EMPLOYMENT TRIBUNALS

Claimant **Respondent**

Mr B Gentry **V** **Royal Mail Group Limited**

Heard at: London Central **On**: 9, 10, 13, 14, 15, 16 January 2020 and 20 and 23 January 2020 (chambers)

Before: Employment Judge Joffe
Ms K A Church
Dr V Weerasinghe

Representation

For the Claimant: Mrs L Gentry, lay representative

For the Respondent: Ms S Hobson, solicitor

RESERVED JUDGMENT

1. The respondent unfairly dismissed the claimant, contrary to sections 94 and 98(4) Employment Rights Act 1996.
2. The claimant was a disabled person at relevant times and the respondent ought reasonably to have know that he was disabled.

3. The claimant's complaints of disability discrimination were presented in time. Alternatively we exercise our discretion to hear any complaints which were presented out of time.

4. The respondent discriminated against the claimant contrary to section 15 Equality Act 2010 in telling him that it was going to commence the SPI process, by moving him to Victoria DO for a period in February 2018 and by subjecting him to a disciplinary process for gross misconduct. The respondent did not prove that any of that treatment was a proportionate means of achieving a legitimate aim.

5. The respondent breached duties to make reasonable adjustments in respect of the following PCPs:

5.1 Requiring the claimant, when he returned from sickness absence in September 2017, to return without sufficient managerial support.

5.2 Requiring the claimant, when he returned from sickness absence in September 2017, to return to an under resourced and/or failing unit.

5.3 Requiring the claimant, when he returned from sickness absence in September 2017, to return to an unmanageable workload.

6. The adjustments which would have been reasonable in respect of these PCPs are:

6.1 Providing adequate managerial support.

6.2 Providing managerial cover for the claimant's reduced hours and reducing the claimant's workload so that it was manageable within his reduced hours.

7. The respondent breached a duty to make reasonable adjustments in respect of the following PCP:

7.1 Moving the claimant to Victoria DO in January 2018.

8. The adjustment which would have been reasonable in respect of this PCP is;

8.1 Proper planning of the move and consultation with the claimant about the move.

9. The respondent breached a duty to make reasonable adjustments in respect of the following PCP:

9.1 Not delaying the disciplinary hearing until the claimant was fit to attend a hearing and/or properly represent himself in writing

10. The adjustment which would have been reasonable in respect of this PCP is:

10.1 Delaying the process to obtain occupational health advice and allow the claimant's condition to stabilise or improve.

11. The respondent breached a duty to make reasonable adjustments in respect of the following PCP:

11.1 Not allowing the claimant's wife to speak at his appeal hearing (allowing representation only by a trade union representative or work colleague)

12. The adjustment which would have been reasonable in respect of this PCP is:

12.1 Allowing the claimant's wife to speak at his appeal hearing.

13. The remaining claims are not upheld.

14. The hearing for remedy will take place on **23 and 24 April 2020**, starting at 10 am on each day. The parties are advised to see whether the matter of remedy can be agreed in part or wholly. If not, the following directions are given in substitution for the directions given at the end of the full merits hearing:

14.1 By 4 pm on **20 March 2020**, the claimant must send to the respondent an updated schedule of loss and any documents which evidence mitigation of loss, such as job applications, or documents which shows sums earned;

14.2 By 4 pm on **3 April 2020**, the respondent must send the claimant a counter schedule, showing what aspects of the schedule of loss are disputed by the respondent;

14.3 By 4 pm on **10 April 2020**, the parties must exchange any further witness statement on which they rely for the purposes of the remedies hearing. The claimant's statement should set out any actions he has taken to mitigate his loss.

REASONS

Claims and issues

1. The issues were discussed with the parties at the outset and agreed as follows:

<u>Time limits / limitation issues</u>

(i) Were all of the claimant's discrimination complaints presented within the time limits set out in sections 123(1)(a) & (b) of the Equality Act 2010 ("EQA")? Dealing with this issue may involve consideration of subsidiary issues including: whether there was an act and/or conduct extending over a period; whether time should be extended on a "just and equitable" basis; when the treatment complained about occurred; etc.

Unfair dismissal

(ii) What was the principal reason for dismissal and was it a potentially fair one in accordance with sections 98(1) and (2) of the Employment Rights Act 1996 ("ERA")? The respondent asserts that it was a reason relating to the claimant's conduct.

(iii) If so, was the dismissal fair or unfair in accordance with ERA section 98(4), and, in particular, did the respondent in all respects act within the so-called 'band of reasonable responses'? The tribunal will consider:

a) Whether the respondent had a genuine belief the claimant was guilty of the misconduct alleged;
b) Whether the respondent had conducted such investigation as was reasonable;
c) Whether the respondent had reasonable grounds for its belief;
d) Whether the procedure followed was fair;
e) Whether dismissal was fair sanction.

Remedy for unfair dismissal

(iv) If the claimant was unfairly dismissed and the remedy is compensation:

a) if the dismissal was procedurally unfair, what adjustment, if any, should be made to any compensatory award to reflect the possibility that the claimant would still have been dismissed had a fair and reasonable procedure been followed / have been dismissed in time anyway? See: Polkey v AE Dayton Services Ltd [1987] UKHL 8; paragraph 54 of Software 2000 Ltd v Andrews [2007] ICR 825; W Devis & Sons Ltd v Atkins [1977] 3 All ER 40; Crédit Agricole Corporate and Investment Bank v Wardle [2011] IRLR 604;

b) would it be just and equitable to reduce the amount of the claimant's basic award because of any blameworthy or culpable conduct before the dismissal, pursuant to ERA section 122(2); and if so to what extent?

c) did the claimant, by blameworthy or culpable actions, cause or contribute to dismissal to any extent; and if so, by what proportion, if at all, would it be just and equitable to reduce the amount of any compensatory award, pursuant to ERA section 123(6)?

Disability

(v) Was the claimant a disabled person in accordance with the Equality Act 2010 ("EQA") at all relevant times because of the following conditions: anxiety and depression?

EQA, section 15: discrimination arising from disability

(vi) Did the following thing(s) arise in consequence of the claimant's disability:

a. Impaired performance?

(vii) Did the respondent treat the claimant unfavourably as follows:

a. Putting him on an IPP [we substitute 'SPI' which is the correct acronym for the respondent's performance procedure at the material time]?
b. Moving him out of Fulham DO to Victoria DO in January 2018?
c. Subjecting him to a disciplinary process for gross misconduct?

(viii) Did the respondent treat the claimant unfavourably in any of those ways because of his impaired performance?

(ix) If so, has the respondent shown that the unfavourable treatment was a proportionate means of achieving a legitimate aim? The respondent relies on the following as its legitimate aim: complying with its Universal Service Obligation.

Reasonable adjustments: EQA, sections 20 & 21

(xi) Did the respondent not know and could it not reasonably have been expected to know the claimant was a disabled person?

(xii) A "PCP" is a provision, criterion or practice. Did the respondent have the following PCP(s):

a. Requiring the claimant, when he returned from sickness absence in September 2017, to return without sufficient managerial support?
b. Requiring the claimant, when he returned from sickness absence in September 2017, to return to an under resourced and/or failing unit.
c. Requiring the claimant, when he returned from sickness absence in September 2017, to return to an unmanageable workload?
d. Putting the claimant on a performance plan?
e. Moving the claimant to Victoria DO in January 2018?
f. Not delaying the disciplinary hearing until the claimant was fit to attend a hearing and/or properly represent himself in writing and/or his wife was no longer caring for her mother?

g. Not allowing the claimant's wife to speak at his appeal hearing?

(xiii) Did any such PCP put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled at any relevant time, in that:

[PCPs a, b and c] When the claimant returned from sickness absence without sufficient managerial support, his anxiety and depression meant he could not cope with an under resourced and failing unit. He could not cope with the work which was required.

[PCP d.] Because the SPI was delivered without notice and in a public space and with no goals and timescales, that put him at a disadvantage because he felt shocked and like the respondent had lost patience and he was embarrassed. He felt that he was not even worth a proper meeting and he felt on edge and as if people were watching him.

[PCP e.] The disadvantage was that the claimant did not know the office, it was far from home, he was not consulted about the move, just told he would be moved. He was moved for only four days and then moved back; this increased his anxiety,

[PCP f.] The claimant was unable to focus well enough to be interviewed, to look at evidence or respond effectively.
[PCP g.] the claimant was unable to speak effectively on own behalf whereas his wife could have assisted.

(xiv) If so, did the respondent know or could it reasonably have been expected to know the claimant was likely to be placed at any such disadvantage?

(xv) If so, were there steps that were not taken that could have been taken by the respondent to avoid any such disadvantage? The burden of proof does not lie on the claimant, however it is helpful to know what steps the claimant alleges should have been taken and they are identified as follows:

With respect to his return to work in September 2017

a) Holding a return to work interview which could have identified adjustments and would have made the claimant feel valued and supported
b) Conducting a stress risk assessment
c) Providing adequate managerial support (above and below the claimant)
d) Putting the claimant in a better resourced unit
e) Providing managerial cover for the claimant's reduced hours
f) Reducing the claimant's workload so that it was manageable within his reduced hours
g) Reviewing the claimant's rehabilitation plan
h) Rehabilitative period, supernumerary
i) Phased return.

With respect to the SPI

j) Giving the claimant adequate notice it was taking place
k) Conducting it in an appropriate professional and private space
l) Not conducting it at all.

With respect to the move to Victoria DO

m) Considering a move closer to the claimant's home and where he would be better supported
n) Giving the claimant more than a day's notice of the move
o) Not moving the claimant to Victoria.

With respect to the disciplinary process

p) Delaying the process until the claimant was fit to attend and/or represent himself properly in writing
q) Keeping the claimant informed about his suspension by reviewing it weekly
r) Not changing the charges midway through the procedure which caused the claimant's anxiety to worsen
s) Providing an occupational health appointment
t) Delaying the process until the claimant's wife was no longer caring for her mother
u) Allowing the claimant's wife to speak at his appeal hearing.

(xvi) If so, would it have been reasonable for the respondent to have to take those steps at any relevant time?

Findings of fact

<u>The hearing</u>

2. We spent the first day of the hearing reading witness statements and documents and agreeing the list of issues with the parties.

3. We heard from the claimant and Bernard Hodges, CMA union representative on the claimant's behalf. The respondent called Henry Aitchison, operations manager, John Cuomo, operations manager and Anna Walsh, independent casework manager.

4. We were provided with an agreed bundle of 626 pages. We were disappointed with the fact that many relevant documents were not present in the bundle. Some of these were provided piecemeal during the hearing. The failure to include many documents we would have expected to see, such as GP certificates and the respondent's policies and procedures relating to long term ill health absence, only became apparent as the hearing continued. One of the statements relied on by Ms Walsh at the appeal stage was missing from the bundle and had to be produced late. The respondent's witness statements did

not in the main enable us to fill in some of the gaps in the evidence. The bundle was difficult to navigate because it was not in chronological order. We understood that the fact that documents were provided in the form that they had been for the disciplinary and appeal stages presented difficulties but observe that it is possible to arrange documents chronologically and then list which were available to each decision-maker. As it was, it was not clear which documents Mr Cuomo has seen nor which Ms Walsh had seen and there were no aide memoires for them to refer to.

5. We would have been greatly assisted by the production of a chronology and a cast list. Either the respondent's recordkeeping has surprising gaps or we were not provided with evidence we might have expected to see. It was difficulty to be clear about some aspects of the chronology of events and which personnel were in Fulham DO at particular times.

Management structure

6. Delivery offices were run by delivery office managers ('DOMs'). Above the DOM, there would be a delivery sector manager (DSM), later called an operations manager. Fulham Delivery Office fell within the South West London sector. Mr Hodges' evidence was that the South West London sector was one of the most difficult in the country to manage. There had been numerous changes to the operations manager. The DOM would have a number of duty managers or 'line managers' under him or her in the management structure; Fulham DO should have had two such managers to be fully staffed.

7. Over much of the relevant period for the purposes of these claims, Mr Aitchison was the South West London operations manager. After Mr Aitchison returned to Scotland in early 2018, there was a restructure of South West London and two operations managers were put in place for the sector, one of whom was Mr Cuomo.

The respondent and regulation

8. The respondent operates subject to regulation by an external regulator, Postcomm, which can impose penalties or withdraw the respondent's licence.

Door-to-door items ('D2Ds')

9. Door-to-door items ('D2Ds') are unaddressed flyers, advertising material and similar materials which the respondent is paid by customers to deliver along with ordinary addressed mail. We were told and accepted that door-to-door materials represent a significant revenue stream for the respondent. They are delivered in boxes to delivery offices on Monday to be sorted into individual walk frames for delivery. The sorting of post into addresses on walk frames is known as 'throwing off' the walk. We were told the practice was generally to deliver a percentage of D2Ds each day. Some items would not be deliverable; for example more items may be delivered then there are addresses in the relevant area and these would be returned to the Mail Centre on the following Monday. A van collects items for return to the Mail Centre on Mondays. Each batch of

returned D2D items should have a facing sheet to show which delivery office it comes from. Delivery office managers report the excess D2Ds by way of the delivery office daily report ('DODR'). If less than 1% excess is reported there is no further enquiry. Other vehicles would come to the delivery office on other days to retrieve empty yorks. A york is a large wheeled cage which contains boxes or trays of mail items.

10. It appears that line managers would fill in the D2D reports on a Saturday although the DOM had ultimate responsibility for the reporting.

11. Fulham DO had a weekly average of 60,000 D2Ds although the total varied from week to week.

Relevant policies and procedures

12. The bundle we were initially provided with contained the respondent's conduct code and business standards document only. We expressed concern that we did not have any policies or procedures relating to long-term ill health or disability and were provided with some further documents, some of which the claimant produced. We were not satisfied that we had ultimately been provided with all of the respondent's relevant policies. In particular the policies we did see referred to further policies which we felt were likely to be relevant; these included the Welcome Back Meetings Guide for managers, the Managing Absence and Disability Guide, and the Work Following Health Problems Guide.

Attendance policy

13. The attendance policy provides for periodic review meetings in cases of long-term absence. It also provides that "occupational health advice will be sought as appropriate to assist managers in making decisions".

Welcome Back Meetings: Guide for employees

14. This guide provides that a welcome back meeting should be held after any period of absence. The meeting has a number of functions including, if appropriate, discussing with the employee whether there is an ongoing health concern. It appears that the 'welcome back meeting' used to be a called a 'return to work discussion' and we saw a template document for recording such a discussion which includes set questions about whether there is an ongoing health condition.

Absent whilst on a formal procedure guide for managers

15. The relevant parts of this guide provide that, where an employee is unable to take part in a formal procedure, the manager should consider a referral to occupational health to understand if there is a medical reason why the employee cannot continue with the formal procedure. Where an employee has not attended an occupational health service referral, the manager is told to advise the employee in writing that the formal procedure will progress but should remind

the employee that they can still agree to attend an occupational health assessment.

Supporting performance improvement policy

16. This policy sets out a procedure to be undertaken where an employee's performance gives cause for concern. There is an informal stage which is documented and provides that the employee will be given interventions to address the performance issue and that there will be a review of progress. Where the informal approach does not bring about the desired improvement, there is then a formal procedure which is followed; this has several stages which can lead to the employee's dismissal for poor performance.

Royal Mail group conduct policy

17. There is a section entitled gross misconduct; this includes examples of types of behaviour which may be judged to be gross misconduct. One example given is intentional delay of mail.

