1. In his claim to the Employment Tribunal, the Claimant, Mr Wali Mohammed makes a number of claims in relation to his employment with the Respondent company.

2. The claims were resisted.

3. On 19 March 2018 there was a closed preliminary hearing held by Employment Judge Ord, where those claims that were being pursued were identified at paragraph 3 onwards of the Case Management Summary. These were a claim of Unfair Dismissal, a claim of Discrimination on the

protected characteristic of disability which related to the dismissal of the Claimant and harassment contrary to Section 26 of the Equality Act 2010. Orders were made and the hearing eventually took place before us on the dates as indicated above.

The Hearing

4. We had provided to us two bundles of documents and we heard evidence from Ms G Price, Human Resources Manager, Mr M Smith, Production Manager and Mr D Barker, Plant Manager. We heard from the Claimant and from Ms S Rai Senior Equality Officer and Mr G Ali. We also had provided to us a chronology and a cast list, a document entitled 'Getting the Most Out of a Fit Note' and at the end of the proceedings written submissions from both Counsel, for which we are grateful, with copies of case law upon which they relied.

The Relevant Law

Unfair Dismissal

5. The relevant statutory provision is provided for in Section 98 of the Employment Rights Act 1996:

> **General.**
> (1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—
>
> (a) the reason (or, if more than one, the principal reason) for the dismissal, and
>
> (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
>
> (2) A reason falls within this subsection if it—
>
> (a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,
>
> (b) relates to the conduct of the employee,
>
> (c) is that the employee was redundant, or
>
> (d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.
>
> (3) In subsection (2)(a)—
>
> (a) "capability", in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and

(b) "qualifications", in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case.

Disability Discrimination

6. In respect of Disability Discrimination provision is provided for under Section 15 of the Equality Act 2010:

Discrimination arising from disability

(1) A person (A) discriminates against a disabled person (B) if—

(a) A treats B unfavourably because of something arising in consequence of B's disability, and

(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

Under Section 39(2) of the Equality Act 2010:

Employees and applicants

(1) …

(2) An employer (A) must not discriminate against an employee of A's (B)—

(a) as to B's terms of employment;

(b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;

(c) by dismissing B;

(d) by subjecting B to any other detriment.

Harassment

7. In respect of Harassment provision is provided for under Section 26 of the Equality Act 2010:

> **Harassment**
>
> (1) A person (A) harasses another (B) if—
>
> (a) A engages in unwanted conduct related to a relevant protected characteristic, and
>
> (b) the conduct has the purpose or effect of—
>
> (i) violating B's dignity, or
>
> (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
>
> (2) A also harasses B if—
>
> (a) A engages in unwanted conduct of a sexual nature, and
>
> (b) the conduct has the purpose or effect referred to in subsection (1)(b).
>
> (3) A also harasses B if—
>
> (a) A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex,
>
> (b) the conduct has the purpose or effect referred to in subsection (1)(b), and
>
> (c) because of B's rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.
>
> (4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—
>
> (a) the perception of B;
>
> (b) the other circumstances of the case;
>
> (c) whether it is reasonable for the conduct to have that effect.
>
> (5) The relevant protected characteristics are—
>
> age;
>
> disability;
>
> gender reassignment;
>
> race;
>
> religion or belief;
>
> sex;
>
> sexual orientation.

Burden of Proof

8. In respect of Burden of Proof provision is provided for under Section 136 of the Equality Act 2010:

> **Burden of proof**
>
> (1) This section applies to any proceedings relating to a 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 provision concerned, the court must hold that the contravention occurred.
>
> (3) But subsection (2) does not apply if A shows that A did not contravene the provision.
>
> (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.
>
> (6) A reference to the court includes a reference to—
>
> (a) an employment tribunal;

The Findings of Fact

9. We make the following findings of fact based on the balance of probabilities having considered those documents to which our attention has been drawn and which are relevant to these proceedings.

9.1. The Claimant was employed as a Machinist by the Respondent from 15 May 1987 to 20 June 2017.

9.2. The Respondent is a global designer and manufacturer and seller of diesel and alternative fuel engines and related components and technology.

9.3. On the site at which the Claimant was employed, which is in Daventry, there are about 1,200 employees. There are about 4,000 in the UK and in excess of 10,000 internationally.

