Case No: 2416698/2018

EMPLOYMENT TRIBUNALS

Claimant: Mr C Carus

Respondent: Liverpool City Council

Heard at: Liverpool On: 8 9 10 and 11 October 2019 and 8 November (in chambers)

Before: Employment Judge Benson
Mrs J Pennie
Mrs V Worthington

Representation
Claimant: Mr L Bronze - Counsel
Respondent: Mr T Kenward - Counsel

JUDGMENT

1. The claimant was fairly dismissed. The claim is dismissed.
2. The claimant was not a disabled person within section 6 and Schedule 1 of the Equality Act 2010.
3. The complaints of discrimination fail and are dismissed.

REASONS

Claims and Issues

1. The claimant brings claims of unfair dismissal and disability discrimination, being direct discrimination (section 13 Equality Act 2010) ('EQA') and a failure to make reasonable adjustments (section 20 EQA). The claimant alleges that he is a disabled person by reason of work related stress. Disability is disputed on the basis that it did not have a substantial long term adverse effect upon the claimant's normal day to day activities.

2. At the outset of the hearing the claimant made two applications:

    a. An application to amend his claim to include a claim under section 15 of the EQA 2010 (discrimination arising from disability). No notice was provided to the Respondent before the day of the hearing that such application was to be made. Having considered submissions from both representatives, the application was refused for the reasons given at the time.

    b. An application to redact parts of the ET3 and two of the respondent's witness statements on the grounds that part of the conversation which the claimant had with the respondent at the meeting on 6 July 2018 was privileged on the basis that it was a 'without prejudice' conversation and further that it was a protected conversation under section 111A Employment Rights Act 1996. Having considered further submissions from the representatives, the application was granted to the extent identified in draft versions of the above documents provided by Mr Kenward.

3. The issues were agreed by both parties as those set out in the case management order of Employment Judge Franey dated 4 February 2019.

Disability – preliminary issue

4. Was the Claimant at the material time a disabled person by reason of a mental impairment which he describes as 'work related' stress?

Direct Disability Discrimination – section 13 EQA 2010

5. Are there facts such that the Tribunal could conclude that in dismissing the Claimant, the Respondent treated him less favourably because of his disability than a hypothetical comparator in the same material circumstances, who was not disabled, would have been treated?
6. If so, can the respondent nevertheless show that there was no contravention of section 13?

Breach of duty to make reasonable adjustments – section 20 and 21 EQA 2010

7. Did the respondent apply a provision, criterion or practice ('PCP') of expecting the Compliance [Officer] of the Cemeteries division to take on a significant number of additional roles?
8. If so did that PCP place the claimant at a substantial disadvantage compared to a person without his disability because his mental impairment meant that he was less able to cope with the demands of such additional roles?
9. If so, can the respondent show that it did not know and could not reasonably have been expected to have known that the claimant was a disabled person and likely to be at such disadvantage?
10. If not, did the respondent fail in its duty to take such steps as it would have

been reasonable to have taken to avoid the disadvantage? The adjustment for which the claimant contends was to have allocated the additional roles to another person.

11. Insofar as the respondent breached the duty to make adjustments more than three months prior to the presentation of the claim form, allowing for the effect of early conciliation, can the claimant show that it formed part of conduct extending over a period ending less than three months before presentation, or in the alternative that it would have been just and equitable to allow longer period?

Unfair Dismissal – Part X Employment Rights Act 1996

12. Can the respondent show a potentially fair reason for dismissing the claimant, being a reason related to his capability?
13. If so was the dismissal or unfair under section 98(4)?

Remedy

14. If any of the above complaints succeed, what is the appropriate remedy?

Evidence

15. Evidence was heard from the claimant, both in relation to the substance of his dismissal and alleged discrimination and the impact which his medical condition had upon his normal day to day activities. Further evidence was heard from the respondent's witnesses, Martin Doherty, the Cemeteries and Crematoria Operations Manager, Ms Sarah Thomson, Business Partner (Human Resources), and Ms Paula Kendrick, the Head of City Watch who was the dismissing officer. All witnesses provided witness statements and were cross examined. An agreed bundle of papers was provided for use by the Tribunal, together with a chronology and a cast list. Submissions were made by both Mr Kenward and Mr Bronze both written and oral and consideration has been given to these by the Tribunal.

