EMPLOYMENT TRIBUNALS

Claimant:	**Mr K Thomas**
Respondent:	**British Gas Trading Limited**
Heard at:	**Cardiff** **On: 9, 10, 11, 12 March 2019** **Chambers 13 March 2019**
Before:	**Employment Judge R Brace** **Members: Ms C Izzard and Mr JD Williams**

Representation

Claimant:	In person
Respondent:	Ms A Palmer (Counsel)

RESERVED JUDGMENT

The claim of automatic unfair dismissal brought under s.103A Employment Rights Act 1996 is not well-founded and is dismissed.

The claim of unfair dismissal brought under s.98 Employment Rights Act 1996 is not well-founded and is dismissed.

The claimant was not a 'disabled person' at the relevant time under s.6 Equality Act 2010.

The claim of discrimination arising from disability under s.15 Equality Act 2010 is not well-founded and is dismissed

WRITTEN REASONS

Preliminary Matters

1. The claims before the Tribunal are of:

   a. unfair dismissal under s98 Employment Rights Act 1996 (ERA 1996);

   b. automatic unfair dismissal under s.103A ERA; and

   c. discrimination arising from disability s.15 Equality Act 2010 (EqA 2010)

2. The issues to be determined were set out in:

a. the case management order sent out following the preliminary hearing before EJ Ward on 15 August 2019, in relation to the claims of unfair dismissal under s.98 ERA 1996, and automatic unfair dismissal under s.103A ERA 1996; and

b. the case management order sent out following the preliminary hearing before EJ Harfield on 4 November 2019 in relation to the additional claim, which was allowed on amendment by her, of discrimination arising from disability in dismissing the claimant (s.15 EqA 2010)

3. There was no suggestion that we needed to depart from those lists of issues, and we were asked to determine the complaints that had also been clarified within those case management orders.

4. The claimant had also provided further particulars of the disclosure(s) relied on as protected disclosures under s.47B ERA 1996 following a direction by EJ Beard and this was contained at page [46.1] of the Bundle.

5. In relation to the disclosure(s) relied upon by the claimant, the respondent's counsel suggested that the nature and content of the disclosure9s) relied upon was still far from clear, despite the further information and at the outset of the hearing this was clarified and agreed by the claimant as being that:

   a. he made a disclosure to Melanie Davies and Millie Way at the Stage 4 meeting on 8 March 2019 that:

      i. taking all absences into consideration at Stage 4 of the Absence Management process, including dependents' leave, would be a breach of a legal obligation; and that

      ii. the respondent had breached the claimant's privacy rights and data rights under GDPR by discussing his private data without his consent.

   b. he later made a further disclosure in an email to Michael Mullins dated 8 March 2019 at 22.51 [403] that his personal data was shared without his consent which was a breach of GDPR.

6. Whilst the burden of proof is neutral on whether the dismissal was fair or unfair in accordance with sections 98(1) and (2) ERA 1996, as it is helpful to know the challenges to fairness, the claimant was also asked at the outset of the hearing to clarify these. He confirmed, in brief, that it included the following:

   a. the progression to Stage 4 of the respondent's absence management process based on historical use and application of criteria;
   b. the criteria of a 'significant and sustained improvement' had not been applied fairly;
   c. other leave, including sabbatical, paternity and TU business absence, had been unfairly taken into consideration;
   d. there had been a ack of consistency;
   e. during the target review period set, historical triggers were ignored.

The Bundle/Documents

7. At the commencement of the hearing we were provide with a chronology which had been prepared by the respondent. We also had before us a bundle of documents (the Bundle) spanning some 851 pages.

8. Prior to the commencement of evidence, an application was made by the respondent for disclosure of the full GP records for the claimant, only extracts from the records having been disclosed by him prior to the hearing. The respondent contended that full disclosure of all GP records was necessary to ensure that the claimant was not omitting any relevant GP record. An email from the claimant to the respondent was provided to us and the respondent's representative submitted that it read as though the claimant was implying that his full medical records did not assist but that he believed that he did not understand the ongoing obligations of disclosure. The claimant confirmed that he had no concerns with disclosing the totality of his GP records in his possession but that he believed that he had disclosed only those that were relevant and that it was disproportionate to oblige him to disclose all.

9. The respondent's representative also confirmed that there had been late disclosure by the respondent of a further document, namely some handwritten notes of Melanie Davies, one of the respondent's witnesses. These had not been disclosed earlier as Melanie Davies had not originally considered that these were relevant and/or necessary to disclose. The claimant objected to the inclusion in the Bundle on the basis that they had been disclosed following exchange of witness statements

10. After adjourning to deliberate on the applications, to read the witness statements and documentation referred to in the witness statements, we reconvened and confirmed that the claimant would be ordered to disclose a full copy of his GP records to the Respondent by later that evening, and that the additional handwritten document of Melanie Davies would be allowed in as evidence and included within the Bundle at page [389.7]. Oral reasons were provided for the decision at the hearing.

11. At the commencement of the cross-examination of the respondent's first witness, Millie Way, it also became apparent that Ms Way had provided the Respondent's solicitor with a number of email exchanges between her and the claimant relating to the claimant's lateness for work, which had not been disclosed to the claimant, and which were potentially of relevance to the issue of disability and/or the respondent's knowledge of that disability.

12. We adjourned to deliberate and on reconvening we confirmed that we had determined that the respondent would disclose that documentation to the claimant by 6pm that evening of the first day of the hearing, that the respondent's solicitor would be asked to explain why such documentation had not been disclosed to the claimant as part of the disclosure exercise and that any cross examination of Ms Way, on the issue of disability / knowledge of disability, would be dealt with by the claimant at the end of his cross-examination of Ms Way on the following morning i.e. the second day of the hearing, following such disclosure.

13. At the commencement of the second day of the hearing, the claimant confirmed that he did not object to the full GP records or the additional emails that had been disclosed to him overnight, being included in the Bundle and these were inserted at pages [550.1-550.5] and [852-865] respectively. A further document, which the claimant had requested of the respondent, namely the notes of the claimant's appeal on his grievance hearing, was also allowed in as evidence and included in the Bundle [866-875].

Matters of alleged conduct

14. At the outset of the hearing counsel for the respondent also raised concern that the clamant had been texting the respondent's witnesses direct and ask that he should refrain from doing so. We did not know and were not shown the detail of the text but it was suggested to the respondent's counsel that unless the claimant was alleged to have behaved in an intimidatory manger, no specific order would be made in relation to this matter.

15. During the hearing we also had to deal with allegations from the respondent's witnesses that the claimant had been gesturing to them during the hearing, as follows:

    f. firstly, in looking and pointing at one of the respondent's witnesses Melanie Davies, just before the commencement of her evidence and cross-examination by the claimant, and mouthing 'You are next'; and

    g. later during the hearing and during the cross-examination of Rhian Davies, the claimant's witness, folding his arms and raising his middle finger to the respondent's witnesses. This second alleged gesture had resulted in a spontaneous outburst from the respondent's witnesses.

16. Neither gesture had been witnessed by anyone on the employment Tribunal panel nor counsel for the respondent. Members of the public who had attended were not asked whether they had seen such behavior.

17. On each occasion the claimant denied such conduct.

18. The parties were reminded that any such conduct, if it had arisen, was wholly unacceptable and if it was considered that there had been intimidation of witnesses, this was a serious allegation and could result in concerns regarding a fair trial.

19. The respondent's counsel was asked if she wished to make any application arising out of the alleged conduct and she declined to do so at that point.

The evidence

20. The Tribunal heard evidence from Millie Way (claimant's line manager), Melanie Davies (Team Manager and Stage 4 hearing manager), Nicola Turner (manager considering appeal on claimant's last grievance) and Nicola Abdo (Customer Services manager and hearing manager for Stage 4 appeal) for the respondent. All four witnesses relied on witness statements, which were taken as read and they were then subject to cross-examination, the Tribunal's questions and re-examination.

21. The Tribunal also heard evidence from the claimant and Rhian Davies (employee of the respondent who had accompanied the claimant to the Stage 4 hearings). Again, both the claimant and Rhian Davies relied on witness statements, which were taken as read and they were then subject to cross-examination, the Tribunal's questions and re-examination.

