EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr Howlett	**v**	British Telecommunications Plc.

Heard at: Cambridge **On**: 5, 6, 8, 9 November 2018

Before: Employment Judge James

Members: Mr Vaghela and Mrs Blunden

Appearances
For the Claimant: **In person***
For the Respondent: **Mr M Dilaimi – Counsel***

**Inserted pursuant to a certificate of correction dated 3 February 2021*

JUDGMENT

1. By a majority decision the Claimant was unfairly dismissed.

2. By a unanimous decision the remaining claims are dismissed.

REASONS

1. In his claim lodged with the Employment Tribunal on 18 August 2017, the claimant brought claims of unfair (constructive) dismissal, unlawful deduction from wages and disability discrimination. The claims arose out of the circumstances surrounding the termination of his employment with the respondent on 13 July 2017.

2. In its response, dated 4 October 2017, the respondent denied all the claims.

3. At a preliminary hearing on 28 November 2017, the claimant's claims were further defined as follows,

   "the claimant says he was the victim of:

3.1 Direct discrimination when he was dismissed. At the time he was, and following a meeting on 29 March 2017, he was expecting discussions regarding a different role. He was also told that his job could not be kept open for him yet others within the same role were allowed to leave by way of voluntary redundancy.

3.2 Unfavourable treatment because of something arising in consequence of his disability. Things arising are his reduced ability to drive, his reduced ability to sit for long periods and his reduced ability to lift. He says that the unfavourable treatment was a failure to find him alternative work suitable to his skills and experience, taking into account the limitations arising from his disability. He says that the dismissal was an act of unfavourable treatment, (the thing arising being the claimant's inability to return to his previous role).

3.3 The claimant says that the respondent failed to make reasonable adjustments to his role by finding him a job suitable for his skills and experience bearing in mind the physical limitations which he had and provide, if necessary, physical aids to assist him in that role.

3.4 The claimant complained that there was no face to face discussions with him from his manager during his absences, no adequate consideration of the occupational health report prepared in relation to his condition and no adequate consideration of alternative roles. The claimant also says that the meeting at which he was dismissed was not a meeting at which he anticipated that dismissal was a possibility."

4. The relevant law is found at section 98 of the Employment Rights Act 1996 and in sections 13 and 15 of the Equality Act 2010.

5. I received evidence from the claimant in his own behalf and from Mr Chris Girling and Mr Jim Murray on behalf of the respondent.

6. The parties had agreed a chronology of events, a copy of which is annexed to this decision. The parties had also agreed a list of issues which is also annexed to this decision. In addition to the evidence of the witnesses, we had the benefit of an agreed bundle of documents comprising 726 pages. All the documents have been taken fully into account.

The Facts

7. The tribunal found the following relevant facts. The claimant commenced his employment with the respondent on 5 October 1987. In 1994 he had surgery to remedy pectus excavatum, a condition that he had had from birth. Following the surgery, he was left with left sided chest pain which was not relieved by any treatments or analgesics. Further, the pain was

exacerbated by activities such as lifting, moving, bending or rotating. The advice he had been given was that no further relief could be obtained by surgery. The respondent had recognised this disability and had made adjustments to the claimant's work and the workplace in that regard. The latest of these adjustments was made in February 2015 when, as a result of that not going out on the call out rota, he commenced work as a secure service specialist. He remained in this role until his dismissal. There is no assertion that the respondent had failed to make reasonable adjustments prior to the matters that are the subject of this claim.

8. In late 2015, the claimant's symptoms were complicated by developing right sided pins and needles and numbness in his arm. He was diagnosed with a prolapsed disc in his neck area and while this was initially helped with physiotherapy, it recurred. In order to relieve this condition, he underwent surgery in June 2016 which initially provided a good result. It is important to note that the appellant went on sick leave for the purposes of this surgery and never returned to work.

9. In the lead up to this surgery it is important to note the accommodations that had been made by the respondent. Having been appointed as a secure service specialist in February 2015, the claimant says that he was assured that he would be working at sites locally to his home. On 28 July 2015, he notified his employers that he was working a longer than a normal day due to the travelling and that he thought this might be the start of the numbness issues in his arm. The appellant asked to go on a different work schedule and although this was initially refused, in October 2015 he was allowed to go on a nine day fortnight work schedule while he was undergoing physiotherapy.

10. The claimant was on sick leave from 12 November to 7 December 2015 having damaged chest muscles while lifting and turning. On his return to work on 7 December 2015 he mentioned the numbness in his right arm to Chris Girling and it was decided that the claimant should not be driving at work until Occupational Health had confirmed that it was okay for him to drive. Following an appointment on 15 January with OHS, it was agreed that he could drive for work but with a restriction of 30 to 45 minutes at a time.

