EMPLOYMENT TRIBUNALS

Claimant: Mr Hayes

Respondent: Wooltex UK Ltd

Heard at: Leeds (by CVP) **On:** 3-4 November 2020 and, on reserved deliberation, 5 November 2020

Before: Employment Judge Parkin
Ms N H Downey
Mrs N Arshad-Mather

Representation
Claimant: Mr P Morgan, Counsel
Respondent: Mr T Sadiq, Counsel

RESERVED JUDGMENT

The unanimous Judgment of the Tribunal is that:

1 The claimant was unfairly dismissed by the respondent;

2 The respondent treated the claimant unfavourably contrary to Section 15 of the Equality Act 2010 for a reason relating to his disability in dismissing him; and

3 The respondent was under a duty to make reasonable adjustments for the claimant under Section 20 of the Equality Act 2010 but failed to do so contrary to Section 21.

4 Consideration of remedy is adjourned to a date to be fixed.

REASONS

1. The claim and the response

1.1 By a claim presented on 9 March 2020, the claimant claimed unfair dismissal and disability discrimination in respect of the termination of his employment as a

warper by the respondent, with effect from 25 October 2019, and the upholding of the dismissal on appeal. He relied upon his disability of type 2 diabetes which had resulted in two toe amputations and foot conditions, claiming disability related discrimination contrary to section 15 of the Equality Act 2010 despite the prognosis and his indication that he would be fit to work soon and medical evidence available the appeal that he was fit for work and able to attend to his role. He also claimed failure to make reasonable adjustments in the respondent failing to modify its capability process or by not dismissing or delaying the dismissal.

1.2 By its response presented on 6 April 2020, the respondent admitted the claimant's disability and knowledge of it. It contended it had dismissed him for reason relating to his capability, A potentially fair reason and that its decision to dismiss was within the range of reasonable responses since he had been absent for 14 months at the time of dismissal with no foreseeable return to work. It did not admit unfavourable treatment relating to the disability but in any event relied upon the defence of justification in that his absence created a financial burden of extra costs and it needed to maintain a consistent and present workforce for business efficiency. It did not admit any work arrangements put the claimant at a substantial disadvantage in comparison with non-disabled persons but in any event contended it had agreed adjustments for if the claimant returned, but that there was no definitive date for return even at the time of his appeal.

2. The Issues

The issues are taken from the case management order of Employment Judge Maidment. They were discussed with the parties at the start of the hearing and the following issues remained for determination following their closing submissions.

Unfair Dismissal:

2.1 What was the reason for the dismissal? The respondent asserts that it was a reason related to capability (long term ill health and absence) which is a potentially fair reason for section 98 (2) Employment Rights Act 1996.

The burden of proof was upon the respondent to prove this reason and the claimant acknowledged in closing submissions that it had done so.

2.2 Did the respondent hold its belief in the claimant's incapacity on reasonable grounds? The burden of proof is neutral here; the claimant's challenges to the fairness of dismissal set out in the ET1 claim form are identified as follows

> 2.2.1 the respondent's breach(es) of procedure and failure to obtain up-to-date medical evidence prior to dismissing the claimant; and/or
>
> 2.2.2 the claimant's indication at the dismissal hearing that he would be fit to work in a reasonable period of time; and/or
>
> 2.2.3 by the respondent's failure to find the claimant a suitable alternative role. This was not pursued by the claimant in closing submissions.
>
> 2.2.4 that the claimant was fit for work at the date of his appeal hearing; and/or

2.2.5 the appeal hearing did not remedy the previous unfairness.

2.3 Was the decision to dismiss a fair sanction, within the reasonable range of responses open to a reasonable employer?

2.4 Did the respondent prove that if it had adopted a fair procedure the claimant would have been fairly dismissed in any event? And/or to what extent and when? This Polkey question this was not pursued by the respondent in closing submissions.

Discrimination arising from disability, Section 15 Equality Act 2010

3.1 The allegation of unfavourable treatment as something arising in consequence of the claimant's disability falling within section 39 EA is the claimant's dismissal. No comparator is needed. The Claimant did not pursue the respondent's failure to redeploy him in closing submissions.

3.2 Has the claimant proved that the respondent treated the claimant as set out above?

3.3 Did the respondent treat the claimant as aforesaid because of "something arising" in consequence of the disability? The fact of dismissal and of 3.2 and 3.3 were acknowledged by the respondent in closing submissions and it accepted the need to justify both the dismissal and the rejection of the appeal.

3.4 Did the respondent show that the treatment was a proportionate means of achieving a legitimate aim? This is often called the justification defence.

In particular, the claimant asserts that the decision was not proportionate in the light of

3.4.1 the prognosis on the claimant's indication that he be fit to work soon;

3.4.2 medical evidence available at the appeal confirming he was fit to work and able to return to his role;

3.4.3 the failure to redeploy the claimant to suitable alternative employment prior to his dismissal and its failure to implement any, or all, of the required reasonable adjustments (as noted below). (The failure to redeploy was not pursued by the claimant in closing submissions)

Failure to make reasonable adjustments within Sections 20, Employment Act 2010, contrary to Section 21

4.1 Did the respondent apply the following provision criteria and or practice ("the provision") generally, namely:

4.1.1 to be fit to work as a warper; and/or

4.1.2 to be fit to work in any alternative role.

4.2 Did the application of any such provision put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled in that:

4.2.1 he was not able to continue in his role as a warper; and/or

4.2.2 he was not redeployed to any alternative employment. (Not pursued by the claimant in closing submissions);

4.2.3 he was subjected to the absence management procedure and a capability hearing; and/or

4.2.4 dismissed.

4.3 Did the respondent takes such steps as to a reasonable to avoid the disadvantage? The burden of proof does not lie on the claimant, however it is helpful to know the adjustments asserted as reasonably required and they are identified as follows:

4.3.1 Modify the absence management slash capability review process;

4.3.2 Redeploy the claimant to alternative employment. (Not pursued by the claimant in closing submissions);

4.3.3 Not dismissing the claimant and/or delaying the decision to dismiss the claimant.

5. Case management at the hearing

5.1 The hearing was by CVP video hearing, connoted by "V" in the title above. On occasions internet reception was lost or an individual's screen froze and the Tribunal needed to stop and resume with all participants active, recapitulating where necessary.

5.2 It was agreed the claimant would give evidence first with the respondent afterwards. There was an agreed Bundle of documents, numbering 249 pages and the Tribunal members were helped by having paper as well as electronic copies.

5.3 Evidence and submissions were heard within two days, allowing the Tribunal to deliberate upon its reserved decision at length on the third day fixed for the hearing.

6. Oral evidence and credibility of the witnesses

6.1 The Tribunal heard oral evidence from the claimant and from 4 witnesses for the respondent: Jonathan Crabtree, Night Shift Manager; Steven Adams, Operations Manager; Nicola Winrow, Human Resources Manager and Carl Winrow (not a relation), Finance Director.

6.2 Credibility of witnesses was central to the Tribunal's ultimate determination, in particular as regards Mr Adams, Mrs Winrow and Mr Winrow. The Tribunal did not accept that Mr Adams made the decision to dismiss the claimant alone on capability grounds but concluded he did so on the strong direction of Mrs Winrow and at the instigation of Mr Winrow. The documentation in the Bundle whilst showing impressive preparation and method by Mrs Winrow also revealed on many occasions that the outcome or way forward was pre-determined, for instance in preparing a "script" for Mr Adams ahead of the capability hearing on 17 October 2019. The input of Mr Winrow was much greater than him simply being kept in the

loop by Mrs Winrow, as demonstrated by him discussing the way forward with Mr Adams ahead of the capability hearing (once the claimant had notified the need for a new amputation and it was known he would be represented by a trade union representative), directing the financial payments to be made to the claimant upon termination of his employment (ahead of the capability hearing taking place) and approving the form of the dismissal letter. Mr Winrow's explanation, in both his witness statement and oral evidence, of his interpretation of the podiatrist's final letter dated 18 December 2019 as being only conditional showed much hindsight given the lack of detailed consideration of its content evidenced in his letter when he rejected the appeal.

