EMPLOYMENT TRIBUNALS

Claimant: Mr A Booth

Respondent: Delstar International Limited

Heard at: Leeds Employment Tribunal
Before: Employment Judge Deeley, Ms Lancaster and Mr Taj
On: 5, 6, 7, and 8 October 2020 (by CVP) and 9 October 2020 (in chambers)

Representation
Claimant: Mr S Healy (Counsel)
Respondent: Ms R Mellor (Counsel)

JUDGMENT

1. The claimant's complaints of (i) discrimination arising from disability and (ii) indirect discrimination made by the claimant in relation to the respondent's delay in applying for income protection benefit under the Unum Scheme on his behalf succeed.
2. All remaining complaints made by the claimant in relation to disability discrimination under the Equality Act 2010 fail and are dismissed.

REASONS

INTRODUCTION

Tribunal proceedings

3. We considered the following evidence during the hearing:
   3.1 a joint file of documents;
   3.2 witness statements and oral evidence from:
      3.2.1 the claimant;
      3.2.2 Mrs Lisa Booth (claimant's wife);
      3.2.3 Mr Michael Booth (claimant's father);
      3.2.4 Mrs Catherine Davis (respondent's HR Manager).

4. We also considered the oral and written submissions made by both representatives.
5. The claimant provided an additional witness statement from Mr Kevin Wharam. However, Mr Wharam did not attend the hearing and we were not asked to read his statement as part of the claimant's case.
6. Both parties disclosed additional documents during the hearing. We discussed these additional documents with the representatives and agreed to add them to the hearing file.

Adjustments

7. This hearing was originally due to take place in person, with Mr Michael Booth only attending via CVP. However, due to confusion with the listing arrangements, all participants attended the hearing via CVP on the first day. We offered the parties that they could continue to participate by CVP or that they (or their witnesses) could attend the hearing in person if they preferred. Both parties and their witnesses decided to continue to attend the hearing by CVP.
8. We noted at the start of the hearing that some of the witnesses may require additional breaks whilst giving their evidence and informed the parties that they may request these and at any time.

CLAIMS AND ISSUES

9. The claimant brought complaints of disability discrimination, consisting of: direct discrimination, discrimination arising from disability, indirect discrimination and failure to make reasonable adjustments.
10. The draft issues to be decided were set out in the case management summary from the Preliminary Hearing held by Employment Judge Wade on 14 April 2020.
11. The respondent conceded that the claimant's medical condition (which include membranous nephropathy (a kidney disease) and a stroke) amounted to a disability for the purposes of s6 of the EQA at the relevant time.
12. The list of issues was discussed with the parties in detail at the start of the hearing. The claimant's representative confirmed that the claimant had decided not to pursue his complaints of direct discrimination at the start of his submissions.
13. The revised list of issues that the Tribunal considered in reaching its conclusions on this claim is set out below.

LIST OF ISSUES

1. Disability status

When did the respondent acquire knowledge of the claimant's disability?

2. Discrimination arising from disability (section 15 EQA)

a. Did the respondent treat the claimant unfavourably by treating the claimant as follows:

i) by delaying in applying for income protection for the claimant (on the grounds that he was permanently ill) *(not disputed)*;

ii) by making employer pension contributions of 7%, rather than 13.5% on his behalf *(not disputed)*; and/or

iii) by attempting to dismiss him at the meeting on 5 February 2018 *(disputed)*?

iv) by not permitting him to be accompanied by a family member to the grievance meeting on 9 August 2018?

b. If so, was such unfavourable treatment due to something arising in consequence of the claimant's disability?

The claimant relies on the following as the "something arising" in consequence of his disability:

(i) the fact that he was absent due to long term sickness was the reason why:

a. the respondent did not apply for income protection cover for the claimant until after 23 March 2018;

b. the respondent decided to consider terminating the claimant's employment (as discussed between the respondent and the claimant at a meeting on 30 January 2018); and

c. he did not receive his full employer pension contribution (which he would have received, if he were at work).

(ii) the fact the claimant brought a grievance which related to matters arising from his disability

The respondent did not dispute that the claimant's absence was 'something arising' from his disability.

c. If so, can the respondent show that treatment was a proportionate means of achieving a legitimate aim?

The respondent relied on the following aims:

(i) **Delay in applying for income protection**: to only make applications that were understood to have a reasonable likelihood of being accepted (e.g. that an employee's ill health would continue beyond the 26 week deferral period under the Unum policy or that otherwise met the policy requirements) and to make appropriate enquiries to establish this, to include receiving and responding to representations from the claimant's union.

The respondent states that the delay was proportionate to this aim because the respondent continued to pay the claimant any entitlement he would have received under the policy as discretionary sick pay.

(ii) **Attendance at meeting on 9 August 2018**: to progress the claimant's grievance in a meeting which was operationally viable and during which the likelihood of inappropriate behaviour was reduced through not inviting Mrs Lisa Booth.

The respondent maintains that this was proportionate because the claimant was still allowed to bring a union representative or colleague and, had he asked, his father or another family member or friend.

(iii) **Pension contributions**: to provide all employees with the benefit of income protection if they are unable to work through illness at a level which is operationally and economically viable (and not at 100% of normal pay and benefits).

The respondent states that this would not be the case if employees were covered under the income protection policy up to their normal full-time employment level of 13.5% employer pension contributions.

3. Failure to make reasonable adjustments (sections 20 and 21 Equality Act 2010)

a. Did the respondent operate a provision, criterion or practice ("PCP") of refusing to permit family members to accompany employees to meetings?

b. If so, did they apply this PCP to the claimant when he attended the grievance meeting with the respondent on 9 August 2018?

c. Did the PCP put the claimant at a substantial disadvantage in comparison to non-disabled persons?

The claimant relies on a hypothetical comparator. The claimant relies on the following alleged disadvantages of his conditions: difficulties in presenting his grievance and/or fully participating in meeting.

d. If the claimant is found to have been at a substantial disadvantage in comparison to non-disabled persons, did the respondent know (or could the respondent reasonably be expected to have known) that the claimant was likely to be at a substantial disadvantage compared to persons who are not disabled?

e. Did the respondent fail to make the adjustments set out in this paragraph?

The claimant alleges that the following adjustments (as identified by the claimant) would have avoided such substantial disadvantage:

(i) for the respondent to permit the claimant to be accompanied by a family member (such as his wife) to the meetings on 30 January, 5 February and 9 August 2018

f. If so, would the adjustments set out in paragraph 2(c) above have removed the substantial disadvantage suffered by the claimant?

g. If so, were those adjustments which the Respondent failed to make reasonable adjustments within the meaning of sections 20 and 21 Equality Act 2010?

4. Indirect discrimination (Equality Act 2010 section 19)

a. Did the respondent operate the following PCPs:

i) refusing to permit family members to accompany employees to meetings;

ii) not applying for income protection for those employees who were permanently ill (i.e. unlikely to return to work)?

b. If so, did the respondent apply either of those PCPs to the claimant?

c. Did the respondent apply the PCP to non-disabled persons or would it have done so?

d. Did the PCP put disabled persons at a particular disadvantage when compared with non-disabled persons, in that the claimant contends that:

i) he could not present his grievance and/or participate fully in the meetings.

ii) He experienced uncertainty and anxiety for several months because he did not have the benefit of income protection during that period.

e. Did the PCP put the claimant at that disadvantage?

f. Was the PCP a proportionate means of achieving a legitimate aim?

The respondent says that its aims were as stated above at paragraph 2(c) (i.e. the s15 claim).

The Tribunal will decide in particular:

(i) was the PCP an appropriate and reasonably necessary way to achieve those aims;

(ii) could something less discriminatory have been done instead;

(iii) how should the needs of the claimant and the respondent be balanced?