9.4. A 'Section 1 Statement' was issued to the Claimant on 1 December 1988 which outlined the basis of the contract of employment between the parties.

9.5. There was a recognition agreement with Unite, the Union, and certain policies and procedures were covered under the Blue Book agreement.

9.6. We were shown a disciplinary policy, an attendance management policy, a grievance policy and a leave of absence agreement.

9.7. We were also shown a document which was entitled 'Treatment of Each Other at Work Policy' which was produced at pages 174 – 178 which showed an implementation date of 17 February 2009 with what was described as a review period to take place at 730 days. This we were told was issued by the American parent company but had not been updated and thus there was no review. This was the policy in force at the relevant time, which predated the Equality Act 2010 and ancillary statutory provision including the Code of Practice on Employment 2011.

9.8. There was an HR department on site. We heard from Ms Glynis Price, who was a member of the HR team, that training, such as it was, was against the 2009 policy. There were however updates, the exact nature of which was not entirely clear. What was apparent however, was that the Claimant's last line manager, and subsequently the dismissing officer, Mr Mark Smith, had no training at all against the Equality Act 2010 or associated provisions relating to disability and he was commendable in the candour with which he agreed that he was *"not up to speed with every line"*, but was aware of the provisions. Ms Price told us that he was given no advice on how to treat someone with a disability, although Mr Smith told us he was confident in operating the Company's disciplinary procedures.

9.9. There was no apparent concern about the Claimant's conduct for approximately 28 years, although he had used the Respondent's procedures, including a complaint made against Mr Smith in 2004 which we understood was part of the grievance procedure. It related to Mr Smith's behaviour for which he apologised. Mr Smith told us and we accept, that in his words *"we reset the boundaries to an acceptable level and resumed our friendship".*

9.10. An incident arose in the workplace and the Claimant was found guilty of aggressive behaviour on 29 June 2016 for which he was given a Final Written Warning for 26 weeks. He appealed against that decision and as will be seen, that appeal process took some time and the appeal was heard later on in 2016.

9.11. The Claimant's health deteriorated. We were shown a report from Ms Alison Woodhouse, a Senior Occupational Health Advisor, which is dated 14 July 2016 which referred to his

many chronic conditions which had led to periods of sickness absence which included a reasonably lengthy one for the treatment of his kidney stones. More significantly, for the purposes of these proceedings, he was seen to be suffering low mood and had difficulty sleeping which he apparently put down to his perception of the work place.

9.12. A further report was prepared by Ms Woodhouse on 15 August 2016 following a referral, as there was a change in his demeanour. He had become withdrawn and was suffering from low mood. He had been to see his GP and was prescribed anti-depressant medication and sleeping medication and his GP had doubled his medication. Ms Woodhouse concluded that he would benefit from a period of sick leave absence and advised him to see his GP.

9.13. On 17 August 2016, the Claimant went to see his GP who diagnosed him as suffering from anxiety and depression and that he was not fit for work for the following two weeks.

9.14. There were medical fit notes presented to us which demonstrate that he continued to experience anxiety and depression. During the course of these proceedings, the Respondent now accepts, that he was a person with disabilities at the time relevant to the claims that he has brought and that this relates to his mental ill health. Although not relevant to the issue of liability, we note from exhibits within the bundle that his mental ill health has continued.

9.15. There was a meeting on 30 August 2016 between the Claimant, Ms Price and Mr Hadley, a former line manager. No minutes were taken of the meeting but a letter was sent on 31 August 2016 which was produced to us at page 311. This is a letter from Ms Price to the Claimant. Within that letter there is a description of the Claimant's current state of health. There is reference to him taking anti-depressants and sleeping tablets as well as medication for diabetes and high levels of cholesterol and that he had been on the anti-depressant medication for six to seven weeks. He had lost weight, which reduced from 13.5 stone to 11 stone. There was mention also of holiday provision and Ms Price stated that she recalled the Claimant saying that he had not been on holiday.

9.16. On 31 August 2016, the Claimant saw his Doctor and was signed off from work for four weeks. We have the Claimant's account of the advice that he was given and were shown page 414 which is a letter from Dr I Imtiaz which confirmed the following,

"He attended for these symptoms (stress and low mood) on 31 August 2016 and was advised to have a short break or a therapeutic holiday by my GP colleague".

