EMPLOYMENT TRIBUNALS

Claimant **Mr G. M. Davies**

Respondent **Openreach Limited**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT NORTH SHIELDS ON 24-27 February 2020
EMPLOYMENT JUDGE GARNON Members Mr R Dobson and Mr P Curtis

Appearances
For Claimant Mr. M Brien of Counsel
For Respondent Mr. P Sangha of Counsel

JUDGMENT

Our unanimous judgment is none of the claims are well founded, so are dismissed.

REASONS (bold print is our emphasis and italics are quotations)

1. Issues

The claim is of unfair dismissal and disability discrimination contrary to s 15 of the Equality Act 2010 (EqA). The claimant accepts the reason for dismissal was his sick absence record and the respondent's genuine belief he would not, due to ill health, in future be able to maintain regular attendance at work. That reason related to his capability, a potentially a fair reason under section 98(2) Employment Rights Act 1996 (ERA). The issues are:

Unfair Dismissal

Did the respondent have reasonable grounds for its belief and act reasonably in all the circumstances in treating that reason as sufficient to dismiss the claimant?
Did it follow a fair procedure and, if not, can it show the claimant could have been fairly dismissed in any event?

Section15

Dismissal is clearly unfavourable treatment but the claimant also alleges refusal (which the respondent disputes) to put him on a scheme called Assisted Job Search (**AJS**) was in itself unfavourable treatment. The "somethings" he says arise in consequence of his disabilities are his past and future anticipated sick absence and his inability to work in a stressful job, such as in the Gosforth Call Centre . The respondent disputes he was **unable** to take **a** job in a call centre, and his sickness absence from May 2018 to February 2019 so arose, but, if we disagree, says it can show its treatment of him was a proportionate means of achieving its legitimate aims to provide effective service to its customers and ensure fairness of work demands on other employees.

2. Relevant Law

2.1. Section 98 of the ERA includes:
"(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair it is for the employer to show –
(a) the reason (or if more than one the principal reason) for dismissal
(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
(2) A reason falls within this subsection if it
(a) relates to the capability.. of the employee for performing work of the kind he was employed by the employer to do,
(3) In subsection (2) (a) "capability" in relation to an employee , means his capability assessed by reference to skill, aptitude ,health or any other physical or mental quality.

2.2. Section 98(4) says:
"*Where an employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –*
(a) depends on whether in all 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
(b) shall be determined in accordance with equity and the substantial merits of the case."

2.3. Helpful cases on fairness in capability dismissals are Spencer-v- Paragon Wallpapers and East Lindsay DC –v-Daubney both of which place great emphasis on the need to consult the employee and not come too hastily to decisions his sick absence is unlikely to improve or there are no other jobs he could do where it would improve .

2.4. Iceland Frozen Foods v Jones , HSBC v Madden and Sainsburys v Hitt held a Tribunal must not substitute its own view for that of the employer on substantive or procedural fairness, unless its view falls outside the band of reasonable responses. In UCATT v Brain, Sir John Donaldson put the matter thus:*" this approach of Tribunals, putting themselves in the position of the employer, informing themselves of what the employer knew at the moment, imagining themselves in that position and then asking the question, "Would a reasonable employer in those circumstances dismiss", seems to me a very sensible approach – subject to one qualification alone, they must not fall into the error of asking the question "Would we dismiss", because you sometimes have a situation in which one reasonable employer would and one would not.*

2.5. In Polkey v AE Dayton Lord Bridge said " *an employer having prima facia grounds to dismiss . will in the great majority of cases not act reasonably in treating the reason as a sufficient reason for dismissal unless and until he has taken the steps, conveniently classified in most authorities as "procedural", which are necessary .. to justify that course of action. Thus in the case of incapacity the employer will not normally act reasonably unless he gives the employee fair warning and an opportunity to .. show he can do the job….*
the one question the Tribunal is not permitted to ask in applying the test of reasonableness .. is the hypothetical question whether it would have made any difference to the outcome if the appropriate procedural steps had been taken. On the true construction of section 98(4) this

question is simply irrelevant. … In such a case the test of reasonableness under section 98(4) is not satisfied …

2.6. Taylor-v-OCS Group 2006 IRLR 613 held, whether an internal appeal is a re-hearing or a review, the question is whether the procedure as a whole was fair. If an early stage was unfair, the Tribunal must examine the later stages " *with particular care… to determine whether, due to the fairness or unfairness of the procedures adopted, the thoroughness or lack of it of the process and the open mindedness (or not) of the decision maker , the overall process was fair notwithstanding deficiencies at the early stage* " (per Smith L.J.)

2.7. Section 15 (1) of the EqA says
(1) A person (A) discriminates against a disabled person (B) if –
(a) A treats B unfavourably because of something arising in consequence of B's disability, and
(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

2.8. In Basildon & Thurrock NHS Trust -v- Weerasinghe 2016 ICR 305 Langstaff P explained there must be "something" arising in consequence of the disability and the unfavourable treatment must, at least in part, be "because of" that "something". In Pnaiser -v-NHS England Simler P agreed this approach. The employer does not need to know the something arose from the disability City of York Council-v-Grosset. College of Ripon and York St.John-.v Hobbs held it is not necessary for the tribunal to be certain of the cause of the problem,provided it is satisfied there is substantial and long term adverse effect, the existence of an impairment can be deduced from the effects.

2.9. The defence "proportionate means of achieving a legitimate aim" used to be called "Justification". Balcombe LJ said in Hampson v Department of Education and Science [1989] ICR 179, it requires an objective balance between the discriminatory effect ..and the reasonable needs of the employer. Pill LJ in Hardys and Hanson -v-Lax said

32. The principle of proportionality requires the tribunal to take into account the reasonable needs of the business. But it has to make ***its own judgment,*** *upon a fair and detailed analysis of the working practices and business considerations involved, as to whether the proposal is reasonably necessary****. I reject the appellants' submission*** *(apparently accepted by the EAT)* ***that, when reaching its conclusion, the employment tribunal needs to consider only whether or not it is satisfied that the employer's views are within the range of views reasonable in the particular circumstances.***

33. The statute requires the employment tribunal to make judgments upon systems of work, their feasibility or otherwise, the practical problems which may or may not arise .. in a particular business, and the economic impact, in a competitive world, which the restrictions impose upon the employer's freedom of action. The effect of the judgment of the employment tribunal may be profound both for the business and for the employees involved.