18. There is a section on safeguarding customers' mail which distinguishes between three different types of delay. Unintentional delays are not to be dealt with under the conduct policy beyond informal discussions. Unexcused delay which arises from carelessness or negligence or breach or disregard of a standard or guideline may be treated as misconduct and dealt with under the conduct policy. Outcomes may range from an informal discussion to dismissal. Intentional delay of mail is said to be classed as gross misconduct, which if proven could lead to dismissal: 'The test to determine whether actions may be considered as intentional delay is whether the action taken by the employee knowingly was deliberate with an intention to delay mail.'

19. There is a section on precautionary suspension. This provides that where an employee is suspended, the suspension must be kept under review, initially after 48 hours and then on a weekly basis.

20. There is an appeal procedure. This provides that the appeal is a hearing at which the appeal manager will rehear the case in its entirety. 'In some cases further investigation will be required in which case the hearing may be adjourned by the appeals manager. The employee will be made fully aware of any relevant new evidence, copies of which will be provided, and they will be given sufficient and reasonable time to consider it with their representative.'

21. An employee is entitled to be 'accompanied by their union representative or a colleague normally from the same work location, who may assist them to present their case' at the appeal.

22. One of the 'guiding principles' is that: 'Cases will be handled as speedily as possible'.

<u>Relevant events</u>

23. The claimant commenced work for the respondent, aged 16, in 1991 as a cadet. He worked his way up to management roles and at the time of his dismissal had been a delivery office manager for some eight years. On joining the respondent, the claimant signed a declaration emphasising the potential criminal offences which can be committed inter alia in relation to delay of mail.

The claimant's health

24. We were provided with some GP records from 13 April 2007 onwards. These seem to be records of relevant documents rather than a record of the claimant's appointments. We also had a selection of other medical letters and reports. We had the claimant's impact statement and two occupational health reports.

25. The claimant had no documented history of mental health problems prior to January 2017 when he was signed off work by his GP with a diagnosis of stress at home (18 January 2017). He told the Tribunal that he had some experience of IBS and anxiety symptoms prior to that date. There were four further certificates dated 31 January 2017, 6 February 2017, 21 February 2017 and 10 March 2017 with the same diagnosis. The certificate dated 30 March 2017 has a diagnosis of 'anxiety states'. The certificate of 25 April 2017 has a diagnosis of 'depression and anxiety'. Further certificates dated 22 May 2017, 19 June 2017, 19 July 201, 5 September 2017, and 24 November 2017 reverted to the 'anxiety states' diagnosis. The record of the certificates records the last two as indicating 'may be fit to work' but the respondent was unable to produce the certificates so we were unable to see what adjustments were suggested by the GP. The certificates themselves were not in the GP notes which the claimant had obtained.

26. The claimant was the subject of a report by Andrea McDade, health and wellbeing adviser in the respondent's occupational health provider, dated 16 February 2017, which reported that the claimant was off work with symptoms of stress which related to personal and family problems and in particular his son's health problems.

27. The claimant had had improvement in symptoms since he had been absent from work however his sleep pattern and mood remained up and down and the claimant was likely to 'remain vulnerable' after his return to work. Ms McDade's opinion was that the claimant did not have an underlying mental health condition and that his condition was reactive in nature. 'It is expected that his symptoms will stabilise once his personal / family situation becomes more settled. A full recovery is expected but will require further time.' Ms McDade's opinion was that the claimant was not covered by the Equality Act 2010.

28. There was no further occupational health referral during the claimant's ill health absence.

29. The claimant's medication records indicate that he was prescribed an anti-anxiety medication, propranolol, in March 2017 and an antidepressant, citalopram, in June 2017. He was prescribed zopiclone on 25 April 2018. It appeared from the records that he had repeat prescriptions for citalopram until

22 November 2018 but there was also a further prescription for citalopram described as 'acute' issued on 6 April 2019. The claimant's evidence to the Tribunal was that he had been on antidepressants throughout the period from when they had first been prescribed.

30. The claimant described his symptoms in an impact statement. His sleep pattern had been disturbed. He was unable to sleep properly, would wake up with panic attacks and would then sleep through the day in small periods. He had lost interest in his appearance and keeping fit. He had lost his appetite and ceased to help with cooking family meals. He worried about the future and felt hopeless and sad. He did not help with daily chores or perform DIY as he had done. The family home was in disrepair. He found it difficult to engage with his children's activities. He struggled to deal with personal finances and bills went unpaid. He had lost interest in social life and had lost friendships. He was unable to concentrate on watching television. He avoided social interactions and was grumpy. He had pains in his lower back and hips and IBS symptoms. He had low libido.

31. The claimant told us that these were the symptoms he suffered when he was off work from January 2017. The claimant's symptoms had improved to some extent by the time he returned to work in September 2017 but he told us that they worsened again after his return.

32. A document entitled 'Patient Boarding Card' dating from April 2019 related to the claimant's referral to an overcoming low mood group . Clinical notes recorded the claimant had had three sessions of CBT the previous year. The notes record that the claimant went off work with stress in January 2017 after his son was diagnosed with ODD, dyslexia, ADHD, PDA and issues with fine and gross motor skills. An array of symptoms are recorded which reflect those reported by the claimant in his impact statement.

33. We were also provided with a letter from Dr King, the claimant's GP, dated 23 December 2019. Dr King said that the claimant had been suffering from anxiety and depression for some time. "At the time he was accused of negligence he was suffering from anxiety and depression and being treated for this. I would be grateful if you would take into the consideration fact [sic] that both medication and the affective disorder can cause problems with concentration and memory."

34. Mr Aitchison told the Tribunal that he was aware the claimant had suffered from stress but could not recall knowing he had or had had depression. He never saw any sick certificates or OH referrals or reports. It appears that these were sent to an admin support officer located in Battersea. He could have accessed these records.

35. At the time the claimant commenced sickness absence, his line manager was Nick Berry. At some point in a round August 2017, Mr Berry left the respondent's employment and was replaced by Dennis Henderson. The claimant had a conversation with Mr Henderson in which he discussed his health issues and those of his son and Mr Henderson promised to support the

claimant on his return. The claimant told us that he felt he could only return with support in place.

36. The claimant returned to work on about 4 September 2017 having taken a period of annual leave from 10 August 2017. Mr Henderson was not available to meet with the claimant and the claimant understood he was either sick or suspended. He subsequently left the respondent's employment. It appears that the role of DSM was being covered by Linsay Miller (performance coach) and Danielle Wright (DOM) until a DSM / operations manager from Scotland, Mr Aitchison, arrived in October 2017.

37. The claimant did not have a welcome back / return to work interview or, it appears, any kind of meeting with more senior management when he returned to work. There was no stress risk assessment. There was no discussion or agreement as to what duties he would carry out or prioritise in his reduced hours and how the work he was not able to carry out would be covered.

38. We heard evidence from Mr Hodges about what might have occurred had there been a more structured return to work. He said that with a diagnosis of anxiety and depression, there would normally be an occupational health referral. A staged return to work might be arranged with the number of hours increasing until a full time return to work had been achieved. He said that it was not necessarily usual for a manager to return immediately to his or her own office and that a return as a supernumerary supporting another manager at the same level might be arranged.

39. The claimant returned on reduced hours of 6 am to 12 noon which had been agreed with Mr Henderson, apparently based on the fit certificate from his GP which he had submitted but which the respondent was unable to produce to us. The date of the certificate appears from the GP records to have been 5 September 2017. The claimant told us that his usual hours of work as a DOM would have been approximately 6:18 am to 2:18 pm.

40. Mark Haughton, who had been covering Fulham DO during the claimant's absence had had to manage two delivery offices during that period. During the period when Mr Haughton was managing Fulham DO, there were periods when the reporting showed a failure to deliver the expected numbers of D2Ds.

41. Fulham DO was supposed to be staffed by two delivery managers or 'line managers' who reported to the DOM. Prior to the claimant's absence, these had been Linton Rawlings and Arthur Thomas. During the claimant's absence, Mr Rawlings was moved to another delivery office and the post was vacant. Mr Thomas commenced a significant period of sickness absence at around the time of the claimant's return. The posts were covered at various times by reserve delivery managers, including Kevin Osagie, George Clavalevo, Syed Naqvi and Nana Adu. Ms Adu was at Fulham DO consistently from about October 2017. She was an inexperienced manner who required training. Dennis Kensah was a reserve manager who covered line managers' days off. He worked until 10 am. It was unclear to us exactly which managers were in

place at Fulham DO at which times in the period between September 2017 and February 2018.

42. On 6 September 2017, the claimant texted Ms Miller with his concerns about the removal of Mr Rawlings and said he needed him back urgently. He said that Mr Thomas had 'had enough' and Ms Adu was struggling. He said that standards had slipped, no D2Ds had been put out and it was 'a complete mess'. He said that he needed time to have a resource meeting. He said that all he himself had done for several days was throw off walks and do part walks.

43. The claimant and Mr Hodges told us that managers did cover walks and were encouraged not to report that fact in the DODR. Mr Hodges said that the practice was 'rife in London at the time'.

44. On 6 September 2017, the claimant reported to Ms Wright by text message that there was significant illness and uncovered walks and that Ms Adu had not attended work. Ms Wright responded that she knew it was 'tough at the moment'**.**

45. There were high levels of sickness absence in Fulham DO which meant that the claimant had to spend some time himself collecting agency staff and assisting them, throwing off walks and delivering them himself. Mr Aitchison told us that there was not actually a resource shortfall in Fulham DO. The problem was the high levels of absence.

46. The use of agency staff created extra work for management because these staff might require collection and would need direction and training on the walks they were covering.

47. No DOM cover was provided for the hours the claimant was unable to work. Mr Hodges' evidence was that there was no way the whole DOM role could be covered in the time the claimant was at work. Mr Aitchison drew a distinction between the work which would have to be done up until about 11 am and work which could be done afterwards but he ultimately agreed that having a DOM who was not working full hours without cover for the remaining hours would create problems for Fulham DO. He agreed that it would have been useful for there to be some additional help. He said that the claimant should have prioritised resolving the sickness absence problems in the DO rather than, for example, covering walks himself. Mr Cuomo's evidence was that it would be possible to run a delivery office with a DOM on reduced hours if there were two line managers. It would be unreasonable to run a delivery office with a DOM on 6 hours per day and only one line manager.

48. The Q & C Delivery Office Metrics One Page Tracker which was in the bundle appears to have been the only performance metrics document considered at the disciplinary and appeal stages. This document covers weeks 28 to 46 for Fulham DO. We were told that week 46 was the week commencing 18 February 2018. The chart shows a variety of reports made about the delivery office over the period from the claimant's return to work until his suspension

and includes matters such as uncovered walks, part covered walks, complaints, and weekly D2D returns submitted.

49. We could see from this document that there were issues over the period with covering walks. For example, in week 28 there were 11 part covered walks. There was a succession of weeks between weeks 32 and week 36 in which there were a number of uncovered and part covered walks. In week 42, the week ending 21 January 2018, there were 14 part covered walks.

50. On 28 September 2017, the claimant emailed Ms Wright : 'Martin said it would be useful if I got referred to ATOS [the respondent's occupational health provider] as I did talk to them at the beginning of my absence, but all things changed and did not have support anymore.'

51. On 29 September 2017, the claimant wrote to Martin Joyce and Ms Wright asking for Mr Rawling to come to the DO for a week to cover the role. Mr Joyce said he could not spare Mr Rawlings for a week but would spare him for a day 'the week after next'. The claimant responded that this was not adequate.

52. The normal practice was for DOMs to work 5 days per week between Monday and Saturday with a rotating rest day. The claimant was granted a fixed rest day of Mondays at some point soon after his return to assist him with his home issues (his wife worked on Monday and someone needed to supervise their son's medication) but there was no record at all of this agreement shown to us and it was unclear exactly when the agreement was made.

53. A delivery office would ordinarily be covered by a cover DOM on the DOM's rest day but because the claimant had a fixed rest day of Monday, Fulham DO only had a cover DOM one Monday in five or six. Mr Aitchison told us that Robert Sacker was the cover DOM. The claimant told us he had not previously heard of Mr Sacker. Mr Aitchison said that the lack of DOM cover after 12 noon or regularly on Mondays at Fulham DO was not ideal.

54. In early October 207, Mr Aitchison started to cover the South West London operations manager role. This was on a short term basis 'to improve our customer scorecard' as described in an email from Tony Bicknell, Delivery Leader London on 4 October 2017. Mr Aitchison told us that Fulham Delivery Office was not performing to the standard he would have liked when he took over. It was some way away from achieving its KPIs or 'score card'.

55. At some point in early October 2017, Mr Aitchison and the claimant had a meeting which Mr Aitchison told us lasted for about an hour. They discussed the fact that things were stressful for the claimant at home and in relation to the claimant's son. Mr Aitchison agreed that the claimant would continue to be on reduced hours and could have some additional time to go to meetings at his son's school. They discussed their mutual interest in boxing. Mr Aitchison told us that he had not seen any of the claimant's sickness certificates. He was aware the claimant had previously been off sick for a substantial period of time and he was aware that the claimant was underperforming. No notes were kept of this meeting. Mr Aitchison said that he did not connect the claimant's under

performance with his stress at home. Mr Aitchison said that he did not discuss the claimant with Ms Blake, who had been looking after the sector on a short term basis.

56. On 5 October 2017, the claimant emailed Ms Wright, ‘Any news on my ATOS appointment yet[?]’

57. Also on 5 October 2017, the claimant emailed Mr Aitchison about lack of cover for walks and part-failed walks.

58. On 13 October 2017, the claimant emailed Mr Aitchison: ‘I desperately need Linton Rawlings back in my unit, this was authorised by Dennis when Mark brought this up when I was off. As discussed I have Arthur off and Linton taken away and Nana has been shown nothing.’

59. The word the claimant repeatedly used in evidence to describe his experience at work at this time is ‘struggling’.

60. On 14 October 2017, the claimant emailed Mr Aitchison asking for a one-to-one meeting: ‘Very much need a 121’. Mr Aitchison told us that he had arranged to have a one-to-one with the claimant in October which the claimant had been unable to attend for reasons Mr Aitchison could not recall. Mr Aitchison could not recall why there was not a rescheduled one-to-one soon after but told the Tribunal he line-managed 15 DOMs and had a schedule of one-to-ones to do.

61. 20 October 2017, the claimant emailed Ms Wright: ‘I still have not heard from ATOS yet’.

62. On 20 and 21 October the claimant emailed Mr Aitchison about difficulties he was having with resourcing and the fact that he needed support to sort out sick leave in the delivery office. He thanked Mr Aitchison for assisting to get Mr Thomas back to work which he said would alleviate the ‘stressful weeks I have had’. He asked to retain Mr Osagie.

63. On 30 and 31 October 2017, there were emails between the claimant and Mr Aitchison about uncovered walks.

64. Mr Thomas returned to work some time in October 217. He had a return to work / welcome back meeting with Mr Aitchison. He then had a period working for Mr Aitchison in a recuperative capacity and returned to Fulham DO some time in November 2017.

65. On 1 November 2017, the claimant emailed Ms Harrison and Mr Aitchison asking to keep Mr Osagie at the delivery office to cover Mr Rawlings’ role. He said that “we are very behind on many areas”. He said that he had lost Mr Rawlings and no cover had been put in place and there had been no handover. He said there were difficulties with the union.

66. On 6 November 2017, there is an email from the claimant to Ahmed Sharif, Brian Ferrell and Mr Aitchison: **‘**Fulham DO is in a bad way due to coverage

and lack of managers.' He mentioned the lack of Mr Rawlings and Mr Thomas and said he only had Ms Adu at present. In a further email that day he referred to failed walks.