6.3 On the very few points of factual issue between the claimant and Mr Crabtree, the Tribunal preferred the evidence of Mr Crabtree, a very experienced manager who regarded himself as a friend of the claimant and gave his evidence entirely straightforwardly, making clear when he could not remember matters but having a very clear grasp of his workplace and responsibilities. For his part, the claimant did not always have the fullest recollection of matters and had not been present at the workplace for well over two years at the time of hearing; for instance, his witness statement at paragraph 11 mixed up events in October and July 2019.

7. The Facts

From the oral and documentary evidence, the Tribunal made the following findings of fact on the balance of probabilities, including the drawing of inferences.

7.1 The respondent is a textile manufacturing company in Huddersfield employing between 120 and 145 employees during the period from 2018 to the date of hearing.

7.2 The claimant had been employed since 18 January 2016 as a skilled warper, fulfilling an important role in the respondent's production cycle. He normally worked 12 hour shifts on the night shift on the Novamatic warper (one of three warping machines the respondent had) 4 nights each week from Monday to Thursday; the work involved being constantly on his feet and on the move, loading yarn into the machine with dexterity and understanding the yarn counts and colours. The work was somewhat repetitive involving hooking the ends of the arm beam onto the warping mill and, when the warp was finished, moving a heavy beam with the assistance of a cart, wearing steel toe cap protective shoes at this stage. His normal place of work on the Novamatic was warm since there was a boiler sited on the floor below. He reported to the night shift manager, Jonathan Crabtree, who then reported to the overall manager, Karl Staley, who set the production schedule.

7.3 The claimant had type 2 diabetes, which was a condition he had experienced for many years, particularly affecting the circulation in his feet and aggravated by standing for long periods and probably by the warm conditions.

7.4 The respondent had 3 warping machines but was rarely able to run all 3 as it would have liked when orders were high. It was always difficult to recruit warpers. There were normally 2 warpers on the night shift and the claimant would generally complete three warps on each shift. When completed warps were not available, the weavers could not move on the next stage of the production cycle causing

disruption and added cost; the role was viewed by management as a "bottleneck" role.

7.5 The respondent's Employee Handbook (44-67) contained a copy of the claimant's statement of particulars of employment, Company policies and procedures and health and safety guidelines. Amongst the policies was the Absence Policy & Procedure at 53-54. This commenced with a Policy Statement:

> "No employee has a job so unimportant that his slash her absence does not affect the production smooth or any of the establishment … Attendance is a vital factor in the effective and efficient operation of the company …"

and included a paragraph headed "Longer Absences":

> "The company will keep in touch with you throughout absences longer than two weeks and may ask your permission to contact your doctor to establish the prognosis for your condition and whether you will be able to return to original job. Regular contact would be made by telephone/visits to an employee on long term sickness absence to agree a suitable back to work programme and to ensure the health of the employee is maintained.
>
> If you are unable to return to your original job, the company will make every effort to accommodate your needs on either a temporary or permanent basis. This may be by making adjustments to equipment or machinery, altering your work methods, adjusting your working hours or a combination of these. If alternative work is available, the rate of pay for the alternative position will be payable. Whatever happens, no action will be taken without a full discussion with you and, if adjustments are not feasible, an explanation of the situation and the action the company intends to take.
>
> In the unfortunate situation that you are unable to return to work at all, we will discuss the situation with you and, subject to any representations by yourself, we will be obliged to consider dismissing you from the company on health grounds."

7.6 No specific right of appeal was set out within the Absence Policy & Procedure but elsewhere within the disciplinary and disciplinary appeals procedure it was set out that an employee had a right of appeal against disciplinary action to a senior manager, to be lodged in writing no later than 7 calendar days after the disciplinary hearing, with the appeal to be heard as soon as possible but not later than 7 calendar days following receipt except in exceptional circumstances (56-57).

7.7 There was also an Equal Opportunities Policy Statement:

> "It is the company's policy to establish and maintain a working environment, terms and conditions of service and employment practises and procedures which will ensure that no job applicant or employee receives less favourable treatment on the grounds of race, religion (or belief), colour, nationality, national or ethnic origin, sex, marital status, responsibility for dependants, disability, sexual orientation, trade union activity and age. Selection criteria and procedures will be kept under review to ensure that individuals are selected, promoted and treated on the basis of their relevant merits and abilities.

> All employees will be given equality of opportunity within the company and will be encouraged to progress within the organisation.
>
> To ensure that there is no direct or indirect discrimination, recruitment and other employment decisions will be regularly monitored. The company is committed to a programme of action to make the policy fully effective." (57)

None of the respondent's witnesses referred to or showed familiarity with its equal opportunities policy, although Nicola Winrow was plainly aware of the concept of protection for disabled persons and the absence procedure expressly included the making of adjustments. There was no evidence of them referring to the Equality Commission's Code of Practice on Employment as a source of guidance.

7.8 The respondent's sick pay policy provided for payment of statutory sick pay for the first 28 weeks of sickness absence. Accordingly for his major absence, these payments had ceased by soon after the end of February 2019.

7.9 The claimant's diabetes caused him to be absent from work for just over 3 months from late July 2017 until early Nov 2017, with the cause of absence described variously as: "Trod on rusty screw", " Diabetes/diabetic foot infection" or "Diabetic foot injury". The lack of sensation in his foot was such that he was unaware he had trodden on the screw which had infected the foot.

7.10 After his return to work in 2017 the respondent moved the respondent moved the claimant to a cooler place of work in the weaving shed to work on the Beninger machine. However, he soon moved back to the Novamatic machine at his own request, saying to Mr Crabtree that his foot was better and he was able to return to the Novamatic, although Mr Crabtree was also aware that the claimant did not like the greater noise in the weaving shed. The Novamatic remained in its original location throughout.

7.11 By mid-2018, the claimant again had serious foot problems caused by his diabetes and he was absent again from 13 Aug 2018, initially for an operation to amputate his right little toe. In the event, the claimant never returned to work for the respondent thereafter.

7.12 Nicola Winrow joined as the new HR Manager in October 2018. Originally appointed to cover her predecessor's maternity leave, this was a permanent appointment since she also had major training responsibilities. She reported to the Finance Director Mr Winrow, often keeping him appraised and seeking his approval of proposals and draft documents. She was an experienced HR professional with CIPD qualification and experience of long term sickness absence situations. She set about improving and updating the respondent's policies and she was immediately made aware of the sickness absence from work of the claimant.

7.13 The claimant's absence from the night shift was covered by the respondent in various ways: overtime by other warpers doing extra hours on the day shift (at a premium rate), hiring in agency warpers (broadly cost-neutral but with less productive output) and having warps manufactured externally by a specialist supplier. The latter was the most expensive option since replacing the 3 warps per

shift the claimant averaged could cost £1500 including transport and on costs in addition to the hidden cost of disrupted production flow.

7.14 During the claimant's absence his manager, Mr Crabtree, kept in regular contact. The Tribunal did not find that Mr Crabtree "kept telling me to finish working for the respondent and when my foot had healed I (could) reapply for my job". The claimant's assertion was not made until his witness statement and Mr Crabtree strongly refuted it.

7.15 Mrs Winrow instituted regular absence reviews from November 2018 onwards and obtained the claimant's consent for the respondent to seek medical information on his condition and prognosis.

7.16 On 27 February 2019 (98), the respondent wrote to the GP with claimant's consent and on 15 April 2019 the GP Dr N Khan wrote (102):

> "At this present time I don't think he is fit to make a return to work as he is having problems with his standing and walking but he is having ongoing treatment at Podiatry and Vascular Surgery at Dewsbury hospital …
>
> I am unable to comment any specific recommendations or restrictions when he does return to work
>
> Overall I think Mr Hayes is unable to continue the current role at the moment until wound is fully healed but I am not sure when that will be. However I would suggest you contact the specialist care for their opinion."