2.10. Though the EqA does not expressly say so, it is impossible to justify s15 discrimination if an employer has not made reasonable adjustments. As Elias LJ said in Griffiths-v-DWP *"An employer who dismisses a disabled employee without making a reasonable adjustment which would have enabled the employee to remain in employment - say allowing him to work part-time - will necessarily have infringed the duty to make adjustments, but in addition the act of dismissal*

will surely constitute an act of discrimination arising out of disability. The dismissal will be for a reason related to disability and if a potentially reasonable adjustment which might have allowed the employee to remain in employment has not been made, the dismissal will not be justified". However, if it has done all that is reasonable there is usually little more to be done to justify dismissing an employee who cannot be predicted to be likely maintain regular attendance. In Chief Constable of Lincolnshire –v-Weaver EAT /0622/07 HH Judge McMullen said *"the Tribunal assessed the reasonableness of allowing the Claimant onto the scheme merely by focusing on his own position. They were obliged to engage with the wider operational objectives of the Force".* **Reasonableness under s 20 and "justification" both involve striking a balance.** For this reason, it is relevant to consider some law on reasonable adjustments.

2.11. Section 39 (5) imposes the duty to make reasonable adjustments and section 20 explains it. There are three requirements, though the first is the only relevant one today " *where a provision, criterion or practice of (the employer) puts a disabled person at a substantial disadvantage in relation to a relevant matter **in** comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.*
Section 21 says a failure to comply with the requirement is a failure to comply with a duty to make reasonable adjustments and an employer discriminates against a disabled person if it does so.

2.12. The concept of "*arrangements*" in the Disability Discrimination Act 1995 was replaced by a PCP "*applied by or on behalf of the employer*". What an employer "provides" **should** happen (a **provision**) or a standard it says should be met (a **criterion**) may differ from what in **practice does** happen or standards which are in **practice** expected. Any one may trigger the duty.

2.13. What Parliament has always intended was explained by Baroness Hale in Archibald -v-Fife Council 2004 ICR 954

57. … the Act entails a measure of positive discrimination, in the sense that employers are required to take steps to help disabled people which they are not required to take for others. It is also common ground that employers are only required to take those steps which in all the circumstances it is reasonable for them to have to take.

58. … The control mechanism lies in the fact that the employer is only required to take such steps as it is reasonable for them to have to take.

2.14. The test of what is reasonable is objective Smith-v-Churchills Stairlifts 2005 EWCA Civ 1220 However, an employer need not necessarily make an exhaustive and individual assessment of each employee's request for change at the time. In Griffiths-v-DWP Elias LJ said

"Thus, so far as reasonable adjustment is concerned, the focus ..is upon the practical result of the measures which can be taken. It .. is irrelevant to consider the employer's thought processes or other processes leading to the making or failure to make a reasonable adjustment.
This replicates , Spence-v-Intype Libra where His Lordship said. :
38…. The issue…, is whether the necessary reasonable adjustment has been made; whether it is by luck or judgment is immaterial.
40. A tribunal will be fully entitled in the light of all the evidence before it to conclude that an employer has failed to make a reasonable adjustment, and his ignorance of the employee's requirements .. will not avail the employer one iota. He may carry out an assessment and fail to make reasonable adjustments; equally, he may fail to carry out the assessment but make all

necessary reasonable adjustments. Mr Spence's contention is even if he takes such steps as are reasonable to mitigate or eliminate the harm, he will be potentially liable for any failure to carry out an assessment. We do not think that is compatible with the language of the legislation…
48.In short, what s4(A) envisages is that steps will be taken which will have some practical consequence of preventing or mitigating the difficulties faced by a disabled person at work. It is not concerned with the process of determining which steps should be taken.

2.15. Project Management Institute v Latif 2007 IRLR 579 held that, in order to shift the burden of proof onto the employer, the claimant must establish the duty has arisen and facts from which it can be reasonably inferred, absent an explanation, it has been breached. So, by the time the case is heard, there must be evidence of some apparently reasonable adjustment that could achieve the end of reducing the disadvantage.

2.16. Tarbuck-v-Sainsbury's Supermarkets held there is no obligation on an employer to create a post which is not otherwise necessary, for a disabled person. It may not be clear whether the step proposed will be effective or not, but it may still be reasonable to take the step even though success is not guaranteed; the uncertainty is one of the factors to weigh up when assessing reasonableness, as Lewison LJ said in Paulley v First Group plc [2014] EWCA Civ 1573.

2.17. It is the treatment of the claimant which must be justified not just the policy Buchanan -v- The Commissioner of Police of the Metropolis. Ill health retirement (at this respondent called medical retirement (MR)) may permit employees who are unable to work to retire early with enhanced pension. In First West Yorkshire Limited -v- Haigh EAT/0246/07 HHJ Richardson said

"40. As a general rule, when an employee is absent through ill health in the long term, an employer will be expected, prior to dismissing the employee, to take reasonable steps to consult him, to ascertain by means of appropriate medical evidence the nature and prognosis for his condition, and to consider alternative employment. An employer who takes such steps will generally meet the standard set out in section 98(4).

41. Where, however, an employer provides an enhanced pension on retirement through ill health, it seems to us that an employer will also be expected to take reasonable steps to ascertain whether the employee is entitled to the benefit of ill health retirement."