Findings of Fact

16. The claimant commenced employment with the respondent, Liverpool City Council on 28 May 1980. During his 38 year career, he had undertaken several roles mostly in the parks and environment division. He was dismissed by letter dated 12 July 2018 on the grounds of capability following a period of ill-health. At that time the claimant was Compliance Officer within the cemeteries division.

<u>The claimant's workload</u>

17. On the Friday before the claimant started work in the cemeteries office in 2008, the Cemeteries Manager had died. The claimant had to take over the duties of the manager as there was no one else who had the horticultural

knowledge and experience that the claimant had. Although the Cemeteries Manager was replaced, the claimant retained some of the roles of the manager up until his dismissal.

18. In 2012, the respondent was looking to save money and offered voluntary severance to staff. This reduced the claimant's team in the parks and environment division from a staff of 18/19 down to 12/13.

19. In 2012, Bobby Robson the Memorial Management officer left the respondent under the voluntary severance scheme. Mr Robson was not replaced. His key duties were shared amongst others but with the claimant taking on the majority. We consider that the claimant was a more efficient worker than Mr Robson and was able to carry out these duties along with his existing duties as Compliance Officer within his normal contracted hours.

20. During his employment the claimant continued to take on additional duties as and when requested by his manager, Mr Martin Doherty. Mr Doherty himself was being asked by his line manager to take on additional responsibilities and frequently it was the claimant who was delegated to carry out the additional tasks. The claimant got on well with Mr Doherty throughout his employment and in line with his work ethic, he took on the roles and got on with the jobs he was given.

21. In 2015, the claimant was asked to carry out the Registrar role, one day a week. He agreed to this but wanted to ensure that he understood the role well and therefore offered to do it two days per week, rather than one. He also covered the Registrar when on annual leave and had additional responsibilities operating the crematoria in emergencies and agreed to assist if there was a staff shortage.

22. Workload tasks were allocated at managers meetings where Mr Doherty was present and the claimant had little involvement. This resulted in the claimant having tasks allocated to him, without his input. The claimant was a diligent and conscientious worker and wanted to ensure that he carried out his role to the best of his ability. The claimant continued to absorb all the work given to him and other than general 'grumbles' during informal conversations with Mr Doherty with whom he shared an office, he didn't raise any concerns that he may have had about his workload, formally or with anyone else in the respondent.

23. He says he lodged concerns with his Trade Union to protect his position, but there was no documentary evidence to confirm what was said and when. In any event he did not ask for any complaint to be raised with his employer.

24. The claimant gave evidence that he did make a complaint directly on one occasion to Mr Willis who was Mr Doherty's manager. He accepted however that this was about a pothole issue and specifically that he wouldn't be able to do the job he had been given properly, unless he carried out measuring in relation to the task. There was a poor reaction from Mr

Willis who told him to get on with the job. There was no complaint by the claimant to Mr Willis about stress, or his workload.

25. For a number of years the claimant had been looking after his elderly parents. The claimant did not consider that this impacted upon his work, but we consider that it did have an impact upon his mental well-being.

The events leading to dismissal

26. In or around October 2017, Mr Doherty who was also working under pressure, was unhappy and looking to leave the respondent. To encourage him to stay, it was agreed that his team could recruit an additional member who would take over the Memorial Management officer role, previously undertaken by Mr Robson. The claimant would relinquish those duties but was asked to train the new recruit, Mr Little. This was a transitional period, but it was intended that when Mr Little was trained, it would free up approximately 25% of the claimant's time.

27. In November 2017, the service area was required to appoint a Data Protection Champion. As the claimant was the Compliance Officer, it was viewed that he was the most appropriate person to take on this role. At the Tribunal hearing, the claimant agreed that this would have been part of his compliance role and he further accepted that the appointment of Mr Little would improve matters for him. At the time he was also the service's photocopier champion.

28. On 16 November 2017, Mr Doherty arranged with Mr Willis for the claimant to attend a four-day course on Data Protection. When the claimant was told of this, he could not cope with the additional work pressure and was signed off sick with a stress related issue from 20 November 2017.