11. Between 20 January 2016 and 8 February 2016 there was a question as to whether there was need to make a person redundant from the team in which the claimant was working. The claimant was notified that they had to reduce the head count by one and that he had been the person selected using a matrix. The claimant raised an objection to this and eventually it was agreed that he would remain with his existing team. The reason for the change of heart has been explained by the respondent as arising from extra funds being found to enable them to maintain a person on the team.

12. On 16 April 2016, the claimant had an appointment with Mr A Iftikhar from Circle Bedfordshire MSK Services. He determined that the claimant had a, *"cervical spine disc lesion, C5/C6 with possible right sided neural*

impingement". On 29 April, Mr Robert Morris, a consultant neuro surgeon confirmed the claimant's condition. Mr Morris noted the claimant's previous surgery for pectus excavatum and that it had a poor outcome. In view of the previous poor outcomes from surgery, Mr Morris was reluctant at that time to consider surgery for the claimant. He agreed to review the claimant in two months. In the event the claimant undertook the surgery on his neck on 15 July 2016 and following it was informed that he should not lift anything heavier than a kettle of water for a period of 8 weeks and to only move his neck slowly from side to side. As a result, he remained on sick leave.

13. On 19 July 2016 the claimant was telephoned by Mr Girling who thereafter completed a home visit summary dated 28 July 2016. At that time, it was anticipated that the claimant would make a full recovery and would be able to return to work. The home visit summary notes that the respondent had a physiotherapy service available to the claimant and it is noted in the document that he was aware of the service and would contact the respondent if it was required. The claimant's projected return to work date was 23 August, subject to the agreement of his specialist. The document notes that a further call would be made to review the situation on 19 August 2016.

14. On 19 September 2016, the claimant spoke with Mr Girling to inform him that he was still having trouble with his neck and he completed a self-referral for physiotherapy through the BT service as he thought it would be quicker than going through the NHS. He started his course of physiotherapy appointments on 26 September 2016 having received advice from an organisation called RehabWorks on 23 September 2016.

15. On 11 October 2016, Mr Girling requested the claimant to attend an OHS appointment which was agreed. The claimant attended that appointment on 21 October 2016 when his condition was reviewed. The report advised that the claimant would be unlikely to return to work within the next three months and that any return to work after that time would be dependent on sufficient improvement in his symptoms. The claimant continued to receive physiotherapy and was awaiting a further specialist review. It was noted that no specific adjustments could be identified at this time because he was not returning to work. In response to the question as to whether he would be likely to render a reliable service and attendance in the future, the report noted that the claimant was currently unlikely to be able to return to work and render reliable service and attendance and that his ability to do so in the future would be dependent on sufficient improvement in his symptoms and his ability to cope.

16. On 9 November 2016 the claimant saw Mr Morris, the consultant neuro surgeon, who reviewed his condition. At that time, it was thought that the surgery had produced a good result in resolution of his shoulder and arm numbness, although it noted that he had recently developed some problems with neck stiffness. A restricted rotation was noted. The

recommendation was made for non-steroidal anti-inflammatories for his neck pain and stiffness and an appointment was made for x-rays.

17. On 10 November 2016 the claimant had his last appointment for physiotherapy arranged by BT. It was considered that matters could not be taken further at that time until the results of the x-rays were known and the claimant was advised not to return to work.

18. On 10 November 2016, the claimant received a call from Mr Girling requesting that he attended a second line manager review. There was a brief discussion of his OHS report at the same time. The claimant contacted his union representative Mr Mark French to get him to attend the meeting. On 15 November 2106, Mr Jim Murray wrote to the claimant confirming the date of the second line manager review meeting which was to be held at Bedford on 22 November 2016. That letter noted that the claimant had been absent from work since 15 June 2016 and expressed a concern about his fitness and potential ability to provide regular and effective service. It also noted that the claimant should be aware that if his current absence was likely to last for much longer there would be a need to reconsider both the arrangements for covering his job and his own future with BT because of the potentially significant impact upon the BT service. The claimant was notified that he may wish to consult a union representative and seek their support at the meeting. In response the claimant wrote to Mr Murray by email on 15 November stating that he would attend the meeting and that he intended to have his union representative attend with him. He noted that there was a suggestion that the meeting should be recorded.

19. The second line manager review meeting took place on 22 November 2016 with Mr French present as the claimant's union representative. A full review of his condition was undertaken and it was noted that the claimant was due to have x-rays on that day which would show the way to treat his condition and to make him fit to return to work. The outcome of the meeting was that the claimant would share the outcome of his x-rays when received. The meeting was recorded and minutes produced. The claimant indicated that he intended to return to work as soon as possible. Straight after the meeting he attended hospital to have x-rays on his neck. The claimant was provided with a copy of the minutes and a copy of the audio recording 24 November 2016.