67. On 7 November 2017, the claimant emailed Mr Aitchison about problems with uncovered walks and what appeared to be unofficial industrial action at Fulham DO.

68. On 10 November 2017, the claimant reported a 'very bad week" in an email to Mr Aitchison. He said: 'I have D2Ds not delivered, which need to be sent back.'

Performance management

69. On an uncertain date in December 2017, the claimant says that Mr Aitchison met with him in the canteen at Fulham DO. Mr Aitchison said that standards were not great at Fulham DO and there were USO failures and that the claimant would be put on an SPI (a type of formal performance improvement plan). The claimant said that he became upset and said to Mr Aitchison that he was on reduced hours. The claimant said he had not previously been subject to performance procedures and it felt like a 'kick in the teeth', because he had been trying to cope with the work on reduced hours and the DO was in a poor state when he returned to work.

70. Mr Aitchison's account of this discussion was that he had an informal conversation with the claimant about how to drive performance improvement and avoid the claimant going on an SPI. He denied that he held a meeting in the canteen area. He said that he met the claimant at an office in Victoria which was an interview room.

71. It seemed to us that Mr Aitchison did not have a very distinct memory of how and where he first raised this issue with the claimant and that his memory of meeting the claimant in an office at Victoria was likely to relate to a subsequent meeting. The claimants had a clear memory of the matter being raised in the canteen because he was offended and upset by it and we accept that Mr Aitchison did first raise with the claimant the possibility that he might have the SPI procedure applied to him in the canteen.

72. The claimant raised the issue with Paul Vines, union representative, and there was a performance one-to-one meeting between the claimant and Mr Aitchison on 17 January 2018. At this meeting, which was documented on a standard form entitled 'performance management one-to-one form', it was recorded that the claimant and Mr Aitchison discussed a number of topics: safety (the claimant was to carry out one SMAT per week and address indoor congestion), the claimant was to ensure that attendance reviews were completed to timescale, the claimant was to deal with customer complaints. It was recorded that: 'Brian to ensure that In Process Checks are robust, including documented daily clear frame checks, clear vehicle & trolley checks. Additional activity

needs to be in place to track the delivery of D2D form Monday mornings to ensure all is delivered on time.'

73. It was also recorded that 'Henry agreed to review the actions in Fulham on 17th January 2018.'

74. No such review in fact happened. Mr Aitchison was not sure why it did not but said that his recollection was that the claimant was not available on that date. There was no further documentation about the matter and it did not appear that a revised date for review was ever set.

75. Mr Aitchison told the Tribunal that this meeting (17 January 2018) was a stage prior to the first informal stage under the SPI procedure. Mr Aitchison's focus for Fulham DO was on reduction of sickness absence. He said that until Fulham DO got its sickness absence down, it would continue to 'firefight'.

76. Mr Aitchison said that he probably visited Fulham DO four or five times during his tenure. He did not see a build-up of D2D items but told us he would not be visiting to look for that issue. He did recall at some point having a conversation with Greg Charles, a CWU area representative, about there being a couple of boxes of D2Ds which OPGs (post delivery people) had not picked up. Mr Charles was telling the OPGs it was important to deliver these items.

77. Meanwhile on 10 January 2018: Mr Aitchison was reporting a 7.5 k workplan failure for Fulham DO.

78. On 11 January 2018, the claimant emailed Ms Adu and Mr Osagie raising an issue about staff who had 'not started their D2Ds'. He asked them to 'have a walk around Thursday and do your checks please. We cannot have staff not do them and expect to go home early.'

79. In January and February 2018, there were regularly part-covered and sometimes uncovered walks.

80. On 27 January 2018, the claimant wrote to Mr Sharif discussing a number of issues with Fulham DO and saying: 'We currently have a D2D issue which I will deal with on Monday to get tidy.'

81. On 27 January 2018, in response to an email from Mr Reid asking if managers needed support particularly around resourcing, the claimant said: 'Yes please I did ask for help with sick absence as its killing us at present, I did email Ahmed and have a discussion with him when he helped me on Sat.'

<u>February 2018</u>

82. The claimant attended for work at Victoria DO for a period at Mr Aitchison's request. Victoria is a very large delivery office which is the equivalent of three normal sized delivery offices. It is run by one DOM and six line managers. There appears to have been no written record of the move or the reasons for it.

Mr Aitchison told the Tribunal it was because there was no sign that Fulham DO was going to turn around; the claimant did not seem to be coping and the 'score card' was not improving. Mr Aitchison said that the claimant would have been working at line manager level at Victoria DO with a view to returning to perhaps returning to another delivery office. The plan does not appear to have been very well developed.

83. It appeared that Mr Aitchison gave the claimant one day's notice of the move and did not tell the claimant whether the move was intended to be temporary or permanent. Mr Aitchison says that he subsequently agreed that the claimant could return to Fulham DO after a discussion with the claimant and his union representative, Paul Vine. Mr Aitchison said that he did not think the claimant was capable of managing Fulham DO at the time but that the claimant said he was 'the man to turn it around.'

84. It appears that the claimant was away from Fulham DO for the weekend of 3 and 4 February 2018, Monday 5 February which was his rest day, Tuesday 6 February and returned towards the end of his shift on 7 February 2018 and then to work as normal on 8 February.

85. Mr Aitchison says that he would have been surprised if he had not put a cover DOM in when the claimant was in Victoria. It 'could have been Mark Haughton'. If there was a cover DOM, that person did not report an issue with undelivered D2Ds.

86. On 7 February 2018, the claimant saw agency workers boxing up D2Ds. He asked Ms Adu what they were and she said failed walks.

87. At some point, Gary Reid became involved with South West London sector; his title was operations support manager. Mr Reid emailed the South West London DOMs and line managers on 8 February 2018. He said 'there is a huge focus on D2D compliance, the level of returns being sent back to the Mail Centre does not correlate with what is being submitted via the weekly process.' He set out a number of reminders, including that daily checks should be performed to ensure that D2Ds were going out, that there should be accurate reporting of D2D returns and that the correct paperwork should be used.

88. The claimant emailed Mr Reid back within ten minutes to say: 'we have a big issue' at Fulham DO due to 'uncovered walks etc'. He said 'We need to have a real clear out so I set the line managers set areas to stay on top of this. Can I call you about this[?]'.

89. Mr Reid emailed back asking for more detail and then went to Fulham DO. He saw what were estimated as 80 – 100,000 D2Ds. Some of these were in yorks. Some were in the line managers' office. Mr Reid in a later statement to the appeal suggested that the D2Ds were in the DOM's office but Mr Cuomo told us that they were in the line managers' office. Others were in a variety of locations around the DO.

90. The claimant told the Tribunal that he was only aware of the D2Ds which Ms Adu had in yorks on that day. The others he described as 'dumped or hidden'. He said that he was not aware of a significant D2D issue, although there had been smaller issues for example where an OPG had removed a label and dumped D2Ds under a sorting frame. He said that the delivery office had been in a mess since he returned from sick leave.

91. Mr Reid sent the claimant home. The claimant returned to work on 9 February 2018 and was then suspended.

92. On 14 February 2018, the claimant was sent by Mr Aitchison a document which said that after the 48 hour review of his suspension, the claimant would remain on precautionary suspension. There is no further documentary evidence of the claimant's suspension being reviewed. Mr Aitchison says that he handed the case over to someone else at this point as he was preparing to go back to Edinburgh. He thought he handed it over to Gary Reid.

93. Ms Miller conducted a factfinding meeting with the claimant on 23 February 2018. The claimant was represented by Mr Hodges.

94. In the course of this meeting, the claimant explained how he had come back from a period of leave for stress and anxiety and returned to a unit which was lacking in managerial support. He said that Mr Thomas had gone sick due to the workload and lack of support from management. He said that Mr Haughton had covered the unit on and off whilst he was away but was trying to run two delivery offices. He explained that the office was a "complete and utter mess" when he returned, that standards were gone, that there were problems with uncovered walks. He suggested that Mr Haughton should be interviewed. The claimant said there were problems with USO failures and that he himself was often out on delivery and dropping staff for their deliveries. The claimant outlined the times he had asked senior management for support.

95. The claimant said there was a period in December and January when he was authorised to have agency staff due to USO failures. He said that he had to collect those staff on a daily basis. There were issues with agency staff bringing back mail.

96. The claimant said that he had been unaware of the quantities of D2D items; he was unaware of the D2Ds found in the HCT shed, confidential waste and in the manager's office. He said that managers would have been responsible for the false reporting. By the time the managers did the DODR, he would have left for the day because he was on reduced hours. Mr Thomas did the D2D reporting every Saturday afternoon. He said that it was Ms Adu who did the clear frame checks although he would speak to her and to Mr Thomas about doing these checks. No one raised with him that there were D2Ds left under the frames. He mentioned that he was on antidepressants and not always "feeling right".

97. The claimant explained that he had been sent to Victoria the week of 8 February and had when he returned on 7 February late morning, he had been shocked to find quantities of D2Ds there. Mr Hodges said that the claimant had

relied on the line managers due to the massive workload and the claimant's reduced hours.

98. On the minutes of this meeting, when the claimant signed them, he added handwritten notes: 'Ensure Kevin and Syed are interviewed about workload and D2D dumping' and 'Brian felt let down and stressed out lack of support and asked to manage unit under immense pressure with no regular line manager whilst doing reduced hours.'

99. At some point in March or April 2018, the claimant was signed off as unfit for work. There is a GP certificate recorded in the GP notes with a diagnosis of 'anxiety states'. Although Ms Walsh said in her later appeal report that the claimant was signed off on 10 March 2018 with 'stress at home', there is no certificate of that date and it appears that Ms Walsh must have seen a GP certificate of 10 March 2017 with that diagnosis and made an error. This added to the lack of clarity as to what documents Ms Walsh had in front of her when considering the claimant's appeal.

100. The claimant was invited by Nicola Blake, operations manager South East London, in an undated letter to attend a formal conduct meeting to consider a charge of unexcused delay of mail on 10 April 2018. He was told that the matter was being considered as gross misconduct and that his dismissal was a possible outcome.

101. The claimant responded on 17 April 2018 to say that he had received the letter on 16 April 2018 and the witness statements and documents said to have been enclosed with the letter were not enclosed. He said that he was very stressed and anxious, that his suspension did not seem to have been reviewed, and that he had not been contacted by management apart from the fact-finding invitation since his suspension. The stress had prevented him eating and sleeping normally and he had sought medical advice. He said he was not fit to attend the meeting.

102. There is a record in the claimant's GP notes of a medical certificate issued on 25 April 2018 with a diagnosis of 'anxiety states'.

103. It appears that the claimant was then referred to occupational health although the respondent had not retained a copy of the referral document and it was unclear which manager had made the referral or what the terms of the referral were.

104. Ms Alison Morrow, an occupational health adviser, reported on 22 May 2018 that she assessed the claimant as suffering from 'severe anxiety and severe depression'. The claimant's GP had prescribed antidepressants but the claimant was not stabilised on the medication. He was tearful when he spoke to Ms Morrow and, amongst other symptoms, 'he cannot concentrate'. Her opinion was that the claimant was not fit for work in any capacity and not fit to attend any formal meeting. She was referring the claimant for an occupational health physician appointment.

105. On 23 May 2018 the claimant was sent an invitation to an occupational health appointment to take place on 29 May 2018 with Dr Joseph McCarthy. The claimant says he only received the letter on 30 May 2018.

106. On 5 June 2018, Mr Reid wrote to the claimant to say that he was sorry to hear he was unwell and wished to agree a contact strategy with him by telephone and via face to face meetings . He offered him a meeting on 12 June 2018. There is no evidence of any previous managerial contact with the claimant about his ill health save for the fact of the occupational health referral.

107. The claimant responded: 'Please refer to my ATOS report as I'm not fit to attend work or any interviews due to my work related anxiety and depression. I'm in contact with ATOS and CMA rep Bernie with all my medical updates'.

108. On 11 June 2018, the claimant was sent an invitation to an occupational health telephone appointment to take place on 14 June 2018 with Dr Muhammad Baig. The claimant says he received this invitation on 15 June 2018. When the doctor rang he was unable to speak because he was with his daughter.

109. On 21 June 2018 Mrs Gentry wrote to Mr Hodges to ask that the respondent telephone the claimant to arrange an appointment to avoid a further failed appointment.

110. On 27 June 2018, Mrs Gentry wrote to Mr Reid asking for the claimant to be given adequate notice of appointments and suggesting that someone from occupational health could ring her directly to see when the claimant could attend an appointment. It appears that there may have been an offer of a further occupational health appointment for 2 July 2018, referred to in an email from Mrs Gentry to Mr Hodges, but it appeared that not all of the relevant correspondence had been provided to the Tribunal and it was difficult to piece together the exact course of events.

111. On 28 June 2018, Mr Reid wrote to the claimant to say that because he had failed to attend for meetings to discuss his absence and failed to attend three scheduled occupational health appointments, his sick pay would be withheld on 28 June 2018 until the respondent was satisfied that the claimant was adhering to the sick pay conditions. He gave the claimant an opportunity to attend a management interview with him on 4 July 2018 but did not offer a further occupational health referral. On the same day, Mrs Gentry wrote to Mr Reid to offer dates and times when the claimant could speak with the occupational physician; these were 4, 5 and 10 July between 10 am and 2 pm.

112. Later that same day Mrs Gentry wrote to Mr Reid explaining that the occupational health appointment letters had only been received after the appointment dates and no texts had been received to advise of the dates and times. She complained about the threatened stoppage of pay and talked about her husband's fragile mental health. She pointed out that there had been no contact strategy from the respondent for some time.

113. On 3 July 2018, the claimant wrote to Mr Hodges to say that he urgently needed another ATOS appointment.

114. On 4 July 2018, the claimant wrote to Mr Reid explaining that he was not in the right mental state to attend any face-to-face meetings he said he would like an urgent ATOS appointment and was willing to self-refer if possible. He said he could be available at any time apart from one CBT appointment. He offered to talk to a manager on 5 July or any time that week.

115. On 5 July 2018, the claimant wrote to Mr Hodges saying he needed an ATOS appointment to see if he was fit enough to give written mitigation as he was currently unable even to look at the papers as he was so depressed and his anxiety was so bad.

116. The claimant received a new invitation to a formal conduct meeting from Mr Watson, Royal Mail manager. The letter is undated. In contrast with the letter from Ms Blake, this letter contains two charges: 'unexcused delay to mail where a significant volume of D2D items have not been delivered in Fulham Delivery Office' and a new charge 'inaccurate reporting on the D2D share-point'. The meeting was to take place on 6 July 2018.

117. There is a further undated letter from Mr Watson saying that the claimant had informed the conduct manager that he was unable to attend due to his well-being and that because the claimant had failed to attend three occupational health appointments, he was now being invited to put forward mitigation in writing, which he was invited to do by 9 July 2018.

118. On 10 July 2018, Mrs Gentry emailed Mr Reid attaching a letter from the claimant's GP. Mrs Gentry said that the claimant needed to be referred back to occupational health to ascertain his fitness in respect of providing written mitigation. She said that the claimant could not in any event have replied to the request for mitigation because no address or email address was provided. She said that the claimant had agreed to be available for an occupational health appointment at any time but had not received an appointment.

119. On 10 July 2018, Dr Tim King, the claimant's GP, reported that the claimant was suffering with anxiety and depression, was currently unable to work and was taking antidepressant medications and engaged with a local counselling service. Dr King says the claimant told him he had missed an assessment appointment with regards to his employment because he didn't receive the letters in time. Dr King said he would be 'grateful for your support for this gentleman and how to enable his reassessment'.