29. On that date, his GP records what the claimant reported to him including that the claimant had felt very stressed with work over the last 18 months, was getting more and more work, couldn't sleep, was feeling very low and anxious at all times and he recorded on examination that the claimant was shaking, crying, obviously very upset and anxious. His diagnosis came as a surprise to the claimant as this was the first time he realised that he had stress issues. He had coped with the level of pressure previously but on this occasion, he was unable to. The claimant self-referred to Talk Liverpool and following his assessment was put on a waiting list for a Psycho – educational stress control course. He attended his GP again on 1 December and although he was feeling a bit better for not being at work, the GP prescribed anti-depressant medication (Sertraline).

30. The respondent has a strict Attendance policy. It would appear that it is applied rigorously. On the face of it, it is a blunt instrument but the respondent state that it does take into account individual circumstances. In the claimant's case, on the first day of his absence, as it was for a stress issue, the policy required him to be immediately referred to Occupational Health. On 11 December 2017, he attended an Occupational Health appointment. The Occupational Health Adviser reported that the claimant's

'barrier for his return to work was not primarily a medical one, but more a psychological reason related to the work issues he perceives he has been exposed to'. She recommended a welfare meeting with his line manager as soon as possible, that there should be a phased return to work, that Keep in Touch meetings should be arranged weekly, training should be identified and a Stress Triggers Assessment should be undertaken. Other than the welfare meeting, these were matters which Mr Doherty intended to implement upon the claimant's return to work.

31. On 20 December Mr Doherty met with the claimant. The meeting lasted somewhere between 5 and 15 minutes. It was a social chat and neither Mr Doherty or the claimant explored the claimant's workplace issues. It is clear that they both found the situation difficult. In accordance with the respondent's policy, Mr Doherty thereafter called the claimant once a week during his absence. Although it is likely that the calls were longer at the initial period of his absence, it is clear that as the claimant's absence progressed, conversation was not easy and the claimant's responses were often monosyllabic, such that the calls only lasted a matter of seconds.

Attendance Review Meetings

32. In line with the respondent's policy, attendance review meetings took place on 11 January, 27 February and 25 May 2018. The outcome of those meetings was set out in letters from Mr Doherty to the claimant following the meetings. There were no retained notes of any formal meetings. The respondent's declared practice of the brief outcome letter being the record of a meeting is unfortunate. Had such minutes been kept, it would have assisted the Tribunal as we do consider that there would have been more detailed discussions than the summary which appears in these letters, however little of that can now be recalled by the claimant or the witnesses. In any event, the outcome letters and their contents were undisputed by the claimant.

33. The claimant's case as presented to the Tribunal was that his stress was caused by the amount of work he had to do and had taken on since 2008 and that in his discussions with Mr Doherty and in his Occupation Health appointments what he was seeking was to be able to return to the duties which he carried out when he became Compliance Officer in 2008.

34. It is clear to us that during the review meetings, there was confusion between the claimant and Mr Doherty as to what the claimant meant when he asked to return to the Compliance Officer role and why. In his letter following the meeting of 27 February, Mr Doherty refers to the claimant stating that he 'expressed the desire to return to work and to fulfill you[r] current role as Compliance Officer once your illness was over'. By this Mr Doherty understood that the claimant wanted to return to his ongoing role. There is no evidence that we were provided with which it our view showed that the claimant had specifically explained to the Mr Doherty, or indeed to anyone at the respondent, that when he referred to returning to his role as Compliance Officer, he meant that he wanted to return to the Compliance role as it was in 2008.

35. This is in our view in part because the claimant did not make it clear to the respondent that his issue with returning to work was the amount of work that he was having to carry out in his then role as Compliance officer. The Occupational Health report of 22 March refers to heavy workload being one of the claimant's concerns but this is part of a number of concerns expressed, including his duties being beyond the scope of the role he was employed for, that the nature of his role was constantly changing and that he felt unsupported by management. There may have been discussion at the 25 May review meeting with Mr Doherty, but we don't know because there are no minutes or notes (from either the respondent or the trade Union representative), the outcome letter is only a summary, there is no evidence from the claimant on this point and in cross examination, he says that he can't remember what he raised.

36. There is reference within one of the outcome letters to Mr Doherty seeking to offer an alternative role at a lower grade to assist the claimant's stress problems. This is refused by the claimant. Mr Doherty also refers to the Data Protection duties being within the claimant's grade 6 Compliance role. It is clear that throughout the absence process, Mr Doherty understood that the claimant's issue was to do with the grade of work he was doing and not the amount. Communication was therefore the crux of this issue.

