EMPLOYMENT TRIBUNALS

Claimant: **Mr R Jones**

Respondents: **Valero Operations Support Limited**
Valero Energy Limited

Heard at: **Cardiff** **On:18th to 21st March and 20th September (in Chambers) 2019**

Before: **Employment Judge R Powell**

Members: **Mr PH Bradney**
Mr M Pearson

Representation:
Claimant: Ms K Moss, of counsel
Respondent: Mr J Walters, of counsel

RESERVED JUDGEMENT

The unanimous judgment of the tribunal is:

1. **The claimant was, at all material times employed by the first respondent.**

2. **The first respondent's conduct amounted to discrimination arising from disability, contrary to section 15 of the Equality Act 2010, in respect of the respondent's letters dated the 22nd June 2017 and the 5th October.**

3. **The first respondent's conduct amounted to discrimination arising from disability, contrary to section 15 of the Equality Act 2010, in respect of the respondent's threat of disciplinary action on 2nd January 2018 is well founded.**

4. **The first respondent's conduct amounted to discrimination arising from disability, contrary to section 15 of the Equality Act 2010, in respect of the respondent's refusal to allow an appeal against the grievance decision of 2nd January 2018 and is well founded.**

5. **The first respondent failed to make reasonable adjustments, contrary to sections 20 and 21 of the Equality Act 2010, in respect of the following matters:**

    a) PCP1: Threatening to withhold sick pay where the employee was unable to attend a scheduled meeting on account of his [health]condition.

b) PCP 6: Denying a right of appeal against a grievance.
c) PCP7: Requiring a certain level of attendance.
d) PCP 8: Dismissing employees for absence.
e) PCP 10: Classifying employees dismissed for capability as "bad leavers".

6. **The claims of a failure to make reasonable adjustments in respect of the following allegations are not well founded and are dismissed:**

   a. PCP2: Including in grievance meetings implications that disciplinary action might be taken for unrelated conduct.
   b. PCP3: The failure to explain thoroughly, clearly and in advance the nature of the grievance meeting.
   c. PCP 4: Requiring an employee to return to work to a department without securing the employee's agreement that the department was appropriate.
   d. PCP 5: Inviting employees to disciplinary hearings because they are unfit to return to work.
   e. PCP 9: Failing to challenge or continue to challenge, UNUM's refusal to provide income protection insurance cover.

7. **The claim of harassment contrary to section 26 of the Equality Act 2010, Consequent to the content of the first respondent's letters dated 22nd June and 5th October 2017 is well founded.**

8. **The claim of harassment contrary to section 26 of the Equality Act 2010 consequent to a comparison by the first respondent of the claimant's disability to a broken leg and correspondence between February and April 2018, which was alleged to be excessive and threatening are not well founded and are dismissed.**

9. **The claims of victimisation contrary to section 27 of the Equality Act 2010 are not well founded and are dismissed.**

10. **The first respondent unfairly dismissed the claimant.**

11. **The dismissal of the claimant amounted to discrimination arising from disability, contrary to section 15 of the Equality Act 2010.**

12. **The claim of direct discrimination is not well founded and is dismissed.**

Orders

13. **The case will be listed for a Remedy Hearing with a time estimate of two days.**

14. **A one hour Telephone Preliminary Hearing will be listed for case management of the Remedy Hearing.**

REASONS

Introduction

1. By a claim presented to the employment tribunal on the 14th August 2018 Mr Jones set out a number of complaints of disability discrimination arising from alleged treatment by his employer during the course of Mr Jones' extended sickness absence, which commenced on the 7th April 2017, and culminated in his dismissal on the 16th April 2018. The specific claims are substantial in both the number of factual allegations and the character of those claims under sections 13, 15, 19, 20, 21, 26 and 27 of the Equality Act 2010.

2. The claim was presented against two respondents. On consideration of the documents in the bundle including the following: 108, 109. 362-5 385-7, 465, 479, the tribunal concluded that the first respondent Valero Operations Support Ltd was the claimant's employer. For convenience references in this judgment and the reasons to "the respondent" are references to the first respondent.

3. The respondent denies all of the alleged incidents of discriminatory conduct and avers that the decision to dismiss Mr Jones was for a potentially fair reason and was reasonable in all the circumstances of the case. The respondent highlighted that aspects of the claims of disability discrimination were, prima facie, out of time.

4. The various documents, which together represent the pleadings in this case, amount to around 54 pages and we are therefore grateful for the parties' efforts to agree a definitive list of issues for us to determine. We will not rehearse the detail of that list at this juncture because the list is reflected in our analysis and conclusions.

5. In brief, Mr Jones' case centres on the following themes; the management of his long term sickness absence, the conduct and management of a grievance which he raised in November 2017, the process and decision to dismiss Mr Jones and the respondent's representations to UNUM; a third party business which provided insurance, subject to conditions, for Mr Jones' long term sickness which could, in principle, have compensated the respondent for a large proportion of the costs related to the continuation of the claimant's salary during his sickness absence.

Disability

6. The respondent accepted that, at all material times, the claimant had the protected characteristic of disability. On the evidence before us, which was not in dispute, the claimant's impairment is as follows. He was diagnosed with depression secondary to pyscho-social stresses compounded by anxiety. His symptoms include anxiety attacks and stress related tinnitus.

The Evidence

7. The tribunal considered the content of an agreed bundle of 532 pages insofar as the parties relied upon the specific documents in the course of their evidence and submissions.

8. The Tribunal considered the witness statements and oral evidence of the following people:

   a) Mr Jones ("the claimant"), the only witness in support of his case.

   b) Mr Ricky Cook, the first respondent's Labour Relations Manager for the UK & Ireland, who had responsibility for a large part of the "day to day" advice and management of the claimant's sickness absence, the claimant's November 2017 grievance and correspondence with UNUM.

   c) Ms Denise Hicks, the first respondent's Refinery Director of Human Resources, who had involvement in the management of the claimant's sickness absence, provided advice to the decision makers (noted below) and corresponded with UNUM in same respect as Mr Cook.

   d) Mr Ben Diment, the first respondent's Complex Manager, who was responsible for the decision to dismiss the claimant.

   e) Mr Andrew Thorp, the first respondent's Director of Refinery Operations, who was responsible for the conduct of the claimant's appeal against his dismissal.

Findings of Fact

9. The following findings of fact are the unanimous conclusions of the tribunal. In reaching these conclusions we have applied the civil standard of proof and directed ourselves to apply that burden in accordance with requirements of the Equality Act 2010 and the Employment Rights Act 1996. In addition to the findings set out in this part of the judgment the tribunal has set out further findings of fact in the context of the analysis of the specific allegations.

10. The respondent is the owner and operator of a large oil refinery on the South Wales coast in Pembrokeshire. It has operated this business since 1st August 2011 when it took over the operation of the refinery from Chevron. That entailed the transfer of Chevron employees to the respondent, one of whom was the claimant.

11. The claimant has a long history of working at the refinery for various businesses but for our decision it is necessary to record that the claimant had been employed by Chevron immediately before the transfer of the business and it is agreed that, by his effective date of termination, he had nine years of continuous employment with the respondent.

12. The terms of the claimant's employment with Chevron were preserved following the transfer. Some of the terms are pertinent to our decisions. They include the following:

   a) The Valero UK Share Incentive Scheme [66 to 89] which awarded employees shares, the option to purchase shares and a share matching scheme. If an employee left the respondent's employment for reasons other than injury, disability, redundancy or retirement, they risked losing accrued "matching" shares award by the respondent and incurring the liability to make payments to HMRC in respect of income tax and national insurance deductions.

b) An Income Protection Plan ("IP") which, as summarised in the respondent's short term absence policy [58-9], provided; "*Where an employee is deemed not medically fit by the IP provider's medical specialist(s) and the employee is considered to be eligible for IP, the employee will receive 67% of covered pay, defined as base pay plus pensionable shift pay if applicable…for a maximum of two calendar years…"* After two calendar years the employee might be dismissed but, if the employee were to continue to meet the definition of incapacity; *"..the IP may continue to until age 65 or state pension age if higher.*"

13. The claimant was employed by the respondent as a Control Operator. On his evidence, his opinions on certain matters of health and safety and the competence of his colleagues differed from those of his manager and the relationship between them soured. He also suffered from some physical symptoms which led colleagues [123] to scrawl disparaging comments about his attitude to work on one of his work lockers. These matters caused the claimant to be upset and increasingly withdrawn.

14. On 5th April 2017 the claimant telephoned a confidential support group which provided support to help people with mental health disorders. This in turn led the claimant to attend his GP on 7th April 2017 who certified that the claimant was not fit to attend work for one month [144]; 7th May 2017.

15. The claimant's GP reviewed him on 4th May and certified that he was not fit to return for a further three months; 4th August 2017.

16. Following an appointment with Elaine Codd, the respondent's occupational health nursing advisor, Ms Hicks was aware that the claimant had been prescribed medication and was attending counselling. She was not able to predict when the claimant would be likely to return to work.

17. On the 8th June 2017, following a consultation with the claimant Dr Liu, the respondent's appointed occupational health doctor, prepared a report for the attention of Ms Hicks [150-3]. In his summation of the claimant's condition he stated:

    "...The presence of a work related trigger is likely to prevent a successful return to work. Therefore, a return to his formal role in a regular and sustainable fashion appears unlikely without some degree of a work solution through mediation. If mediation is unsuccessful, the next step will be to consider permanently redeploying Mr Jones to a separate area to maximise the chances of sustainability.

    Given that Mr Jones' current symptoms at its current level are likely to interfere with the effectiveness of a formal discussion at work, I would suggest allowing additional time for him to improve further. As such, I would recommend a review with the OHA in two months' time to re-assess for fitness to attending a formal meeting."

18. The recommended two months for further improvement would have delayed the respondent progressing towards a formal meeting until the 8th August 2017. This prognosis was similar to that of the GP, as noted above.

19. On 14th 2017 June Ms Hicks wrote to the claimant to inform him that she had arranged a mediation meeting with Mr Ricky Cook and a senior Manager Mr Richard Allan, its purpose was to understand the "*the issues you currently have with your line manager and to explore ways in which the company may be able to assist*" [154]. Whilst the purpose of the meeting reflects the advice of Dr Liu the timing of the proposal appears to ignore that same advice.

20. The letter distressed the claimant and he informed a member of the respondent's HR staff that he had become emotional and upset on receipt and that he was not well enough to attend on the 20th June but would do so when he was able.

21. The notes of Ms Codd [130] record her conversation with the claimant on the 19th June 2017: "*Advised the meeting would not take place until he was stable enough to deal with it and that it was possible it could take place off site in company of someone of his choosing.*"

22. In Ms Hicks' witness statement, at paragraph 21, she refers briefly to this correspondence. In cross examination she accepted that her letter was likely to have caused the claimant upset and that her proposal was "too quick" given the aforesaid advice from Dr Liu.

23. On 22nd June Mr Cook wrote to the claimant [155] proposing that the mediation meeting took place on the 18th July 2017, outside the refinery, with himself and Richard Allen. The letter concluded with an extract from the respondent's Short-term Sickness absence management policy; "*It should be noted that sickness absence pay may be withheld at any time if an employee does not provide reasonable co-operation during sickness absence, with the concurrence of the Human Resources Director or his/her equivalent*."

24. In the original policy this paragraph [56-57] is set out within the context of "Medical referrals" and the employee's duty to co-operate with medical examinations. The policy does refer to contact with the employer; "*Throughout the STSA period, the line manager and employee should agree to have a continued regular dialogue on the expected date of return to work"*. The policy goes no further.

25. Mr Cook's evidence explained the inclusion of the paragraph. He stated that, in consultation with the respondent's recognised trade unions, the respondent had agreed to include the paragraph in correspondence with absent employees to make sure employees were aware of the possible consequences of failing to comply with their responsibilities under the STSA policy; a preventative measure.

26. We note that his senior manager, Ms Hicks, did not include that paragraph in her correspondence of the 14th June 2017 nor does her correspondence of the 12th September 2017 [165] which, in essence conveys the same message as Mr Cook's letter of the 22nd of June 2017. Ms Hicks however does cite the same element of the policy in her correspondence of 6th October 2017 [169-70]. In that letter the cited STSA paragraph is preceded by Ms Hick's statement: "*I am concerned that, despite every effort made by the company to accommodate your return to work, you continue to dwell on an issue which has been removed."* and goes on to state that if the claimant did not commit to a date to meet with occupational health prior to the 12th October 2017 she would request that his sick pay be withheld. The respondent's briefing note for the claimant's eventual appeal against dismissal [383] states expressly that the claimant was advised in this letter that he could lose his sick pay because Mrs Hicks did not

believe the claimant had provided reasonable co-operation to reach a resolution to the issues underpinning his absence,

27. The tribunal also note that Mr Cook's evidence in chief did not advance the explanation given in his oral evidence and that the respondent has not offered any documentary evidence which corroborates Mr Cook's explanation.

28. We do not find Mr Cook's explanation credible.

29. On 27th June 2017 Ms Codd met the claimant to review his health. On 4th July Ms Codd wrote to Ms Hicks providing advice in respect of the claimant's health. Inter alia, she advised Ms Hicks that: "*...this type of reactive state can often be improved by resolution of the precipitating factors*." [157]. She further advised that the claimant was not well enough to attend a formal meeting with the respondent.

30. Following a further review on 17th July 2017 Ms Codd advised [158] that the claimant's symptoms had lessened in severity. She did not advise that his ability to attend a meeting had changed from her previous opinion. On the 4th August the claimant's GP issued a medical certificate which stated that the claimant was unfit to attend work before the 4th November 2017 [159].

31. On the 18th August Ms Codd advised that the claimant was continuing to show signs of improvement and that new medication had been prescribed which would take a few weeks to establish its effective level. Nevertheless, she did not consider that he was fit to return to work.[160].

32. Around 6th August Dr Liu sent a report to the respondent, addressed to Ms Hicks [162-4]. He too confirmed an improvement in the claimant's health. He noted that the claimant felt that he had been unjustly treated in work, needed to regain trust in his employer and to be reassured that which he had alleged had happened would not reoccur. Dr Liu's opinion was: "I *do not foreseeable (sic) Mr Jones returning to work without some form of a work solution*.". He added later; "*Addressing his concerns and mediation may allow a sense of closure for him to improve further and return to work".* In his concluding paragraph he stated: "*long term prospects of returning to work are poor as long as his concerns remain unresolved. The key factor is whether management feels able to achieve said resolution considering the wider aspects of this case."*

33. With the benefit of the advice from Ms Codd and Dr Liu Ms Hicks invited the claimant to a meeting on the 19th September [165] and the claimant agreed to attend.

34. There is a degree of disagreement between the parties about the nature of the discussion which took place between 10 and 11 am on the 19th September 2017. Ms Hicks and the claimant have given evidence to the tribunal on this issue. Both have produced written synopses or accounts of the meeting [166- 170]. Mr Richard Allen, the third participant has not provided an account.