120. Around this time, the disciplinary case was passed from Mr Watson to Mr Cuomo, operations manager of Streatham and Wandsworth (i.e. part of the South West sector previously covered by one operations manager), due to Mr Watson's other commitments. Mr Cuomo was not given any information about the claimant's medical condition. On 11 July 2018, Mr Cuomo sent the claimant an invitation to put forward written mitigation by 20 July 2018. He said that if the claimant failed to submit mitigation a decision would be made with what

evidence Mr Cuomo had already had presented to him. He said that the charges were being considered as gross misconduct. He told the claimant that one possible outcome could be his dismissal without notice.

121. On 16 July 2018 the claimant sent Mr Cuomo Dr King's letter. He asked for an occupational health physician referral urgently and he asked for his sick pay to be reinstated.

122. The claimant then emailed Mr Cuomo again with a further letter from Dr King dated the same day. This letter said that the claimant was not well enough to 'attend his upcoming assessment'. He said the claimant had missed some appointments, one of which failures was because he was over-sedated with sleeping pills. The claimant reported to him that he was being asked to provide written mitigation but due to his anxiety levels was unable to focus on this and the ongoing dispute was undoubtedly contributing to his anxiety symptoms. He asked if the respondent could provide 'a more supportive role for this gentleman'. In his email the claimant also asked for an urgent referral to the occupational health physician.

123. Mr Cuomo subsequently spoke to Mr Reid. On 17 July 2018 he emailed the claimant and said that it would be in his interest to meet with Mr Reid to discuss his personal health issues and agree a way forward. He also said that 'seeking professional medical advice and support would be beneficial'.

124. On 19 July 2018, Mr Cuomo wrote to the claimant offering him three options as to how he could respond to the charges. The claimant could answer some questions by email, he could answer some questions over the phone, or he could attend a face-to-face meeting with Mr Cuomo on 7 August 2018.

125. The claimant responded on 18 July 2018 saying that he was not well enough for a face-to-face meeting and again asking for an occupational health referral to be made. He said that his mother-in-law had been diagnosed with cancer that day. Mrs Gentry's mother ultimately died in January 2019.

126. On 24 July 2018, Dr King wrote a further letter in which he referred to the claimant suffering from anxiety and depression. He said that the claimant's mother-in-law had just been diagnosed with terminal cancer and his wife had gone to look after her mother. The claimant's parents were taking him away for a short break between 31 July and 6 August. Dr King thought this would be beneficial for the claimant's mental health.

127. On 5 August 2018, the claimant wrote to Mr Cuomo saying that he had been given a letter from his doctor which had been sent to Mr Reid, saying he was not mentally fit to give written mitigation in his conduct case. He described his mental health and stressful home circumstances and once again asked to be referred to the occupational health physician.

128. On 7 August 2018, Mr Cuomo wrote back to ask what medical support the claimant was receiving from the NHS. He said 'the reason I ask is that the purpose of any referral to Atos is to seek occupational health advice to support

people back to work or in your case have a view on whether you are fit to attend a disciplinary interview. You've made it clear that your GP believes you are not mentally fit to attend an interview. Has he/she given a view as to what needs to happen for you to be able to attend interview or give written mitigation. What support are they giving you at this difficult time?'

129. On 15 August 2018, Mr Cuomo emailed the claimant again to ask why he felt an occupational health referral would be helpful and what medical support he was receiving from the NHS.

130. On 16 August 2018, the claimant wrote to say he had not replied sooner because his wife was looking after her mother and he was struggling on his own. He said that he was taking antidepressants and sleeping tablets and receiving CBT therapy. He said that Mr Reid stopped his pay because he had missed occupational health appointments and said that he had been requesting occupational heath appointments for months now. He was confused that it was now being suggested he did not really need one anyway.

131. On 28 August 2018, Mr Reid wrote to Mr Cuomo setting out the claimant's earlier missed occupational health appointments and the explanations given for them. He said: "due to this third appointment being missed and being unable to arrange another appointment the referral closed down."

132. Mr Cuomo said a number of things about this correspondence and his decision to proceed without obtaining an occupational health report. He suggested that his response to the claimant's continued requests for an appointment was to investigate with him why he wanted one, but he also said that the usual point of such a referral would either be getting an employee back to work or ascertaining fitness to participate in a disciplinary process. He said that the latter would have been the point of an OH assessment in this case so it was difficult for us to understand why he was asking the claimant why he required an appointment.

133. Mr Cuomo seemed at one point to be suggesting that he had relied upon the claimant's own GP's view that he was not fit ('to attend his upcoming assessment') but twice said that he would be guided by occupational health and not a GP in the circumstances which had arisen and would 'always' seek an occupational health report.

134. Ultimately Mr Cuomo was unable to provide any cogent reason why he had not made the occupational health referral the claimant was requesting. He was unaware of the provision in the respondent's Absent Whilst on a Formal Procedure policy which provides for employees to be given a final chance to attend an occupational health appointment.

135. On 29 August 2018, the claimant submitted a grievance. That grievance covered matters such as his return to work in 2017 without any kind of return to work meeting or stress risk assessment and the lack of resources in and issues at Fulham DO. He set out some detail about the lack of support he felt he had had and complained about stoppage of his pay and his treatment by Mr Reid.

He complained about the failure to provide him with an occupational health appointment.

136. The claimant never received a substantive response to his grievance. He emailed the respondent's CEO on 5 November 2018 chasing a response and received an email from Phil Northage, Just Say It channel manager, telling him that Viren Visalia had been appointed to hear his grievance and would be contacting him. He never heard anything further about his grievance. No explanation was provided to the Tribunal by the respondent for this state of affairs.

137. Mr Cuomo decided the disciplinary case on the basis of the documentary evidence which he had. This included a number of photographs. These showed D2D items found in various parts of Fulham DO. There are handwritten captions on the photographs indicating the location of the items. Some are said to have been in 'the manager's office'. There is a photograph of eight yorks full of undelivered D2Ds. We were told that this represented all of the material after it had been gathered up. Other photographs showed D2Ds under prep frames in a bin, in something called the bomb tube, in HCT storage areas.

138. So far as dates are concerned, there was one label (apparently attached to one bundle of D2Ds) with a date of 29 January 2018, one with a date of 17 April 2017, one with a date of 15 January 2018, one with a date of 4 September 2017 and one with a label dated 7 March 2016 together with two photographs of labels where the quality of the photograph meant the date was unreadable.

139. There was a selection of 'clear frame sheets' dated between 6 January 2018 and 10 February 2018, covering a selection of days from that period. There was a tracker document and there were witness statements from Pauline Sinclair, Barry Judge, and Stephen Reynold. There was a reminder email from Mr Reid about the D2D compliance standards.

140. The tracker document which was in the bundle seems to have been redacted or obscured so that the section which showed how many D2D items had been returned on a weekly basis from Fulham DO only showed weeks 43, 44 and 45; these appeared to be the weeks ending 28 January 2018, 4 February 2018 and 11 February 2018.

141. Mr Judge was a distribution driver at Jubilee Mail Centre. Mr Judge's statement recounted that Ms Adu had been asking him to take back four to six Yorks of undelivered D2Ds to the mail centre on a weekly basis since roughly October 2017. The paperwork was never correct but Ms Adu would ask him to return the items as a favour. He said he had refused to take these items since January 2018. He said that on occasions there were 'yorks upon yorks of door-to-doors not even out of the boxes, potentially tens of thousands of D2Ds just being dumped back to the Mail Centre.'

142. Mr Vennard similarly reported that Ms Adu had asked him to take yorks of D2Ds back to the Mail Centre. Mr Vennard was the late turn collections

manager. He started work, the claimant thought, at 1 or 2 pm. He was responsible for collection of post from pillar boxes.

143. Ms Sinclair, Fulham collection manager, reported that Ms Adu had been seen by her opening D2Ds due for delivery and putting them into trays for return to the Mail Centre. She had also witnessed her using casuals to open boxes of D2Ds and put them into trays to be returned. She said this would average three to five yorks at a time and sometimes more.

144. We add parenthetically that it emerged during the tribunal hearing that Ms Adu had been disciplined and dismissed in separate proceedings. We were not provided with any detail about that matter except that Ms Hobson told us that a tribunal had found Ms Adu to have been unfairly dismissed but she had had her compensation reduced on the basis of contribution.

145. Mr Hodges was critical of the quality of the photographic evidence and said more photographs should have been taken; those taken should have been clear and shown the dates on the labels.

146. Mr Cuomo accepted that some of the volume of D2Ds found on 8 February 2018 would have been from the period when the claimant was off sick. He said that the reporting charge related to the three weeks which were shown on the document which we saw. He accepted that D2Ds described as being in the manager's office were in the line managers' office. He said that the claimant should have seen the D2Ds as part of health and safety checks of the DO and said it was 'inconceivable and unreasonable' for him to have been unaware of the D2Ds. He said that the claimant should have walked the floor before he left for the day to check that all mail including D2Ds had gone out. He said that the delivery staff would be out on their walks by 10 am so that the claimant should have been able to see what mail including D2Ds had been left behind.

The clear frame sheets

147. Mr Cuomo accepted that these would have been completed by the line managers. Mr Cuomo did not appear to have appreciated that some of the sheets covered days when the claimant was not in the office, including at least one day after he was suspended. Mr Cuomo was not aware that the claimant had been in Victoria for part of the period when Mr Cuomo found that there was inaccurate reporting and was not aware whether there had been a cover DOM during that time. He said that these were matters which the claimant could have raised had he attended the disciplinary hearing.

148. Mr Cuomo accepted that the claimant would not be present at the DO on Mondays but said that the undelivered items would be consolidated on Saturday so that on Saturday the volume would be apparent. Mr Cuomo said that the volume of D2Ds must have been generated over many weeks so it was his assumption that there must have been misreporting. Controls could not have been in place.

149. In terms of whether a DSM / operations manager would or should have seen a build up of D2Ds earlier in the period, had they been evident, Mr Cuomo said that Mr Aitchison had fifteen DOMs under his line management and that different ops managers have different styles and habits as to when they would visit. They would expect to see relatively large volumes of D2Ds earlier in the week. He said that if the claimant had returned from sick leave and became aware of volumes of undelivered D2Ds from the period when he was off sick, this was a matter which he should have reported to his DSM / operations manager.

150. Mr Cuomo could not recall whether he had seen the report from Ms Morrow, OHA, dated 22 May 2018. He had seen the claimant's absence record kept by the respondent, which only records the reason for the claimant's long absence in 2017 as 'stress' .

151. Mr Cuomo wrote to the claimant on 3 September 2018 finding the claimant guilty of both charges and dismissing him without notice. He attached a report outlining how he had made his decision. He noted that Ms Adu had also been investigated separately.

152. Mr Cuomo's findings were essentially:
- 'the volume of undelivered D2D items that were identified would be difficult for any competent manager to miss despite the pressures that the unit were under. He was aware of the limited capabilities of the line manager Nana Adu but appeared to turn a blind eye to what was taking place. I find it hard to believe that he was not aware of the D2D items in the manager's office and other parts of the unit.…The control measures that were in place i.e. daily check sheets were not completed correctly and he should have questioned what he was seeking with the reports that were being submitted. Level of grip and control was completely inadequate.'
- Mr Cuomo said that he took into account the pressures that the management team were under from the autumn of 2017 and the lack of stability and took into account the points raised by Mr Gentry about coverage issues and line manager capability.
  We not that in evidence it appeared that Mr Cuomo was not aware of the extent of the managerial under resourcing at Fulham DO. He did not know for example how long Mr Thomas was off sick.

153. Mr Cuomo told the Tribunal that if the charge had been the unexcused delay charge only, and not the inaccurate reporting charge: 'I would certainly have had second thoughts about dismissing.' Although in his witness statement, Mr Cuomo refers to having 'lost all confidence in [the claimant's] ability to report honestly', neither the original charges nor Mr Cuomo's dismissal letter and report make allegations or findings of dishonesty.

154. The claimant appealed in a long email dated 6 September 2018. He said that he had received Mr Cuomo's letter on 5 September 2018. We noted that much of the text of this email is taken from the claimant's earlier grievance document.

155. Ms Walsh was appointed to hear the claimant's grievance by the respondent's Appeal Gateway Team. Prior to working as an independent casework manager, Ms Walsh had worked as an appeals manager. She told us that she had heard more than 300 appeals in total whilst working for the respondent and had on occasion advised that reinstatement was appropriate.

156. Ms Walsh invited the claimant to a hearing in a letter dated 13 September 2018. A date of 26 September 2018 was agreed to accommodate the attendance of Mr Hodges. On 20 September 2018, the claimant emailed Ms Walsh to ask for the hearing to be at his home as he was still suffering from anxiety and the thought of attending Kingston delivery office made him feel very anxious. He also told Ms Walsh that in addition to his representative he intended to have his wife present. Ms Walsh agreed to attend the claimant's home address, although she explained that she would not usually do so. She said that non-employees were not allowed to attend but that on this occasion she would allow Mrs Gentry to be present.

157. The appeal hearing took place at the claimant's home on 26 September 2018. The claimant was represented by Mr Hodges and his wife was in attendance as an observer. Ms Walsh made it clear to Mrs Gentry that she was allowed to listen but not participate, as she recorded in her appeal report. Her evidence to the Tribunal was that she had told Mrs Gentry she could not contribute her thoughts. Her reasoning was that whilst Mrs Gentry could report on how her husband appeared to her during the conduct case, she could not offer any evidence as to what he did or did not do during his tenure at Fulham DO.

158. We saw a copy of the notes of the hearing. The claimant was informed that the appeal would be a rehearing and that that Ms Walsh might conduct further investigations. He would be provided with and given the opportunity to comment on any new evidence but would only be invited to a further meeting if Ms Walsh felt that was necessary.

159. The claimant and Mr Hodges made a number of points at the appeal, including:
- That the claimant had not had support when he returned to work with mental health problems. The office was failing. He did not have adequate support from delivery managers; the ones he had were inexperienced and did not understand the office. He had asked for Mr Rawlings to have a proper handover with Ms Adu but that had not happened.
- He had to undertake walks himself and collect agency staff during his reduced working hours. He had prioritised covering walks.
- The evidence before the disciplinary was flawed. There were dates on the D2Ds when the claimant was off sick. In some photographs the dates could not be read. He relied on the delivery managers to report the D2Ds which were returned on a Monday, when the claimant had his rest day.
- The claimant had been employed for 27 years with no previous capability or conduct issues.
- There was a failure to refer the claimant to occupational health before the decision to dismiss.

160. Mr Hodges summed up the grounds as: 'The evidence is flawed, the process is flawed and Brian's mental health has been disregarded in all of this.' Mr Hodges gave some evidence that the D2Ds found in the office on 8 February 2018 had not been all stacked in yorks as in one of the photographs. They had been in a variety of place such as drawers, the bomb bin, the area where HCTs are stored. None were in the claimant's office.

161. After the hearing, Ms Walsh carried out further investigations. She told the Tribunal that there was 'no investigation' at the disciplinary stage, which necessitated her investigation at the appeal stage. She attended Fulham DO, having spoken with the manager, Grace Hall. She asked Ms Hall if she knew what had happened in the DO regarding D2Ds. Ms Hall said that some of the OPGs had told her what they had seen but she did not wish to repeat their stories. Ms Walsh said that she would listen to any OPG who was willing to tell her what he/she saw regarding D2Ds during the claimant's tenure as DOM. A room was provided and Mr Gleeson and Mr Amankwah presented themselves. A third OPG, Mr Paisley, only agreed to speak to Ms Walsh whilst he carried on working at his sorting frame.

