EMPLOYMENT TRIBUNALS

Claimant: Mr M Riley

Respondent: DL Insurance Services Limited

Heard at: Leeds **On:** 14, 16, 17, 18, 19 and 20 September 2019

Before: Employment Judge Rogerson

Members: Ms H Brown
M G Corbett

Representatives

Claimant: in person
Respondent: Mr Arnold (counsel)

RESERVED JUDGMENT

1. The complaint of unfair dismissal fails and is dismissed.

2. The complaints of discriminatory dismissal (direct disability discrimination and discrimination arising from disability) made pursuant to sections 13 and 15 of the Equality Act 2010, also fail and are dismissed.

3. The complaint of a failure to make reasonable adjustments made pursuant to Sections 20 and 21 of the Equality Act 2010, is dismissed because the complaint was presented out of time, and it was not just and equitable to extend time.

REASONS

1. The issues to be determined in this case had been previously identified at a preliminary hearing before Employment Judge Jones on 11 and 21 January 2019.

2. Dismissal is disputed and for the dismissal complaints to succeed the Claimant must prove that there was a 'dismissal'. If there was no dismissal all those complaints fail. If there was a dismissal, the tribunal will have to determine the reason for that dismissal. The Claimant complains the dismissal was unfair and also discriminatory (less favourable treatment on the grounds of his disability (direct discrimination) or was unfavourable treatment arising from disability (discrimination arising from disability)).

There was no time point in relation to the dismissal complaints.

3. The claimant also complains of a failure to make reasonable adjustments complaint which does raise a time point which is identified in the agreed issues for that complaint which are:

<u>Breach of the duty to make adjustments</u>

4. Provision of auxiliary aids:

   4.1 Was the Claimant put at a substantial disadvantage but for the provision of the following auxiliary aids?

      4.1.1 A headset with software for use of both computer and phone to enable the Claimant to use speech and text communication from the end of 2017.

      4.1.2 A brain in hand app to assist the Claimant with such matters as crisis support and travel to work.

      4.1.3 A template to use during the online calls?

   4.2 If so did the Respondent fail to take reasonable steps to provide such aids?

5. <u>Physical features</u>:

   5.1 Did the following physical features place the Claimant at a substantial disadvantage? :-

      5.1.1 Proximity of his seating from April 2018 to the canteen/corridor/toilets and lockers, generating significant noise.

      5.1.2 Lighting in that vicinity which flickered and made a buzzing noise.

      5.1.3 A citing of his workstation which was surrounded by other employees who sat behind him and hot desked.

   5.2 If so, did the Respondent take reasonable steps to avoid those disadvantages? The Claimant will say that prior to March 2018 his workstation had not created those difficulties, in that he did not have somebody working behind him, his back was to a wall and the lighting did not create a problem and the workstation was in a quiet area.

6. <u>Provisions, criteria or practices (PCP's):-</u>

   6.1 Did the Respondent impose a PCP to require the Claimant to work 35 hours per week?

   6.2 If so, did that place the Claimant at a substantial disadvantage?

   6.3 If so, did the Respondent take reasonable steps to avoid that disadvantage?

6.4 Did the Respondent impose a PCP of requiring the Claimant to work on phone activities (accepted PCP).

6.5 Did that place the Claimant at a substantial disadvantage by exacerbating levels of his anxiety?

6.6 Did the Respondent take reasonable steps to avoid those disadvantages, for example by: -

6.6.1 Providing coping strategies?

6.6.2 Providing co-coaching training for the Claimant and his Team Leader?

6.6.3 Providing mental health awareness training for the team?

6.6.4 Providing consistent single skill activities for the Claimant to undertake?

7. <u>Time limits: -</u>

7.1 In respect of the breach of the duty to make adjustments: -

7.1.1 Did any of the failures amount to conduct which extended over a period, the last part of which fell within the time period of 3 months and any relevant early conciliation period before the presentation of the claim?

7.1.2 Alternatively, did the Respondent make a decision in respect of the provision of aids/making of adjustments before the time period?

7.1.3 If so, is it otherwise just and equitable to allow those complaints?

7.1.4 If the Respondent did not make a decision did it act inconsistently with doing something which would be in furtherance of discharging its duty, and if so did that occur outside the time period?

7.1.5 If so, is it otherwise just and equitable to entertain those complaints?

7.1.6 If it did not act inconsistently with doing something in furtherance of discharging its duty, when might the Respondent reasonably have been expected to make a decision in respect of the adjustments/provision of auxiliary aids?

7.1.7 If that is outside the above time limit is it otherwise just and equitable to consider those complaints?

Background

8. The Tribunal heard evidence from the Claimant. For the Respondent, from Ms S Terry (Team Leader), Mrs D Baker (Team Leader) and Mr A Spink, (Operations Manager). The Tribunal also saw a witness statement from Ms Simone Burrell (Team Leader) who did not attend the hearing due to a family bereavement. The Tribunal attached such weight as it considered was appropriate to that witness statement, with more weight attached to those parts of the statement supported by other witness evidence or the contemporaneous documents. We also saw documents from an agreed bundle of documents.

9. Before we set out the findings of fact it is important to state that in this case much of the evidence, the Tribunal had to consider came from the contemporaneous evidence. That evidence recorded what was said and done by the parties at the time without any thought of these proceedings. There was no factual dispute about the content of those documents, although the Tribunal were invited to interpret some documents differently depending on the case presented by the Claimant or Respondent.

10. We found that all the witnesses who gave oral evidence to the Tribunal did so in an honest and open manner, they were helpful and were not evasive in their answers.

11. We would also like to acknowledge how well the Claimant has done in presenting and preparing for his case to the Tribunal. His witness statement addressed the background information the issues and the Respondent's grounds of resistance. He prepared his questions for the witnesses in advance of the hearing. He also prepared a very helpful and thorough written closing submission responding to each point in the list of issues. When he was cross examined by Mr Arnold or asked questions by the Tribunal, he answered the questions fully and was also able on occasion to draw the Tribunal's attention to documents in the bundle he believed supported his answer. In his written closing submission, he not only prepared very comprehensive written arguments addressing all the issues but was he also able to provide a detailed oral response to answer the points raised by Mr Arnold, in his written closing submissions.