35. On the two accounts produced by Ms Hicks the following facts are evident; the meeting did not seek to mediate the claimant's concerns nor did it seek resolve his concerns. The respondent

sought to place the claimant in a post where he would no longer have contact with his former line manager.

36. In our own objective assessment of this meeting we have taken into account the relevant witness evidence of the claimant and Ms Hicks. In cross examination Ms Hicks accepted that the claimant had told her and Mr Allen about his line manager's behaviour. She accepted she had advised the claimant that "he had to move on". She denied that she said "put Karl in a box". She agreed that she had told the claimant that he need to stop dwelling on negative thoughts. She stated that the claimant had agreed with this. She further stated that the claimant would not talk, in detail, about a return to work but returned to the issue of his line manager's behaviour. Ms Hicks was clear, that in her mind, the claimant had aired his concerns. She also accepted that she was aware that his concerns were not resolved by the end of the meeting and that she did not invite him to seek a resolution, for instance, through the respondent's grievance procedure. Ms Hicks stated that it was she, not Mr Allan who had compared the claimant's mental health to a physical injury such as a broken leg; that mental health illness was not as apparent or easy to understand compared to a physical injury.

37. The claimant's notes are much briefer [167]: "told to put Karl [the claimant's line manager] in a box", Move on." We accept that the claimant felt that he was being prevented from voicing his concerns and that caused him a great deal of upset.

38. The respondent's meeting of the 19th September was not a mediation process nor did it seek to achieve a resolution of the claimant's sense of injustice. Rather, according to the Response [29E, paragraph 12] it sought to inform the claimant of a decision it made prior to 7th April 2017, which had not been communicated to the claimant due to his ill health absence; that he was to be transferred to a different shift and would no longer be reporting to his current line manager.

39. On the 26th September 2017 Ms Hicks and the claimant spoke by telephone. In response to the claimant complaining that the respondent had done nothing to address his allegations about his line manager's conduct Ms Hick's advised him that he needed to let go the negative feelings he had about his line manager because he would not be returning to work on that manager's shift.

40. It is evident, in our judgment, that the respondent was aware of the medical advice that a resolution, or at least an attempt to achieve resolution, perhaps through mediation, was the process which was most likely to improve claimant's mental health and thereby to hasten the claimant's fitness to return to work.

41. The respondent perceived that decision as having a co-incidental benefit; it resolved the difficulty the claimant had with his line manager by ending their working relationship.

42. Ms Hicks advised the claimant to lay aside, to let go of, his negative feelings. The claimant agreed he needed to so do. Both the claimant and Ms Hicks were aware that his feelings which were, on the medical advice provided to the respondent, the underlying cause of his previous five months of sickness absence, had not been resolved through medication, counselling and psychiatric help.

43. On 5th October 2017 Ms Hicks wrote to the claimant [169-70]. The letter set out Ms Hick's perception of the conversations of the 19th and 26th September and surrounding events. Ms Hicks responded to the claimant's assertion that the respondent had failed to do anything about his line manager's actions thus; "…as mentioned previously, there has been no grievance raised by yourself against [the line manager] for the Company to investigate."

44. Ms Hicks, as the Director of HR, was aware of the respondent's grievance procedure and the informal stage [61 and 64] of that procedure which provided the employee with an opportunity to informally discuss concerns about their line manager with a more senior manager and to seek a resolution without raising a formal grievance. This process was akin to, or could have encompassed, Dr Liu's advice to the respondent to consider mediation of the difficulty between the claimant and his line manager.

45. It is clear that the respondent considered that removing the claimant from his former line manager's shift was sufficient to remove; "the stumbling block referred to in Dr Liu's letter" [170] albeit Dr Liu's written report [162] also emphasised the need for a sense of closure, to enable the claimant to regain trust in the company; that his prospect of returning to work was poor as long as his concerns remained unresolved [163].

46. As noted above, this letter concluded with a warning that Ms Hick's intended to instruct the respondent's pay roll to stop the claimant's sick pay if he did not commit to attending an occupational health meeting prior to the 12th October 2017 [170]. In cross examination it was put to Ms Hicks that the reason she raised the possibility of the loss of sick pay was her belief that the claimant was wilfully reluctant to return to work. She admitted this.

47. When first asked whether she thought that view was unfair, Ms Hicks said "No". When asked again She accepted that she no longer thought that the claimant had been reluctant to return to work and no longer thought it was fair to threaten the withdrawal of sick pay.

48. She further accepted, with hindsight, that setting a short time frame for the claimant to attend an occupational health meeting was "piling on the pressure".

49. The claimant's evidence, corroborated by the notes of Ms Codd dated 29th September and 3rd October 2017 [133-4], described a significant worsening of his symptoms following the 19th September meeting and subsequent telephone call with Ms Hicks. The dosage of his anti-depressant medication was doubled and that increase had a corresponding effect on the side effects of his medication; poorer sleep, severe headaches and dizziness.

50. By the 12th October 2017 the respondent's note of a telephone discussion with Dr Liu demonstrates the respondent was contemplating dismissal: "- if over 8 weeks we can make a judgment as to whether we wish to continue the contractual relationship." [172].

51. Ms Codd's record of the claimant's attendance at a meeting with her on 13th October [136] records that the claimant had taken diazepam to be able to attend that appointment.

52. Following her assessment of the claimant she wrote to Ms Hicks [194] describing the claimant's current health and the possible plan for a return to work when the claimant was well enough to do so. In the last paragraph she advises Ms Hicks that the:

> *"…blockage to a successful return..." was the claimant's "perception of workplace issues/ employee relation issues*." She concluded thus; *"Clinical evidence suggests, that until this perception has been resolved, one way or another, the employee is likely to continue with their symptoms."*

53. The advice from Dr Liu and Ms Codd was consistent on this point and Ms Hicks was clearly aware of that advice.

54. Following receipt of Ms Hicks' letter, the claimant submitted a formal grievance on the 30th October 2017 [195-198]. The claimant's complaint centred on the alleged conduct of his Line manager and a reference to an occasion when persons unknown had written abusive comments on the claimant's "alkey" locker. The Respondent's grievance procedure [61-4] states that a grievance raised by an employee against their line manager should be raised with the next level of management. That manager should, if the grievance is contested:

a) Invite the employee to a hearing to formally discuss the grievance;
b) If the matter needs further investigation, the line manager should undertake such investigation, and
c) Thereafter respond to the employee in writing, normally within five days of the hearing.

55. On the 20th November the claimant attended a grievance hearing. He was accompanied by his trade union officer Allan Card. The grievance hearing was managed by Mr Cook rather than the relevant line manager.

56. The Claimant and Mr Cook addressed this meeting in their witness statements and their oral evidence. There are significant differences between them which we must decide. Mr Card has not provided any evidence but we have considered the content of emails which he sent to the claimant and Mr Cook in the aftermath of the meeting.

57. We are satisfied that prior to the grievance hearing Mr Cook had undertaken some investigation and had taken statements from some of the relevant witnesses. He had also prepared questions for the claimant which he had written out as a prompt for reference in the grievance hearing [247A -ZF].

58. It is also evident from the hand written annotations to that document, that during the meeting Mr Cook did ask the claimant questions concerning his grievance statement.

59. It is common ground that, having completed his questions arising from the claimant's grievance complaint, Mr Cook raised a separate issue based on his typed note. This related to a verbal comment he received from an employee of the respondent [247ZE] which stated, although we are not clear if this person was a witness to the event or repeating a rumour, that the claimant had taken a photograph of his Shift Team Leader whilst that person was asleep on duty. Mr Cook put a series of questions to the claimant, which we set out verbatim:

"Why did you take the photograph, what was your intentions, would you have been happy if this had happened to you, did you intend to blackmail him, use it for him to look favourable on you, would you class this as Intimidation? What was your intentions? Do you still have the photograph?"

60. After these questions were put to the claimant without warning, the claimant and his representative asked for an adjournment.

61. At this juncture there begins a significant divergence in the evidence between Mr Cook and the claimant.

62. Mr Cook cannot give evidence of what was said between the claimant and his representative during the adjournment and accordingly we accept the claimant's evidence, set out in paragraph 49 of his statement, and find that the claimant was advised to close his grievance which would mean the issue of potential "blackmail" or "intimidation" against the claimant would not be pursued. He went on to say that Mr Cook had indicated in the meeting that the grievance had been upheld and asked the claimant what more he could achieve. The claimant instructed his trade union representative that he agreed to the proposed course of action, so long as the grievance was upheld. The claimant and his trade union representative returned to the meeting.

63. In the reconvened meeting the progress of the grievance was mentioned and, it is common ground that grievance process concluded on that day. The witnesses' account of reasons and basis upon which that closure took place are irreconcilable and we have therefore deliberated upon which account was the more likely to be reliable.

64. We have concluded that we find the claimant's evidence more reliable than that of Mr Cook. We have done so on two broad grounds, the first entailed considerations of doubt about the reliability of Mr Cook's evidence in wider respects and the latter, which we address below, turned on the evidence pertinent to this issue.

65. We noted that Mr Cook stated he was unaware that the claimant had taken diazepam during the adjournment in the grievance meeting whereas, in an email to UNUM, dated the 22nd November 29017 [[456] he reported; " during our meeting we had to adjourn for him to take diazepam for anxiety."

66. We took into account the medical evidence, cited above, how the claimant had expressed the cause of his mental health illness, the depth of his feeling, that a resolution of the line manager's alleged conduct was important to his recovery. We noted, to use Ms Hick's phrase, the claimant's "fixation" with the subject matter of his grievance.

67. We find it difficult to believe that the claimant would have withdrawn his complaints without some specific outcome to the grievance process. Even with the fear of a counter allegation of intimidation, we do not believe he would have done so unless he perceived the outcome was positive.

68. We noted the subsequent correspondence between the parties.

69. On the 20th November email Mr Cook sent to the claimant's trade union representative [248] asking him to confirm that "the grievance submitted by is now formally closed and that no further action is required". To which the claimant's representative replied; "*Please accept this as confirmation from Russell that a line has now been drawn in the sand on this matter and that he is content with the way that the grievance has been resolved*".

70. We have balanced this evidence with Mr Cook's letter of the 22nd November 2017 [249] which said: "*I can confirm your involvement within the grievance procedure is now complete. All relevant documentation will be given to the Operations Management for review and decision will be made by them on any action going forward regarding the matters that you raised*."

71. Further we considered the claimant's subsequent email to his trade union representative [page 249A] and the trade union officer's response; "*I am content that this letter says that your grievance was justified and upheld*". Neither gentleman refers to a "withdrawal".

72. The claimant then wrote to Mr Cook [250-251] concerning the content of Mr Cook's letter of the 22nd November; "….*But you have not indicated: a) Whether the grievances are considered justified and upheld, this is certainly the impression you gave in the meeting but this is not reflected in the letter*."

73. We considered Mr Cook's response [259] and the claimant's personal note, dated the 10th December 2017,[265] of events on the 20th November and the correspondence which followed.

74. Taking all of the above into account we find that Mr Cook's account is less likely to be correct and we have concluded that the claimant agreed to the conclusion of the grievance procedure because Mr Cook had indicated that the grievance, in his opinion was justified and upheld and that the information collected during the investigation would be passed on to a senior manager to consider what action might be necessary.

75. On 6th December 2017 the claimant attended a consultation with Dr Liu [257-8]. The Doctor noted some improvement in the claimant's health. The Dr noted that the claimant told him of a positive outcome to the grievance but there was a lack of written evidence of that decision which make it difficult for the claimant to achieve closure; a previously noted step to recovery and thereby, his return to work. The Doctor advised that *"It may be worth considering a trial return to some form of work as it is likely to be therapeutic for him*."

76. There was advice on the possible number of hours a day and the number of days a week on which the claimant might start and taking the advice Ms Codd in respect of any increase in hours.

77. On Friday 8th December 2017 [259] Mr Cook wrote to the claimant stating that the grievance had not been upheld and had been closed when the claimant said he wanted to draw a line in the sand.

78. On the 8th December Mr Cook also wrote to the claimant informing him that the respondent had, following the advice from Dr Liu, decided to plan for the claimant to return to work the following week; Monday 11th December 2017. The claimant was to work in the Horseshoe

Building and to do work which the company considered suitable, as well as added value to the company itself.

79. The claimant replied to the Mr Cook's second email saying that his own GP wanted to see him before he returned to work and she was not available until the 15th December 2017 with a view to starting work on the 18th December.

80. In this same period the claimant was beginning to distrust Mr Cook, and his own trade union representative concerning the grievance outcome; he had taken legal advice, contacted ACAS and on 14th December 2017 he wrote to Mr Cook complaining that the respondent had not complied with the relevant Code of Practice [269- 270]. In essence the claimant stated that, if the grievance had not been upheld, then the process was not at end.

81. The claimant attended his GP who certified that he was not fit to commence work and the claimant wrote to several senior members of the respondent on the 17th December 2017 [272] setting out his perception of the grievance hearing and its aftermath and concluding by stating that the stress consequent to the grievance, financial hardship and not knowing when he would be fit for work had made him too ill to attend work on the 18th December 2017 [272],[275].

82. On 2nd January 2018 Mr Cook wrote to the claimant [277-8]. He noted that the claimant's GP had certified the claimant as unfit to attend work. He noted the cause of the claimant's inability to attend work stemmed from anxiety resulting from "dealing with myself and the Union"; a reference to the grievance process. He stated:

    "As you maybe aware, the advice from the Occupational Health profession overrules a GP fit note.

    By failing to conform to the recommendation set by Dr Liu you have placed yourself at risk as your absence is unauthorised and this could result in a finding of frustration of contract.

    This letter serves to confirm you are to attend a disciplinary hearing on Thursday 11th January 2018 at 10:30 hours at the HR department"

83. On the same day Mr Cook sent the claimant a formal outcome regarding the claimant's grievance. In the second paragraph he wrote as follows:

    "However the occupational advice to the company received in early December and indicated that addressing the issues with the grievance outcome would assist your ability to return to work and sustain your attendance……I am providing you with this formal outcome now in an attempt to remove any perceived obstacles to your return to work."

84. None of the elements of the claimant's grievance were upheld due to insufficient evidence. This outcome was reached without the completion of the investigation.

85. The claimant responded to Mr Cook's letter expressing his intent to appeal. Mr Cook responded [286] stating that the claimant had no right of appeal because; "… at your request the grievance was closed out…"

86. Due to the claimant's ill health, the date for the disciplinary hearing was adjourned to the 1st February 2018 and then further delayed, without any specific date for a hearing [291].

87. The tribunal read the report of Dr Gnanavel, Consultant Psychiatrist, dated 25th January 2018. It included his advice that the claimant's medication of Sertraline be increased from 100mgs to 150mgs and, if needed, to 200mgs. He recommended that the claimant needed to cut down his use of Diazepam and recommended a follow up appointment in four to five months [291A-D].