162. Ms Walsh told the tribunal that she did to ask to speak to other OPGs who had not self-selected. She said that she 'had enough to go ahead and make my decision' with the evidence she had obtained.

163. On 1 October 2018, Ms Walsh took notes of her interviews with Eddie Amankwah, Gerry Gleeson, and Adam Paisley.

164. Mr Hodges told the Tribunal it was unusual to interview OPGs in a disciplinary about a manager because OPGs might well bear grudges against managers.

165. Ms Walsh said that Mr Paisley was reluctant to speak with her and she made a brief file note of her discussion with him which took place whilst he was throwing off his walk: 'Adam told me that he was working on the packet frame and he saw Brian Gentry putting Door-to-Door items into trays to be sent back to the Mail Centre.'

166. Mr Amankwah's relevant evidence was:
'One OPG used to bring the Door-to-Door round to our bays. We had no problem with the Door-to-Doors then. Then that job stopped. The Door-to-Door was not brought to the bays. When it was brought to the bays you could not say that you do not have it. Brian Gentry was not doing it like that. The D2D used to be piled up. By the time they put it out it was too late.'

'**Did you ever see Brian dealing with the Door-to-Door mail in the yorks**?

Yes. Brian would put the door-to-door sheets into trays and put them on the Yorks. He would print the sheets out and put the sheets in the York to return it to the Mail centre. Nana saw what Brian was doing and so she did the same. Brian was doing it so Nana copied him.'

167. Mr Gleeson's relevant evidence was:

> 'In November/December 2017 Brian told me to bundle up door-to-door mail and give that plus the missorts car driver [sic]. Paula, the late manager, stopped me and said "do not do it. That needs paperwork". I had no idea that it needed paperwork to go with it. So I did not send off the door-to-doors with the driver. The next time Brian asked me to do it I said no. I told him Paula said not to do it. He said not worry about the paperwork so I went to do it again and again Paula said "no. There will be trouble if you send it off without paperwork".'
>
> 'I went to see Arthur Thomas to ask about this. Arthur confirmed that the mail needed papers before it was sent back and he would not do it. He said that if Brian wanted done he needs to print the papers and do it himself.
>
> That was when Brian told Nana to box it up. He told her to work with a casual and box it all up and send it all back. That was the last I knew of it. I came back from leave and Brian was suspended. Brian instructed me to send back the door-to-door mail and when I would not do it he instructed Nana to do instead.'
>
> 'Paula' is a reference to Pauline Sinclair. Mr Gleeson's account was not put to Mr Thomas or Ms Sinclair.
>
> Mr Gleeson said: 'Brian told me to take the door-to-door out of the brown boxes and give the items to the driver at 11 am. I thought I was just sending old stuff back.'

168. Mr Gleeson said that casual staff were sent to the office in Ubers and the casuals would go to Mr Thomas or the other managers for a map.

169. Ms Walsh told the Tribunal that she felt enough people had come forward and she found Mr Gleeson honest and credible. She found Mr Paisley very awkward and said she did not give his evidence much weight.

170. It is convenient to record at this stage the claimant's evidence to the Tribunal that he had had 'run-ins' with Mr Amankwah and that Mr Gleeson resented being required to go out on delivery; he worked in the caller's office.

171. Ms Walsh spoke to three delivery managers: Mr Osagie, Arthur Thomas and Dennis Kensah.

172. Mr Thomas gave evidence as to the state of the office and how he went off sick with stress: 'Brian was off sick for the part of the year. Mark Haughton was in here. Mark then said he had enough and was coming out. They took Linton Rawlings out and put Nana in here. By this time, I had enough; I went sick with stress in August last year. I did not come back until November. When I did come back I was working for Henry Aitchison for two weeks. Henry said come in at 6 am and make sure you go home at 10 am. The first day I came in

there was work everywhere. I did not look at it. I went into the office and did what I needed to do. '

173. He said that the claimant sometimes went out to pick up casuals although not all the time. He said that the claimant spent most of his time in his office and not on the floor. He said that the office was a mess in January. He said that he never returned D2Ds.

174. Mr Kensah was asked in terms whether he had ever seen the claimant box up D2D mail and return it to the Mail Centre and he said that he had not. He said that the claimant had had to pick up casuals on two or three occasions but not regularly.

175. There is a file note of a conversation Ms Walsh had on the telephone with Mr Osagie on 1 October 2018. It is difficult to understand the timings of much of what Mr Osagie related to Ms Walsh as on the whole no time periods were given. Mr Osagie said:
- He had not witnessed the claimant putting D2Ds into trays to send back but had seen Ms Adu doing so 'on Brian's authority' [what that meant was not explored]. He said he did not see the official covering note go with those items;
- Fulham was a difficult office to manage. There were a hard core minority who did not want to do D2Ds and it was difficult to cover the walks. 'He said that with the struggle to cover the walks, getting the Door-to-Door out of the office was put on the back burner.' Checks to ensure D2Ds were taken out drifted.
- When he first came to the office, the claimant was off sick. When he returned he had expected grip to be returned to the office but that did not happen and no one took ownership of the situation.

176. Ms Walsh took a photograph of the area in the DO where the photograph of the yorks was taken.

177. On 1 October 2018, the claimant sent Ms Walsh a number of emails dating from June / July 2018 mainly relating to the occupational health referral issue. He also sent Ms Walsh an email adding some points to the hearing notes, in particular he said that he had been out of Fulham DO for 'the weekend and then two days not one day on a move' as Mr Hodges had been recorded as saying at the appeal hearing.

178. On 5 October 2018 Ms Walsh interviewed Mr Reid. Mr Reid described how there were 80 – 100,00 items of D2D in the office when he visited:
'On Monday 5th February 2018 they reported having less than 1% excess Door-to-Door items in the office and that those were returned to the Mail Centre. On Thursday 8th February 2018 I found 80 – 100,000 Door-to-Door items in the office.'

179. Mr Reid said that he must have visited Fulham DO before and that he had not seen D2D items on those occasions. He said, 'They might have been in boxes under the OPGs frames. That would appear entirely normal. That is where they are kept and the OPGs put them into the frames so that they can take

some out each day.' Mr Reid was unaware that the claimant was still working reduced hours at that point.

180. Ms Walsh asked whether she would be able to ascertain anything from Mail Centre reports. Mr Reid said that she would not because the DO was reporting less than 1% D2D returns. Other items were being returned sporadically in vans which were also attending other delivery offices.

181. On 17 October 2018, Ms Walsh wrote to the claimant and sent him the notes of her further investigations. She offered him the opportunity to comment on that evidence by 29 October 2018.

182. Ms Walsh did not ask to see any documents in the respondent's possession about the claimant's health, for example the occupational health reports. She told the Tribunal that she contemplated getting an occupational health report but did not see how it could contribute to her decision-making. The reason the claimant was dismissed was for the build up of D2Ds in the office and she did not see what occupational health advice could tell her about a failure to see the build up of D2Ds or to follow the processes for dealing with D2Ds.

183. The claimant wrote to Ms Walsh with his comments on the new evidence very shortly after midnight on 30 October 2018.

184. He made in particular the following points:
- That he had struggled to go through all the statements because of his mental health and his wife being away from home looking after her mother;
- That he had only had Mr Osagie's statement that day (presumably 29 October 2018) because it had not been included with the original documents;
- Mr Gleeson and Mr Amankwah were both postmen and could be difficult. He had had dealings with them as their manager which could have influenced their statements. Mr Amankwah had argued with staff and the claimant had had to deal with his conduct. Mr Gleeson worked 'indoors' [the callers' office] and did not like being required to do deliveries when the DO was short. He had been challenged about going straight home after deliveries and had involved his union;
- Mr Gleeson was long term sick in December and January;
- He disputed what Mr Amankwah and Mr Gleeson said about his involvement with return of D2Ds. The sending back of D2Ds took place on a Monday when he was not present in the office;
- Build up of D2Ds when he was off sick;
- As to Mr Osagie's statement, Ms Adu only had authority to send back D2Ds on a Monday.

185. Ms Walsh wrote a detailed report dated 30 October 2018 and wrote to the claimant the same day rejecting his appeal.

186. In a report of some 28 pages Ms Walsh set out her conclusions in significant detail. She said in the report that she had taken into account the claimant's submissions on the further evidence although she did not refer specifically to any point made in those submissions.

187. Ms Walsh accepted the evidence of Mr Gleeson and Mr Amankwah. She derived from that evidence a conclusion that the claimant himself was sending D2Ds back to the Mail Centre without appropriate paperwork. She said that the claimant was 'taking Door-to-Door items straight from their delivery boxes and putting them into trays for return to the mail centre with no attempt being made to get the OPGs to deliver the mail.'

188. She characterised the claimant's conduct as 'dishonesty'. The inaccurate reporting as found by Ms Walsh was that the claimant was himself returning large quantities of D2Ds to the Mail Centre whilst being 'aware that the DODR report stated that less than 1% of the Door-to-Door mail was being returned to the Mail Centre.' Mr Cuomo had not himself made a finding that the claimant was sending D2Ds back to the Mail Centre.

189. Ms Walsh accepted that there were problems at Fulham DO but said that these were 'down to Mr Gentry's lack of management control'.

190. Ms Walsh covered in her report the claimant's concern about not being sent for an occupational health appointment. She set out the chronology up to 28 June 2018 when Mrs Gentry wrote to offer some appointment availability for her husband. She commented that 'I have never seen such a narrow and prescriptive list of availability'. She did not comment on further emails sent by the claimant asking for an appointment including the email of 4 July 2018, from the claimant to Mr Reid which had been forwarded to her, and in which the claimant indicated he was available at any time for an appointment, bar the time when he was at one therapy appointment, and further emails indicating unrestricted availability.

191. She concluded that the claimant was guilty of 'Unexcused delay to mail' and 'Inaccurate reporting on the door-to-Door share point'. Both were gross misconduct because of the volumes of mail involved and the number of times the return rate was misreported. She found that the claimant could not be relied upon. By way of mitigation, she said that she considered the claimant's 27 years service, his clear conduct record and 'his mental illness' but these were not sufficient to warrant reducing the penalty. Either charge in isolation would warrant dismissal.

The law

Disability discrimination

Definition of disability

192. Section 6(2) of the Equality Act 2010 provides that a person has a disability if that person:

- Has a physical or mental impairment

- The impairment has a substantial adverse effect on that person's ability to carry out normal day-to-day activities;
- That effect is 'long-term'.

193. 'Substantial' is defined in S.212(1) EqA as meaning 'more than minor or trivial'. In considering whether there is a substantial adverse effect on normal day-to-day activities, the focus should be on what the person cannot do and not what he or she can do: Goodwin v Patent Office [1999] ICR 302, EAT.

194. Schedule 1, paragraph 2(1) provides that the effect of an impairment is long-term if it has lasted for at least 12 months, or is likely to last for at least 12 months, or is likely to last for the rest of the person's life. When looking at whether an effect is 'likely' to last for at least 12 months, a tribunal should consider whether 'it could well happen': Boyle v SCA Packaging Ltd (Equality and Human Rights Commission intervening) [2009] ICR 1056, HL.

195. A tribunal may, in a case where there is a dispute about the existence of an impairment, 'start by making findings about whether the Claimant's ability to carry out normal day-to-day activities is adversely affected (on a long-term basis), and consider the question of impairment in the light of those findings': J v DLA Piper UK LLP [2010] ICR 1052. It is good practice for a tribunal to state conclusions separately on the question of impairment and adverse effect, but the tribunal should not proceed to those conclusions in rigid consecutive stages.

196. An impairment must be treated as having a substantial adverse effect if measures are being taken to treat or correct it and but for those measures, it would be likely to have that effect: para 5(1), Schedule 1 Equality Act 2010.

Discrimination arising from disability

197. In a claim under s 15, a tribunal must consider:

- Whether the claimant has been treated unfavourably;
- Whether the unfavourable treatment is because of something arising in consequence of the employee's disability;
- Whether the employer knew, or could reasonably have been expected to know, that the employee or applicant had the disability relied on.

198. There are two aspects to causation:

- Considering what caused the unfavourable treatment. This involves focussing on the reason in the mind of the alleged discriminator;

- Determining whether that reason was something arising in consequence of the claimant's disability. That is an objective question and does not involve consideration of the mental processes of the alleged discriminator: Pnaiser v NHS England and anor 2016 IRLR 170, EAT.

199. An employer has a defence to a claim under s 15 if it can show that the unfavourable treatment was a proportionate means of achieving a legitimate aim.

200. Assessing proportionality involves an objective balancing of the discriminatory effect of the treatment and the reasonable needs of the party responsible for the treatment: Hampson v Department of Education and Science [1989] ICR 179, CA.

201. If there is a link between reasonable adjustments said to be required and the disadvantages or detriments being considered in the context of indirect discrimination and/or discrimination arising from disability, any failure to comply with the reasonable adjustments duty must be considered 'as part of the balancing exercise in considering questions of justification': Dominique v Toll Global Forwarding Ltd EAT 0308/13. The EAT commented that it was difficult to see how a disadvantage which could have been alleviated by a reasonable adjustment could be justified.

Failure to comply with a duty to make reasonable adjustments

202. Under s 20 Equality Act 2010, read with schedule 8, an employer who applies a provision, criterion or practice ('PCP') to a disabled person which puts that disabled person at a substantial disadvantage in comparison with persons who are not disabled, is under a duty to take such steps as are reasonable to avoid that disadvantage. Section 21 provides that a failure to comply with a duty to make reasonable adjustments in respect of a disabled person is discrimination against that disabled person.

203. In considering a reasonable adjustments claim, a tribunal must consider:

- The PCP applied by or on behalf of the employer or the relevant physical feature of the premises occupied by the employer;
- The identity of non-disabled comparators (where appropriate) and
- The nature and extent of the substantial disadvantage suffered by the claimant.

Environment Agency v Rowan [2008] ICR 218, EAT.

204. The concept of a PCP does not apply to every act of unfair treatment of a particular employee. A one-off decision can be a practice, but it is not necessarily one; all three words connote a state of affairs indicating how similar cases are generally treated or how a similar case would be treated if it occurred again: Ishola v Transport for London [2020] EWCA Civ 112.

205. A claimant bears the burden of establishing a prima facie case that the duty to make reasonable adjustments has arisen and that there are facts from which it could reasonably be inferred, in the absence of an explanation, that the duty has been breached. There must be evidence of some apparently reasonable adjustment which could be made, at least in broad terms. In some cases the proposed adjustment may not be identified until after the alleged failure to implement it and this may exceptionally be as late as the tribunal hearing itself: Project Management Institute v Latif [2007] IRLR 579, EAT. There is no specific burden of proof on the claimant to do more than raise the reasonable adjustments that he or she suggests should have been made: Jennings v Barts and the London NHS Trust EAT 0056/12. The burden then passes to the respondent to show that the disadvantage would not have been eliminated or reduced by the proposed adjustment and/or that the adjustment was not a reasonable one.

206. By section 212(1) Equality Act 2010, 'substantial' means 'more than minor or trivial'.

207. When considering what adjustments are reasonable, the focus is on the practical result of the measures that can be taken. The test of what is reasonable is an objective one: Smith v Churchills Stairlifts plc [2006] ICR 524, CA. The Tribunal is not concerned with the processes by which the employer reached its decision to make or not make particular adjustments nor with the employer's reasoning: Royal Bank of Scotland v Ashton [2011] ICR 632, EAT.