RELEVANT LAW

14. The Tribunal considered any legal points raised in both parties' helpful submissions, in addition to the relevant law set out below.

Definition of disability (s6 EQA)

15. The definition of disability is set out at 26 of the EQA:

6 Disability

(1) A person (P) has a disability if –

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

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

16. We note that:

16.1 '*substantial'* in this context is defined at s212(1) of the EQA as: *"more than minor or trivial"*; and

16.2 *'long term'* means that the adverse effect has lasted (or is likely to last) 12 months or more, or that it has or is likely to recur.

17. The relevant time for assessing the claimant's disability status and the respondent's knowledge of disability is the time at which the events referred to in the claimant's complaints took place. For the purposes of this claim:

17.1 the relevant time starts at the point at which during 2017 the respondent could have applied for the income protection benefit on behalf of the claimant, but failed to do so at that time; and

17.2 the relevant time ends on the date on which the claimant submitted his claim (i.e. 20 December 2019). This is because the claimant complains that the respondent has failed to pay an employer pension contribution of 13.5% into the respondent's pension scheme on his behalf on an ongoing basis.

Discrimination arising from disability (s15 EQA)

18. The right not to suffer discrimination arising from disability is set out at s15 of the EQA:

15 Discrimination arising from disability

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

(a) A treats B unfavourably because of something arising in consequence of B's disability, and

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

(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

<u>Unfavourable treatment</u>

19. In relation to the question of 'unfavourable treatment', both representatives referred the panel to the Supreme Court's decision in the case of *Williams v Trustees of Swansea University Pension and Assurance Scheme* [2018] UKSC 65. We considered the Supreme Court's decision in detail, together with relevant parts of the

Court of Appeal's and Employment Appeal Tribunal's judgments. The claimant in *Williams* disputed the calculation of his ill health early retirement pension. Lord Justice Bean's judgment in the Court of Appeal notes that the requirement for ill health early retirement was whether a member is 'permanently incapable of carrying on his or her occupation' (paragraph 14).

20. The claimant in *Williams* originally worked full time, before moving (at his request) to part time hours because of his disabilities. The claimant's condition then deteriorated and his employment ended when he took ill health early retirement. The claimant in *Williams* complained that his pension was calculated on his part time salary, rather than his previous full time salary.

21. Lord Carnwath giving judgment on behalf of the Supreme Court in *Williams* held at paragraph 26 that: *"Mr Williams had not been treated unfavourably. He had not received a lower or lesser pension than would otherwise have been available to him if he had not been disabled. If he had not been disabled and had been able to work full time, the consequence would not have been calculation of his pension on a more favourable basis, but loss of entitlement to any pension at all until his normal retirement date"*.

22. Lord Carnwath observed that the Code of Practice provides helpful advice as to the relatively low threshold of disadvantage which is sufficient to trigger the requirement for an employer to justify its conduct under discrimination arising from disability claims. However, he added at paragraph 28: *"It is necessary first to identify the relevant 'treatment' to which the section is to be applied. In this case it was the award of a pension. There was nothing intrinsically 'unfavourable' or disadvantageous about that. By contrast in* Malcolm*…there was no doubt as to the nature of the disadvantage suffered by the claimant. No one would dispute that eviction is 'unfavourable'."*

23. Lord Justice Bean also considered this point in the Court of Appeal and commented at paragraph 49: *"No authority was cited to us to support the view that a disabled person who is treated advantageously in consequence of his disability, but not as advantageously as a person with a different disability or different medical history would have been treated, has a valid claim for discrimination under section 15, subject only to the defence that the treatment was a proportionate means of achieving a legitimate aim. If such a claim were valid it would call into question the terms of pension scheme or insurance contracts which confer increased benefits in respect of disability caused by injuries sustained at work, or which make special provision for disability caused by one type of disease (for example cancer)…."*

24. We have also considered the Supreme Court's observations in the case of *O'Hanlon v Revenue and Customs Commissioners* [2007] ICR 1359 in which the employee complained about the level of sick pay provided during her disability-related absence. *O'Hanlon* related to a complaint for failure to make reasonable adjustments, rather than discrimination arising from disability (which did not exist at the time that the *O'Hanlon* case was brought). However, the Supreme Court agreed with the Employment Appeal Tribunal's observations regarding sick pay (paragraph 28 of the Supreme Court's judgment, highlighting paragraphs 67-69 of the EAT's judgment): *"…the implications of this argument are that tribunals would have to usurp the management function of the employer, deciding whether employers were financially able to meet the costs of modifying their policies by making these*

enhanced payments…The tribunals would be entering into a form of wage fixing for the disabled sick."

Something arising in consequence of B's disability

25. The EAT in *Sheikholeslami v University of Edinburgh* [2018] IRLR 1090 (paragraph 96) held that s15 requires the Tribunal to consider "two distinct causative issues" when considering whether the 'something' alleged arose in consequence of B's disability. The EAT set out the issues as follows:

"(i) did A treat B unfavourably because of an (identified) something? and (ii) did that something arise in consequence of B's disability?

The first issue involves an examination of the putative discriminator's state of mind to determine what consciously or unconsciously was the reason for any unfavourable treatment found. If the 'something' was a more than trivial part of the reason for unfavourable treatment then stage (i) is satisfied. The second issue is a question of objective fact for an employment tribunal to decide in light of the evidence."

Failure to make reasonable adjustments (s20 and 21 EQA)

26. The legislation relating to a claim for failure to make reasonable adjustments is set out at sections 20 and 21 of the EQA:

20 Duty to make adjustments

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

(2) The duty comprises the following three requirements.

(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

…

21 Failure to comply with duty

(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.

(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.

…

27. We also note that 'substantial' in the context of 'substantial disadvantage' is defined at s212(1) of the EQA as: *"more than minor or trivial"*.

28. Both representatives referred the panel to the Court of Appeal's judgment in the case of *Ishola v Transport for London* [2020] EWCA Civ 112. Lady Justice Simler held at paragraph 37 that: "*In my judgment, however widely and purposively the concept of a PCP is to be interpreted, it does not apply to every act of unfair treatment of a particular employee. That is not the mischief which the concept of indirect discrimination and the duty to make reasonable adjustments are intended to address. If an employer unfairly treats an employee by an act or decision and neither direct discrimination nor disability related discrimination is made out because the act*

or decision was not done/made by reason of disability or other relevant ground, it is artificial and wrong to seek to convert them by a process of abstraction into the application of a discriminatory PCP."

29. Lady Justice Simler went on to state at paragraph 39 that: *"…the one-off decision treated as a PCP in* Starmer *is readily understandable as a decision that would have been applied in future to similarly situated employees. However, in the case of a one-off decision in an individual case where there is nothing to indicate that the decision would apply in future, it seems to me the position is different. It is in that sense that Langstaff J referred to "practice" as having something of the element of repetition about it. In the* Nottingham *case in contrast to* Starmer*, the PCP relied on was the application of the employer's disciplinary process as applied and (no doubt wrongly) understood by a particular individual; and in particular his failure to address issues that might have exonerated the employee or give credence to mitigating factors. There was nothing to suggest the employer made a practice of holding disciplinary hearings in that unfair way. This was a one-off application of the disciplinary process to an individual's case and by inference, there was nothing to indicate that a hypothetical comparator would (in future) be treated in the same wrong and unfair way."*

Indirect discrimination (s19 EQA)

30. The legislation relating to indirect discrimination is set out at s19 of the EQA:

19 Indirect discrimination

(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.

(2) For the purposes of subsection (1), a provision, criterion or practice is discriminator in relation to a relevant protected characteristic of B's if –

(a) A applies, or would apply, it to persons with whom B does not share the characteristic,

(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,

(c) it puts, or would put, B at that disadvantage, and

(d) A cannot show it to be a proportionate means of achieving a legitimate aim.