7.17 The respondent not had a response to its request for information from the claimant's diabetic clinic and the GP had given no indication of when he may be fit to return to work. It was therefore already in Mrs Winrow's mind that the respondent would need to meet the claimant to discuss the possibility of making the decision to terminate his employment. She emailed Mr Crabtree (103):

> "We have had a report back from his GP which doesn't give any indication that Bernard would be able to return to work in anyway in the foreseeable future . Bernard is aware of this report already as he sought before his. However, from the telephone conversation with Bernard, I don't think he is thinking the same way as us.
>
> At the meeting - we will go through the report with him and if he thinks there is any evidence he can gain to contradict the GP info - perhaps from his diabetic clinic - we can consider this and perhaps we would be willing to hold off making a decision to end his employment with Wooltex for a further month. We already wrote out to his diabetic clinic back in December but we have been unable to get any kind of report back from them. We can't keep going on as we are indefinitely and we need to start having the honest discussion about this with Bernard now face to face. I've started to do this via my most recent phone call also."

7.18 Mrs Winrow then wrote to the Diabetes Multi-disciplinary Team again on 1 May 2019 with specific questions similar to those sent later on 13 June 2019 (104).

7.19 On 7 May 2019. Mr P Rhys-Vivian, Diabetes Specialist Podiatrist, wrote explaining that the claimant had had a number of diabetic foot ulcers on both feet,

currently on his left foot, and should reduce pressure to the air as much as possible by offloading. He agreed with the GP letter dated 15 April 2019 and answered the questions as follows:

> "Once healed, the patient will require offloading footwear slash insoles to help reduce the risk of recurrence. A phased return would be advisable. Whilst the patient has active ulceration, it is not advisable for him to undertake his current role. If there are other roles, within your organisation, that require less standing than this may be more suitable." (109)

7.20 On 8 May 2019, there was a long term absence review meeting. Since Steve Adams had only just become the Operations Manager, the meeting was with Jonathan Crabtree and Nicola Winrow (110). The claimant confirmed he wished to return to work and Mr Crabtree spelt out that it did not appears the claimant would be fit to return to work anytime soon but the respondent would need a letter supporting him being fit to return to work and an indication of when. There was a discussion of alternative roles and the claimant said he would consider another role with less standing but that he didn't consider an office role would be suitable; there was some discussion of a role in inspection if it could be done while sitting. Soon after, the claimant then provided a copy of podiatrist's letter of 7 May 2019, agreeing with the GP that he was not ready to return.

7.21 The next review meeting with the claimant was held on 13 June 2019 by Mr Adams, the new Operations Manager, with Mrs Winrow (115). The claimant felt he was getting better all the time but his doctor just couldn't put a date on when he would be right to come back; he made clear he wished to return to work and said he understood the work area was not as hot and referred to using cool mats to go under feet at work. Mr Adams told him:

> "You may have to face facts that you may not be able to return. However we are happy to wait for further more positive response from your doctor more specialist in the next 6 to 7 weeks, until just before the summer Holidays"

Nicola Winrow indicated that a phased return to work plan would be necessary and it was agreed the next meeting would be held in the week commencing 22nd July 2019

7.22 Nicola Winrow then obtained the claimant's approval of the content of her draft letter to Mr Rhys-Vivian, Diabetes specialist podiatrist at Dewsbury District Hospital (123-4), dated 13 June 2019, with the claimant's job description:

> "I would therefore appreciate it if you could please provide answers to the following questions:
>
> • do you envisage that Bernard will be able to make a full return to work in the foreseeable future (ie within the next three months)? If so when do you envisage that this will be possible?
>
> • Are there any specific recommendations or restrictions which you feel we should be aware of when considering/ facilitating a return to work for Bernard? (for example this could be a restriction to his daily/weeks working hours).

- would Bernard be able to consider a phased return to work plan? If so are you able to provide guidance on this?

- should his current role be considered unsuitable for him, are there any specific recommendations/restrictions you wish to confirm which would help in finding him an alternative role with Wooltex?

- Additionally - please advise if you believe there is any further relevant information that you believe we should be aware of as his employer .

She sent the letter by email attachment on 18 June (122), making clear that she needed an update by the next meeting in mid- July. Initially she heard no more.

7.23 On 8 July 2019 (128), she emailed to Carl Winrow, copying in Steve Adams:

> "Next steps for Bernard Hayes - meeting date?
>
> I've heard nothing further from Bernard since our last meeting with him on 13 June.
>
> I also wrote out to his specialist again but have had nothing back. I gave Bernard a copy of the letter too so that he could take it with him to his specialist appointments.
>
> I think we've reached a point where we need to bring Bernard's employment to an end - in the absence of any other medical info suggesting that he may be able to return.
>
> He has been off since 13 August 2018 so almost 11 months now.
>
> Will you (or another Director) do this meeting with me or will I arrange it with Steve (with a director as a point of appeal)?
>
> I'm keen to get a date in the diary before we break for summer. I know you are on holidays soon also."

She was moving the process forward as the HR professional and with the experience of long term sickness absence, which neither Mr Adams nor Mr Winrow had dealt with before.

7.24 Whilst there is no document to evidence this, it is clear that the response from Carl Winrow approved of the suggested way forward but felt that Steve Adams should deal with it with Mrs Winrow initially, since she emailed Steve Adams on 17 July (129) about the letter she was sending to the claimant that day inviting him to a capability hearing on 23 July.

7.25 Mrs Winrow's letter to the claimant dated 17 July 2019 (131-2) explained that Steve Adams, Operations Manager, and she would be in attendance and he could be supported by a work colleague or trade union representative. The purpose of the meeting was to formally discuss the claimants employment following his current period of absence from work which began on 13 August 2018, with a reminder that at the last meeting in June "…we advised you that we would need to consider bringing your employment to an end in the near future due to your long term ill-health, unless we were able to establish in the near future, and supported by your medical specialist at the diabetic clinic , a more positive prognosis about

your fitness to resume work in some capacity in the near future and be able to remain in work on a regular basis…". She acknowledged that he remained absent from work with a fit note dated up until 22 July 2019, that the absence was now over 11 months and the medical reports did not indicate a likelihood of return to his role as a warper in the near future. She had not heard again from Mr Rhys-Vivian, despite seeking an update. Her letter concluded that the aim of the hearing was to discuss the medical information received and any further medical updates and confirm the next actions and she enclosed copies of the respondent's letters to the diabetes team of 13 June 2019, 5 December 2018 and 1st May 2019, to the GP dated 27 February 2019 and from the GP dated 15 May 2019 and Mr Rhys-Vivian's letter dated 7 May 2019 (135).

7.26 The respondent had found some difficulty getting information back from the claimant's medical professionals and therefore relied upon the claimant to prompt the professionals into providing information. On 18 July 2019, the claimant attended the diabetes clinic and prompted Mr Rhys-Vivian to respond to Mrs Winrow. This time the response was much more positive (136-7):

> "Bernard's foot ulcer has much improved since my last letter and if things to continue then it is possible he may be able to return within three months. There are a number of factors which may delay this - mainly infection, pressure relieve and his diabetes control, which have all been in his favour recently.

The reference to 3 months picked up that timing from Mrs Winrow's letter. On specific recommendations he wrote:

> "The main consideration to Bernard's returned to work is pressure relief to his feet. We can sort out pressure reducing in cells which understand would have to be worn in toe protector boots. It is also worth noting that Bernard may need time out of work to attend appointments for his foot care in the future, although in the past we have worked around his work pattern to minimise work disruption."

He recommended that a phased return would be worth considering in terms of gradually increasing the time Bernard stands so as to reduce the pressures to his feet and asked if it would it be suitable for him to have a chair near his machinery. He wrote that Bernard's role at this stage was still suitable for him as long as his foot health continues to improve and the adjustments are made in terms of footwear and allowing him to have a phased return to his standing, pointing out that the claimant was keen to return to work as soon as possible.

7.27 This caused the respondent to change the capability hearing to a review/planning meeting. Accordingly on 19 July 2019, Mrs Winrow emailed the claimant notifying him that in the light of the more positive feedback received from his specialist it would be more of a planning meeting to discuss next steps ie his return to work hopefully within the next three months ie. by mid-October 2019. She understood he would need a phased return to work plan (141).