208. Carrying out an assessment or consulting an employee as to what adjustments might be required is not of itself a reasonable adjustment: Rider v Leeds City Council EAT 0243/11, Tarbuck v Sainsbury's Supermarkets Ltd 2006 IRLR 664, EAT.

209. Although the Equality Act 2010 does not set out a list of factors to be taken into account when determining whether it is reasonable for an employer to take a particular step, the factors previously set out in the Disability Discrimination Act 1995 are matters to which the Tribunal should have regard:

- The extent to which taking the step would prevent the effect in relation to which the duty was imposed
- The extent to which it was practicable for the employer to take the step

- The financial and other costs that would be incurred by the employer in taking the step and the extent to which it would disrupt any of its activities
- The extent of the employer's financial and other resources
- The availability to the employer of financial or other assistance in respect of taking the step
- The nature of the employer's activities and the size of its undertaking
- Where the step would be taken in relation to a private household, the extent to which taking it would (i) disrupt that household or (ii) disturb any person residing there

  This is not an exhaustive list.

Knowledge

210. An employer is not subject to a duty to make reasonable adjustments if it did not know or could not reasonably be expected to know:
   - That the employee has a disability; and
   - That the employee is likely to be placed at a disadvantage by a PCP: Schedule 8, para 20(1)(b) Equality Act 2010.

211. An employer has a defence to a claim under s 15, if it did not know or could not reasonably have been expected to know of the employee's disability: s 15(2) Equality Act 2010.

212. Lack of knowledge that a disability caused the 'something arising in consequence' of which the employee was subjected to unfavourable treatment is not a defence to a claim under s 15: City of York Council v Grosset [2018] ICR 1492, CA.

213. An employer must do all it can reasonably be expected to do to find out whether an employee has a disability: EHRC Employment Code, para 5.15.

Time limits

214. Under s 123 Equality Act 2010, discrimination complaints should be presented to the Tribunal within three months of the act complained of (subject to the extension of time for Early Conciliation contained in s 140B) or such other period as the Tribunal considers just and equitable. The onus is on a claimant to convince the tribunal that it is just and equitable to extend the time limit: Robertson v Bexley Community Centre t/a Leisure Link 2003 IRLR 434, CA.

215. Under s 123(3), conduct extending over a period is to be treated as done at the end of the period.

Unfair dismissal

216. The test for unfair dismissal is set out in section 98 of the Employment Rights Act 1996. Under section 98(1), it is for the employer to show the reason (or, if more than one, the principal reason) for the dismissal, and that it is either a reason falling within subsection (2), e.g. conduct, or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

217. Under s 98(4) '… the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and shall be determined in accordance with equity and the substantial merits of the case.'

218. Tribunals must consider the reasonableness of the dismissal in accordance with s 98(4). However, tribunals have been given guidance by the EAT in British Home Stores v Burchell [1978] IRLR 379; [1980] ICR 303, EAT. There are three stages:
(1) did the Respondent genuinely believe the Claimant was guilty of the alleged misconduct?
(2) did the Respondent hold that belief on reasonable grounds?
(3) did the Respondent carry out a proper and adequate investigation?

219. Tribunals must bear in mind that whereas the burden of proving the reason for dismissal lies on the respondents, the second and third stages of Burchell are neutral as to burden of proof and the onus is not on the respondents (Boys and Girls Welfare Society v McDonald [1996] IRLR 129, [1997] ICR 693).

220. We reminded ourselves of the case of Strouthos v London Underground Limited [2004] EWCA Civ 402. In which Pill LJ said '…it does appear to me quite basic that care must be taken with the framing of a disciplinary charge, and the circumstances in which it is permissible to go beyond that charge in a decision to take disciplinary action are very limited. There may, of course, be provision, as there is in other Tribunals, both formal and informal, to permit amendment of a charge, provided the principles in the cases are respected. Where care has been taken on to frame a charge formally and put it formally to an employee, in my judgment, the normal result must be that it is only matters charged which can form the basis for a dismissal.'

221. We have reminded ourselves that the question is whether dismissal was within the band of reasonable responses open to a reasonable employer. It is not for us to substitute our own decision.

222. 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 of whether an investigation into suspected misconduct was reasonable in all the circumstances as it does to other procedural and substantive aspects of the decision to dismiss a person from his employment for a conduct reason. The objective standards of the reasonable employer

must be applied to all aspects of the question whether an employee was fairly and reasonably dismissed. (Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23, CA).

223. In reaching their decision, tribunals must also take into account the ACAS Code on Disciplinary and Grievance Procedures. By virtue of section 207 of the Trade Union and Labour Relations (Consolidation) Act 1992, the Code is admissible in evidence and if any provision of the Code appears to the tribunal to be relevant to any question arising in the proceedings, it shall be taken into account in determining that question. A failure by any person to follow a provision of the Code does not however in itself render him liable to any proceedings.

Polkey reduction

224. Section 123(1) ERA provides that

'…the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in the all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.'

225. A tribunal will be expected to consider making a reduction of any compensatory award under section 123(1) ERA where there is evidence that the employee might have been dismissed if the employer had acted fairly (see Polkey v AE Dayton Services 1988 ICR 142; King and ors v Eaton (No.2) 1998 IRLR 686).

226. The authorities were summarised by Elias J in Software 2000 Ltd v Andrews and ors [2007] ICR 825, EAT. The principles include:

215.1 in assessing compensation for unfair dismissal, the employment tribunal must assess the loss flowing from that dismissal, which will normally involve an assessment of how long the employee would have been employed but for the dismissal;

215.2 if the employer contends that the employee would or might have ceased to have been employed in any event had fair procedures been adopted, the tribunal must have regard to all relevant evidence, including any evidence from the employee (for example, to the effect that he or she intended to retire in the near future);

215.3 there will be circumstances where the nature of the evidence for this purpose is so unreliable that the tribunal may reasonably take the view that the exercise of seeking to reconstruct what might have been is so riddled with uncertainty that no sensible prediction based on the

evidence can properly be made. Whether that is the position is a matter of impression and judgement for the tribunal;

215.4 however, the tribunal must recognise that it should have regard to any material and reliable evidence that might assist it in fixing just and equitable compensation, even if there are limits to the extent to which it can confidently predict what might have been; and it must appreciate that a degree of uncertainty is an inevitable feature of the exercise. The mere fact that an element of speculation is involved is not a reason for refusing to have regard to the evidence;

215.5 a finding that an employee would have continued in employment indefinitely on the same terms should only be made where the evidence to the contrary (i.e. that employment might have been terminated earlier) is so scant that it can effectively be ignored.

227. As Elias J said in Software 2000:

'The question is not whether the tribunal can predict with confidence all that would have occurred; rather it is whether it can make any assessment with sufficient confidence about what is likely to have happened, using its common sense, experience and sense of justice. It may not be able to complete the jigsaw but may have sufficient pieces for some conclusions to be drawn as to how the picture would have developed. For example, there may be insufficient evidence, or it may be too unreliable, to enable a tribunal to say with any precision whether an employee would, on the balance of probabilities, have been dismissed, and yet sufficient evidence for the tribunal to conclude that on any view there must have been some realistic chance that he would have been. Some assessment must be made of that risk when calculating the compensation even though it will be a difficult and to some extent speculative exercise.'

Contribution

228. Under section 123(6) Employment Rights Act 1996, where a tribunal finds that a dismissal was to any extent caused or contributed to by any action of a claimant, it must reduce the compensatory award by the amount which it finds to be just and equitable. The employee's conduct must be blameworthy or culpable: Nelson v BBC (No. 2) [1980] ICR 110.

Submissions

229. Ms Hobson provided us with written submissions on the issue of unfair dismissal and oral submissions on the disability discrimination claims. Mrs Gentry made oral submissions on behalf of her husband.

230. During the course of our deliberations in chambers, it seemed to us that the case of Strouthos might be relevant to our conclusions on the unfair dismissal

claim. I therefore wrote to the parties inviting their further submissions in the form appended to this Judgment and we received written submissions from the parties.

231. We took into account all of the submissions we received from the parties.

Conclusions

232. It seemed to us it was logical to look at the issues in this order:

- The claims of breach of a duty to make reasonable adjustments;
- The claims under section 15 Equality Act 2010;
- The unfair dismissal claim.

Was the claimant a disabled person in accordance with the Equality Act 2010 ("EQA") at all relevant times because of the following conditions: anxiety and depression

233. For the purposes of these claims, 'relevant times' commenced in or about early September 2017 when the claimant returned to work.

Substantial adverse effect on day to day activities

234. It seemed to us it was appropriate, in accordance with the guidance in DLA v Piper, to consider the issue of adverse effect and then return to the question of impairment.

235. We had regard to what the claimant said about his symptoms and their impact on his daily life. The effects of low mood and disturbed sleep were such as to significantly restrict his domestic and family activities. We accepted what he told us about the effects and these were consistent with the contemporaneous medical records we had and the fact that his general practitioner prescribed an anti-anxiety drug and then an antidepressant.

236. We concluded that there were substantial adverse effects on the claimant's day-to-day activities and we go on to consider what the duration of those effects was.

Impairment

237. The label which was put on the claimant's mental heath condition by his GP changed over the course of his absence but was identified as 'depression and anxiety' by his GP in April 2017.

238. It was our view that whatever label was placed on the claimant's condition, the effects which he described to us amounted to a mental impairment.

239. We gave careful consideration to whether those effects could be described as a normal reaction to the vicissitudes of life. We were aware that the claimant had been understandably very upset by his son's diagnoses and the ongoing

difficulties of managing his son's special needs. We concluded that what the claimant experienced went beyond a normal reaction to an adverse life event, as illustrated by the lengthy period he required off work and the prescriptions for antidepressant drugs.

Long term effect

240. Was the impairment / were the substantial adverse effects long term in the required sense?

241. We concluded that the period when there were substantial adverse effects commenced in January 2017 when the claimant was unwell enough to be unable to attend work. By September 2017, when he returned to work, the effect had not therefore been ongoing for twelve months. However we concluded that by that stage, it was likely to endure for that period. Although the claimant had had some improvement in his symptoms which enabled him to return to work, he remained on antidepressants. We have to disregard the improvement these appear to have effected in his symptoms. Given that the claimant's condition had gone on for a period of some eight months by the time he returned to work and that he was continuing to take antidepressants, it seems to us that it was likely in the required sense that the claimant's impairment would continue for a further four months or more at this point. We have considered this issue with particular care, because we are conscious that we did not have expert medical evidence on the issue.

242. We also bore in mind that the trigger for the claimant's impairment, i.e. the situation with his son, was not something which had been or was in many ways capable of resolution. Clearly the fact that a trigger for an episode of mental ill health remains unresolved does not of itself mean that the impairment cannot resolve but given that the claimant's impairment had not resolved when he returned to work, it reinforced our view that the 'it could well happen' that the claimant would continue to suffer from substantial adverse effects.

243. The evidence we had for the period thereafter was that the adverse effects worsened after the claimant returned to work because of the stressors he encountered and by May 2018 he had severe anxiety and depression. It was clear to us from the medical and other evidence we have recited above that the effects of the claimant's impairment continued throughout the disciplinary and appeal process.

244. We therefore find that the claimant was disabled within the meaning of the Equality Act 2010 from September 2017 and up to and including October 2018 when the appeal process was concluded.

<u>Reasonable adjustments</u>

245. It is convenient to consider each PCP, together with the disadvantage alleged and adjustments contended for, in turn.

246. We considered the first three PCPs together because they seemed to us to overlap to some degree:

Requiring the claimant, when he returned from sickness absence in September 2017, to return without sufficient managerial support.

Requiring the claimant, when he returned from sickness absence in September 2017, to return to an under resourced and/or failing unit.

Requiring the claimant, when he returned from sickness absence in September 2017, to return to an unmanageable workload.

247. We considered that as a matter of fact, the scenario described by these PCPs existed. In terms of managerial support from above, the situation seems to have been in transition. There was no permanent manager when the claimant returned to work. Mr Aitchison was covering for a temporary period but the respondent seems to have ultimately realised that the South West London sector required two operations managers. The facts we have recited above seemed to us to demonstrate very little involvement or support from managers senior to the claimant when he returned to work and in the months leading up to his suspension.

248. The respondent accepted that Fulham DO was not in a good state when the claimant returned to work and it clear that it was under resourced in terms of both line managers and in terms of staff at lower levels because sickness levels meant that there were frequently insufficient permanent staff to carry out the required delivery work.

249. We considered also that the claimant's workload was unmanageable, partly because of his reduced hours but also because of the problems with resourcing and generally in Fulham DO which we have described in our findings of fact.

250. Did these matters amount to PCPs, bearing in mind the guidance of the Court of Appeal in Isola? We considered that they did. The lack of managerial resource and of resource at the level of OPGs was of sufficient duration and generality to amount to a practice. Issues had been ongoing on the evidence we heard since the period of the claimant's sickness absence and the continued at least until the claimant was suspended; it was a state of affairs which affected others, including, for example, Mr Rawlings and Mr Thomas.

251. Did these PCPs put the claimant at a substantial disadvantage compared with persons who were not disabled?

252. We bear in mind that it would have been difficult and stressful for any manager to deal with the issues which were presented by Fulham DO at the relevant times. However, it seemed to us equally clear that the claimant's

depression and anxiety made it more difficult for him to take effective action and that he also suffered a worsening of his condition as a result of the situation which would not have been experienced by a person without the claimant's disability.

253. We then considered the adjustments proposed by the claimant. In each case we make a provisional finding as to whether or not there was a breach of the duty to make reasonable adjustments which is dependent on us also finding that the respondent had actual or constructive knowledge of the claimant's disability and the effect of each PCP, an issue we consider after we make provisional findings on reasonable adjustments. For the sake of concision we do not repeat that caveat in respect of each proposed adjustment but our findings are to be understood as dependent on our further findings on the issue of knowledge.

Adjustment: holding a return to work interview which could have identified adjustments and would have made the claimant feel valued and supported; and
Adjustment: conducting a stress risk assessment; and
Adjustment: reviewing the claimant's rehabilitation plan

254. We consider it highly unfortunate that the respondent did not conduct a return to work interview with the claimant which would, conducted properly, have been likely to have identified the ongoing issues with his health and triggered an occupational health referral. It is possible that this would also have led to a stress risk assessment. Whatever the assessment was called, it would have been appropriate for careful consideration to have been given by the respondent to what support the claimant required in returning to work after his prolonged sickness absence.

255. However, we bear in mind that the case law is clear that assessments of the need for reasonable adjustments are not themselves adjustments and we do not find that the respondent breached a duty to make reasonable adjustments in not carrying out a return to work interview or a stress risk assessment. We considered the same approach applies in relation to the adjustment contended for of reviewing the claimant's rehabilitation plan.

Adjustment: providing adequate managerial support

256. The adjustment of providing adequate managerial support for the claimant seemed to us to have been a reasonable adjustment which the respondent failed to make. Once Mr Thomas went off sick, the respondent did not return Mr Rawlings to Fulham DO. We had no evidence that it would not have been practicable or affordable for that to have occurred. We had no evidence which demonstrated that the only available manager to fill one of the positions in Fulham DO was Ms Adu, who was inexperienced and required training. The picture we had was that there was no continuity over the period from the claimant's return and that he had a patchwork of reserve managers. We took the view that having experienced line managers under him would have

enabled the claimant to cope far better with the difficult circumstances at Fulham DO and take action in relation to particular issues such as the problem of sickness absence.

