Case Number: 2201874/2018

EMPLOYMENT TRIBUNALS

Claimant **Respondent**

S **v** **A**

Heard at: London Central **On**: 21 – 25 and 28 October 2019

Before: Employment Judge E Burns
Mrs J Cameron
Mr M Reuby

Representation

For the Claimant: Mr Sangha (counsel)
For the Respondent: Mr Anderson (counsel)

WRITTEN REASONS

Claim and Issues

1. By a claim form presented on 3 April 2018, following a period of early conciliation from 2 March to 2 April 2018, the claimant brought claims of discrimination arising from disability, failure to make reasonable adjustments, harassment on the ground of disability and for breach of contract (notice pay). The claimant withdrew his claim of harassment following a preliminary hearing held on 30 July 2018.

2. The issues in this case were agreed between the parties prior to the hearing and are contained in the following list of issues.

Unfair dismissal (s. 98, ERA 1996)

1. What was the reason for the dismissal? R contends that the reason related to the capability of C for performing work of the kind which he was employed by R to do, assessed by reference to his ill health. In particular:

    a. Did R honestly believe that C was incapable by reason of his long-term ill health?

b. If so, were the grounds for that belief reasonable?

2. If the reason was as the Respondent contends, was the dismissal, having regard to that reason, fair or unfair within the meaning of s. 98(4), ERA 1996?

Wrongful dismissal

3. It is common ground (1) that C had exhausted his entitlement to statutory and contractual sick pay and (2) that the notice to be given by R to terminate the contract had to be at least one week more than the notice required by s. 86(1), ERA 1996.

4. In light of s. 87(4), ERA 1996, was C entitled to payment in respect of his statutory notice period?

Disability (s. 6, EA 2010)

5. It is accepted that C, at all material times, suffered from the disabilities arising from his underlying medical condition and depression.

Discrimination arising from a disability (s. 15 and s. 39(2), EA 2010)

6. Did R know, or could R reasonably have been expected to know, that C had either disability?

7. If so, did R dismiss C because of his long-term absence?

8. If so, did his long-term absence arise in consequence of either disability?

9. If so, can R show that dismissal was a proportionate means of achieving a legitimate aim?

Failure to make reasonable adjustments (s. 20, s. 21 and s. 39(5), EA 2010)

10. Did R know, or could R reasonably have been expected to know, that C had either disability?

11. If so, did R operate the provision, criterion or practice (the "**PCP**")? C has identified the PCP as being "*that C had to maintain a certain level of absence at work in order not to be subject to the risk of sanction under R's absence management policy*".

12. If so, did that PCP put C at a substantial disadvantage in relation to his employment in comparison with non-disabled employees to whom it would also be

applied? C has identified the substantial disadvantage as being *"The C's disabilities significantly impacted on his ability to attend and present for work. Accordingly, his disabilities lead to a level of absence which a non–disabled employee is unlikely to have. The C therefore avers that the operation of the Absence Management Policy puts the C at a substantial disadvantage."*

13. If so, did R know, or could R reasonably have been expected to know, that C was likely to be placed at that disadvantage?

14. If so, did R take such steps as it was reasonable to have had to take to avoid the disadvantage? C relies on the following steps:

    a. C says that "*R should have followed the Occupational Health recommendations it acquired in respect of C particularly its recommendation that he attend evidence based cogitative therapy in the form of face-to-face-one-on-one sessions. This would have assisted in his circumstances. These adjustments would better enable the C to return or remain in work*".

Limitation

15. It is common ground that the complaints of unfair dismissal, wrongful dismissal and, only to the extent that they relate to dismissal, the discrimination complaints have been brought in time.

16. R contends that any act which occurred on or before 02.12.17 is prima facie out of time. Subject to clarification of the issues by C, R may seek to plead a limitation defence in any amended Response.

17. C contends R was responsible for a continuing discriminatory state of affairs. S.123(3) Equality Act 2010 provides that where an act extends over a period, it is treated as taking place on the last day of that period. The dismissal was the last act of that period.

18. Further and in the alternative, if the Tribunal is of the view that any of the acts are out of time is it just and equitable to consider them in any event?

Remedy

19. If C was unfairly dismissed, how much (if any) should he receive by way of basic and compensatory awards?

20. Would it be just and equitable to reduce the amount of the basic award on account of any conduct of C before the dismissal and, if so, by how much?

21. If any of the complaints of unlawful discrimination are well-founded, how much (if any) compensation should C receive? In particular, C seeks compensation for injury to feelings and personal injury.

22. Should any compensation (whether for unfair dismissal or unlawful discrimination) be reduced:

    a. on account of any failure by C to mitigate his loss?

    b. to reflect the fact that C would have been dismissed in any event?

    c. on account of C's contributory conduct

3. When asked about the issues at the start of the hearing, the parties' representatives confirmed that, save for the issue of the respondent's knowledge of disability which had now been conceded (knocking out numbers 6 and 10 above), the list was correct.

4. As the hearing progressed, however, and particularly at the point of closing submissions, it became clear that there was a problem in the way in which the reasonable adjustments claim was set out in the list of issues.

5. The first problem was with the interpretation of the suggested reasonable adjustment in the list of issues and whether it should be read narrowly or broadly. Mr Anderson, on behalf of the respondent, invited us to read it narrowly such that the only adjustment being sought was that the respondent should have paid for the claimant to receive evidence based cogitative therapy sessions privately. He said that this was the case the respondent had understood and defended.

6. The second problem arose because Mr Sangha, for the claimant, sought to advance an argument, in his closing submissions, for two new adjustments, neither of which appeared in the list of issues. He suggested that this was permissible because the burden of proposing adjustments does not fall on disabled employees.

7. Specifically, Mr Sangha sought to advance the following:

    - "*the respondent failed to make reasonable adjustments [to the timescales] when applying the appropriate review dates; and*

    - *the respondent should have, but did not, put in place, the return to work plan whereby the claimant should do a combined counselling course alongside a phased return to work."*

8. We agreed that, as a statement of the substantive law on reasonable adjustments Mr Sangha was correct. The duty to consider whether adjustments should be made and what those particular adjustments should be, falls squarely on the employer at the time it is under the duty. However

we did not consider this legal principle helped us with the problem of the list of the issues.

9. In order to be able to examine, in retrospect, whether an employer has complied with a duty to make adjustments, in tribunal proceedings, the tribunal and the parties need to understand the arguments that are being advanced by both sides. This includes the arguments with regard to possible adjustments. This understanding is achieved through the mechanism of an agreed list of issues.

10. To assist us with the question of whether we could consider the two new reasonable adjustments, we found it necessary to review the authorities on lists of issues. We considered, in particular *Parekh v London Borough of Brent* [2012] EWCA 1630, *Scicluna v Zippy Stitch Limited & O*rs [2018] EWCA Civ 1320 and *Saha v Capita plc* UK EAT 0800/18/DM.

11. In *Saha*, Mrs Justice Slade says at paragraph 37:

"*In my judgment, far from being authority for the proposition that the ET and the parties are bound by the list of issues, Mummery LJ in Parekh made it clear that the core duty of an Employment Tribunal is to determine the case in accordance with the law and the evidence*."

We consider that the approach advocated by Mrs Justice Slade is correct in principle. However, it cannot mean that we are free to abandon agreed lists of issues in all cases. In the *Saha* case, the problem with the list of issues was that a particular head of claim had been given an incorrect legal label. It was therefore relatively straightforward for the tribunal to modify the list of issues at the start of the hearing without creating injustice to the respondent, who had dealt with the particular matter evidentially when preparing for the hearing.

12. In this case, however, we were being asked to make a more significant change to the list of issues. The danger associated with such a change, particularly when raised towards the end of a hearing, is that neither side has been able to properly dealtwith it during the hearing, especially the side that has not proposed the change.

13. In this case, we did hear some evidence relevant to the additional new reasonable adjustments advanced by Mr Sangh. This made us pause to consider whether we could go on and make findings in relation to them.

14. Our conclusion was that we could not, and at the same time ensure that the parties remained on an equal footing and that the proceedings were fair. The degree of amendment to the list of issues was, in our judgment, too great.

15. In addition, we decided that it was was correct to give the reasonable adjustment in the lost if issues the narrow interpretation advanced by Mr Anderson, as, in our view, this was its natural meaning.

The Hearing

16. For the respondent, the tribunal heard evidence from four witnesses who were:

- Mark Ashdown, who at the relevant time was the Head of Regional Compliance for Europe and the UK
- Coleen Highfield, who at the relevant time was the respondent's Global Head of Operations
- Catherine O'Sullivan, who at the relevant time was the respondent's Head of Key partnerships for Europe
- Keeley Vaughan-Davies, who at the relevant time was the respondent's Head HR Partner

17. For the claimant, the tribunal heard evidence from the claimant himself.

18. There was an agreed trial bundle of 656 pages. Some additional documents were added to the bundle during the course of the hearing with the agreement of the parties. We read the evidence in the bundle to which we were referred. Page numbers referred to below are references to the page numbers in the bundle.

19. There was an early dispute between the parties with regard to a medical report that the claimant had served on the respondent the previous week for the purpose of remedy. The medical report was included in the bundle, but we decided, before the hearing commenced, that it could not be relied upon as the sole medical evidence for remedy. We therefore decided, if a remedy hearing was required, this would need to take place later and we would make appropriate orders dealing with medical reports once liability was decided.

20. The evidence and closing submissions were concluded after four days, leaving the fifth day as a day for the panel to deliberate. The judgment was delivered at the beginning of the sixth day.

21. The claimant applied for an anonymity order. The tribunal made an order to anonymise the parties' names with the consent of the respondent. The reason for this was the claimant's wish to keep details of his underlying medical condition private.

Findings of Fact

22. Our findings of fact, where required, are made on the balance of probabilities, having considered all the evidence.

Background

23. The respondent is a company within the MoneyGram group which provides currency transfer and payment services internationally. Globally it employs around 3000 employees with around 65 employees in the UK.