13. The Tribunal were aware of the need to make reasonable adjustments during the hearing and we were greatly assisted in that process, by the Claimant who guided us on any adjustment that he required during the hearing. We would also like to note and thank Mr Arnold for his assistance during the hearing. He was amenable to the making of any adjustment required for the claimant and he was fair in his presentation of the respondent's case presenting the differences between the parties' position on the evidence in a balanced manner. He signposted the claimant to each area of cross examination in advance to give the claimant notice and time to think and made sure his questions were clear and concise. In his summing up, he has noted not ignored the claimant's position on the evidence, to present the evidence of both parties accurately to the Tribunal. The respondent has also assisted the Tribunal by agreeing at the end to a written reserved decision when on the final day of the hearing the claimant felt too unwell to wait for an oral judgment. We found the assistance provided by the parties and Mr Arnold extremely helpful throughout the hearing.

Findings of Fact

14. The Claimant was employed by the Respondent from 12 March 2012 until the termination of his contract on 19 September 2019.

15. It is accepted that the Claimant is a disabled person, at the material time by reason of his impairments of 'Autistic Spectrum Disorder' and 'Mixed Anxiety and Moderate Depression'.

16. The Claimant was employed as a 'Home Claims Adviser'. His role was based at a call centre in Leeds. His main responsibilities were to conduct telephone calls with customers, third parties and suppliers, usually involving the registration of new claims and dealing with complaints.

17. The Claimant was contracted to work 35 hours per week.

18. At the beginning of his employment, the Claimant joined the Respondent's Private Health Insurance scheme 'PHI', which was offered by a third party, UNUM. He opted at the start to upgrade this benefit from a '5' year fixed period to a benefit 'until state retirement age'. He believed that this was the 'smart' thing to do because there may come a time when he would be unable to work at all because of his disabilities. It was something he had done in his previous employment.

19. For UNUM to treat a member as "*incapacitated*" under the policy to qualify for that benefit (payment of salary), they require that the member is "*unable by reason of illness or injury* ***to perform the material and substantial duties of the insured occupation*** *and there is* ***evidence for UNUM to reasonably conclude,*** *according to accepted medical principles that as a result of illness the* ***member satisfies the definition of incapacity*** *at the relevant time"* (see page 67 highlighted text our emphasis).

20. The policy guidance (see page 113) defines 'incapacity' based on "*assessing the Claimant's ability to perform the duties of their occupation that are considered to be material and substantial*". This is relevant because the Claimant offers a different interpretation of the meaning of 'incapacity' in his case. He suggests it means "an inability to perform his contractual 35 hours per week" and is not about his ability to perform the duties of the role. We do not agree with the claimant's interpretation which is inconsistent with the clear and unambiguous meaning given by the policy to the term 'incapacity'. The definition clearly refers to the duties of the role not the contractual hours. Additionally, the reason why the claimant upgraded the benefit at the beginning of his employment was because he was concerned there may come a time in the future when he was unable to work at all, it was not because he was concerned he might be unable to work 35 hours a week.

<u>The Claimant's absence and attendance record</u>

21. The attendance/absence record was not in dispute. From those records it is accepted that for 3 years from 2014 to October 2017 the claimant was absent from work, by reason of his anxiety and depression and was incapable of performing any work.

22. During that period the claimant was managed by team leader, Ms Simone Burdell, who did not initiate any capability process for his absence. She kept in contact with the claimant, made enquiries about his health and progress and sought occupational health advice. The Claimant had thought about resigning in 2017 and had expected his employer to terminate his contract because of his long absence.

23. In the period October 2017 to April 2018, the Claimant was on a 5 month return to work programme to try to help him return to working life.

24. From 3 April to 21 May 2018 the Claimant returned to his role taking live calls on reduced hours (12 hours per week), on a phased return to work, working 2 non-consecutive days a week. During this period there were still some intermittent occasional sickness absences caused by the claimant's anxiety.

25. From the attendance record it was clear the claimant only took live calls for 14 days in total. On 3 of those days he was managed by Ms Sally Terry and worked:

- 3 April - 6 hours
- 9 April - 6 hours
- 13 April - 6 hours

26. Then for 11 days he was managed by Ms Simone Burdell and Mrs Dee Baker and worked:

- 16 April - 6 hours
- 20 April - 6 hours
- 23 April - 6 hours
- 27 April - 6 hours
- 30 April - 6 hours
- 4 May - 6 hours
- 7 May - 6 hours
- 11 May - 6 hours
- 14 May - 6 hours
- 18 May - 6 hours
- 21 May - 6 hours

27. There was a further period of absence from 22 May 2019 to 19 September 2019, when the contract was terminated. During this period the claimant was assessed by his GP as unfit for any work.

<u>PHI Claim</u>

28. In early 2015, a claim was made under the PHI policy provided by UNUM which was accepted. The Claimant was paid in accordance with that policy by the Respondent from 2015 (see page 111 to 115) until 19 September 2019, then directly by UNUM. Those payments are to continue potentially until state retirement age. The policy did require the claimant to consent and agree to UNUM accessing and using medical records and reports from any health care professional attending the claimant.

Adjustments made by the Respondent

29. In 2017, with the input of an adviser from Remploy and a Rehabilitation Specialist (Sophie Dalton) provided by UNUM, a return to plan work was agreed with the Claimant to help him to adjust to working life after his lengthy absence from work.

30. A detailed (13 pages) vocational rehabilitation assessment report was prepared by Ms Dalton after her assessment with the claimant on 22/8/17. She looked at the activities the claimant was able to engage in, and devised a 4 stage return to work plan giving the claimant over 5 months to adjust before he was required to take any live calls. The plan provided:

    30.1 A ‘work hardening’ plan to give the Claimant a structure of activities at home to help him get back into a routine in preparation for work.

    30.2 A period of retraining.

    30.3 A phased return to work over 2 non-consecutive days to allow for respite.

    30.4 Reduced hours gradually increasing from four to twelve hours per week with a view to try and build up the hours gradually to 35 hours week.