22. After the completion of the respondent's evidence, Rhian Davies was called as a witness. As a result of the failure by the claimant to put certain issues to Millie Way and Melanie Davies in his original cross examination, before any further cross-examination of Rhian Davies, both Millie Way and Melanie Davies were recalled for the claimant to put specific issues to the witnesses in relation to:

a. Whether it was specifically agreed by Melanie Davies at the Stage 4 meeting on 8 March 2019, that absences after 28 January 2019 would be excluded from her decision-making;
b. whether Melanie Davies agreed at the Stage 4 meeting on 8 March 2019, that references to absences post 28 January 2019 would be removed from the Stage 4 hearing 'pack';
c. Whether Rhian Davies took any notes at the Stage 4 hearing of 8 March 2019; and
d. in relation to Melanie Davies her reasons for dismissing the claimant.

Assessment of the Evidence

23. The Tribunal was satisfied that all the respondent's witnesses gave their evidence honestly and to the best of their knowledge, information and belief. The Tribunal looks for witness evidence to be internally consistent and consistent with documentary evidence.

24. The Tribunal found the respondent's witnesses to be consistent compelling and accounts were plausible. We found that if there were any occasions that the witnesses appeared confused, this was largely due to the extended and complex sentence questions that were being asked of them by the claimant.

25. We accepted that Millie Way's statement, that she had conducted the claimant's back to work interview on 31 January 2019, was plainly wrong, There had been no attempt however to amend the return to work documentation [337/338] which clearly showed that Rob Pritchard had undertaken the return to work on Ms Way's behalf, and we considered this to be a genuine error on Ms Way's part and not deliberate. It did not impact on the credibility of the evidence that she gave in our view.

26. Whilst we were satisfied that in respect of some of the evidence in relation to process followed, the claimant gave his evidence honestly and to the best of his belief, based on his own interpretation of the respondent's policies and procedures, his evidence was confused and lacking in credibility e.g. the claimant's suggestion that the respondent in some way had fabricated documents e.g. the Toolkit, purely to defeat his claim was wholly lacking in credibility.

27. We were also concerned regarding the credibility of the claimant's oral evidence, with regard to the impact that the claimant's stomach complaints were said to be having on his normal day to day activities. The lack of contemporaneous and supporting evidence, particularly within documents such as the GP records or review meetings with the claimant, and email exchanges with Ms Way, led us to question whether the claimant exaggerated his symptoms in order or seek to substantiate the necessary impact to demonstrate that he was a disabled person.

28. Rhian Davies had confirmed that she considered herself independent from the claimant and respondent. We were not wholly convinced. During the hearing, the claimant and Rhian Davies had laughed together during a moment when the respondent's counsel had made a very slight error in her facts on cross-examination. This led us to conclude that on balance of probabilities, Rhian Davies was not as independent as she had verbally confirmed.

29. The Tribunal preferred the evidence of the respondent's witnesses where there were mattes of dispute or contest for the above reasons.

Findings of Fact

30. The respondent is a nationwide utility supplier. It employed the claimant as a Customer Services Adviser at its Callaghan Square, Cardiff centre from 11 February 2008 until 18 March 2019 when it dismissed the claimant. The claimant was 44 years' old at the date of his dismissal.

31. The claimant was employed on terms and conditions provided within the Bundle [115] and had the benefit of contractual sick pay (Clause 15,) which included 6 months full and six months half of basic salary in any 12 month period (after continuous employment of 18 months). The claimant was also a trade union representative throughout his employment with the respondent and held the role of Black Members Equality Officer from 2009 to 2019.

32. The claimant worked 37 hours per week which the claimant worked over a four-day week. Each working day was in excess of 9 hours.

Absence Management Policy ("AMP")

33. The respondent operated an Absence Management Policy (AMP) which had been in place since August 2016 and the version that applied during the claimant's employment (Version 1.0) was that contained within the Bundle at page [79].

34. The claimant made an assertion during the hearing that this was not a 'true version' and had been fabricated by the respondent due to:

    a. a lack of tracking number on the document;
    b. the fact that the document referred to a software system, "Workday", that had only been introduced in the summer of 2016; and
    c. that an absence management policy had been in place since 2008 and as such there would have been earlier versions i.e. this was not version 1.

35. We did not accept this as compelling evidence and, in the absence of any other document and in light of the verbal evidence from Ms Way on cross-examination that this was the policy to manage staff absence and utilised by the respondent since she had become a manager in 2008, we found that the document at page [79] of the Bundle was the relevant policy that applied to the claimant's employment.

AMP Toolkit

36. Two versions of a guidance for managers on the use of the AMP, referred to as a Support Toolkit, had been provided in the Bundle at pages 813 and 112A.

37. The claimant sought to rely on the document at page 813 as being the applicable guidance for managers at the point of his dismissal and particularly relied on the targets that were included within that version of the guidance/toolkit. These included reference to a target of absence of no more than 5 days absence and 5 occasions, that would be set at every attendance management review during a target period of 9 months.

38. That version was stated as being version 4, marked as having been updated on 25 November 2019, with updates to the targets reflected on pages 6 and 7 of that document.

39. When referred to that version [813] on cross-examination, as being the applicable guidance for managers, Ms Way gave evidence that this document was the new guidance that had been issued by the respondent since the termination of the

claimant's employment, and that this was not the guidance in place when the claimant had been dismissed and that it was not the relevant toolkit. Towards the end of her evidence on cross-examination, the claimant again returned to the issue of the relevant toolkit and asked the claimant whether the guidance/toolkit at page [112A] of the bundle was the relevant toolkit. Again, Ms Way confirmed that this was the relevant guide and was the document that she used to guide her and not that contained at page [813].

40. The claimant was stopped from asking repeat questions of Ms Way in relation to the applicable toolkit, on the basis that Ms Way had already responded that it was her position that the November 2019 version was not in place at the time of the claimant's employment.

41. During the later cross-examination of the claimant by the respondent's counsel, the claimant suggested that the document at page 112A was not a genuine document. The respondent's representative challenged the claimant at this point that he had not put this allegation to Ms Way on cross-examination. His response was that he had not as the Employment Judge had 'advised' him that it was not relevant during his cross-examination of Ms Way.

42. This matter was considered by the Tribunal during a short adjournment and on reconvening the claimant was informed that the Tribunal panel agreed that during the hearing that that no advice had been given to the claimant and that the Employment Judge had only indicated to the claimant that the relevant policy would be that which existed at the point of employment or termination of employment and that there had been no restriction on the claimant on questioning the respondent's witnesses on the veracity of the document at page 112A. The veracity or genuine nature of the document had not been raised as an issue at that point.

43. In submissions the claimant again suggested that the toolkit at page 112A was not a genuine document and that the genuine guidance was at page 813. He based this belief on the fact that:

    a. Version 3 [112A] had been provided by the respondents only after he had provided version 4 [812] on disclosure; and
    b. Version 3 contained no tracking number or 'ownership' which he considered was suspicious.

44. Again, we did not accept this as compelling evidence. We did not consider that this supported the claimant's contention that the respondent had fabricated the guidance provided at page 112A for the purposes of defeating the claimant's litigation.

45. We accepted the verbal evidence from Ms Way on cross-examination and found that the guidance at page 112A was the guidance in place that was applied up to and at the time of termination of the claimant's employment.

    <u>AMP Process</u>

46. The AMP provided for four stages of attendance management process. The trigger point starting an attendance management procedure was: –

    a. six days absence in a rolling 12-month period bracket either continuous six days or separate periods brackets; or
    b. off sick on three occasions in the last six months.

47. If the employee reached one of those trigger points, the manager would invite the employee to an attendance review meeting. This was Stage 1 of the AMP. If attendance improved to an acceptable level for a sustained period, the manager would let the employee know that they were no longer in the attendance management procedure. If the employee was absent again before the next review, the manager would consider whether it was appropriate to meet with the employee again before that.

48. If attendance did not improve to an acceptable level during Stage I, the manager would then consider whether it was appropriate to invite the employee to a second attendance review meeting when the employee would be moved to Stage 2 of the AMP (or otherwise as appropriate). Stage 2 contained options dependent on attendance being improved to an acceptable level for a sustained period with movement to Stage 3 of the AMP.

49. At the Stage 3 review meeting, if attendance improved to an acceptable level for a sustained period, absence would be monitored. If absence fell below an acceptable level in the 12 months following the end of the review period, the employee could go back into the Stage 3 AMP. If the employee was absent again before the next review, the manager could consider whether it was appropriate to meet with the employee again before that and, if attendance did not improve to an acceptable level for a sustained period, the manager would decide whether it was appropriate to hold a Stage 4 attendance hearing.