Most of these were based in its London head office. It has a specialist HR function, although this is not large.

24. The respondent operates in a highly regulated industry necessitating compliance with financial services and money laundering regulations. Many of the respondent's services are delivered via partners called "agents". Most are small retail merchants but some are much larger partners known as "super agents." The respondent also has relationships with a number of regulators.

25. The respondent's compliance teams are tasked with ensuring that its agents are complying with the relevant regulatory framework. It undertakes agent reviews annually in two cycles – cycle 1 occurs between January and June, with cycle 2 taking place between July and November each year. For "super agents" there are also governance frameworks in place which require additional review meetings that normally take place monthly.

26. The claimant commenced employment with the respondent on 26 September 2012 as a member of its compliance team. From around February 2014, the claimant became a direct report of Mark Ashdown, Head of Regional Compliance for both Europe and the UK. The claimant was promoted to the position of UK Regional Compliance Manager in early 2015 and was responsible for managing the UK compliance team.

27. At the time of the claimant's dismissal five employees reported to him. The respondent had been moving towards a model of where non-agent facing roles were increasingly based in a centre in Warsaw. One UK team member holding a junior analytical role was based in Warsaw. A second team member holding a junior analytical role was based in London. The other three UK compliance team members were compliance officers at varying levels of seniority and were London based.

Medical Condition and Leave of Absence

28. Prior to March 2016, the claimant had no notable periods of sickness absence. In March 2016, however, the claimant was diagnosed with a serious life-long medical condition.

29. In the months following his diagnosis, the claimant told his manager, Mr Ashdown that he had been diagnosed with a condition for which he had to take medication. The claimant did not say what the condition was, but informed Mr Ashdown that the medication was causing him to feel nauseous. The claimant requested permission to work from home from time to time when this occurred. Mr Ashdown granted him permission to do this. The frequency of such occasions was not such to cause Mr Ashdown any cause for concern.

30. The claimant was also struggling with his emotional reaction to the diagnosis. He did not share this with Mr Ashdown and this did not prevent him from being able to work. He used his private medical insurance, a benefit from his employment, to access counselling at this time.

31. In or around July 2016, the claimant asked Mr Ashdown if he could take a period of unpaid leave (a sabbatical). This was agreed by Mr Ashdown and the claimant was therefore absent from the business between 27 October 2016 and 4 February 2017 (214).

32. Our finding is that Mr Ashdown did not, in his mind, connect the claimant's request for unpaid leave, with his underlying medical condition or the claimant's emotional reaction to his diagnosis. Mr Ashdown perhaps should have made the connection and it is entirely possible that a different manager with a better developed sense of emotional intelligence would have made the connection. We find that Mr Ashdown genuinely did not.

33. Mr Ashdown was concerned to keep the amount of time taken off by the claimant to a manageable amount and to ensure that the claimant took the leave at a quieter time for the business, outside of the two review cycle periods. The timing he agreed with the claimant for the sabbatical (end of October to start of February) clearly demonstrates that this was in Mr Ashdown's mind at the time.

34. Prior to commencing his sabbatical, the claimant was able to organise a proper handover for his team to assist in covering for his absence. This included introducing relevant team members to the super-agents for which the claimant had responsibility.

35. We have not been presented with any evidence that the claimant was unable to work during the unpaid sabbatical due to his underlying medical condition or consequential psychological condition.

February - May 2017

36. The claimant was due to return to work from his sabbatical on 6 February 2017. He did not return, however, but instead telephoned his manager on Friday 3 February 2017 to say that he had been signed off sick by his GP.

37. The claimant subsequently submitted a series of medical notes certifying him as unfit to return to work. This continued to be the case until his dismissal on 15 March 2018. The fit notes covered his ongoing absence for periods of between 4 to 6 weeks at a time.

38. Not all of the medical certificates were included in the bundle and not all of them gave exactly the same the reason for the claimant's absence. They were all very similar however. For example, the reason for absence on 1 March 2017 was "*psychological stress and anxiety due to a significant new medical diagnosis*" (215). On 7 April 2017, it was "*adjustment reaction to medical condition*" (219) and on 26 June 2017 it was "*anxiety and depression*" (230).

39. The claimant wanted to inform his team in person that he would not be returning from his sabbatical as planned. He sought approval from Mr Ashdown to do this and, when it was given, arranged to meet the UK

based members of his team for dinner on 9 February 2018. He then later met the Poland based employee when she was in the UK visiting the London office a few weeks later. Mr Ashdown was not in attendance at either social event.

40. Between February 2017 and the end of May 2017, the claimant kept Mr Ashdown updated with regard to his medical condition by email and occasional phone call. He submitted his medical certificates to HR. On 25 May 2017, the claimant emailed Mr Ashdown asking if it was possible to "*arrange a chat*" so that the claimant could update Mr Ashdown in more detail on his heath and the plan that he and his doctor were working towards at that time. The claimant indicated that he was happy for Mr Ashdown to include HR in the conversation. (221)

41. By coincidence, at around this time, the Regional HR Director covering the UK and Europe left the organisation. This led to the Global Head of HR operations, Coleen Highfield assuming responsibility for the role of UK HR Business Partner (in addition to her own substantive role). She also took over responsibility for managing the respondent's team of European HR Business Partners. This change meant that Ms Highfield became responsible for the management of the claimant's case from an HR perspective.

42. In reply to the claimant's request, Mr Ashdown suggested a meeting in the respondent's office on 30 May 2017. In fact, the meeting took place by telephone, at 10 am on 30 May 2017. This was primarily due to the fact that the claimant had a medical appointment at 11 am on the same day making it difficult for him to meet in person on 30 May 2017. The claimant was prepared to meet Mr Ashdown and Ms Highfield face to face on a different date, but had requested this be somewhere outside the office saying "*Considering my health and that I am still signed off, I'd prefer not to be seen in the office at this time*". (220)

43. Ms Highfield prepared a note of the conversation. (222) According to the note:

"[The claimant] opened the call by stating that he wanted to provide an update to [the respondent] on his current health situation. He confirmed that he had sent to [Mr Ashdown] another medical certificate confirming he was unfit to work for a further month. He said he was still having a lot of issues with the medication he was taking and that there had been some changes to this medication as the previous medication he was taking was discontinued by the NHS. As a result of trying to get the balance of medication right, he was still suffering from acute nausea. He also stated that he was dealing with the emotional impact of the diagnosis of his medical condition last year."

44. The claimant added that he continued to regularly visit his GP and other doctors who were supporting his treatment plan and that he anticipated remaining off work for a further two months, due to the waiting times to see these doctors. Following this, he thought he would be well enough to have

some kind of phased return which would be likely, to start with, to need to encompass some project work from home.

45. According to her note, Ms Highfield explained in response that, with the claimant's consent, she would like to engage an independent third-party occupational health provider. We find it is significant that she explained that the occupational health provider would approach the claimant's GP for a medical report on his condition and treatment plan. She told the claimant that this would be needed to help the respondent support the claimant's return to work.

46. Ms Highfield also told the claimant that on receipt of the report, the respondent would invite him to a Stage I Absence Meeting. The claimant agreed to this, notwithstanding that he did not at that time understand what Ms Highfield meant when she referred to a Stage I Absence Meeting.

June Correspondence – Team Event

47. In June 2017, the claimant was in contact with a member of his team to congratulate him following a promotion. As a result of the contact, a suggestion was made that members of the UK compliance team meet socially with the claimant, in a similar way as had occurred earlier in the year in February.

48. The social event did not take place. When the claimant's colleague approached Mr Ashdown to request that the team be allowed to leave the office slightly early one day, to enable them to meet the claimant, Mr Ashdown became concerned. He took advice from HR who shared his concerns. Mr Ashdown wrote to the claimant by email on 8 June 2017 to ask him to reconsider the social event.

49. Mr Ashdown stated in his email:

"*As you are currently not certified fit for work, I wanted to reiterate that you should not be undertaking any kind of work related activities.*

Whilst I appreciate that a dinner with your team may not constitute a work related activity and it is entirely at the discretion of your team if they wish to attend, I also believe that this does put the team in an awkward position given that you are their boss so they won't wish to disappoint you…" (224)

50. Mr Ashdown told us that he was concerned about the social event because he felt it was blurring the professional boundaries between the claimant as the manager and the team. He said that he asked the claimant to reconsider the invitation as he wanted to protect him from having to interact with work colleagues while he was off with an illness that he wished to keep confidential. He also wished to protect the team from feeling awkward in a social setting with the claimant when he had been absent for an extended period of time.

51. Although Mr Ashdown's email was expressed as a request to the claimant to reconsider the social event, the claimant interpreted it, correctly in our view, as an instruction not to proceed with the event. The claimant replied to Mr Ashdown by email saying: "*That's no prob - understood*" (224).

52. The claimant's reply did not reflect the claimant's true feelings. The claimant was, in reality, unhappy that he had been asked not to socialise with his team and felt that the email represented a marked change in attitude by his manager towards his sickness absence. The claimant explained that his team were fully aware that he was unwell and that this was due to an underlying medical condition that he did not want to disclose, as he had explained the position to them at the social event in February.

53. We find there was no reason for the respondent to need to protect either the team or the claimant from the social event in the circumstances. The team wanted to meet the claimant and, as confirmed by Mr Ashdown, were not raising the potential social event with him because they were concerned about it, but simply because they wanted to leave early for it. The claimant was unlikely to have found the social event difficult as he had been open with his team about his medical condition previously.

54. We find further that Mr Ashdown and Ms Highfield were not and could not have been aware of the true position with regard to the social event. No-one had informed them of the circumstances, such that they would have been able recognise that their request to the claimant was somewhat heavy-handed. As the claimant did not share his true feelings with them about Mr Ashdown's email they had no reason to be aware that he was upset by it.