    30.5 A set desk rather than hotdesking.

    30.6 Microbreaks.

    30.7 A mentor

    30.8 Regular contact with the rehabilitation specialist to provide ongoing advice, support and updates to the Respondent as to the Claimant’s prognosis.

    30.9 A graduated return to work plan updated as required, based on any change in circumstances and advice given.

    30.10 A training plan incorporating some of the adjustments recommended which were made up of training, listening in and microbreaks.

For the employer guidance was provided to enable the employer to support and assist the claimant and to have a greater insight into his condition of anxiety and depression. All those steps were taken prior to the Claimant returning to work to take live calls on 3 April 2019.

Access to work – recommended adjustments

31. On 13 November 2017, the Claimant had a workplace assessment with Access to Work. They provided a report which recommended a ‘3’ hour session of management awareness training to raise department awareness of Asperger’s. 8 x ‘3’ hour Co-coaching training described as a “*novel way to facilitate reasonable adjustments and the implementations*

from coping strategy sessions" between the claimant and his line manager "*to problem solve current issues in the workplace build bridges if there is friction and improve communication about disabilities"*. The report also recommended a noise cancelling headset, text read and write programme and an ergonomic chair.

32. The report was provided to Ms Sally Terry she agreed with the recommendations and made the claimant aware that she would arrange for them to be put in place.

33. On 23 November 2017, Ms Dalton updated her report referring to the Claimant experiencing '*bouts of anxiety where he was unable to identify the triggers of that anxiety'.* In that report she recommended the Claimant create his own templates for work tasks to make them easier for him and that he also made use of brain head space apps that were available for free, to help him cope with his anxiety in stressful situations. These were recommendations made aimed at the Claimant taking some steps to help himself, rather than at the Respondent.

34. Ms Dalton's report also recommended the noise cancelling headphones be purchased and the training supporting the recommendations made by Access to Work.

35. Ms Terry explained that once the adjustments had been agreed there were external and internal processes to be followed to get them put in place. There was a process of form filling required from Access to Work, then a supplier had to be authorised by the Respondent, before a recommendation could be put in place. As a result, there was a delay in providing the equipment and training that Access to Work had recommended in their report of November 2017. Some equipment was obtained for example, an ergonomic chair was delivered on 13 April 2018. The headphones were also delivered in April 2018 but had to be changed because they were not suitable. The replacement headphones were ordered but had not been delivered by the 21 May 2018.

36. No co-coaching training, coping strategy training and mental health awareness training had been put in place prior to or by 3 April 2018 when the claimant took his first live call. Ms Terry accepted those items were still outstanding even though the adjustments had been agreed and the claimant knew they were going to be provided.

37. Ms Terry recalls a handover meeting at some point with the new Team Leaders Dee Walker/Simone Burdell when she updated them on the progress made by the Claimant in her team and on the outstanding adjustments. The Respondent accepts that as at the claimant's last day at work on 21 May 2018, the adjustments in relation to the training and the equipment (headset) had not been provided. The respondent's case is that these adjustments had 'slipped through the net'. Viewed in the context of all the other adjustments that had been made by the respondent to help get the claimant back to work, it was clear the respondent was trying to make those further adjustments as well.

38. However, once the Respondent had agreed the adjustments recommended by Access to Work in November 2017, they should have put in place in a timely manner. The training should have been in place in

advance of 3 April 2018 and the headphones should have been provided to the Claimant by no later than 3 April, when he returned to work and was expected to take live calls.

39. Whilst it is clear the respondent had already made a substantial number of adjustments and these further agreed adjustments had slipped through the net accidentally, rather than intentionally, there was still a failure to take the step that would avoid the disadvantage which the claimant would face on his return to work. The reason for that failure might be relevant to mitigate any injury to feelings but it did not change the fact that there was a failure to make a reasonable adjustment.

Auxillary Aid Requirement

40. Aside from the headset the 2 other auxiliary aids, the Claimant refers to are a 'brain-in-hand app' to assist him with matters such as crisis support and travel to work and a template for online calls, which he alleges the Respondent failed to provide.

41. The Claimant accepts he had access to a brain-in-hand application on his phone but believed that if this did not work, another application could have been obtained by the Respondent through the National Autistic Society to help him with crisis support, particularly support for travel to work.

42. Mr Arnold makes the point in closing submissions that these were both matters that Ms Dalton had identified as steps for the Claimant take to help himself with calls/travel. Crisis support generally and specifically for travel to work were not 'work related' adjustments the employer could make for the claimant. This 'crisis support' was a matter for the claimant's primary healthcare providers to assist the claimant in a 'crisis' situation to help him cope with the symptoms of his anxiety. For travel the respondent had done what it could do, by adjusting the Claimant's shift times to help him avoid having to travel at busy times. The 'brain in hand app' was a tool for the Claimant to use for self/help when he needed it. As far as the respondent was aware no issue had been raised about any further self-help applications that they should obtain from elsewhere.

43. In relation to the template, this was something that the Claimant was expected to create for himself as a self-help tool/reminder to help him with the live calls. The respondent had already implemented a detailed and lengthy return to work with a long training period to help the claimant deal with live calls. As far as the respondent was concerned, there was no issue raised about the quality of the claimant's live calls that would have alerted them that the claimant was placed at any substantial disadvantage by not having a template. The Claimant accepts that he never asked his employer for the template or for a brain in hand app and that none of the reports identified these as steps the Respondent should take.

Physical Features Requirement

44. When the Claimant worked in Ms Terry's team he had a set desk and was not hotdesking. He raised no issue that the physical features of his workstation were putting him at a substantial disadvantage as a disabled person. His complaint in these proceedings, as clarified at this hearing, is that the proximity of his seating to the canteen, corridor, toilets and lockers

generated noise, the lighting in the vicinity flickered and made a buzzing noise and the citing of his workstation was unsuitable when he moved on 16 April 2018 to Simone Burdell and Dee Walker's team.