88. A medical certificate dated 31st January 2018 certified that the claimant was unfit for work for five months [298].

89. In a report dated 6th February 2018 Dr Liu expressed the opinion that the claimant's health had deteriorated since his December 2017 advice. He stated that it was possible that the claimant's anxiety might improve to the extent he would be able to return to work, in some capacity after three months and there were no reasonable adjustments which he could recommend at the time [305 -305F].

90. At a further review, summerised in a report dated 7th March 2018 [314], Dr Liu noted very little improvement in the claimant's health and his recommendation was limited to a repetition of his previous advice for a further review in two to three months: May or June 2018.

91. On the 16th March 2018 Mr Cook wrote to the claimant to invite him to attend an meeting on the 22nd March at which the respondent would consider the termination of the claimant's employment [316].

92. The claimant wrote to Mr Cook on the 22nd March asking the respondent to delay the proposed meeting "for a few weeks per the company doctor's advice in his last O/H assessment". Essentially a request that he be allowed for his health to improve before the question of his dismissal was decided.

93. Mr Cook declined the request stating that, despite the increase in the claimant's medication no improvement had been reported. He quoted from Dr Liu's report: "*importantly he [Dr Liu] added that the key factor is whether management deems it reasonable to wait a further period*" and for these reasons the hearing would remain fixed for 29th March 2018.

94. The tribunal notes that the respondent was aware of Dr Liu's advice that the claimant was probably not well enough to attend a formal meeting with the respondent [305B, second paragraph].

95. The meeting of the 29th March did not take place and a further review was undertaken by Dr Liu on 5th April 2018 [342-6]. The advice to the respondent was that the claimant was not likely to be fit to return to work for three to six months, if not longer.

96. Before turning to our conclusions on the dismissal and appeal against that decision we turn to one of the factors taken into account as part of the rationale for the claimant's dismissal; the

decision of UNUM to reject the application by the respondent for payment in respect of the claimant's salary during his ill health.

97. The respondent operates an income protection scheme [58-60], the cost of which is underwritten by an insurance company called UNUM. The scheme states that an employee who has been on Short Term Sickness Absence ("STSA") benefit for ten weeks, and is unable to return to work will be sent an "IP Claims package" which the employee is obliged to complete; on pain of losing their contractual sick pay if they fail to do so. The claimant's responsibility includes consenting to allow UNUM to access medical records and to attend a medical assessment if so required.

98. UNUM then undertakes to review the information provided and determine whether the employee is deemed not medically fit for work. If the employee is eligible for income protection then the employee will receive "67% of covered pay". The Income protection pay is paid to the employee through the employer's payroll for the first two years.

99. At the end of the two-year period, if the employee is still unfit for work the employee may be issued with notice of termination on the grounds of capability.

100. If the employee continues to meet UNUMs incapacity criteria the income protection may continue until age 65 or state pension age, if higher.

101. By the 18th October 2017 the claimant had exhausted his entitlement to sick pay and faced significant financial difficulties, which subsequently exacerbated his stress. He complained with the IP claims policy and completed an application to UNUM. Mr Cook then wrote to the claimant informing him that UNUM had not expressed a decision upon the claimant's eligibility but, the claimant could receive compensation at 66% (rather than the 67% stated in the policy) of his current annual salary.

102. On 1st November 2017 the respondent informed the claimant of UNUM's decision thus; that the reason the claimant could not return to work was not his ill health but the workplace issues. Accordingly, he did not suffer from a medical condition or symptoms that were of a severity that would have prevented him from returning to work [210].

103. The claimant appealed and provided medical evidence from his GP and a psychiatrist's report. On 12th December 2017 UNUM wrote to the respondent indicating that the assessment of the claim had not changed and liability was declined. [268].

104. In cross examination both Ms Hicks and Mr Cook were taken to correspondence between the respondent and UNUM.

105. On the 17th October 2017 Mr Cook emailed UNUM expressing the following statement about the claimant:

> "I would like to make you aware that continuously Mr Jones has been reluctant to return to work through his stress/anxiety due to work issues. We have met with Mr Jones on two separate occasions offering him the opportunity to change shift, move to a different area

etc. basically eradicating the work issues. Mr Jones has still refused to return to work and the possibility is that this will lead to a disciplinary through the Valero process."

106. Ms Hicks, on the 5th March 2018 [435], wrote to UNUM describing the respondent's perception of the claimant's inability to return to work on the 18th December 2017. The account fails to describe that the Claimant's GP certified that the claimant was not fit for work, incorrectly states that the claimant had not given notice of his continued absence until the 18th and expressed the company's belief:

"It is the company's belief that as soon as we put adjustments in place to accommodate Russell's return to work, he changes the goal posts."

107. UNUM responded and asked Ms Hicks; "If you are happy for me to add this to our assessment, it will assist us" [434]. Ms Hicks confirmed she was happy for her comments to be added to UNUM's assessment.

108. By the 16th March 2018 UNUM had rejected the claimant's application again. The 16th March was also the date on which Mr Cook invited the claimant to the hearing to consider the termination of his employment.

109. The tribunal notes that Ms Hicks' expressed perception of the claimant on 6th October 2017 and 5th March 2018 evidences a theme of doubt about the degree to which the claimant's ill health impeded him from returning to work. Similarly, Mr Cook's email to UNUM on the 17th September 2017 and his institution of a disciplinary process on the 2nd January 2018 is also indicative of an unwillingness to accept that the claimant was too ill to attend work.

110. Returning to the respondent's process which lead to the claimant's dismissal.

111. Following Mr Cook's letter of the 16th March 2018 Mr Jones replied making several points and asking Mr Cook, in litigious terms, to explain what Mr Cook believed the respondent had done when he wrote: "all our efforts to support your early return to work…"

112. The questions were repeated in Mr Jones. email of the 24th March 2018 [330] with an additional request: *"…also who is the person appointed to keep in contact with me…".* Mr Cook's response [332] identified the offsite meetings of September 2017, the Occupational Health appointments and telephone discussions and the return to work plan for the 18th December 2017.

113. On the 27th March the claimant wrote to Mr Cook setting out a brief history of his efforts to improve his own health and concluded with the following: " *I believe that I will have an unfair dismissal claim, disability discrimination claims and a potential personal injury claim.*"[334].

114. By the 10th April 2018 the respondent had received a further report from Dr Liu in which [342-6] the prognosis had not changed; the claimant was not likely to be able to return to work in any capacity for a further three to six months, if not longer.

115. Mr Cook wrote to the claimant asking that he responded to a series of questions by the 13th April 2018 [357]. The claimant complied with that request [360-1, 365] by the 13th April. In addition to his answers, Mr Jones stated to Ms Hicks:

> *"I am increasingly dissatisfied by the actions of Ricky Cook which have aggravated, rather than aided my recovery from my current condition. As informal comments have not had any effect, I now wish to raise a formal grievance."*

116. Ms Hicks did not respond on the 13t April. On the 16th April she wrote, declining to allow the claimant to commence a grievance because; "… the issues you raise are intrinsically linked to the consideration of dismissal process and therefore a separate grievance is not required." [365].

117. The formal hearing was chaired by Mr Diment, the claimant did not attend due to his ill health. We considered Mr Diment to be a candid witness.

118. In cross examination Mr Diment provided the following evidence:

119. With respect to the claimant's failure to commence a phased return to work on the 18th December 2017, he was unaware that his absence at that time was consequent to the claimant's GP's advice that he was not well enough to do so and that a medical certificate confirmed that opinion.

120. He did not have the January 2018 psychiatrist's report or the occupational health reports. He was aware that Mr Cook had asked the claimant to answer specific questions concerning his health but he had not seen the claimant's answers at the time he made the decision to dismiss the claimant. His knowledge of the claimant came from Mr Cook.

121. He accepted that the respondent could have waited to see if the claimant's health improved and the respondent could have retained the claimant as an employee during his notice period to see if there was any improvement in his health. He did not take into account the claimant's length of service or consider whether there were any alternative duties that the claimant could undertake.

122. He was unaware, at the time that the letter of dismissal [363] was not strictly correct when it stated "You are not fit for any work at present or for at least the next six months"; because he had not seen Dr Liu's April 2018 report, which referred to a period between three and six months. The letter of dismissal had been drafted by HR and Mr Cook had advised him to dismiss the claimant.

123. He accepted he would not go against the advice from HR. He accepted that if UNUM had accepted the claimant was incapable of work that could have changed his mind but he was not minded to wait for the outcome of the claimant's final appeal against UNUM's decision due to the ongoing cost of covering the claimant's post.

124. In answer to questions from the tribunal Mr Diment stated that he had not considered any documentary evidence, nor the written answers which the claimant had provided on the 13th April. The tribunal notes, that because Mr Diment was not provided with the claimant's

answers, he was also not aware that the claimant was accusing Mr Cook of impairing his recovery. Consequently, Mr Diment did not have the opportunity to investigate this or consider Mr Cook's advice in that context.

125. In essence, Mr Diment had been provided with a dismissal letter by Mr Cook. All of the information and advice which Mr Diment considered came from Mr Cook and that information was accepted. Mr Cook's letter included the following statement of fact *"Valero considers it has done everything reasonably possible to help resolve the workplace difficulties."* That, along with the annual cost of covering the claimant's absence, which was in the region of £80,000.00, was the basis on which Mr Diment signed the letter of dismissal and terminated the claimant's employment, with pay in lieu of notice, on 14th April 2018.

126. On the 17th April the claimant wrote to the respondent setting out a brief outline of his grounds of appeal [373] and the following day the respondent wrote to the claimant to inform him that his appeal would be heard by Mr Andrew Thorp on the 26th April 2018 [374].

127. The claimant was able to attend the hearing as the respondent had allowed the claimant to be accompanied by two trade union officers one of whom was there to provide personal support to the claimant whilst the other, Mr Card, acted as the representative.

128. Present at the appeal hearing were Mr Thorp, Ms Hicks, the claimant, Mr Allan and Mr Kavanagh. Ms Hicks produced a summary of the discussions between the parties at the appeal [379-81]. She had also prepared a three page document titled "Absence Management Review – April 2018" which Mr Thorp accepted he had received before the appeal hearing commenced but not disclosed to the claimant or his representative. In cross examination Mr Thorp accepted his decision making was influenced by Ms Hicks' written account of events.

129. The claimant's appeal raised four broad arguments:

a) The conduct of the respondent's employees had caused the claimant's ill health absence.
b) The conduct of the respondent's HR manager, Mr Cook, had worsened the claimant's health as had a change of the intended phased return role in December 2018.
c) The respondent had failed to understand the claimant's health or listen to the medical professional's opinions.
d) That recent changes in the claimant's medication could lead to an improvement in the claimant's health.

130. Mr Thorp's outcome letter was based on the following: evidence and submissions made during the appeal hearing, discussion with Mr Cook prior to the appeal hearing, discussions with Ms Hicks (who advised Mr Thorp to uphold the dismissal) and Ms Hicks' summary of the events.

131. Within Ms Hick's summary were comments on some importance:

> "*As part of the evidence, all of Dr Liu's reports and the Consultant psychiatric report were reviewed from which it is clear that as soon as the Company puts adjustments in place to accommodate Russell's return to work, he changes the goal posts."*

132. She repeated comments, noted above, about the claimant's reluctance to return to work and "his failure to provide reasonable co-operation to reach a resolution to the issues underpinning his period of sickness absence." [383].

133. She described the claimant, and Mr Card being clear that the grievance had been withdrawn, without mentioning their assertion that it had been upheld. She described the eventual formal rejection of the claimant's grievance as; "an aid to assisting Mr Jones with his return to work."

134. The claimant and his representative were not invited to comment on the accuracy or inaccuracy of Ms Hicks' statement.

135. Mr Thorp's approach to the appeal was not to reconsider the merits of the claimant's objection to dismissal, only to consider anything new; matters which had not been put forward to Mr Diment.

136. Mr Thorp's decision was sent to the claimant in a letter dated the 5th May 2018 [385—7]. It was drafted by Ms Hicks based on her discussion with Mr Thorp after the hearing.

137. In our judgment the content of the letter was substantially influenced by Ms Hicks despite Mr Thorp's assertion that he made his own judgment. For instance, in cross examination he accepted that, with respect to the claimant's grievance he had only seen Mr Cook's January 2018 grievance outcome letter whilst Mr Thorp's letter asserts "I have reviewed the grievance hearing notes", The letter also summarises all of the medical advice provided to the respondent whilst Mr Thorp stated in cross examination that he had seen the last three to six months of that advice but in cross examination he was not able to be specific about which documents he had seen.

138. The Tribunal noted the respondent's written closing submission [paragraph 200] conceded that the failure to garner all the evidence at the appeal hearing itself is a procedural irregularity. The same admission was made in respect of Mr Diment's hearing [paragraph 198].

139. Mr Thorp does not appear to have been informed of the medical recommendation for mediation or the medical advice that resolution of the underlying cause of the claimant's mental health problem was an important aspect of recovery: a matter which was apparent from the occupational health reports but absent from Ms Hick's summary.

140. In his outcome letter Mr Thorp does not address the account given by Mr Card, and the claimant, that Mr Cook had stated that the claimant's grievance was upheld and for this reason the claimant did not pursue it further. Mr Thorp's outcome letter reflects Ms Hick's briefing note; which does not mention the claimant's complaints about Mr Cook.

141. In any event, the respondent concluded it was not reasonable to re-instate the claimant and allow him a further period as an employee to see if his health would improve sufficiently to enable his return to work within a three to six month period.

142. Finally, we address the respondent's decision to determine that the claimant was a "bad leaver" and the consequent adverse effect that had on the claimant's entitlement to "matching shares" and the tax treatment of those shares.

143. It is common ground that if the claimant's employment was terminated by reason of injury, disability, redundancy or retirement he would be required to take all his shares, including matching shares awarded by the respondent, out of the company SIP and would not pay income tax or national insurance on those benefits.

144. It was common ground that if he left for any other reason, he would forfeit the "matching shares" the respondent had awarded him in the previous three years of his employment and that the benefit would be subject to income tax and national insurance deductions.

145. It is common ground that the respondent decided the claimant's termination was by reason of capability and, for this reason he was deemed a "bad leaver".

146. Ms Hicks was asked in cross examination whether the respondent had understood that the claimant was person with a disability at the time of its decision. She confirmed it did so. She also accepted that the claimant's disability was the cause of his absence and the root reason for his dismissal. She was asked whether the respondent had the option to correct the reason for the claimant's termination to show "disability" and Ms Hicks accepted that was possible. Ms Hicks could not explain why that had not been done.

147. Whist the respondent has not conceded this claim, its submissions on contractual liability only, in this respect were limited to a written undertaking; "to pay the monies forthwith" [paragraph 202]; the amount the claimant lost as a consequence of the respondent declaring that claimant a "bad leaver".

Discussion and conclusions

148. Both parties submitted substantial written submissions to which we will refer but not recite in detail.

The claims of discrimination arising from disability

15 Discrimination arising from disability

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

(a) A treats B unfavourably because of something arising in consequence

of B's disability, and

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

a legitimate aim.