37. During these formal meetings, and in the outcome letters, Mr Doherty did indicate what arrangements would be but in place when the claimant returned to work. He accepted the recommendations made by the Occupational Health practitioners. The claimant however did not believe that Mr Doherty would action these recommendations.

Medical Evidence

38. In addition to the Occupational Health reports, we were referred to the claimant's GP notes for the period from 20 November 2017. The claimant was signed off by his GP from that date to 12 July 2018 when he was dismissed. His doctor's notes refer to the reason for his ill health being a stress related problem. From 1 December 2017 the claimant was prescribed medication being Sertraline and from 15 February 2018 Propranolol for his anxiety.

39. The claimant visited his GP regularly throughout this period. Although the medication was helping, until the being of May 2018, he was still reporting symptoms: feeling nervous all the time, unsettled, jittery, shaky and some palpitations (February 2018); Still having bad days but also having really good days (March 2018); Gradually improving but still having bad days (April 2018). The Occupational Health reports confirmed that he was continuing to experience psychological symptoms relating to his mood, sleep, motivation and anxiety and poor concentration (March 2018).

40. In his impact statement the claimant has described the impact that his work-related stress had upon his day to day activities. These include feelings of hopelessness, sadness, lack of interest, lack of self- esteem, crying bouts

and worry all the time. His character has changed from being an outgoing person who would have lead roles in shows and singing in bars and clubs, to avoiding nights out and feeling happier in the home environment. He stopped some of his hobbies such as cycling and going out for meals in public areas. His sleeping pattern was disturbed and he had panic attacks. He was unable to enjoy cooking and eating food with his family and friends and had to cancel a holiday last year.

41. The claimant reported to his GP on 8 May 2018 that he had started to feel better in himself and that his family had noticed that he seemed more relaxed though not 100% back to usual.

42. On his visit on 5 June 2018, the claimant reported that although he had not been feeling great over the past couple of weeks, he thought that was the lead up to the meeting with the meeting at work. He further reported that he now needed to make a decision about whether to return to work with a phased return as advised by OH or whether to look for a new job.

43. On 3 July 2018, the claimant was reported to look more relaxed and chatty. He confirmed he was feeling nervous amount the review meeting later that week, but felt positive for the new role they are offering but needs to clarify further details and discuss what has gone on in the past few months.

44. Following that meeting at which the claimant was dismissed, which we consider below, the next time the claimant attended his GP on 22 August was to discuss knee pain. He reported that he was feeling happier since stopping work.

Meeting on 6 July 2012

45. The claimant was invited to an attendance meeting regarding his sickness absence on 6 July 2018. The meeting was to be chaired by Paula Kenderik and Mr Doherty was to be present to present the management case. The claimant was told that this was the final stage of the procedure and that it could result in him being issued with a notice of dismissal. His attendance hearing report was enclosed which summarised the attendance procedure and meetings to that date.

46. The claimant attended that meeting with his Trade Union representative. Ms Thompson was also present as HR adviser. By the time this meeting took place the claimant had decided that he couldn't return to work. He didn't trust that Mr Doherty would deliver any changes to the Compliance role or implement the recommendations of the Occupational health adviser.

47. Once Ms Kenderik had introduced those present, and asked Mr Doherty to present the respondent's case, the claimant's Trade Union representative asked to discuss other options available to the claimant. When the claimant was advised that voluntary severance or ill health retirement were not available, the claimant said he did not want to carry on with the hearing. The claimant said that he did not want to return to work and asked whether

he would receive rolled up notice pay. Ms Kenderik asked him if he would like to take a break so that he could discuss this with his trade union representative. He agreed and there was a break for approximately five minutes. When he returned, he confirmed that his position remained the same and he had not changed his mind.

48. The claimant's version of that meeting was at odds with that of the respondent's witnesses. We accept the respondent's version of events. The claimant was clearly anxious in the meeting and his recollection was no doubt impacted by this. The evidence of the respondent's witnesses was clear. Further following the meeting, the claimant sent an email to his Trade Union representative which was sent on to the respondent on 26 July. This stated:

    'at my attendance meetings I simply could not see me returning to work within the near future, so I resigned under ill health capability that was under duress due to personal/work related stress' and he 'felt he could not return to work and I felt I had no option left but to resign'.