50. Para 7.8 of the AMP [88] provided that the purpose of a Stage 4 attendance meeting would be to conduct a thorough review of the employee's attendance record and for a decision regarding future employment with the respondent. Before such a meeting, a written report would be prepared, usually by the line manager, containing:

    a. details of absences over the previous 12 months or longer showing the number of absences and the reasons for them;

    b. Notes of any discussions about absence previous attendance review meetings;

    c. copies of any documents sent relating to absence record;

    d. (Where relevant) any occupational health / My health or other medical reports which had been authorised for disclosure to the manager;

    e. any other relevant information, including any identified patterns of absence and calendar events.

51. What was to be discussed at that meeting and possible outcomes, including termination was also to be included.

    <u>Claimant's absence up to 4 February 2019</u>

52. The claimant's absences from November 2011, both in terms of length of absence and reason for absence were as reflected in the report, prepared by Millie Way, the claimant's line manager, for the claimant's Stage 4 meeting which was conducted by Melanie Way, Team Manager of the respondent (the "Report").

53. A copy of this Report was provided at page [344] and the absence dates, number of days absence and absence reasons were set out in a tabular format at page 347-348.

In response to a direct question from the Tribunal, the claimant confirmed that he accepted that this information was correct.

54. This information indicated (as confirmed in the Introduction to the Report [346]) that the claimant had been absent for sickness related reasons on 31 occasions, totalling 193.5 days over the period of his employment. This figure did not include other absence that were not sickness related and the figure did not include the absence that had commenced on 4 February 2019, when the claimant was commenced a period of sick leave as a result of stress, that had continued up to the date of termination of his employment.

55. The claimant had first triggered the AMP in October 2012 and had been placed on Stage 1 of the AMP.

    a. A Stage 1 review meeting had been held on 13 May 2013.

    b. Stage 1 had been re-triggered again on 14 April 2014 and again on 7 January 2015.

    c. The claimant had been placed on Stage 2 on 13 April 2015 and a review meeting took place on 24 December 2015. At that meeting it was agreed that it wasn't necessary to refer the claimant to occupational health.

56. On 25 January 2016 the Claimant submitted a grievance against one of the respondent's customer services manager [135] regarding the claimant's concerns that he had been threatened that if his attendance did not improve, his union facilities would be removed, and that he had been subjected to a detriment whilst he attempted to fulfil his role as a trade union representative.

57. Following further absences on 3 April 2016, the claimant progressed to Stage 3 of the AMP.

58. On 26 June 2106 received the outcome to that grievance [139].

59. In August 2016, the claimant was off work for a total of 14 days (from 17 August 2018) with a stomach complaint.

60. The claimant's GP records show [550.4] that on 25 August 2016 the claimant had a GP consultation for gastroenteritis and was prescribed Dioralyte, that a further consultation had taken place on 2 September 2016 as his symptoms had persisted, when he was additionally prescribed Loperamide (Imodium) and that a sample was sent off for testing the following week. The results of the test were not evident to us from our reading of the GP notes and we made no findings as to the results of the investigations by the GP at that time.

61. No medical evidence, beyond the GP notes have been provided. These GP notes were not available to the respondent during the claimant's employment.

15 September 2016 Review

62. The claimant remained at Stage 3 of the AMP when his absence was reviewed on 15 September 2016. On that date the claimant attended an attendance review meeting and a letter confirming what had been discussed was sent to the claimant on 16 September 2016 [143].

63. There was no suggestion that the content of that letter was incorrect, and we found that it was likely to be an accurate reflection of the matters discussed at the attendance review meeting which was that:

    a. the claimant's absences remained at an unacceptable level, with the claimant having been off at that point in 2016 a total of 45 days with:

        i. stress and anxiety (2 days),
        ii. a further period of stress an anxiety from 21 January 2016 (26 days),
        iii. a gastric bug (3 days); and
        iv. in July 2016, a period of 14 days as a result of stomach pains;

    b. the respondent agreed that the absences for stress and anxiety in January 2016 would not be progressed within the attendance management procedure;

    c. the claimant confirmed that he had been prescribed anti-sickness tablets and rehydration medication and he was taking omeprazole for his stomach;

    d. the claimant had been given support with comfort breaks, which had been temporarily put in place and managed by his line manager; and

    e. the claimant had provided a stool sample to his GP and was awaiting results.

64. Outcomes of the meeting were stated to be that:

    a. occupational health suggested that following the results of the claimant's stool sample, a further consultation may be required;

    b. the claimant would progress to Stage 3 and would need to make significant and sustained improvement to his attendance.

65. The claimant was told that there would be a review in 6 months or sooner if there were concerns regarding his absence. The claimant was warned about the potential implications of future absences and that if he failed to reach and maintain a satisfactory level of attendance, the respondent may need to end his employment on grounds of capability or unacceptable levels of attendance.

66. The claimant was off work for two more days in November and December 2016 such that the total absences from work in 2016 amounted to 47 days.

67. In cross examination of the claimant, he gave evidence that the 26 days that he had been absent in January 2016 had not been taken into account as the absence had been caused by the respondent and that the business had taken responsibility for that absence by reason of upholding an element of his grievance against the Customer Services manager.

68. Whilst we don't find it necessary to make any findings on whether or not the respondent took responsibility for that specific period of absence, we did find that it was agreed that it would not be taken into account for the purposes of progressing the claimant's absence management. We also found that it had not been taken account when considering the claimant's absence in September 2016.

69. However, we also find that there was no assurance from the respondent that further absences for stress / anxiety would not be taken into account.

70. In March 2017 the claimant was absent from work for 9 days. There was no contemporaneous documentation in the Bundle (e.g. return to work documents) supporting this, but the Stage 4 Report [page 347], accepted by the claimant to be correct, recorded that the absence was related to food poisoning.

71. The claimant also attended his GP at this time, as reflected by the GP notes [550.3], which indicated that the claimant was suffering from acid reflux from food poisoning from pub food.

29 June 2017 Review

72. On 26 June 2017 the claimant was invited to an attendance review meeting [155] on 29 June 2017. The letter confirmed that despite the claimant successfully completing his review period, since the last meeting in September 2016, the claimant's attendance had again deteriorated, and he had been off work for a further 13 days:

    a. November/December 2016 - 2 days - cold/flu
    b. March 2017 - 2 days – bereavement
    c. March 2017 - 9 days with food poisoning.

73. The letter of 5 July 2017 to the claimant [157] recorded the matters discussed at that review meeting which reflects that the claimant told the manager at that time that there were no underlying circumstances that the respondent was required to take into consideration. Again, outcomes were set out which included the need to make a 'significant and sustained improvement, and that a 9-month review period would commence from 29 March 2017. The claimant was again warned of the implications of future absences, including possible termination of employment.

74. On 9 August 2017 the claimant was advised that he was being invited to attend an investigatory meeting regarding his failure to report non-attendance a Unison training course [176]. At this time the claimant was also alerted to concerns regarding his management of customer calls [178]

75. On 27 August 2017, the claimant raised a grievance regarding the handling of two investigations into the claimant 180] and a further grievance was raised by the claimant on 21 September 2017 [193]. A further grievance was raised by the claimant on 2 October 2017.

76. The claimant also attended a disciplinary hearing on 24 November 2017.

77. We were not taken to the detail of the disciplinary or grievances nor indeed the disciplinary grievance documentation on cross-examination and, beyond making findings that the claimant had been subjected to disciplinary action and had brought such grievances, we do not make any findings in relation to the substance of those disciplinary and/or grievances.

31 January 2018 Review

78. On 31 January 2018 the claimant attended an attendance review meeting with his line manager Millie Way, Team Manager. This was the first review meeting conducted by Ms Way having taken responsibility for line managing the claimant in November 2017 [354]**.**

79. The letter of 31 January 2018 confirming the matters discussed was included in the Bundle [241]. There was no suggestion from the claimant that it was not an accurate

reflection of the matters discussed and we found that the contents did represent an accurate summary of the matters discussed.

80. At that meeting the claimant's attendance during the period 29 June 2017 to the date of the meeting was discussed. During this time, the claimant had been absent for a total of 20 days.