(2) Subsection (1) does not apply if A shows that A did not know, and could not

reasonably have been expected to know, that B had the disability.

149. In **Basildon and Thurrock NHS Foundation Trust v Weerasinghe** [2016] I.C.R. 305, EAT. Langstaff P cautioned against a "deliciously vague" approach to causation and concluded that the Act requires Employment Tribunals to approach causation in two stages:

> "26 The current statute requires two steps. There are two links in the chain, both of which are causal, though the causative relationship is differently expressed in respect of each of them. The tribunal has first to focus on the words "because of something", and therefore has to identify "something"—and second on the fact that that "something" must be "something arising in consequence of B's disability", which constitutes a second causative (consequential) link. These are two separate stages. In addition, the statute requires the tribunal to conclude that it is A's treatment of B that is because of something arising, and that it is unfavourable to B".
>
> In **Pnaiser v NHS England** [2016] I.R.L.R. 170, Simler J summarised the proper approach to section 15:
>
> (a) A Tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises.
>
> (b) The Tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a section15 case. The 'something' that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.

150. In **Hall v Chief Constable of West Yorkshire** [2015] IRLR 893, Laing J approached the test by asking: what was the "effective cause" of the unfavourable treatment?

151. The concept of "because of" in section 15 is no different from the concept in section 13. To determine this particular question (in a non-obvious case) therefore requires a consideration of the motivation of the decision-maker, and whether the "something" in the particular case materially influenced them. See: **City of York Council v Grosset** [2018] ICR 1492 (CA) at paragraphs 36 – 37; **Dunn v Secretary of State for Justice** [2018] EWCA Civ 1998, at paragraph 18.

152. As noted by the claimant the "something" does not need to be directly linked to the disability; there is a loser causation test under section 15: **University of Edinburgh v Shiekholeslami** [1018} IRLR 1090.

153. The term unfavourable is synonymous with the term detriment for these purposes is to be broadly defined; it will protect against any disadvantage and should be found to exist if "a reasonable worker would or might take the view that the treatment in issue was, in all the circumstances, to his detriment: **Jeremiah v Ministry of Defence [**1979] QB 87 CA and **Shamoon v Chief Constable of the Royal Ulster Constabulary** [2003] IRLR 285 HL, at paragraphs 104 to 105.

The Defence

154. The burden of proof is on the respondent to prove:

155. Any proven unfavourable treatment was for a legitimate aim and

156. It acted proportionally.

157. In **Bank Mellat v HM Treasury (No 2)** [2014] AC 700 per Lord Sumption: "20 … the question depends on an exacting analysis of the factual case advanced in defence of the measure, in order to determine (i) whether its objective is sufficiently important to justify the limitation of a fundamental right; (ii) whether it is rationally connected to the objective; (iii) whether a less intrusive measure could have been used; and (iv) whether, having regard to these matters and to the severity of the consequences, a fair balance has been struck between the rights of the individual and the interests of the community…"

158. Paragraph 9 of the agreed list of issues sets out nine specific instances of alleged unfavourable treatment in subparagraphs 9.1 to 9.7.

Knowledge of the claimant's disability - section 15(2)

159. The respondent has not argued, or adduced evidence, to show that it did not have the requisite knowledge at all material times.

The specific allegations

9.1 letters dated 22nd June and 5th October 2017

160. The respondent admits, as recorded in its closing submissions [paragraph 175] discrimination arising from disability in respect of part of allegation 9.1; the respondent's letter of the 5th October 2017 but denies the very similar allegation in respect of Mr Cook's letter of the 22nd June 2017.

Letter of the 5th October 2017

161. In light of the respondent's admission we find that the respondent discriminated against the claimant, contrary to section 15 of the Equality Act 2010, through its unfavourable treatment of threatening to withhold sick pay within its letter dated the 5th October 2017 in circumstances where the respondent accepts the treatment was not justified.

Letter of the 22nd June 2017

162. The respondent accepts that the letter from Mr Cook contained the same threat to withdraw sick pay as that set out in the 5th October 2017 letter.

163. The respondent does not dispute that the conduct was unfavourable nor does it dispute that the conduct arose from the claimant's disability. Its defence rests upon section 15(1)(b); "A cannot show that the treatment is a proportionate means of achieving a legitimate aim."

164. At paragraphs 55 and 141 of the respondent's submissions the tribunal is invited to conclude that the words were included in the 22nd June letter because the respondent was simply notifying the claimant of its policy and the trades unions were keen that their members were on notice of the need to comply with the respondent Short Term Sickness Absence management policy. We did not find that explanation credible (see paragraphs 21 to 27 above).

165. The evidential burden lies upon the respondent to show its conduct was a proportionate means of achieving a legitimate aim. The respondent relied upon the explanation set out in Mr Cook's evidence. In this case we have not found Mr Cook's explanation credible and in these circumstances, the respondent has not discharged the burden upon it as defined in **MacCulloch v ICI** [2008] IRLR 846 we have concluded that the claim of discrimination, contrary to section 15 of the Equality Act 2010 is well founded.

9.2: The Respondent mentioning an alleged misconduct on the part of the claimant at his grievance hearing on the 20th November 2017

166. On the claimant's evidence, at paragraph 48 he states that; *"Ricky Cook told me that Valero was considering taking disciplinary action against me for taking these pictures but this would not be taken further if I dropped my grievance.*"

167. The claimant was cross examined in detail on this matter and was insistent that that Mr Cook had made the comment just before Mr Card asked for an adjournment. He was equally certain that he had not withdrawn his grievance but agreed to end the process because he had been told the grievance had been upheld. Mr Cook denied making any comment the effect that grievance was upheld but we have made a finding of fact that we doubted the evidence of Mr Cook with respect of his account. In light of the above we also prefer the claimant's evidence on this issue.

168. We have also made a finding of fact that Mr Cook was aware that the claimant took a diazepam tablet during the grievance hearing (paragraph 64).

169. We therefore find that Mr Cook did mention the possibility of disciplinary action against the claimant and did so at a time when he was aware the claimant was taking medication to manage the adverse effects of his disability.

170. The introduction of an assertion of a misconduct by the claimant and mention of the possibility of a disciplinary hearing was, in this context clearly something which was adverse; **Trustees of Swansea University Pensions & Assurance Scheme v Williams** [2015] IRLR 885 and in our judgment amounted to unfavourable treatment.

171. The respondent does not argue that such a comment was justified for the purposes of section 15(1)(b) but had it done so the tribunal would have preferred the argument set out in paragraphs 35 and 36 of the claimant's written submission; that the allegation was not relevant to the claimant's grievance against his line manager or the complaint that persons unknown had defaced his locker. It was more likely that Mr Cook sought to pressure the claimant into withdrawing the grievance. Such conduct was not in furtherance of a legitimate aim nor was it proportionate.

172. For the above reasons the claim of unfavourable treatment arising from the claimant's disability in respect of this allegation is well founded.

Allegation 9.4; denial of a right of Appeal against the Grievance outcome

173. It is an agreed fact that the respondent rejected the claimant's request to appeal against the grievance outcome.

174. The tribunal has made a finding of fact that the claimant's agreement to end the grievance process was predicated on his understanding that Mr Cook had upheld his grievance and would pass the grievance papers to senior management to consider whether any action was appropriate. We have made a finding that the claimant's understanding was based on a statement to that effect by Mr Cook. It follows, that we make finding of fact that when Mr Cook refused the claimant's request to appeal, he was aware that he had led the claimant to believe that the grievance had been upheld on the 20th November 2017.

175. To reject a request for an appeal against the conclusion of a grievance in the context of our findings of fact amounts to unfavourable treatment.

176. For the reasons set out in paragraph 161 above, we find that Mr Cook's retreat from his oral statement to the claimant on the 22nd of November and thereafter the refusal of an appeal was not for a legitimate purpose.

177. We note that the respondent's submissions do not argue that there was a legitimate purpose for a refusal on the facts as we have found them.

178. For the above reasons this claim of discrimination arising from disability is well founded.

Allegation 9.5 The respondent's comments to UNUM

179. The respondent's submission is twofold; the claim was not pleaded and it resisted the amendment application which the claimant indicated at the outset of the hearing.

180. The second submission, was succinct; "It is denied".

181. The application to UNUM was one which arose from the claimant's ill health. The symptoms of the claimant's ill health were the same symptoms which the respondent accepts amounted to a disability.

182. If UNUM had accepted liability and made payments to the respondent it is likely that the claimant's anxiety would not have been exacerbated by financial worries and it is further likely, as admitted by Mr Cook in cross examination, that the respondent would not have decided to dismiss the claimant in April 2018.

183. The tribunal's findings of fact are set out above (paragraphs 104 to 107). These comments were unfavourable to the claimant's application to UNUM as they portray the claimant as wilfully uncooperative and evasive in his effort to return to work.

184. It light of our findings of fact that the claimant was too ill commence a phased return to work in December 2017 and his health had also been the reason for his conduct in October 2017. In that respect the respondent's comments were clearly factually incorrect and detrimental to the claimant. They amounted to unfavourable treatment.

185. The comments arose from the claimant's disability because they were direct references to his ill health absence and were provided to UNUM as evidence for assessment of the claimant's incapacity for work and the cause of that incapacity; his disability.

186. The respondent has not identified a legitimate aim or asserted that the conduct was a proportionate means of achieving a legitimate aim.

187. In any event the tribunal would not have concluded that such misstatements of fact, by persons who were appraised of the claimant's health at the material time, could be legitimate in purpose.

188. For the above reasons this claim of discrimination arising from disability is well founded.

The application to amend the claim

189. The claimant's original pleaded complaint asserted the respondent had failed to "fully explore" his entitlement and had thereby deprived him of two years' of income protection payments [18 and 19], in the claimant's further and better particulars of claim[49] the claim, framed as indirect discrimination and "arising from" [52], asserted the failure to explore the claimant's contractual entitlement, failing to challenge UNUM and failing to appeal to the Financial Services Ombudsman. These replies were served in February 2019, some two months after the parties were due to exchange documents; at which time the claimant could have appreciated the content of emails passing between Mr Cook, Ms Hicks and UNUM.

190. The proposed amendment, to reflect the case put by the claimant, was notified to the respondent in March 2019; shortly before this liability Hearing. The respondent objects to the claim on the basis that it is a fresh claim of which it had no notice and the balance of prejudice, and the timing of the application weigh against its admission.

191. The claimant argues that the respondent was broadly aware that it was accused of not assisting the claimant to persuade UNUM to accept his claim and that evidence, which the respondent held at all material times (the emails) is self-evidently an instance of failing to assist the claimant, even of the actually conduct is more accurately described as actively undermining the claimant's application.

192. The claimant accepts that the application could have been made earlier, albeit not before the claimant had received disclosure and had an opportunity to digest the content. This in our judgment could have taken place in January 2019 rather than March 2019.

193. In our judgment the key consideration in this case is the relative prejudice to the parties. In the first place we conclude that the documents would have been the subject of cross examination in any event. Secondly the respondent was aware of their inclusion in the bundle and the potential for cross examination. Thirdly, the respondent's witnesses had the opportunity to address the new issue in supplement questions in their oral evidence in chief, fourthly, there was no dispute between the parties that the documents were accurate and a true reflection of the opinions of Mr Cook and Ms Hicks at the relevant dates.

194. Taking all of the above into consideration we considered the overriding objective of the employment tribunal and the guidance in **Selkent Bus Company v Moore** [1996] ICR 836 and **Sefton NBC v Hinks** [2011] ICR 1357.

195. In our judgment the interests of justice are better served by allowing the application to amend the claim.

196. Allegation 9.6, relating to the dismissal, is addressed immediately after the tribunal's conclusions on the issue of unfair dismissal (below).

The claims in respect of alleged failures to make reasonable adjustments

197. Sections 20 and 21 of **Equality Act 2010**. set out three requirements. Materially (s20(3)) there is a duty on an employer, where a PCP puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

The Employer's Knowledge

198. During the hearing the respondent was asked to identify the date on which it accepted that it had the requisite knowledge, to enable the tribunal to under stand the scope of dispute, if any between the parties.

199. The respondent accepted that it had the requisite knowledge throughout the material time frame. Consequently, neither party addressed this issue in submissions.

The elements of the prohibited act

200. Once the employer has such knowledge, then the tribunal considers the questions posed by HHJ Serota QC in **Environment Agency v Rowan** at paragraph 27:

> "In our opinion an Employment Tribunal considering a claim that an employer has discriminated against an employee pursuant to section 3A(2) of the Act by failing to comply with the section 4A duty must identify:
>
> (a) the provision, criterion or practice applied by or on behalf of an employer, or
>
> (b) the physical feature of premises occupied by the employer,
>
> (c) the identity of non-disabled comparators (where appropriate) and
>
> (d) the nature and extent of the substantial disadvantage suffered by the Claimant. It should be borne in mind that identification of the substantial disadvantage suffered by the Claimant may involve a consideration of the cumulative effect of both the 'provision, criterion or practice applied by or on behalf of an employer' and the, 'physical feature of premises' so it would be necessary to look at the overall picture.
>
> In our opinion an Employment Tribunal cannot properly make findings of a failure to make reasonable adjustments under sections 3A(2) and 4A(1) without going through that process. Unless the Employment Tribunal has identified the four matters, we have set out above it cannot go on to judge if any proposed adjustment is reasonable. It is simply unable to say what adjustments were reasonable to prevent the provision, criterion or practice, or feature, placing the disabled person concerned at a substantial disadvantage."

201. The words of **Rowan** may however insufficiently emphasise the need to show, or to understand, what it is about a disability that gives rise to the substantial disadvantage, and therefore what it is that requires to be remedied by adjustment. Without knowing that, no assessment of what is, or is not, reasonable by way of adjustment can properly be made**: Chief Constable of West Midlands Police v R Gardner** EAT/0174/11/DA paragraph 53

202. **Royal Bank of Scotland v Ashton** [2011] ICR 63, which drew attention to the fact that the Act where it speaks of making adjustments is concerned with outcome and not with the process by which the outcome is reached.

203. In **Salford NHS Primary Care Trust v Smith** EAT/0507/10 noted that a reasonable adjustment is one which prevents or ameliorates a PCP placing the claimant at a substantial disadvantage in comparison with persons who were not disabled. Reasonable adjustments are primarily concerned with enabling the disabled person to remain in, or return to, work with the employer. Matters such as consultations and trials, exploratory investigations and the like do not qualify as reasonable adjustments.

28. The statutory Code of Practice on Employment has been published by the Equality and Human Rights Commission. Courts are obliged to take it into consideration whenever it is relevant: section 15(4). Chapter 6 is concerned with the duty to make reasonable adjustments. Paragraph 6.2 states:

> "The duty to make reasonable adjustments is a cornerstone of the Act and requires employers to take positive steps to ensure that disabled people can access and

> progress in employment. This goes beyond simply avoiding treating disabled workers … unfavourably and means taking additional steps to which non-disabled workers … are not entitled."