9.17. Later that day, the Claimant phoned Mr Hadley. We did not hear from him but a note of an interview which subsequently took place was produced at page 353. That note was taken during an investigation meeting undertaken by Amanda Ludlow and was prepared three months later. The note shows that the first question that she asked was as follows,

"I want to talk to you regarding Wali Mohammed wanting time off because he didn't have enough holiday".

Mr Hadley stated,

"I am going to guess it was about two or three weeks before he went off sick".

This seems to us to be a conversation other than the one that took place on 31 August 2016. Mr Hadley then stated,

"He was talking about taking a break. I suggested at the time, why don't you just book something and go away and get your head straight. He said that is what he wanted to do but he was asking about unpaid leave. I remember specifically saying I wasn't a hundred per cent sure but my thought process was that he puts it in writing and then we have a conversation with HR".

9.18. On looking at this note, two matters are apparent to us. First, any reasonable investigator in our judgment would have asked an open question or open questions, particularly as this evidence was used in the disciplinary procedures, and not in the terms that questions were asked. Second, there is no specific reference to the phone call, apparently made on 31 August 2016, and no following up on this which was central to the issues subsequently raised by the Claimant.

9.19. In any event, the Claimant's account was in terms that he had asked for permission to go away and Mr Hadley had said he would call him back. Later that day there was a conference call between the two and Ms Price.

9.20. In evidence Ms Price accepted that such a call had been made, although there was no reference to the call in her statement, nor was there any file note made. In our judgment it was an important conversation given the processes that followed. When cross examined, Ms Price

could give no reason why it was not in her statement. She stated that the Claimant had said he needed time to go away and they gave him the dates of the Appeal Hearing on 9 September 2016 and an Occupational Health appointment on 16 September 2016. Therefore, in her view, he could either go away between those dates or after 16 September 2016. Although Ms Price stated that she was not giving permission, we accept the Claimant's evidence that he genuinely believed he was being given permission to follow his GP's advice to go on a therapeutic break. This he repeated in evidence on a number of occasions.

9.21. An Appeal Hearing took place on 9 September 2016 against the Final Written Warning. His Appeal was dismissed.

9.22. On 16 September, there was a meeting with Dr Cassidy who is an Occupational Health physician. This meeting is a significant one in these proceedings. In her letter of the same date to Ms Price, she wrote,

"I understand that Wali has now been absent from the work place with a diagnosis of work place stress. He has had problems in the work place dating back to April and there is an ongoing dispute. I understand that he has appealed against the sanction and that he is waiting for his appeal to be heard. From my discussions with Wali today, it appears that all his anxieties and symptoms are related to events in the work place. He is clearly very worried and anxious and this is leading to a deterioration in his mental state to the point where he does not want to go out and is sleeping badly… I can confirm that Wali has been seeing his GP and is on appropriate medication. I have discussed my concerns with Wali today. I am concerned that an ongoing sickness absence is not in his best interest and although it is going to be very difficult to return to the work place, at some place soon he needs to do this. I feel it is important that his appeal is heard as this is obviously preoccupying him. I would suggest that his appeal is dealt with as soon as is practicable and he is returned to the work place… I would suggest that initially he does half his hours for the first week and then sees Alison for a review. I very much hope he could be up to his normal working hours within two to three weeks. Wali knows that a return is going to be difficult for him and at some point, he has to come to terms with the difficulty he has experienced in the work place over the last few months and not allow this to affect his future performance at work."

9.23. The Claimant told us, and we accept, that it was only after the meeting of 16 September 2016 that he booked his ticket to go to Pakistan. In evidence he told us,

"What the Doctor had to say was relevant and she might have said that I was not to travel".

He also stated,

"I was on a sick note, not like annual leave. This was different as the Doctor told me to go away."

He accepted that although Dr Cassidy did say he was fit to go back to work, no date was given for his return to work or what hours were to be worked.

9.24. Later that day, the Claimant went to see his Union representative Mr Richard Cole. We did not hear from Mr Cole but were shown an email that was sent later that day to Ms Dot Boyles in the HR department which was in the following terms,

"I have spoken with Wali today after his visit to see the Company Doctor. He is asking that the feedback meeting for his Appeal can take place after his next appointment with Occupational Health which I believe is scheduled for Wednesday 28 September 2016".

9.25. Ms Price decided to have hand delivered a letter inviting the Claimant to a meeting on 22 September 2016 to discuss Dr Cassidy's report and the support the Respondent could give him.