31. The case of *Ishola* referred to in the section above entitled 'Failure to make reasonable adjustments' also applies in relation to the definition of a PCP for the purposes of indirect discrimination.

Burden of proof

32. The burden of proof is set out at s136 EQA for all provisions of the EQA, as follows:

136 Burden of proof

…

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
(3) But subsection (2) does not apply if A shows that A did not contravene the provision.
…
(6) A reference to the court includes a reference to -
(a) an employment tribunal;
…

33. The Supreme Court in *Hewage v Grampian Health Board* [2012] ICR 1054 stated that it is important not to make too much of the role of the burden of proof provisions. Those provisions will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. However, they are not required where the Tribunal is able to make positive findings on the evidence one way or the other.

FINDINGS OF FACT

Background

34. The claimant was originally employed by Smith & Nephew Extruded Films Limited ("**Smith & Nephew**") on 4 January 1994 as a Cutinova Manufacturing Technician, based at Smith & Nephew's Gilberdyke site. The site was involved in the manufacture of extruded film products. Smith & Nephew recognised Unite the Union at the Gilberdyke site.

35. The claimant was eligible to participate in benefits including:

35.1 life assurance; and

35.2 membership of Smith & Nephew's Final Salary Pension Scheme (the "**Final Salary Scheme**").

36. The purpose of the Final Salary Scheme was to provide its members with a pension calculated on a proportion of each member's salary. The Final Salary Scheme also contained ill health early retirement provisions.

37. Smith & Nephew also operated a Stakeholder Pension Scheme (the "**Stakeholder Scheme**"). Employees who joined Smith & Nephew after 2002 could participate in the Stakeholder Scheme, but could not join the Final Salary Scheme. The Stakeholder Scheme was a far less valuable benefit than the Final Salary Scheme. Employees built up a 'pot of money' under the Stakeholder Scheme, consisting of employer and employee pension contributions. They may be able to either draw down monies from their pension or use those monies to buy an annuity when they retire. However, they will not benefit from a guaranteed annual pension under the Stakeholder Scheme.

Income protection insurance

38. Smith & Nephew's corporate group had a group income protection insurance policy which covered some of its employees. The policy was insured by UNUM (a third party insurer).

39. We considered an extract from the Smith & Nephew handbook regarding income protection cover which stated:

*"**Income Protection***

Depending on your position within the Company and whether you are a member of the Stakeholder Pension Scheme, your income may be protected under the UNUM Provident Income Protection Scheme. This means that if you are unable to work due to illness or injury, Smith & Nephew have arranged that, after 26 weeks, 50% of your salary (less state benefits) will be paid to you, until you are able to return to work or retire…Further information is available from the UK Benefits Manager."

40. The claimant believed that he was covered by Smith & Nephew's income protection insurance. However, we find that the claimant's belief was mistaken. We find that the claimant was not covered by Smith & Nephew's income protection insurance for the following key reasons:

40.1 none of the versions of the claimant's terms and conditions of employment stated that he was entitled to the benefit of any income protection insurance;

40.2 the schedule of employees (provided by Smith & Nephew to the respondent as part of their 2015 sale of the business to the respondent) included 25 Manufacturing Technicians amongst the staff listed. Six of the Manufacturing Technicians (including the claimant) were members of the Final Salary Scheme and were not entitled to income protection insurance. The remaining 19 Manufacturing Technicians were members of the Stakeholder Scheme. We have concluded that Manufacturing Technicians were only eligible to receive the benefit of income protection insurance if they were members of the Stakeholder Scheme;

40.3 we accept Mrs Davis' evidence that some senior staff who were members of the Final Salary Scheme had also negotiated income protection cover as part of their remuneration and benefits package, including the Business Development Manager and the Product Development & Technical Manager. We note that those senior staff were also eligible for other benefits, such as private medical insurance; and

40.4 the claimant's responses to cross-examination questions suggested that he did not understand the difference between income protection insurance and life assurance (to which he was entitled). He appeared to have regarded these benefits as one and the same.

January 2015 - Transfer of the claimant's employment to the respondent

41. The respondent was in negotiations with Smith & Nephew to acquire Smith & Nephew's extruded film business during 2014. Smith & Nephew and the respondent consulted with employees regarding the transfer of the business following their announcement on 18 November 2014 that the respondent would acquire the Gilberdyke factory and its assets. The employment of the majority of the staff at the Gilberdyke factory (including the claimant) were due to transfer under the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("**TUPE Legislation**") to the respondent.

42. Smith & Nephew and the respondent held one to one meetings with individual employees. Many of the employees were accompanied to these consultation meetings by their Unite union representatives. Catherine Davis met with the claimant on 11 December 2014 to discuss the transfer and the impact on the claimant's employment.

43. Smith & Nephew provided a schedule of transferring employees to the respondent. The schedule set out the employees' key terms of employment and benefits. The transfer took place with effect from 1 January 2015.

44. The claimant received a letter headed "Your first week with Delstar" from the respondent dated 23 December 2014. This was a generic letter to employees and it stated that benefits would be 'transferred smoothly', including life assurance, Unum (permanent health) and car insurance. It stated that employees would receive an individual 'welcome letter' on 5 January 2015, which would confirm employees' main terms and conditions of employment.

45. The claimant's individual welcome letter confirmed that he would remain on his existing terms and conditions of employment, but that his new employer was the respondent with effect from 1 January 2015. The last part of the letter contained a short summary of the claimant's terms. There was a row headed 'Other' which was blank for the claimant. We accept Mrs Davis' evidence that this row was intended to refer to employees' benefits, such as medical insurance.

46. The respondent did make changes to the claimant's pension arrangements. The respondent did not operate a final salary pension scheme. Instead, the claimant and all other transferring employees who were previously members of the Final Salary Scheme were included in the respondent's defined contribution pension scheme with enhanced pension contributions (as set out in the table below).

	Respondent's maximum contributions (standard rate)	**Respondent's maximum contributions (ex-Smith & Nephew Final Salary Scheme members)**
Employer pension contribution rate	7%	13.5%
Employee pension contribution rate	3%	3%

February 2016 - Respondent's introduction of income protection insurance cover for all employees

47. The respondent's senior directors discussed the possibility of providing the Unum income protection insurance cover (the "**Unum Scheme**") to all employees of the respondent towards the end of 2015. The directors agreed that this benefit would be provided to all employees from 1 February 2016.

48. Mrs Davis contacted Finch (the respondent's employee benefits broker) and provided employee schedules to Finch, setting out three groups of employees for administrative purposes:

    48.1 **Group 1** – former Smith & Nephew employees who transferred to the respondent with Unum income protection insurance cover;

    48.2 **Group 2** – two employees who worked for SWM's European operations, but lived in the UK; and

    48.3 **Group 3** – all remaining employees of the respondent (including the claimant).

49. Mrs Davis held a staff meeting on 18 January 2016 to discuss the extension of the Unum Scheme to all employees. The claimant attended but stated that he did not

recall the contents of that meeting because he thought he was already covered by that benefit.

50. With effect from 1 February 2016, employees were covered by the Unum Scheme set out in the table below, subject to meeting the terms of the scheme.

	Group 1	**Group 2**	**Group 3** (including the claimant)
Insured earnings*	50%	50%	50%
Employer pension contribution	13.5%	7%	7%
Employee pension contribution	3%	3%	3%

**calculated by reference to an employee's basic annual salary day on the day prior to incapacity*

51. The key terms of the Unum Scheme included:

    51.1 Unum would pay these benefits to the respondent (who would then make the appropriate payments to the employee and the pension scheme);

    51.2 benefits were subject to employees meeting the relevant definition of 'incapacity', which would require satisfactory medical evidence; and

    51.3 there was a 6 month deferred period beginning on the date of the employee's incapacity before the respondent could receive benefits under the Scheme in respect of a particular employee.