81. 9 of those days were not taken into account, or 'progressed' as it was referred to in the letter, when reviewing the claimant's absence, for reasons that were not provided within the letter. The reason why these 9 days were not taken into account was therefore not a relevant consideration for us and we accepted that the review took into account the fact that the claimant had been absent for 11 days not 20.

82. Reasons for absence that were taken into account were as follows:

    a. July 2017 – 1 day – Cold Flu
    b. July 2017 – 1 day – Stress
    c. 27 December 2017 – 9 days – Cold/Ear infection

83. Again, the claimant informed the respondent that there were no underlying circumstances that they were required to take into consideration, and recent absences due to cold/ear infection were discussed. Overall absence for 2017 was discussed including unplanned leave, for domestic reasons in the main.

84. It was agreed that no referral to occupational health was required. It was also confirmed to the claimant that despite successfully completing the review period, he had not maintained attendance levels and he was 'reinstated' to Stage 3 of the AMP.

85. The claimant was told that he needed to make a 'significant and sustained improvement' in his attendance to a level that was acceptable to the respondent and that a 9-month review period would commence from 12 January 2018. He was informed that there would be a review meeting in 9 months or sooner if there was a concern regarding the claimant's absence.

86. Again, the claimant was warned about the potential implications of future absences and that if he failed to reach and maintain a satisfactory level of attendance, the respondent may need to end his employment on grounds of capability or unacceptable levels of attendance.

87. In the early part of 2018, the claimant's appeal in relation to the grievance raised by him was dealt with and further grievance was made by him. Further grievance and grievance appeals were also brought and dealt with in April and indeed throughout 2018 to January 2019. Again, we make no findings in relation to the substance of any grievance or those grievance appeals.

88. In July 2018 the claimant requested and was provided with a sabbatical break for a period of 4 weeks to support the claimant on childcare issues [348].

89. On 15 October 2018, the claimant was absent from work for 15 days. No FIT note was provided in the Bundle. No Return to work document was included in the Bundle. The Report at page [348] indicated that the reason for absence was 'stomach issues'.

90. The GP records, which were not provided to the respondent at the time, reflect that on the 25 October 2018 the claimant had a GP consultation [550.3] with the claimant reporting intermittent abdominal pain over the previous few days, which had started

after the claimant had diarrhoea. The GP notes reference another female (name redacted) having symptoms, but recovering. A stool sample was suggested.

14 November 2018 Review

91. On 14 November 2018 the claimant met Ms Way again as his level of absences remained at an unacceptable level. The letter of 14 November 2018 confirming the matters discussed was included in the Bundle [316].

92. Again, there was no suggestion from the claimant that it was not an accurate reflection of the matters discussed and we found that the contents did represent an accurate summary of the matters discussed.

93. At that meeting the claimant was told that his absences were significantly higher than site average which, in turn, had an adverse impact on colleagues and business performance.

94. At that point, at since the last review on 31 January 2018, the claimant had been absent for 18 days as follows:

    a. Feb 2018 – 1 day – cracked tooth;
    b. February 2018 – 2 days – nausea and diarrhoea
    c. October 2018 – 15 days – Stomach issues.

95. The claimant explained his absences as a stomach bug, but as the symptoms persisted, he had consulted his GP who had requested blood tests for Celiac/Colitis/Chron's and was expecting the results shortly.

96. In terms of outcomes from the meeting, the claimant was told he could take additional toilet breaks when needed but was reminded that he was at Stage 3 of the AMP and was required to make a 'significant and sustained improvement' to his attendance. It was confirmed that they would meet in 9 months to review or sooner if Ms Way was concerned about the claimant's absence.

97. Again, the claimant was warned about the potential implications of future absences and that if he failed to reach and maintain a satisfactory level of attendance, the respondent may need to end his employment on grounds of capability or unacceptable levels of attendance.

98. The GP records from 13 November 2018 [550.2] indicate results received from the sample. No clear diagnosis was evident to us from the records and no separate report or medical evidence was included. We therefore make no findings as to the results of that test.

Events following 14 November 2018 review

99. Ms Way accommodated the claimant's stated need to have additional and lengthier toilet breaks referred to as 'Occupational Health' breaks, into the claimant's daily work programme. This was dealt with in cross-examination of Ms Way and she explained that this was pending the further investigation that the claimant was said to be undergoing in relation to the tests for his stomach complaints [323].

100. The claimant was again absent from work on sick leave:

    a. December 2018 – 2 days – cold/flu

b. December – 1 day – sciatica
c. January 1 day – stomach issues

101. On 7 January 2019 the claimant was provided with a copy of the outcome letter from his grievance appeal meeting [325].

102. On 31 January 2019, following the claimant's absence from work on 28 January 2019, the claimant attended a return to work meeting with Rob Pritchard [338]. At this meeting the claimant confirmed that he did not require further support.

103. This meeting was not conducted by Millie Way despite her confirming as much in her statement [para 27]. We considered that this was a clear error on Ms Way's part in the drafting of her statement, but not a significant error and not one which undermined the credibility of the rest of the evidence that Ms Way had provided in her statement nor indeed in her cross examination.

104. On Monday 4 February 2019 Ms Way met with the claimant and informed him that she would be looking at whether further action had been triggered within the AMP and that a Stage 4 meeting may be called. This was an informal discussion which took place between the claimant and Ms Way, in her capacity as the claimant's line manager and colleague. This was not recorded in writing, nor did it form part of the AMP process. Rather, we found this was an every-day conversation between a manager and her subordinate, initiated by Ms Way out of genuine concern regarding the impact of further absences on the claimant's employment.

105. The claimant subsequently reported sick and presented a FIT note dated 6 February 2019 for a period of one month due to 'Stress at work'.

106. The GP records from that consultation [550.2] included references to:

a. the claimant having stress at work
b. that the claimant reported struggling with being bullied at work;
c. this was causing stress and affecting his mood.

107. A further GP consultation took place on 13 February 2019 [550.2] were the claimant reported loose stools and associate cramping abdominal pain which had been 'worse recently', with bloating. The records also state the following:

> '*Likely IBS given symptoms – previous investigations suggest this but needs faecal calprotectin to complete the diagnosis.*
>
> *Follow up with result, given information including advice re: FODMAPS.*
>
> *Lifestyle advice regarding diet leaflet and advice Irritable Bowel Syndrome (IBS)*

108. By way of email of 19 February 2019 [378] Ms Way confirmed to the claimant that she was preparing a Stage 4 report under the AMP as a result of his absence levels.

109. The GP notes from 22 February 2019 record that at that date the following

> '*No evidence of GI inflammation - suggestive of Irritable Bowel Syndrome'*

110. There was no further medical evidence or report that interpreted such a note and no clear diagnosis within the GP records of irritable bowel syndrome. We could make no finding as to whether this confirmed IBS or discounted IBS.

111. We were provided with a number of email exchanges between the claimant and Millie Way from November 2017 through to 1 February 2019 regarding a variety of issues including the claimant's work and childcare responsibilities, his time-keeping due to traffic and other absences from work. We found that none disclosed in the Bundle referred to any lateness or absences due to the claimant's sickness or his health.

Stage 4 Report and Meeting

112. The Stage 4 report (the "Report") was prepared by Ms Way and was included within the Bundle [344 to 355]. Attached as appendices to the Report were the Attendance Improvement log [356-367], Attendance Profiles [368-370] and documentation relating to the claimant's sabbatical taken in July 2018 [371].

113. The Report contained [at 378] a summary regarding the reasons why the claimant had been granted a sabbatical and referenced that alternative shift options and reduction to part time hours to assist with his domestic arrangements had also been offered to the claimant but had been declined by him.

114. The Report also made reference to the fact that the claimant had not been in work since early February 2019 with work-related stress and that the claimant remained off work. The summary [355] stated that the claimant had had numerous periods of short-term frequent absence for apparently unrelated reasons. Whilst the claimant had raised concerns regarding having an underlying health condition, no diagnosis or supporting medical information had been presented.

115. By way of letter dated 4 March 2019 the claimant was invited to a Stage 4 attendance meeting [389.1] before Melanie Davies Team Leader. The letter enclosed a copy of the Report and the appendices referred to.

116. The claimant attended the meeting with a work colleague, Rhian Davies. An independent scribe was also present for the respondent to take notes. Millie Way also attended as the claimant's line manager.