7.28 On 23 July 2019, the claimant attended the meeting with Mr Adams and Mrs Winrow (142-3). There was discussion of possible adjustments in relation to possible return to work. He said that he was being provided with pressure reducing

insoles and also had a new pair of safety shoes on order which were more breathable and that he would use a cool mat for his breaks. Mr Adams said:

> "Your specialist has advised that your role as a warper is still suitable for you, so long as you have a phased return to work plan. Your specialist is aware of the fact that your role is 12- hour shifts, so during your phased return to work and your ongoing discussions with your specialist, you need to know if the 12 hour shifts may be achievable in the longer term or not".

Nicola Winrow told him the respondent could come up with a return to work plan, but it would be best coming from his specialist or his doctor.

Mr Adams said:

> "So, three months from when your specialist wrote to us is 18th October, so we need to have you back at work by the following Monday at the latest, 21st October. If you can come back to work sooner than that then great. If however, after these three months, for whatever reason, you are not in a position to return, then we won't be able to consider any further extension to the time frame. I hope you think we've been fair. Perhaps more importantly, when you are back, we want you to be fit and well so that you can remain in work … So to be clear, if by early October, we've not heard anything further from you, we will be back in touch to arrange a meeting as we need you to be able to return at the latest by 21st October". Mr Adams was very firm that the claimant needed to achieve his return to work within 3 months, by 21 October 2019. Although Mrs Winrow was guiding him through the process, this specific deadline was presented by Mr Adams at the meeting without having discussed it with her.

The claimant explained that he was seeing his specialist that week and would speak with him about a phased return.

7.29 Nicola Winrow sent the claimant the notes of 23 July 2019 meeting on 24 July (144). The Tribunal found that the respondent was genuinely working towards him returning to work, but with a fixed time limit of 21 October 2019.

7.30 On 18 September 2019, the claimant texted Mr Adams to say he was providing another sick note and hoped to return on 21 October (187-8). He had a medical recommendation for phased return 4 hours per night to start 6:00 to 10:00 o'clock. Mr Adams noted to Mrs Winrow that he had not seen any evidence supporting this phased return (147).

7.31 However, when Mrs Winrow contacted the claimant in early October since she had not heard from him, he told her he needed a further toe amputation of his left little toe, as the offloading shoe he has worn since his first operation to protect the right foot had put pressure on the left.

7.32 On 3 October 2019, Mrs Winrow emailed Mr Adams, copying in Mr Winrow (150). The claimant had told her the the operation was to be on 16 October:

> "I've advised him that we will need to have our meeting with him prior to this …I think he perhaps realises that we are not going to extend his return any further - I did say it would be a formal meeting and that he would be able to

> bring someone with him. I am a bit disappointed that he hasn't contacted us to update us on his situation."

7.33 On 4 October 2019, Mrs Winrow sent the claimant a formal invitation to a capability hearing on 11 October 2019, enclosing minutes from the meeting on 23 July and copy correspondence to and from the GP and podiatrist (155). The final version of her letter set out:

> "…We discussed at our last meeting on 23 July 2019, that should you be unable to return to work by mid-October 2019, supported by the guidance from your GP or specialist, then we would need to review the situation further.
>
> At this current time, you still remain absent from work with a fit note dated up until 20 October 2019. As you have recently advised me that you now need to undertake a further operation to your foot on 16 October 2019 com it is unlikely that you will be able to return to work in the near future . It is therefore now necessary for us to consider whether it is appropriate to bring your employment to an end due to your long-term ill-health …"

7.34 On 7 October 2019, Mrs Winrow wrote to Mr Winrow enclosing a copy of her letter of 4 October (154). She explained the claimant would have three years' service should his employment end that week and they would need to give him three weeks' notice pay and three days' accrued holiday pay:

> "Are you happy that this is all the payments we wish to make? Some companies do pay additional monies- as an ill health dismissal compensation often equivalent to a redundancy payment…"

Mr Winrow replied that he didn't have any intention of a further payment, but that this was not something which had cropped up before and he asked some others for further thoughts (154). On 8 October he replied that having thought it over, notice and accrued holiday pay was appropriate in this situation (157).

7.35 On 9 October 2019, Mrs Winrow told Mr Adams that, having spoken to Karl Staley, Karl (Staley) had a warper in mind to recruit at that time. (159)

7.36 On 10 October 2019, Mr Adams wrote to Mr Winrow about the claimant:

> "I spoke with Nicola about him, I was wondering if the fact that he was going in for another operation, and that he is bringing a Union rep to the next meeting altered our position at all, she said not. The meeting isn't until next Thursday now, if you have any advice I'd be glad to hear it next week when you're back in." (160)

The respondent was not unionised such that trade union representation of employees was not common and Mr Adams was wary of this involvement and wanted to seek advice about it. Although not documented, there was a discussion between Mr Winrow and Mr Adams before the capability hearing, which was rearranged for 17 October 2019 to enable the claimant's trade union representative to attend and the Tribunal inferred that Mr Winrow advised that the capability hearing should proceed as planned with dismissal the likely outcome notwithstanding the claimant's further operation and trade union representation.

7.37 Mrs Winrow prepared a briefing paper or "script" for Mr Adams to use at the capability hearing (169-173). The paper carefully set out the history of the matter including correspondence seeking and obtaining medical information and the course of the meetings, including Mr Adams' comment on 23 July 2019 that should Bernard not be in a position to return by 21st October 2019, then no further extension to this time frame would be possible. Whilst the script expressly set out that Mr Adams was to say he wouldn't be making a decision that day but after the meeting, and built in space for the claimant asking any questions and providing any further information for consideration, it set out:

> "One outcome is that the decision may be made to dismiss you from your position at will text you to your continuing long-term ill-health and the longevity of your absence from work,"

and, under the heading "Additional Information":

> "We are now in a position where we really need to fill Bernard's role as a Warper - it is costing us a lot. Expand financial implications of not having fill this role on the hope that Bernard would be in a position to return to work soon
>
> We feel that Bernard has always been keen to return but that this keenness hasn't really been matched with the reality of his health improving sufficiently to a point where a return is possible. There is also the concern, that even should Bernard have been able to get to a point of return to work, based on the things that have happened in the past, things could easily then deteriorate again which would then mean further long periods of absence from the role leading to further problems.
>
> We feel we have been very reasonable in supporting Bernard's absence from work for this extended period since August 2018."

7.38 The claimant had his right little toe amputated on 16 October 2019. He had hoped that the surgeon would be able to close the wound with stitches to assist him to return to work more quickly on a phased basis starting with four hours a night. However, the extent of the heavy bleeding of the wound meant the surgeon was unable to stitch it.

7.39 On 17 October 2019, the day after the amputation, the rescheduled capability hearing went ahead before Mr Adams, Operations Manager, with Mrs Winrow HR (176-181). Mr Adams had experience of disciplinary hearings but not of long term absence capability hearings. The claimant was accompanied by Kevin Mawer, a full-time trade union officer. Although the claimant had a sick note then until 20 October, he was clearly not going to be able to return to work on 21 October 2019 and would be getting another sick note. Indeed, he explained that because of the heavy bleeding he might not have been able to come to the meeting and that he had been back to Podiatry that morning to have the wound checked; he would see his surgeon the following week.

7.40 Mr Adams went through the medical history with the claimant, especially the content of Mr Rhys-Vivian's letter of 18 July 2019 and the way the meeting on 23 July had proceeded. That was discussion of possible alternative employment such

as office work, which the claimant firmly rejected and mending which did not involve standing but which the claimant regarded as mainly a role for females which he couldn't do because of his big fingers. Mr Adams made clear he could not approve a return to worker as a warper with a chair alongside the claimant.

7.41 Mr Mawer acknowledged that there had been plenty of meetings held and discussions about reasonable adjustments. He asked the claimant about recovery time and whether the surgeon could set this out. The claimant explained he was was driving his automatic car but not very far having only had a local anaesthetic and he would have to get another fit note from the doctor and could ask the question about a return "but it's all down to me really" and he was keeping control of his blood sugars.