52. There were no restrictions as to the date on which an application under the Unum Scheme could be made. There was nothing in the Unum Scheme terms to prevent the respondent from applying for income protection benefit on behalf of an employee either:

    52.1 whilst the employee was in receipt of company sick pay; and/or

    52.2 before the end of the 6 month deferred period (provided that the employee's absence was likely to continue beyond the end of the deferred period).

53. The definition of 'incapacity' under the Unum Scheme which was later considered in relation to the claimant was as follows:

    "Definition A

    (i) If a member is not required by the terms governing the employment relationship to hold a licence or certificate which is issued only when the member meets required medical standards, the member is incapacitated if Unum is satisfied that the member is –
    (a) unable by reason of their illness or injury to perform the material and substantial duties of the insured occupation, and is
    (b) not performing any occupation, except as provided under paragraph 5.3 (Proportionate benefit)…"

54. The definition of "Proportionate benefit" was as follows:

"Benefit may be paid in respect of a member who, although incapacitated, is working in their normal occupation on a reduced basis, or working in a different and less well paid occupation".

Claimant's ill health and sick pay

55. The claimant experienced serious difficulties with his health from late 2016 onwards and was absent on sick leave. He was told that he had a pulmonary embolism and was later diagnosed with kidney disease. The claimant returned to work for a short period in late January 2017, but was absent from work from 8 February 2017 when he suffered a 'mini stroke'. The claimant then suffered what he described as a 'life changing stroke' in late March 2017. The claimant did not return to work and remains absent on sick leave.

56. The claimant's prognosis following his stroke in March 2017 was unclear. The claimant needed time to recover from his stroke. In addition, the claimant's six month treatment plan for his kidney disease was postponed due to his stroke.

57. Mrs Davis emailed Paul Ainsley (whose position at that time was Plant Manager) on 5 May 2017, stating:

"I called Andy yesterday. He had a very pronounced stutter and reports being mentally tired very easily…

Andy also reports medical professionals are telling him his kidneys have stabilised but he does need the treatment. He has to now wait a month before he can commence the chemo he was supposed to start when he had his stroke.

In all, Andy remains extremely poorly and there is absolutely no way we will see him any time soon. He still has a lot of company sick pay to run due to his long service but I'm expecting to put in a UNUM application for him when it runs out later this year."

58. The claimant was entitled to 43 weeks' contractual company sick pay, which ended on 8 October 2017. During this period, the respondent paid to the claimant (or paid pension contributions on his behalf):

58.1 his normal salary;

58.2 his full employer pension contribution of 13%;

58.3 his full employee pension contribution of 3%.

59. The respondent then paid the claimant discretionary sick pay from 8 October 2017, consisting of:

59.1 50% of his normal salary;

59.2 half of his employer pension contribution – i.e. 6.75%; and

59.3 half of his employee pension contribution – i.e. 1.5 %.

60. We accept Mrs Davis' evidence that the respondent intended that the claimant's discretionary sick pay would continue until their application to Unum for income protection benefit for the claimant had been dealt with. Her letter to the claimant of 17 November 2017 mentioned their discussions regarding his sick pay and stated:

"Your CSP entitlement gave you full pay up to end of week 40 (8/10/2017) and since that date for the time being we are giving you 50% pay on a discretionary basis. The next review of that will be on review of your future capacity for work and/or the

outcome of the UNUM application that we will make for you following your appointment with Occupational Health."

Occupational health report

61. Mrs Davis telephoned the claimant and spoke with him and his wife on 7 November 2017 to discuss his current status. At that time, the claimant's contractual sick pay had expired and she intended to apply on his behalf to the Unum Scheme for income protection benefit as soon as possible. Mrs Davis told the claimant that she would need assistance from Ian Watkinson (occupational health physician) to prepare the application.

62. Mrs Davis attempted to arrange for Mr Watkinson to visit the claimant at home in order to prepare an occupational health report. She wrote to the claimant on 17 November 2017, offering dates for this visit. Mrs Davis also prepared the referral form on 23 November 2017. Her final comments on the referral form stated:

"Andy's wife Lisa has been a great support to us and Andy in assisting with liaison with us as his employer and we now feel that a formal report on Andy's current and future capacity for work would be useful. Also, Andy has run out of company sick pay but we have a permanent health insurance policy (UNUM) and need to apply for this for Andy, who may need assistance to provide information on his condition to the provide[r] so we would like to ask for your support in this if you can please Ian".

63. Mr Watkinson visited the claimant on 7 December 2017 and prepared his report. The report included the following comments in answer to Mrs Davis' questions:

"In my opinion, Mr Booth is unfit for work and he will not be fit in the foreseeable future.

There appears to be no information available regarding the prognosis for Mr Booth's kidney condition. He has long term impairment of his vision and short term memory. These have not improved to date….I expect that his visual and short term memory impairments will not fully resolve, although they could possibly improve to some degree over the longer term…

…At any time a return to work becomes feasible Mr Booth will require a temporary period of reduced hours and/or duties. I advise that he is re-referred to occupational health at that stage.

I believe that it is unlikely that Mr Booth will provide his employer with a reliable and efficient service in the long term.

In my opinion, a tribunal would be likely to qualify Mr Booth as disabled within the terms of the Equality Act 2010.

In my opinion, there are no available adjustments, adaptations or restrictions that are likely to make a return to work feasible at this stage.

In my opinion, it is likely that Mr Booth would be unfit to sustain any role at this stage and early retirement through ill health would be the best option at this stage."

64. Mr Watkinson also noted that:

"Mr Booth is also concerned regarding the effect of his inability to work upon his finances."

65. Mrs Davis called the claimant's home number, spoke to Mrs Booth and asked how the respondent should provide a copy of the report and the claimant's Christmas

present. They agreed that Mrs Davis and James Fox (the new Plant Manager, following Mr Ainsley's promotion to Plant Director), would visit the claimant on 21 December 2017. The visit took place, but there was no discussion regarding the occupational health report because the claimant needed time to read it and consider its contents.

66. Throughout this period, the claimant believed that Mrs Davis would take steps to apply to the Unum Scheme for income protection on his behalf.

Meeting to discuss occupational health report

67. Mrs Davis called the claimant to arrange a meeting on 30 January 2018 to discuss the occupational health report with him and with Mr Fox. She spoke to the claimant and his wife. Mrs Booth was invited to attend the meeting, but decided not to attend because Mick Millar (Unite representative at the Gilberdyke site) was able to attend the meeting.

68. Mrs Davis' letter of 25 January 2018 to the claimant inviting him to the meeting at the Gilberdyke site was headed 'Re: Occupational Health Referral' and stated:

"As arranged we now need to invite you in to discuss the medical report and your future capacity for work. Please be aware that your future employment with us will be discussed in this meeting."

Mrs Davis' preparations for the meeting

69. We accept Mrs Davis' evidence that she intended to discuss the occupational health report with the claimant. She wanted to obtain his feedback on Mr Watkinson's conclusions regarding the claimant's prognosis.

70. Mrs Davis also wanted to discuss what might happen next with the claimant. She stated in evidence that she believed that the claimant was not eligible to receive income protection benefit under the Unum Scheme at that time.