Occupational Health

55. When the claimant had not heard anything from the respondent about an occupational health appointment nearly a month later, he proactively chased the respondent. He emailed Ms Highfield on 26 June 2017 (227). She replied to apologise for the delay and explained that the respondent did not have an occupational health provider in place in the UK and so she was in the process of getting one set up (226).

56. Arrangements with the occupational health providers were in place by 4 July 2017 and the claimant's first appointment was on 12 July 2017.

57. The arrangements entered into with the occupational health providers (which were overseen by Ms Highfield) did not follow the model described by Ms Highfield during the call on 30 May 2017. Instead of the Occupational Health providers obtaining medical notes or reports from the claimant's treating physicians, they relied solely on the claimant self-reporting information about his medical conditions to them over the phone. Ms Highfield told us that she did not believe the provider she contracted with offered the service of reviewing GP medical notes. We find this is not at all typical.

58. On 12 July 2017, Ms Highfield emailed the claimant to tell him that she had received his latest medical certificate confirming that he was not fit to return to work until 28 August 2018 (237). She also said that she understood that the claimant had had an appointment with the occupational health provider that day and that as soon as she received the report from them she would arrange a meeting with the claimant under stage I of the respondent's absence management policy.

The Absence Management Policy

59. The absence management policy Ms Highfield referred to was actually a new policy that had only been adopted by the respondent very recently. Although the claimant later became suspicious that the policy was put in place purely to deal with his case, we do not find this was the case. We accept the evidence of the respondent's witnesses that the respondent had been working on a global project to update its HR policies and the new absence management was put in place pursuant to that. A new Employee Handbook was sent to all of the UK employees by email on 3 July 2017 (229) and we find that it became effective on this date.

60. We note that at the time of the initial meeting by telephone, held on 30 May 2018, the policy was not in place. We do not find that it was significant that Ms Highfield referred to a Stage I Absence Meeting at that initial meeting, before the new policy had been introduced, however, as she had been involved in working on the new policy at that time and was aware of it.

61. The new policy (178 – 181) allows for a four-stage process of managing absence with a review meeting at each stage. The four stage process is set out in section 6.6 and is called an "Absence management programme" (180 – 181). Employees are entitled to be accompanied at each review meeting. Stage IV is the dismissal stage. The policy states that meetings will "*normally take place following receipt of initial occupational health advice.*"

62. The policy does not provide timescales for escalation between the stages. This is left to the discretion of the managers involved to determine on a case by case basis. The policy states:

"*Following each formal meeting under the programme a formal advice note will be issued which will confirm the discussion and the outcome and any actions including timescales. The advice note will set out the date for review of your situation*." (180)

There is also a right of appeal at each stage of the policy.

63. At para 6.6.4, Stage IV is explained as follows:

"*Stage IV – dismissal – You will be invited to attend a meeting if after the stage II or stage III review meetings the Company has concluded that you*

will be unable to return to your role or give sustained and regular attendance in your role or if after the further period for review set out in stage III formal advice note you remain unable to return to work or give sustained regular attendance in your role or if further information obtained indicates that you are unlikely to be able to return to work. The stage IV meeting will take place with a member of the management team or relevant senior manager supported by an HR representative. You will be advised that the termination of your employment will be considered at the meeting. The Company will discuss the situation with you and consider all the information available including occupational health advice or other medical advice. Where the Company conclude that there is no clear likelihood of your return to work within a timeframe that is reasonable in the view of the Company, taking into account the circumstances this will normally result in the termination of your employment." (181)

UNUM

64. In addition to sending the policy to the claimant with her email of 12 July 2018, Ms Highfield also sent the claimant forms from UNUM to enable him to make a claim for income protection. She explained in her email that if the claim was approved, the claimant would be entitled to receive up to 75% of his pay from 26 weeks after the date his absence commenced until the date he returned.

First Occupational Health Report

65. As noted above, the claimant's first occupational health appointment was on 12 July 2017. The report produced by the occupational health provider of the same date (239 – 243) stated that the claimant was experiencing difficulties due to side effects of medication for a relatively newly diagnosed condition as well as having developed moderate to severe depression.

66. Although the claimant told the occupational health provider what his underlying medical condition was, he asked the occupational health provider to keep this information confidential. The report stated:

"[the claimant] has been diagnosed with a condition that is a named Disability within the wording of the Equality Act 2010, from the date of initial diagnosis." (242)

67. The report made it clear that the claimant was not at that time fit to return to work. With regard to a longer term prognosis, the report stated that with psychological support, the claimant was predicted "*to make a full return to duty and to his usual productive self*". The report recommended a review in "*eight weeks or so*".(242)

68. Having received the report, Ms Highfield invited the claimant to the Stage I Absence Management meeting previously discussed with him. The invitation was by a letter dated 2 August 2017 sent by email and post (243). The letter suggested a face to face meeting and advised the

claimant that he was entitled to be accompanied to the meeting if he wished.

69. The claimant replied requesting that the meeting take place by telephone saying, "*I would prefer that we could do the meeting by telephone. This would make me feel much more comfortable and I would hope would be considered a reasonable adjustment*". The claimant's request was agreed and the stage I meeting took place by telecon on 15 August 2017. (250)

August 2017 - Stage I Review Meeting

70. The discussion at the Stage I Review Meeting appears not to have been particularly difficult. A note was not taken of the meeting, but we have been able to see what was covered because Ms Highfield followed the meeting up with a letter in which she recorded the main points of the discussion (262 – 264).

71. In summary, the following were discussed:

- The claimant asked about the date when the new absence management policy had come into effect..
- The parties went through the background to the claimant's absence including his sabbatical.
- The parties went through the events since then, including the claimant's evening out with his team shortly after he became unwell, the May meeting held by telephone, the fact that the team event in June had not proceeded and the occupational health report.
- The respondent queried whether the claimant's condition was deteriorating as he had been well enough to meet with his team earlier in the year and in June, but had requested the Stage I review meeting take place by telephone. The claimant disputed this was the case.
- The claimant confirmed that it would be fair for the company to assume that he would not be fit enough to return to work at the end of August when his current medical certificate expired.
- The claimant said he was still waiting to receive news as to when he would be able to access psychological support via the NHS and that the barrier to him returning to work at that time was the combination of his ongoing medication side effects (for his underlying condition) and the wait for psychological support.

72. Ms Highfield sent the letter to the claimant by email the same day. The letter confirmed:

"*Therefore, per the recommendation from Occupational Health, we would like you to be seen again by them in mid September and we will convene a meeting in late September, under Stage II of the Absence Management Policy thereafter to discuss their report*." (264)

The letter failed to offer the claimant a right to appeal.

73. The claimant felt that Ms Highfield had missed out some important information in her letter and so he requested a word version and tracked some changes to it. The claimant was not trying to suggest that the letter inaccurately recorded the discussion at the meeting, but was trying to find a way to ensure that the respondent fully understood his true position.

74. In particular, the claimant sought to emphasise that his underlying medical condition was a "*life long, chronic*" medical condition so added these words into the letter. He also repeated the formulation used in the occupational health report saying that it was a condition that is a named disability within the wording of the Equality Act 2010. (270)

75. The claimant made a number of other amendments to the letter, largely seeking to ensure that the information it in was factually correct, but also asking for clarification on a couple of points. (270 – 273)

76. Having received the claimant's amendments to the letter, the respondent confirmed to him that it would keep it "on file" rather than change the initial letter. (267) The respondent took this view because it wanted the letter to stand as an accurate note of the discussion at the meeting. We find this was a reasonable approach to take, although it would have been more helpful if the respondent had acknowledged the significance of the additional information provided by the claimant and commented on it.

77. The respondent did answer the two specific questions raised by the claimant within the tracked changed letter by email (266). The first question concerned whether the claimant was permitted to have contact with his work colleagues. The respondent replied, "*we are not telling you not to speak to your colleagues but rather to use your judgment about attending and arranging social events with colleagues while you are certified unfit to work*." The claimant's second question sought to establish if the respondent doubted his medical conditions as he had interpreted Ms Highfield's letter as suggesting this. His suspicions arose because of the respondent's questions around whether his condition had deteriorated.

78. Ms Highfield responded to this by saying: "*We do not know what your underlying medical condition is but we are aware that you are suffering from depression and anxiety related to the medical condition, so there is no doubt on that point*." (266)

79. Unfortunately, neither Mr Ashdown nor Ms Highfield appreciated the significance of the use of terminology referring to the Equality Act in the occupational health report. They failed to realise that it meant that the claimant's underlying medical condition could be one of only three, very serious, medical conditions. They did not seek to clarify this with either the claimant or the occupational health providers.

View of the Claimant as Difficult

80. At around this time, Mr Ashdown and Ms Highfield formed the view that the claimant became "*more difficult*". Both gave evidence that this was

because the claimant failed to approach the absence management meetings in the collaborative and open spirit they intended and became more defensive from this point forwards.

81. Mr Ashdown's view was influenced by the fact that the claimant had made amendments to Ms Highfield's letter. We do not find it was reasonable for the respondent to view the claimant as "becoming difficult" simply because he wanted to provide further information.

82. Mr Ashdown also told us that his view was also influenced by the fact that the claimant had accepted his (Mr Ashdown's) decision not to allow him to meet his team in June, but appeared to be questioning it afresh in August. Again, we do not find it was reasonable to treat the claimant as "becoming difficult" in connection with this. The claimant felt isolated from his colleagues and wanted to understand the position better.

83. Both Mr Ashdown and Ms Highfield told us that they felt that the claimant's decision not to share the nature of his underlying medical condition with them was "unhelpful" and we find that this contributed to the view they were taking of him. There is evidence, disputed by Ms Highfield that she told the occupational health providers that the claimant was being difficult when she spoke to them by telephone on 19 September 2017. We find that she did say this (as per the contemporaneous note recorded by the occupational health providers (579L) and the reason for her view was connected to the claimant's refusal to disclose the nature of his underlying condition.