2.18. The claimant's application for MR has been refused. He appealed but did not pursue it for economic reasons we understand. Mr Brien at a preliminary hearing before Employment Judge Johnson last November, and today, rightly conceded any claim the claimant may have about the refusal of his application could only be directed towards the pension supplier, not the respondent in its capacity as the claimant's employer. Taking both cases together, we can see how serious failure by the respondent to act reasonably and competently in its handling the claimant's MR application may undermine its s15 (2) defence, and may be relevant to the test of fairness . However, although the hurdle is higher for the respondent under s15 (2) EqA in comparison with the band of reasonableness test under s 98 (4) ERA, neither requires perfection in every detail.

3. Findings of Fact

3.1. We heard the claimant George Malcolm Davies (known as Malcolm), his wife Jacqueline Joyce Davies and, for the respondent, his first line manager, James Matthews, his second line manager, David Tulip who decided to dismiss and Christopher Joseph Taggart, Senior

Engineering Optimisation Manager for North of England who decided the appeal against dismissal. We had a large agreed bundle of documents.

3.2. The claimant was born on 3 April 1959 and worked for the respondent or its predecessor since 1996 latterly as a Customer Service Engineer (CSE). He was dismissed in February 2019 with notice expiring 27 May. The respondent concedes he was at all material times disabled by Hypertension and Cervical Spondylosis. The former is managed by medication. He had surgery for the latter in 2014 but it still causes him pain, especially when bending and, as it is a degenerative condition, is becoming worse.

3.3. In May 2018 the claimant experienced shaking of his hands and family members observed him on occasions staring blankly. He describes it as "advanced day-dreaming". On 29 May 2018 this led to him starting a period of sick leave which his GP certified as due to "*H/o Seizor-awaiting investigations*" . It was possible he had Parkinson's disease or epilesy. He was stopped from driving or climbing whilst the investigations were ongoing on the recommendation of a consultant neurologist. Driving was an integral part of his substantive role.

3.4. He says he was ***instructed by management*** to commence sickness absence from 28 May 2018. We reject that. Mr. Matthews had become his first line manager in May 2018 and understood the reason for absence. The claimant had suggested he could shadow or buddy up with a colleague but no such roles were available at the time. In any event, working in the field with the cause of his health problems undetermined, he may be a risk to himself, colleagues or the public if he were to have an episode at work. Mr. Matthews said **the best option** was for him to stay off work until the results of the tests, and let him know once he had the results. Mr. Matthews did consider whether there was any work available without the need to drive but there was not. That was good advice, as for some time he would be on full pay.

3.5. For five years the claimant was Branch Officer for his trade union and knew the respondent's sick absence policies well. On 9 July he was visited at home by Mr Matthews and we find he must have known this meeting was a first line manager absence review, even if he was not expressly told . The results of MRI ECG and EEG tests were inconclusive, but referring to the EEG the consultant stated in a letter dated 26 July 2018 "*this did not demonstrate any evidence of seizure activity*". Time lapse triggered a second line manager review by September.

3.6. David Tulip knew the claimant had cervical spondylosis for many years and adjustments to his engineering duties to reduce bending or stooping for long periods when working on the under ground network were made, but it could not be eliminated. Mr Tulip wrote on 3 September 2018 to invite the claimant to a meeting on 11 September. The letter set out the potential consequences. The meeting was put back to 13 September due to unavailability of the claimant's union representative, Ms Jean Sharrocks.

3.7. "Job News" is an internal portal in which vacancies are advertised. The benefits of AJS are (i) one sees vacancies as "Pre-Job News" around 2 weeks earlier than others do on Job News; (ii) there is support available on such matters as creating an effective C.V. (iii) if a candidate applies for a job on AJS, he does not have an interview but an informal discussion and, if he meets the essential criteria, will usually get the job. AJS is for a finite period of **up to** 6 months. To get on AJS, there would first be a discussion between the potential candidate and a manager,

then between the manager and HR or the WISH (Wellbeing, Inclusion, Safety and Health) team. After AJS is set up, it is the employee who leads the process, with support from a manager.

3.8. The Workplace Adjustments Policy states AJS is used when someone becomes no longer able to carry out their own role. The expectations of an employee include, checking Pre-Job and Job New, making contact with the hiring managers of jobs **the employee believes to be suitable** and applying for them. It does not state an employee has to apply for or accept any role within their skills regardless of the potential effect on their health conditions. **Mr Tulip agrees all that**. He added that in the past AJS was not always popular with all employees, but his enthusiasm for it was very apparent, he saw the benefits for both employee and employer. He had previous successes using AJS, which the claimant vaguely recollects hearing about and Ms Sharrocks was aware of too.

3.9. In the September meeting, the claimant accepted he would not be able to return to his current role at that time. They discussed exploring alternative employment through an **informal local search** or AJS. Mr Tulip explained AJS required the claimant to be proactive and open-minded in **considering** any vacancy and the majority of current vacancies likely to be suitable were call centre roles. The claimant had worked in the call centre 20 years earlier when he had no hypertension and could cope with stress. He referred to his experience as a union representative representing call centre workers. He said this was not something he wished to do. He requested further time to consider his options and await the outcome of his investigations. MR was also discussed. The claimant said his family were very worried about his health and keen to explore it. He would prefer to work, as he had all his life.

3.10. After the meeting ,Mr Tulip decided to obtain further Occupational Health (OH) advice. A copy of the referral form was sent to the claimant to review (187). The claimant says he thought the OH appointment on 27 September 2018 was to consider his eligibility for MR but the referral made no mention of it. The OH report, dated 2 October 2018, (188-190) said he was not fit to continue in his current post but with time and treatment this may change. No return to work date was given but OH said he may be able to return sooner in a role which did not require driving, manual handling or heavy exertion.