29. Paragraphs 6.23 to 6.29 of the Code give guidance as to what is meant by "reasonable steps" and paragraph 6.28 identifies some of the factors which might be taken into account when deciding whether a step is reasonable. They include the size of the employer; the practicability of the proposed step; the cost of making the adjustment; the extent of the employer's resources; and whether the steps would be effective in preventing the substantive disadvantage. So far as efficacy is concerned, it may be that it is not clear whether the step proposed will be effective or not. It may still be reasonable to take the step notwithstanding that success is not guaranteed; the uncertainty is one of the factors to weigh up when assessing the question of reasonableness: ***Paulley v First Group plc*** [2015] 1 WLR 3384, paras 44-45.

204. In circumstances where a number of adjustments had been made, it was perfectly natural and entirely appropriate' to consider the adjustments as a whole: **Burke v College of Law** *[2012] All ER (D) 29*.

205. Considerations of the respondent's operational needs are relevant considerations for the tribunal: **Chief Constable of Lincolnshire v Weaver** UKEAT/0622/07 and **O'Hanlon v Commissioners for Inland Revenue & Customs** [2007] IRLR 404 in which it accepted that the Employment Tribunal was entitled to have regard to the overall cost of altering sick pay rules in favour of the disabled when assessing whether an adjustment in a particular case was reasonable.

206. The parties have helpfully structured the list of issues and their submissions in accordance with the guidance in Rowan. There is a substantial degree of agreement which we will record:

The Provision, Criterion or Practice

207. The parties agreed[1] that respondent applied the following "PCP" to its employees:

a) "Threatening to withhold sick pay where the employee was unable to attend a scheduled meeting on account of his [health]condition.
b) "Requiring an employee to return to work to a department without securing the employee's agreement that the department was appropriate.
c) The failure to explain thoroughly, clearly and in advance the nature of the grievance meeting
d) By denying a right of appeal against a grievance / where the complainant had withdrawn his grievance on advice from his union.
e) Requiring a certain level of attendance.
f) Dismissing employees for absence.
g) Classifying employees dismissed for capability as "bad leavers".

208. Three further asserted PCP's were disputed. Before turning to our conclusions on the three disputed matters we direct ourselves as follows:

[1] The respondent's written submissions at paragraph 135 accepted the six PCP's listed here.

209. A provision, criterion or practice might include such matters as the rules governing the holding of disciplinary or grievance hearings. Practice connotes something which occurs more than on a one-off occasion and which has an element of repetition about it. It is unlikely that the application of a flawed disciplinary procedure on a one-off basis will amount to a 'PCP'; **Nottingham City Transport Ltd v Harvey** [2013] All ER (D) 267 (Feb)*, and* **Carphone Warehouse v Martin** UKEAT/0371/12 *[2013].*

210. In general the PCP is concept which approached with a liberal, rather than an overly technical manner: **Carrera v United First Partners Research** UKEAT/0266/15.

211. The first disputed PCP is as follows:

PCP 2: "By including in grievance meetings implications that disciplinary action might be taken for unrelated conduct".

212. The Respondent's argument was one of fact; that the claimant's evidence was that there was an express reference to disciplinary action and that evidence should not be accepted, consequently the alleged PCP was not applied.

213. We have found that Mr Cook did refer to potential disciplinary proceedings so we do not accept that submission. However, we have found no evidence that the conduct of Mr Cook was anything other than a singular and isolated incident. We note that, according to the respondent's grievance policy the responsibility for investigating or determining grievance lay with an employee's manager (or more senior manager), not the Human Resources staff In our judgment the involvement of Mr Cook was exceptional and this aspect of his conduct was singular. [2]In these circumstances we have concluded that the conduct did not amount to provision, criterion or practice.

PCP 5: "Inviting employees to disciplinary hearings because they are unfit to return to work"

214. The respondent's submission states that Mr Cook invited the claimant to a disciplinary hearing because he believed the claimant was fit for work. On consideration of the content of the 2nd January 2018 letter [277], the tenor of the letter is clearly an assertion that the claimant had failed to attend work, on a phased return, when the respondent's occupation health physician had advised that he was fit to do so.

215. The essence of the claimant's case in cross examination was that Mr Cook was wrong to have formed the view that the claimant was fit to return for two principle reasons; Dr Lui's advice had been conditional ("maybe fit") and secondly Mr Cook's suggestion that Dr Lui's opinion of the 6th December 2017, given before the claimant had been informed of the location of his phased return, somehow trumped the advice of the claimant's GP which was provided on the 15th December 2017. That point is reiterated in the claimant's submissions [paragraph 16]; *"If there was the slightest consideration of Mr Jones position or the slightest scrutiny of the medical evidence at the time…it would have been obvious that it was not appropriate to invite Mr Jones to a disciplinary…"*

[2] Whether that agreement was factually correct is addressed in detail later in this judgment.

216. We have taken into account the responsibility of the tribunal to adopt a purposive, or liberal, approach to the identification of the PCP but we have concluded that the respondent did not have a practice of inviting employees to disciplinary hearings because they were unfit for work. We prefer the respondent's argument; that Mr Cook's conduct was based on his belief that the claimant was fit to attend a phased return and the claimant's approach, in criticising Mr Cook's failure to analyse the evidence available to him at the time, is consistent with the respondent's assertion of Mr Cook's belief.

217. In the alternative, we again can find no evidential basis to conclude that Mr Cook's conduct was otherwise than a singular event.

PCP 9: "failing to challenge or continue to challenge, UNUM's refusal to provide income protection insurance cover"

218. The Respondent disputes that it failed to challenge the insurers decisions. It is not disputed that the respondent made an application for income protection in respect of the claimant [179]. It is not disputed that the respondent presented an appeal on behalf of the claimant.

219. The tribunal notes that the documents to which the claimant refers in submissions [paragraph 21], to evidence the respondent's asserted failure to challenge UNUM, are either the claimant providing medical evidence from sources to which the respondent did not have direct access or relate to requests for disclosure of documents. All the documents, and the activities they evidence post-dated UNUM's refusal of the appeal application.

220. There is no evidence that respondent failed to challenge the decision of UNUM to refuse to accept liability for payments. The specific failing identified in the submissions, but not particularised prior to that, is the same factual matrix raised as a claim under section 15; that Mr Cook and Ms Hick's tried to sabotage the application. That is a quite different allegation to the allegation pleaded as a failure to make a reasonable adjustment.

221. In our judgment the respondent did not "fail to challenge or continue to do so" accordingly the respondent did not apply the alleged PCP.

222. By reason of the above, in respect of the three disputed PCP's, these three claims for a failure to make reasonable adjustments are **not** well founded and are dismissed.

Substantial disadvantage; comparators

223. The Tribunal went on to consider the degree to which a disabled person was put at a substantial disadvantage compared to an able-bodied employee, due to the application of the PCP's which the claimant has proven.

224. The Tribunal notes that the respondent admits that four of the PCP's would put disabled employee at such a substantial disadvantage.

a) "Threatening to withhold sick pay where the employee was unable to attend a scheduled meeting on account of his [health]condition.
b) Requiring a certain level of attendance.
c) Dismissing employees for absence.
d) Classifying employees dismissed for capability as "bad leavers".

225. It denies that the following would do so:

a) PCP 3: The failure to explain thoroughly, clearly and in advance the nature of the grievance meeting.

b) PCP 4:Requiring an employee to return to work to a department without securing the employee's agreement that the department was appropriate.

c) PCP 6: By denying a right of appeal against a grievance

226. The Tribunal has concluded as follows in the respect of the above dispute:

The failure to explain thoroughly, clearly and in advance the nature of the grievance meeting.

227. The tribunal accepts that am employee with depression and anxiety, who did not understand whether a formal meeting was part of investigation or a meeting to determine the merits of a grievance would be at a substantial disadvantage compared to an employee without the cognitive impairment.

228. The former requires the employee to be able to articulate their account of the facts, the latter might require them to respond to evidence contrary to their own case and to argue the respective merits of contradictory evidence. It is more than likely that such uncertainty would cause much greater distress to a disabled employee whose cognitive ability is impaired than it would to an able-bodied person.

Requiring an employee to return to work to a department without securing the employee's agreement that the department was appropriate.

229. The tribunal accepts that an employee who was disabled by reason of depression and who was directed to return to work at a venue and to undertake tasks, without an opportunity to comment or agree on the terms of their return to work is likely to be put at a substantial disadvantage.

By denying a right of appeal against a grievance

230. The parties do not agree the wording of the PCP in this respect. The claimant argues the character of the PCP as set out in paragraph 212(c) above. The respondent argues that the correct characterisation is fuller: where the complainant had withdrawn his grievance on advice from his union".

231. We cannot accept the respondent's formulation is an accurate reflection of the case. The claimant's case is that he agreed the conclusion of the grievance process because he had been

informed that his grievance had been upheld and he wished to avoid a disciplinary allegation. The respondent's case is that the claimant unambiguously withdrew his claim following advice.

232. The better formulation of this PCP would be: "The refusal of a right to appeal against the conclusion of a grievance, without a formal finding, by the claimant who was under the misapprehension that the grievance had been upheld."

233. The tribunal accepts that a person whose cognitive function was impaired by their disability of depression and anxiety might be less able to assimilate information, understand the import of statements or make a considered decision, and thereby at be at a substantial disadvantage compared to an able-bodied employee.

234. The Tribunal next addressed the disputed issues of **substantial disadvantage to the claimant.**

PCP 4: "Requiring an employee to return to work to a department without securing the employee's agreement that the department was appropriate."

235. On consideration of the correspondence from Mr Cook dated the 8th December 2017 [262] and the claimant's reply [262]. It is clear that the claimant had been informed of the place, tasks, and working hours of his proposed return to work ten days before the 18th December 2017. It is also evident from the claimant's reply [262] that he had discussed a return to work with his GP and, subject to her approval, he was content to do so.

236. Further, the claimant did not articulate any difficulty with the proposed arrangements until 07.45 on the 18th December 2017.

237. For these reasons we find that the claimant was **not** subject to a substantial disadvantage because he had ten days prior notice and the opportunity to object to any aspect of the proposed terms of his phased return to work.

238. For these reasons this claim is not well founded and dismissed.

PCP 3:The failure to explain thoroughly, clearly and in advance the nature of the grievance meeting.

239. The respondent did not write to the claimant to invite him to a grievance hearing but it relies on its provision of the terms of the Grievance policy [62] which does state that the first formal stage of the grievance process is a hearing and that, if the matter needs further investigation the manager should consider adjourning the hearing and reconvening the hearing at a later date.

240. It is the respondent's case that Mr Cook conducted a grievance hearing. The tribunal notes that such a hearing, if not adjourned, is a meeting at which the merits of the grievance are determined.

241. Secondly, Mr Cook asserted that he informed the claimant's trade union officer, Mr Card that the meeting was a hearing, not, a "read through" as the claimant understood from Mr Card.

242. We took into account the email from Mr Cook to Mr Card [206] in which he said , that prior to the meeting on the 20th November 2017, "we will carry out investigations into the allegations" and that the claimant wrote directly to Mr Cook [222] on the 19th November 2017 an email titled "investigation meeting" and, on the evidence before us Mr Cook did not correct the claimant's understanding.

243. The claimant's evidence in his witness statement at paragraph so 46 and 47 does not identify that he was at any disadvantage in the meeting in respect of his ability to articulate his grievance.

244. The submission on behalf of the claimant argues that "….not knowing precisely what the meeting is for would increase the stress and exacerbate his condition". However, the claimant's case was that he clearly understood the meeting was investigatory in nature and that it was only, *after* the meeting that Mr Card explained to the claimant that the meeting had been a grievance hearing. The claimant's evidence in paragraph 48 of his statement stated that his anxiety was increased by the sudden disclosure that the respondent was considering a disciplinary allegation against the claimant, not by the character of the meeting. That is a matter which we have addressed, and upheld, as a breach of section 15 of the Equality Act.

245. On the evidence before us we have concluded that the claimant was **not** put at the asserted substantial disadvantage by reason of the lack of clarity about the character of the meeting. We find, on the claimant's own evidence that it was the specific reference to potential disciplinary proceedings which caused the particular disadvantage.

246. For the above reasons this claim is **no**t well founded and dismissed.

PCP 6: The refusal of a right to appeal against the conclusion of a grievance, without a formal finding, by the claimant who was under the misapprehension that the grievance had been upheld

247. The claimant was clearly substantially disadvantaged by the refusal of the right of appeal. The medical advice of Dr Liu had identified that reaching some resolution of underlying cause of the claimant's ill health was an important factor in his recovery. In the absence of mediation or some other informal process the formal grievance process was the remaining procedure which might facilitate some degree of resolution. To be deprived of that opportunity was likely to extend the claimant's ill health and thereby increase the prospect of continued absence from work.

PCP 1 "Threatening to withhold sick pay where the employee was unable to attend a scheduled meeting on account of his [health]condition.

248. The respondent admitted that the claimant would be at substantial disadvantage in respect of the letter of the 5th October 2017 but denied that the claimant was equally disadvantaged in respect of the letter of the 22nd June 2017. We have set out our findings of fact in respect of

the latter and have concluded that the claimant was substantially disadvantaged in this respect.

PCP 7: Requiring a certain level of attendance

249. The respondent conceded that the claimant was at a substantial disadvantage in this respect as his disability was the direct cause of his continuous absence.

PCP 8: Dismissing employees for absence

250. The respondent conceded that the claimant was at a substantial disadvantage as the claimant was dismissed due to his long term mental ill health which inhibited him from attending work.

PCP 10: Classifying employees dismissed for capability as "bad leavers".

251. The respondent denied that the claimant was substantially disadvantaged by this PCP[3]. We prefer the claimant's argument, addressed earlier in this judgment, that consequent to the claimant's classification as a "bad leaver" he lost the value of the "matching shares" the company had allocated to him in the three years prior to his dismissal and became liable for income tax and national insurance on the shares he had accrued. The claimant estimates his loss to be in the region of £30,000.00.

The Reasonable Adjustments

252. In the agreed list of issues, the claimant set out 15 potential reasonable adjustments. A number of these were pertinent to "PCP"s or substantial disadvantages which the tribunal has not upheld. We now address the balance.

PCP 1: "Threatening to withhold sick pay where the employee was unable to attend a scheduled meeting on account of his [health]condition

253. The proposed reasonable adjustment was to refrain from making the threat. In respect of the letter of the 5th October 2017, the respondent concedes that the proposed adjustment was reasonable and the tribunal finds that such an adjustment would have entirely avoided the substantial disadvantage. The same adjustment could have been made in respect of the 22nd June 2017 letter and would have been equally effective in preventing the substantial disadvantage.

254. The failure to make that adjustment was unreasonable in these circumstances and this claim is therefore well founded.

PCP 10: Classifying employees dismissed for capability as bad leavers.

[3] Paragraph 149.

255. The proposed reasonable adjustment was the reclassification of the reason for the claimant's termination as disability rather than capability.