84. The claimant's evidence was that the contents of the respondent's letter and the reaction to his suggested amendments to his letter began to make him feel anxious and insecure about the security of his future employment. He later learned about Ms Highfield's comment as a result of making a subject access request connected with the income protection claim. Learning of her view in this way no doubt exacerbated the anxiety and insecurity he was feeling.

Second Occupational Health Report & Stage II Absence Management Meeting

85. The claimant's second appointment with occupational health was arranged for and took place on 21 September 2017. Again, it was conducted by telephone. The report (276 – 280) provided a little bit more detail about the side effects from his medication, describing them as debilitating. It also stated that the claimant was continuing to await counselling on the NHS and that this would be "*the key for gaining some progress*" The report stated that it was unlikely that anything majorly clinical would change before December and recommended a review then. (278)

86. The medical appointment was followed by a stage II absence management meeting which took place by telephone on 20 October 2017. As before the claimant received a formal invitation to the meeting which included a right to be accompanied (281).

87. The main discussion at the Stage II meeting concerned the fact that there had been no change in the claimant's condition since the last meeting. The claimant was still experiencing difficulties with his medication and was still waiting for counselling via the NHS for his anxiety and depression. Ms Highfield recorded in her subsequent summary letter dated 23 October 2017 (285 – 286) that the claimant stated that he had a significant clinical journey to go on to feel well enough to potentially return to work.

88. Prior to the meeting, Ms Highfield had received a telephone call from UNUM rejecting the claimant's claim for income protection. This was discussed briefly at the stage II meeting, but could not be discussed fully as the respondent had not received the written confirmation from UNUM at this point.

89. As before, Ms Highfield sent the claimant her letter dated 23 October 2017 to act as a record of the discussion that had taken place. Unlike the letter that she had sent following the Stage I Meeting, the letter did not set out a timescale for the next review meeting and therefore did not comply with the requirements of a formal advice note under the respondent's policy. As before, no right of appeal was mentioned.

Stage III Review Meeting

90. The UNUM rejection letter was dated 25 October 2017 and received by Ms Highfield at around that time. It appeared to contain information that contradicted the information in the Occupational Health reports – specifically it said that the claimant's underlying condition was stable and well managed and that he was not suffering from a psychological condition.

91. Having received the written rejection from UNUM, the respondent invited the claimant to a stage III Review Meeting. The result of the respondent's decision, to discuss the UNUM report in a formal meeting under its absence management programme, was that the claimant received an invitation to the stage III meeting on 2 November 2017, only 10 days after the stage II meeting. The meeting was held on 13 November 2017 such that the gap between the stage II and stage III meetings was only 3 weeks.

92. For some reason, which is not clear to us, there was a miscommunication between the claimant and Ms Highfield concerning the UNUM letter. The claimant believed that Ms Highfield was withholding the rejection letter from him and forced him to make a subject access request to UNUM to obtain it. This was not correct. Ms Highfield did not appear to realise that the claimant did not have a copy of the actual rejection letter when advising him to make a subject access request. Her advice was concerned with how he could obtain the medical report which the claimant's GP had submitted to UNUM as the respondent did not hold it.

93. The focus of the discussion at the Stage III meeting was the UNUM rejection. This can be clearly seen from Ms Highfield's summary letter sent subsequently dated 15 November 2017 (303 - 306).

94. As can be expected, the letter largely deals with the UNUM matter. It states that as the respondent did not see the medical information sent by the claimant's GP to UNUM the respondent was not in a position to assess whether UNUM's decision was correct or not. Ms Highfield says that there is no reason to believe that UNUM did not follow the correct process in assessing the claimant's claim, but suggests that once the claimant has obtained details of the report made by his GP to UNUM he should let the respondent know, in case there is additional information which needs to be brought to UNUM's attention. (304 – 305)

95. With regard to the claimant's ongoing sickness absence and its management under the respondent's absence management programme, the letter records that there has been no change in the claimant's medical condition and that he is experiencing difficulties with side effects from medication for his underlying condition and still waiting for counselling via the NHS for his anxiety and depression. (303)

96. The letter mentions the claimant's potential ability to access counselling privately via the respondent's medical expenses scheme and advises the claimant about its EAP scheme. The letter states that the claimant had used BUPA to obtain counselling, but had exhausted his entitlement under the scheme. This was not strictly accurate. The claimant had used this benefit to access counselling in 2016. At that time, the claimant had also brought forward his entitlement to counselling from 2017, meaning that in 2017 there was no entitlement to counselling paid for privately under that scheme. He would become eligible under the scheme again in 2018 however. (303) The respondent does not appear to have been aware of the correct position.

97. The letter then refers to a further appointment with occupational health to take place in early December with a stage IV absence review meeting in mid-December. It therefore conforms with the requirements of the respondent's policy for a formal advice note specifying a review period. As before it does not mention the claimant's right of appeal (304).

98. The letter records that when confronted by the fact that a Stage IV meeting would be held in December, the claimant expressed concern saying that nothing had changed in his situation. The letter suggests he questioned the respondent's need to refer him to occupational health. The respondent noted that the previous occupational health report had recommended a review in December and that the claimant's medical certificate was due to run out on 20 December 2017. The letter states that if the claimant did feel ready to return to work on 20 December, the guidance of occupational health would be needed to understand how to support him with reasonable adjustments (304).

99. The letter adds:

"I need to advise you that whilst the Company wishes to do all it can to support you through your period of ill-health, it is not sustainable for the business to hold your role open indefinitely and currently, based on the information you have shared with us, it appears that there is no likelihood of your return to work in a timeframe that is reasonable for the business. As you have been absent for over 9 months and your absence has had a detrimental impact of the business, we will therefore hold a Stage 4 meeting in mid-December as per the Policy." (304)

100. The claimant returned a version of the letter to the respondent on 27 November with his comments on Ms Highfield's letter (307 – 311). On this occasion, Ms Highfield had refused to provide a word version of the letter to him, but did indicate via email (301) that the respondent welcomed any feedback the claimant wished to provide. The claimant cut and pasted the letter to create his own version of it and provided comments on it as explained in a cover email (321). He also asked a number of questions in the email. The first four questions were concerned with the UNUM application. The fifth question asked, "*Provide me with the available adjustments you would suggest based on my current medical conditions*."

101. In his comments on the letter (309), the claimant reiterated that he had advised the respondent that his underlying medical condition was named as a disability under the Equality Act. Part of the letter recorded that the claimant had said at the meeting that he had not given any consideration to any adjustments that the company could make to facilitate his return to work. The letter commented that the claimant did not seem to want to explore what these options might be. In response, the claimant commented, "*You are already fully aware that my doctor and I have discussed a phased return to work when I am fit to return. This is also something that you and [the respondent] have already confirmed is what you would like to do also*." (309)

102. Ms Highfield responded to the claimant's questions, but not to the comments. In response to his question about reasonable adjustments, she acknowledged it saying: "*We noted from the report that you are keen to get back to work, but that as it currently stands, attempting to do that could be counter-productive*." (318)

Third Occupational Health Report

103. The next occupational health appointment occurred on 27 November 2017. Again, the appointment was conducted by telephone.

104. The report, produced on 27 November 2017 (314 – 317), provided more detail as to the specifics of the claimant's medical difficulties. The respondent interpreted this as "new" information, which annoyed the claimant, because he felt that it was not new information. Our finding is that the increased level of detail was new. In addition, there was a small amount of entirely new information, but on the whole, given what the claimant had previously told the respondent about the nature of his

difficulties, the respondent should already have had a good appreciation of the detailed symptoms he was likely to be experiencing.

105. In addition, the medical report indicated the following:

- The report provided the detailed history of what had happened with the claimant's medication for his underlying condition, including recording the symptoms he experienced in some detail. The report also recorded that matters had worsened as a result of the NHS ceasing to fund a once-a day formulae for the claimant's medication. This had led to him experiencing the symptoms twice a day for a period of time, until the once-a day formulae was reintroduced. (315)

- It stated that the ongoing side effects from the medication for the underlying condition were not the primary barrier to the claimant returning to work and could be mitigated against by some modifications to his working pattern. (316)

- The report stated that the main barrier to the claimant's return to work at that time was the claimant's mental health condition which would not improve until he received specialist counselling in the form of CBT. The report specifically stated that the claimant would need a minimum of three months of counselling before he was well enough to return to work. It went on to state that it was envisaged that, in total, the claimant would need 12-18 sessions of CBT, but that it would not be necessary for this all to take place before he could commence a phased return to work. (316)

- The report also mentioned a general statistic that only 5% of people who have had a year or more off work due to sickness absence are able to return to work. (316)

- The report also touched upon the fact that the claimant was feeling aggrieved about his treatment by the respondent and it was likely that some form of mediation would need to be undertaken to address this. The report noted that the claimant's negative perception of the respondent's behaviour was potentially being affected by his mental health condition. (316)

106. Having received the updated medical report, the respondent submitted it to UNUM by way of an appeal. When the appeal was rejected, the respondent later made a complaint on behalf of the claimant to UNUM and this was followed by a complaint made by the claimant himself. Ultimately UNUM did not change its mind and its final decision was communicated to the claimant and the respondent on 7 March 2018.

Stage IV Review meeting – December 2017

107. The respondent invited the claimant to the stage IV absence review meeting by way of a letter dated 5 December 2017 which was in the same

format as previous letters. The letter on this occasion, however, stated that a potential outcome of the meeting could be the claimant's dismissal on the grounds of capability (330).