3.11. We accept Mr Tulip wrote the reason the claimant did not wish to work in a call centre was he had not enjoyed it previously, which is not fully correct. His previous experience was the call centre environment was very stressful. Stress is a contributing factor to hypertension and, as it had taken two years to get his blood pressure under control, he did not consider a role which may jeopardise this to be suitable **on medical grounds**. There are various roles in the call centre, some less stressful than others. Although it would not be normal procedure, Mr Tulip arranged a further meeting. Mr. Tulip was aware of no suitable vacancies at the September meeting. However, he looked locally over the coming weeks.

3.12. On 24 October 2018, there was no further update from his doctors. They discussed the implications of the OH advice. Mr Tulip set out all informal searches he had undertaken for jobs which could be reached by public transport, including desk-based roles in Real Time Work Flow, planning and triage but there were no roles available outside the call centre.

3.13. Mr Tulip again raised the possibility of AJS. He denies the allegation in the claim form that at this meeting he "*took Assisted Job Search off the table*" or insisted the claimant move to a call centre. He again explained the claimant had to be open-minded to any employment, which would likely include call centre roles for the process to be worthwhile. The claimant again said he was not open to such roles. Mr Tulip talked about previous successes he had, including one employee who had even managed to gain a promotion. As recorded in Mr Tulip's own note at page 179, he did say as the claimant would not even consider the call centre, he could not recommend he be placed on AJS. Mr Dobson asked him about this and he said, **in the context of the discussion** he understood the claimant did not want AJS which historically was viewed by some as not a good option. Had Mr Tulip simply refused to put the claimant on AJS, Ms Sharrocks would have intervened and she did not. We accept his evidence. The claimant and Ms Sharrocks agreed at the conclusion of the meeting his preference was MR. The claimant then sent an email on 4 November 2018 (196) saying on reflection he wanted to wait for a diagnosis and/or to get his driving licence back. Mr Tulip let the sick absence process run on.

3.14. The claimant continued to have absence review meetings with Mr Matthews. Mr Tulip continued to explore options for alternative employment, including whether any of the available vacant roles could be adjusted. At a meeting on or around 20 December 2018 Mr Matthews and the claimant went for a coffee (200 – 203). By this point, the claimant had some scan results to confirm there were no signs of seizures but continued to wait for an appointment with his consultant to review the results, so it was still not possible to agree a return to work date.

3.15. Mr Matthews suggested a trial day in the Gosforth call centre, and recalls the claimant seemed in good spirits and open to the idea . We accept the claimant was not forced into this, although he had reservations about the impact on his health. However, there are a range of roles in the call centre so Mr Matthews arranged for a trial of a customer service rather than sales role. Although this is also a customer-facing, it is not based on volume and commissions - the purpose is to assist customers reporting faults and requesting repairs, which relates to the claimant's skills and experience as an engineer. However, such customers may be angry and frustrated if their equipment is not working after several calls , and we accept that on the trial day one was, which is stressful.

3.16. The trial day was on 8 January 2019. Before the visit, the claimant took his blood pressure and it was under control but when he checked it again afterwards it was dangerously high. His GP had recommended he should avoid work where stressful situations are the norm. His neurologist had observed damage in a brain scan which he attributed to hypertension. Work in a stressful environment could cause further damage and increase the risk of heart attack or stroke. Studies have found a link between stress and cardiovascular events as shown in an article (338-339). The claimant informed Mr. Tulip of his concerns in an email dated 21 January 2019 (213). In January 2019, his consultant said there was no evidence of Parkinson's Disease, epilepsy or seizure. His symptoms were most likely related to his Cervical Spondylosis. He was considered fit to drive so commenced the process to get his driving licence back on 31 January 2019. He notified Mr. Tulip of this by email that same day.

3.17. The claimant had suggested he may be able to work in "Frames" in Newcastle City Centre . Mr Tulip looked into this but there were no available vacancies on the Newcastle Frame at that

time. More generally, traditional Frames roles were in decline. The claimant said he was being treated unfairly but ultimately accepted this was not an available option.

3.18. Following the meeting on 24 October 2018, Mr Tulip made arrangements for an indicative advice on MR. The request form (197 -199) included the OH report dated 2 October 2018, An indicative opinion on 16 January 2019 said the MR criteria were unlikely to be met (page 207). No rationale is given but page 706 sets out the criterion " ***Permanently incapable of giving regular and effective service in the duties of his/her position by virtue of ill health***." It then defines "*permanently*" as meaning to normal pensionable age (65 in most cases), and " *duties of his/her position"* as *"the substantive post , as reasonably adjusted, and* ***suitable*** *alternative work which is* ***available*** *"* By then, the claimant had been on sick leave for over 6 months. With no date in sight by which in his medical situation would permit absence. By letter dated 18 January 2019 he asked the claimant to a Resolution Meeting and made clear one outcome could be dismissal.

3.19. The claimant sent Mr Tulip an email dated 21 January 2019 (213- 214) taking issue him writing the claimant had said he did not **wish** to work in a call centre environment as he had worked in one before and not enjoyed it. Mr Tulip says this was reflective of their discussions but there was never a suggestion the claimant would be required to pursue any option which would put his health at risk by increasing his blood pressure .We accept Mr Tulip's evidence.

3.20. The resolution meeting went ahead on 4 February 2019. Ms Sharrocks attended. The meeting was recorded and the claimant has provided a transcript. Before Mr Tulip turned on the recording there was a brief conversation in the presence of Ms Sharrocks .Mr Tulip felt the claimant's attitude towards him was quite hostile. It was raised he and Ms Sharrocks had not seen copies of the notes of the previous meetings. Mr Tulip had understood they had been provided by HR and accepted this was an oversight. He gave copies to them and they confirmed they were happy to go ahead with the meeting.