20. On 8 December 2016, the claimant saw his doctor to discuss his x-rays. They did not answer the two questions that the neuro surgeon had asked in relation to a) whether his bone had fused and b) whether the cage supporting his chest had moved. They also discussed whether his chest pain could be adding to the slowness of his recovery from the neck surgery. The claimant contacted Mr Morris' office to see if he could obtain his x-rays and give advice.

21. On 4 January 2017, Ms Barbara Rose, a high performance and case consultant for HR Services within the respondent's organisation, emailed

Mr Girling confirming a discussion they had had that day about making a further OHS referral for the claimant. She sent him a form seeking information in order to pursue that referral. Mr Girling responded the following day to say that he had spoken to the claimant on that day and made him aware of the referral and that the claimant had indicated that it should be after the 18 January 2017 because he was due to see a specialist at Papworth hospital on that day. Mr Girling provided the information requested by Ms Rose in order to make the OHS referral.

22. On 18 January 2017 the claimant attended a thoracic consultant appointment. In a report dated 19 January 2017 it is noted that since his surgery in 1994, his chest pain has progressively worsened and that the pain had neuropathic features. It noted that the pain had affected the claimant's daily life and had done so for several years and that he would probably have the pain for the rest of his life. It noted that analgesics and treatments had not been successful to relieve the pain. Finally, it was noted that there was nothing further that could be done surgically and that any surgery undertaken would probably make his condition worse.

23. On the 31 January 2017, the claimant attended an OHS appointment at Peterborough and a report was provided to the respondent dated 6 February 2017. That report provided a detailed review of his condition and provided answers to some specific questions that had been raised by the respondent. In response to an enquiry as to the claimant's likely date of return to work, it was noted that the claimant was keen to return to work and was worried about his future. However, he was temporarily unfit to return to work. Hope was expressed that his neck and shoulder symptoms would improve over the next three to six months, especially if he sought further treatment, but it was not possible to be clear about what level of function he would get back to. In the long term, his chest pain was expressed to be his likely biggest issue. The claimant has told us that during the appointment he had asked whether he could go back to work but was told by the Doctor that it would be unethical for her to say he was fit for work until they knew the outcome of the x-ray results and he had completed his physiotherapy appointments and at that point they could reassess his capabilities. There is no reference of this in the report dated the 6 February 2017.

24. There were no recommended adjustments for the claimant as he was at that point unable to return to work. The report noted the attempts that the claimant had made to relieve his pain. It also noted that he had a number of chronic musculoskeletal conditions and that when he was fit to return to work he may still be at risk of further sickness absence. This condition would be for the foreseeable future.

25. On 6 February 2017 the claimant wrote to Miss Rose asking if she was dealing with his HR management case, and if so did she only deal with the management side or did she deal with his side as well? He also asked whom he should speak with, with regards his recent OHS assessment? Ms Rose replied that she just dealt with the management side and asked

what he wanted to discuss. On the same day the claimant responded thanking her for her response and saying that it was nothing to do with the report from the OHS appointment last week, that it was to do with what the consultant who had conducted the assessment had said in relation to medical retirement. He asked where he would find information about medical retirement. On 7 February 2017 Miss Rose wrote to the claimant saying that she had received a case via E-Chat where he had asked for information about medical retirement and this email was copied to Mr Girling. Miss Rose did not supply information about medical retirement directly but stated that it would be dealt with by the claimant's line manager. Ms Rose made inquiries to see if medical retirement would be considered prior to receipt of the latest x-rays.

26. By 22 February 2017, there were still difficulties in supplying his x-ray results to his neuro surgeon, Mr Morris. But on that day his office emailed the claimant to say that they expected to see them that day or the following day and would be in touch as soon as Mr Morris had viewed them.

27. On 1 March 2017, Miss Emma Vickers, a high performance and case consultant in HR Services, emailed Dr Diane Macaulay, Head of Health for the respondent, setting out the details of the claimant's circumstances and asking if the information provided would meet the criteria for medical retirement. Those circumstances were forwarded through Miss Tanya Dickens to Dr Macaulay who provided an indicative advice on medical retirement that the criteria were unlikely to be met. However, Dr Macaulay recommended it was appropriate to forward the case to Group HR Reward for consideration of RITIE, (Retirement in the Interests of Efficiency). RITIE can be used as a form of medical retirement but with lower benefits than a full medical retirement.

28. On 2 March 2017, Miss Vickers also contacted Mr Murray to advise him how to invite the claimant to a resolution meeting under the attendance procedure. A number of draft documents and policy documents were provided to Mr Murray, including a copy of the attendance procedure.

29. Also on 2 March 2017, Miss Vickers contacted Mr Neal Foreman by email attaching the case relating to the claimant requiring consideration of eligibility for enhanced pension benefits under RITIE. On the same day, Dr Macaulay formerly notified her indicative advice on medical retirement criteria suggesting that it would be unlikely that the claimant would be able to meet those criteria and recommending that it would be appropriate to forward the case for consideration of RITIE.