108. The meeting took place on 13 December 2017 by telephone.

109. Mr Ashdown opened the meeting by outlining the respondent's position. This is recorded in Ms Highfield's subsequent letter at page which states that he said the following:

" - *The Company have been managing your absence in anticipation of your return with some adjustments as we talked about in our discussion in May and due to the anticipation of your return, we've haven't backfilled your role as we've been managing this on a 6-8 weeks basis as per your Fitness to Work certificates.*

- *Your absence has had a significant impact and has put the team under pressure as we've had to find cover for your tasks.*

- *It has also impacted on our ability to carry out the cycle one and cycle two reviews due to a lack of resource in the team which creates risk for the business.*

- *As we stand today, the Company is not clear on if or when a return to work may happen within a reasonable timeframe and how that may happen in terms of adjustments." (*343)

110. The claimant was concerned to find himself in a stage IV meeting and made this known to the respondent. At the meeting, Ms Highfield asked him to provide consent for a GP's medical report so that the respondent could better understand his medical condition and explore the apparent contradiction between the UNUM position and the occupational health reports. The claimant refused to provide his consent at the meeting as he wanted to keep his underlying condition confidential.

111. The claimant contacted his GP the following day and provided a letter from his GP dated 14 December 2017 which confirmed that (1) he had been diagnosed with a medical condition, (2) was suffering from the side effects of the medication he was taking and from anxiety and depression and (3) he was still waiting for psychological support (341 – 342). The claimant emailed the letter to the respondent on 21 December 2017 with a sick note signing him off until the end of January 2018 (337).

112. The stage IV meeting ended somewhat abruptly. The claimant terminated the call. The claimant explained in his evidence to us, which we accept, that he became upset during the call and could not continue. The claimant had sought to agree an agenda for the meeting in advance and was very concerned that the respondent was not following it during the call. He followed the call up, however, with emails dated 14 December and 21 December 2017 in which he expressed a number of concerns about the

absence management process. He also confirmed that his long awaited counselling was beginning with an appointment on 21 December 2017.

113. The claimant received around 6 sessions of counselling via the NHS from late December 2017 onwards. He changed to a private provider in early 2018 and continued to receive weekly counselling up to the termination of his employment and beyond. As noted above, he was able to use the private health insurance that he received as an employee to fund the sessions from the start of 2018 onwards.

114. The respondent decided not to make a final decision with regard to the claimant's employment following the stage IV review meeting, but to allow time to see if the claimant benefited from the counselling. Ms Highfield confirmed this in writing to the claimant following the meeting in a letter dated 22 December 2017 (343 – 346). That letter states that an occupational health meeting would be arranged for the end of January 2018 with a further stage IV review meeting held shorty after that. The letter again did not offer a right of appeal.

115. There is a section in the letter dealing with the discussion about whether the latest occupational health report provided new information or not. Towards the end of this section, the letter then goes on to record that the claimant had said there was information that he did not want to or need to divulge regarding his medical conditions. It adds, that in his view, his plan had always been that once he received counselling support he was hopeful of returning to work with adjustments, but that he felt that the respondent was continuously poking for information that was not necessary to the respondent's management of his absence. (344)

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116. It transpired that the claimant was not invited to attend a further appointment with occupational health until 12 February 2018. This was to be a face to face appointment at the instigation of the occupational health providers. We were told they had a policy of ensuring they see employees face to face after a particular length of time. When the claimant found out that the appointment was to be face to face, and therefore inconvenient for him to attend, he rang the occupational health providers and questioned where the instruction for this came from. He had assumed it was from Ms Highfield, but we do not find that this was the case and our finding is that it came from the occupational health providers themselves.

117. The claimant's conduct on the telephone towards the occupational health providers was raised with Ms Highfield subsequently in the form of a complaint. The claimant admitted in his evidence to the tribunal that he was upset that the appointment was to be face to face. This was because of the difficulties attending a face to face appointment presented to him. He accepted that he had expressed his emotions during his call with the occupational health providers. He told us that, notwithstanding his annoyance, he was planning to attend the appointment.

118. In fact, the claimant did not attend. The reason was because his uncle died that morning. He cancelled the appointment by speaking directly to the occupational health providers and was told that they would inform the respondent who would be responsible for requesting a further appointment. He did not therefore contact the respondent to say that he had not attended.

119. Later that same day, the claimant received notification that UNUM were continuing to reject his claim. The claimant also submitted a grievance about the absence management process. He says that he was unhappy about various aspects of the management process, but the "last straw" was his perception that Ms Highfield had failed to be entirely truthful about UNUM complaint's process.

120. Ms Highfield told us that the reason that the respondent did not try and rearrange the missed medical appointment with occupational health was because they did not believe the claimant would attend the appointment. She said that the three things playing in her mind at the time she reached this view were (a) the fact that the claimant had questioned the face to face appointment in advance leading to the complaint, (b) his failure to inform the respondent of his non-attendance and (c) the fact that he had been able to submit a grievance that day. Ms Highfield said that if the claimant was able to do this, she would have expected him to be able to attend the appointment.

Grievance

121. The claimant's grievance (435) included a number of matters, including a claim of disability discrimination.

122. The grievance was considered by Catherine O'Sullivan, Head of Key Partnerships for Europe with the support of an HR Business Partner, junior to Ms Highfield. A grievance meeting was conducted by telephone with the claimant on 22 February 2018. A note was taken of the meeting (445 – 448), but in addition the claimant covertly recorded the meeting and a transcript was included in the bundle (437G – 437L).

123. During the conversation, the claimant explained that one of the key elements of his grievance was that although he had been told that the purpose of the absence management procedure was to support him to return to work, he felt that quite the reverse was happening in the background. He felt that the company was actually attempting to move very quickly to stage IV to dismiss him. He cited the speed with which the company had moved from stage II to stage IV of the process despite the fact that the medical evidence and occupational health advice was that he needed time off.

124. On 23 February 2018, Ms O'Sullivan met with and interviewed Mr Ashdown (notes from the meeting were at pages 437A – 437B) and Ms Highfield (notes from the meeting were at pages 437C – 437F) on 23 February 2018. These meetings were conducted in person.

125. Mr Ashdown was not interviewed about the absence management process, but only about why he had sought to prevent the dinner with the team taking place in June. The claimant had raised this issue as part of his grievance, his complaint being that the respondent had isolated him from his colleagues. He later alleged that the effect of this was that he was not able to contact anyone to ask them to accompany him to the absence management review meetings.

126. Ms Highfield appears to have told Ms O'Sullivan that once the absence management process was up and running, it did appear to get going quickly, but this was due to the delays within the early part of the absence. She said that when she was able to manage it properly she did so working to a 4-6 week process cycle between follow ups (437C).

127. In her evidence to the tribunal, Ms Highfield said that she did not mean that the absence management process had actually accelerated, but that she was trying to explain to Ms O'Sullivan that she understood why the claimant perceived that it had. Ms Highfield also told us that she was sure that she had not said that she was managing the claimant's absence by working to a 4-6 week process cycle as this was not what she was doing. Her evidence was that initially the respondent had managed the claimant's absence on a six to eight week cycle based on his fit notes, but that subsequently it was based on the milestones identified by occupational health.

128. Our finding, as a matter of fact, is that not all the review stages were conducted in line with the milestones identified by occupational health:

- This was true for the first review. The first occupational health report was dated 12 July 2017 and recommended a review around 8 weeks later. The respondent had arranged for the claimant to be seen by occupational health 10 weeks later on 21 September 2017 ahead of the Stage II review meeting.

- There was no referral to occupational health between the Stage II (23 October 2017) and Stage III (13 November 2017) meetings which were held only three weeks apart. This was despite the occupational health report of 21 September 2017 clearly stating that nothing was likely to change until the claimant began to receive counselling and recommending a review in December 2017.

- The first Stage IV meeting was held in line with a milestone identified by occupational health, but this was the review period identified in the second occupational health report and not the intervening third occupational health report.

129. Ms O'Sullivan finalised the grievance outcome and on 2 March 2018 arranged to deliver it in person to the claimant over the phone. She subsequently confirmed the position in writing. Ms O'Sullivan rejected all of the claimant's complaints (443 – 444 and 449 – 453).

130. We do not find it surprising that this was the outcome. Ms O'Sullivan confirmed to the tribunal that she had no experience of managing a long term absence or of investigating a grievance of disability discrimination. Ms O'Sullivan told us that she was familiar with conducting disciplinary investigations and her grievance outcome report reads very much as if this is what she was doing. We find that she relied entirely on what Ms Highfield told her about normal intervals between absence review meetings rather than assess this independently. In fact, her report contains inaccurate details of the review dates and she incorrectly concluded that there was at least a month between all of the review meetings where this was not the case (450). We therefore do not find that the grievance findings made by Ms O'Sullivan were particularly helpful to us when deciding the claim.

131. The claimant immediately submitted an appeal against the grievance outcome (454 – 469). He also commenced the ACAS early conciliation process on the same date.

Further stage IV review meeting

132. Separate to the grievance process, the claimant was invited to attend a further stage IV absence management review meeting by telephone on 7 March 2018. The invitation was sent to him by letter dated 5 March 2018 (470). The letter again warned him that the termination of his employment was a possible outcome of the meeting.

133. It was a difficult meeting from the start. Ms Highfield and the claimant prepared separate notes of the discussion (471 - 474 and 500 – 505). The notes are naturally fairly consistent. Where they differ, we prefer the accuracy of the claimant's note on key matters. It tells us the following:

- The claimant asked Ms Highfield to tell him how quickly the respondent expected him to be able to return to work in order to avoid being dismissed. Ms Highfield initially tried to put her answer in context by explaining the overall legal position. However, when the claimant pushed for a precise timescale she told him that in her mind the timescale was 2-3 weeks. The claimant responded by saying that in his view the meeting was pointless because his current medical certificate was for a longer period than this and asked if there was any point in proceeding (500).

- The claimant objected to the meeting proceeding when his grievance (i.e. the appeal) was ongoing (501).

- The claimant told the respondent that the reason he had not attended the occupational health meeting on 12 February 2018 was because of a death in his family. Ms Highfield did not question this and did not explain that she believed that at least part of the real reason the claimant did not attend was because he was unhappy about the face to face appointment. Ms Highfield did mention that

the respondent was aware that the claimant had received the UNUM rejection and submitted his grievance that day. (472 and 502)

- The claimant confirmed that his counselling had begun, but was not asked further about it (505)

134. Following the meeting, the respondent received the final confirmation from UNUM that the claimant's claim had been rejected. This confirmation was received by email at 3.30 pm on 7 March 2018 (475).