3.21. The claimant gave an update from the neurologist. He also said his cervical spondylosis was deteriorating rapidly and was now considerably worse than at the time of the OH report in October 2018. His prognosis had not improved. Mr Tulip decided there would be no point seeking updated OH advice. He asked the claimant to suggest his ideal solution or say if anything had been missed. The claimant said in view of his worsening condition he would not be fit to return to his substantive role, accepted Mr Tulip had explored a number of alternatives , he did not wish to do call centre work and no other suitable vacancies had been identified. The day visit to Gosforth Call Centre was discussed and the claimant said there were good medical reasons why the role was unsuitable. In response Mr. Tulip stated "*Based on the information we have following the OHS report and the information we have, you might be right*". page 224.

3.22. Mr Tulip had made clear MR was outside his control and the outcome could not be guaranteed. They discussed the indicative advice and, as it was not favourable, a definitive decision could only be made following termination of employment. The claimant was still not permitted to drive, had applied to get his licence back but did not, in fact, get it back until June 2019 as DVLA had to wait for medical confirmation. In his oral evidence, the claimant stated his view at the time was that had he been on AJS, the first job that came along in a call centre was one he would be required to take regardless of its effect on him. We find that was not so. He feared turning down an offer would make his dismissal more likely, but he was facing the virtual certainty of dismissal if he could not be redeployed so would be no worse off. His case now is

effectively that Mr Tulip should have put him on AJS anyway, if needed against his will , but in our view that would not have been practicable. In the meeting, the claimant confirmed his preferred option was MR. An entry at page 225 is Ms Sharrocks saying " *So is that what we are doing then, we are going down the lines of medical retirement?* " . The claimant said " *yeah, I think so ".*

3.23. Following the resolution meeting, and before reaching a decision, Mr Tulip considered the previous review meetings; the OH advice and listened back to the resolution meeting recording. He reviewed the claimant's substantial history of absence over the previous 5 years, including the current absence which totalled 260 days. He felt it was time to make a final decision, balancing the claimant's needs against the impact on the business of the additional strain on colleagues covering his shifts by working over-time and the increased cost of this. At the time some engineers were working up to 7 days a week to cope with customer demand and doing daily weekday over-time. There was risk of letting customers down, Service Level Agreements not being met and fines being imposed. He felt all reasonable and available alternatives had been explored and in view of the claimant's own admissions as to his prognosis, it was unlikely he would recover sufficiently to return in the foreseeable future. He therefore decided to dismiss on the grounds of impaired capability due to ill-health. He confirmed the outcome in a letter and detailed rationale dated 27 February 2019 (226-231). The claimant was given 12 weeks' notice from 4 March 2019 so his last day of employment would be 27 May 2019. He was informed of his right of appeal and asked if he wished to pursue a definitive opinion on MR.

3.24. He appealed saying, among other points, he felt his dismissal was unfair as the OH report and indicative MR advice was out of date. If one had been sought by Mr Tulip it could only have changed for the worse and made dismissal more likely.

3.25. Mr Taggart had no prior contact with, or knowledge of, the claimant or his case before being asked to hear the appeal. He wrote on 7 March 2019 inviting him to an appeal meeting on 19 March 2019 The letter informed him of his right to submit his views in writing and to be accompanied at the hearing. Prior to the hearing Mr Taggart read documents provided by HR including the notes of Mr Tulip's review meetings (177-184), the OH advice (188-190) and Mr Tulip's outcome letter and rationale (226 – 231). On 19 March 2019, the claimant attended with Ms Sharrocks. Mr Taggart recorded the hearing(transcript is 239- 252). The claimant did not provide written submissions in advance but brought a statement which he read aloud (237). Mr Taggart made manuscript notes. The claimant agreed he was unfit for his substantive role and did not think he would be in future (top 252) as his condition continued to deteriorate.

3.26. During his notice period on 25 March 2019 an email advertising an office based administrative role of North Complex Engineering Reception was sent out. The claimant says this would have been suitable for him but the respondent did not consider redeploying him to it although Mr. Tulip was copied into this email . The role was a temporary secondment and Mr Taggart's evidence was it requires challenging civil engineering companies on delivery and usually arises out of particularly poor customer experiences where a customer has been out of service for 30-40 days, so is as stressful as any role in the call centre. In any event, the claimant did not apply. It was not discussed at the final Appeal Hearing in June 2019.

3.27. On 19 March they agreed his main points of appeal at the end of the meeting were the claimant did not believe the MR process had been followed correctly ; did not believe the AJS

process had been followed correctly ; believed there were factual inaccuracies in the rationale provided by Mr Tulip, centred on usage of the word “incoherent” ; and believed there had been procedural issues surrounding recordings and paperwork not being sent out .Mr Taggart explained no decision would be made that day as further information may need to be obtained ; he would normally look to respond within 10 working days but further delays may be necessary depending on the extent of any additional investigations required.

3.28. On reflection after the meeting, Mr Taggart contacted the claimant on 6 April 2019 (262) to explain it may be beneficial for him to attend a further OH appointment. This was not because he believed Mr Tulip should have sought updated OH advice before deciding to dismiss. The most recent OH report at that time was October 2019, the claimant had confirmed in the resolution meeting he had received the outcome of his neurological investigations and been given the all clear but his neck condition was worse so there was no suggestion he would be fit to return to work. However, as several months had now passed, Mr Taggart thought it appropriate to explore (i) the impact of his cervical spondylosis continuing to deteriorate (ii) whether there was any suitable alternative work now (iii) the impact of his blood pressure condition on his ability to work in some desk-based roles, including call centre, as such roles were the main alternative to engineering roles in the business and he had seen no medical evidence whether this was something which should be ruled out. The claimant had provided some indications he may at some future date be open to some call centre roles, such as in Controls, which involves taking inbound calls from engineers in the field, not customer facing roles such as sales or the service role he tried on the trial day in January 2019.

3.29. Mr Taggart set out the questions to be asked of the OH practitioner and the claimant provided his consent by return email on 10 April 2019 (261 and 264- 265). He received other correspondence from the claimant regarding his pay which has now been resolved and this element of claim was withdrawn and subsequently dismissed by the Tribunal.