71. We accept Mrs Davis' evidence that she mistakenly believed that the purpose of the Unum Scheme was to provide a means for the respondent to keep paying the employees sick pay, pending an employee's return to work. She later stated in her email dated 21 March 2018 to Malcolm Hancock (Regional Organiser for Unite) that:

"…it is important to point out what the policy is and what it isn't. This is not a long-term disability policy covering our employees as insured parties…Instead it is a policy that covers SWM (not the employee) and pays SWM in order to allow us to continue to pay a partial salary to employees after the typical Company Sick pay would run out…

Accordingly, we have made use of the policy from time to time as to employees who have an expectation to return to work. However, we have not used it for employees who may be classed as permanently disabled and have no expectation or ability to return to work. It is not reasonable to expect the company to hold open his job for an employee for a guaranteed indefinite period of potentially numerous future years of incapacity.

Under the circumstances, it is not appropriate to engage this policy until Andrew returns to work because, if his medical report, is accurate, he will not be able to return to work at any time in any capacity. This is why we have not done so."

72. We also note Mrs Davis' evidence that:

72.1 she had limited experience of permanent health insurance or income protection policies, despite her 20 years' experience in HR;

72.2 she had not seen a copy of the Unum Scheme terms; and

72.3 she did not speak to Unum or to Finch (the respondent's brokers) regarding the claimant's eligibility for income protection benefit.

73. Mrs Davis believed that the respondent may need to consider terminating his employment because of her mistaken belief that he was not eligible for income protection benefit under the Unum Scheme.

74. Mrs Davis emailed Mr Millar (copied to Mr Fox) on 25 January 2018 regarding the meeting on 30 January and stated:

"We are concerned about [the claimant's] *future capacity for work and will need to discuss his employment with us. Depending on how the meeting goes we may need to adjourn and may even make a decision to terminate his employment on grounds of capability (incapacity)."*

However, Mr Millar did not tell the claimant and Mrs Booth about his email at that time.

75. Before the meeting with the claimant, Mrs Davis had obtained Mr Ainsley's authorisation (as Plant Director) for a potential termination and settlement of the claimant's employment with an ex gratia payment. Mrs Davis prepared a brief document for Mr Fox which set out two scenarios and sets of financial figures in case this matter was raised during the meeting:

75.1 *"Dismissal on grounds of capability…Right of Appeal to Paul Ainsley"* - £10,952.69 (less deductions); and

75.2 *"Suggest settlement"* - £22,016.58 *"but only on settlement agreement*".

Meetings on 30 January and 5 February 2018

76. The meeting took place on 30 January 2018. It was adjourned and continued on 5 February 2018. None of the witnesses could provide written notes of the meeting and there was some confusion as to which parts of the discussion took place on which date.

77. We find that the key points discussed on 30 January 2018 related to the occupational health report prepared by Mr Watkinson in December 2017. The claimant said that he did not accept Mr Watkinson's opinion that the claimant would not be able to work again although he had been given similar advice from his doctors. The claimant became upset and Mrs Davis decided to adjourn the meeting to 5 February 2018.

78. There was no discussion regarding the Unum Scheme or any potential termination of the claimant's employment at the meeting on 30 January 2018. We accept the claimant's evidence that the meeting ended amicably.

79. Mrs Davis did not send any further invitation letter to the claimant for the adjourned meeting on 5 February 2018. Mr Millar attended this meeting with the claimant. Mrs Booth was unable to attend this meeting because of work commitments. We accept Mr and Mrs Booth's evidence that they believed that the purpose of the meeting on 5 February 2018 was to discuss the occupational health report and not to discuss terminating his employment.

80. Mrs Davis told the claimant at the meeting on 5th February that the Unum Scheme 'was not going to be an option after all'. The reason she said this was because Mrs Davis and Mr Fox had considered the occupation health report and the claimant's comments on this. They had concluded that the claimant was unlikely to be able to return to work and that the respondent could not apply for income protection benefit.

81. Mr Fox and Mrs Davis discussed the possibility of reaching a settlement with the claimant and discussed the figures prepared by Mrs Davis. They said that the claimant would have seven days to accept the settlement offer. The claimant asked what would happen if he did not accept the settlement. Mr Fox and Mrs Davis said that there might be a capability process, which could result in the termination of the claimant's employment, but that he would have seven days to appeal against any termination.

82. The claimant asked to see the piece of paper with the figures. Mr Fox and Mrs Davis left the room so that the claimant and Mr Millar could discuss the settlement figures. We accept the claimant's evidence that at this point his brain 'shut down' and that he walked out of the room. Mr Millar went to tell Mrs Davis and Mr Fox that the claimant had left. Mr Millar asked Mrs Davis if he should go after the claimant and Mrs Davis said that he should. Mr Millar then drove the claimant home but the claimant was unable to recall any discussions with Mr Millar. When Mrs Booth returned home, the claimant told her that 'they were dismissing me'.

83. We accept the claimant's evidence that he experienced uncertainty and anxiety because of the discussions on 5 February 2018. The claimant was understandably worried about his financial position because he had a family to support and a mortgage to pay. The claimant was also concerned about the impact of the financial worries on his health because he had been told that worrying about things could lead to further damage whilst he was recovering from his stroke.

'Appeal' letter – 12 Feb 2018

84. The claimant believed he had been dismissed at the meeting on 5 February 2018. Mrs Booth accepted in her oral evidence that the respondent did not dismiss the claimant on 5 February 2018. However, she wrote a letter to Mr Ainsley which purported to appeal against the claimant's dismissal on the claimant's behalf because he was unable to use a computer at that time.

85. We find that the respondent did not in fact dismiss the claimant at the meeting on 5 February 2018. The respondent continued to pay the claimant discretionary sick pay and did not issue any written termination of employment.

86. Mrs Davis wrote to the claimant on 14 February 2018, inviting him to an 'Issues Resolution' meeting. She did not state in her letter that the claimant remained employed by the respondent and had not been dismissed. Mrs Davis said that this was because she thought it would be better to deal with any questions at a meeting, rather than by letter.

87. In the meantime, the claimant sought further assistance from Unite. Malcolm Hancock (Unite Regional Organiser) became involved. He emailed Mrs Davis on 15 February 2018 and stated that:

"I am not really sure why Andy's wife Lisa sent the email to Paul Ainsley appealing against the dismissal because I have had a conversation with Andy to point out that a dismissal has not taken place at this point in time and that he does not need to

worry about appealing within seven days until such a time as written confirmation of the dismissal is received from the Company…For whatever reason they have somewhat jumped the gun here. I will once again clarify the point with them."

88. Mr Ainsley emailed Mrs Booth later on 15 February 2018, stating:

"The reality however is, as indicated by medical professionals, that he will not be able to fulfil the role he is employed to do, and we don't have any suitable alternatives. We have offered a settlement over and above statutory requirements in recognition of Andy's situation, but this is conditional on a mutual agreement between both parties."

Meeting on 12 March 2018

89. The Issues Resolution meeting was rearranged from 21 February 2018 to 12 March 2018, so that Malcolm Hancock (Regional Organiser) could attend. The invitation letter stated that: *"we…hope we can help to increase your understanding and resolve some of your and Lisa's concerns".*

90. The meeting took place at the Gilberdyke site. Mr and Mrs Booth, Mr Hancock, Mr Fox and Mrs Davis attended. No notes were taken of this meeting.

91. We accept Mrs Davis' evidence that the previous meetings that she had attended with Mr and Mrs Booth were amicable and constructive. However, this meeting was quite different. We find that:

    91.1 Mr and Mrs Booth were very upset before the meeting started because of the previous discussions regarding Mrs Davis' belief that the claimant would not be covered by the Unum Scheme and the potential termination of Mr Booth's employment; and

    91.2 Mr Fox and Mrs Davis were also aware that this would be a difficult meeting, because Mr Booth walked out of the meeting on 5 February 2018 and because of the subsequent correspondence.