7.42 Towards the end of the meeting Mr Adams said:

> "What if any good news can you give? We did set a latest return date of 21 October. We have been incurring lots of costs - agency staffing, costs of commission warping, thousands of pounds for that. I know you've done everything you can to help yourself. With this later surgery taking place only yesterday, we do now need to consider for further extension is advisable now. You have now been absent 14 months."

7.43 Mr Mawer felt the only bright light was what the doctor might say in the next week or so but Mrs Winrow questioned whether the doctor was realistically going to say that the claimant would be fit to return in the next couple of weeks. In a comment the respondent placed much reliance upon, Mr Mawer said:

> "I think you've dealt with this really fairly. You've had lots of meetings with Bernard, and you've already extended the return., and considered lots of adjustments and phased returns, even move the machine. It has been 14 months. Often companies don't let it go to 12 months... If you do decide to terminate, should his health improved to a good point again, would you then consider him again?"

Mr Adams replied that the respondent would certainly consider him but would not be able to create a role for him. Mrs Winrow stressed that warpers were very hard to recruit and were in very short supply. The meeting concluded with the claimant saying that he was seeing his surgeon the following Wednesday and would speak with the respondent after that appointment and let them know about his fit note.

7.44 Mrs Winrow did not wait for that further notification from the claimant but prepared her minutes of the meeting together with a draft letter of dismissal for Mr Adams to review on 21 October 2019, proposing that the leaving date would be for the coming Friday (25 October 2019). (182-4) Mr Adams replied on 21 October 2019 that he was happy for the draft letter to be sent as it was, before he had heard any more from the claimant (185).

7.45 On 23 October 2019, the claimant texted Mr Adams (189):

> "Hi Steve just been to see my surgeon today he said 6 to 8 weeks looking at the way it's looking at the moment Bernard".

7.46 During the claimant's absence R had employed another warper for 6-7 months, but had covered his absence by overtime by other warpers, agency staffing and outsourcing warping work to specialist external providers at considerable cost.

7.47 The draft dismissal letter was reviewed by Carl Winrow, who approved it on 23 Oct 2019: "Hi Nicola. These are both fine to go. Good job with the drafting (190)".

7.48 On 24 October 2019, (191) Mrs Winrow, having read the text message from the claimant emailed Mr Adams proposing that they went ahead and issued the letter with some indication of having received the text; she confirmed Mr Winrow had approved the letter. Mr Adams clearly agreed since the final letter of dismissal dated 24 October 2019 was emailed to the claimant with a copy of the hearing notes that day. The dismissal letter (195-6) was in very similar terms to the earlier draft and included:

> "Unfortunately, this anticipated and much hope for return has not happened. You have since had further health problems which have led you to needing to undertake a further foot operation on 16th October 2019, from which you are now in recovery from …following the adjournment of the hearing on Thursday, I have taken time to consider everything that was discussed. I note also the text message you have sent me on 23rd October 2019, advising that your surgeon as suggested the six to eight week recovery time. Unfortunately, with so much time having already elapsed, I am not able to consider a further extension to accommodate this. It has been a very difficult decision to make but having now taken everything into account, unfortunately, my decision Is to dismiss you from your position at will text. This is due to your continuing long- term Hill- health which has prevented you from returning to work within an expected and reasonable time- frame. You have now been absent from work for over 14 months, and at this point in time, and expected return date cannot be confirmed.
>
> As a company, we now need to move forward and look to fill your role on a permanent basis. Significant costs have been incurred during your absence in order to complete our warping requirements and we cannot continue supporting these additional costs…
>
> In line with company procedures, you have the right to appeal against this decision. If you wish to do so, please submit your appeal in writing to Carl Winrow, Finance Director at Wooltex, within 7 calendar days of receiving this letter, stating the grounds for your appeal.

7.49 On 30 October 2019, the claimant appealed with a very brief letter of appeal (187):

> "I wish to raise an appeal regarding my dismissal the reasons for my appeal are as follows: I believe my medical condition with my legs and right feet was due to my employment".

7.50 Soon afterwards, the claimant was provided with a copy of a further letter from Mr Rhys-Vivian, the podiatrist dated 31 October 2019 (198), which he brought to the appeal hearing:

> "The patient has had longstanding problems with his feet and the Podiatry wound care department has been seeing him regularly over that time. A number of factors can influence the healing time/cause of these problems. One of these factors may have been heat the patient has been experiencing with his feet at work, this has the potential to reduce the integrity of his skin and may increase the likelihood of infections. If you require any more information please contact me (giving his telephone number)."

7.51 The decision was made that Mr Winrow would take the appeal despite his prior involvement. He had never dealt with a capability appeal before, although he was the named point of contact to send the notice of appeal and, as he described himself "the go to man" to hear an appeal. The respondent experienced few appeals to director level, but there were other directors who could have heard the appeal.

7.52 After the claimant's dismissal the respondent started to train a female operator who was employed in another area to run a warping machine on the night shift (not the Novamatic). Partly because of her time on furlough, she was still not fully trained and effective by the date of the hearing.

7.53 The original date set for the appeal hearing was postponed from 12 November 2019 for the claimant and his trade union representative's availability but went ahead on 13 December 2019 before Carl Winrow, with Mrs Winrow in attendance (208-210). The claimant was represented by Mr Mawer, as before. Mr Winrow was somewhat taken aback by the course of the appeal which did not follow the grounds put forward by the claimant. Mr Mawer took a very different stance contending that the decision to dismiss seemed to have been made too early following the capability meeting since in January the claimant would be fit to return to work. It was stressed that he had not been receiving company sick pay for some time, so there would be no additional cost to the company to reinstate him. Mr Mawer stated that a request was made at the meeting just to wait a bit longer and that the claimant "had skipped up the stairs today" unlike the last meeting and that the area where his machine had been moved to was in a cooler part of the mill. Therefore they were hoping the decision could be overturned. He acknowledged that the respondent had done a lot and it did seem that things were just going on and on and it had seemed likely at the last meeting that it would take several further months until the claimant would be fit again but he had recovered remarkably. They had hoped that the decision would be that the respondent would wait but they were then further delays until the medical appointment actually took place and Mr Adams had to make his decision. Mr Mawer felt that if the responded to being able to wait until the New Year then the claimant would still have been working there. He had advised the appeal and through October and November the claimant's health had improved and his doctor had advised that he would be okay to return to work in the New Year. The claimant confirmed he had the two pairs of work shoes he had ordered specially.

7.54 Mr Winrow made clear that medical documents of fitness to return to work would be essential to support the appeal and would need to be reviewed before making any decision. He thought that the Benninger warping machine was only a little bit further from where it had been and no assumptions should be made about the ambient temperature; he did not refer to the Novamatic machine which the claimant had mainly worked on and which had not moved. The appeal hearing ended with Mr Winrow saying:

> "So, to clarify, the basis of your appeal now is that there has been a vast improvement in Bernard's medical situation, and if we had waited a bit longer, we would have had information to support him being able to return to work. I would say that the paperwork from the hospital and the doctor are key here. It is however, fundamentally a different reason for appeal than the one on his appeal letter (appeal letter shown)… I now really have to wait for the information which supports the basis of your appeal today . If you are saying we should have waited just a bit longer and now you are fit to return to work, then we need to see the medical evidence to support this. I think that this is all we can really do today. Once we have this information, we will need to review it and then go from there. This will likely delay things in making a decision, particularly this close to Christmas."

The only new medical evidence handed in at the appeal was the podiatrist's letter of 31 October 2019, which was not helpful to the claimant.

7.55 Before Christmas, the claimant received a more positive report from Mr Rhys-Vivian, dated 18 December 2019 (213):

> "The patient's foot ulcer has much improved and barring any changes, which may slow down or interfere with the current healing rate, then there would be no reason why he cannot return to work. Ideally on a phased return, to reduce the risk of re occurrence."

7.56 From Friday 20 December 2019, the respondent was on annual works shutdown for Christmas and New Year until Friday 3 Jan. During that period the podiatrist's letter of 18 December 2019 came in and was considered by Mr Winrow in early January 2020.