    Although it was not the case that the claimant resigned at that meeting this further supports the respondent's evidence that the claimant had decided he could not return to work. We do not accept the claimant's contention that the meeting was in the form of an interrogation, though it is likely to have been a more formal meeting that the claimant had attended before, nor that he asked to return to his Compliance role during the meeting.

49. Mrs Kendrick accepted what the claimant's said at face value. She considered that effectively he had decided not to contest the consideration being given by the respondent to dismiss him on capability grounds. Neither he nor his trade union representative put forward any suggestions to either extend his employment or alternatives which would have allowed him to return to work. She considered matters over the following few days and on 12 July wrote confirming the decision to end his employment by reason of his capability. In doing so she considered his lack of any input into the meeting, his long service and the fact that he offered no resistance to the decision to terminate his employment. Further that the claimant would not be fit to return to work in the near future, and the impact which the claimant's ongoing absence was having on the service, in terms of the detriment to service provision and the additional burden being placed on colleagues. The claimant had by that time been absent for 7 months with no return in prospect.

50. The decision to dismiss the claimant was communicated by letter dated 12 July 2018. The claimant was given the right of appeal but did not exercise it.

The Law

<u>Disability</u>

51. The definition of disability is contained in the EQA 2010 at section 6. It states that:

    A person (P) has a disability if-
    (a) P has a physical or mental impairment; and
    (b) the impairment has a substantial and long term adverse effect on P's ability to carry out normal day to day activities

    Section 212(1) defines "substantial" as more than minor or trivial.

52. Schedule 1 of the Act provides supplementary provisions, including at paragraph 2(1)

    The effect of an impairment is long term if-
    (a) It has lasted for 12 months
    (b) It is likely to last for at least 12 months, or
    (c) It is likely to last for the rest of the life of the person affected.

    And at 2(2)
    If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day to day activities, it is treated as continuing to have that effect if that effect is likely to recur.

    Paragraph 5(1) of Schedule 1 states that an impairment will be treated as having a substantial adverse effect on a person's ability to carry out normal day-to-day activities if:

    (a) Measures are being taken to treat it or correct it; and
    (b) but for the measures, the impairment would be likely to have that effect.

53. Further, Schedule 1 provides the power for guidance to be issued and that a Tribunal must take account of such guidance as it thinks relevant. The guidance which has been issued is the *Guidance on Matters to be taken into account in determining questions relating to the Definition of Disability (2011)* (*'The Guidance').* We have also had regard to the *EHRC Code of Practice on Employment (2011) ('the Code') Appendix 1* in so far as it relates to the matters which we must decide.

54. The activities affected must be "normal". The EQA 2010 Guidance states at paragraph D3 that in general, day-to-day activities are things people do on a regular or daily basis.

55. In considering whether the substantial adverse effect is likely to last 12 months, this should be determined at the time of the alleged discriminatory act. In considering whether it is 'likely' the Guidance states that this should be interpreted as 'could well happen'.

56. We have also had regard to the decision of the EAT in Goodwin v Patent Office 1999 ICR 302 in which guidance was given as to the proper approach to adopt when applying the provisions relating to disability.

Although this case related to the Disability Discrimination Act 1995, the approach is one which can be adopted in determining section 6 of the EQA2010. The four questions which we must address sequentially are:

(1) Did the claimant have a mental and/or physical impairment?
(2) Did the impairment affect the claimant's ability to carry out normal day to day activities?
(3) Was the adverse condition substantial?
(4) Was the adverse condition long term?

Duty to make reasonable adjustments

57. By section 20 of EQA 2010 the duty to make adjustments comprises three requirements.

58. The first requirement, by section 20(3), incorporating the relevant provisions of Schedule 8, is a requirement, where a provision, criterion or practice of the employer's puts a disabled person at a substantial disadvantage in relation to the employer's employment in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

59. A disadvantage is substantial if it is more than minor or trivial: section 212(1) EQA 2010.

60. Paragraph 6.28 of the EHRC *Code* lists some of the factors which might be taken into account when deciding what is a reasonable step for an employer to have to take:
(1) Whether taking any particular steps would be effective in preventing the substantial disadvantage;
(2) The practicability of the step;
(3) The financial and other costs of making the adjustment and the extent of any disruption caused;
(4) The extent of the employer's financial and other resources;
(5) The availability to the employer of financial or other assistance to help make an adjustment (such as advice through Access to Work); and
(6) the type and size of employer.