92. Mrs Davis talked about occupational health report. She said 'it must have been difficult to hear' that the claimant may not be able to return to work. All of the witnesses accepted that there was confusion on Mrs Booth's part and that she believed that Mrs Davis was referring to Mr Booth's physical hearing. We find that Mrs Booth responded angrily to this, stating that there was nothing wrong with Mr Booth's hearing. However, we find that Mrs Booth did not swear, as alleged by Mrs Davis. Mrs Davis' own evidence was that she thought that Mrs Booth either stated that there was nothing wrong with Mr Booth's 'bloody hearing' or 'fucking hearing'. We find that there is a significant difference between those two expressions and that if either had been used, then Mrs Davis would have had a clearer recollection of the words used.

93. We accept Mrs Davis' evidence that she was concerned by Mrs Booth's behaviour but that she felt she was able to manage it. The meeting continued and there were detailed discussions regarding the Unum Scheme, as referred to in Mr Hancock's follow up email to Mrs Davis of 15 March 2018.

94. A further 'Issues Resolution' meeting was scheduled for 18 April 2018 with Mrs Davis and Mr Fox, however this did not proceed because the claimant raised a grievance on 16 April 2018. The respondent invited Mrs Booth to attend this meeting, as well as Mr Hancock.

Mr Hancock's correspondence with Mrs Davis regarding the Unum Scheme

95. Mrs Davis obtained a copy of the Unum Scheme policy after the meeting on 12 March 2018 and sent a copy to Mr Hancock. Mr Hancock emailed Mrs Davis on 15 March 2018, asking her to clarify several points relating to the Unum Scheme.

96. Mrs Davis initially repeated her view that the claimant was not eligible to receive any benefit under the Unum Scheme in her email of 21 March 2018 (as set out above). However, she then sought legal advice from the respondent's internal legal team and realised that she had made a mistake.

97. Mrs Davis was unable to recall when she told Mr Hancock of her mistake. She did not communicate her mistake directly to the claimant because communications between Mrs Davis and Mr and Mrs Booth had deteriorated. We find that Mrs Davis did not tell Mr Hancock of her mistake until after she saw a copy of the claimant's grievance letter on 16th April 2018 because:

    97.1 we find it highly likely that Mr Hancock would have informed the claimant promptly of Mrs Davis' change of view regarding his eligibility for cover under the Unum Scheme;

    97.2 the claimant's grievance letter did not mention Mrs Davis changing her mind regarding the Unum Scheme application; and

    97.3 there was no further correspondence between Mrs Davis and the claimant regarding the Unum Application until Mrs Davis wrote to the claimant on 9 May 2018, enclosing the application form and asking for his consent to make the application.

98. There was a short delay whilst the claimant obtained his medical records and completed the application form. Mrs Booth assisted the claimant to fill in the form and the claimant signed it on 4 June 2018. Unfortunately, Unum initially requested the claimant's medical records from 2018 (rather than 2016). This led to a further delay, before the correct medical records were provided.

99. Unum made an award under the Unum Scheme relating to the claimant, as set out in their letter to Finch (the respondent's employee benefits broker) of 14 September 2018. The letter stated that the claimant's award would be backdated to 7 August 2017 (i.e. the end of the six month deferred period). The letter stated that the respondent would receive the following payments going forwards in respect of the claimant's income protection benefit:

    99.1 50% of salary;

    99.2 7% of salary (in relation to employer's pension contributions); and

    99.3 3% of salary (in relation to employee's pension contributions).

Claimant's grievance and hearing on 9 August 2019

100. The claimant raised a grievance in a document dated 16 April 2018. The claimant's grievance was wide-ranging and included:

    100.1 several matters which took place before his sickness absence, such as abusive Facebook posts from colleagues, complaints regarding working practice and health and safety issues; and

100.2 matters relating to the respondent's then refusal to apply for income protection benefit for him under the Unum scheme and the respondent's handling of the meetings on 30 January and 5 February 2018.

101. The respondent arranged for a grievance hearing to take place on 9 August 2018 with Mr Fox. Mrs Davis did not attend this meeting at the claimant's request. Lesley McGovern (Senior Administrator) attended to take notes of the meeting.

102. The respondent's grievance policy stated: *"It is acknowledged that there is the right to accompaniment at Hearings and Appeal".* The policy did not provide any further details as to the categories of individuals permitted to accompany employees to grievance or grievance appeal meetings.

103. The invitation letter from Mr Fox to the claimant stated:

"You are entitled to bring along a Trade Union Representative or work colleague to accompany you in the meeting. As your chosen representative is Malcolm Hancock Unite Area Official, we have liaised with his office in order to identify a suitable date."

104. The claimant replied to this letter. He stated that he would attend with Mr Hancock, Mrs Booth and Mr Wharham (a work colleague). The claimant said that he did not want Ms McGovern to attend because he believed that she had a conflict of interest.

105. Mr Fox responded, stating that Ms McGovern had no conflict of interest. He stated:

"As per my invite letter, you are entitled to one rep to this meeting and this must be either a Trade Union Representative or a work colleague…Your wife Lisa is welcome to sit in our reception area whilst she waits for you until the meeting has finished"

106. The claimant emailed Mr Hancock and said that *"my condition in relation to my disability of short term memory loss and often loosing the thread of a conversation. My wife was with good reason and entitled to be there as previous meetings."* He did not write again to Mr Fox before the meeting.

107. Neither Mr Fox nor Mr Hancock gave evidence during the hearing of this claim. We are unable to establish whether this issue was discussed before the hearing. However, neither Mr Hancock nor the claimant asked during the grievance hearing to adjourn it on the basis that Mrs Booth was not permitted to attend.

108. We accept Mrs Davis' evidence that the respondent's normal practice is to permit family members to attend meetings unless they are likely to be disruptive. Mrs Davis' witness statement said that Mr Fox did not want Mrs Booth to attend the grievance hearing because he was concerned regarding her behaviour at the meeting on 12 March 2018, although she confirmed in her oral evidence that Mr Fox did not consult with her regarding the issue of Mrs Booth's attendance at the hearing before the hearing took place.

109. We do not accept Mrs Davis' evidence that the claimant's father would have been permitted to attend the grievance hearing if the claimant had requested. Mr Fox's letters do not suggest that the claimant could bring another family member or friend. They state that the claimant may only bring one representative.

110. We accept the claimant's evidence that Mrs Booth had helped him to prepare the grievance, that she had given him a file of documents and that he struggled to find the relevant papers without her. We accept the claimant's evidence that he had not

met with Mr Hancock before the grievance hearing and that Mr Hancock did not have as much knowledge of his grievance as Mrs Booth. Mrs Davis also agreed during cross examination that Mrs Booth would have been able to provide 'emotional support' to the claimant in a way that Mr Hancock could not.

111. However, the claimant was unable to provide specific examples of the documents which he would have referred to or any further evidence that he would have been able to provide during the grievance hearing if Mrs Booth had attended during his oral evidence. The three sets of notes of the grievance (taken by Mr Fox, Ms McGovern and Mr Hancock) were very detailed and suggested that the claimant's concerns had been discussed in detail.

112. Mr Fox carried out further investigations into the claimant's grievance and issued an outcome letter on 22 October 2018. The outcome letter dealt with all points raised by the claimant. It included an acceptance by Mr Fox that the respondent should have applied for income protection benefit for the claimant under the Unum Scheme at an earlier stage.

113. The claimant later appealed against the grievance outcome. He also raised a second grievance regarding health and safety concerns. Mr Fox invited Mrs Booth to attend the second grievance hearing. The respondent also invited Mrs Booth to attend the appeal hearing. In the event, the claimant's father attended both hearings.

114. We do not need to make any further findings of fact regarding these matters because they do not form part of this claim.