7.57 On 9 January 2020, almost 4 weeks after the appeal hearing on 13 December 2019, Mr Winrow's appeal decision was sent to the claimant, upholding the dismissal (215):

> "During the meeting we discussed your appeal request. Please find enclosed a copy of the notes from the meeting. Following the meeting, I received a copy of the hospital discharge summary. I then received the medical note from doctor Reese Vivian on 18th December 2019 which you kindly supplied as requested at the meeting. Having reviewed these in addition to the number materials in your case file, and having considered the arguments put forth by yourself at the hearing, I have decided not to overturn the decision to dismiss you on medical grounds.
>
> The decision taken by Steve Adams, Operations Manager, was appropriate given the length of time you had been absent under your presentation at

> your final capability hearing. I appreciate that you have argued that had we waited longer before making the decision to dismiss you, this may have led to a different outcome. however, the company had engaged constructively with you join the 14 months of your absence, with the aim of reaching a position where you'd be well enough to return to your role as a warper. I understand that there had been previous discussions about alternative job roles which may have been more suitable for you, but that you had not wanted to consider alternative roles.
>
> At the capability hearing held on 17 October 2019, you were unfortunately not in a position to return to work as you had had two undertaker further foot operation on 16 October 2019 from which you were then recovering.
>
> Whilst the news of improvement in your health is welcome, I do not believe it to be sufficient grounds to overturn the dismissal decision.

7.58 The crux of Mr Winrow's written decision was therefore considering Mr Adams' decision to dismiss the claimant in October 2019, with a brief two lines at the end about the improvement in his health. It was not clear that Mr Winrow had given any real consideration to the content of Mr Rhys-Vivian's letter of 18 December 2019.

7.59 The claimant would have been fit to return to work as a warper after the works shutdown on 6 January 2020. He was thereafter signed fit for work and started looking for alternative work.

7.60 During the period August 2018 to January 2020, there was never a permanent replacement for the claimant on the Novamatic machine in place and there was generally only one warper on the night shift. An agency worker, Jaheed, covered the claimant's role on the Novamatic for some months and and may have been taken on as an employee but did not stay long. The respondent did wish to recruit another warper in particular for the night shift almost constantly during the claimant's absence but was generally unsuccessful in doing so since warping was specialist position that was always difficult to recruit to.

8. The parties' submissions

8.1 Counsel agreed that the Tribunal's determination of reasonableness was at the heart of all three types of claims, with the claimant highlighting the question of proportionality for the decision on objective justification in the Section 15 claim.

8.2 The claimant relied upon two EAT authorities in respect of the unfair dismissal claim namely First Hampshire & Dorset Limited v Parhar UKEAT/0643/11/LA for the principle that the tribunal must look at matters up to and including the point of appeal in order to determine whether they respondent acted within the range of reasonable responses open to a reasonable employer and Ramphal v Dept of Transport [2015] IRLR 985 in respect of the involvement of an HR practitioner which should not go beyond giving advice.

9.1 The respondent submitted that it was likely that a finding that the dismissal was disproportionate under the Equality Act would also mean it was unfair. For section 15 the dismissal arose in consequence of the disability but the question was

whether it was justified; in its grounds of resistance, the respondent's justification was firstly the maintaining of efficiency and secondly the financial burden/saving of costs. The Tribunal must carry out the objective balancing exercise between the discriminatory effects and the respondent's needs; the dismissal was a combination of Mr Adams' decision and the rejection of the appeal by Mr Winrow so both needed to be justified which was in effect the same as the range of reasonable responses.

9.2 The respondent made 7 points about the decision to dismiss: the claimant had been off sick for 14 months since August 2018 with no credible evidence of a likely return to work date in the foreseeable future; the trade union representative conceded the respondent had dealt fairly with the claimant holding lots of meetings over an extended time period and considering adjustments; the respondent had already extended the period from July 2019 with previous long term absence review meetings on 8 May, 13 June and 23 July 2019 and had made it clear it could not support a further extension if the claimant did not return on 21 October; alternative employment had already been explored: the claimant declined an office role, had said mending was mainly a role for females and he was not interested in inspection; it was not challenged that the respondent had already incurred substantial costs which Mr Adams put at thousands of pounds; at the hearing there was more evidence from Mr Winrow that as well as calculable costs of agency wages, extension of overtime and outsourcing of warping, the disruption was impossible to cost; the claimant's text of 23 October 2019 that his surgeon said 6 to 8 weeks was recovery time, not return to work. The text was considered by Mr Adams in his dismissal decision with no further update from the claimant and nowhere did his representative request further time; indeed he conceded it was likely to take several months until the claimant was fit again at the dismissal stage. The dismissal decision was well within the range of reasonable responses dnd fully justified.

9.3 The respondent made 5 points about the appeal outcome on 9 January 2020: the written appeal was limited to medical conditions due to the employer not about failure to delay; this changed at the appeal hearing to asking the respondent to wait longer but there was nothing from the GP at appeal or thereafter to say the claimant was fit to work; on 13 December 2019, the respondent agreed to wait for medical evidence which was fair and inconsistent with the appeal being premeditated; the podiatrist's letter of 18 December was unsatisfactory setting no return to work date and being conditional; by 9 January 2020, the claimant had been absent for over 17 months but there was no GP note or letter of fitness to return to work and no further update from the claimant.

9.4 It was not a question of whether the respondent could wait a little longer but whether it should have done so; at 17 months it was entitled to say enough is enough. The Tribunal should consider the whole period and not just the last few weeks especially when the respondent had already waited longer for 3 months from July to October. There was no corroborated evidence of the claimant being fit for work rather than just an assertion even at the date of hearing. In all the circumstances it was not disproportionate or unreasonable to dismiss.

9.5 On other matters which arose in the course of the hearing: it was completely unproven, unsupported and not part of the claimant's pleaded case nor his witness statement that the dismissal was at the behest of Nicola Winrow or ordered by Carl Winrow. Mrs Winrow reported to Mr Winrow and he was kept in the loop as Finance Director rather than involved in significant decisions before the appeal; the

claimant had been aware of this since disclosure of documents. The decision was not premeditated: the respondent gave the claimant 3 more months in July and at the meeting on 23 October 2019, Mr Adams clearly indicated: "We need to consider if a further extension is advisable now". No evidence of likely return to work date in the foreseeable future was available and the trade union representative conceded the respondent was dealing with the claimant fairly. It was justified in not delaying "a little longer", especially with the lack of corroborative evidence of fitness for work. It was never the claimant's pleaded case that the respondent should have made further inquiries of the medical experts.

9.6 As to reasonable adjustments, there was no obligation on the respondent to make reasonable adjustments at the time of dismissal or appeal because there was no suggestion of any reasonable adjustment which would have got the claimant back to work. As before, the only live adjustment asserted is waiting a little longer and modifying the capability absence process or delaying the decision to dismiss; for the same reasons as with the section 15 and unfair dismissal claims, that would not have been a reasonable adjustment. The respondent had acted reasonably here.

10.1 The claimant acknowledged that his three claims overlapped significantly; the respondent's reason for dismissal was accepted so the question was did the respondent act reasonably in all the circumstances in dismissing; for the section 15 claim, was the dismissal proportionate – it arose from the claimant's disability and, whilst the respondent had potential legitimate aim justification arguments, it was a question of proportionality; for the section 21 claim, the remaining issues were also a question of reasonableness.