61. Claimants bringing complaints of failure to make adjustments must prove sufficient facts from which the tribunal could infer not just that there was a duty to make adjustments, but also that the duty has been breached. By the time the case is heard before a tribunal, there must be some indication as to what adjustments it is alleged should have been made.

Burden of proof

62. Section 136 of EQA 2010 applies to any proceedings relating to a contravention of EQA. Section 136(2) and (3) provide that if there are facts from which the tribunal could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the

tribunal must hold that the contravention occurred, unless A shows that A did not contravene the provision.

63. We are reminded by the Supreme Court in *Hewage v. Grampian Health Board* [2012] UKSC 37 not to make too much of the burden of proof provisions. They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other.

Direct Discrimination

64. Section 13 of the EQA provides that a person (a) discriminated against another (B) if, because of a protected characteristic, A treats B less favourably that A treats or would treat others.
65. Section 23 (1) provides that on a comparison of cases for the purposes of section 13….there must be no material differences between the circumstances relating to each case.
66. Section 23(2) provides that the circumstances relating to each case, include a person's abilities if on a comparison for the purposes of section 13, the protected characteristic is disability.

Unfair Dismissal

67. It is for the employer to show the reason for dismissal and that it is a potentially fair one. Capability is a potentially fair reason for dismissal under section 98(2)(a) of the Employment Rights Act 1996 ("ERA").

68. The burden is on the employer to show that it had a genuine belief in the reason as alleged.

69. We have considered section 98 (4) of the Act which provides "…. 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".

70. The starting point should always be the words of section 98(4) themselves. In applying the section the tribunal must consider the reasonableness of the employer's conduct, not simply whether it considers the dismissal to be fair. In judging the reasonableness of the dismissal the tribunal must not substitute its own decision as to what was the right course to adopt for that of the employer. In many (though not all) cases there is a band of reasonable responses to a set of factual circumstances within which one employer might take one view, and another might quite reasonably take another. The function of the tribunal is to determine in the particular circumstances of each case whether the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer

might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair.

71. In coming to our decision, we have considered the relevant authorities to which we have been referred by both counsel in their written submissions.

Decision

Was the claim of a failure to make reasonable adjustments presented in time?

72. The first occasion that the claimant raised the issue of returning to his original role as Compliance Officer (in his mind this being with reduced duties) was at the meeting on 11 January 2017 when met with Mr Doherty. At that stage Mr Doherty proposed a move to a Grade 5 role with a proportionate reduction in responsibility. This was rejected by the claimant who wanted to return to his own Grade 6 Compliance officer role but with parts of his job being reallocated to other staff. At a meeting on 27 February, he renewed his request to return to work and fulfil his current role as Compliance Office once he had recovered. In view of our findings, this request was renewed during the claimant's absence (although it was misunderstood by Mr Doherty) and remained outstanding on his dismissal. The alleged discrimination was therefore a continuing act from 11 January 2017 through to dismissal and the claim under section 20 EQA 2019 was presented time.

Was the claimant a disabled person at the relevant times?

73. The next issue which we must determine is whether the claimant was a disabled person within the meaning of section 6 and Schedule 1 of the EQA2010 at the time (i) of his dismissal (12 July 2018); and (ii) at the time that a duty arose to make the reasonable adjustment of allocating some of his duties as Compliance Officer to someone else (11 January 2018 to 12 July 2018).

74. When deciding whether the claimant was disabled, we are obliged to answer sequentially four questions referred to in Goodwin v Patent Office above.

75. We find that the claimant did as from 20 November 2018 have the mental impairment of work related stress. There is ample medical evidence to that effect. There is no medical evidence that he suffered from it prior to that date, though as the claimant alleges it may have been something that was building up. The claimant has referred in parts of his evidence to depression, but it was clarified with Mr Bronze at the outset of this hearing that the disability relied upon was work related stress. Further there is no medical evidence to support that the claimant was suffering from depression.