256. In cross examination Ms Hick accepted that the reason the claimant was dismissed was because his disability prevented him from attending work. She accepted it was reasonable and practical to have altered the recorded reason for the claimant's termination to disability. When asked why she had not done so she could not provide an answer. That act would have led to the claimant being classed as a "good leaver" under the terms of the Share Incentive Plan.

257. The proposed reasonable adjustment was practical and would have eliminated the substantial disadvantage. The respondent has failed, through argument or evidence, to establish that it was unreasonable to make this adjustment.

258. By reason of the above this claim is well founded.

PCP 6: The refusal of a right to appeal against the conclusion of a grievance, without a formal finding, by the claimant who was under the misapprehension that the grievance had been upheld

259. The respondent's submission in respect of this issue was succinct. "*The Claimant had wanted to withdraw his grievance and did so. He changed his mind. This is denied".*

260. We have already set out our findings of fact and rejected the respondent's account.

261. It is evident from the claimant's private note of 10th December 2017 and his email correspondence with Mr Cook on 14th December 2017 [269] that this issue was a pressing concern by 17th December [272, 275] "the stress of this unresolved issue" was a significant contributing factor in the claimant's inability to commence his phased return to work.

262. Allowing the claimant to appeal was, in our judgment likely to have reduced the claimant's concerns about the grievance process and increased his confidence in his employer. Both of these factors would have (a) lessened, or wholly avoided the adverse impact on the claimant's health consequent to the refusal of an opportunity to appeal and increased the probability that the claimant's health may have improved to enable him to consider a return to work on a phased basis in 2017.

263. Whilst allowing an appeal would not necessarily have led to a resolution of the claimant's concerns about his line manager's conduct there was a real possibility, through the grievance procedure, of some findings in favour of the claimant in respect of his complaints, or an opportunity for a degree of resolution through understanding his line manager's perspective or explanations, or the option of considering some informal resolution between them; akin to the mediation recommended by Dr Liu. Moreover, to have allowed an appeal was likely to have lessened the claimant's degree of distrust in his employer, part of which stemmed from the refusal of the appeal and significantly contributed to the claimant's inability to return to work on the 18th December 2018.

264. Mr Cook's letter of 2nd January 2018 demonstrated that it was reasonable for the respondent to turn its mind to the merits of the grievance, to consider the evidence and to formulate conclusions. On the evidence before us the proposed adjustment would have caused no disruption or additional cost for the respondent as the adjustment fell within the scope of the respondent's grievance policy. For the above reasons this claim is well founded.

Giving the claimant an opportunity at informal or formal meetings without any criticism (expressed or implied) and without any implied threat of disciplinary action

265. There is a substantial duplication in this proposed adjustment with the grievance appeal addressed above. The tribunal have noted that the Respondent was advised to consider mediation as a means of overcoming the root cause of the claimant's ill health and therefore his disability. Dr Liu and Ms Codd advised that efforts to resolve the underlying problem were key to enabling the claimant to return to work (see paragraphs 28 and 31 above).

266. The respondent had invited the claimant to a meeting in September 2017, which it described as mediation, but in our judgment, no effort was made to address the point highlighted by the medical advisors.

267. In our judgment undertaking mediation between the claimant and his line manager, with a view to reducing the claimant's anxiety and depression would have significantly improved the prospect of the claimant returning to work on a phased return. If 19th September 2017 meeting had been a mediation process or, if mediation had been initiated following the subsequent telephone discussion, the consequent October 2017 down turn in the claimant's health may well have been avoided. As the respondent was able to organise a meeting which professed to be a mediation meeting it is evident that to do so was reasonable and practical.

268. For the above reasons, we find this claim to be well founded.

Exploring alternatives to dismissal before deciding to dismiss

269. This proposed adjustment was not ventilated in any detail before the tribunal. In the circumstances of the claimant, who was wholly unfit to attend work prior to the dismissal it is difficult to understand what alternative was open to the respondent save allowing the claimant more time to recover and to serve his notice and therefore continue in employment until late June or early July 2018.

270. On the evidence before us, as set out the GP "fit notes" [389 & 400], the claimant's health post dismissal did not improve and he was certified unfit for work until the late October 2018. It is therefore difficult to conceive of any alternative which would have had any prospect, still less a likelihood, of enabling the claimant to return to work.

271. For these reasons we do not uphold this claim and it is dismissed.

Postponing the capability meeting (in March and April 2018) until more information could be gleaned about the claimant's prospects of returning to work (including an understanding of the effect of the claimant's change in medication)

272. The capability meeting in March 2018 was postponed until the 13th April. The respondent obtained Dr Liu's medical opinion on 5th April 2018 [342-5]. His advice was that the claimant would not be fit to return to work for three to six months, if not longer. The claimant had increased his anti-depressant dose on the recommendation of Dr Liu [330] in mid March 2018. It appears that Dr Liu had a thorough understanding of the claimant and his medication at the date of his April report.

273. Based on the GP certificates, it does not appear that the claimant's prognosis improved and Dr Liu's assessment of "…six months, if not longer" was an accurate prediction. It is not evident that delaying the dismissal, in isolation, could have made any material difference to the prospects of the claimant being able to return to work.

274. For these reasons these claims are not well founded and are dismissed.

The Dismissal of the Claimant

275. The claimant alleges that his dismissal was not for a potentially fair reason and was also unfair contrary to section 98(4) of the Employment Rights Act 1996, an act of discrimination arising from his disability and direct discrimination. We turn first to the Employment Rights Act 1996.

Section 98(2)

276. It is admitted that the claimant was dismissed within the meaning of section 95 (1) (a). The respondent thereby bears the burden of proving the reason, or if more than one, the principle reason for dismissal. The Respondent asserts the reason for the claimant's dismissal was his capability.

277. The claimant disputes this assertion. The respondent must produce evidence to the tribunal that, prima facie, show the reason for dismissal was conduct: **Maund v Penwith District Council** [1984] IRLR 24 CA.

278. The respondent's case is straight forward; the claimant had been continuously absent for a year by the date of his dismissal and recent medical opinion anticipated that the absence would continue for at least three further months, possibly considerably longer. The claimant's role had not been filled and the cost of overtime payments was significant.

279. The claimant's challenge to that reasoning, as set out in closing submissions at paragraph 56 which refers to the preceding 55 paragraphs without further explanation and stated: "It is clear that Mr Jones was a thorn in Valero's side because of his sickness absence and HR resented him for it, and/or had stereotypical views about people with depression.

280. Both arguments find their root in the claimant's absence from work which was due to his health and the respondent's reaction to that ill health absence. The claims of discrimination, particularly the section 15 claim, argues that the claimant's dismissal arose from his disability;

which caused his ill health absence. We lastly noted that the particulars of claim drafted by the claimant's solicitors did not allege that the dismissal was not for a potentially fair reason.

281. Taking all of the above into account we are satisfied that the respondent dismissed the claimant due to his extended sickness absence; a potentially fair reason for dismissal.

Section 98(4)

282. The starting point for analysing the duty of the tribunal in deciding whether or not an ill health capability dismissal is fair is the EAT decision in **Spencer v Paragon Wallpapers Ltd** [1976] IRLR 373, *[1977] ICR 301*. In that case Phillips J emphasised the importance of scrutinising all the relevant factors.

''Every case depends on its own circumstances. The basic question which has to be determined in every case is whether, in all the circumstances, the employer can be expected to wait any longer and, if so, how much longer?''

283. And he added that the relevant circumstances include 'the nature of the illness, the likely length of the continuing absence, the need of the employers to have done the work which the employee was engaged to do'.

284. In **Lynock v Cereal Packaging Ltd** [1988] IRLR 510, *[1988] ICR 670*, the EAT (Wood J presiding) described the appropriate response of an employer faced with, in that case a series of intermittent absences, as follows:

285. ''The approach of an employer in this situation is, in our view, one to be based on those three words which we used earlier in our judgment—sympathy, understanding and compassion.

286. In **East Lindsey District Council v GE Daubney** [1977] IRLR 181), it was stated:

"27. … First, … it is essential to consider the question of whether the employer can be expected to wait longer. Secondly, there is a need to consult the employee and take his views into account. … this is a factor that can operate both for and against dismissal. If the employee states that he is anxious to return as soon as he can and hopes that he will be able to do so in the near future, that operates in his favour; if, on the other hand he states that he is no better and does not know when he can return to work, that is a significant factor operating against him. Thirdly, there is a need to take steps to discover the employee's medical condition and his likely prognosis, but this merely requires the obtaining of proper medical advice; it does not require the employer to pursue detailed medical examination; all that the employer requires to do is to ensure that the correct question is asked and answered."

287. **Sainsbury Supermarkets Ltd v Hitt** [2002] EWCA 1588, The range of reasonable responses test (or, to put it another way), the need to apply the objective standards of the reasonable employer) applies as much to the question whether the investigation was reasonable in all the circumstances as it does to the reasonableness of the decision to dismiss. Although a procedural breach does not necessarily vitiate the employer's decision when viewed in all the relevant circumstances.

288. **Grattan v Hussien** (EAT 0802/02): The issue is not whether further investigation might reasonably have been carried out but whether the investigation which had been carried out could be regarded by a reasonable employer as adequate**.**

289. **Dick v Glasgow University** [1993] IRLR 581 CS: The employer who has undertaken a reasonable investigation should not be judged by reference to material which was not known to it at the time of the dismissal.

290. **Taylor v OCS Group Ltd** [2006] IRLR 613 CA; the fairness of a respondent's response must be considered in the round; an appeal or review.

291. The original decision to dismiss the claimant did not consider the complaint raised by the claimant in his 13th April 2018 email nor did it consider his responses to questions posed by Mr Cook. That was because Ms Hick did not pass the claimant's responses to Mr Diment. The claimant's complaint against Mr Cook and his responses were relevant matters which any reasonable employer would have taken into account and investigated. This was not done.

292. Mr Diment, in our judgment, did not consider the medical advice, the respondent's compliance with that advice or the or the respondent's own conduct. Rather he accepted the advice of Mr Cook and adopted Mr Cook's rationale for dismissal without any critical scrutiny in circumstances where Mr Cook was as much a witness as he was an advisor. Mr Cook did not alert Mr Diment to any of his own prejudgment of the claimant's case. Mr Diment therefore did not consider whether the respondent was in any respect culpable for the cause of the claimant's absence or its duration; **Royal Bank of Scotland v McAdie** 2008 ICR 1087.

293. The tribunal notes that the respondent conceded that this stage of the dismissal process was subject to procedural errors[4].

294. Mr Diment accepted that it would have been practical to delay the decision to dismiss the claimant to allow the claimant's challenge to the refusal of IPP by UNUM. Mr Diment did not take into account the claimant's length of service.

295. Taking all of the above into account, and directing ourselves that "the band of reasonable responses test" is applicable to the employer's investigation as it is to the employer's response we have concluded that the respondent's decision to dismiss the claimant on the 13th April 2018 was unreasonable.

296. The Respondent avers that the appeal conducted by Mr Thorp remedied the procedural failings noted in this decision and thereby, the process overall was reasonable albeit, in its closing submission the respondent conceded that "…the failure to garner all the evidence at the appeal hearing itself is a procedural irregularity."[5]

297. Mr Thorp was advised by Ms Hicks, as the claimant has submitted, her perspective of the claimant was reflected by her comments to UNUM. Both she and Mr Cook were somewhat partisan; a fact which she did not disclose to Mr Thorp. Similarly, her document summarising the history of the claimant's case contained errors and excluded any reference to the possible

[4] Respondent's closing submission, paragraph 198.
[5] Ibid, paragraph 200.

failings of the respondent. Mr Thorp, in our judgment was substantially influenced by that document and he failed to allow the claimant to see the document and thereby deprived him of the opportunity to respond.

298. On Mr Thorp's evidence he saw only parts of the relevant documentation and his outcome letter does not evidence that he gave thought, still less reasonable scrutiny to the claimant's complaint against Mr Cook or the degree to which the respondent caused, or exacerbated the claimant's ill health.

299. The respondent is a large organisation. It had sufficient resources to allow two HR staff to manage the claimant's absence and it had the capacity, expertise, time and finances to allow it to undertake a reasonable investigation. It had sufficient available expert HR advice to enable the respondent to conduct a balanced and reasonable thorough investigation and to know that it would be reasonable to allow the employee to respond to written representations on which the respondent's decision maker placed considerable weight.

300. Rather than remedy the procedural failings of the dismissal hearing the appeal process duplicated and compounded them.

301. In all of the above matters, the respondent failed to act as any reasonable employer would in all of the circumstances of the case.

302. For the above reasons the Tribunal has concluded that the respondent unfairly dismissed the claimant.

Direct Discrimination: section 13 of the Equality Act 2010

303. The claimant's written closing submission makes clear that the dismissal is the only allegation of less favourable treatment[6].

304. The claimant bears the initial burden of proof in a discrimination complaint: paragraphs 10 to 13 in **Royal Mail Group v Efobi** [2019] ICR 750. There is a clear policy justification for this; Advocate General Mengozzi at [22] in **Meister v Speech Design Carrier Systems GmbH** (Case C-415/10) [2012] ICR 1006 cited with approval by Elias LJ in Efobi at paragraph 14. That requires a Claimant to establish the facts giving rise to the allegations of less favourable treatment and some basis on which it could be said that the treatment was on the grounds of disability. A bare difference of treatment is not enough: **Madarassy v Nomura International Plc** [2007] IRLR 246.

305. The essence of the claimant's submission centres on the conduct and statements of Mr Cook and Ms Hicks and asserts that they held stereotypical views about the claimant's mental health; that he was; "swinging the lead"[7]. The tribunal was not taken to any evidence of

[6] Claimant's closing submission, paragraph 45.
[7] Ibid, paragraph 46.

recognised stereotypical assumption. The submission then argues that it was Mr Cook and Ms Hicks who made the decisions on dismissal and Appeal, not Mr Diment or Mr Thorp.

306. A claim of direct discrimination cannot be based upon an unproven assertion of stereotypical assumption. Per Mummery LJ at [49] in **Stockton on Tees Borough Council v Aylott** [2010] ICR 1278: direct discrimination claims must be decided in accordance with the evidence, not by making use, without requiring evidence, of a verbal formula such as "institutional discrimination" or "stereotyping" on the basis of assumed characteristics. There must be evidence from which the employment tribunal could properly infer that wrong assumptions were being made about that person's characteristics and that those assumptions were operative in the detrimental treatment, such as a decision to dismiss.

307. The Tribunal was not directed to any evidence of an acknowledged stereotype that people with mental health problems are more likely to "swing the lead". The tribunal notes that mental health conditions cover a diverse range of impairments from dyslexia, autism, agoraphobia to post traumatic stress disorder.

308. We first considered the characteristics of a hypothetical comparator for the purposes of section 123 of the Equality Act 2010. We accept the respondent's argument that such a person would be an employee of the respondent who had been absent from work for a year due to a condition other than mental health and who was, at the time of dismissal, not expected to return to work for at least three months, if not substantially longer. The claimant did not dispute this approach.