135. Ms Highfield wrote to the claimant on 15 March 2018 to confirm that he was being dismissed (480 – 483). The letter recounts what had occurred between 2016 and that date in some detail. It also records that the rejection of the income protection claim by UNUM.

136. The letter then sets out the reasons for the claimant's dismissal at paragraphs 18 – 21 (482 – 483) as follows:

"18 As you know, you have continually refused to engage in any meaningful discussion about any potential adjustments that could be made to facilitate your return to work, you refused our reasonable request to obtain a medical report from your GP and you *failed to attend the occupational health assessment on 12th February 2018.*

19 Your most recent Fit Note dated 28th February 2018 states that you are not fit for work until at least 1st April 2018 but based on the information I have at my disposal, I do not consider it likely that you will return to work at any time in the foreseeable future. Further, I do not believe that there are any reasonable adjustments that [the respondent] could implement to enable you to return to work (in any capacity) in the foreseeable future.

20 It is clear that, despite our best efforts, there is no reasonable prospect of your return to work in the foreseeable future. [The respondent] has taken a more than fair and reasonable approach towards your absence, but as we said previously, this is not a position that it can adopt indefinitely. In particular, [the respondent] has not filled your role and, as a result, your absence has had an impact on the resources in the team, on [Mr Ashdown] as the team leader and on [one of the claimant's colleagues] who has attempted to cover your role. This has led to a serious impact on cycle one and cycle two reviews and has created risk for the business. We have also tried to obtain income protection as an alternative to dismissal but have been unsuccessful.

21. Having considered all of the information in your case, therefore, I regret to inform you that [the respondent] has decided to terminate your employment on the grounds of ill-health capability."

137. We have considered the factual position with regard to each of the respondent's assertions in the dismissal letter as follows.

138. Our finding is that there is no evidence that the claimant refused to engage in any meaningful discussion regarding adjustments that could be made to facilitate his return to work. The claimant's position was clearly stated from the very beginning of the absence management process which was that, as soon as he was fit enough to return to work in some capacity, he anticipated a phased return with some adaptations to the work he was required to do. This is clear from the discussion in the informal meeting held on 30 May 2017 and from the note he added to the letter at the Stage III meeting. (309)

139. It is factually correct that the claimant had refused to give consent to the respondent to obtain a report directly from his GP at the Stage III Meeting. His reason for this was his desire to keep the actual diagnosis of his underlying condition private. He had provided a good deal of information about the effects of his medical condition to the respondent and hah shared the full details with the respondent's occupational health adviser.

140. The claimant had also, following the first Stage IV meeting held on 13 December 2017, immediately obtained a letter from his GP to provide additional information. Ms Highfield said in her evidence that the letter was not satisfactory because it was not in the form she would expect of a medical report answering questions about reasonable adjustments. The letter, however, makes it clear that the claimant's GP was happy to provide further information as may be required. It states:

"*I trust this information is useful. We are happy to provide more details at your request and subject to patient consent."* (341)

141. It is factually correct that the claimant had not attended the occupational health meeting on 12 February 2018. As noted above, the reason for his non-attendance was not fully explored with him. The respondent believed that, because the claimant had not attended the previous face to face appointment, he was not likely to attend a further face to face appointment. Neither Ms Highfield nor Mr Ashdown had asked him this outright, however, and Ms Highfield had not told him about the complaint she had received from the occupational health providers about him. Our finding is that the claimant would have attended a further appointment had the respondent rearranged it.

142. We do not consider, as a matter of fact, that it was possible for the respondent to conclude, on an informed basis as at 15 March 2018, that the claimant would not be able to return to work in the foreseeable future. We find that the respondent simply did not have sufficient up-to-date medical information to reach this conclusion.

143. The information that the respondent was relying on, as at 15 March 2018, included the occupational health report from 27 November 2017, the letter from the GP dated 14 December 2017, the claimant's latest fit note which

signed him off until 1 April 2018 and whatever the claimant had said about his medical condition at the second Stage IV review meeting on 7 March 2018.

144. The respondent did not fully explore the claimant's medical condition with him during the second Stage IV meeting. In particular, the respondent did not ask the claimant about the impact of the counselling he was having, nor did it seek to obtain an updated medical report providing an independent assessment of its impact.

145. The only up to date medical information available to the respondent at the meeting was the fit note. All that the claimant said at the meeting was that he would not be able to return before the end of his current fit note.

146. The occupational health report (then four months old) had stated that the medication side effects were not the main barrier to the claimant returning to work and had suggested that he could return to work, at least on a phased basis once he started to receive specialist counselling (CBT) to help him with his psychological symptoms. The occupational report identified the psychological symptoms as the main barrier to his ability to return to work. This meant that understanding the impact of the counselling was key.

147. The claimant's GP letter dated 14 December 2017 (3 months old) could be read as suggesting that the ongoing medication issues were still a barrier to him being well enough to return to work, in addition to the claimant's psychological symptoms. The letter states:

"*These side effects [listed in the letter from the medication for the underlying condition] have made it very difficult to manage day to day activities including full time work. [The claimant] is still working with medical experts to address the daily side effects to his medication*." (341)

The letter goes on to say:

"*As of 14 December 2017, he continues to suffer depression, anxiety and side effects to his daily medication. He currently waiting to start psychological counselling. This continues to be a major barrier to returning to work*."

148. We find that a correct reading of the letter is that the medication side effects were still present and causing the claimant some issues, but the main barrier to him returning to work when the GP letter was written was the need for specialist counselling. The claimant told us that, by 15 March 2018, he had reached a position where he was managing the side effects much better than previously. He had not wanted the letter from his GP not to mention the side effects, because they continued to cause him some difficulties and will for the rest of his life. He said that still has good and bad days even now 18 months later. We accept this evidence on this point.

149. Finally returning to the dismissal letter, we do not accept that the claimant's absence was having the serious impact on the respondent's business that was asserted by the respondent. Inevitably being one person down in the UK compliance team, meant that there were less resources available to the respondent. However, it appears to us that the respondent was managing without the claimant.

150. The respondent said that the claimant's absence had led to a serious impact on the cycle one and cycle two reviews which had created risk for the business. In his evidence, Mr Ashdown was unable to give specific examples of the number of review meetings that had been missed. Further, he acknowledged that if there were missed review meetings, the reason for them could just as easily have been caused by a vacancy in the team (between late 2017 and Spring 2018) as the claimant's absence.

151. We found it notable that Mr Ashdown was only able to cite one example of when he personally was put in difficulty because two meetings he should have attended were scheduled for the same time. One of these meetings would have been covered by the claimant had he been present.

152. We also noted that the respondent had the ability to bring additional resource temporarily into the UK compliance team from its other European compliance teams, but did not do this at any time during the claimant's absence.

153. In reaching our factual conclusion with regard to the impact on the respondent's business, we have also taken into account what happened after the claimant's dismissal in terms of how the respondent re-organised the UK compliance team. We were told that a number of the positions held by existing team members were repurposed, such that the vacancy that was created by the claimant's dismissal was for a junior analyst role in Poland. Further that role was not purely allocated to UK work. This suggests that the claimant's responsibilities had been successfully reallocated across the existing team during his absence on an informal basis. Following his dismissal this informal reallocation appears simply to have been formalised.

Notice Payment

154. The claimant's employment was terminated with effect from 15 March 2018. The claimant had 5 complete years of service with the respondent at this date.

155. Under clause 20 of his contract of employment he was entitled to notice on termination of "*1 week's notice for each complete year of service – with a minimum of 8 weeks and a maximum of 12 weeks" (209)*. In his case, his entitlement was therefore to 8 weeks' notice.

156. The respondent did not make a payment in lieu of notice to the claimant as he had exhausted his entitlement to company sick pay and statutory sick pay as 15 March 2018 and was therefore in receipt of nil pay.

Grievance Appeal and Appeal Against Dismissal

157. The claimant was offered the opportunity to appeal against his dismissal. This was heard by Ms Keely Vaughan Davies who had also been assigned to consider the appeal against his grievance. She treated the two appeals as quite separate.

158. Although Ms Vaughan Davies tried to arrange to hold meetings by telephone with the claimant to understand his appeals, they did not proceed in a meaningful way. The claimant was not prepared to explain his appeals to Ms Vaughan Davies, but expected her to have read the material he had sent her and express her views on his case before he commented. Ms Vaughan Davies was not prepared to proceed in this way.

159. Our view is that the claimant's view of the absence management process at that stage had reached a point of despair. This prevented him from participating in the grievance appeal and appeal against his dismissal in an effective manner. This was exacerbated after he had been dismissed.

160. Ultimately this meant that Ms Vaughan Davies' view of the relevant issues simply reflected what Mr Ashdown and Ms Highfield told her as she was really only able to obtain and understand their versions of events. We have not therefore found the appeal findings helpful when considering the case.

Law

Reasonable Adjustments

161. Section 39(5) of the Equality Act 2010 imposes a duty to make reasonable adjustments on an employer.

162. Section 20 provides that where a provision, criterion or practice (a PCP) applied by or on behalf of an employer, places the disabled person concerned at a substantial disadvantage in comparison with persons who are not disabled, it is the duty of the employer to take such steps as it is reasonable to have to take in order to avoid the disadvantage.

163. Section 21 of the Equality Act provides that an employer discriminates against a disabled person if it fails to comply with a duty to make reasonable adjustments. This duty necessarily involves the disabled person being more favourably treated than in recognition of their special needs.

164. In *Environment Agency v Rowan* 2008 ICR 218 and *General Dynamics Information Technology Ltd v Carranza 2015 IRLR 4* the EAT gave general guidance on the approach to be taken in reasonable adjustment claims.