10.2 For unfair dismissal, would a reasonable employee have waited longer before making the decision to dismiss taking into account the decision on appeal, in accordance with the First Hampshire authority? At the original hearing the respondent should have extended time and obtained evidence; on appeal, no further extension of time was needed as the claimant should simply have been allowed to return to work. The respondent's process was unfair in a number of ways: first, it was apparent from the documents at pages 128, 150, 160 and 191 that Nicola Winrow took the lead role in the process and the dismissal was not a decision made by Steve Adams; she told Mr Adams what to do, not just what process to follow, contrary to the principle in the Ramphal authority. Next**,** the procedure itself showed a great lack of guidance for ostensible decision makers since the Employee Handbook was deficient in detail about process and how to assess; Steve Adams and Carl Winrow had never dealt with a capability procedure before and say they took guidance from HR. However, Mrs Winrow was not even aware that Mr Adams had not done a capability procedure before and she said she just left it to Mr Winrow at the appeal. The lack of guidance in the written procedure is consistent with it being driven by Mrs Winrow. There was repeated insistence on a return to work within 3 months from the letter to the podiatrist, although his July letter said only: "…it is possible he may be able to return within three months". The capability hearing became more of a review meeting but from then on in comments at that review meeting, internal emails and what is said to the claimant, the constant refrain is that the claimant needed to be back by the end of October. This took away from a decision-maker the chance to take account of the evidence at that time, as is reflected by Steve Adams and Nicola Winrow's lack of inquiry what the position is on 23 October; it was up to the claimant's trade union representative to ask about recovery time. The script prepared for 23 October hearing did not

ask: “What is the current situation? What does your expert say in respect of return to work?”. Although Mrs Winrow said this was only a script for the historical part, this was not the case since it included: “Do you have any questions?”. The content of the script prepared ahead is consistent with the lack of inquiry about timing after the claimant’s text on 23 October 2019, such as asking if the 6-8 weeks was recovery time or return to work date or if the claimant could get medical evidence to support the date of return to work.

10.3 As to the question of Carl Winrow’s role in appeal, there was contradiction: Mrs Winrow said it would not necessarily go to him but Mr Winrow said he was the “go to” man for appeals. If he was the appropriate person, it is surprising he was copied in at page 150 and even more inappropriate that he had conversations with Mr Adams about the fact the claimant was having another operation and bringing a trade union representative. It should have been obvious to him and Mrs Winrow that it was inappropriate for him to take the appeal; that he did so is clear evidence of prejudgment. The claimant gave a witness statement in relation to matters he knew about but his counsel put all these matters to all the respondent’s witnesses in cross-examination, since it did not need to be in the statement in order to help the tribunal determine fairness. The evidence showed the claimant was fit to return to work at the date of the appeal hearing or at least by early January 2020. This was understood by Mr Winrow at the end of the appeal (foot of page 209) who said he needed to see the medical evidence to support it. Whilst the podiatrist’s letter at page 213 is open to more than one interpretation, that the claimant was fit to return to work immediately or in the future, the claimant’s understanding was that it concurred with his view he was fit to return to work which is plausible. The claimant thought he had provided a document giving a date; his doctor had told him he was fit to return to work after the Christmas holiday. If there was any ambiguity, the podiatrist had included his telephone number and it was unreasonable not to have made the call.

10.4 In October 2019, the respondent should not have been bound by a rigid deadline set in July since it should have extended the time for the expected return to work date or sought to obtain that information. At the time of the appeal, it should have obtained that information or allowed for the claimant to return to work in January. This claimant was not being paid sick pay from early 2019 and was in a very skilled job which was difficult to replace and the respondent had throughout wanted to recruit for the night shift; the evidence is that on coming back to work his situation would have been in a cooler location, having had his operations and his ulcers having reduced greatly, the likely recurrence of his condition was reduced. The dismissal was unfair and disproportionate whereas doing those things would have been a reasonable adjustment.

10.5 The claimant started looking for new employment in January 2020 and had no further problems with his foot or diabetes; he was not cross-examined on this. Having spoken to the podiatrist his evidence was that, in the 18th December 2019 letter, the podiatrist saying he was fit to return to work. Finally, he submitted that there should be no Polkey reduction; had he not been dismissed, he would still have been employed by the respondent at the date of the hearing.

11 The Law: Statutory provisions and the Tribunal’s approach

11.1 The protection against unfair dismissal is set out at Part X of the Employment Rights Act 1996, in particular at Section 98:-

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

> (a) the reason (or, if more than one, the principal reason) for the dismissal, and
>
> (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

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

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

(3) In subsection (2)(a)—

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

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

> (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
>
> (b) shall be determined in accordance with equity and the substantial merits of the case.

11.2 The statutory provisions relating to unlawful disability discrimination are in the Employment Act, 2010, particularly at Sections 6, 15, 20-21 and 39.

On discrimination arising from disability, Section 15 sets out:-

"(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…"

11.3 The duty to make adjustments is at Section 20 of the 2010 Act:-

"(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…

11.4 Section 21 provides for failure to comply with the duty, as follows:-

"(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…

11.5 Section 39 protects against acts of discrimination within the employment field, as follows:-

"…(2) An employer (A) must not discriminate against an employee of A's (B) -

… (c) by dismissing B;

(d) by subjecting B to any other detriment…".

11.6 In respect of the unfair dismissal claim, there was no issue that the respondent proved it dismissed the claimant for a reason relating to his capability. The starting point for the Tribunal in deciding whether or not an ill health capability dismissal is fair is the long-established EAT decision in Spencer v Paragon Wallpapers Ltd [1977] ICR 301. In that case Phillips J. emphasised the importance of scrutinising all the relevant factors;

> "Every case depends on its own circumstances. The basic question which has to be determined in every case is whether, in all the circumstances, the employer can be expected to wait any longer and, if so, how much longer?".

The relevant circumstances to be considered up in deciding whether the decision to dismiss was reasonable under Section 98(4 can include the following, with weight attached as appropriate in the particular case: the nature of the illness and how it was caused, the likely length of the continuing absence and the sufficiency of the employer's information about it, the job the claimant was employed to do and the need of the employer to have the employee's work done and their resources to cover the absence, the application of and clarity of an employer ill health policy; the effect of sick-pay, availability of alternative employment and length of service. The needs of the business and those of the employee are often in conflict, and the Tribunal must be satisfied that the employer has sought to resolve that conflict in a manner which a reasonable employer might have adopted since dismissal should be a last resort. However, the Tribunal reminded itself in respect of the unfair dismissal claim that it should not substitute its own view of what should have been done in respect of the claimant's incapability or ill health for that of the employer but should decide whether the decision to dismiss fell outside the range of reasonable responses open to a reasonable employer.

11.7 Insofar as Ramphal appears to lay down a fixed rule that the input of the HR practitioner should only be procedural, based upon the Supreme Court decision in Chhabra v West London Mental Health Trust 2014 ICR 194, the Tribunal considered that the role must be viewed in the context of the particular factual background especially the size and administrative resources of the respondent. In the Tribunal's experience, it is not uncommon for an HR practitioner to have an

influential role with the disciplinary manager or appeal manager, sometimes even as joint decision maker, going beyond mere guidance on procedure. The Tribunal was loth to conclude that influence or involvement by the HR practitioner in this way would in itself always make a dismissal unfair, without something more. As to First Hampshire & Dorset Limited v Parhar, the Tribunal was clear that it should look at the whole procedure adopted by the respondent including the internal appeal after dismissal and not only at matters up to and including the decision to dismiss in this ill health unfair dismissal claim when considering Section 98(4) reasonableness.

11.8 Discrimination arising from disability: In determining upon the defence of justification, the Tribunal must carry out an objective balancing exercise to decide whether the respondent acted proportionately in pursuit of a legitimate aim, for instance to see whether other lesser measures could have been adopted by the employer. Where the outcome is dismissal, it will generally but not necessarily be the case that the decision on the Section 15 justification defence and the unfair dismissal range of reasonable responses approach will be the same.

11.9 Failure to make reasonable adjustments: The adjustment desired must be capable of alleviating the effects of the provision, criterion or practice in question, the work arrangement which puts the employee at a substantial disadvantage in comparison with a non-disabled employee. The possible adjustment must be established as having a 'reasonable prospect' of preventing the disadvantage in question (not just providing an opportunity of avoiding it) and if so, the Tribunal should to move to decide to decide if it was reasonable to expect the employer to have implemented the adjustment. Generalisations will not be sufficient to provide proportionate justification.