117. The claimant has challenged the accuracy of the scribe's notes included within the Bundle [390-402]. Despite the claimant having been provided with a copy of the respondent's notes of the meeting, at no time did he raise any concerns regarding the accuracy of those notes on a contemporaneous basis.

118. Whilst a second set of notes were also included within the Bundle [430-435] which Rhian Davies told us were her notes, we did not undertake any detailed analysis of where the notes differed. Further, the respondent's witnesses on cross-examination evidenced that they had not witnesses Rhian Davies take any notes.

119. More fundamentally, on the basis that the claimant had not challenged the accuracy of the independent scribe's notes at the time, we found that the scribe's notes [390 onwards] were more likely to be an accurate record of the matters discussed.

120. It is agreed between the parties that the claimant raised a concern at the outset of the meeting regarding which absences were being considered at the meeting. The claimant did not want anything being discussed other than his sickness record.

121. All absences were included, or referenced by way of appendix, within the Report including the sabbatical leave that the claimant had taken in the summer of 2018, and it was made clear to the claimant, by Melanie Davies at the Stage 4 meeting, that all absences were taken into consideration and that this included the claimant's sabbatical and other forms of leave.

122. We accepted the evidence from Ms Way that she had included the claimant's sabbatical, and the reason for that sabbatical, to demonstrate the level of support that had been given to the claimant.

123. We also found that during the Stage 4 meeting the claimant refused to discuss the reasons for his sabbatical and any personal issues. He considered that there was no reason to include the reason for his request for a sabbatical within the Report, and that he had not given permission for any of his personal information to be discussed. The claimant became agitated.

124. He told Melanie Davies and Millie Way that including such information was a breach of the 'GDPA' (which we have taken to refer to the General Data Protection Regulations) and had been provided in confidence. He asked for an adjournment to raise a complaint regarding his data rights.

125. In order to progress the meeting Melanie Davies agreed that the reference to the claimant's sabbatical should be removed from the pack and a short adjournment took place whilst the Report was amended by Millie Way.

126. An amended version of the Report was included within the Bundle [832-847] (which had been provided by the claimant on disclosure) and which also included manuscript amendments made by the claimant.

127. In our view this issue has caused the claimant significant confusion. Whilst the claimant had disclosed the amended Report, and had initially maintained that this was the amended Report, he changed his position during the hearing and told us that he did not accept that the amendments made at page 837 were the amendments that had in fact been made to the Report by Ms Way during the adjournment. He told us that he had been provided with a second 'pack' but could not explain where this was or explain the amended Report.

128. Both Millie Way and Melanie Davies gave similar evidence that the only changes were made to the Report itself during the Stage 4 hearing, and these were the changes found at page 837 in the Bundle. They also disputed that a second 'pack was provided'. Rhian Davies also agreed that the only change that was made was to the Report and no further pack was provided. She could not give any evidence as to what changes had been made to the Report, not having considered the documentation herself.

129. We found that a change was agreed to be made to the Report by removing reference to the reason for the sabbatical. The fact that the claimant had requested a sabbatical remained in the amended version of the Report, as did the reference to the claimant's absence from work since 4 February 2019 [841].

130. We were also of the view that the claimant was confused at the Stage 4 hearing and remained confused at this hearing as he failed to distinguish between what absences were taken 'into consideration' i.e. reviewed to demonstrate the support given to the claimant, and what absences were used to progress the absence management of the claimant to dismissal.

131. Melanie Davies had confirmed in her evidence, that at the Stage 4 meeting she believed that the claimant thought that the sabbatical was counting against him. We also found that the claimant still believed that these absences were detrimental and led to the decision to dismiss him.

132. We did not find that the claimant's absences on sabbatical (or indeed any other type of dependency leave or trade union activity) were used against the claimant when deciding to dismiss him. Rather that these were considered by Melanie Davies only in the context of ensuring that sufficient support had been provided to the claimant.

133. The 'trigger' for the Stage 4 meeting was also the subject of much cross-examination by the claimant of both Millie Way and Melanie Davies, as well as the dismissal appeal manager, Nicola Abdo. The claimant's questions were in some cases extremely complicated and difficult to follow. In the Tribunal's view, this resulted in the respondent's witnesses becoming confused and the claimant was told on a number of occasions to make his questions simpler.

134. The decision by Ms Way to progress the claimant to a Stage 4 meeting had not been made on the basis that the claimant had been absent for 1 day on 28 January 2019. Rather, the three absences over four days that had arisen since the December 2018 review meeting had triggered the Stage 4 meeting.

135. The claimant also disputed that his current absence (from 6 February 2019) should be considered as this was due to workplace stress, that such absence should be treated differently and under a different policy. He also suggested that it had been agreed that it would not be taken into account.

136. Melanie Davies did not at any time during the Stage 4 meeting, agree that the sickness absence from 4 February 2019 would not be included from her decision-making. The claimant's absence, which had commenced on 4 February 2019 and was continuing at the date of the Stage 4 meeting, was also taken into consideration. Such absence was referred to in the Report at page 355 and in the amended Report at page 841.

137. During the Stage 4 meeting the claimant challenged the attendance target that has been set and questioned the consistency in treatment in progressing him to Stage 4 whereas in previous review period, he had been treated differently in terms of targets.

138. The reason for the claimant's absences were considered with the claimant. The claimant told Melanie Davies that he had now been diagnosed with stress-induced IBS and could provide evidence from his GP. He told her that he had a 'weak stomach' and that he had eaten 'something gross' in May 2016 that had made him very ill. He asked that she take his disability into account. He also confirmed that he had stopped eating out so that he would not get food poisoning.

139. The Stage 4 meeting ended for Melanie Davies to deliberate and make her decision.

140. Later that day, the claimant sent an email to Michael Mullins, Head of Customer Services [403] complaining about the sharing of his personal data during the meeting. He stated that his 'personal family circumstances were discussed' without his consent and that this was a 'serious breach of GDPR'.

141. He sought an investigation and an explanation of how the GDPR breach was allowed to occur. He also sought reassurances that the business would review its processes to ensure that staff were protected from such breaches in future. He followed this up with a further email on 9 March 2019 [404] referring to his concerns regarding safeguarding of staff data.

142. Following the Stage 4 meeting a decision was made by Melanie Davies after consideration of the Report and the notes of the meeting. She also took advice from Employee Relations and confirmed her decision by way of letter dated 18 March 2019 [456].

143. She was unaware that the claimant had brought a number of grievances against the respondent and/or that there had been any disciplinary action against him. She based her decision on the information before her which related to the claimant's sickness absence as had been presented in the Report.

144. She concluded that the claimant had not demonstrated sufficient improvement in his attendance and that the level of his absence was not operationally acceptable to the respondent. She considered that his employment should end because of unacceptable levels of attendance. The claimant's employment was ended with immediate effect and he was paid 10 weeks' notice. He was provided with a right of appeal.

Appeal

145. On 24 September 2019 the claimant provided a detailed letter of appeal. This is contained at pages 461-465 of the Bundle which is incorporated by reference into this decision. His main points of appeal related to the conduct of Millie Way and Melanie Davies, the lack of a defined target and lack of consistency. He did not consider that the AMP had been applied fairly to him. He also stated that he believed that raising a breach of his personal data rights influenced the decision to dismiss.

146. An appeal meeting took place on 9 April 2019 held by Nicola Abdo, Customer Services Manager and on 3 May 2019 her decision was communicated by way of letter to the claimant [508]. Again, the detail of the letter is not repeated within this decision and the contents are incorporated by reference. In conclusion she confirmed that the decision to take the claimant to Stage 4 hearing to end his employment due to unacceptable levels of attendance should be upheld.

147. For completeness the claimant's GP records reflect that the claimant attended his GP again on a number of occasions following the termination of his employment including on 5 July 2019 when he attended for other medical reasons but reported that the FODMAPS diet was working well for his IBS symptoms.

148. On 22 May 2019 the claimant engaged in early conciliation through ACAS which ended on 28 May 2019 and ACAS Certificate R159076/19/36 was issued to the claimant. On 7 June 2019 the claimant issued his claim for unfair dismissal.

Law

149. With unfair dismissal, we first have to consider the reason for the dismissal. In this case, the claimant has the requisite two years' service to claim ordinary unfair dismissal and as such the burden of proof is on the respondent to show, on balance of probabilities, the reason for dismissal.