45. No issue was raised by the Claimant with either Team Leader to alert them to these physical features of his workstation putting him at any disadvantage. From the we had from both Team Leaders if such an issue had been raised, they would have addressed it. Moving his seat was a step that could have been done quite easily, if they had known it was a problem at the time. The respondent had agreed to implement adjustments previously whenever the Claimant had requested them and there was no reason why they would not have done so in relation to the citing of his desk which was an easy step to take. Without knowledge of the disadvantage, the duty to make the adjustment is not engaged. We found that the Claimant had not informed his managers when he moved teams on 16 April 2018 that his new desk location was a problem in the way he alleges. If he had there is no reason to doubt that they would have moved him.

<u>The PCP requirement</u>

46. The first 'PCP', the Tribunal is required to make findings about whether the Respondent imposed a PCP of requiring the Claimant to work 35 hours per week. Although the Claimant's contract does provide that he is required to work 35 hours a week, in practice on the agreed facts for 3 years the claimant did not work at all and then he only worked 12 hours a week from 3 April to 21st May 2018. The hours he worked were agreed so there was no requirement placed by the Respondent for the Claimant to work 35 hours a week. From the evidence the maximum number of hours the Claimant worked was 12 from 3 April 2018 to 21 May 2018.

47. The second PCP is requiring the Claimant to work on phone activities which is an accepted PCP applied in the period 3 April to 21 May 2019 when the Claimant was taking live calls. It had been agreed by Ms Terry prior to 3 April 2018 that when the Claimant was able to take calls he would be single skilled (meaning he should deal with calls from one brand only, new claims rather than existing claims or complaints).

48. The Claimant was told that there was no requirement for him to take any other calls but the Respondent could not guarantee all incoming calls would be single skilled for 2 reasons. Firstly, although Ms Terry had asked for the Claimant's settings on the phone system to be adjusted, the system would not allow a permanent fix, it had to be done manually each time which sometimes was a problem. Secondly, if customers pressed the wrong option on their own phones this could result in the wrong call coming to the Claimant. The Claimant was made aware of these problems and was told that he should notify his team leader if the wrong call came to him inadvertently, so that corrective measures could be taken.

49. Ms Terry's unchallenged evidence was that on 3 April 2018 the Claimant took nine calls, five of which were the wrong calls. Ms Terry immediately contacted the "real time department" to ask for the settings to be adjusted and this had to be repeated on occasion, but the Claimant knew his Team Leader was acting on the problem to fix it and there was no adverse

consequence on him if he did not take the call. On 9 April 2018, the Claimant took 13 calls and all of them were correct. On 13 April 2018 the Claimant took 10 correct calls and 4 mixed line calls. Ms Terry chased the 'real time department' to ask for a reset and told the Claimant that she had done this. He knew she was doing her best to resolve the situation.

50. On 16 April 2018, the Claimant moved teams to Simone Burdell and Dee Walker's team. As far as they were concerned if a problem occurred with the calls the claimant was taking they would address it. Ms Burdell also offered the Claimant alternatives so that if by accident the wrong call came into him, he could transfer the customer to a colleague and if no other colleagues could take it he could arrange a call-back to be made to the customer by another colleague. He was not expected to deal with the wrong call and no criticisms were made of his calls and no target was set for the Claimant for live calls. This was because the Respondent just wanted to build the claimant's confidence up at work to sustain and maintain a return to work rather than to achieve a target of set number of live calls.

51. The impression Mrs Walker and Ms Burdell had of the Claimant's performance at work was that he was getting on fine and was doing well. He was scoring 99 and 93 out of 100 for his calls and was receiving positive feedback from customers. The problem was that the Claimant's health continued to fluctuate and was unpredictable. Even if he had a seemingly good day at work it would be followed by an absence for reasons related to his anxiety.

52. On 25 May 2015, the Claimant contacted his team leaders by e-mail and the relevant parts of that e-mail are as follows:

"Hi Simone/Dee

I can't come into work at the moment. I am not well enough to make the journey into and out of the office. Nor am I emotionally stable enough to be talking to people. I am struggling with challenging the self-harm thoughts at the moment without having to try and concentrate on work tasks.

My paranoia is getting really bad at the moment, I have an appointment booked with the GP for Thursday 31 May and an appointment with Dr Iqbal (Consultant Psychiatrist) on 9 August. I have stopped taking my tablets because they make me sleepy and I know someone wants to kill me during my sleep.

Last night I felt like I wanted to be discharged from the Community Mental Health as I wasn't getting better and that they want to keep me like this forever and watch me fall apart. Since losing Alan I have been struggling and because of that it's making it extremely difficult to trust anyone and discuss it with anyone, (UNUM reduced involvement, moved teams at work, Dr Iqbal reduced hours, Alan left). Trish offered to see me next week but I can't tell her about this so I told her to just see me the week after so I see her on 2 June.

My thoughts don't stop at work though. I don't go for my microbreaks because all I think about is showing on a report for call avoiding. I had my

first day of my calls being correct (all direct line on Monday) but my thoughts are that someone is swapping me on purpose just to get a reaction and exasperate me intentionally. Which is making it really difficult for me to focus on doing things and I keep losing my train of thought. I currently aren't able to talk on the phone or deal with things so can you let UNUM know and once I am feeling more in control I will be in touch."

53. It is clear from this letter that the effects of the Claimant's anxiety and the paranoia and thoughts of self-harm are the factors the Claimant identifies are preventing him from returning to work. Even when the live calls are all correct his paranoia affects his perception of the correct calls. His health issues are the reason why he is unable to work and he recognises this in his email which is an honest reflection of his feelings and state of mind at the time. He also refers to his need to seek treatment from his primary health care team to help him deal with the effects of his anxiety. The claimant's heath is the reason why the Claimant is incapable of working from 25 May until the termination of his employment and thereafter. In fact, all the subsequent GP fit notes/advice to the respondent from UNUM confirms that position:

- The first GP fit note on 31 May 2018 was for two weeks for 'anxiety' confirming that the Claimant was assessed as 'unfit to work'.
- On 8 June 2018, UNUM confirmed that the Claimant was awaiting medical treatment from the Community Mental Health Team.
- On 12 June 2018, the Claimant's GP provides a further fit note for two weeks again for 'anxiety' and confirming the Claimant was still 'unfit to work.'
- On 3 July 2018, a further fit note for 7 weeks for anxiety confirming the Claimant was unfit for work.
- On 9 August 2018, the Claimant provided an update after seeing his psychiatrist, Dr Iqbal which informs the respondent that his treatment had changed from anti-anxiety medication to anti-psychotic medication and that he was waiting for his GP to prescribe him with that new treatment
- On 11 September 2018, the claimant was assessed and a final fit note was issued by the GP assessing the claimant as unfit for work for 3 months (backdated from 13/8/2018) to 12 November 2018.