APPLICATION OF THE LAW TO THE FACTS

115. We applied the law to our findings of facts as set out below. We have first dealt with the issue of disability status and then turned to the legal complaints made in relation to each of the factual complaints, i.e.:

115.1 the respondent's delay in applying to the Unum Scheme for income protection benefit on behalf of the claimant;

115.2 that the respondent 'attempted to dismiss' the claimant at the meeting on 5 February 2018;

115.3 the respondent's refusal to permit Mrs Booth to attend the grievance hearing on 9 August 2018; and

115.4 the respondent's payment of employer pension contributions at 7%, rather than 13.5%, on behalf of the claimant.

DISABILITY STATUS

When did the respondent acquire knowledge of the claimant's disability?

116. We have concluded that the respondent acquired knowledge of the claimant's disability by early May 2017. Mrs Davis' email of 5 May 2017 makes it clear that she was aware of the impact of the claimant's stroke on his health and the fact that he was awaiting chemotherapy treatment for his kidney disease. The contents of that email demonstrate that the respondent was aware that the claimant had a physical

impairment which had a substantial adverse effect on the claimant's ability to carry out normal day to day activities.

117. Mrs Davis' email also states that she expects to apply to Unum for income protection benefit at the end of his 43 week company sick pay, on the basis he would not be capable to return to work at that point in time. This means that she was aware that the adverse effect of the claimant's condition was long term (i.e. likely to last 12 months or more) as at early May 2017.

A) RESPONDENT'S DELAY IN APPLYING FOR INCOME PROTECTION

Discrimination arising from disability (section 15 EQA)

a. Did the respondent treat the claimant unfavourably by delaying the application for income protection?

118. We found that the respondent could have applied for income protection benefit under the Unum Scheme on behalf of the claimant at any time from May 2017 onwards. The application could have been made after May 2017 because it was likely that his absence would continue beyond the six month deferred period (i.e. beyond 8 August 2017), although the respondent would not have received any payment for the claimant's absence until after 8 August 2017.

119. However, the unfavourable treatment that the claimant has complained of did not commence at the time that the application could have been made. The claimant complains of two difficulties that he faced due to the respondent's delay:

119.1 **Anxiety and uncertainty** – we found that up until the meeting on 5 February 2018, the claimant believed that the respondent intended to apply for income protection benefit under the Unum Scheme on his behalf. We found that the claimant did not experience uncertainty and anxiety caused by the respondent's delay until Mrs Davis told him at the meeting on 5 February 2018 that she believed that he was not eligible for the benefit because the occupational health report stated that he was unlikely to be able to return to work. This anxiety and uncertainty continued up until the claimant was informed in late April or early May 2018 that Mrs Davis was mistaken and that the respondent would make the application on his behalf.

119.2 **Financial disadvantage** – the claimant's financial disadvantage started on 8 October 2017 (when his contractual sick pay ended) and ended on 14 September 2018 when Unum awarded him backdated cover. Mrs Davis' evidence was that the respondent paid employer pension contributions of 6.75% and employee pension contributions of 1.5% into the respondent's pension scheme on behalf of the claimant during that period, rather than the 7% employer contribution and 3% employee pension contribution under the Unum scheme.

b. If so, was such unfavourable treatment due to something arising in consequence of the claimant's disability? The claimant relies on the

following as the "something arising" in consequence of his disability: the fact that he was absent due to long term sickness was the reason why the respondent did not apply for income protection cover for the claimant until after 23 March 2018.

120. We have considered the EAT's decision in the *Sheikholeslami* case, referred to in the section on 'Relevant Law' above. We note that:

120.1 the first issue is whether the respondent treated the claimant unfavourably because of an identified 'something' and that this involves an examination of the respondent's state of mind to determine what consciously or unconsciously was the reason for any unfavourable treatment found;

120.2 the second issue is whether that something arose in consequence of the claimant's disability.

121. In relation to the first issue, we have concluded that Mrs Davis' delay in applying for income protection benefit under the Unum Scheme was due to her view that the scheme did not apply to employees on long term sickness absence who were unlikely to return to work. The key reasons for our decision are:

121.1 Mrs Davis initially intended to make an application. She changed her mind after she received the occupational health advice that the claimant would not be fit for work for the 'foreseeable future' due to his medical conditions.

121.2 Mr Hancock later challenged Mrs Davis' interpretation of the Unum Scheme rules. Mrs Davis' email response to Mr Hancock of 21 March 2018 stated (with our underlining added for emphasis):

"Accordingly we have made use of the policy from time to time as to employees who have an expectation to return to work. However, <u>we have not used it for employees who may be classed as permanently disabled and have no expectation or ability to return to work</u>."

121.3 Mrs Davis sought legal advice after this email exchange and realised she had made a mistake. The claimant's prognosis did not change materially throughout this period.

122. Turning to the second issue, the respondent has already accepted that the claimant's sickness absence was 'something arising' from his disability. This must be correct in light of the medical evidence provided at the time.

c. If so, can the respondent show that treatment was a proportionate means of achieving a legitimate aim? The respondent will rely on the following aim: to only make applications that were understood to have a reasonable likelihood of being accepted (e.g. that an employee's ill health would continue beyond the 26 week deferral period under the Unum policy or that otherwise met the policy requirements) and to make appropriate enquiries to establish this, to include receiving and responding to representations from the claimant's union. The respondent states that the delay was proportionate to this aim because the respondent continued to pay the claimant any entitlement he would have received under the policy as discretionary sick pay.

123. We accept that making applications that would have a reasonable likelihood of being accepted may be 'a legitimate aim'.

124. However, we find that the respondent's treatment of the claimant was not a proportionate means of achieving that aim. The reason for the respondent's delay was Mrs Davis' mistaken belief as to the terms of the Unum scheme. Mrs Davis admitted that she did not read the terms of the scheme and that she did not contact Unum and/or Finch regarding the terms until Mr Hancock challenged her on this in March 2018. In addition, the claimant received lower employer and employee pension contributions as part of his discretionary sick pay than he would have received under the Unum Scheme.

125. The claimant's complaint of discrimination arising from disability in relation to this factual complaint is upheld.

Indirect discrimination (Equality Act 2010 section 19)

a. Did the respondent operate the following PCP: not applying for income protection for those employees who were permanently ill (i.e. unlikely to return to work)?

126. We concluded that the respondent did operate a PCP of not applying for income protection for employees who were permanently ill and unlikely to return to work. Until Mrs Davis realised her mistake in late March 2018, she would have applied the same PCP to any employee who was absent on sick leave and who may have met the definition of 'incapacity' under the Unum Scheme.

b. If so, did the respondent apply this PCP to the claimant?

127. The respondent did apply this PCP to the claimant.

c. Did the respondent apply the PCP to non-disabled persons or would it have done so?

128. The respondent was not considering any other applications for income protection at that time. However, it would have applied this PCP to non-disabled persons, albeit that it is difficult to envisage a non-disabled person in such circumstances. We note that any employee who was permanently ill (i.e. unlikely to return to work) and who was likely to meet the 'incapacity' criteria in the Unum Scheme was highly likely to be regarded as having a 'disability' for the purposes of s6 of the EQA.

d. Did the PCP put disabled persons at a particular disadvantage when compared with non-disabled persons, in that the claimant contends that he experienced uncertainty and anxiety for several months because he did not have the benefit of income protection during that period?

129. We have concluded that the PCP did put disabled persons at a particular disadvantage when compared with non-disabled persons. This is because disabled persons as a group were far more likely than non-disabled persons to be eligible to receive the benefit of income protection cover under the Unum Scheme.

e. Did the PCP put the claimant at that disadvantage?

130. The claimant was put at that disadvantage. He experienced uncertainty and anxiety because of the delayed application. He also received lower pension employee and employer contributions during that period.

f. Was the PCP a proportionate means of achieving a legitimate aim?

131. We have concluded that the PCP was not a proportionate means of achieving a legitimate aim for the reasons set out in relation to the discrimination arising from disability complaint.