9.26. His medical fit note stating he was not fit to attend work, expired on 27 September 2016, but it was the Respondent's considered view that in line with statutory provision the fit note was advisory only and the advice from Occupational Health took precedence.

9.27. On 21 September 2016, the Claimant's wife, who did not give evidence, phoned and spoke to Ms Price who made a file note of the conversation. Mrs Mohammed apparently said that the Claimant would not be able to attend the meeting on Thursday 22 September 2016. Ms Price said in response, that presented no problem and it could be rescheduled for the following day, 23 September 2016. She was then apparently told by Mrs Mohammed, when she was asked by Ms Price where the Claimant was, that he was in Pakistan.

9.28. There was a scheduled Occupational Health meeting for 28 September 2016. We were told, and it was not in dispute that the Claimant had returned from Pakistan the previous

day. However, he phoned on 28 September 2016 and stated that he was not well enough to attend the meeting, that he had seen his GP. The meeting was adjourned until 5 October 2016.

9.29. On 5 October 2016, the meeting took place between the Claimant and Ms Woodhouse. Following the meeting, Ms Woodhouse sent to Ms Price a letter which included the following information,

"As you are aware, Wali is currently off sick from work. He saw Dr Cassidy on 16 September 2016, the report from this appointment stated it was recommended Wali return to work on four hours a day and that he would see me for a review two weeks after this.

As you are also aware, Wali has subsequently been back to see his GP and has been signed off for a further four weeks until 24 October 2016. During this time Wali has taken a trip to Pakistan. Wali tells me that during his appointment with Dr Cassidy, when a return to work was discussed, he informed her that he would be going away somewhere before he returned to work. He also informs me that he advised Richard Cole (the Union representative) of the same information and that he would then come in and see me before he returned to work.

Wali has presented to the department today and in my medical opinion he does not look well. He tells me that the reason he did not attend his appointment last week was due to starting a new medication for his depression and for his poor sleeping. He saw his GP last week who prescribed this medication and it is still relatively early, although it can cause some side effects initially, such as mood or behaviour changes, anxiety, panic attacks and trouble sleeping… I have been asked if Wali is fit to return to work tomorrow (6 October 2016) and in my medical opinion I do not consider him fit due to the information disclosed today regarding the new medication as being prescribed which he has brought in to show me today, but also how he has presented to me in the department… He does have a sick note at the moment until 24 October 2016, however, I have advised that this is advisory and I will aim to override this and I feel that in this particular circumstance if I consider Wali well enough to return to work next week then I will deem this appropriate as the right way forward."

9.30. What was referred to as an informal meeting took place on 10 October 2016. A note was taken. The meeting for 10 October 2016 was one that was arranged as an

Occupational Health meeting. Ms Price and Mr Smith joined the meeting and the note that was taken is produced at pages 328 and 329. During the discussion the Claimant made no secret of the fact that he had been to Pakistan which he described as,

"A change of scenery and with friends to make me feel better"

He was asked then by Ms Price,

"The Doctor said you were well enough to come back to work"

To which he replied,
"Then why did the Doctor make an appointment for me with Alison? So, after I feel better Alison will give me the hours that I can work".

9.31. In our judgment the misunderstanding, because that is what it was, was summed up by the above quotes.

9.32. The path then was followed by the Respondent to take the Claimant through a disciplinary procedure for failing to obtain written permission, among other things, to take a holiday to Pakistan which subsequently led to his dismissal. The Claimant told us and we accept, believed that having been advised by his Doctor to take a therapeutic break and being certified as unfit to work, he was able to go to Pakistan so long as he did not miss any of the scheduled meetings. The focus of the Respondent was apparently the need for written permission that the Claimant should have had when he chose to go to Pakistan.

9.33. From October 2016 to April 2017, the Claimant attended approximately 11 meetings with the Occupational Health Advisor which took place, so far as we can ascertain, on 14, 17, 21 and 28 October 2016, 3, 23 and 25 November 2016, 16 December 2016, 20 January 2017, 24 February 2017, 29 March 2017 and 28 April 2017. Whatever else the report portrayed, there is a well documented account of the Claimant's poor mental health.

9.34. We understand Ms Price's reasoning to proceed with a disciplinary procedure in the belief, which was genuinely held, that it would assist the Claimant in removing a reason for his anxiety. Adjustments were put in place to give him support during the process.