257. It also seemed to us that having consistent support at the DSM / operational manager level would have helped the claimant to manage Fulham DO and would be likely to have identified measures to provide him with support. We had no evidence that it would not have been practicable for the respondent to provide more significant managerial resource at that level. We note that the sector was ultimately assigned two operational managers; the respondent appears to have recognised that the resource was too thinly spread.

Adjustment: putting the claimant in a better resourced unit

258. Turning to the proposed adjustment of placing the claimant in a better resourced unit, we were not persuaded that this is an adjustment which would have been reasonable in the particular circumstances. We say that because, although it would have taken the claimant away from the immediate circumstances at Fulham DO, it would also have placed him into an unfamiliar environment which he would have had to manage on the reduced hours he was working. We did not have any evidence that there was somewhere the respondent could practicably have moved the claimant to within reasonable travelling distance of his home. On the limited evidence which we had, it seemed to us that the steps which should reasonably have been taken were steps to support the claimant at Fulham DO.

Adjustment: providing managerial cover for the claimant's reduced hours

259. We heard no evidence from the respondent generally about whether there was support at DOM level which could have been made available to cover the hours when the claimant was not working. We were aware that there was at least one manager providing cover on rest days and it may be that that manager could have done several hours at Fulham DO on a regular basis to make up the difference. We did not hear evidence that it would not have been affordable or otherwise practicable for the respondent to have provided the managerial cover in this or some other way. We concluded that this measure, in conjunction with other measures, was likely to have helped alleviate the disadvantage caused to the claimant by the relevant PCPs. The work which the claimant was unable to complete in his reduced hours would have been performed by someone else; it is hard to see how this could not have improved the functioning of the delivery office, reduced the stress on the claimant and reduced the possibility of the situation developing where D2Ds were not being delivered.

Adjustment: reducing the claimant's workload so that it was manageable within his reduced hours

260. This adjustment seemed to us to be the flip side of the adjustment we have just considered. The tasks which the claimant was unable to perform in his reduced day could have been performed by someone else. We had no evidence that

anyone had given any consideration to how the claimant would be able to perform the entirety of his role as a DOM on his significantly reduced hours. We do not make a separate finding in relation to this proposed adjustment but simply observe that it is an inevitable corollary of the adjustment we find would have been reasonable of providing some managerial cover for the hours the claimant was not working.

Adjustments: rehabilitative period as a supernumerary; and Phased return

261. The two remaining proposed adjustments – a rehabilitative period as a supernumerary and a phased return did not seem to us to address the real problems presented by the PCPs and we did not have any real evidence as to how these adjustments would have alleviated the disadvantage to the claimant. We understood that the adjustment of a reduction in hours was in accordance with the claimant's relevant fit certificate (which we did not see) and that his GP had not advised on some other form of graduated return or altered duties. The real problem was the lack of support at Fulham DO and the adjustments which we have found would have been reasonable were steps which would have addressed that situation.

PCP of putting the claimant on a performance plan

262. Ultimately this PCP appeared on the facts to amount to discussing with the claimant the possibility of putting him on the informal stage of the SPI procedure.

263. That of itself would not be a practice in the required sense but the underlying practice complained about is the respondent's practice of applying its performance procedures to employees who are perceived to be underperforming. That seems to us to amount to a practice in law, however we do not find that it was a practice which ultimately was applied to the claimant. Although the matter was raised, Mr Aitchison modified his position after protest by the claimant and his union representative.

264. We note also that the matters which the claimant felt disadvantaged him in relation to his discussion with Mr Aitchison were not matters intrinsic to the procedure itself but to what he felt was a mishandling of the procedure – how he was told about it and where. Those were matters specific to the treatment of the claimant which were not themselves a practice on the evidence we heard.

265. We therefore find that in relation to this complaint, no duty to make reasonable adjustments arose.

PCP of moving the claimant to Victoria DO in January 2018

266. This was on Mr Aitchison's account a one-off decision to move the claimant to Victoria DO to address the fact that, as Mr Aitchison saw it, he did not seem to be coping and there was no sign that Fulham DO was going to 'turn

around'. Although we were not given examples of others in similar circumstances who were treated similarly, it appeared clear from Mr Aitchison's evidence that this was essentially a business decision about how best to resolve the situation in Fulham DO and we infer that it would happen in similar situations. It had sufficient generality to amount to a practice.

267. Did it put the claimant at a substantial disadvantage compared with someone who was not disabled?

268. We concluded that it did; the claimant's anxiety had been increasing as a result of the return to Fulham DO without appropriate resources being in place. No doubt any DOM would have felt concerned at being moved for performance reasons to what was a supernumerary position at a lower level. Mr Aitchison's apparently abrupt decision to try to address the performance problems by moving the claimant to Victoria caused the claimant more significant anxiety and distress because of his existing mental impairment.

269. The adjustments proposed by the claimant were considering a move somewhere closer to the claimant's home where he would be better supported, giving him more than a day's notice and not moving the claimant to Victoria. We took the view that those could be considered in the round as a better planned and discussed move which might or might not have been to a delivery office which was more conveniently located. The adjustment which we find was likely to have been practicable and effective was a better thought out, consulted on and explained move. The claimant clearly was struggling and it may be that he needed to be somewhere which was not Fulham DO with its ongoing problems. We concluded however that the adjustment we describe might well have enabled the claimant to make that move without increasing his anxiety to the extent which the temporary move to Victoria did.

PCP of not delaying the disciplinary hearing until the claimant was fit to attend a hearing and/or properly represent himself in writing and/or his wife was no longer caring for her mother

270. The practice we can identify in this complaint can be defined as proceeding expeditiously with disciplinary processes: 'Cases will be handled as speedily as possible'. Although the process was delayed over time for a variety of reasons, the respondent clearly eventually wanted to get on with it by July 2018.

271. Clearly also, the claimant was disadvantaged compared with a person without his disability by the disciplinary hearing going ahead at a point when he had difficulty focussing on the evidence and responding to it effectively because of his disability. This was a particular disadvantage because of the approach Mr Cuomo in fact took to the process; he did no further investigation because the claimant was not present to raise points on his own behalf.

272. We looked carefully at the adjustments proposed.

Adjustment: delaying the process until the claimant was fit to attend in person and/or represent himself properly in writing

273. In terms of delaying the process until the claimant was fitter, we were very conscious that the ongoing stress of disciplinary processes itself takes its toll and that it was probably unlikely that the claimant would be fully well whilst the disciplinary was hanging over his head. The question is whether with a reasonable period of delay he could have been fitter than he was in late August / early September 2018 and fit enough to attend a disciplinary hearing.

274. We bore in mind that in the summer period the claimant was in particularly difficult circumstances after his mother-in-law's diagnosis in July 2018 with the knock on effects that this had on the whole family and the support his wife was able to provide to the claimant. By October 2018, the claimant was in fact able to attend the appeal hearing and give evidence for himself, although he was clearly not well and still required support. We therefore took the view that had the respondent delayed the disciplinary hearing whilst it commissioned occupational health advice there is at least a real prospect that there could have been a delay until the claimant's condition was more stable, with recommendations from occupational health as to how best to manage the hearing, which would have enabled the claimant to be present at a disciplinary hearing and represent himself.

275. We concluded that some further delay to obtain occupational health advice and allow the claimant's condition to stabilise or improve would have been a reasonable adjustment with a real prospect of alleviating the disadvantage to the claimant. We were not presented with evidence that a further delay of up to a couple of months would cause significant disruption or expense to the respondent which outweighed the likely advantage to the claimant. We of course acknowledge that in cases where someone has a serious mental impairment which is not resolving or improving there is likely to come a time when the employer is entitled to proceed with a disciplinary in the employee's absence.

Adjustment: keeping the claimant informed about his suspension by reviewing it weekly

276. Although we understood that the claimant felt concerned about this issue, it did not seem to us that it was an adjustment which would have alleviated the disadvantage caused by the PCP complained of and we therefore do not find that the respondent was in breach of a duty to make reasonable adjustments in this respect.

Adjustment: not changing the charges midway through the procedure which caused the claimant's anxiety to worsen

277. This seemed to us to relate to a separate complaint or concern, rather than being a measure which would have alleviated the disadvantage caused by the PCP in question.

Adjustment: providing an occupational health appointment

278. This would not itself have been an adjustment but would have enabled the respondent to have obtained advice on the claimant's fitness to take part in the disciplinary process and what adjustments he might require in order to do so.

279. We considered that, although this is not of itself a breach of the duty to make reasonable adjustments, the respondent should have provided the claimant with an occupational health appointment for reasons we deal with more fully when considering the unfair dismissal claim.

Adjustment: delaying the process until the claimant's wife was no longer caring for her mother

280. We understood that the reason for delay would have been so that Mrs Gentry was more available to support her husband with the disciplinary process. We were not persuaded that this of itself was a reasonable adjustment. We did not hear evidence as to what the prognosis for the claimant's mother was at the relevant time or as to how Mrs Gentry's caring responsibilities varied over the relevant period. We do know that Mrs Gentry's mother died in 2019. Although we considered that it would have been reasonable for the respondent to delay the disciplinary process whilst advice was obtained as to whether the claimant could participate more fully in the process with appropriate adjustments, on the evidence we had it did not seem that delaying for an indeterminate period until Mrs Gentry was no longer required to care for her mother would have been a reasonable adjustment. The respondent would have had to delay the process for what appears to have been an open-ended period.

PCP of not allowing the claimant's wife to speak at his appeal hearing

281. We understood that this was an example of the respondent's general practice of allowing representation by a colleague or trade union representative but not, for example, a family member. Allowing Mrs Gentry to be present at all was already an exception to that general policy or practice.

282. We had some sympathy with Ms Walsh's position. The claimant had Mr Hodges present as a representative and Mrs Gentry would not be able to give any evidence relevant to the issues of what had occurred at Fulham DO. We were very conscious that an employer is entitled to take care to ensure the integrity of the evidence which is presented during a disciplinary hearing; it will be important that the person hearing the evidence obtains the direct evidence of the person charged with the disciplinary offence.

283. It was also clear to us that, given the claimant's ongoing impairment, not having the assistance of his wife did put him at a disadvantage. Mrs Gentry, as was apparent to us during the hearing, had a thorough understanding of her husband's condition and its effects over the relevant period. The holding of the appeal hearing in the claimant's home implicitly recognised the difficulties presented by the claimant's mental health impairment. Those difficulties extended to his ability to concentrate and focus; deficiencies in his ability to marshal and present his case were not, in our view, fully addressed by having the assistance of a trade union representative, who inevitably did not have the depth of understanding of the effects of the claimant's condition which the claimant's wife had.

Adjustment: allowing the claimant's wife to speak at his appeal hearing

284. Whilst we are fully cognisant of the difficulties presented by allowing Mrs Gentry to play a role in the proceedings, we took the view that this would have been a reasonable step for Ms Walsh to take. There would of course have had to be careful boundaries to what Mrs Gentry was permitted to do. Whilst she could not answer questions on the claimant's behalf, she could have been allowed to make some submissions, suggest further lines of enquiry and give evidence herself as to her husband's condition and its effects. She had been involved in the efforts to get an occupational health appointment for her husband and could presumably have given a clear chronology of what had occurred in that respect. We note that Ms Walsh seems to have formed a view about that matter which was at best incomplete.

285. This was the only hearing the claimant had in his disciplinary process and his career was at stake. We cannot say that Mrs Gentry's involvement would necessarily have altered Ms Walsh's final decision but we concluded that it would have helped him to present his case more fully. We accept it would have been more difficult to conduct the hearing in this way, but ultimately we did not conclude it would have been impracticable and on balance we found that this would have been a reasonable adjustment.

<u>Knowledge of disability</u>

286. The respondent's witnesses told us that they did not know the claimant was disabled at relevant times. Ought they reasonably to have known?

287. We considered that they should have done. The claimant was off work for a significant period of time with a mental impairment identified by his GP on one of his certificates as anxiety and depression. He had told his then line manager, Mr Henderson, about his condition and need for support. He returned with a certificate advising he work reduced hours. The respondent should have ensured that the claimant had a further occupational health referral on his return. Had the respondent taken that reasonable step, it seems to us is that the likelihood is that what would have been revealed is that the claimant was still experiencing symptoms and was on antidepressants. We think it would then reasonably have been evident to the

respondent that his condition had a substantial adverse effect on his day to day activities and was long term in the required sense.

Knowledge that the PCPs put the claimant at a substantial disadvantage

288. Our conclusion is that had the respondent, as it ought reasonably to have done, had knowledge of the claimant's ongoing impairment, it would also reasonably have been aware that he was likely to be disadvantaged by the state of affairs at Fulham DO (PCPs a - c). Similarly the possible effect on the claimant of being moved to a different delivery office would have been apparent. The disadvantage caused by not delaying the disciplinary hearing would have been evident had the respondent obtained an occupational physician's report at that stage, as it should reasonably have done, as would the disadvantage caused by not allowing Mrs Gentry to speak at the appeal hearing.

Section 15

Unfavourable treatment: putting the claimant 'on an SPI'

289. Was the claimant unfavourably treated? As a matter of fact, the claimant was not put on the formal or even the informal stage of performance management. What happened was that he was initially told he would commence the informal stage and, after his trade union became involved, Mr Aitchison decided to commence dealing with the performance issues at a pre-SPI procedure level of informality. The claimant did not as we understood it object to this latter course. What he was upset by was the proposal to deal with him under a formal performance procedure in circumstances where he had a long history with no performance procedures and was struggling with a difficult job on reduced hours and with ill health.

290. The respondent's position was that this was not unfavourable treatment but a form of support for the claimant. We did not accept that. An employer may well be justified, both in the colloquial sense and in the technical legal sense, in commencing a performance process in relation to a particular employee, but that does not detract from the fact that employees will rightly consider they are disadvantaged by the commencement of a process which can lead to dismissal. That is more so in a case where the employee is not being provided with support that he requires, either of a practical nature or in relation to an assessment of his health.

291. The 'something arising in consequence' of disability relied upon by the claimant was impaired performance. Did the impaired performance which led to the threat of commencing the SPI arise in consequence of his disability?

292. It was clear to us that the claimant's performance was impaired as a result of his disability when he returned to work.

293. This was partly because the claimant was unable to work his full hours, on the advice of his GP and as agreed by the respondent. It was not possible for the work of the DOM to be performed adequately in those hours.

294. It seemed to us that the condition of Fulham DO when the claimant returned to work would have been stressful for someone who was entirely well; for the claimant it was overwhelming. The connection between the claimant's inability to cope with the work expected and his condition seemed to us to be illustrated by the emails he sent during the period, asking for more practical help, but also asking for an occupational health appointment.

295. We concluded that the threat of commencing a process under the SPI procedure was unfavourable treatment because of something arising in consequence of the claimant's disability. We consider below whether the respondent has satisfied us that this was a proportionate means of achieving a legitimate aim.

Unfavourable treatment: Moving the claimant out of Fulham DO to Victoria DO

296. We considered that, properly done, moving the claimant out of a difficult underperforming unit (Fulham DO) to a role elsewhere where he was better supported could have been favourable treatment of the claimant.

297. However, what Mr Aitchison in fact did, which was to remove the claimant with little notice, little explanation and no proper plan for his future and place him on duties at a lower level, seemed to us rightly to have been regarded by the claimant as unfavourable treatment. It appeared to us that Mr Aitchison was simply firefighting the ongoing problem with the performance of Fulham DO.