309. The respondent submits that it would have dismissed any person in those circumstances.

310. Whilst the claimant accepts that the overall length of past and predicted future absence (no less than fifteen months in total, and possibly more that 18th months based on Dr Liu's April 2018 prognosis) was relevant he also submits that: "*the stereotypical views of DH and RC, that, for at least some of the sickness absence Mr Jones was swinging the lead , must have fed into their decision to dismiss*."

311. That point is clearly relevant to the "question why" but its significance on the question of less favourable treatment is not obvious. The claimant does not argue that person without the claimant's disability would have been retained in employment if their total past and projected absence was at least fifteen months and possible eighteen or more months.

312. We have taken into account the claimant's submission, and our finding, that Mr Cook and Ms Hicks certainly did not believe that the claimant was so incapacitated by his disability that he could not have returned to work on a phased basis in December 2017. However, by the dated of the dismissal in April 2013 the evidence of the claimant's incapacity was overwhelming; as noted by Dr Liu in January 2018 [305D] the claimant's anxiety had worsened to a point where the claimant was taking sedatives on a daily basis. We do not consider that Mr Cook and Ms Hicks were, consciously or unconsciously, affected by any stereotypical assumption by the date of the dismissal or the appeal against the dismissal, the claimant was wilfully avoiding work or failing to do his best to recover.

313. We have also taken into account the respondent's lack of any policy for the management of long term sickness, the lack of an equal opportunities policy, the lack of training on equal opportunities for managers and the HR staff at the refinery and the lack of any formal guidance for managers responsible for disabled staff, whether the disability be physical or mental in its origin. In general, an apparent disregard for the employer's duties towards disabled employees regardless of character of their impairment.

314. Having had the benefit of hearing from four of the respondent's managers, we have concluded that the underlying theme in the respondent's management of the claimant was to press him into returning to work; being principally concerned with the cost and inconvenience of his absence rather than his welfare or the respondent's responsibilities to assist his recovery. We have concluded that behaviour is more likely than not consistent with the respondent's general approach to employee absence; it was more focused on the adverse impact on its business than concern for the individual.

315. In these circumstances we have concluded that a hypothetical employee, whose circumstances were not materially different from that of the claimant, save for the protected characteristic, would have been dismissed.

316. We therefore conclude that the dismissal of the claimant on the 13th April 2018 was not less favourable treatment.

317. For these reasons the claim of direct discrimination is not well founded and is dismissed.

Discrimination arising from disability: dismissal

318. The respondent does not dispute that the dismissal of the claimant was unfavourable treatment arising from his disability. It does assert that the dismissal was for a legitimate purpose:

"147. However, requiring a reasonable level of attendance in order to ensure operational resilience is a legitimate aim and it is a proportionate means of achieving resilience that its employees are required to have satisfactory and reasonable levels of attendance"

Where an employee is unable to achieve any attendance for a year and there is no prospect of a recovery to permit a return to work in the foreseeable future then dismissal is a proportionate means of achieving its aim."

319. The claimant has referred us to the ECHR code on Employment [2011[sections 5.21 and we consider this in the context of out finding that the respondent failed to make three reasonable adjustments pertinent to the claimant's ability to return to work [see paragraphs 246 to 262 above]. The claimant has also advanced the argument that the respondent's conduct had exacerbated the claimant's ill health and inhibited his return to work. Lastly the claimant asserted that losing the claimant's skills and experience did not achieve the pleaded legitimate aim.

320. The role of the ET in assessing the employer's justification for the purposes of s 15(1)(b) was considered by Singh J in **Hensman v MoD** UKEAT/0067/14/DM, who observed that:

"43. … the role of the Employment Tribunal in assessing proportionality … is not the same as its role when considering unfair dismissal. In particular, it is not confined to asking whether the decision was within the range of views reasonable in the particular circumstances. The exercise is one to be performed objectively by the Tribunal itself.

44. … the Employment Tribunal must reach its own judgment upon a fair and detailed analysis of the working practices and business considerations involved. In particular, it must have regard to the business needs of the employer. …"

321. Singh J had drawn assistance from the earlier guidance provided by the Court of Appeal in **Hardy and Hansons plc v Lax** [2005] ICR 1565, where Pill LJ stated:

"31. … It is for the employment tribunal to weigh the real needs of the undertaking, expressed without exaggeration, against the discriminatory effect of the employer's proposal. The proposal must be objectively justified and proportionate.

322. The tribunal reached the following conclusions:

323. The claimant's employment, had it continued, would have no direct cost to the respondent because the claimant had exhausted his entitlement to contractual sick pay in October 2017.

324. The claimant's gross annual pay was £46,000.00. The respondent could train or employ a person to fulfil the claimant's work on his former shift because, whilst the claimant's absence continued (a) the respondent had decided to move the claimant from that shift in April 2017 and (b) the claimant had expressed a desire to move away from work which would bring him into contact with his former line manager.

325. The cost of paying an alternative person to undertake the claimant's former work, on a regular basis, would not, on the very limited evidence before us, have been a substantial expense. Certainly, the option of taking this approach was one the respondent could have offered to the claimant rather than dismiss him.

326. Even if there was additional cost to the respondent, in the context of the respondent's own failures, which, in our judgment, worsened the claimant's health after the 19/26th September 2017 meeting/telephone call, the 8th December 2017 confirmation that the claimant's grievance had been withdrawn and the 2nd January 2018 threat of disciplinary proceedings it would not have been proportionate to dismiss the claimant without taking a more proportionate intermediate approach of trying to address the claimant's underlying concern and trying to rebuild trust.

327. In part that would necessarily include addressing the claimant's complaints in his email of the 13th April 2018 relating to Mr Cook's conduct and a lack of effort by the respondent to assist the claimant to return to work, matters which the respondent should have addressed in the course of considering merits of the proposal to dismiss the claimant and the appeal from the dismissal.

328. By reason of the above the tribunal concludes that the respondent had a legitimate aim but its actions were disproportionate to the discriminatory effect upon the claimant when less intrusive options existed in April 2018.

329. For the above reasons this claim is well founded.

Scetion 19 - the claims of indirect discrimination

16. Section 19 of the Equality Act 2010 provides as follows:

> "19 Indirect discrimination
>
> (1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.
>
> (2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if -
>
> (a) A applies, or would apply, it to persons with whom B does not share the characteristic,
>
> (b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
>
> (c) it puts, or would put, B at that disadvantage, and
>
> (d) A cannot show it to be a proportionate means of achieving a legitimate aim.
>
> (3) The relevant protected characteristics are -
>
> …disability……."

330. The PCP which needs to be justified within the meaning of section 19 of the Equality Act is the PCP adopted by the respondent which puts the claimant, and those with whom he shares the relevant characteristic, at a particular disadvantage when compared with persons who do not share that characteristic.

331. What renders the act discriminatory is not subjecting persons to a disadvantage; it is the fact that the disadvantage is suffered by some and not others and that the selection of those to be disadvantaged is based on the adoption of a PCP which is not a proportionate means of achieving a legitimate aim. In this case the one of the disadvantages which the claimant suffered is the act of dismissal. The act of dismissal is not itself an act of discrimination. What potentially renders it discriminatory is the way in which those to be subject to dismissal are chosen. It is the selection process which creates the risk of discrimination, not the decision to dismiss.

332. The claimant cites nine[8] of the ten PCP's pleaded for the purposes of the claim for failure to make reasonable adjustments.

333. The claims of indirect discrimination replicate the factual allegations made under section 20 & 21. Those matters have been determined and five allegations have been upheld and five dismissed.

334. The repetition of the same factual matrix under the proximate legal matrix of Section 19 amounts, in our judgment, to an alternative argument which does not require a separate determination.

335. The tribunal does not consider it proportionate to re-iterate those reasons and conclusions set out above in respect of the successful claims brought under section 20/21. The findings of fact in respect of the PCPs, their application to the claimant and disadvantage would lead to the same conclusions under section 19(1) and (2)(a-c). The judgment of the tribunal that the respondent failed to make reasonable adjustments would have led to a formal conclusion that the respondent, for the purposes of section 19(2)(d), had not discharged the burden upon it.

336. Turning to the balance of the "PCP"s in the pleaded complaints:

a. PCP2: Including in grievance meetings implications that disciplinary action might be taken for unrelated conduct.
b. PCP3: The failure to explain thoroughly, clearly and in advance the nature of the grievance meeting.
c. PCP 4: Requiring an employee to return to work to a department without securing the employee's agreement that the department was appropriate.
d. PCP 5: Inviting employees to disciplinary hearings because they are unfit to return to work.
e. PCP 9: Failing to challenge or continue to challenge, UNUM's refusal to provide income protection insurance cover.

337. Again, with reference to our findings in respect of the duty to make reasonable adjustments, on the issue of which PCP's were applied to the claimant, we found that Issues a, b and d were not PCP's. There being no material difference in law on this issue we reach the same conclusion.

338. Whilst there is a substantial difference between the concept of "particular disadvantage" for the purpose of section 19 and the concept of "substantial disadvantage" for section 20/21, we have already made a finding with regard to "c" "that the claimant was not put to any disadvantage whatsoever because the respondent did secure the claimant's agreement to return to work in the Horseshoe offices, albeit the claimant later retracted that consent.

339. Similarly, with regard to "e" we concluded that this PCP was not applied to the claimant because, as a matter of fact, the respondent did challenge UNUM's refusal to provide income protection insurance cover.

[8] Claimant's closing submissions, paragraph 24; failure to explain thoroughly the nature of the grievance meeting is not argued under section 19.

340. The tribunal notes that, despite the distinctions in the legal matrices, the tribunal's findings of fact in respect of the above allegations, have led to identical conclusions on the merits in respect of the same claims under sections 19 and 20/21.

Harassment contrary to section 26 of the Equality Act 2010

Statutory provisions

341. The relevant statutory provisions states:

(1)A person (A) harasses another (B) if—

(a)A engages in unwanted conduct related to a relevant protected characteristic, and

(b)the conduct has the purpose or effect of—

(i)violating B's dignity, or

(ii)creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

(2)-

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—

(a)the perception of B;

(b)the other circumstances of the case;

(c)whether it is reasonable for the conduct to have that effect.

(5)The relevant protected characteristics are—

…disability

342. The proper interpretation of the relevant statutory provisions on harassment is explained in the following authorities:

Richmond Pharmacology v Dhaliwal [2009] IRLR 336

Grant v HM Land Registry & anor [2011] IRLR 748

General principles

343. The relevant principles derived from these authorities are as follows.

344. The prescribed elements of unlawful harassment are

a. unwanted conduct;
b. having the purpose or effect of either:
c. violating the claimant's dignity; or
or related to the prohibited grounds.

345. Although many cases will involve considerable overlap between those elements of harassment, it would normally be a 'healthy discipline' for tribunals to address each element separately and to ensure that factual findings are made in each regard (Dhaliwal).

346. When considering whether the conduct had the prescribed effect on the claimant, although the tribunal must consider objectively whether it was reasonable of the claimant to consider that the conduct had that requisite effect, the claimant's subjective perception of the conduct in question must also be considered.

347. In **Dhaliwal**, the EAT (Underhill P) said that:

> ”We accept that not every racially slanted adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other grounds covered by the cognate legislation to which we have referred), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase.”

348. The Court of Appeal echoed these sentiments in Grant v HM Land Registry & anor [2011] IRLR 748 when it stated in relation to whether an effect could ‘amount to a violation of dignity’ or properly be described as ‘creating an intimidating, hostile, degrading, humiliating or offensive environment’ that:

> ‘Tribunals must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment.

349. The claimant raises the following allegations of harassment:

a) The letters of the 22nd June and 5th October 2017.
b) Richard Allan’s comparison of the claimant’s disability to a broken leg.
c) The correspondence between February and April 2018, which was excessive and threatening.

The letters of the 22nd June & 5th October 2017 and 2nd January 2018

350. The respondent’s submissions[9] it admitted that the letters of the 5th October and 2nd January contained a threat, that those two letters were unwanted and that both letters could have created an intimidating atmosphere for the claimant.

351. The respondent denies that the conduct related to the claimant’s protected characteristic of disability. The respondent is understood to be relying on the consistent submission in respect of the letter of the 22nd June that the “threatening paragraph was included in the letter for all staff and that it was also done in response to a request from the trade unions to ensure staff were aware of the consequence of failing to comply with the respondent’s STSA policy.

352. As set out in paragraphs 22 to 26 of this judgment we did not accept that this explanation was credible. We find that all three letters were drafted because the respondent doubted the degree to which the claimant was ill or willing to co-operate.

[9] Paragraphs 182 and 186.

353. We have therefore reached the conclusion that the said correspondence was conduct which related to the claimant's protected characteristic. In light of the respondent's admissions, we have reached the conclusion that this claim **is well founded**.

Comparison of the claimant's mental health condition with a broken Leg.

354. Ms Hicks admitted that she was the person who mentioned the comparison. The claimant was unable to recall the context or what was said [witness statement paragraph 27].

355. Ms Hicks account was set out in paragraph 25 of her witness statement: in response to a comment from the claimant that most people did not understand mental health issues, Ms Hicks essentially agreed with the claimant; saying that most people did not understand because mental health issues were not obvious as a broken leg would be.

356. It is evident that this comment related to the claimant's disability given the content of the exchange.

357. It is also evident that the claimant treated it as an unwanted comment and it was a comment which the claimant felt was entirely inappropriate. However, that perception was based on his lack of appreciation of what was said. Indeed, the claimant's account does not identify in what way the comparison was made.

358. In the absence of the claimant having a clear recollection of the manner of the comparison we accept Ms Hicks account of her statement; that she was endorsing the claimant's preceding statement and using an example of a physical injury to that purpose.

359. On our analysis of Ms Hick's mental process she did not speak with the prescribed purpose; the opposite was her intention

360. The effect of the words upon the claimant were subjectively upsetting. The degree to which that comment upset him, as distinct from other comments about which he complains ("Move on" from his issues and put his issues "in a box" as examples of matters not pleaded as harassment), is difficult to disentangle and thereby to gauge.

361. We have been taken to the case of **Driskel v Peninsula Business Services ltd** [2000] IRLR 151 and turn to the objective aspect of our assessment. Objectively the comment could not understood as objectionable in the circumstances; the comparison was an endorsement of the claimant's preceding statement. We are also concerned that claimant's degree of upset was based on a contemporary lack of understanding of what was said.

362. Balancing the matters considered above we reached the following conclusions. The comment could not reasonably be as adverse. Even if it were so it was of such a modest character, said in good faith and without ill will that it is not serious enough to amount to harassment: ***Dhaliwal*.**

363. For these reasons we have concluded that this claim is **not** well founded and is dismissed**.**

The excess of correspondence April 2017 to April 2018.

364. To avoid duplication of findings on the same factual matrix. the correspondence addressed in the first allegation of harassment is logically excluded from this aspect of the claim.