9.35. Amanda Ludlow undertook the investigation and witnesses were interviewed on 17, 18 and 23 November 2016.

9.36. Dr Cassidy was not interviewed by her. Apparently, she was busy and going on leave and in a telephone conversation lasting 5 to 10 minutes, spoke to Ms Price who made a note of the telephone conversation on 18 November 2016, which was approximately two months after the conversation on 16 September 2016. The notes are produced at page 361 in the following terms,

GP *"Wali told us that he told you that he was going away"*

JC *"I thought that he went to Pakistan before he saw me. I told him to go back to work. He didn't say he was going away."*

GP *"There is no mention of that in the report."*

JC *"He talked about needing to get away. It is not a medical thing. I write myself medical notes. The last thing I said – it was very clear – that he needed to get back to work. I don't believe he said he wanted to go away. I have made an appointment for him with Alison."*

GP *"Wali is saying it was after he was going off."*

JC *"My understanding was that he was coming back to work. He might have said he wanted to go away and made noises like that. He was talking about going away but not that he was going away. I was saying* "you need to get back to work"*. The only important fact was that I told him that he was well enough to come back to work and that he needed to come back to work."*

9.37. In our judgment, any ambiguity in the conversation with the Claimant was not cured and Ms Price had no idea if Dr Cassidy was referring to notes or just from memory. In her view the important fact was that the Claimant was well enough to go back to work and he needed to go back to work.

9.38. On 21 December 2016 there was an invitation for the Claimant to attend a disciplinary hearing which was to take place on 5 January 2017 to discuss the following allegation [sic] –

i. Failing to follow the instruction of the Company Doctor and return to work;
ii. Travelling to Pakistan making you unavailable for work;
iii. Breach of trust and integrity.

9.39. As we understand the processes, Ms Ludlow believed that the matter should go to a disciplinary hearing and there was a case to answer following the decision of Mr Smith that the investigation should take place. Mr Smith, as the Claimant's line manager, was appointed to Chair the disciplinary hearing. As already noted, he had had no training in dealing with people with disabilities and in spite of the wealth of evidence of mental ill health of the Claimant, in answer to a question from the Tribunal which he was asked,

"Did it occur to you that his anxiety may have meant that he did not use the proper procedure?"

Mr Smith answered,

"No, I didn't think he was that ill or disabled."

9.40. He was also asked by the Tribunal,

"Could there have been a misunderstanding when he thought he should return to work?"

To which he answered,

"Had he been in the country at the time he would have received the letter (of 20 September 2016) *any misunderstanding would have come to an end."*

9.41. We found that to be a curious response as it was clearly impossible for the Claimant to have received that letter in good time as he was in Pakistan. Mr Smith did, however, accept that the trip the Claimant made to Pakistan was not pre-planned and Mr Smith reached that belief on or around 22 September 2016.

9.42. In our judgment, Mr Smith was principally focused on what he considered to be a breach of Company procedure and had little or no regard for the Claimant's apparent misunderstanding as he had described. In giving evidence, he referred to having discounted any consideration of health issues, which in his view could not mitigate the Claimant's ability to follow or understand the process.

9.43. Mr Smith also accepted, when asked by the Tribunal, what the penalty would have been had he not been issued with a Final Written Warning and he was clear that it would have been a First Written Warning for this offence alone.

9.44. Just pausing there, the core of the Claimant's account that there had been a genuine misunderstanding on his part, was consistent throughout his written and oral evidence and that it was his belief that he had been given permission. We find that that was a belief he genuinely held which was rejected during the disciplinary hearing.

9.45. In any event, the Claimant was dismissed and the effective date of termination was 20 June 2017. By that time, the Claimant had been unwell mentally for almost a year.

9.46. The Claimant appealed against the decision to dismiss him and a hearing was arranged to take place, to be chaired by Mr Dave Barker. Mr Barker told us that he had received training against the Equality Act 2010 which was some years ago. It was General Awareness training through a corporate cascading process which could have been online, in a workshop or written. In giving evidence, in an answer to a question from the Tribunal, it was his conclusion that the Claimant was lying and had not misunderstood anything that Dr Cassidy had said. He had seen the note produced by Ms Price, did not think it in any way strange or unusual that she had not been interviewed by Ms Ludlow and surprisingly, given the importance of establishing the truth or otherwise of what the Claimant was saying, chose not to re-interview Dr Cassidy in spite of some ambiguity in her responses. In our judgment, any reasonable Appeal Officer would have re-interviewed Dr Cassidy.

9.47. Moreover, at page 462, which is part of the Appeal Hearing notes he referred to the Claimant adding a further matter that during his call with James Hadley and Glynis Price on 31 August 2016, the Claimant had raised the issue of going on holiday and James Hadley had said that he could go.

9.48. Mr Barker, for reasons which were not entirely clear, did not re-interview Mr Hadley or Ms Price, but relied on the note at page 353, which we have referred to above, which is a note taken by Amanda Ludlow on 17 November 2016, which related to a discussion with Mr Hadley and the Claimant while he was at work and

"two to three weeks before he went off sick".

9.49. In Mr Barker's words when being asked why he chose not to investigate further, he said,

"I didn't think it was necessary to investigate further. The Claimant knew there was a process to follow".

9.50. Although Mr Smith had decided, on or around 22 September 2016, that the Claimant had not pre-planned the holiday to Pakistan, in contrast Mr Barker, *"found it difficult to believe"* and in his letter of 21 July 2017 when he dismissed the Appeal, made it clear that that was his belief.

9.51. In that letter, Mr Barker summed up the grounds of appeal as being two fold,

"(1) you did not understand that you were expected to return to work between the Occupational Health Assessment on 16 September 2016 and the next assessment scheduled for 28 September 2016;

(2) that you were signed off by your GP until 30 September 2016 so should have been able to take a holiday to Pakistan."

9.52. Having identified the issues raised by him, which any reasonable Appeal Officer would have seen was the core of his explanation throughout, it is difficult to comprehend why, faced with the ambiguity in evidence that he was, from Dr Cassidy and Mr Hadley, among others, that some degree of re-interviewing or further investigation was not undertaken.

9.53. We also heard evidence from Ms Rai who referred to a conversation that she overheard while in the presence of the Claimant and Mr Ali on 5 January 2017. Mr Ali also heard that conversation. Whilst we do not doubt the sincerity of their belief, we must apply the balance of probabilities in assessing whether what happened during that telephone conversation was harassment by Ms Price and we find that the evidence does not reach the required level.

9.54. We note however, that Mr Ali who is a long term and close friend of the Claimant, describes the difficulty the Claimant experiences in absorbing information, although of course he is not medically qualified to give an opinion and the opinion he expressed was that the Claimant's condition had got worse.

Conclusions

10. We referred both Counsel to advice given by Mr Justice Mitting in Mr T Risby v Waltham Forest LBC [2016] 3WLUK547, where at paragraph 9 Mr Justice Mitting gives the following advice,

> *"In a case in which it is alleged that an employee has been dismissed because of something arising in consequence of his disability, there is likely to be a substantial degree of overlap between the two statutory questions, but they are not identical and require to be addressed in a structured manner. It will often be the case that an Employment Tribunal will be well advised to start with Section 15."*

11. We follow that advice and note the comments at paragraph 15 which refers to other case law and parliament's intention in enacting Section 15 to reverse the effect of Malcolm

"and to loosen the causal connection which is required between the disability and any unavailable treatment."

12. We consider the questions posed at paragraph 3 of the Case Management Summary. 3.1.2 poses the question simply as,
"Was the Claimant a disabled person at the material time pursuant to s.6 of the Equality Act 2010?"
At the commencement of these proceedings, Mr Holloway pointed to correspondence in the Tribunal file in which it was accepted by the Respondent that at the material times the Claimant was a disabled person.

13. The second question at 3.1.3 was whether,
"The Respondent knew, or ought to have reasonably known that the Claimant was disabled for the purposes of the Equality Act 2010 at the material times?"
In our findings of fact, we have referred to the surprisingly large number of reports from Occupational Health, the medical notes, the observations of staff in the Occupational Health department and others and find it quite remarkable that this is an issue before the Tribunal. There was a wealth of relevant information available to the Respondent and repeated reference to his mental ill health. It cannot sensibly be argued that the Respondent did not know or ought not reasonably to have known that the claimant was a disabled person, given the time scales over which the documents extend.