3.30. The further OH report dated 14 May 2019 (271) in summary concluded (i) the claimant : remained unfit for his role but was likely to be medically fit for amended duties; (ii) with appropriate medication a blood pressure condition would not normally preclude working in an office based administrative role (such as a call centre) and further advice should be sought from his GP;(iii) once he could manage his symptoms, there was no reason he could not undertake administrative/training roles; (iv) it was difficult to give return to work timeframe (v) with time and treatment he **may** be able to render reliable service in future. Mr Taggart arranged a further meeting to discuss the report for 13 June 2019.

3.31. The claimant says the indicative advice on MR did not give any detail as to why it formed the view, which is true. It stated that if a more definitive opinion was required a formal referral should be made. He says the advice was based upon the OH report prepared in September 2018 and was out of date, the referral for the indicative opinion wrongly stated he was absent with suspected epilepsy and failed to mention the underground working aspect of his job which, at that time, was the biggest issue preventing his return due to his cervical spondylosis worsening remarkably in the last month. Even with his driving licence back, he would not be able to carry out overhead work as he was unable to hold his hands above his head for any length of time. We find these criticisms of the indicative opinion are not valid. There is no evidence the specialist doctor

who gave the opinion based it only on the earlier OH report and if Mr Tulip had sought a new one in February it would have been worse and made dismissal more likely.

3.32. On 15 May 2019 the respondent requested a definitive opinion on MR (274 -277). The claimant says the request contained the same errors and omissions as the indicative request and no updated information regarding his health was included. We find these criticisms equally invalid and will return to the point in our conclusions.

3.33. The claimant says page 666 shows there should be a referral to OHS Core for definitive advice on MR "*the answer can take some time and whilst the outcome is awaited there will be no decision made on the employee's future employment*". We find that is a misreading. Only if the indicative advise was positive, which it was not, would termination be "suspended". The claimant complains OH were not provided with any details of the duties of the call centre, but the very reason for using specialists in OH is they are aware of the risks of various jobs.

3.34. The claimant and Ms Sharrocks attended a further appeal meeting on 13 June 2019. It was recorded and a transcript prepared (293 - 298). Mr. Taggart accepts he told the claimant his interpretation of the OH advice was the claimant would need to be **prepared to consider** work in a call centre, if he made the decision to overturn the dismissal and put him on AJS. The OH report (at point 6 on page 271) referred to high blood pressure not normally precluding an "office based administrative role". However, if after his GP's advice stressful environments posed a risk of the claimant's health being harmed, no respondent would take that risk. Mr Taggart does not believe the report stated a call centre role would definitely not have a negative effect on his hypertension, only that it depended on the job and more medical advice would be needed. When asked by our Employment Judge why he did not go along with considering roles in the call centre, the claimant replied that as a man of integrity he would not pay lip service to considering such jobs. We would not suggest he should, but jobs there may have changed since he was last familiar with them and reasonable adjustments could be made to the expectations placed on him. We find it was the claimant who closed off the possibility of redeployment in that setting.

3.35. The claimant made the point he was a former Union Representatives and knew the correct procedures and without him saying so Mr Taggart would not have been aware of this. The claimant had some queries regarding the choice of language in the OH referral form and the OH report. They discussed MR and Mr Taggart explained he had no control over it. As for Frames work, no vacancies had been available and it often involved working with hands above head height, which OH advice said would be a difficulty. His substantive role already had in place adjustments because he had difficulty bending and stooping. Mr Taggart explained if he were to undergo AJS, the main alternative roles available would be call centre roles. The claimant confirmed he was not willing to consider any because he disagreed with the recent OH advice and considered such work would not allow him to manage his blood pressure.

3.36. Mr Taggart wanted to understand what the claimant's objectives were at this point He felt the claimant was conscious the meetings were being recorded and was guarded as to what he thought he should say. The claimant had accepted he was not capable of returning to his substantive engineering role even with adjustments, said he wanted to continue in work but was categorically not willing to consider roles in call centres, Mr Taggart concluded the meeting and

ended the recording. After doing so, but still in the presence of Ms Sharrocks, he again asked the claimant what outcome he wanted. At the outset he had said he was in considerable pain and his condition was deteriorating. The claimant said he did not know what he wanted to do and would speak to his wife. To ensure there was no doubt that all alternatives had been exhausted, Mr Taggart said he would reinstate him and personally support him undergoing AJS which would look at roles right across the business, not just call centre roles, if this was his wish.

3.37. Mr Taggart emailed the claimant on 20 June 2019 to ask whether he had come to a conclusion (286-289). In the email exchange which followed, he thought the claimant misrepresented the conversation which took place after the audio-recording stopped, as he denies saying the claimant **had to consider** call centre jobs to go on AJS. The claimant now argues Mr. Taggart accepted *off the record* he should have been **placed** on AJS and asked whether he would consider returning and being put on AJS only for one month when an employee should be placed on it for six months. That is not so, AJS is for **up to** six months and Mr Taggart's mention of one month was in response to the claimant expressing doubts he could be on AJS for longer, acknowledgement of the stress the claimant was under and ultimately to put his mind at rest there were no other jobs out there.

3.38. Mr Taggart's recollection was supported by Ms Sharrocks in an email to the claimant on 27 June 2019 (288) which was copied to Mr Taggart . Ms Sharrocks confirmed her recollection was this not the only option put to him and Mr Taggart had asked him to consider coming back and doing a full job search. By email of the same date (288-289), the claimant said he could no longer see himself working for either Openreach or BT and even Frames work would be inappropriate due to the twisting movement necessary to complete most tasks. The claimant said in oral evidence he has never known a union officer copy advice to her member to a manager. Neither have we, but it is obvious to us Ms Sharrocks , unlike the claimant, did not see this as management gunning for him but rather trying to work with him and her to find the best solution to a major problem, the existence of which the claimant referred to in his early meeting with Mr Tulip, that being his very understandable difficulty in coming to terms with the fact his health simply was not permitting him to do what he wanted- to work as an engineer.

3.39. Mr Taggart emailed him on 3 July 2019 to restate he would support an AJS if that was what he wanted and call centre roles could be **excluded** from the scope of the search. The claimant responded on 8 July 2019 stating he rejected this offer and simply wanted to bring the process to a conclusion (285-286). He now says he felt the offer of support and placement on AJS was for appearances sake only and he would be dismissed for being unable to accept a call centre role. In addition, he says the way he had been treated by the respondent made him feel he was not wanted and had destroyed his faith in it . Finally, even if a non call centre role was found he "*would have a target on my back*" . There is no logical reason for him to feel any of this

3.40. Mr Taggart took further time to consider everything presented at the two appeal hearings, and the May 2019 OH advice . He drafted a detailed rationale, dated 23 August 2019 (304-312), and added an additional ground of appeal to capture the claimant's concerns that he did not feel he had been supported by management and they had been looking to get him out. He wrote on 30 August 2019 (page 303) to confirm the appeal was not upheld His reasons are best set out by

quoting his statement (noting what he called initially "point 3 " was not a ground of appeal which explains wht it does not appear in the rationale) which we accept in its entirety

In relation to point 1, I reviewed the Medical Retirement Procedure and did not consider that there was evidence of any breach. There was no requirement or expectation that a final decision should have been sought and the process taken to its full conclusion before the decision to dismiss was made in the circumstances of this case. A prerequisite to the full conclusion, at the time, was a dismissal on the grounds of impaired health due to capability. Mr Tulip had followed the procedure correctly in obtaining an indicative opinion. I did not consider that the decision would be impacted by Mr Tulip obtaining more recent OH advice (which I considered was sufficiently up-to-date) but in any event the more recent advice I obtained in May 2019 would also be taken into account in the ultimate decision.

In relation to point 2, from my review of the resolution meeting with Mr Tulip and my initial appeal meeting with Mr Davies on 19 March 2019, it was apparent that Mr Davies' preference as to how his long-term absence would be resolved was by pursuing medical retirement. Mr Tulip had explored several opportunities for alternative employment, but Mr Davies confirmed that he was not willing to pursue those available roles, which were in a call centre environment. Once the indicative opinion was received in January 2019, that it was not likely to be granted, I felt that Mr Davies had back tracked on his preferences stating that this was to pursue alternative employment. However, despite offering him the opportunity to be reinstated and conduct a full AJS, he declined.

In relation to point 4, Mr Davies had expressed concerns about the use of language Mr Tulip had used to describe his symptoms, specifically the word 'incoherent'. I considered that in view of the full OH and medical advice available, this use of language did not ultimately impact the decision reached by Mr Tulip or by myself on appeal, nor was the use of language an attempt to misrepresent Mr Davies' condition but merely a none medical professional trying to describe his understanding.

In relation to point 5, Mr Davies expressed concerns about delays in Mr Tulip providing copies of the notes and recordings of his meetings with Mr Davies. It is apparent from Mr Davies own statement to the appeal (page 236) that copies of the notes to the previous second line manager reviews were provided by the time of that meeting. I understand that Mr Tulip had difficulty providing the recording of the resolution meeting in the correct format, but this was provided subsequently and in any event before the appeal hearing on 19 March 2019. In any event, I ensured that Mr Davies had copies of all relevant documents as part of the appeal process.

In conclusion, Mr Davies was appealing the decision to dismiss but I was unsure what his desired outcome was. Mr Davies accepted that he was not fit to continue in his substantive role and was unlikely to be in future. There was currently no anticipated return date. Despite this, to ensure all avenues had been explored, I offered him the opportunity to return to the business to carry out a further job search. The reason for this was because his position seemed to have changed away from a preference of pursuing medical retirement, which the indicative advice had suggested he was unlikely to be awarded, to suggesting he wanted to continue working. In my opinion, Mr Davies believed medical retirement was still a potential option, hence my discussion with him

after I stopped the audio-recording to check his preference. Considering Mr Davies' long service and the desire to support him however I believed that offering to personally support him through our AJS process was an offer worth making, as he had stated he wanted to continue working. Mr Davies then declined this offer on the basis he did not want to prolong matters and that he had lost faith in the business.

I considered that the decision to terminate Mr Davies' employment on grounds of capability due to ill-health was not taken lightly by Mr Tulip and there was evidence of support provided over an extended period and no suggestion that the business was purposely acting against him in any way. I believed that all options had therefore been exhausted and upheld the decision to dismiss.

3.41. A definitive opinion was requested from BT's medical officer who found the claimant did not to meet the relevant criteria for MR (318). A letter was sent to the claimant on Mr Tulip's behalf on 26 September 2019 (319) confirming this. The medical officer had been provided with the OH report dated 5 May 2019 and records were sought from the claimant's GP The claimant says the decision is wrong as it ignores a report from his GP dated 4 September 2019 (648 -649) which states his symptoms are chronic and prospects of recovery are minimal.

3.42. The claimant also says notes of previous meetings provided to him and Ms Sharrocks contained things which were untrue including the reason he refused a call centre job and that he had been given all the options available. He says he had been denied any opportunity to object to the contents or correct the notes, but we note he did so. He also says (i) the 27 February letter stated he was suffering periods of incoherence which is false and had he been neither he nor his family would have accepted his consultant discharging him (ii) Mr Tulip emailed notes to Ms Sharrocks and Mr. Taggart which are different to the notes disclosed by the respondent at pages 176 – 184, which add information and include a number of extra paragraphs. If the amended notes were provided to Mr. Taggart after the appeal process had started he was not given a fair appeal as he was unware of the information which Mr. Taggart was considering. We accept there are differences compatible with a draft being turned into a final version, rather than any distortion of meaning which would take the procedure outside the band of reasonableness.

4 Submissions and conclusions

4.1. We need not set out the parties' submissions in full. Suffice to say, the claimant says dismissal was unfair and discriminatory because the respondent
(i) did not follow the correct procedure by failing to place him on AJS.
(ii) failed to obtain up to date medical advice before making a decision to dismiss
(iii) **refused** to put him on AJS because of his **inability** to work in a call centre due to hypertension.
(iv) made the decision to dismiss **because** he was unable to carry out his substantive role due to Cervical Spondylosis and unable to work in a call centre due to hypertension.

4.2. Points (i) and (ii) are in our view well within the band of reasonableness procedurally and procedure is not material to his EqA claim. Point (iii) we reject factually, there was no **refusal**. Any reluctance on the part of Mr Tulip was not because of any inability to do the work but his perception of the claimant's outright refusal to consider working in a call centre when he had not even ascertained what jobs existed there.Point (iv) is valid and the only real issue is justification.

4.3. We reject the respondent's submissions on two points . First it says there is no direct medical evidence in support of the claimant's contention call centre work would adversely affect his hypertension. There is, in that he took his blood pressure before and after the trial day and the article at 338-339 supports a link, which is common sense, between stress and increase in blood pressure . Second it says his sickness absence from May 2018 to February 2019 was for the purpose of investigating seizures so did not arise in consequence of either disability he has pleaded. With hindsight it now appears the episodes probably were a consequence of his cervical spondylosis, but even if it was not clear why, he was stopped from doing a day to day activity of driving and unable to do tasks at work which most people can. Following City of York Council-v-Grosset and College of Ripon and York St.John-.v Hobbs we need not be certain of the diagnosis or cause of the problem provided we are satisfied an adverse effect which is substantial and long term kept him off work for that period, and we are.

4.4. The claimant expressed a preference for MR. On 13 September 2018 (para 2 on 178) he had discussed it with his family and it was noted as "*definitely their preference*". In the October 2018 meeting he spoke with Ms Sharrocks and concluded he would probably seek MR . By the resolution meeting in February 2019, his deteriorating Cervical Spondylosis prevented him doing his substantive job and his hypertension deterred him actively pursuing certain other jobs . He metaphorically put all his eggs in the one basket of MR despite having a negative indicative opinion. At that stage dismissal of an employee who could not return to any job was well within the band of reasonable responses and a proportionate means of achieving the respondent's legitimate aims of providing a reliable service without overworking other engineers. Procedurally Mr Tulip acted well with the band of reasonableness even though he may on occasions have expressed himself a little better. The test demands fairness, not perfection.

4.5. Then, at the appeal stage, Mr Taggart offered AJS and he declined. He said in an email it is too little too late but now in evidence says it was because there was a restriction of 1 month imposed. We accept Mr Taggart's account that he referenced 4 weeks because of the claimant's presentation at the time and it is unreasonable for the claimant to see this as him being offered one-sixth of his entitlement. Any procedural failings at the dismissal stage, and we see none of significance , were cured by this very thorough appeal. Dismissal was neither unfair nor discriminatory and there was no other detriment to which he was subjected contrary to s15.

4.6. The real point which causes the claimant to feel hard done to is the refusal of MR. Although that is not a matter for us, we think it important to explain to him what we believe caused that. In the 1980's concerns were emerging that some pension funds were being depleted by too readily granting early retirement on ill health grounds . In the teaching profession for example, some retired on such grounds, had early access to enhanced pensions and later returned as supply teachers. If such trends continued the pensions of future retirees could only be guaranteed by increasing employer and employee pension contributions. In many public and private sector pension funds, steps were taken to ensure doctors with knowledge of occupational health had to certify strict criteria were met. At page 704-705 we can see the respective roles of OHS Core and the Chief Medical Officer. There is scope for an indicative opinion to be obtained. If it is negative, a definitive opinion is provided for only where a decision has been made to terminate an employee's service on grounds of capability due to ill-health. The criteria are set out on page 706 and were quoted by us at 3.18. above. An employee has the right of appeal (708-709).

4.7.The indicative advice from Dr Macaulay on 16 January 2019 was the criteria were unlikely to be met. At the resolution meeting on 5 February 2019, the claimant said he was "very surprised" by that assessment. A definitive opinion was requested on 15 May 2019. On 4 July Dr Macaulay concluded the criteria were not met. The evidence she considered included all OH assessments and medical information from the claimant's doctors. A review carried out by Dr Macaulay in its manuscript version (314-315) concludes MR criteria were not met and says of the claimant "In addition, he is unwilling to consider possible alternative role." We have known some doctors take a view of the criterion of "permanent" incapability based on what may be possible improvements by treatment theoretically available rather than what can be done, and when, by treatment available in the area under the NHS. However, in this case his cervical spondylosis would get worse not better and it is likely Dr Macaulay recognised that. By contrast, hypertension can be controlled by medication hence the "permanent" criterion is unlikely to be met. Such control may be put at risk by stress but not all jobs in the call centre would inevitably cause that. Had the claimant "considered" such roles and turned them down because he reasonably feared they may harm his health, a refusal of MR would be harder to justify. The claimant viewed with suspicion and distrust the acts of managers who were trying to help him. Had he not done so but accepted Mr Taggart's offer within less than six months either AJS would have found a job he could do or, more likely, not done so . His dismissal would still have been inevitable but his application for MR stronger in that if he considered alternatives and rejected them for good cause, the criteria at page 706 would be more likely to be met.

4.8. The members of our panel know from professional and personal experience how hard it is for a person who has worked in a job he likes to reconcile himself to the fact his health has altered to prevent him continuing . Added to that, being unable to drive and trying to get one's driving licence back from DVLA after surrendering it on medical grounds is frustrating. This claimant says his treatment has had an adverse effect on him and he feels worthless, unwanted and shame he can no longer provide for his family as he once did. We sympathise but cannot accept the respondent should have waited any longer or pursued redeployment opportunities with greater vigour than it did.

Employment Judge Garnon
Date signed 3 March 2020