150. If we conclude that the reason for dismissal is that the claimant made a protected disclosure, that is the end of the matter and the dismissal is automatically unfair. An employee will only succeed in a claim under s.103A ERA 1996 if the tribunal is satisfied, on the evidence, that the 'principal' reason is that the employee made a protected disclosure and a 'principal reason' is the reason that operated in the employer's mind at the time of the dismissal (as per lord Denning MR in **Abernethy v Mott, Hay and Anderson** 1974 ICR 323, CA). If the fact that the employee made a protected disclosure was merely a subsidiary reason to the main reason for dismissal, then the employee's claim under s.103A ERA 1996 will not be made out. In **Royal Mail Group Ltd v Jhuti** 2019 UKSC 55, Supreme Court confirmed that courts and tribunals need generally look no further than at the reasons given by the appointed decision-maker

151. S.103A ERA states that an employee will be regarded as unfairly dismissed if the reason (or, if more than one, the principal reason) for that dismissal is that the employee made a protected disclosure. s.43A ERA 1996 provides that a 'protected disclosure' means a qualifying disclosure as defined by s.43B, which is made by a worker in accordance with any of the sections 43C to 43H ERA 1996.

152. A 'qualifying disclosure' means a disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the matters set out in 43B(1)(a)-(f) ERA 1996. Section 43B(1) also requires that in order for any disclosure to qualify for protection, the disclosure must, in the reasonable belief' of the worker:

a. be made in the public interest, and
b. tend to show that one, of the six relevant failures, has occurred, is occurring or is likely to occur.

153. The test is a subjective one, with the focus on what the worker in question believed rather than what anyone else might or might not have believed in the same circumstances. That it is made in the context of an employment disagreement does not preclude that conclusion.

154. With regard to causation, as confirmed in **Chief Constable of Werst Yorkshire Police v Khan** 2001 ICR 1065 HL (a case concerning victimization contrary to the Race Relations Act 1976 but approved for the purposes of s130A ERA 1996 in **Trustees of Mama East African Women's Group v Dobson** EAT 0220/05) this is a factual not legal exercise. In establishing the reason for dismissal in a s.103A ERA 1996 claim I am required to determine the decision-making process in the mind of the dismissing officer. This requires the tribunal to consider the employer's conscious and unconscious reasons for acting as it did. In doing so I need to consider:

a. why did the dismissing officer act as he did?
b. What, consciously or unconsciously, was his reason?

155. If we conclude that it was for some other reason, the respondent invites us to find that it was the claimant's sickness absence, we have to conclude whether it was a potentially fair reason for the dismissal.

156. In this regard, the Respondent asserted that the reason for the Claimant's dismissal was his capability which was a potentially fair reason for dismissal pursuant to section 98(2)(b) Employment Rights Act 1996 (the "Act").

157. After considering the reason for dismissal, on the presumption that we identified a potentially fair reason for dismissal, we then have to consider whether the application of that reason in the dismissal for the claimant in the circumstances was fair and reasonable in the circumstances pursuant to section 98(4) of the Act

158. When considering the claimant's disability claim, the Equality Act 201 ("EqA) provides that a person has a disability if he or she has a 'physical or mental impairment' which has a 'substantial and long term adverse effect' on his or her 'ability to carry out normal day to day activities'. Supplementary provisions foe for determining whether a person has a disability is contained in Part 1 Sch 1 EqA.

159. Furthermore, a non-exhaustive list of how the effects of an impairment might manifest themselves in relation to these capacities, is contained in the Appendix to the Guidance on matters to be taken into account in determining questions relating to the definition of disability. Whilst the Guidance does not impose any legal obligations in itself, tribunals must take account of it where they consider it to be relevant.

160. The burden of proof is on the claimant to show she or she satisfied this definition and the time at which to assess disability, is the date of the alleged discriminatory act. This is also the material time when determining whether the impairment has a long-term effect.

161. Finally, if we do conclude that the claimant is a disabled person, we are referred to s.15 Equality Act 20190 which provides that a person (A) discriminates against a disabled person (B) if A treat B unfavourably because of something arising in consequence of B's disability and A cannot show that the treatment is a proportionate means of achieving a legitimate aim. This does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

Conclusions

Unfair Dismissal: Reason for dismissal

162. In applying our findings to the issues identified at the outset, we needed to initially consider the reason for dismissal.

163. The claimant contends that the real reason the respondent dismissed the claimant is two-fold:

a. that he had made a protected disclosure in the Stage 4 meeting and/or in the email that followed that meeting; and/or

b. That the decision to progress the claimant to Stage 4 of the AMP and to dismiss was claimant was due to the complaints or grievances that he had raised during his employment regarding the conduct of various manager.

164. Turning firstly to the comments made by the claimant to Melanie Davies in the meeting on 8 March 2019 the claimant relied on as the qualifying disclosure, the matters claimed fall into the category of breach of legal obligation (s.43B(b)). The provisions of s47(B)(1) ERA 1996 are clear that a qualifying disclosure is something disclosed which in the reasonable belief of the worker, is made in the public interest and tends to show one of the headings that follow is met.

165. We did not consider that it was reasonable of the claimant to believe in the circumstances of the case, that taking all absences into consideration at Stage 4 of the Absence Management process, including dependents' leave, would be a breach of a legal obligation. This was in our view, stretching the interpretation of the legislation. Whilst the claimant may not have considered it fair or reasonable, or in accordance with the respondent's own policies, he did not satisfy us that he reasonably believed that there was a breach of any legal obligation.

166. We considered that it was reasonable however of the claimant to believe in the circumstances of this case, that the respondent's reference to his personal data/confidential information in the Stage 4 meeting, could breach the employer's duties on employee data under the General Data Protection Regulations ('GDPR') and/or under more general duties of confidence and be a breach of a legal obligation.

167. We concluded that where it was obvious that some legal obligation was engaged (i.e. GDPR/Duties of confidence) then the disclosure could potentially qualify for protection without specifics as to the legal obligation envisaged.

168. The respondent has sought to argue that what the claimant disclosed in the Stage 4 meeting did not 'disclose facts' and simply contained an allegation which was devoid of specific factual content and cannot be said to be a disclosure of information tending to show a relevant failure. There is a distinction between 'information' and the making of an 'allegation' and the ordinary meaning of giving 'information' is 'conveying facts' (see **Cavendish Munro Professional Risks Management Ltd v Geduld** 2010 ICR 325, EAT.

169. In this case, having considered the notes of the meeting of 8 March 2019, we concluded that the claimant was conveying more than just a general allegation of breach and was conveying facts, specifically that

a. the fact and reasons for his taking a sabbatical in the summer of 2018;
b. was personal data;
c. he had not consented to disclose beyond limited individuals; and
d. was a breach of the GDPR and/or general duties of confidence.

170. The respondent's counsel had further argued that the claimant would have failed to meet the public interest test. She was asked if she was able to assist with caselaw on the issue of public interest within private employment disputes but indicated that she was not aware of any.

171. We have considered **Chesterton Global Ltd (t/a Chestertons) and anor v Nurmohamed (Public Concern at Work intervening)** 2018 ICR 731, CA, and **Underwood v Wincanton plc** EAT 0163/15.

172. Whilst we were cautious about reaching a conclusion that the public interest test was met, we were satisfied that even where the disclosure relates to a breach of the worker's own contract of employment (or some other matter where the interest in question is personal in character) there may nevertheless be features of the case that

make it reasonable to regard disclosure as being in the public interest, as well as in the personal interest of the worker. In this regard, we considered;

a. the size of the respondent's undertaking i.e. all staff whose interests the disclosure served;

b. the nature of the wrongdoing disclosed i.e. breach of GDPR;

c. the claimant's trade union background.

173. Whilst we accepted that whilst the focus of the disclosure on 8 March 2019 at the Stage 4 meeting, and the subsequent email sent later that evening to Mr Mullins, did relate to the claimant's personal position, and we recognize that the person that the claimant was most concerned about was himself, he did highlight that his concerns were not just related to him but also to other staff more widely at the respondent.

174. We were satisfied that he did have the other staff in mind and conclude that a section of the public was affected, particularly in the case of an organization of the size of the respondent's undertaking.

175. We therefore concluded that the claimant had made a protected disclosure at the meeting on 8 March 2019, and again by way of email later that day to Mr Mullins.