165. A tribunal must first identify:

    1.1 the PCP applied by or on behalf of the employer

1.2 the identity of non-disabled comparators; and

1.3 the nature and extent of the substantial disadvantage suffered by the claimant in comparison with the comparators

166. Once these matters have been identified then the tribunal will be able to assess the likelihood of adjustments alleviating those disadvantages identified. The issue is whether the employer had made reasonable adjustments as matter of fact, not whether it failed to consider them.

167. The test of reasonableness imports an objective standard. The tribunal must examine the issue not just from the perspective of the claimant, but also take into account wider implications including the operational objectives of the employer.

168. The Statutory Code of Practice on Employment 2011, published by the Equalities and Human Rights Commission, contains guidance in Chapter 6 on the duty to make reasonable adjustments. Paragraph 6.28 sets out some of the factors which might be taken into account in determining whether it is reasonable for an employer to have to take a particular step in order to comply with the duty to make reasonable adjustments. These include whether taking the step would be effective in preventing the substantial disadvantage, the practicability of the step, the cost to the employer and the extent of the employer's financial and other resources.

Time limit – disability discrimination

169. The relevant time-limit is at section 123 Equality Act 2010. In section 123(1)(a) the tribunal has jurisdiction if the claim is presented within three months of the act to which a complaint relates.

170. Section 123(3)(a) provides that conduct extending over a period is to be treated as done at the end of that period. Subsections 123(1) and 3(a) have to be read with subsections 123(3)(b) and (4) which deal with a failure to act and when this is deemed to take place.

171. Helpfully, the interaction between these provisions in a case of reasonable adjustments has been considered in the case of *Abertawe Bro Morgannwg University Local Health Board v Morgan* [2018] Civ 640. The Court of Appeal held that the primary three month time limit begins to run from the end of the period in which the respondent might reasonably have been expected to comply with a duty to make reasonable adjustments.

172. The tribunal may still have jurisdiction to consider a claim if the claim was brought within such other period as the employment tribunal thinks just and equitable in accordance with section 123(1)(b).

Conclusions on time limit for reasonable adjustment claim

173. Having limited ourselves to the narrow interpretation of the single suggested reasonable adjustment contained in the list of issues, we have

considered whether the claim for this reasonable adjustment has been presented in time.

174. We judge that the period in which the respondent might reasonably have been expected to comply with a duty to make the reasonable adjustment sought begins to runs from the date of the first occupational health report where it was mentioned as a suggestion in the recommendations. This was 12 July 2017.

175. In our judgement, the duty came to an end, however, as at the date of the third occupational health report, 27 November 2017. At the earlier date, it was clear that had the respondent paid privately for the specialist counselling that the claimant needed, this was a step that might have ameliorated the substantial disadvantage being suffered by the claimant at that time and therefore might reasonable be one that the respondent should have taken.

176. However, as at the date of the third occupational health report, the claimant was about to start receiving counselling via the NHS. The suggested step, of paying privately for the counselling, ceased to be a potential reasonable adjustment in the circumstances because the same outcome could have been achieved by simply waiting a short time. It was not therefore even potentially reasonable for the respondent to have to pay for the counselling. As such, in our view, the duty to take that step ceased by 27 November 2017.

177. In order to bring his reasonable adjustments claim in time, the claimant would have needed to commence the early conciliation process within three months less one day of 26 November 2017. He did not do this. We conclude that the claim is brought outside the primary time limit.

178. Having reached this conclusion, we do nevertheless consider that it is appropriate to grant a just and equitable extension in this case. The claimant told us he may have had some legal advice prior to submitting his claim, but he could not remember precisely when this was. He was not represented until after the proceedings commenced. Time limits for reasonable adjustment claims are complex and we judge that he would have needed advice in order to understand the nature of his potential claim. He was also unwell at the relevant time for submitting claim in time and this was no doubt a factor that had an impact on him.

Conclusion on reasonable adjustment claim

179. We have therefore gone on to consider whether it was actually reasonable (and not merely potentially reasonable) for the respondent to have paid for the claimant to have private counselling between 12 July 2017 and 26 November 2017

180. Our conclusion is that it was not. The ability of an adjustment to ameliorate the substantial disadvantage experienced by the claimant is one of the key factors in determining whether or not an adjustment is actually reasonable.

181. Although the suggestion of the respondent paying privately for the claimant to receive counselling was made in the first occupational health report, it was not obvious at that time that counselling, of itself, would have assisted the claimant to return to work. At that time, the side effects of the claimant's medication were as significant a factor in his absence as his mental health condition. Although counselling would have helped, it would only have assisted with the claimant's psychological condition and not done anything to help the problems resulting from the medication side effects. Our view therefore is that the adjustment would not, at the relevant time, have ameliorated the substantial disadvantage experienced by the claimant sufficiently to justify the cost to the respondent. It was not therefore a reasonable adjustment for the respondent to have to make.

Unfair Dismissal

182. The test for unfair dismissal is set out in section 98 of the Employment Rights Act 1996. Under section 98(1), it is for the employer to show the reason for the dismissal. In this case that reason was capability which is one of the fair reasons found in section 98(2).

183. We have therefore had to decide whether the dismissal is fair or unfair having regard to the test set out in section 98(4) which says that

> '… the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) 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 shall be determined in accordance with equity and the substantial merits of the case.'

184. In other words, we must decide whether it was reasonable for the respondent to dismiss the claimant for capability in all the circumstances of the case. We accept entirely that the law does not require employers to indefinitely retain employees who are not capable of working due to ill health.

185. We have reminded ourselves of the key authorities that deal with reasonableness in this context. These include the leading case of *East Lindsey District Council v Daubney* [1977] ICR 566 together with the subsequent authorities including *Hart v A R Marshall & Sons (Bulwell) Ltd* [1977] IRLR 61), *BS v Dundee City Council* [2013] CSIH 91, *Monmouthshire County Council v Harris* [2015] UKEAT/0010/15) and *O'Brien v Bolton St Catherine's Academy* [2017] EWCA Civ 145, *City of York Council v Grosset* [2018] EWCA Civ 1105t and *DL Insurance Services Limited v O'Conner* [2018] UK EAT 0230/17/2302.

186. The question is whether dismissal, at the time it took place, was within the band of reasonable responses open to a reasonable employer. It is not for us to substitute our own decision. The band of reasonable reasonable

responses test applies to the procedure followed and to the decision to dismiss. We have reminded ourselves of the sound advice the EAT gave tribunals in the case of *DB Schenker Rail (UK) Ltd v Doolan* [2010] UKEAT/0053/09 where it noted how easy it can be for tribunals to fall into the substitution mindset in cases of ill-health and to guard against this.

187. We have also, however, been mindful of the decision in *O'Brien v Bolton St Catherine's Academy* [2017] EWCA Civ 145. The Court of Appeal held that an employment tribunal was entitled, on the facts in that case, to hold that a dismissal was unfair (and disproportionate) notwithstanding that the claimant had been absent for 15 months. In that case, described by the Court of Appeal as near the borderline, the tribunal found that, as there was some medical evidence presented at the appeal stage that the employee might be fit to return to work immediately, it was within the range of reasonable responses for the employer to have waited a little longer before making a final decision to enable a further medical assessment by its own occupational health advisers.

188. When considering the question of the employer's reasonableness, we also reminded ourselves that we must take into account the process as a whole, including the appeal stage.

189. These cases, where there is long term absence, but the medical position is not clear cut, are always difficult to analyse and have to be viewed on a case by case basis. The factors we have considered are of greatest relevance in this case are as follows:

Sabbatical

190. When dismissing the claimant, our view is that the respondent should not have taken into account the time that he spent on unpaid sabbatical when measuring the length of time of his absence due to ill health. The sabbatical was not part of the claimant's sickness absence and it would not have been reasonable to treat it as such.

191. We do not think that at the time of dismissal the respondent did this, but the argument was advanced in closing submissions that the claimant had been absent for medical reasons since October 2016. We therefore feel it is important to be clear that we have assessed whether the decision to dismiss fell within the range of responses of a reasonable employer based on the claimnt having been absent since 6 February 2017 which is a total of just over 13 months as at the date of dismissal.

Underlying Medical Condition

192. The respondent's position was that it was unhelpful not to be told by the claimant about his underlying medical position. A key factor in their decision making process appears to be the claimant's refusal to tell them his underlying medical condition or to provide consent to a GP report for their use. This appears to have had particular influence on the

respondent's view of its ability to obtain medical expert advice on reasonable adjustments that would assist the claimant to return to work.

193. We do not consider that this was a reasonable position for the respondent to take. We believe that the claimant was entitled to withhold the name of his underlying condition from the respondent. The claimant was trying to preserve his right to privacy while providing the respondent with the information it needed.

194. Far from being unhelpful, the claimant provided the respondent with information, which had they realised its significance, made it clear that he had been diagnosed with one of three very serious conditions named in the Equality Act 2010. He informed the respondent's own occupational health provider of the actual underlying condition demonstrating that the claimant was content to share the full details with medically qualified experts, but not with his employer itself.

195. The claimant also sought to provide additional information from his GP when medical information became an issue. As noted above, Ms Highfield said that the GP letter was insufficient for the respondent's purposes as it did not cover the matters she would normally expect in a medical report. Quite apart from the fact that this is what the occupational health process was for, we note that Ms Highfield did not make any effort to provide the claimant with the questions she needed answering so that these could be passed to his GP. The GP's letter had made it clear that they were happy to provide further information as required.

196. We consider it was possible for the respondent to obtain the information it needed in a way that preserved the claimant's right to privacy either through asking the GP specific questions, or through getting the occupational health provider to review the claimant's GP notes. The respondent, however, took the view that the claimant was being difficult simply because he wanted to preserve his privacy.

UNUM

197. We consider that it was appropriate for the respondent to take into account the information from UNUM. Our view is that the law requires employers to consider all relevant information available to them when dealing with ill health processes.