132. The claimant's claim of indirect discrimination in relation to this factual complaint succeeds.

B) 'ATTEMPTING TO DISMISS' THE CLAIMANT ON 5 FEBRUARY 2018

Discrimination arising from disability (section 15 EQA)

a. Did the respondent treat the claimant unfavourably by 'attempting to dismiss' the claimant at the meeting on 5 February 2018?

133. We have concluded that the events at the meeting on 5 February 2018 amounted to unfavourable treatment. The claimant was told that he was not eligible to receive the benefit of the Unum Scheme and was offered a settlement package based on the termination of his employment. At the time of this meeting the claimant's health was poor as set out in our findings of fact.

134. We also found that the respondent discussed what might happen if the claimant refused the settlement (i.e. that his employment may be terminated after a capability process). The respondent did not forewarn the claimant that a settlement package or any potential capability process might be discussed during the meeting.

b. If so, was such unfavourable treatment due to something arising in consequence of the claimant's disability? The claimant relies on the following as the "something arising" in consequence of his disability: the fact that he was absent due to long term sickness was the reason why the respondent decided to consider terminating the claimant's employment at the meeting on 5 February 2018.

135. We have concluded that the unfavourable treatment was not due to something arising in consequence of the claimant's disability. Rather, it arose from Mrs Davis' mistaken belief that the claimant was not eligible for income protection benefit under the Unum Scheme and that the respondent therefore needed to consider other options, such as a settlement.

136. The claimant's claim of discrimination arising from disability in relation to this factual complaint fails.

C) RESPONDENT'S REFUSAL TO PERMIT MRS BOOTH TO ATTEND THE GRIEVANCE HEARING ON 9 AUGUST 2018

Failure to make reasonable adjustments (sections 20 and 21 Equality Act 2010)

a. Did the respondent operate a provision, criterion or practice ("PCP") of refusing to permit family members to accompany employees to meetings?

137. We have concluded that the respondent did not operate a PCP of refusing to permit family members to accompany employees to meetings. The key reasons for our conclusion are that:

137.1 the respondent's grievance policy does not specify whether or not family members are permitted to accompany employees to meetings;

137.2 we accepted Mrs Davis' evidence that the respondent's normal policy is to permit family members to attend meetings, except where they may be disruptive;

137.3 the grievance hearing was the only hearing to which Mrs Booth was not invited (or permitted) to attend. She was invited to attend meetings in 2017 and in early 2018. We note that Mr Fox specifically invited Mrs Booth to attend the second grievance hearing and that the grievance appeal manager also specifically invited Mrs Booth to attend.

138. The claimant's complaint of failure to make reasonable adjustments in relation to this factual complaint fails.

Indirect discrimination

139. The claimant's complaint of indirect discrimination in relation to this factual complaint also fails because we have concluded that the respondent did not operate a PCP of refusing to permit family members to accompany employees to meetings.

Discrimination arising from disability (section 15 EQA)

a. Did the respondent treat the claimant unfavourably by treating the claimant by not permitting him to be accompanied by a family member to the meetings on 9 August 2018?

140. We have concluded that the respondent treated the claimant unfavourably by refusing his request to be accompanied by Mrs Booth at the meeting on 9 August 2018. The respondent did not suggest that another family member, such as the claimant's father, could attend the meeting instead of Mrs Booth. The wording of Mr Fox's correspondence makes it clear that he would only have permitted one representative to attend the meeting.

b. If so, was such unfavourable treatment due to something arising in consequence of the claimant's disability? The claimant relies on the following as the "something arising" in consequence of his disability: the fact the claimant brought a grievance which related to matters arising from his disability and under the respondent's standard policy only co-workers and/or TU representatives were permitted to accompany employees at meetings.

141. We found that part of the claimant's grievance related to his disability. However, we have concluded the fact that the claimant raised a grievance was not something arising in consequence of his disability. We have also concluded that Mrs Booth's behaviour at the meeting on 12 March 2018 was not something arising in consequence of the claimant's disability.

142. The claimant's claim in relation to discrimination arising from disability in relation to this factual complaint fails.

D) DIFFERENCE IN PENSION CONTRIBUTIONS

Discrimination arising from disability (section 15 EQA)

a. Did the respondent treat the claimant unfavourably by treating the claimant as follows: reducing the claimant's employer pension contributions from 13.5% (when working full time) to 7% (whilst in receipt of income protection benefit under the Unum Scheme)?

143. We have concluded that the payment of 7% employer pension contributions as part of the claimant's income protection benefit under the Unum Scheme did not amount to unfavourable treatment for the following key reasons:

143.1 we note that the Supreme Court in *Williams* confirmed that the decision to grant the claimant in that case ill health early retirement under the University's pension scheme could not amount to 'unfavourable treatment'. They concluded that there is nothing intrinsically unfavourable or disadvantageous about such a decision. Instead, the claimant's complaint was about the level of payment that he received under the ill health early retirement pension under the University's pension scheme rules;

143.2 similarly, the decision by Unum that the claimant met the definition of 'incapacity' under the Unum Scheme cannot amount to 'unfavourable treatment'. The claimant's real complaint here is about the amount of employer pension contribution that is paid into the pension scheme on his behalf under the Unum Scheme, rather than the award of the income protection benefit itself.

144. We do not accept the respondent's representative's submissions that we should distinguish *Williams* in these circumstances. In particular:

144.1 the fact that *Williams* concerns ill health early retirement and the claimant's claim concerns income protection insurance benefit is not sufficient to distinguish *Williams* from the current case. Both cases involve a decision to award a benefit which the individual would not have received, if they had not met the threshold criteria under the scheme. In both cases, the complaints are about the amount of the payment paid to the individuals under the respective rules of the schemes. Also, both cases relate to long term benefits designed to protect employees against a complete loss of income, which could continue for the remainder of their working life;

144.2 the respondent's representative is correct in pointing out that the fact that 7% of the employer pension contributions is underwritten by Unum is irrelevant. We agree that it was the respondent's decision to seek insurance for 7% of employer pension contributions for Group 3 (into which the claimant fell), rather than insurance for 13.5% of employer pension contributions. However, in both this case and in *Williams*, decisions had to be made regarding the level of payment of any benefit awarded;

144.3 the respondent's representative pointed to paragraph 28 of the Supreme Court's judgment which stated that the only basis on which Mr Williams was entitled to ill health early retirement was by reason of his disabilities. However, the Court of Appeal's judgment in *Williams* makes it clear that the criteria for ill health early retirement under the University's pension scheme was in fact whether a member is '*permanently incapable of carrying on his or her occupation'* – i.e. not disability per se under the EQA. It is possible (albeit highly unlikely) that an individual may not be able to work as a university lecturer, but still not meet the definition of disability under the EQA. Definition A(a) of the Unum Scheme contains similar wording: *"the member is incapacitated if Unum is satisfied that the member is unable by reason of their illness or injury to perform the material and substantial duties of the insured occupation."* As the respondent's representative correctly points out, the Unum Scheme's definition of incapacity does not require 'permanent' incapacity. However, the number of non-disabled individuals who would meet that criteria after the 6 month deferred period who would not be viewed as disabled at that time that Unum evaluates their condition is likely to be very limited.

145. The claimant's claim in relation to discrimination arising from disability in relation to this factual complaint fails.

CONCLUSION

146. We have concluded that the complaints of (i) discrimination arising from disability and (ii) indirect discrimination made by the claimant in relation to the respondent's delay in applying for income protection benefit under the Unum Scheme on his behalf succeed.

147. We have concluded that all remaining complaints made by the claimant in relation to disability discrimination under the Equality Act 2010 fail and are dismissed.

Employment Judge Deeley

19 October 2020