76. We consider that from November 2017, the claimant's stress had an adverse effect on his ability to carry out normal day-to-day activities and

that effect was substantial. In coming to that view we have discounted any treatment which the claimant may have had to ameliorate the effects upon him, particularly his medication. Both the Occupational Health reports and GP notes reflect the impact which the claimant's condition had upon him during the period to his dismissal and shortly thereafter. The claimant's impact statement records in detail how his day to day activities were affected and our findings of fact above summarise the impact upon him. In considering both the Guidance and the examples within the appendix, together with the relevant case law, we consider that the claimant's interrupted sleep, difficulty concentrating, inability to enjoy normal social interaction, his low motivation and loss of interest in socialising with family and friends are all normal day to day activities which were substantially affected by his work related stress. We consider that in view of the medical evidence, it was during the initial periods of his absence that there was a more severe impact but that a substantial impact continued until the claimant's dismissal.

77. The final question for us to consider is whether the effect was long-term? By this we must consider whether the substantial adverse effect had lasted at least 12 months; or if not was the total period from first onset likely to last 12 months or was it likely to last for the rest of the claimant's life?

78. We consider that the substantial adverse effect started on 20 November 2017 when the claimant was signed off work. Prior to that date the claimant, even if stressed, had coped with any pressures and his day to day life was not substantially impacted. At the date of the alleged discriminatory treatment being from 11 January 2018 to dismissal on 12 July 2018, we find that the substantial adverse effect had not lasted 12 months.

79. We then go on to consider whether the substantial adverse effect was likely to last 12 months from 20 November 2017. In considering this we must make that assessment as at the date(s) of the alleged discrimination. These were from 11 January to 12 July 2018. The question for us therefore is whether during that period it could be said that the substantial adverse effect of the claimant's condition upon his normal day to day activities could well last until 19 November 2018?

80. The effect that the claimant's condition had upon him went through peaks and throughs in part linked to his contact with work. In this regard we have considered the medical evidence which shows that at times the claimant was coping better than at others. In coming to this view, we note that from 8 May 2018 the GPs notes reflect that the claimant was 'gradually improving but still having bad days; starting to get back to his normal self'; on 5 June 2018, 'not feeling great over last couple of weeks' and on 3 July 2018 that he 'feels positive for new role, some set-backs; still on medication.' 'Chatty looks more relaxed today.' The report of the Occupational Health Adviser states that the claimant's 'barrier for his return to work was not primarily a medical one, but more a psychological reason related to the work issues he perceives he has been exposed to'. There was always the prospect that the claimant would be returning to work, the claimant was of that view and the respondent was exploring options. Had

the parties' communication with each other been better, we consider that the claimant would have returned to work with a lighter workload at some stage before his dismissal and any impact of his stress substantially reduced. Until the claimant decided that he no longer wanted to return, it could not be said that the substantial adverse effect of the claimant's work related stress upon his normal day to day activities was likely to last 12 months since its onset on 20 November 2017.

81. As at 6 July 2018, the claimant had made a decision not to return to work and advised the respondent of this. We consider that this gave him a degree of control again because had made a conscious decision rather than being led by events. This is reflected in his next GP appointment on August 2018 where the GP notes say 'has now finished work – feeling happier since stopping'. We find that the date of his dismissal, again it could not be said that the substantial adverse effect was likely to last 12 months since its onset.

82. We therefore find that at the relevant times, the claimant was not a disabled person by reason of work related stress. Should we be wrong on this, we have in any event gone on to consider the claimant's claims of discrimination.

Did the Respondent treat the claimant less favourably than his comparator because of his disability? (section 13 EQA 2010 Direct discrimination)

83. The claimant's comparator is someone in the same material circumstances as him but who is not disabled. In the claimant's case this would be someone which had a similar length of service as the claimant, who had been absent from work for the same period of time and who attended an absence review meeting and said that he didn't want to return to work and didn't want to talk about. The burden is initially on the claimant to show facts from which it may show that he was treated less favourably than his comparator. We consider that the claimant has been unable to discharge that burden. Although there may have been others on long term sickness who were not dismissed before they had exhausted sick pay, there was no evidence put forward to that effect or that those individuals had indicated that they didn't want to return to work and didn't want to discuss it. We consider that this claim would in any event have failed.