365. The claimant alleges that the respondent's conduct was excessive and in the claimant's submissions a number of specific items of correspondence are relied upon, referenced by page numbers of documents in the bundle. We first identify which of these items of correspondence were the conduct of the respondent and then why such correspondence was sent:

a) [249] A letter from the respondent confirming the claimant's involvement within the grievance procedure "…*is now complete. All relevant documentation will now be given to the Operations Management for review and decision will be made on any action going forward regarding the matters that you raised*."

b) [250] correspondence sent by the claimant.

c) [252] correspondence dealing with a request from the claimant on the progress of his UNUM application and receipt of medical evidence from the claimant as well as a query regarding Mr Cook's formal response to the claimant's grievance.

d) [259] Mr Cook's response to questions raised by the claimant about the outcome of his grievance.

e) [267] A letter from the respondent updating the claimant on UNUM's decision to reject his appeal against the refusal of his claim and arrangements for the claimant's planned phased return to work.

f) [269-70] an email for the claimant about his grievance.

g) [272] A letter from the claimant.

h) [272] letter of the 2nd January 2018 which has been cited as harassment in the first of these allegations, and upheld.

i) [286] a response to an email from the claimant requesting an appeal against the formal grievance outcome and the refusal of that request.

Aggressive correspondence in the same period

j) [330] The respondent questions the accuracy of claimant's statement that the last medical advice from Dr Liu had advised that the proposed capability hearing should be postponed a few weeks and asks the claimant questions so it can understand the role of a mental health advocate who the claimant's asks to be allowed to accompany him at that same meeting.

k) [332] Response to a letter from the claimant principally addressing who could accompany the claimant to the forthcoming formal meeting of the 13th April and acknowledging that he could be accompanied by a registered nurse ("RGN") as well his trade union representative.

l) [354] A response to issues raised, or reiterated. in an email from the claimant.

m) [357-8] A response to the claimant's indication that he would be unable to attend the formal meeting on the 13th April and asking the claimant to provide answers to specific questions which were matters for consideration at the 13th April meeting.

366. The claimant's submissions go on to allege that "Valero singularly fails to set out any reasonable adjustments to any of their processes or even a willingness to make adjustments in their correspondence.

Conclusions

367. Having reviewed the correspondence the tribunal is of the view that the tenor of the correspondence is typical of that which passes between an employer and employee in relation to formal and serious matters such as medical reports, appointments, capability hearings and insurance claims. It is not, objectively viewed, aggressive. Objectively viewed the volume of the correspondence sent by the respondent is not excessive; it deals appropriately with a number of issues; UNUM, medical evidence from the claimant, requests for reasonable adjustments. The allegation that the respondent failed to show any willingness to make reasonable adjustments is somewhat contradicted by two examples of the correspondence relied upon by the claimant.

368. We also note that the claimant's witness statement describes stress and despair at two items of correspondence dated the 2nd January 2018, and in correspondence on the 27th March [333] the claimant stated that, "in his mentally dysfunctional state", he found the volume of correspondence "distressing and bewildering". He does not assert that the correspondence was aggressive.

369. We firstly find that the claimant did not evidence that he found the respondent's correspondence aggressive. That evidence concurs with our objective view.

370. Taking into account the claimant's perception and an objective assessment of the correspondence, the allegation of aggressive correspondence is **not** well founded and is dismissed.

371. We secondly find that the assertion that the claimant personally found the volume of correspondence distressing and bewildering is proven and thus subjectively, the respondent's volume of correspondence could have created an intimidating environment, albeit that environment was away from the place of work.

372. We find that, objectively, the volume of the respondent's correspondence was proportionate to (a) the volume of correspondence raised by the claimant and (b) the number of issues which needed to be addressed with, or on behalf of, the claimant.

373. We then balanced the claimant's perspective with our objective perspective. Save for the dispute over the conclusion of the grievance, it is difficult to conclude that the respondent could have communicated adequately with the claimant through less frequent correspondence. We find that responding to correspondence from the claimant was unambiguously reasonable. We find that informing the claimant of decisions from UNUM, or sending information regarding forthcoming formal meetings was unambiguously reasonable.

374. We remind ourselves that this allegation is not concerned with the content of individual items of correspondence, such as the invitation to a disciplinary hearing or the warnings of loss of sick pay; these have been pleaded elsewhere in the claimant's case. Here we are concerned with the volume of correspondence. In our judgment it is not reasonable to conclude that the volume of correspondence had the effect of causing an intimidatory environment.

375. Further, on consideration of the respondent's motivation, we have been guided by the dicta in **Unite the Union v Nailard** [2018] EWCA Civ 1203, in particular paragraphs 79, 80 and the relevant conclusion in 104. We have concluded that the reason for the *volume* of the respondent's correspondence was not, consciously or unconsciously related to the claimant's disability it was rather those motives we we have found and set out above.

376. For these reasons this claim is **not** well founded and is dismissed.

The claim of victimisation contrary to section 27 fo the Equality Act 2010

377. The Equality Act 2010 defines victimisation in section 27 which states:

(1) A person (A) victimises another person (B) if A subjects B to a detriment because—

(a) B does a protected act, or

(b) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act—

(a) bringing proceedings under this Act;

(b) giving evidence or information in connection with proceedings under this Act;

(c) doing any other thing for the purposes of or in connection with this Act;

(d) making an allegation (whether or not express) that A or another person has contravened this Act**.**

378. The parties cited no authorities but the tribunal has directed itself as follows:

379. The protected act must be 'because' of the protected act: **Greater Manchester Police v Bailey** [2017] EWCA Civ 425.

380. That necessarily the respondent had the requisite knowledge of a protected act or the belief for the purpose of section 1(b).

381. The motivation of the respondent maybe conscious or unconscious; **Nagarajan v London Regional Transport** [1999] ICR 877. The protected act need not be the only consideration affecting the respondent's conduct but it must be 'of sufficient weight'*:* **O'Donoghue v Redcar and Cleveland Borough Council** [2001] EWCA Civ 701.

382. The claimant asserts the incidents of his conduct which he avers amount to protected acts each of those acts are statements contained in documents. They are:

a) [247A-I] The claimant's grievance dated the 30th October 2017.
b) [365] The claimant's email to Ms Hicks on the afternoon of the 13th April 2018.
c) Issuing these proceedings on the 18th August 2018.

383. Submissions on behalf of the claimant [paragraph 53] state: "Even if (a) and (b) did not contain any express or implied allegations of discrimination Valero must have believed that he may do a protected act, due to their references to his disability and unfavourable treatment" The submission goes on to assert that the commencement of Early Conciliation put the respondent on notice of an impending disability discrimination claim on the 8th May 2018.

384. The respondent admits that (b) and (c) were protected acts [paragraphs 187-8] even though there is no express or obviously implied protected act in the text of the 13th April email.

385. In our own judgment the claimant's grievance does not express or imply any allegation of a transgression of any part of the Equality Act 2010. It does not amount to a protected act for the purpose for section 27.

386. The claimant relies on four detriments, the date of each event is of importance.

The claimant was denied the opportunity to have his grievances heard in full

387. The respondent communicated the denial of the appeal to the claimant, at the latest, in a letter dated the 2nd January 2018 when it stating that the grievance was closed; that correspondence confirmed an earlier statement to the same effect. This decision pre dates the first protected act (13th April 2018) and self-evidently, the second protected act as well.

The claimant was threatened with disciplinary action

388. There was one disciplinary action brought against the claimant, in respect of his absence from work on the 18th December 2017 onwards. This statement was made by a letter dated the 2nd January 2018 and predates both the protected acts.

389. He was dismissed on the 13th April 2018. This action took place on the same day as the first protected act but predated the second.

390. We have made a finding of fact that Mr Diment did not receive, or become aware of the content of, the email which contains the protected act prior to his decision to dismiss.

391. In respect of the first three detriments we accept the respondent's submission that there is an absence of evidence to warrant a conclusion that mind of Mr Cook or Mr Diment was consciously or unconsciously affected by protected acts which had not occurred and which, on our findings of fact, were not anticipated at the material times.

392. The last detriment is set out thus; The respondent refused to pay to the claimant all or part of the £18.000.00 it received from UNUM.

393. On the 4th July 2018 UNUM agreed to pay £18,697.68 to the respondent as compensation [529-31] because: "*I understand that this will put Valero Energy in a difficult position and therefore as a resolution of the complaint I am offering a lump sum payment from the commencement date of the claim to the date of* [the claimant's]*termination of employment*."

394. Correspondence from UNUM, dated the 27th July 2018 [483] makes it clear that the sum was offered as a settlement of the complaint raised by the respondent and that UNUM considered it was "for Valero to decide how the money should be dispersed as they are the policy holders." [483].

395. However, correspondence on the 21st and 27th June 2018, between the same UNUM representative, the claimant and between Mr Cook and the claimant [397, 486] suggest that both UNUM and Valero's HR advisor expected the compensation from UNUM to be paid to the claimant in accordance with the term of the respondent's income protection plan.

396. It is on this evidence, rather than any reference to applicable contractual term, that the claimant asserts he was subject to the detriment of a failure to pay to him sums equivalent to that which UNUM would have paid to him, via the respondent, if UNUM had accepted liability for such payments. UNUM did not accept that the claimant was entitled to any payment.

397. On the 24th August 2018 the UNUM wrote a Mr Medlar, employed by the respondent as Manager of Compensation and Benefits and based in Canary Wharf. It appears that Mr Medlar had been in discussion with UNUM since the 26th July 2018 [483] concerning to whom the settlement offer, made by UNUM to the respondent, should be paid.

398. The 24th August 2018 letter to the respondent again [480-1] made clear that UNUM's settlement offer was made to the respondent in respect of all UNUM's existing and future potential liabilities to the respondent.

399. On the evidence before us, the first record of a formal offer of payment was made by UNUM in the letter of the 4th July 2018. That payment was offered to the respondent. The tribunal notes the date on which Valero could have made a payment to the claimant must post date the 4th July 2018.

400. That date is prior to the commencement of proceedings but it is clear that the correspondence, summarised above was ongoing after the date of presentation of the claim.

401. The claimant's case rests upon his admitted protected act, the views of two persons who were not the relevant decision makers at UNUM or the respondent and what we will call the moral obligation to treat the compensatory sum in the way it would, hypothetically, have been treated if the same level of payment made had been after the acceptance of Mr Jones' application by UNUM.

402. It is also unclear why UNUM were offering the respondent compensation as a settlement of any claims the respondent might have against UNUM, given UNUM was clear in its judgment that the claimant was not incapable of attending work due to illness.

403. The tribunal accepts that the sum offered appears to equate to the sum that would have been paid to the respondent, had UNUM accepted liability in respect of the claimant's absence. It is also clear that at one point Mr Cook and an employee of UNUM expected the compensation paid to the respondent to be processed in accordance with the respondent's income protection policy.

404. So far as we are able, on the evidence before us, we have not been able to ascertain with certainty which employee of the respondent made the decision not to allocate any part of that compensation to the claimant. On balance, the evidence suggests that the senior manager of Compensation and Benefits was the most likely person; Mr Medlar.

405. Certainly, on the evidence of Mr Cook and Ms Hicks they were not the decision makers and, whilst we have concerns about their reliability as witnesses, there is no evidence to contradict their denial and moderate corroboration of their evidence in the Medlar correspondence.

Conclusions

406. If the decision was made by Mr Medlar then it is possible that other persons in the respondent's business had informed him of the protected acts, but there is no evidence before us to warrant a conclusion any such communication did take place. There is insufficient evidence to infer such a conclusion from circumstantial evidence.

407. There is a logical and "untainted" argument put forward by the respondent for keeping the UNUM payment: it was a payment as settlement of a dispute in return for which the respondent agreed to waive any claim arising from UNUM's conduct in respect of its rejection of the respondent's application (as the policy holder) for payments in respect of the claimant's absence.

408. It seems likely that Ms Hick's would, as the Director of HR for the refinery, have been aware of the early conciliation process and the tribunal proceedings but there is no documentary evidence or witness admission to warrant a conclusion that she made the decision not to process the UNUM compensation in accordance with the income protection policy.

409. The tribunal considered the application of section 136 of the Equality Act and the guidance in **Ayodele v City Link Ltd** [2017] EWCA Civ 1913 and **Greater Manchester Police v Bailey** [2017] EWCA Civ 425 and concluded that, the evidence before us, taken at its highest, the evidence could not warrant a conclusion that the decision to retain a payment, which had been made as consideration for the respondent forgoing any possible claims in respect of UNUM's duty to the respondent, was an act of victimisation in circumstances where the claimant could not evidence (expressly or by inference) that: (a) who was the decision maker (b) that the

decision maker had knowledge of the protected acts or (b) that the decision was, consciously or unconsciously, tainted by knowledge of a protected act.

410. For the above reasons the claims of victimisation are not well founded and are dismissed.

Jurisdiction: whether any of the claims are out of time

411. Neither party made any specific submission on this issue. The respondent does not dispute that the claims relating to the dismissal were presented in time. Neither party adduced the early conciliation certificate. The Tribunal notes the claim was presented on the 14th August 2018. Neither party referred to any authority. The tribunal notes that the claimant pleaded that he was subject to a continuing course of conduct.

412. The tribunal has found that the Mr Cook, and his Line manager Ms Hicks managed the claimant's absence from the outset and remained responsible for the decisions and actions of the respondent up to the date of the dismissal. The tribunal has also found that Mr Cook and Ms Hicks were influential participants in the dismissal and appeal hearings. The Tribunal has found that the majority of the proven aspects of the claim were the acts or omission of Mr Cook or Ms Hicks.

413. The Tribunal has directed itself in accordance with the authorities relevant to the application of section 120 which states that a claim 'may not be brought after the end of—(a) the period of three months starting with the date of the act to which the complaint relates' (s 123(1)(a)), The act extends the meaning of the phrase 'date of the act to which the complaint relates' by providing that (a) conduct extending over a period is to be treated as done at the end of the period; and (b) failure to do something is to be treated as occurring when the person in question decided on it (s 123(3)(a).

414. In **Hendricks v Metropolitan Police Commissioner** [2003] IRLR 96 at para 51–52 it was held that , in cases involving numerous allegations of discriminatory acts or omissions, what he has to prove, in order to establish a continuing act, is that (*a*) the incidents are linked to each other, and (*b*) that they are evidence of a 'continuing discriminatory state of affairs'.

415. All of the allegations in this case relate to the claimant's sickness absence and the respondent's management of his absence. Throughout the relevant period the respondent's HR had effect control, or a high level of influence over all the decisions made by the respondent.

416. We are satisfied that the conduct of the respondent amounted to conduct extending over a period of time. Consequently, we have concluded that all of the claims we have upheld were brought within the prescribed timeframe and are within the tribunal's jurisdiction.

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Employment Judge R Powell
Dated: 21st November 2019

REASONS SENT TO THE PARTIES ON

31 December 2019

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FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS