EMPLOYMENT TRIBUNALS

Claimant: **Mr M Robertson**

Respondent: **British Telecommunications PLC**

Heard at: **London South (Croydon)** **On: 11/11/2019 and 12/11/2019 In chambers 22/11/2019**

Before: **Employment Judge Wright**
Mrs C Wickersham
Mr M Sparham

Representation:
Claimant: **Mr T Cooper – union representative**
Respondent: **Mr H Sheehan - counsel**

RESERVED JUDGMENT ON LIABILTY ONLY

It is the unanimous Judgment of the Tribunal that the claimant:

was unfairly dismissed contrary to s.94 Employment Rights Act 1996;

is a disabled person by reason of his neck/shoulder injury (the musculoskeletal condition) for the purpose of s.6 Equality Act 2010;

was unlawfully discriminated against in part because of something arising from his disability contrary to s.15 Equality Act 2010; and

was unlawfully discriminated in part in that the respondent failed to make reasonably adjustments contrary to its duty under s. 21 Equality Act 2010.

The Tribunal makes a recommendation that the respondent reviews its sickness absence policy.

REASONS

1. By a claim form presented on 14/11/2017 the claimant presented claims of unfair dismissal and disability discrimination. The claimant was employment by the respondent from 17/9/2000 until his dismissal on 4/8/2017 effective from 27/10/2017. The case had been listed previously for two final hearings, but for various reasons they were postponed. At the start of this hearing, the panel was ready to commence the reading of the papers and anticipated being able to conclude matters within the allotted time. The respondent however had failed to ensure the bundles were available to the panel and they did not arrive until midday on the first day. The bundle was in excess of 400-pages.

2. The issues to be determined had previously been identified at a case management hearing by EJ Spencer. They were recorded as (taking the numbering from that order):

> *4.1 Was the claimant dismissed for a fair reason under section 98 (2) of the Employment Rights Act 1996 (ERA) namely capability and/or some other substantial reason (SOSR)?*
>
> *4.2 Did the respondent act reasonably in all the circumstances in treating the claimant's capability and/or SOSR as sufficient reason for dismissal?*
>
> *4.3 Has the respondent complied with the respondent's procedure and/or the ACAS code of practice?*
>
> *4.4 Did the respondent act reasonably or unreasonably in treating the claimant's capability as s sufficient reason for dismissal and was it within the range of reasonable responses in all the circumstances?*

Under disability discrimination, it was recorded:

4.5 At the relevant time was the claimant a disabled person by reference to:

4.5.1 An impairment to his neck and shoulder?

4.5.2 Irritable bowel syndrome?

4.5.3 Anxiety and depression?

4.6 Did the respondent subject the claimant to unfavourable treatment because of something arising in consequences of his disability? The unfavourable treatment is (i) requiring him to attend meetings under the respondent's attendance policy and (ii) the claimant's dismissal. The 'something arising' is his absence from work.

4.7 If so, was the treatment justified as being a proportionate means of achieving a legitimate aim?

4.8 Did the respondent's attendance policy (the PCP) put the claimant at a substantial disadvantage in comparison to those who were not disabled, in that he was unable to attend work for an extended period of time?

4.9 If so did the respondent take such steps as was reasonable to have to take to avoid that advantage? It is the claimant's case that the respondent should have:

4.9.1 Allowed him more time to recover before requiring him to attend meetings to consider his absence:

4.9.2 Given him a greater period of time to recover and return to work before dismissing him.

4.10 It is also the claimant's case that the respondent failed to make a reasonable adjustment for his back and shoulder injury in that in December 2016, the respondent imposed a requirement that he work in the office every day. Did the application of that PCP (namely that he works in the office every day) put the claimant at a substantial disadvantage in comparison to those who were not disabled, in that this caused him additional pain.

4.11 If so did the respondent take … such steps as was reasonable to have to take in order to avoid that disadvantage. It is the claimant's case that the respondent should have allowed him to

continue to work part of the time from home as he had previously been doing.

4.12 (Time issues may arise in respect of some of the issues.)

3. EJ Spencer then gave directions in respect of medical evidence related to the claimant's conditions which he claimed amounted to a disability for the purposes of the Equality Act 2010 (EQA). The respondent was directed to inform the Tribunal whether or not it accepted the claimant was a disabled person for the purposes of the EQA by 7/5/2018. The respondent did not make such a concession and confirmed at the start of the hearing that disability remained an issue to be determined.

4. Due to the fact the bundles were not available to the panel at the start of the hearing and waiting for them to located, the hearing did not start on time. The Tribunal heard evidence from the claimant on the first day. It then heard from the respondent's witnesses, Mr A Brown, who took the decision to dismiss the claimant and Mr E Jakeman, who heard the claimant's appeal against his dismissal. The Tribunal was able hear oral submissions and reserved its Judgment on the second day.

The Law

5. Section 98 of the Employment Rights Act 1996 (ERA) deals with unfair dismissal and provides:

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it—

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

(b) relates to the conduct of the employee,

(c) is that the employee was redundant, or

(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

(3) In subsection (2)(a)—

(a) “capability”, in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and

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

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

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

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

6. The other claims fall under the Equality Act 2010 (EQA) and the relevant sections are:

6 Disability

(1) A person (P) has a disability if—

(a) P has a physical or mental impairment, and

(b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.

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.

20 Duty to make adjustments

(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.

(2) The duty comprises the following three requirements.

(3) The first requirement is a requirement, where a provision, criterion or practice of A's 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.

(4) The second requirement is a requirement, where a physical feature 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.

(5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put 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 provide the auxiliary aid.

123 Time limits

(1) Subject to sections 140A and 140B proceedings on a complaint within section 120 may not be brought after the end of—

(a) the period of 3 months starting with the date of the act to which the complaint relates, or

(b) such other period as the employment tribunal thinks just and equitable.

(2) Proceedings may not be brought in reliance on section 121(1) after the end of—

(a) the period of 6 months starting with the date of the act to which the proceedings relate, or

(b) such other period as the employment tribunal thinks just and equitable.

(3) For the purposes of this section—

(a) conduct extending over a period is to be treated as done at the end of the period;

(b) failure to do something is to be treated as occurring when the person in question decided on it.

(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—

(a) when P does an act inconsistent with doing it, or

(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

7. The respondent submitted that an employer who dismisses an employee on the basis of ill health should take appropriate steps to discern the true medical position and referred to East Lindsay DC v Daubney [1977] ICR 566:

> 'Unless there are wholly exceptional circumstances, before an employee is dismissed on the ground of ill health it is necessary that he should be consulted and the matter discussed with him, and that in one way or another steps should be taken by the employer to discover the true medical position. We do not propose to lay down detailed principles to be applied in such cases, for what will be necessary in one case may not be appropriate in another. But if in every case employers take such steps as are sensible according to the circumstances to consult the employee and to discuss the matter with him, and to inform themselves upon the true medical position it will be found in practice that all that is necessary has been done.'

8. The respondent also referred to the leading case on dismissals arising from ill health – Spencer v Paragon [1076] IRLR 376:

> '… 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, the circumstances of the case and concluded that the employers had discharged the onus put upon them under …'

Findings of fact

9. The claimant had been involved in a road traffic accident in November 2009 and this had caused his neck and shoulder injuries. As a result of that accident, he was off work until August 2010. There was an occupational health (OH) report relating to this dated December 2014 (page 45A).

10. The chronology is that Mr Brown had taken over as the claimant's line manager's manager in October 2016. As a result of that, he no longer needed the claimant to carry out the management role he had been 'acting up' into. The claimant was not demoted and in the acting up role, there had been no pay rise or increase in grade. Mr Brown was also unhappy with the claimant's performance in the role which he had moved the claimant into.

11. The claimant had worked from home for three days a week from July 2014 due to his neck/shoulder injury. When the respondent changed the claimant's role in December 2016, it then required him to be office-based. The claimant was not properly trained in the new role and this contributed to his stress and anxiety (the respondent acknowledged this by stating that the claimant needed to complete his training).

12. As a result of this, the claimant was re-referred to OH in February 2017 (page 96). The report dealt with the neck and shoulder injury. In answer to the question 'do any adjustments apply and for how long?' the report stated:

> '… You may wish to consider allowing Mr Robertson adjustments in terms of working from home some days of the week rather than in the office, according to what he is prepared to bear and you are prepared to accommodate. As his neck and back pain are ongoing it would appear that these adjustments would also need to be ongoing, although one option can be to put these in place for a fixed period (perhaps 6 months) and then review the situation again after that.'

13. OH also suggested that the respondent carry out a stress risk assessment. This did not happen and the claimant took it upon himself to do a STREAM (stress risk assessment) on 8/3/2017. The result was 'red'. The normal process would be for the manager or their line manager to arrange a meeting to discuss this further. This did not happen as the claimant was then absent from 9/3/2017. He did not return to work.

14. The respondent criticised the claimant for leaving work on the 9/3/2017 without informing his line manager. The claimant spoke to HR and due to the issues he was having with his line manager, he was advised to send

her a text to let her know he was okay and that was what he did (page 98A).

15. An absence review meeting was held with the same line manager on 29/3/2017. The claimant's stress was caused by the work he was asked to carry out (bearing in mind this was a new role and it was acknowledged by the respondent he required training and that there were questions around his performance), the breakdown in the relationship with his line manager and his personal situation (caring responsibilities) (pages 101-106). As a result, on 31/3/2017 the claimant's line manager was changed.

16. The new line manager conducted a further absence review meeting on 5/4/2017 (page 123-124).

17. The claimant self-referred to OH and a report was produced on 12/4/2017 (page 147-148). That letter referred to the neck and shoulder problem and the stress which was aggravating that. It also referred to:

> '[the claimant] has found that working from home has greatly improved his ability to cope.
>
> …
>
> It is ultimately for management to determine the extent of any adjustments that could be accommodated and whether homeworking is considered operationally feasible.'

18. The respondent relied upon the reference to management determining the extent of any adjustments and contended that the adjustments the claimant required were unreasonable as opposed to reasonable. The Tribunal finds that an organisation of this size and particularly in the technology industry should be able to make and accommodate these sorts of adjustments; particularly when it had been able do so in the past, for a considerable period of time.

19. On 25/5/2017 Mr Brown conducted a second line manager review meeting, along with the claimant's line manager (pages 160-172).

20. Mr Brown conducted a further (a resolution) review on 27/7/2017 (pages 182-188). Mr Brown then wrote to the claimant on 4/8/2017 and dismissed him for unsatisfactory attendance (pages 196-197). The dismissal was with notice and Mr Brown informed the claimant his last day would be 27/10/2017. The claimant was required to submit sickness certificates throughout his notice period and was informed that if his sickness absence came to an end during this point, he would be expected to use his annual leave.

21. At the meeting the claimant said that if the meeting went well, his GP would sign him as fit for work and he suggested he would cancel the pre-booked annual leave he was due to take in August 2017 to come back earlier to help the team (pages 187 and 212).

22. The claimant also clearly stated (it is recorded in the minutes) that he 'wanted to get back to doing the role he is employed to do' and 'he had made every effort to return to work as soon as he could, but there were delays in NHS process and getting his illness under control has delayed things' (pages 185 and 187).

23. The claimant was due to have a colonoscopy in August 2017. Mr Brown was asked why he did not wait for the outcome of that. He replied that potentially he could have, however he had no confidence in the claimant's ability to return to work. Mr Brown was of the view that the impact of the claimant's absence was causing the team to miss its SLRs. At the resolution meeting, he expected the claimant and his Union Representative to say why he should reach a decision to continue the claimant's employment. He went onto say he expected the claimant to demonstrate a real commitment to returning to work and to present a robust case. Mr Brown put the onus on the claimant and did not follow the absence procedure.

24. The Tribunal finds this is putting the burden onto the claimant and is not in accordance with the respondent's policy.

25. The claimant had expressed an interest in joining Reza Rahnama's team, but that nothing was available. Mr Brown said he had made enquiries on the claimant's behalf. The Tribunal has concerns that any redeployment would not have been discussed in a constructive manner and finds that Mr Brown would have referred to the reason the claimant was seeking an alternative role, which was his absence/health issues. As such, the claimant would not have been considered as a positive addition to the prospective team. Hence, no alternative role was sourced for him.

26. The claimant appealed against the decision to dismiss on 21/8/2017 (page 208-211. Mr Jakeman upheld Mr Brown's decision to dismiss on 4/8/2017 (page 237).

27. The respondent has an Attendance Policy and Procedure (pages 35-45). Under the heading extended absence, the policy provides (page 39):

> 'If long term or permanent adjustments are required to prevent a person being placed at a substantial disadvantage in relation to

maintaining regular attendance in effective employment, these should be based on an up to date OHS capability assessment.'

28. There is a three-paragraph process under the heading '4 Extended Absence'. Following that, there is a heading '5 Repeated Absences' and a procedure sets out a process for managing repeated absences. The first section is 'initial warning for repeated absence', then 'final formal warning for repeated absence', then 'improvement after a formal warning for repeated absences' and finally 'termination of employment'. That part of the process comprises of 17 paragraphs. The next section is '6 Right of Appeal'.

29. Under the 'repeated absences'[1] section, the following extracts are noted:

> 'It is important to avoid being judgemental about the causes of repeated absences and attempts to identify whether reasons for absence are 'genuine' or otherwise are inappropriate and unproductive.
>
> …
>
> When an individual's attendance is below the standard expected and normal supervision/managerial guidance and support have not produced the necessary improvement, managers should seriously consider the issue of an initial formal warning. Full account should be taken of recurrent health problems or disability and the impact that this might have on ability to attain normal standards of attendance.
>
> …
>
> If the individual has or may have a recurrent health problem or disability, OHS advice should be sought on whether this is affecting their attendance, if adjustments are indicated, whether medical management of the condition can be improved and on the anticipated level of future absences.
>
> …
>
> Whether or not it is decided to issue a warning, the line manager should seek guidance from the case advisor on procedural issues and confirm actions taken via the HR system.
>
> …

[1] There is no process to follow set out under the extended absences section.

If a sustained improvement has not been achieved following an initial formal warning, the line manager should consider all the facts and circumstances of the case before deciding whether a final formal warning is appropriate. Particular attention should be paid to any factors, such as a deterioration in health and/or the development of a disability, which might alter the complexion of the case and indicate the need for additional specialist advice.
If it is decided to proceed to consideration of a final formal warning, the line manager must again seek guidance from the case advisor.

…

The individual must be advised that failure to achieve a sustained improvement in attendance following this final formal warning could lead to dismissal.

…

Termination of employment will need to be considered if there is a failure to achieve/sustain improvement following a final formal warning for repeated absence **or where an extended absence becomes unsustainable**. Follow consultation with the case advisor, the first line manager may recommend to the second line manager that consideration be given to termination of employment. When termination is recommended, the second line manager must review the individual's case. The second line manager must ensure at this stage that procedures for determining eligibility for any pension benefits are activated.

[emphasis added as this is the only mention of extended absence in this section of the policy]

…

The individual must be given written notification that termination of employment is being considered.

…

The second line manager must hold a decision meeting at which the individual should be given the opportunity to input any information which they feel is relevant to their continued employment.

…

> The second line manager must consider all aspects of the case carefully and should contact the case advisor before making any decision.
>
> Where grounds for dismissal are impaired capability due to ill health and Core OHS has indicated at the resolution stage that the individual is likely to meet the criteria for medical retirement, the case should not normally move to termination of employment until a definitive opinion on eligibility has been provided.'

30. The relevance of the medical retirement aspect is that after the claimant's employment was terminated (but before his last day) enquiries were made about medical retirement. It is not clear as it was not an issue before the Tribunal, whether or not this post-dated his diagnosis of bowel cancer.

31. The respondent did not follow its own procedure. Section 4 of the policy refers to extended absence; extended absence is not defined. The section provides for a 'rehabilitation plan' should be discussed with all people who are absent for an extended period. The Tribunal was not taken to any evidence that such a plan was discussed with the claimant, either formally or informally.

32. There is a reference long term or permanent adjustments being required. It could be argued this had occurred in the past when the adjustment of the claimant working from home three days a week was made and there is therefore an argument that unless the claimant's situation had changed (there is no evidence that it had) this adjustment had been unilaterally withdrawn. The policy goes onto state that:

> '…every reasonable effort should be made to accommodate permanent adjustments within the business unit but, where that is not possible, a **comprehensive search for alternative duties must be undertaken**.'

[emphasis added]

33. There was then what appeared to be a hyperlink to a 'Adjusted Job Search Procedure', however the Tribunal did not have access to this document (page 40).

34. The claimant had looked for alternative roles himself and in particular ones that would accommodate his working from home, but he was not successful in finding anything. It must be remembered that the claimant was off work due to ill health and therefore, the Tribunal finds that the onus is on the respondent to facilitate this search for alternative work and that in addition, it 'must' do so.

35. The respondent claims it gave the claimant notice that his job was at risk, however, the Tribunal finds that although there is reference to termination of employment in the letter inviting the claimant to the second review meeting (page 178) that is not specific enough to alert the claimant to the fact that Mr Brown was considering dismissing him. The claimant (when he said to his line manager Ms Hill he was worried about losing his job) thought, the decision to dismiss him had already been taken and he was reassured that was not the case and the purpose of the meeting was to discuss his sickness absence. Ms Hill's interpretation of how the respondent should have applied its absence policy was correct. It should have been the case that he had nothing to worry about: he was genuinely ill; his absence was certified; and he was co-operating. The claimant had had no formal notice that the respondent was considering terminating his employment and the standard references to 'one consideration following the meeting could be the termination of your employment' is not enough to put the claimant on notice that Mr Brown had moved to the stage of the procedure where he was considering dismissal. That stance only became apparent at the meeting.

36. The Tribunal also finds Mr Brown should certainly have re-referred the claimant to OH before taking any decision to dismiss. Mr Brown did not entirely accept what the claimant was saying about his health. Mr Brown went beyond that however and queried (at least to himself) that the claimant had been prescribed ibuprofen by his GP, whereas Mr Brown considered this would have contributed to the claimant's stomach problems. This is contrary to the policy of not being judgemental about the reasons for absence. Mr Brown did not accept the claimant's health issues were genuine and simply did not believe him. Despite not following the procedure or applying natural justice, Mr Brown approached the second review meeting with a closed mind. It then follows that Mr Brown would not be open-minded to considering reasonable adjustments or to searching for alternative roles for the claimant. Mr Brown also said:

> 'I believe he was waiting until the expiry of his full pay under the attendance procedure (this is reduced after six months) and did not believe that any action would be taken before this. I did not feel this was acceptable.'

37. If the claimant's contractual entitlement was for six months' full sickness pay and then a lower amount, so be it. Mr Brown did not accept the absence was genuine, he thought the claimant was malingering in order to benefit from the contractual sickness pay. This is not accepted and the claimant did say that he wanted to return to work after the annual leave he had booked in August and discussed cancelling the leave so as to return to work earlier (page 187). He was never given the opportunity to do so.

Mr Brown at the second review meeting he wanted the claimant to demonstrate he had some kind of plan and aspiration to get back to work. The claimant did set this out and made various suggestions. As Mr Brown did not listen to what the claimant had to say as he had closed his mind to any other outcome than dismissal.

38. Mr Brown also criticised the claimant for producing short term sickness absence certificates[2] (they were not all in the bundle, but the Tribunal was told there were eight in total), rather than being signed off for a lengthy period. This was put to him in cross-examination. He replied that receiving multiple certificates was one of the factors he took into account. Mr Brown appeared to expect that the claimant would be returning to work at the expiry of each certificate and was annoyed with the claimant when he did not. The certificates do not state, for example, when he was signed off for a period of two weeks, that it can be expected that the claimant will return at the end of the two-week period. At no point, was there a sickness certificate (which the Tribunal saw) which indicated that the claimant may be fit for work, subject to suggested adjustments. The Tribunal finds the claimant cannot be criticised for the manner in which the sickness certificates were presented.

39. The respondent in submissions said the claimant's illness was still being investigated at the time of the second review meeting and he appeared to be developing new conditions and symptoms rather than getting better. The respondent did not, as it should have done, refer the claimant to OH and seek input. The claimant may have been optimistic about his prospects of recovery; however, the respondent's view was that the claimant was either a malingerer or his illnesses were not genuine.

40. The respondent put it to the claimant that his absence was impacting upon the team. There was a reference to the team not meeting its service level agreements (SLAs); that penalties were high and that one particular customer was imposing fines of more than £90,000 per month. When asked how it dealt with absences, the respondent accepted it used temporary cover, borrowed staff members from other teams and used overtime. The Tribunal finds that this is not a matter that the claimant should have been blamed for. The respondent is expected to cater for absences (planned or unplanned). It is an employer of 75,000 people. It negotiates the contracts and it has the resources to cover one individual's sickness absence.

41. The respondent said that it was not possible to train the claimant in the new role whilst he worked from home. The respondent seemed to accept that the claimant could eventually return to his working from home pattern

[2] The claimant's absence could be considered to have been repeated absence for this reason, however the more detailed repeated absence procedure was not followed.

as Mr Brown said that working in the office five-days-per-week was necessary, 'at least in the short term'.

42. It was suggested to Mr Brown that the claimant could train in the office for two days per week and he could be trained over a longer period. This was an employee with 17 years' service who had returned to work after the accident in August 2010, after a lengthy period of absence. He had had no other sickness absence until March 2017 (page 48). If the training took three weeks (15 days) then why could the claimant not do the training two-days-per-week over eight weeks? He could then have taken annual leave or unpaid leave for the rest of the time. It may have been the case that when his contractual sickness pay reduced from 100% after six months, that he would then be on 50%[3]. He could have worked part of the week in the office whilst he was trained and used the remaining time for recovery. The Tribunal was not told how long the period of training would be.

43. In the 17/2/2017 OH report the question was posed:

> 'Is the employee likely to render reliable service and attendance in the future?
>
> It is not possible to make any precise predictions as to what the future may hold. I note that Mr Robertson has been carrying out the actual tasks of his job itself very successfully, and that he has not had any sick leave in relation to his ongoing symptoms.'

44. No consideration was given to the fact that the claimant had had one pervious period of long-term sickness absence, that he had successfully returned from that absence and he had not been absent since then. Those facts alone indicate that the claimant had previously demonstrated a willingness to return to work and had done so.

45. In addition, when asked, the claimant replied that if it was a case that he either work in the office five-days-per-week or lose his job, what would he do? The claimant would have forgone the home working and worked in the office. This was never tested by the respondent and so it cannot say that the claimant would not have done so. In fact, the claimant said he loved working for the respondent and the Tribunal finds that he would have returned to working in the office; at least until he found a more amenable role which did allow him to work from home. The Tribunal was told that roles where the claimant could work from home did come up, however none materialised during the claimant's notice period.

[3] The Tribunal was only told the claimant's pay would reduce from 100% after six months, but was not told how much the reduction was.

46. Mr Jakeman referred to the adjustments the claimant had been offered such as a later start time so as to avoid the rush hour. Although this was offered, that does not mean the respondent has discharged its duty. There may have been other reasonable adjustments which could also be offered. This proposed adjustment did not assist him, due to his caring responsibilities for his father. The Tribunal finds that the other suggestions which the respondent made did not ameliorate the fact that the claimant had been working from home three-days-per-week for over two years prior to this. This had become part of his terms of employment. A change in role was then imposed upon the claimant and he was expected to be in the office five-days-per-week, for at least the time his training would take.

47. In his detailed rationale document, Mr Jakeman said the claimant refused to supply a return to work date. The Tribunal finds that the claimant did discuss a return to work in August 2017 as set out above. He also said that failing to make contact and working from home as an adjustment were not taken into account when making the decision to dismiss. The Tribunal finds those matters were taken into account as Mr Brown referred to them in his dismissal rationale (pages 198-201).

48. The respondent also said that before the claimant could work from home that his performance needed to improve. There was a lack of consistency over whether the claimant needed to be in the office for training or whether there would be a period of time for his performance to be monitored.

49. The respondent did not give the claimant the opportunity to return to work. The claimant offered to return to work on 4/8/2017 or after his period of annual leave on the 17/8/2017. At that point, the claimant was offering to return to work in six days' time. The Tribunal finds it is nonsensical for the respondent to say that a return to work was not discussed or offered. The discussion is recorded in the minutes of the meeting (page 183).

50. The respondent took the view that the claimant would not return to work and it was not prepared to give him the opportunity to do so.

Conclusions

51. The Tribunal has totally disregarded the claimant's subsequent unfortunate diagnosis of cancer and that matter has had no influence on the issues which the Tribunal has had to determine.

Unfair dismissal

52. The respondent's reason for dismissal is capability or in the alternative some other substantial reason. The some other substantial reason is the

claimant's extended absence. The Tribunal finds the reason for the dismissal was the claimant's absence, but not that it was extended.

53. The Tribunal finds the respondent acted unreasonably in treating the claimant's absence as a reason for dismissal. The respondent did not allow the claimant the opportunity to demonstrate that he could return to work. At the time of the second review meeting, the claimant said he would return to work in the near future and he offered to return in six days' time. The respondent did not follow the guidance set out in East Lindsay DC v Daubney [1977] ICR 566 and did not take any steps or even any reasonable steps to discover the true medical position.

54. The claimant had developed new medical issues and yet he was not re-referred to OH.

55. By no means had the respondent had followed his own absence procedure. That apart and accepting the procedure is unclear, natural justice would have expected further medical evidence to be obtained, warnings to be given and at least, to have allowed the claimant the opportunity of returning to work when he said he was able to do so.

56. There is clearly a process of warnings and reconsideration under the repeated absence section of the policy. It does not however provide for the same in the extended absence part. Even so, the procedure set out in the extended absence section is the type of process which the Tribunal would expect the respondent to follow when considering dismissal for capability.

57. The respondent cannot have discharged its duty in respect of the nature of the illness as it did not take up-to-date OH advice. The last time the claimant was seen in person by OH was February 2017. Similarly, the respondent cannot have given any serious consideration to the length of absence as it had no up-to-date medical information. Although the respondent had a need to have the work done, it is a large employer and this was an underperforming employee. Finally, the circumstances of the case were that the claimant was offering to return to work in six days' time, he was a long-serving employee who had successfully return to work for a sustained period after a previous lengthy period of absence.

58. Taking into account the size and administrative resources, the respondent acted unreasonably in dismissing the claimant for the reason of his absence. Furthermore, equity and the substantial merits of the case would take into account the claimant's length of service, previous absence record (including the fact that he had returned after the previous lengthy absence and had had no further absence since that episode) and the fact

that he was genuinely ill, his absence was certified and that he was developing other medical conditions.

59. For those reasons, the Tribunal finds the dismissal was unfair and contrary to s.94 ERA.

Disability

60. As set out above, under s.6 EQA, the claimant relied upon three conditions which he says amount to a disability under s. 6 EQA.

61. In respect of the IBS and anxiety and depression, at the relevant time (March to August 2017) the Tribunal finds that they were not 'long-term' conditions in that they had not lasted 12-months and it cannot be said that they were likely to last 12-months (taking into account the Guidance on the definition of disability (2011) paragraph C4). The Tribunal also accepts the claimant indicated he would be able to return in August 2017. This, as the respondent submitted indicates that these conditions were not long-term.

62. The claimant also relies upon the neck/shoulder injury resulting from a road traffic accident in November 2009. He returned to work on 13/8/2010. The respondent did not make any adjustments at that stage as the claimant was working close to home. The respondent then moved the claimant in 2013 to work in London. According to the OH report dated 17/12/2014, due to the neck/shoulder condition the claimant was no longer performing field-based work and he worked inside (whether office or home based). The report noted the symptoms do remain significant and are a cause for a work-based adjustment. The report recommended a commute of no longer than 30 minutes. Furthermore, the physician concurred with the previous advice that the musculoskeletal condition is likely to come within the provisions of the Equality Act 2010.

63. Although the respondent did not concede disability and submitted the burden is on the claimant, it did not challenge the claimant on the evidence he relied upon (his disability impact statement).

64. The Tribunal finds that the claimant was disabled by reason of his neck and shoulder injury. It is a physical impairment and it is long-term. It was recognised as such by OH in the 2014 report. It has an adverse and substantial effect on his ability to carry out day-to-day tasks, such as travelling in the rush hour or for longer than 30 minutes, which the claimant was unable to do without exacerbating the impairment. He could no longer carry out field-based work. That substantial and adverse effect on his ability to carry out day-to-day tasks continued up to the point of his dismissal.

65. Turning to the claimant's allegations under s.15 EQA, the Tribunal does not find that requiring the claimant to attend meetings under the respondent's attendance policy, due to his absence from work (the something arising) was unfavourable treatment in consequence of his disability. The respondent was and is entitled to meet with the claimant to discuss his illness and doing so in those circumstances is not unfavourable treatment. This claim under s. 15 EQA fails.

66. In respect of the claim that the dismissal itself is unfavourable treatment arising from his absence from work, the Tribunal does find that is unfavourable treatment. The respondent also concedes that fact. The respondent says it relies upon a legitimate aim, but does not expressly say what that aim is. It is assumed the respondent relies upon regular attendance in order for the business to effectively perform. It says the proportionate means of achieving that aim should be approached in the same way as whether or not it is reasonable to dismiss for capability. The respondent therefore relies upon: the nature of the illness; the likely length of the continuing absence; the need of the employer to have the work done; and; the circumstances of the case.

67. In respect of the nature of the illness and the likely length of the continuing absence, as the respondent did not refer the claimant to OH or take any steps to discover the true medical position on either aspect. The respondent acknowledged the claimant appeared to be developing new conditions and was not getting any better. It is impossible to now say how long the claimant's absence would have been for. Although the claimant said he intended to return to work in August 2017, he was then dismissed and told not to return to work. It is accepted the fact of the dismissal will have had an impact on him.

68. The Tribunal accepts the respondent has a need to have the work done, but it does not accept that the absence of one member of staff in an organisation of 75,000 employees; results in this burden falling upon the claimant. The respondent set out how it covers work where there is a planned or unplanned absence. In addition, the claimant was new to his role, it was acknowledged he needed training in the new role and he was underperforming. It is difficult to therefore reconcile how his absence could have contributed in any particular way to the respondent's performance under its contracts.

69. In relation to the circumstances of the case the respondent refers to the adjustments the claimant said would assist him (including working from home) and alternative roles. As it has made reasonable adjustments in the past and as the claimant's condition had not improved so as to render the need for them as void, it was reasonable to continue to make those

adjustments. Albeit that it may have been necessary to fit the adjustments around the need for the claimant to undertake training in his new role. The modifications to the adjustments could have been along the lines the Tribunal has suggested above.

70. For those reasons, even if the Tribunal accepted the respondent's legitimate aim, it does not accept the means of achieving that were proportionate or were the least discriminatory methods of achieving that aim.

71. The claimant's claim under s.15 EQA of unfavourable treatment being the dismissal therefore succeeds.

72. The Tribunal finds that if applying its attendance policy was a PCP which was applied to the claimant and he contended for more time to recover before he was required to attend the meeting(s); there was no disadvantaged to the claimant. Requiring him to attend meetings to discuss his absence was a reasonable step for the respondent to take and there was no disadvantage caused to the claimant by the respondent taking this step. This claim under s. 20 EQA fails.

73. The respondent says that it did not act with undue haste or failed to apply the absence policy when it dismissed the claimant. The findings have been made that the absence policy is opaque and has not been followed by the respondent. In the alternative, the absence policy did not adequately cover extended absence and was not adapted to the extended absence in this case. No policy was therefore followed.

74. The respondent also says that that applying the absence policy can only be relevant to a claim for unfair dismissal and is not a separate claim for a failure to make reasonable adjustments. In the alternative, the respondent repeats its justification as set out above.

75. The failure to make reasonable adjustments claim can be distinguished from the unfair dismissal claim and the respondent has not prior to its closing submissions sought to establish there is no separate claim. The reasonable adjustment the claimant contends for is it have allowed him more time to recover and to return to work before dismissing him.

76. The claimant's claim under s.20 EQA succeeds in respect of the disadvantage of him being unable to attend work for an extended period of time. The adjustment which the respondent failed under its duty to take was allowing him a period of time to recover before dismissing him.

77. The respondent was on notice from 17/12/2014 that the neck/shoulder injury was in the opinion of OH to amount to a disability. There was an

updated OH report dated 17/2/2017 which made it clear that his condition had not improved. Furthermore, at the time of the second review meeting, the claimant had indicated he expected or hoped to return to work in the very near future. Then he was dismissed with notice and was never allowed to return to work.

78. It would have been a reasonable adjustment to allow the claimant further time (six more days as at the second review meeting on 27/7/2017) to recover and return to work before dismissing him.

79. The claimant also claims that the respondent failed to make a reasonable adjustment for his neck and shoulder injury in that in December 2016 it imposed a requirement upon him that he work in the office every day. The case was put did the application of the PCP that he works in the office every day, put the claimant at a disadvantage in comparison to those who are not disabled as it caused him more pain?

80. The respondent contends this claim is out of time per s.123 (3)(b) EQA as the time limit runs from the point at which the respondent made the decision that the claimant could no longer work from home or part of the week.

81. The Tribunal finds that the claimant raised working from home in the in second review meeting on 27/7/2017 and again at the appeal meeting on 31/8/2017 (page 240). The Tribunal finds that the decision not to allow the claimant to work from home in December 2016 was revisited when the claimant referred to it again in the meetings. It was therefore either a continuing act under s. 123(3) EQA. Or, in the alternative, the time limit started to run from the last time it was revisited on 31/8/2017 and it was therefore in time. In the further alternative, it is just and equitable to extend the time limit under s. 123(1)(b) EQA as this continued to be a 'live' issue of which the respondent was fully aware.

82. The claim under s.20 EQA that the requirement the claimant attend the office every day (the PCP) put the claimant at a disadvantage in comparison with those who were not disabled succeeds. The respondent did not make the reasonable adjustment of allowing the claimant some form of home working (even if only during the period of training) in order to avoid the disadvantage. The claimant having had the benefit of such an adjustment for over two years previously.

Recommendation

83. The Tribunal also makes a recommendation that the respondent's absence policy is revisited as it is not clear (and therefore it is not clear to any managers following the policy) what procedure should be followed in

respect of extended absence (which is not defined) and whether or not the section on repeated absence (paragraph 5) and the procedure which then follows, applies only to repeated absences or to extended absences in addition. It is also recommended that a manager managing an employee under the policy (including considering dismissal) ensures they follow the policy.

Remedy

84. A remedy hearing is listed for 9/3/2020 and 10/3/2020.

85. Since he presented the ET1 the claimant has indicated that he seeks reinstatement or re-engagement. Section 112 and 113 of the ERA provides:

112 The remedies: orders and compensation.

(1) This section applies where, on a complaint under section 111, an employment tribunal finds that the grounds of the complaint are well-founded.

(2) The tribunal shall—

(a) explain to the complainant what orders may be made under section 113 and in what circumstances they may be made, and

(b) ask him whether he wishes the tribunal to make such an order.

(3) If the complainant expresses such a wish, the tribunal may make an order under section 113.

(4) If no order is made under section 113, the tribunal shall make an award of compensation for unfair dismissal (calculated in accordance with sections 118 to 126 to be paid by the employer to the employee.

113 The orders

An order under this section may be—

(a) an order for reinstatement (in accordance with section 114), or

(b) an order for re-engagement (in accordance with section 115),

as the tribunal may decide.

86. Directions for the remedy hearing will follow, however in the meantime, the claimant is to confirm which remedy/ies he seeks and to confirm the same

to the respondent. If the claimant still seeks reinstatement or re-engagement the parties can commence discussions.

87. The parties are to inform the Tribunal if the remedy hearing can be vacated.

17/12/2019

Employment Judge Wright