14. The third question at 3.1.4 was,
"Did the Respondent submit the Claimant to unfavourable treatment by dismissing him?"
The conclusion we reach is that had it not been for his disability he would not have considered going to Pakistan for what he described, or rather his Doctor described, as *"a need for a therapeutic break".* The claimant had travelled in previous years to Pakistan but to visit family alone and not to

take a "therapeutic break". The Respondent says that the failure on the Claimant's part and his misconduct was the failure to follow a procedure and complete the requisite forms.

15. We found some of the evidence given by the Respondent's witnesses confusing. As far as holiday was concerned, for example, holiday could be booked by using the electronic clocking in system, a written request, and it was even suggested a third party request could be made, and in this instance a request made by the Claimant's wife was suggested. It remained the Claimant's belief that as he was on sick leave and he had been given permission to take holiday in the conversation with Mr Hadley and Ms Price, that the necessary authority had been given so long as he was back for the appropriate meetings.

16. The Respondent, in submissions made by Mr Holloway, has suggested that the Claimant has been unreliable and has changed the account he has given at various stages. We are not medical experts, but we note that regular breaks were needed throughout these proceedings to enable the Claimant to follow them. The deterioration of his mental state was noted by the Occupational Health department at various times, for example on 16 September 2016. On 16 September 2016, Dr Cassidy reported,

"We have been very clear with Wali today, that in our judgment, he either is not fit to absorb information from the Safety Training Programme and therefore the Safety Training Programme is not appropriate, or if he is well enough to understand the Safety Training Programme then he is well enough to commence a staged return to work soon."

17. We note that his ability to absorb information and to respond was questioned then, his *"significant"* depression noted by Dr John Harrison in January 2017, who is also part of the Occupational Health provision. Gail Eastwood, another Occupational Health Advisor on 29 March 2017 refers to the Claimant's difficulty reported by him of sleep, diet, concentration and motivation. In spite of these difficulties, there remains a consistent core to his evidence that he genuinely believed that he had the requisite authority to take the "therapeutic break" and the break was needed because of his mental ill health.

18. There is no requirement for a direct connection to be established between disability and conduct which led to the claimant's dismissal. We have already referred to paragraph 15 of Risby that the intention of parliament was to loosen the causal connection which is required between the disability and any unfavourable treatment. We also note the analysis by Langstaff J in Basildon and Thurrock NHS Foundation Trust v Weerasinghe on 29 July 2015 which was unreported, that there was no requirement for a direct linkage between a claimant's disability and his conduct. All that had to be established was that the claimant's conduct arose in consequence of his disability or that was an effective cause or more than one on his conduct.

19. The unfavourable treatment was dismissal. Had it not been for his disability the claimant would not have taken his "therapeutic" break to Pakistan and been required to attend the disciplinary hearing. Dismissal was the decision of Mr Smith who was acting on behalf of the Respondent in the role of disciplining officer. In in our judgment the break was an effective cause of the unfavourable treatment. We agree with the submissions made by Mr Carter at paragraph 47 of his written submissions, in which this analysis was developed.

20. We are required to address the question as to whether the respondent has shown the unfavourable treatment to which the claimant had been subjected, namely dismissal, was a proportionate means of achieving a legitimate aim. At paragraph 38 of Mr Holloway's written submission the legitimate aims are identified as: the need for employees who are signed off sick to be available to attend Occupational Health appointments, Welfare Meetings, Grievance Meetings and/or Disciplinary meetings; the need to avoid a sick leave policy that is open to abuse by employees taking leave while signed off sick; the need for employees who are deemed fit for work by Occupational Health to be available for work.

21. We indicated that we would refer to the case of Hardy and Hansons Plc v Lax [2005] EWCA CIV 846. The Court of Appeal in this case of course, had to consider a provision of what was then the Sex Discrimination Act. The guidance on justification is given by Pill J at paragraph 32 as follows,

"It must be objectively justifiable", (Barry), and I accept that the word "necessary" used in Bilka is to be qualified by the word "reasonably". That qualification does not however permit the margin of discretion of range of reasonable responses for which the appellants contend. The presence of the word 'reasonably' reflects the presence and applicability of the principle of proportionality. The employer does not have to demonstrate that no other proposal is possible. The employer has to show that the proposal, in this case for a full time appointment, is justified objectively not withstanding its discriminatory effect. The principle of proportionality requires the tribunal to take into account the reasonable needs of the business. But it has to make its own judgment upon a fair and detailed analysis of the working practices and business considerations involved as to whether the proposal is reasonably necessary".