54. On 22 August 2018, as a consequence of the claimant's continuous sickness absence which was likely to continue the Respondent raised some queries with UNUM. The e-mail enquiry from HR to UNUM asks the question:

"Is there anything additional from your recent medical review into his case that you can share with us to help us aid the conversation around his fitness for work?"

Answer:

"Our most recent medical review confirmed that the member continues to be actively, medically managed and treated for his condition. The medical reports to date remain supportive that Mr Riley is ***unable to perform his insured role. It is difficult to see that Mr Riley would recover sufficiently to perform his role in the near or medium future.*** *We are unable to share any more specific information." (Highlighted text our*

emphasis)

55. As a result of this assessment, the Respondent made some further enquiries because they incorrectly believed, the claimant was limited to five years PHI scheme benefit which had started on 1 February 2015 and would end on 1 February 2020. With the UNUM assessment there was a possibility that UNUM could take over direct payment of the benefit. The Respondent wanted to explore this further with the Claimant and by email dated 28 August 2018, invited the Claimant to attend a meeting to discuss his "ongoing phased return to work, how it was going and the options going forward".

56. That meeting took place on 31 August 2018. The meeting minutes are at page 575 to 578 and were accepted as an accurate record of the meeting. There is a review of matters generally, how the return to work had gone, whether a return to work in the future was sustainable in the light of the claimant's continuing ill-heath and the UNUM assessment. It is only in that context that UNUM and the pay direct offer is raised with the Claimant. The minutes record:

    *"UNUM have done an assessment on you and **advised that you are currently not fit to work and they cannot foresee that you will be fit for work in either the short or medium term.** UNUM will complete an annual assessment. **We need to consider what the prospect is of you both doing the role and doing what is good for your health.** We need to look at how we manage your hours and how you will cope with that. You currently work 12 hours per week which the business cannot sustain and to increase your hours even up to 16 hours a week may have a negative impact on your health. UNUM have taken all these things into consideration and confirm that at the moment you are not fit for work. **UNUM do a scheme call pay direct and because they do not see you being able to return to work in the medium term, this pay direct scheme they offer would continue to support you financially and we (Direct Line Group) take a step back. You would cease employment with Direct Line and UNUM would pick up the payments. You would get paid what you get now but UNUM would pay you rather than us**."*

57. The Claimant's response is: "**My only issue with this is will it take me up to state pension age?**". In the light of that response, HR agreed to investigate that issue further.

58. Throughout the meeting the claimant is asked to confirm his understanding/thoughts. He is asked "*What are your thoughts? How do you feel about it all*?" And his response is recorded as:

    *"It all makes sense. I know really that this is where it's been heading for the last four years. **This ties it all up as I do not have to think about how I am going to get back into work and what a phased back to work will look like and when I am going to be able to come to work and the hours.**"*

    The Respondent quotes the extract from UNUM that they were given and the claimant requests that this extract is provided to him by e-mail so that he could show it to his GP at his next consultation.

59. From our reading of the minutes of that meeting, it was clearly a supportive meeting, with the purpose of exploring with the Claimant, his views and thoughts about the future and his ill-health, to help both the Claimant and Respondent make the right decisions to move forward. The Respondent was right to share UNUM's advice in full, with the Claimant to give him the opportunity to explore that advice further with his GP. From his responses the Claimant is happy with the option because he can see the benefits it gives him. "It all makes sense" and "ties it all up" it is where "it's been heading for the last four years" and is better for him than the uncertainty of a return to work. The Claimant raises the state pension age issue, because he is aware having upgraded the policy for this reason that this option exists for him. The Respondent is unaware and agrees to check it out. This option offers the claimant the certainty of payments for his salary until retirement, without the risk of uncertainty because of his health issues. This was exactly what the claimant envisaged might happen when he upgraded the policy.

60. Against all that evidence, the Claimant says he did not understand what was being said to him at that meeting. We do not agree with that position because there was nothing said or done at the time by the Claimant that would have alerted the Respondent to any lack of understanding. The Claimant clearly understood what was being said and was weighing up his options. He was more knowledgeable than the respondent about the scope of the benefit available to him if his contract was terminated.

61. Mr Spink did not put it to the Claimant as a 'take it or leave it' offer or put any pressure on the Claimant. He gave the Claimant the time and opportunity to make his own enquiries and offered another meeting after those enquiries were made, if the Claimant wanted it.

62. On 3 September 2018, the Claimant emailed the Respondent chasing the UNUM extract so that he could take it to his GP to "*get a sick note to reflect this as was **agreed** in the meeting"*. If the Claimant really did not agree with UNUM's assessment he could have asked his GP to provide a contrary view about his ability to return to work. If he had done that, UNUM/the Respondent might have reconsidered their position and the direction of travel towards a termination by agreement might have stopped. The reason the claimant did not do that, was because at the time, he agreed with the UNUM assessment and did not want to jeopardise the chance of guaranteed payments under the policy.

63. On 5 September 2018, another query was raised by the Claimant which demonstrates how proactive he was in the process before termination of his contract. The Claimant requested and the Respondent agreed there would be no gap in the payments between his contract ending with the Respondent and direct payment from UNUM, to ensure a smooth transition so the claimant did not lose out financially.

64. In the Claimant's email he uses the terminology of his 'contract ending' demonstrating his understanding that the benefit could only be accessed if the contract came to an end. Both parties were proceeding, on the basis, there was an agreed termination so that the Claimant could access those payments, after termination.

65. On 5 September 2018, the Respondent sent the Claimant the extract from

the UNUM report. On 6 September 2018, Ms Burdell sent the Claimant an email confirming the points she discussed with him over the telephone. Her email is clear and summarises the 8 points discussed. Although the Claimant says he did not read the email before responding to it, he does not challenge its contents. Given his proactive involvement to date, if the email did not accurately reflect his understanding of the discussion, he would have corrected it subsequently. The important point about this email is that the Claimant is put on notice that he needs to make an 'informed' decision. The e-mail states:

"*You need to consider this and make an informed decision. I understand you have been in contact to clarify some queries you had. If you wish to take on pay direct and you confirm this, we will invite you to a formal meeting and end your employment with Direct Line Group."*

66. The e-mail also confirms that there would be a payment in lieu of notice to ensure a smooth transition, that further enquiries were being made in relation to state pension age and the length of time the benefit would be paid. Importantly point 7 states:

"*If you confirm your agreement we would invite you to a face to face meeting to confirm the outcome. So, if you are happy to move to pay direct please can you confirm this to me and I will start to schedule final meeting with you."*

67. The final point noted in the e-mail is point 8:

"You asked the question about whether or not you would still receive your free shares once your employment with us has terminated. I think it would be highly unlikely that you would continue to receive these". (The fact the claimant raises the shares is evidence of his informed proactive approach to this termination option)

68. The e-mail ends with Ms Burdell hoping the Claimant has a good weekend and that she looked forward to hearing from him. There was no pressure put on the Claimant to make a quick decision. Despite being given the time to think the Claimant's immediate response was:

"Hi Simone

As per our discussion today please accept this e-mail as acceptance for pay direct. I understand that this now needs to go to Kam in HR and then you will be back in touch so I will await a response. I have a GP appoint on Tuesday so will forward the sick note then."

69. HR then confirmed that the benefit would be paid until state retirement age because the Claimant had paid for additional cover when the policy commenced. That meant the Claimant was entitled to that benefit until 21 July 2059 unless he no longer fulfilled the definition of incapacity or died.

70. On 13 September 2018, Ms Burdell acknowledged the sick note the Claimant had provided and confirmed that UNUM had confirmed he had extended pay direct until state pension age. That e-mail was sent at 15:37 and the Claimant's response at 17:30 is to provide his availability dates for

a final meeting. He knew a final meeting was required to end his employment because this was made clear to him in the email. Again, the Claimant was very prompt in providing his availability so that the meeting could take place as quickly as possible.

71. On 13 September 2018, Ms Burdell provided the Claimant with a copy of the minutes of the meeting of 31 August 2018. If the Claimant disagreed with the content of those minutes he had the opportunity to challenge them before or at the next meeting.

72. By email dated 14 September 2018, the Claimant was invited to attend a final meeting. The letter clearly states that the purpose of the meeting will be to discuss "your proposed move to pay direct scheme overseen by UNUM". It had been made clear to the Claimant that the meeting was about the ending of his employment required for him to access the benefit. The minutes of the meeting are at pages 604 to 606. The claimant confirmed the accuracy of the minutes at the time and has not disputed the content at this hearing. The Claimant accepts that he understood that when the word 'dismissal' was used it meant ending his employment so that he could access the policy benefits through UNUM. Mr Spink made that clear in the meeting when he stated "*UNUM will pay you directly under their pay direct policy and your employment with DLG will end. Does that make sense?* The Claimant's response is "*I would need it in writing that I am no longer employed". Mr Spink responds "Yes that is fine". Do you have any questions?"*. The questions the Claimant does ask are about the transition regarding his pay from the Respondent to UNUM. Mr Spink makes it clear that he did not want to leave any questions 'unanswered'. The Claimant's response to this is *"I understand and agree with it all, so that's fine"*. There is then an adjournment during which the Claimant has time to consult his employee representative, Kirsty Walker. The meeting is reconvened and the decision is confirmed. The claimant then completed some forms required for the direct payments to be paid by UNUM.

73. By letter dated 25 September 2018, the Claimant's employment was terminated with effect from 19 September 2018. The Claimant is offered a right of appeal but does not exercise it. It is unclear why the Claimant did not exercise that right, based on his case at this hearing that he was tricked into agreeing to take the benefits from the UNUM policy until state retirement age at the termination meeting.

Conclusions on Termination

74. In the Claimant's submissions he suggests he was 'tricked' and he did not understand what was being said at the meetings. There is nothing in the minutes of the meetings to support this. The minutes reflect the active role played by the Claimant throughout this process from start to finish. He asked questions based on his self-interest (gaps in pay/state retirement/ entitlement to shares post termination), he took the UNUM extract to his GP's to seek advice about UNUM's assessment, and on more than one occasion he was asked and confirmed his agreement to the termination and his understanding of the process.

75. The termination of the contract was an agreed mutual termination it was not a dismissal. It was agreed because it was mutually beneficial to both

parties. It was beneficial to the Claimant because it allowed him to benefit from the scheme, he joined and upgraded at the beginning of his employment. He foresaw then that his anxiety/depression might prevent him from working. It was beneficial for the Respondent who had to manage the Claimant's absence from work since 2014, and despite the best efforts of the Respondent and the Claimant, the Claimant had only managed 14 day's work in a '4' year period. The absence and unfitness to work from 25 May 2018 was to continue to November 2018. Any future prospect of a return to work was unlikely. The respondent had committed a huge amount of time and resource to try to achieve a sustainable return to work without success. It was only when UNUM advised them based on medical information accessed through the Claimant's mental health team, that a return to work in the future was unlikely, that this proposal ever came to be discussed. The Claimant's agreed with UNUMS assessment and proactively pursued the offer made because he understood it and wanted to take advantages of it by agreeing to the termination of his contract.

76. The Claimant made an informed decision to mutually terminate the contract and he has benefitted since that date from that decision. No pressure was placed upon the Claimant. If he really did not agree with it, he had many opportunities to challenge it before the termination, and afterwards at an appeal, He did not do that because it was what he wanted at the time and it 'made sense'. He might now have changed his mind but that does not change the facts, there was an agreed mutual termination not a dismissal.