298. It appeared to us that the claimant's ongoing performance issues undoubtedly arose from his disability in conjunction with the difficult circumstances he was dealing with in Fulham DO. Again, subject to justification, this complaint was made out.

Unfavourable treatment: subjecting the claimant to a disciplinary for gross misconduct:

299. Clearly being subjected to a disciplinary process for gross misconduct is unfavourable treatment. We had to consider with care whether the impaired performance of the claimant which we have found arose in consequence of his disability also led to the state of affairs which sparked the disciplinary investigation. That state of affairs was the presence of a large quantity of undelivered D2Ds in Fulham DO on 8 February 2018.

300. We concluded that it did. Some of the items had built up whilst the claimant was on sick leave. Others were not being delivered by OPGs when the claimant returned to work. Ms Adu had a practice of simply sending some back to the Mail Centre without any effort being made to deliver them.

301. We accepted that in normal circumstances it would be the role of the DOM to ensure that that state of affairs did not develop but we also accept that the claimant was unable to cope due to his impairment and the lack of managerial grip on Fulham DO was the result. That in turn led to the situation where D2Ds had not been delivered and any failure to deliver was not being reflected in the reporting which was being performed by the line managers.

302. This complaint, subject to justification, is made out.

Objective justification: has the respondent shown that the unfavourable treatment was a proportionate means of achieving a legitimate aim?

303. The legitimate aim put forward by the respondent in relation to each alleged act of unfavourable treatment was complying with its Universal Service Obligation. By this we understood its obligation to deliver the mail.

304. We entirely accept that this is a legitimate aim on the part of the respondent, both to meet its regulatory obligations and to ensure that it is able to continue to compete in the competitive marketplace it finds itself in.

305. Was the treatment in each case a proportionate means of achieving that legitimate aim?

306. The effect on the claimant in respect of each act of unfavourable treatment was undoubtedly a significant one. He was upset by the suggestion he would be subjected to a performance procedure and by the clumsily handled and ultimately abortive move to Victoria. The impact of the disciplinary proceedings was the most significant – leading as they did to the claimant's dismissal from the employment he had pursued his entire working life.

307. We do not under-estimate the importance to the respondent of meeting its various commercial and regulatory obligations. It is clearly entitled in general to address deficiencies in performance by way of its performance management procedures and to use its disciplinary procedures where there are apparently significant defaults in relation to delay of the mail.

308. However, as set out above, we have found that the respondent failed to make reasonable adjustments which had a real prospect of enabling the claimant to cope with his work and therefore not exhibit the failures in performance which led to all of the unfavourable treatment. In those circumstances, we do not find that the treatment was proportionate in the required sense.

Knowledge: has the respondent shown that it did not know and could not reasonably have been expected to know that the claimant had the disability?

309. For the reasons set out earlier in this Judgment, the respondent did not satisfy us that it could not reasonably have known that the claimant had a disability.

Were any of the discrimination complaints presented put of time and, if so, would it be just and equitable to extend time?

310. The following complaints were on their face out of time regarded as freestanding acts:
    310.1 Complaints about the SPI process;
    310.2 Complaints about the move to Victoria DO;
    310.2.1 Complaints about the situation at Fulham DO on the claimant's return to work in September 2017 and up to the point of his suspension in February 2018.

311. We considered that there was a continuing act such that all of the complaints were in fact in time. Essentially we concluded that all of the matters of complaint arose from an ongoing discriminatory state of affairs which was the failure by the respondent's management to recognise or take appropriate action in respect pf the claimant's mental impairment. This led to the situation where he was not coping in the difficult circumstances of Fulham DO. From this flowed the state of affairs leading to a disciplinary process, the threat of performance proceedings and the abortive move to Victoria DO.

312. We would, in any event, have considered that it was just and equitable to extend time. Our reasons for taking that view are:

- Although the claimant, as a litigant in person, did not explicitly put forward an explanation for delay, there was a great deal of evidence in fact before the Tribunal which seemed to us to explain the delay. The claimant was suffering from severe anxiety and depression by May 2018. By July 2018, his wife was not in a position to provide him with the support she had earlier provided. He was dealing with what was no doubt his main concern in relation to his employment, the ongoing disciplinary proceedings;
- The claimant did seek to raise concerns by way of the grievance procedure; The respondent essentially seems to have taken no action at all to respond to the grievance despite leading the claimant to believe it would do so as late as November 2018;
- We were conscious that the claimant had support from his trade union in relation to the disciplinary process but we had no evidence as to what if any advice he received about bringing tribunal proceedings;
- The respondent did not suggest that it had suffered any prejudice as a result of the claimant not commencing proceedings earlier in respect of the earlier complaints.

Unfair dismissal

What was the principal reason for dismissal and was it a potentially fair one in accordance with sections 98(1) and (2) of the Employment Rights Act 1996 ("ERA")?

313. It was clear to us that the respondent's reason for the claimant's dismissal was conduct.

If so, was the dismissal fair or unfair in accordance with ERA section 98(4), and, in particular, did the respondent in all respects act within the so-called 'band of reasonable responses'?

314. In considering the issue of fairness, we reminded ourselves that we need to look at the fairness of the process as a whole and that if we found any defects at the dismissal stage which were outside of the range of reasonable responses, these were capable of being rectified on appeal. We looked at each stage of the Burchell test.

Whether the respondent had a genuine belief the claimant was guilty of the misconduct alleged

315. There was no evidence before us that either Mr Cuomo at the disciplinary stage or Ms Walsh at the appeal stage did not genuinely consider the claimant to have been guilty of misconduct.

Whether the respondent had conducted such investigation as was reasonable;

316. We bore in mind that the standard of investigation required is not that of a criminal court or of an employment tribunal. We considered the disciplinary stage and the appeal stage both individually and in the round to decide whether the process was one which a reasonable employer could have conducted.

Disciplinary stage

317. We concluded that it was a significant procedural failing on the part of Mr Cuomo not to obtain an occupational health physician's report on the claimant prior to proceeding to decide the case in his absence.

318. Even if Mr Cuomo was entitled to conclude that the claimant had not made every effort he could have done to attend an appointment when the first telephone appointments were made (and we do not think he had clear evidence to that effect), he was ultimately faced with a situation where the claimant was repeatedly asking for such an appointment. The reasons Mr Cuomo gave the Tribunal for not making a referral did not make sense and Mr Cuomo was in breach of the respondent's own policy.

319. This failure led to unfairness in two ways.

320. Firstly, Mr Cuomo deprived himself of advice which may have demonstrated that the claimant would be able to attend a hearing within a reasonable timescale and/or with particular measures in place.

321. The claimant had raised at the factfinding interview the very difficult conditions in Fulham DO and suggested witnesses who could attest to that fact. On Mr Cuomo's own account, because the claimant did not attend a hearing or make

representations, he did not himself conduct any further investigations. He was not aware that the claimant was at Victoria much of the week before the D2Ds were discovered nor was he aware that, as Mr Aitchison told the tribunal, there would have been a cover manager at Fulham DO during that period.

322. Secondly, Mr Cuomo deprived himself of information about the claimant's mental impairment which was highly relevant at the very least to mitigation. Given the facts of this case, it seemed to us that a reasonable investigation would have entailed obtaining better evidence of the claimant's impairment and its effect on his ability to perform his role and on the state of affairs in Fulham DO. These matters were highly relevant to the extent to which the claimant could properly be considered to be to blame for the undelivered D2Ds and deficiencies in reporting.

Whether the respondent had reasonable grounds for its belief;

323. Given that we found that Mr Cuomo's investigation and process were not reasonable, it follows that he could not have had reasonable grounds for his belief. He had very limited actual acknowledge about the claimant's state of health and seemed to us to have a poor grasp even of the evidence which was in front of him. He had not, for example, appreciated that the report he had showed three weeks of reporting, only one week of which was a week when the claimant was responsible for the office throughout. He had not noticed or did not know that some of the clear frame sheets also related to periods the claimant was not at Fulham DO.

Appeal stage

324. We did not find the appeal stage rectified the deficiencies in the disciplinary process, nor that, looking at the two stages together, the process was fair overall.

325. Ms Walsh did not obtain an occupational health report nor did she have a good understanding of the claimant's mental health condition. She therefore did not do investigations which in our view would have been likely to have given her a much clearer picture of the mitigating circumstances. The claimant, an employee with very long service and a clear disciplinary record, had been put, whilst unwell, in a situation where he was unable to cope. We consider that no reasonable employer could take the view that such a report could not potentially materially affect conclusions about whether there were significant mitigating circumstances.

326. Ultimately we concluded that there was something mechanistic about Ms Walsh's approach to evidence gathering, reflected in the remark she made to us a number of times that she 'had enough' evidence. It appeared to us that what this meant was that she 'had enough' to uphold the dismissal, not that she had enough to take a fair view of the whole picture, having looked at evidence which might be exculpatory or provide mitigation as well as evidence which suggested guilt. One example of what seemed to us to be an unfair

approach to the evidence which she did have was her conclusion essentially that it was the claimant's fault he did not have an occupational health appointment, which conclusion disregarded all of the correspondence which showed his later requests to have such an appointment and his offers to make himself available at any time. Similarly she referred to the problems at Fulham DO being down to the claimant's lack of 'managerial control' without reference to evidence about the state of Fulham DO whilst the claimant was off sick and when he returned, including Mr Thomas' evidence as to how that situation had led to him going off sick with stress.

327. One aspect of what we identified as this flawed approach was that we were not persuaded that Ms Walsh had fully and fairly considered the claimant's detailed email to her in response to her investigation, when she produced her extensive report during the course of the day during which the email had been sent after midnight. This email was the claimant's only chance to respond to an extensive body of evidence which had only been gathered at the appeal stage. Although we considered that a reasonable employer could have followed Ms Walsh's approach of not providing the claimant with an opportunity to comment on that evidence at a resumed hearing, provided there was fair opportunity to respond in writing, we found no evidence in the report that Ms Walsh had actually engaged with the points made by the claimant. The lack of any reference to any particular submission made by the claimant reinforced our conclusion that the decision was essentially made by Ms Walsh by the time she received the email.

328. There is another aspect of Ms Walsh's approach in this respect which we considered to have been unfair; Ms Walsh ultimately decided against the claimant on the basis of what we consider to have been in fact a revised charge, although the charge was never formally redrafted. The respondent distinguishes between various types of delay to mail and the claimant was charged with 'unexcused delay', which is delay essentially arising from some form of negligence or failure to follow policies. Intentional delay involves deliberate action and an intention to delay mail.

329. It was never put to the claimant at the factfinding or disciplinary stage that he was involved in intentionally delaying mail by simply sending volumes of D2Ds, without paperwork and any effort having been made to effect delivery, back to the Mail Centre and Mr Cuomo did not find that this was factually what had occurred. Bearing in mind the guidance in Strouthos, we considered that Ms Walsh had ultimately found the claimant guilty of a charge which was not the charge which had been levelled against him at the disciplinary stage or in respect of which he was defending himself at the appeal hearing. We do not go so far as to say that the respondent could not fairly have revised the charge, but we consider that this would need to be done clearly and openly and the claimant would have to have been given a proper opportunity to understand the extent of the change and respond to it. The method followed by Ms Walsh did not enable this to take place.

330. For these reasons we find that the respondent did not act reasonably in dismissing the claimant for misconduct and that his dismissal was unfair.

Reductions to compensation on basis that claimant would or might have been dismissed anyway and/or for contribution

331. We considered that it would be appropriate to give the parties the opportunity to make submissions on both of these matters at the remedy hearing, based on our detailed findings of fact.

332. In order to consider the issue of contribution, we are obliged to make findings as to whether and to what extent the claimant's conduct was blameworthy. This requires us to make findings as to what actually occurred, as opposed to what the respondent could reasonably have believed had occurred. In order to ensure that any such findings have not infected our thinking about the fairness of the dismissal or caused us impermissibly to substitute our view for that of the respondent at the stage of considering fairness, we have made our findings about this issue separately and they are set out below.

333. We had no live evidence apart from that of the claimant as to what had actually happened to lead to the presence of the large volumes of D2Ds in Fulham DO. We did however have all of the material gathered during the disciplinary process and the evidence of Mr Cuomo and Mr Aitchison about Fulham DO and the respondent's processes more generally. We bore in mind that there is a spectrum of potential culpability on the part of the claimant – from a culpable failure to be aware of the D2Ds piling up through awareness of the piling up of the D2Ds whilst failing to take action through to deliberate action to send D2Ds back to the Mail Centre without any effort being made to deliver them.

334. The only witness who seemed to us to provide clear evidence that the claimant was involved in improperly returning D2Ds to the Mail Centre was Mr Gleeson and we scrutinised his evidence with great care. We noted that Mr Gleeson's account was detailed and named others as being involved, which seemed to us to make it less likely to have been an invented account. Did this persuade us on the balance of probabilities that the claimant was involved in sending D2Ds back to the Mail Centre deliberately and without proper paperwork? We concluded that it did not. We had regard to the fact that none of the managers interviewed, Mr Kensah, Mr Osagie and Mr Thomas, supported the account and that none of the witnesses interviewed at the disciplinary stage including Ms Sinclair, had suggested that the claimant was involved in the deliberate sending back of D2Ds without proper paperwork. The claimant had put forward a motive for Mr Gleeson to implicate him which had not been tested in evidence before the Tribunal, unlike the claimant's evidence. Ultimately we concluded that we were not persuaded to the relevant standard that the claimant was engaged in deliberately sending back D2Ds without attempting to deliver them.

335. We bore in mind the wide range of evidence we heard and read including the following:

- It was not possible to ascertain from the available evidence what proportion of the D2Ds which were present on 8 February 2018 had accrued since the claimant returned to work;
- Although there was clearly some build up of older D2Ds, if Ms Adu was regularly sending undelivered D2Ds back to the Mail Centre, it is impossible to know how extensive that build up was prior to early February 2018;
- 80,000 – 100,000 D2Ds is more than a week's worth of D2Ds but less than two weeks' worth;
- When more senior managers such as Mr Aitchison visited over the relevant period, they did not see anything obviously amiss, although they may have visited during times in the delivery cycle when it would not have been considered unusual to see many D2Ds stacked under frames;
- It does not appear that the cover manager, Mr Sacker, noticed a build up of D2Ds in the office or, if he did, he did not alert management to a problem;
- The claimant was clearly aware at points that issues were arising about D2D delivery, such as when he emailed Mr Aitchison on 10 November 2017.

336. We concluded that the claimant was not exerting the level of control and oversight that the respondent expected a competent DOM working fulltime hours to exert. He was not doing checks of the office or of the responsibilities which were delegated to Mr Thomas and Ms Adu such as final frame checks and DODRs, which might have enabled him to discover the problems with D2Ds earlier. It appears that proper checks of the delivery office would have resulted in him seeing that there was some volume of D2Ds still present in the DO at times when all such D2Ds should have been delivered. However, we also concluded that the claimant's impaired performance arose from a combination of his mental impairment, the conditions at Fulham DO and the lack of support provided to the claimant.

337. Although these failures led to the claimant failing to notice or investigate the presence of at least some undelivered D2Ds in the office, it seems likely that what was present on 8 February 2018 was in large part the current week's D2Ds (i.e. some 60,000) which Ms Adu was seeking to return to the Mail Centre. This would still leave a reasonably significant number which the claimant failed to notice or investigate.

338. We will consider the parties' submissions on the Polkey and contribution issues at the remedies hearing if the parties are unable to resolve issues relating to remedies between themselves.

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Employment Judge Joffe
London Central Region
2 March 2020

Sent to the parties on:
03/03/2020

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For the Tribunals Office