176. With regard to whether the disclosure was the reason or principal reason for the dismissal, we were not satisfied however that the disclosure at the meeting on 8 March 2010 played any part in Melanie Davies' conscious or unconscious reasons for dismissing the claimant.

177. In reaching this conclusion we considered why did Melanie Davies, as the dismissing officer, acted as she did.

178. We were satisfied that the evidence demonstrated:

a. an extremely long and significant absence record for the claimant,
b. the considerable steps that the employer had taken to encourage the claimant to improve his attendance;
c. the claimant being on Stage 3 of the AMP, and having been at that level for some years;
d. the evidence from Millie Way and Melanie Davies (supported by Nicola Abdo) that the conclusions were that the business could not sustain the claimant's continued absence.

179. We were not persuaded that simply because Melanie Davies did not postpone the Stage 4 meeting to allow the claimant's concerns on GDPR/confidentiality to be investigated, this would lead us to conclude that she dismissed the claimant because he had made such disclosures.

180. For the same reasons, we conclude that the reason for the dismissal of the claimant was not because he had brought grievances during the latter part of his employment and, for the avoidance of doubt, we accepted Melanie Davies' evidence that she was not aware of the grievances that had been brought by the claimant in any event.

181. We were therefore satisfied that the respondent had demonstrated to us on balance of probabilities, that the only reason for the claimant's dismissal was his absence record/capability which is a potentially fair reason for dismissal.

182. The claim brought under s.103A ERA 1996 was therefore not well founded and we concluded that it be dismissed.

Unfair Dismissal: Fairness of Dismissal

183. With regard to the challenges to fairness, the claimant raised a number of issues which, for the sake of clarity, we have dealt with under the following headings and we shall deal with each in turn.

184. *Progression to Stage 4 AMP based on historical use and application of criteria*

a. One of the claimant's complaints of fairness was that he had been progressed to Stage 4 in January 2019 prematurely. He argued that he had had not been progressed with similar absences (i.e. three episodes/ 4 days) in a previous review period. He argued that historical triggers had been ignored. He considered the progression to Stage 4 in January 2018 to be premature when compared to management of him at earlier stages and that the progression was therefore unfair and any targets should be applied on a pro-rata basis.

b. Whilst we found that the respondent had not taken account the claimant's sickness absence in January 2016, when progressing the claimant through the AMP in September 2016, there was no evidence before us to come to the conclusion that this set any form of precedent binding the respondent in respect of future absences, whether caused by stress and anxiety or otherwise.

c. Likewise, we did not conclude that targets set in previous years for the claimant, bound the respondent in future years or stages of the AMP. We did not consider it reasonable to say that a target set in one year, set the benchmark on future targets.

d. We also concluded that there was no merit in the argument, and no evidence before us to find that, the respondents should have applied some form of pro-rata to the absence in January 2019.

e. The AMP made it clear that the review could take place if the claimant was absent before his review period and the manager could decide whether it was appropriate to meet before the next review. We accepted evidence from Millie Way that some managers could be more 'easy-going' than others and that this did not constrain them in making decisions later in the process. We also concluded that this did not necessarily lead to unfairness and was not unreasonable taking into account different personal circumstances and different sickness history,

f. As the respondent's witnesses all repeatedly stated in their evidence, which we accepted, their approach had been to take into account all the circumstances of each case which would naturally vary. As such, we did not conclude that it was unfair or unreasonable for the respondent to progress the claimant to Stage 4 at a point of absence, in terms of days or frequency, that was lower than had been previously been set for the claimant at previous review meetings or Stages.

g. The claimant also claimed that there was no provision in the AMP which suggested or allowed for repeat reinstatement to each Stage of the process – he referred to the architecture and application of the AMP - and that if he had successfully completed a review he should come out of the AMP entirely.

h. We concluded that it was clear that it was not the case that he had successfully completed a stage such that he would have or should have come out of the AMP entirely. Whilst we were satisfied that the claimant demonstrated an improvement at certain points during certain review periods there had been a lapse by the claimant of his attendance which had warranted the claimant being subject to a further review period. This had resulted in the claimant being given a series of successive review periods in Stage 3.

i. We considered that the respondent's use of the word 'reinstatement' may have caused confusion for the claimant, particularly where he was already undergoing a further review period within a particular stage, but we concluded that further review periods and successive review periods was not unreasonable and did not lead to unfairness to the claimant.

185. *Criteria of a 'significant and sustained improvement' had not been applied fairly*;

a. Within this we also considered the claimant's arguments that there had been lack of consistency

b. We were satisfied from our review of the AMP documentation that at every stage of the AMP the manager was entitled to review the individual's sickness absence on the information available to them at each review point and concluded that such a review would naturally entail all the personal circumstances of the individual and previous sickness history.

c. We also concluded that this could and would naturally lead to

   i. different targets being set for different individuals; and
   ii. different targets being set for employees at different stages of the AMP

   based on those differing factors of personal circumstances and sickness history

d. We did not consider that this was unreasonable or led to any unfairness for the claimant.

e. The claimant relied on a guidance that had not been published as at the point of termination, claiming that he should have been granted 5 days absence and 5 occasions as a target in line with the Toolkit at page [819]. He did not consider that the criteria of 'significant' and 'sustained' improvement that was reflected in the AMP and the Toolkit at page 112A, should have been applied.

f. We readily rejected this argument. There was no merit in the claimant's argument that the target set in the Toolkit from November 2019 would have or should be applied to him or that the Toolkit at page [112A] was not a genuine document.

g. We have already set out our findings in relation to this and do not repeat them here. We were satisfied that the respondent had demonstrated that their conclusions that the claimant did not meet their criteria of both a substantial and sustained

improvement were reasonable and that there was no evidence before us to conclude that this criterion had not been applied fairly or consistently.

186. *Other leave, including sabbatical, paternity and TU business absence, had been unfairly taken into consideration*

a. Whilst we found that other leave, including sabbatical and other forms of non-sickness leave, had been referred to in the Report (or attached as an appendix to the Report,) we had also concluded that such absences were only included within the Report to enable the respondent, and the Stage 4 hearing manager in particular, to take an holistic approach when dealing with the case, to ensure that proper consideration had been given to whether sufficient support had been provided to the employee and that all individual circumstances had been taken into account.

b. We viewed the evidence given by both Millie Way, Melanie Davies and Nicola Abdo to be reasoned, credible and consistent in this regard.

c. Furthermore the AMP at para 7.8 [88] also provided that any written report would detail absences over the past 12 months or longer showing the number of absences and the reasons for them and that the purpose of the Stage 4 meeting would be to carry out a review of attendance. This would have or at least should have alerted the claimant to this fact.

d. We concluded that including other leave, not just sickness absence, was to the benefit of an individual and was not for the purpose of prejudicing the employee. As a result, we concluded that this was not unreasonable and did not result in any unfairness in the procedure nor the claimant specifically.

e. Whilst the claimant clearly objected within the Stage 4 meeting to any reference or inclusion in the Report to any absences other than his sickness, it was not discussed at the insistence of the claimant. Again, this did not lead to any unreasonable conduct on the part of the employer which could have or did leave to unfairness for the claimant.

187. *Including absences post 28 January 2019*

a. Having found that absences following 28 January 2019 were taken into account in Melanie Davies' decision to terminate and having found that she had made it clear to the claimant at the meeting on 8 March 2019 that she would be taking all absences into account, we then turned to the consideration of whether this was reasonable.

b. We concluded that there was nothing unreasonable in Melanie Davies taking into account the claimant's continued absence from the beginning of February 2019 when making her decision to dismiss the claimant.

c. It was wholly reasonable in our view for an employer to look at and review all the instances of sickness absence in the Stage 4 meeting and that this would naturally have included the current absence.

188. Millie Way did not conduct the RTW on 31 January 2019

a. We accept that Ms Way did not undertake the return to work in January 2019 but concluded that this had no impact on the overall fairness of the dismissal.

189. Lack of referral to Occupational Health

a. Whilst we accepted that the claimant was referred to occupational health in February 2109 [375], this dealt with the claimant's current absence at the point of referral i.e. stress and anxiety and not with the claimant's stomach complaints.

b. When considering the evidence from Melanie Davies whilst she did consider an adjournment, she took the claimant's statement at face value that the business had been supportive and that his manager '*couldn't have done anything else'* [400].

c. Furthermore, we were not satisfied that it was clear, from either the pattern of absences or what the claimant was telling her, that there was a clear underlying condition that had been the cause of a significant number of the short-term absences.

d. We did not consider that this was a case where the employer would have been well-advised to seek medical opinion or that this would have made any difference in any event.

e. We did not consider that the lack of referral to occupational health therefore led to any unfairness in the process nor the decision taken by the respondent in this case.