Did the Respondent fail in its duty to make reasonable adjustments for the claimant? (section 20 EQA 2010)

84. We do not consider that the respondent applied a provision, criterion or practice of requiring the Compliance Officer to take on a significant number of additional roles. Even if we had found that the claimant was a disabled person, the earliest that any duty would have arisen was in January 2018. At that stage there was no PCP imposed upon the claimant requiring him to take on additional roles, as the roles he was doing, he had been essentially been doing for some 8 or 9 years by that time in addition to his substantive role as Compliance Officer. This was against a background of financial restraints and cutbacks within the Council. He took on these

additional duties because he was a conscientious worker and always fulfilled them to best of his ability. He was highly regarded because of this. At times he carried out work over and above that which he was asked to do. He however fulfilled his role within normal working hours. There was little evidence that he complained or resisted these changes, other than low level dissatisfaction, which he expressed to his manager. We consider therefore that he was generally accepting of the changes which were inevitable at the time of financial problems within the Council. The changes proposed in October and November 2017, upon Mr Little joining were to remove duties rather than to impose additional ones. There was therefore no PCP as described by the claimant applied at that time, and as such we do not consider that a duty to make adjustments would have arisen even if we had found that the claimant was a disabled person.

Was the claimant unfairly dismissed?

85. The respondent contends that the reason for the claimant's dismissal was capability, in that he had been absent for some seven months, that the claimant didn't want to return to work and didn't want to discuss it and that his service area needed to have a permeant replacement as it was struggling without the claimant.

86. We find that the respondent has shown that the reason it dismissed the claimant was his capability being his inability to carry out his role through his ill health and that Ms Kendrick had a genuine belief in this position. Capability is a potentially fair reason to dismiss.

87. The respondent applied their absence process. They could be said to be quick off the mark in arranging an Occupational Health appointment on the first day of the claimant's absence, but this was in accordance with their procedures. Further medical evidence was obtained during the claimant's absence. There was ongoing contact with the claimant weekly by telephone and although in reality there was little that he and Mr Doherty felt able to speak about as his absence continued, contact was made. Three formal review meetings were also held at which medical reports were discussed. He was warned in the letter dated 4 June 2018 following the meeting on 25 May 2018 that if there was no change in his situation in the near future, it could ultimately lead to his employment being terminated on capability grounds. He thereafter provided another sick note for 4 weeks. In a letter dated 19 June inviting the claimant to a Formal Case Review meeting on 6 July, the claimant was advised that the meeting constituted the final stage of the procedure and that a decision would be made about his employment which could result in his being dismissed.

88. At the meeting on 6 July the claimant had made the decision that he wasn't going to return to work. He did this after discussion with his Trade Union representative. He did not argue or put forward any proposals to extend his employment or which would assist in his returning to work in any other capacity. He advised Mrs Kendrick that he did not want to return to work. Mrs Kendrick was concerned to ensure that the claimant had time to consider what he was saying and following a break with his representative,

he confirmed that he wished to leave.

89. In these circumstances, Mrs Kendrick made the decision to dismiss.

90. In considering whether this decision was fair within section 98(4) of the ERA 1996. It is not for us to substitute our own view, rather we must consider whether the decision to dismiss was fair and reasonable in all of the circumstances of the case and whether the decision to dismiss was within a band of reasonable responses a reasonable employer could take. We consider that the respondent followed a reasonable procedure, being their own absence policy. They obtained medical evidence and they discussed it with the claimant, they kept in touch with him throughout and although some of their conversations with Mr Doherty were short, contact was made. Alternative work was initially discussed with the claimant but he was not interested. Account was taken of the claimant's long service, and the difficulties that Mr Doherty was having with not having the claimant working and requiring someone to do the job on a permanent basis. Against this background and where the claimant says he doesn't want to return to work and doesn't want to discuss it further, it is in our view within a band of reasonable responses for a reasonable employer to take the claimant at face value and to dismiss.

91. We consider therefore dismissal was fair and reasonable with section 98(4).

92. All claims are dismissed.

Employment Judge **Benson**

Date 5 December 2019

JUDGMENT SENT TO THE PARTIES ON

9 December 2019

FOR THE TRIBUNAL OFFICE

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

Public access to employment tribunal decisions
Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.