198. In this case, it was appropriate for the respondent to want to understand the apparent contradiction between the UNUM decision and the information in the occupational health reports. However, in doing so the respondent needed to bear in mind the particular test being applied by UNUM and the time period over which it was examining the claimant's medical conditions. The assessment which UNUM carried out was an entirely different exercise to that which the respondent was undertaking.

199. It was not reasonable to use the UNUM report as a reason to escalate through the absence management stages. This was the explanation for the

very quick jump between stages II and III. Although the addition of a second stage IV stage went someway to make up for this jump in pure time terms, one consequence of the jump was that the claimant lost trust in the process. The jump was solely caused by the respondent and made it more and more difficult for the parties to have meaningful review meetings.

Procedure

200. We find that the process followed by the respondent was, in most respects, conducted in line with the type of procedure we would expect of a reasonable employer.

201. The respondent followed a written procedure which it shared with the claimant. The procedure required the respondent to obtain expert medical information and consult with the claimant.

202. The claimant was invited in writing to each consultation meeting and was offered the right to be accompanied. He says he did not exercise this right because the respondent had discouraged him from contacting his colleagues, but we do not find this is accurate. Each invitation letter provided the claimant with clear information as to what to expect from the meeting. The meetings were conducted by telephone at the claimant's request. Each meeting was followed by a letter outlining the discussion and, in most cases, clearly indicated the next steps. The respondent allowed the claimant to comment on the letters and to provide further information. Although we noted above that the respondent's approach when the claimant provided additional information could have been more helpful, we do not consider the respondent acted unreasonably.

203. There were some significant flaws in the procedure. These included the failure to identify the timescales for review at each stage and the failure to offer a right of appeal at each stage. This latter flaw was, to some extent, remedied by the fact that the claimant was able to bring a grievance complaining about aspects of the procedure, but see our comments below on this.

204. The timescale between the review meetings was also a flaw. Our factual finding was that the respondent was not working to the milestones outlined in the occupational health reports. This was clearly not the case when it came to the trigger for the Stage III meeting as described above. We cannot ignore that fact that the respondent effectively remedied this fault so far as the timing was concerned by having a later second stage IV review meeting. In our judgment, this was a procedural remedy only as the substantive issue of understanding the claimant's true medical position at the time of dismissal was not remedied by adding this additional step.

Up to Date Medical Information

205. Our judgment is that the respondent should not have proceeded to dismiss the claimant without first obtaining updated medical evidence. The respondent was aware, as a result of the third occupational health report,

that there had been improvement in the claimant's overall medical condition. The side effects of his medication remained, but were at that point being well managed. The main barrier to the claimant being able to return to work was his psychological condition. The respondent had been given clear advice that the claimant would need CBT and that it should allow an appropriate period of time to see how effective this treatment was. Having decided to postpone making a final decision in December 2017, to allow time to so this, the respondent then failed to see this through.

206. We can understand that the respondent was frustrated that the claimant did not attend the occupational health appointment on 12 February 2018. However, on learning that he had a good reason for not attending, namely the death in his family, our finding is that a reasonable employer would have allowed an opportunity for this appointment to be rearranged. The failure to do so meant that, as at the date of dismissal, the respondent was relying on medical evidence that was almost four months out of date. The third occupational health report had suggested that the claimant would be well enough to consider a phased return to work after having between 12-18 weeks' worth of CBT.

207. As stated above, we considered, as a matter of fact, that it was not possible for the respondent to conclude, on an informed basis, that as at 15 March 2018, that the claimant would not be able to return to work in the foreseeable future. It follows that no reasonable employer would have reached this conclusion.

208. This defect in relation to the lack of medical evidence was not remedied at the appeal stage. Ms Vaughan Davies did not undertake her own investigations into the claimant's current medical condition as part of the appeal process.

Respondent's Business

209. As noted above, we do not accept that the respondent's business was under the degree of strain that has been asserted. Although the claimant had been absent for a significant period of time, we were not presented with any evidence that the respondent could not wait a little while longer before making a final decision. In fact, the evidence was to the contrary. There was minimal ongoing cost to the respondent as the claimant had exhausted all entitlement to sick pay. In addition, the respondent had the option of bringing in temporary support if this was needed. When the claimant was dismissed, he was not replaced and the roles within his team were simply repurposed.

Overlap between Grievance and Dismissal

210. Finally, we consider that it was outside the range of reasonable responses of a reasonable employer for the respondent to proceed with the dismissal meeting on 7 March 2018 while the claimant's grievance was ongoing. The claimant's grievance was effectively an appeal against the earlier stages of the absence management process and it should have been fully resolved

before proceeding with the dismissal meeting. This would have been in accordance with the employer's policy which allowed for an appeal at each stage of the process.

Conclusion on Unfair Dismissal

211. Taking into account the factors that we have highlighted above, we conclude that the procedure followed by the respondent was procedurally unfair, when judged through the lens of the range of reasonable responses of a reasonable employer. In particular, a reasonable employer would have obtained up to date medical evidence and would have waited until the claimant's grievance appeal was concluded before dismissing. The respondent's business was not so strained by the claimant's ongoing absence as to make this an unreasonable course of action.

212. In our view, the factors we have highlighted above, mean that the respondent's decision to dismiss the claimant was outside the range of responses of a reasonable employer with the result that the dismissal was also substantively unfair. The key factors were the absence of medical evidence and our view that the respondent exaggerated the adverse impact on its business of the claimant's absence.

213. We consider that it is possible that the respondent would have been in a position to fairly dismiss the claimant within quite a short period of time. This would have occurred for example, if he was still unwell with an uncertain prognosis because the counselling was not proving to be effective. As expert medical evidence is being obtained for the purposes of considering the claimant's personal injury claim, we have requested that it also cover this issue. This will enable us to assess whether any deduction to the claimant's compensation is appropriate in accordance with the decision in the case of *Polkey v AE Dayton Services Ltd* [1987] ICR 142.

Discrimination Arising from Disability

57. Section 15 of the Equality Act 2010 provides that

> (1) A person (A) discriminates against a disabled person (B) if—
>
> (a) A treats B unfavourably because of something arising in consequence of B's disability, and
>
> (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

214. In this case, the only issue is whether the dismissal of the claimant was a proportionate means of achieving a legitimate aim.

215. In considering this question, the tribunal must undertake a balancing exercise. We are required to make an objective assessment which does not depend on the subjective thought processes of the employer. This question is not to be decided by reference to an analysis of the employer's thoughts and actions. The question is whether the dismissal is, objectively

assessed, as at the time it occurred, a proportionate means to achieve a legitimate end irrespective of the process adopted by the employer.

216. Many of the authorities that we have reviewed for the purposes of considering the unfair dismissal claim are relevant to this claim as well.

217. We have also considered the guidance contained in the EHRC Statutory Code of Practice that is relevant to this question. This is contained, in particular at paragraph 5.12 which states that:

"*It is for the employer to justify the treatment. They must produce evidence to support their assertion that it is justified and not rely on mere generalisations."*

We have also taken into account the guidance in paragraphs 4.28 – 4.32.

Conclusion on Discrimination Arising from Disability Claim

218. As noted above, we accept entirely that the law does not require employers to indefinitely retain employees who are not capable of working due to ill health. This is not changed where that employee is disabled.

219. Our task has been to consider whether objectively the dismissal of the claimant, at the time, it took place, was proportionate in all the circumstances, balancing the needs of the employer with the potential for discrimination against the individual.

220. In this case, the conclusion of our balancing exercise is that the dismissal was not proportionate as at the date it took place. Similar factors that have led us to conclude that the dismissal was substantively unfair are relevant here. We have been careful not to allow the procedural failings we have found influence us, but instead we have assessed the evidence the respondent has presented to us that dismissal was proportionate at the time it took place.

221. As noted earlier, our finding in fact is that the degree of strain on the respondent's business did not prohibit waiting a little while longer to enable the respondent to find out if the claimant's counselling would be effective. There was clearly some strain, but it was not so great to prohibit a short, but critical waiting period.

222. We also said earlier that our finding was that the respondent did not have reliable up to date evidence at the time of dismissal that the claimant was not able to return to work in the foreseeable future. The only reliable up to date evidence was that he would not be able to return before 1 April 2018.

223. Taken with our findings on the impact of the business, the respondent's failure to obtain up to date evidence results in us finding that that the respondent has not discharged the burden of producing evidence to support its assertion that the dismissal was proportionate and therefore justified.

224. In a similar vein to the unfair dismissal claim, we consider that it is possible that the respondent's dismissal of the claimant would have been proportionate within quite a short period of time. Whether any deduction to the claimant's compensation is appropriate in accordance with the decision in the case of *Chagger v Abbey National plc and another* [2009] EWCA Civ 1202 can be assessed at the remedy stage based on the expert medical evidence.

Wrongful Dismissal

225. Section 86 (1) of the Employment Rights Act 1996 provides for a minimum period of statutory notice for employees of 1 week for each complete year of service. In the claimant's case, this was 5 weeks.

226. A combination of sections 87(1) and section 88(1)(b) of the Employment Rights Act 1996 provide that employees (with normal working hours) who are incapable of working during notice, are nevertheless entitled to be paid in full.

227. This does not apply however where section 87(4) Employment Rights Act 1996 operates. That provides that "*This section does not apply in relation to a notice given by the employer or the employee if the notice to be given by the employer to terminate the contract must be at least one week more than the notice required by section 86(1)*.

228. Under the claimant's contract of employment, he was entitled to a minimum of 8 weeks' notice. This was 3 weeks more than his statutory minimum entitlement to notice of 5 weeks.

229. The exclusion in section 87(4) Employment Rights Act 1996 therefore applies in his case and the respondent was not required to pay him in full during his notice period when he had exhausted his entitlement to company and statutory sick pay.

230. The claimant's claim for wrong full dismissal therefore fails.

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Employment Judge E Burns
10 December 2019

Sent to the parties on:

31/12/2019

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For the Tribunals Office