77. Even if the word 'dismissal' was used in the termination letter it was clear that on the facts there was no dismissal. We agreed with Mr Arnold's submission that it is the substance, not the form of words used. The claimant understood it was a termination by agreement even though the word dismissal was used. He was agreeing to that termination so that he could access the benefit until state retirement age directly from UNUM. Although Mr Arnold has very clearly and carefully set out a number of authorities on this issue in his written closing submissions, we do not address them here because our findings of fact are clear and support our conclusion that there was a mutual termination of the contract of employment on 19 September 2018 not a dismissal. That finding means all the dismissal complaints fail.

Post Termination/ Time Point

78. Sometime after the termination the Claimant accessed some advice. He rang the Equality Advisory Service, ACAS, the Citizens Advice Bureaux and then attended an appointment with the law clinic on 17 October 2018 and obtained advice in writing from them on 29 October 2018.

79. The first time the Respondent was aware that the Claimant had any issue in relation to his employment was when ACAS contacted them on 29 October 2018.The ACAS period of conciliation ran from 29 October (Day A) to 12 November 2019 (Day B). The claim was presented on 22 November 2018. Any allegation before 30 July 2018 is prima facie out of time and the time point therefore only applies to the reasonable adjustment complaint.

80. We found the Claimant's was unfit to work in any capacity from 25 May 2018 until 12 November 2018. Any failure to make any reasonable adjustments had to relate to the period when the claimant was capable of working for the duty to be triggered. The duty to make adjustments was engaged from the return to work programme to the claimant taking live calls in the 14 days he worked from 3 April 2018 to 21 May 2018.

Conclusions on the Time Point

81. The time point issue on the reasonable adjustment complaint had been identified in the list of issues. The claimant dealt with it in his evidence and was cross examined on this point. Both parties also helpfully addressed the Tribunal on this issue in their closing submissions.

82. In answer to the issue "if outside the above time limit, is it otherwise just and equitable to consider those complaints? The Claimant's response is:

"I feel that as the e-mail (page 574 e-mail to Dee to Claimant) stated it was to discuss my return to work that this happened within the time period allowed and therefore the point stands."

83. The email is the invitation letter of 28 August 2018 which informs the Claimant that a meeting is to be arranged to discuss his "ongoing phased return to work, how it is going and options going forward" (see paragraph 42 above).

84. The other point that the Claimant makes refers to the minutes of the meeting of 19 September which he did not challenge at this hearing. He says in his statement at paragraph 126:

"*I ended up unsure what to do so rang the Equality Advisory Service, ACAS, Citizens Advice and then eventually got a face to face appointment with Leeds Beckett Law Clinic. I attended the Law Clinic and they advised they would write to me with some advice. By the time I had this and what options I had* ***the time scale to challenge the decision had already been breached*** *so I contacted ACAS to begin early conciliation." (*the Claimant attended the clinic on 17 October 2018 he received advice dated 29 October 2018*)*

85. Mr Arnold's submissions on the time point asks the Tribunal to note that, "*despite his illness, the Claimant was able to interact with the Respondent in matters leading up to him being able to accept the pay direct scheme. This included raising enquiries with his employer and union about the scheme".* He notes the number of advisers to whom the Claimant had access and submits it is not just and equitable to extend time to the date of presentation.

86. The Claimant commented on these submissions and asked the Tribunal to prefer his submissions on the time point. The Claimant submissions on the time point were:

"*I believed when work engaged with me that we would be discussing what support/adjustments could be implemented to help me return but this never happened. I expected this to happen on 31 August 2019 meeting based on DS's e-mail. I therefore believe I have been within time scales*

and if I was not within time scales that is due to DLG not keeping me informed or not actively managing the request for adjustments but when I left Sally's team I knew requests were in place and had no doubts that anything had changed when I moved team." (The Claimant moved team on 16 April 2018.)

87. Dealing firstly with the failure to make reasonable adjustments and the time point. The guidance given by the EAT **Environment Agency v Rowan [2008] ICR 218**, identifies the key components which must be considered in a such a complaint (taking out the disability issue which was conceded in this case):

- What is the provision, criterion or practice (PCP), physical feature of premises or missing auxiliary aid or service relied upon?
- How does the PCP/physical feature/missing auxiliary aid put the Claimant at a substantial disadvantage in comparisons with persons who are not disabled?
- Can the Respondent show that it did not know and could not reasonably have been expected to have known that the Claimant was likely to be at that disadvantage?
- Has the Respondent failed in its duty to take such steps as it would have been reasonable to have taken to have avoided that disadvantage or to have provided the auxiliary aid or service
- Is the claim brought within time?

88. For the successful complaint of a failure to make reasonable adjustments we found that the Respondent had applied a PCP of requiring the claimant to take live calls from 3 April 2018 to 21 May 2018 during the 14 days when the claimant attended work. The respondent accepted the recommendations made by Access to Work in November 2017 for training (coping strategies, co-coaching and mental health awareness training) and equipment/auxiliary aids (a headset with software for use of both computer and phone to enable the Claimant to use speech and text communication from the end of 2017). It was accepted the PCP/auxiliary aid put the claimant at a substantial disadvantage in comparison with persons who are not disabled. The respondent accepts knowledge of the disadvantage and the duty to make the adjustments which slipped the net' and we found were not made in a timely manner.

89. The Claimant could reasonably have expected that training/equipment to be in place by no later than 3 April 2018, when he was expected to deal with live calls in the workplace. He knew the adjustments had been agreed by Ms Terry but had not been put in place by 21 May 2018, his last working day. After 21 May 2018, the claimant was incapable of performing any work at all due to his impairment of anxiety.

90. The statutory provisions on time are set out in sections 123(3) and 123(4) of the Equality Act 2010 and determine when time begins to run in relation to acts or omissions which extend over a period.

91. *Section 123 provides so far as relevant that:*
"(1) …proceedings on a complaint….may not be brought after the end of-
(a) The period of 3 months starting with the date of the act to which the complaint relates, or
(b) such other period as the employment tribunal thinks just and equitable.