22. It is beyond sensible argument to suggest that the respondent was not entitled to call the claimant to a disciplinary hearing and to consider disciplining him to uphold its standards. Section 1 of the Employment Rights Act 1996 and the Acas Code of Practice number 1 give clear guidance to employers as to the need for a disciplinary procedure and there can be no doubt that as such the proposal was objectively justifiable and reasonably necessary.

23. It is not suggested in evidence or submission that necessarily a breach of discipline will lead to dismissal. Mr Smith told us that had the claimant not been subject to a final written warning he would have considered a lesser

sanction, a first written warning. What is 'necessary' and that which is suggested, in effect, is for the respondent to investigate, to consider the available evidence and to reach a decision based on that evidence. It is also recognised that section 15 is not to be deployed in such a way so as to provide disabled persons with immunity from dismissal, or otherwise intended to prevent an employer taking any action where a disabled person commits an offence of gross misconduct. It is a perfectly legitimate aim to maintain high standards. But to do so without regard to fairness or reasonableness cannot be a proportionate means to achieve that aim. There is no logical necessity that a breach will lead inevitably to dismissal or indeed to a disciplinary sanction. We have looked carefully at the manner in which the hearing was conducted. The onus of justification is on the respondent. In our assessment of the relevant facts there was a signal failure to follow a fair procedure. We have commented on the attitudes displayed by Mr Smith and have already commented that it seems to us quite remarkable that he would have reached the conclusion as to the claimant's health that he did. He made a value judgment as to the reasons for the claimant's behaviour. That judgment was based neither on experience, training nor indeed any justifiable qualification. As we noted above, the respondent has since recognised that the claimant is a disabled person. Mr Smith had provided to him as part of the management case, copies of the Occupational Health reports and it must have been obvious to a person of his senior management responsibility and experience that if this was not a disability or if he was in doubt, further enquiries were necessary. We of course have to consider whether the provisions of the sub-section are met, and in the circumstances, we have described they clearly are not and we are satisfied that the respondent discriminated against the claimant contrary to section 15.

24. We then go on to consider unfair dismissal which is provided for under section 92 of the Employment Rights Act 1996. We have to consider the provisions of section 98(4) to which we refer in paragraph 5 above.

25. It is of course for the respondent to show the reason or principal reason for dismissal. The evidence points to the principal reason in the mind of the dismissing officer, Mr Smith, as being the conduct of the claimant. We have already commented on the linkage between the claimant's disability and his actions. What section 98(4) refers to and the emphasis under (a) is whether in the circumstances, which includes the size and administrative resources of the employer's undertaking, the employer acting reasonably or unreasonably in treating it as a sufficient reason for dismissing him. In British Home Stores Ltd. v Burchell [1980] ICR 303, the tests are laid out carefully and are well known and often cited. The second and third questions, the reasonable grounds for the belief based on a reasonable investigation go to the question of reasonableness under section 98(4) and there the burden is neutral. We must not of course substitute our own views. We have already commented on the deficiencies in the investigation. There were failings such that we do not find the investigation to have been a reasonable one. The whole process took many months to complete and there was ample time to undertake those enquiries that any

reasonable investigator would have undertaken. The impression that we were given was that the Respondent was focussed purely on the apparent need for the claimant to follow process and the reasons for his behaviour were of relatively little importance. The appeal hearing did nothing to rectify the situation. Mr Barker, in our judgment did little but go through the motions of an appeal hearing. It was an opportunity to reconsider the inherent and obvious unfairness in dismissing the claimant in the circumstances that were apparent. He simply endorsed the earlier decision. For these reasons we find that the dismissal was unfair.

26. We have read the submissions of Mr Holloway, which he amplified in oral submissions. At paragraph 16 onwards of his written submissions he argues that the complaints of harassment are out of time and no evidence has been advanced so that the tribunal should consider extending the time in which to bring such complaints. We agree with that submission and find that the tribunal has no jurisdiction to hear the complaints and we dismiss them. We can add that had we jurisdiction we would have dismissed them in any event.

27. The hearing is adjourned until 13 November 2019, for evidence and submissions on remedy.

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Employment Judge Cassel

Date: 16 September 2019

Sent to the parties on: ....19.09.19….

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For the Tribunal Office