11.10 The Tribunal had regard to the Equality & Human Rights Commission Statutory Code of Practice: Employment, 2015 at Chapter 5 on Discrimination Arising from Disability, Chapter 4 on objective justification and Chapter 6 on the Duty to Make Reasonable Adjustments

12. Conclusion

12.1 Unfair dismissal: Since there was no dispute that the respondent dismissed the claimant for the potentially fair reason related to his capability, the Tribunal only had to determine upon reasonableness within section 98 (4). Standing back to consider the whole picture and reminding itself that it must not substitute its own decision for that of the employer, the Tribunal found the dismissal unfair in that the respondent acted outside the range of reasonable responses open to a reasonable employer in dismissing as and when it did and in rejecting the claimant's appeal. Whilst the respondent's submission that the claimant's challenge to Mr Adams, Mrs Winrow and Mr Winrow's roles was not set out in his claim form or witness statement was correct, this did not mean the Tribunal could not determine upon their credibility. In conduct and capability unfair dismissal claims, it is often the case that much more turns upon the credibility of the respondent's key witnesses than upon that of the claimant as was the case here.

12.2 The Tribunal concluded that there were a number of strands to the respondent

dismissing unfairly notwithstanding that it had stood by the claimant for a considerable period and had, in the summer of 2019, showed commitment trying to get him back to work and had discussed alternative jobs with him which he did not consider suitable. The dismissal was ultimately unfair because of Carl Winrow's involvement throughout which was much more extensive than him simply being kept in the loop by his line report Mrs Winrow and because Mr Adams was driven by Carl Winrow and Nicola Winrow rather than reaching his own fully independent decision to dismiss. It was however Mr Adams who put the fixed time limitation on the claimant's return to work of 21 October 2019; this was unrealistic and unreasonable in view of the 18 July 2019 medical evidence which suggested the respondent should review the position at the end of three months, rather than that the claimant would definitely return to work within that period. The clear and strong inference from the emails between Mrs Winrow and Mr Winrow and from Mr Adams to Mr Winrow is that Mr Winrow was closely involved with the decision that the respondent was to terminate the employment following the capability hearing and with the amount of the final payment. Accordingly, the Tribunal found that the outcome of the capability hearing on 17 October 2019 was pre-judged as demonstrated by Mrs Winrow and Mr Winrow's input, such as his determination upon the financial terms, the content of the "script" for the hearing and the speed with which the draft dismissal letter was prepared which all suggested no genuine consideration of a further deferment was made.

12.3 The final important factor making the dismissal unfair was the rejection of the appeal at a time when the medical evidence was very different from that in October 2019. Having been so involved previously, it would have been very difficult for Mr Winrow to be impartial in any event in dealing with the appeal but the Tribunal concluded on the balance of probabilities that the podiatrist's letter of 18 December 2019 did support the claimant's contention that he was fit to return to work, certainly by the resumption after the work shutdown in January 2020. Rather than as conditional as Mr Winrow claimed to have construed it, the Tribunal considered Mr Rhys-Vivian's letter to be cautiously supportive of a return to work. Having said clearly to the claimant on 13 December 2019 that he needed more medical information, which was then provided in the letter dated 18 December 2019, if Mr Winrow found the information inadequate or unclear, it was unreasonable not to go back to the claimant to say so or to pursue with the podiatrist what it meant. If he had genuine doubts what the letter was saying or felt it was still unsatisfactory or conditional, it was open to the respondent to follow up the letter with the podiatrist and with the GP (since it would have needed a fit note or letter confirming the claimant was ready to return to work to work on a phased basis). The Tribunal inferred that the respondent by this appeal stage had lost patience with the claimant, not least when his trade union representative had changed tack significantly since the capability hearing and notice of appeal, notwithstanding that the letter rejecting the appeal was sent almost four weeks after the capability hearing had been held. In all these circumstances, the claimant was unfairly dismissed.

12.4 Discrimination relating to disability: Whereas the respondent was fully entitled to implement and to put into effect a long term absence procedure within a capability policy, and such an application could indeed amount to achieving a legitimate aim in certain circumstances, the Tribunal concluded that the respondent did not proportionately justify its action in dismissing the claimant when viewed objectively especially in fixing the return to work date at 21 October 2019

and then in confirming the dismissal after the appeal in December 2019, when the appeal decision was only taken in early January 2020. When set within the context of all that had gone before and the exceptional difficulty in recruiting warpers, it was not justified in failing to wait to see if the claimant did indeed return to work with the support of medical evidence on 6 January 2020 or itself taking steps to get the medical information to provide a firm return to work date. Plainly the claimant's absence was causing disruption and extra cost to the respondent, but there was no documentary evidence about the extent of that disruption to the business and not satisfying customer requirements nor as to the detail of the added costs (as distinct from general costs such as the cost of outsourcing 3 warps) or evidencing how often this was needed, notwithstanding the respondent's description of warping as a "bottleneck position" within its production operation. Although by January 2020 another 3 months had passed, the claimant's medical position appeared very different from that in October. The Tribunal found the decision to dismiss notified on 24 October 2019 disproportionate and unreasonable and still more so the rejection of the appeal on 9 January 2020, paying little regard to the claimant's changed health situation. The Tribunal concluded that the respondent had unlawfully discriminated against the claimant arising from his disability in dismissing him and confirming that dismissal on appeal since it did not prove its aim to be a proportionate response.

12.5 Failure to make reasonable adjustments: The Tribunal concluded that the respondent was under a section 20 duty to make adjustments because the respondent applied its provision or work arrangement that he needed to be fit to work as a warper, which put him at a substantial disadvantage in comparison with non-disabled workers because of the physical symptoms and effects of his type 2 diabetes. The failure to make a reasonable adjustment related to the respondent's state of urgency to get on and make a decision about continuing his employment in October 2019, which was an arbitrary deadline set by Steve Adams and then the reluctance to delay matters further at or after the appeal on 13 December 2019 notwithstanding the impending works shutdown for Christmas and the New Year and the arrival of the 18 December 2019 information from the podiatrist. On both aspects, the Tribunal concluded that it would have been a reasonable adjustment to adapt the broad unfettered approach afforded under the respondent's absence procedure to allow the claimant more time and that this would have had a reasonable prospect of alleviating the disadvantage to the claimant. In October 2019, that time would have allowed for the medical evidence as to prognosis of the success of healing after the right toe amputation. Most especially in January 2020, it would have afforded Mr Winrow the opportunity of seeing whether the claimant was indeed fit to return to work at the start of the year after the works shutdown. Another reasonable adjustment at that point in time at the beginning of January 2020 would have been to use the appeal to look much more fully at the claimant's capacity at that point in time rather than the correctness of the decision to dismiss made earlier. Mr Winrow and Mr Adams were both new to dealing with a long term sickness absence situation and this inexperience may have contributed to their respective mindsets, Mr Adams about the fixed date of 21 October 2019 and Mr Winrow in his consideration of what the podiatrist's 18 December 2019 letter was telling him, which lacked depth. Ultimately, the Tribunal agreed with the respondent's counsel that its decision upon the three forms of claim turned on the respondent's reasonableness or otherwise, with the three standing or falling together. If, as Mr Winrow insisted, the letter was unclear, it would have been reasonable for the respondent knowing of the claimant's keenness to return to work

as a warper throughout, set in the context of how long it had waited already and its difficulty in recruiting warpers, to obtain the precise medical evidence about his ability to return to work itself.

12.6 Polkey and remedy: Since no evidence was called and no argument was made by the respondent in respect of a Polkey finding, the Tribunal makes no such finding at this stage in respect of the unfair dismissal claim or the other claims. Determination of remedy is adjourned to a date to be fixed and it is hoped that the parties may discuss resolution without any further hearing. They are asked to notify the Tribunal by 42 days from the date this Judgment is sent to them whether they have been able to agree upon terms relating to remedy or further case management orders in respect of a Remedy Hearing such as length of hearing, further disclosure and agreement of a bundle, service or exchange of further or updated witness statements and updated schedule of loss with counter-schedule. For the avoidance of doubt, the Tribunal considers that all matters would be at large for its determination at a Remedy Hearing.

Employment Judge Parkin

Date: 25 November 2020