190. Respondent's Toolkit retrospectively supports the respondent's case

a. This was not raised by the claimant within his appeal despite being an experienced trade union representative. It is not referred to in the pleadings. Had the claimant considered this to be a real concern it would have been raised and it was not.

b. Having found that the respondent's evidence in this regard was lacking in credibility and that there was no fabrication of the respondent documentation, we did conclude that this impacted on the fairness of the dismissal.

191. *Grievances made by the claimant were a significant contributor to the dismissal*

a. All the respondent's witnesses, who were cross-examined by the claimant, deny that the grievances made by the claimant had any impact on their decision-making, evidence which we accepted.

b. In particular, we accepted the evidence from Melanie Davies that she was not even aware of the grievances that had been made by the claimant or concerns that had been brought about his performance.

c. We therefore concluded that this did not play any part in the thought process of:

   i. Millie Way, in progressing the claimant to a Stage 4 meeting; or
   ii. Melanie Davies, in the decision to dismiss the claimant.

d. We concluded that the grievances made by the claimant played no part in the process to progress the claimant to Stage 4, or in the dismissal of the claimant and as a result did not lead to any unfairness.

192. Notification of breach of GDPR

a. The claimant had suggested that telling Melanie Davies at the Stage 4 meeting, that he believed that there had been a breach of his rights under the GDPR, significantly contributed to her deciding to dismiss him.

b. We have already made our findings and conclusions in relation to protected disclosure and impact on the reason for dismissal and we would repeat those findings and conclusions more generally in terms of overall fairness of process, namely that we concluded that the respondent had demonstrated that there were compelling reasons for the dismissal of the claimant as a result of his sickness absence and that they no confidence that such absence would improve.

c. We readily concluded that raising concerns regarding GDPR played no part in the decision-making of Melanie Davies did not impact on fairness of the process or decision to terminate.

193. In terms of overall fairness, we therefore considered that in the particular circumstances of this case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted and the dismissal was fair.

194. We accepted that the respondents had taken into account the persistent short-term absences, had given the claimant an opportunity to improve and that the claimant had confirmed that the respondent had been supportive. We accepted the evidence that the business could no longer sustain the claimant's continued and persistent absences and was entitled to draw the conclusions that they did that they had no option other than to dismiss. There had been no improvement in the claimant's sickness absence for many years despite consistent opportunities to improve for many years and had been given repeated warnings of the consequences of failure to improve. Even taking into account the size of the employer, the dismissal was fair.

195. The claim of unfair dismissal (s.98 Employment Rights Act 1996) is therefore not well-founded and is dismissed.

<u>Disability: s.6 and s.15 Equality Act 2010</u>

196. No medical report had been provided in support of the claimant's contention that he was a disabled person. GP records only were disclosed and included within the Bundle. There was no record within the claimant's GP notes of the claimant having a diagnosis of IBS, despite the claimant's evidence that this had been the case. Indeed, it was our conclusion that there had been no formal diagnosis of IBS albeit that this does not appear to have been ruled out by the claimant's GP.

197. The GP records that had been disclosed dated back to 2006, albeit in summary form prior to 2015. There was no indication in the medical records that the claimant had been suffering from IBS or an impairment that could be diagnosed as IBS from as early as 2012 as had been contended by the claimant [para 2 Impact Statement].

198. GP records indicate appointments prior to the termination of appointment for a verity of issues but in particular:

a. 26 April 2016 for nausea and vomiting with viral like symptoms

b. 25 August 2016 for gastroenteritis

c. 2 September 2016 for diarrhoea

d. 20 March 2017 for acid reflux and possible food poisoning from pub food

e. 25 October 2018 for abdominal pain and diarrhoea

f. 13 November 2018 test results regarding coeliac disease which the claimant informed us proved to be negative; and

g. 13 February 2019 for loose stools and cramping abdominal pain where the claimant was recommended a diet to help control symptoms known as FODMAPS.

199. Whilst post-dating the termination of the claimant's employment, for completeness there were also GP appointments continuing which also confirmed that by July 2019 the claimant reported that FODMAPS was 'working well for IBS symptoms. Entries concluded on 21 October 2019.

200. When considering whether the claimant had a 'physical or mental impairment', the respondent invites us to find that were do not have proper evidence of impairment before us and that records indicate that the claimant's health issues were related to other factors such as food poisoning.

201. We have had regard to Appendix 1 to the EHRC Employment Code which states that 'There is no need for a person to establish a medically diagnosed cause for their impairment. What is important to consider is the effect of the impairment, not the cause' — para 7. We did not consider that it was necessary to determined the precise m

202. Whilst we were not satisfied that the claimant has demonstrated to us that he was suffering from IBS, we were satisfied that the claimant was on balance of probabilities suffering from some form of physical impairment relating to his stomach and/or digestive system from October 2018 when his GP commenced a series of investigations to establish the cause of the claimant's stomach problems.

203. We then turned our minds to the issue of whether this impairment had a 'substantial and long term adverse effect' on his 'ability to carry out normal day to day activities' and in that regarding considered both Part 1 Sch 1 EqA and Guidance on matters to be taken into account in determining questions relating to the definition of disability.

204. The claimant has invited us to find that:

a. it caused him to be absent from work and to occasionally leave work early/arrive late due to being unable to comfortably (due to social anxiety) use the toi9let facilities at work or due to extended bowel movements causing him to leave home late in the morning;
b. that he would miss or suddenly leave social events;
c. he was only able to travel in his own vehicle and was unable to use public transport;
d. that he was unable to eat significant meals.

205. The respondent has submitted that the claimant's evidence is unsatisfactory and challenged that if he had been describing the extreme effects included in his Impact Statement:

a. why has the claimant not gone to the GP more often; or
b. when he has visited his GP, why has this not been referred to or noted in the GP notes;
c. and that when challenged the claimant says the symptoms were intermittent and fluctuating.

206. We did not consider on balance of probabilities that the claimant's impairments i.e. his stomach/digestion problems had a long term 'substantial and long-term adverse effect' on his 'ability to carry out normal day to day activities'.

207. We were persuaded by the respondent's arguments and did not consider the claimant's evidence, with regard to impact, to be credible. We too were persuaded by the lack of any contemporaneous evidence from the claimant to support his Impact Statement.

208. We concluded that had the impact been as significant as that set out in the Impact Statement, this would have been disclosed to either or both of the claimant's work managers and his GP. They were not.

209. We accepted the evidence of Ms Way that he had not indicated to her problems with fatigue, eating or inability to socialise. The claimant did not raise at the Stage 4 with Melanie Davies and Millie Way the impact that he now includes within his Impact Statement. It was our conclusion that had the impairment had such an impact the claimant would have at some point raised this with his managers. He did not.

210. We also accepted Ms Way's evidence that the claimant had not explained his lateness as relating to his stomach and that this was supported by the email exchanges that had been disclosed and that had his impairment caused time-keeping issues these would have been raised by the claimant. We did not consider that in asking for more frequent toilet breaks was indicative of the impact that the claimant now relies upon.

211. Whilst we accepted that these activities would amount to normal day to day activities, we were not satisfied that the claimant had, on balance of probabilities, proven that the impact of any impairment was long term substantial and adverse.

212. The claim that the claimant is a disabled person under s.6 EqA 2010 is therefore not well-founded and any claim under s.15 EqA 2010 is also not well founded and is dismissed.

213. Finally, for the avoidance of doubt, if we are wrong on the question of whether the claimant is a disabled person under s.6 EqA 2010, we considered that in using the one day's sickness absence on 28 January 2019 for stomach related issues, as one of the triggers for the Stage 4 hearing would be unfavourable treatment of the claimant arising out of his disability.

214. However, we also concluded that the respondent did show that the treatment was a proportionate means of achieving a legitimate aim., namely managing sickness in accordance with the AMP.

Employment Judge R Brace

Date 30 March 2020

RESERVED JUDGMENT
REASONS SENT TO THE PARTIES ON 31 March 2020

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FOR EMPLOYMENT TRIBUNALS