(3) For the purposes of this section-
(a) conduct extending over a period is to be treated as done at the end of the period:
(b) failure to do something is to be treated as occurring when the person in question decided on it
(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something –
(a) when P does an act inconsistent with doing it, or
(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it"

92. The provisions are set out in the list of issues. as they apply to be considered in this case. Based on our findings of fact the questions at 9.1.6-9.1.7 need to be decided:

> "9.1.6: If the Respondent did not act inconsistently with doing something in furtherance of discharging its duty, when might the Respondent reasonably have been expected to make a decision in respect of the adjustments/provision of auxiliary aids?
>
> 9.1.7: If that is outside the above time limit is it otherwise just and equitable to consider those complaints?"

93. We found the guidance given by the Court of Appeal in **Abertawe Br Morganwg University Local Health Board -v- Morgan (2018) EWCA CIV 640** particularly helpful on this issue. In that case for there was also a point in time when Ms Morgan was unfit to work in any capacity (August 2011) and for her that remained the position at the time of her dismissal (15 December 2011). The Court of Appeal agreed with the EAT that a claim based on a failure to make adjustments, from that point of incapacity (August 2011) to dismissal could not be sustained. At paragraph 14 the provisions of section 123(3) and (4) are considered.

"*Ascertaining when the respondent might reasonably have been expected to comply with its duty is not the same as ascertaining when the failure to comply with the duty began. Pursuant to section 20(3) of the Equality Act, the duty to comply with the requirement relevant in this case begins as soon as the employer is able to take steps which it is reasonable for the employer to have to take to avoid the relevant disadvantage. It can readily be seen, however, that if time began to run on that date, a claimant might be unfairly prejudiced. In particular, the claimant might reasonably believe that the employer was taking steps to address the relevant disadvantage, when in fact the employer was doing nothing at all. If this situation continued for more than 3 months, by the time it became or should have become apparent to the claimant the employer was in fact sitting on its hands, the primary time limit for proceedings would already have expired.*

15. This analysis of the mischief which section 123(4) is addressing indicates that the period in which the employer might reasonably have been expected to comply with its duty ought in principle be assessed from the claimant's point of view, having regard to the facts known or which ought reasonably to have been known by the claimant at the relevant time." …….

94. Based on our findings the claimant knew that the training was still

outstanding but had been agreed he knew the equipment (headset) was reordered but outstanding and that remained the position from 3 April 2018 until 21 May 2018 his last day at work. He was then incapable of any work until the contract was terminated by agreement on 19 September 2018. The Claimant's position that as at 28 August 2018 he reasonably expected the respondent to comply with the duty to provide the training and the equipment so the claim was made in time, is not accepted. As at August 2018 he was still unfit for any work at all. A claim for a failure to make reasonable adjustments in the period 25 May 2018 to 19 September 2018, cannot be sustained. The trigger for the claimant's absence was his anxiety and paranoia and thoughts of self- harm. He needed to treat those effects by seeking treatment from his primary health care. His psychiatrist Mr Iqbal and his GP changed his medication and he was then awaiting therapy.

95. In terms of knowledge, the Claimant has suggested in his submissions that the time should run from 31 August 2018 from the meeting where the pay direct scheme was first discussed with him. The problem for the Claimant is the same he is incapable of any work and was proactively pursuing with his employer a termination to enable a move to UNUM paying him directly under the scheme.

96. The reasonable adjustments complaint was therefore made out of time with the last date being 21 May 2018 and the claim presented on 12 November 2018. We then had to then consider whether to extend time on just and equitable grounds to the date of presentation.

97. The tribunal has discretion to extend time in accordance with section 123(3). In exercising that discretion, we considered the factors identified in the case of **British Coal Corporation v Keeble [1997] IRLR 336.** We considered the reasons for the delay first then the length and whether the delay had prejudiced the Respondent.

98. The Claimant in his witness statement requests time is extended on the basis that he relies upon 28 August 2018 as the date when he was to discuss his return to work and the claim is in time. He also states that he did not believe his employer had made a decision. He refers in his witness statement to seeking advice in October 2018. He does not say that he was too unwell to submit a claim any earlier than he did and confirmed he was able to and had lodged the claim himself. His fit note ran until 12 November 2018. We considered the findings we had made about the claimant's proactive involvement in the decision making prior to termination. The enquiries he made to get the best possible outcome for him (pay/shares/duration of benefit) while he was unfit to work demonstrate his ability to act in his self-interest and to make informed decisions. He could have pursued a different course if he felt the respondent was failing to make reasonable adjustments as at August 2018 and if he felt he was able to return to work for those adjustments to be put into place. He did not do that because termination was the route he wanted not a return to work. If he disagreed with UNUM's advice, having obtained the extract that assessed him as incapable of returning to work he could have asked his GP to challenge it and assess him at fit to return with adjustments. He did not that because he did not want to risk losing the certainty of obtaining the benefit of the UNUM policy payments directly from UNUM until state retirement.

99. It appears to the Tribunal that the Claimant has changed his mind now about the decision he made to agree to terminate the contract. He is retrospectively replaying events with a changed mindset. At the time of the meeting in August 2018, it was clear from the Claimant's responses that he was happy with the option of direct payments from UNUM because he knew it was the better option. The reason why he said, "It all makes sense" and "ties it all up" and this is where "it's been heading for the last four years" was because he knew the option of returning to work was not feasible because of his health issues. The direct payment option offered the claimant the certainty of payments of salary until retirement, without the risk of uncertainty because of the continuing health issues. The situation the claimant envisaged might happen, was happening. By this stage he had not worked for 4 years and had only managed 14 days of a return to work before his health prevented him from working again. His GP's final fit note assessed him as unfit to work at all until 12 November 2018. He was not presenting to his employer as someone who was ready and able to return to work because he wasn't.

100. A change of mind by the claimant about an agreement made by both parties in good faith, was not a ground for a just and equitable extension of time. The other factors of the length of delay and prejudice considered in that context do not persuade the Tribunal that it is appropriate to grant an extension of time.

101. The dismissal complaints (unfair/direct and discrimination arising from disability) all fail because there was no dismissal. The reasonable adjustment complaint (training/auxiliary aids) is out of time and time is not extended which means that complaint also fails and is dismissed.

Employment Judge Rogerson

Date 7 November 2019