30. On 6 March 2017, the claimant attended as an outpatient at Papworth Hospital to discuss his chronic pain. He was provided with a new prescription drug and it was planned to review him again in three months to consider the effectiveness of the drug and the tolerability of side effects. This appears to be a pain management consideration rather than any

anticipated medical improvement. On 6 March 2017 Mr Foreman confirmed that he could support RITIE in the claimant's case.

31. On the same day, Mr Murray wrote to the claimant inviting him to attend a resolution meeting on Wednesday 22 March. On 8 March the claimant contacted Mr Murray to ask if it could be rescheduled because his union representative would not be available on that date. The appointment was rescheduled for 29 March 2017. The letter refers to the OHS report dated 6 February 2017 and its conclusion that the claimant was currently unfit for work but that with further treatment there may be an improvement in the claimant's symptoms in three to six months. It is stated that during the meeting there would be a discussion of medical retirement as advice had been sought on this. The letter states that one of the considerations following the meeting could be termination of the claimant's employment on the grounds of impaired capability due to ill health.

32. On 9 March 2017, the claimant received advice from RehabWorks. He informed them that he had made little progress with his shoulder symptoms and that he was due to see a consultant shortly. Two further sessions of treatment were authorised but it was noted that if no progress was made to his symptoms they would have to discuss referring the case to the FRP Service, (Functional Restorative Programming).

33. On 9 March 2017, the claimant thanked Mr Murray for changing the date of the resolution meeting and asked for confirmation that the meeting could be recorded in the same way that the previous meeting in November had been recorded.

34. On 15 March 2017 the claimant saw Mr Morris at his clinic. Mr Morris confirmed that the x-rays indicated that the chest cage was in a satisfactory position and there was evidence of bony fusion through the cage which Mr Morris found reassuring. As a result of these findings the claimant was discharged from his clinic.

35. The claimant attended the resolution meeting on 29 March accompanied by his union representative Mark French. An attempt was made to record this meeting through Mr Murray's laptop computer. It is clear that that was ineffective and only part of the proceedings were recorded. There is a transcript of those proceedings, so far as they were recorded, within the bundle of documents. Throughout the course of the transcript are timings showing when various statements were made, the meeting started at 0930. Mr Murray set out at 2 minutes 58 seconds into the meeting that there were a number of possible outcomes to the meeting, including to "continue to accommodate full support on restricted duties" as well as medical retirement. Mr Murray states he will go through the medical retirement option first in more detail. At 3 minutes 31 seconds into the interview, Mr Murray raised the issue of making progress with his case by using medical retirement and that topic dominates the conversation almost exclusively. There are significant portions of the conversation not recorded and the claimant tells me that in the latter part of the meeting,

which was not recorded, he raised concerns about ensuring that he was able to return to work as soon as possible and that his expectation was to return to work. This is disputed by the respondent.

36. As a result of a full transcript not being possible due to the failure of the recording system, Mr Murray made written notes of the outcome of that meeting. Those notes indicate that the claimant and his trade union representative did not agree that medical retirement was an unlikely outcome. They wanted all information to be looked at involving the claimant's medical conditions. They believe that he met the criteria for medical retirement and wanted Dr Macaulay to review his full case history about his health, OHS, GP and surgeons. The CWU felt medical retirement was the correct outcome rather than RITIE, and in that regard a copy of the RITIE paperwork had been given to the claimant during the meeting. The claimant indicated that he was happy to consent to any medical retirement paperwork to make a formal referral and that the union and the claimant would challenge any other decision than medical retirement either formally or legally. In addition, the claimant and his trade union representative indicated that they firmly believed that no decision could be made until Dr Macaulay reviews medical retirement fully and they didn't agree with any outcome until that had taken place. It was noted that the claimant's chest condition was deteriorating and would never get better although it was accepted that his shoulder and neck was getting slightly better from medical treatment. Finally, it was noted that the claimant and the union representative thought that he reached the requirement for medical retirement and would challenge any decision to the contrary.

37. On 29 March 2017, the claimant wrote an email to Mr Murray following the meeting and commenting on it. In it he states,

"As I stated in the interview with regards to the medical retirement issue, I do believe that a thorough check has not been done and that under the circumstances with my future employment at BT an issue that this should have been looked at in a manner fitting the situation. The bottom paragraph from Dr Macaulay states about the need to give consent with regards to medical records. I completed these forms on 31 January when I had my OHS appointment with Dr Edwards and she mentioned my suitability for medical retirement. She said that if I completed these now this would possibly help the situation and as I have nothing to hide I am more than happy for any of my consultants to be contacted. The one thing in the response from Dr Macaulay that angered me more than anything else, was that she felt that my incapacity would persist for at least another 12 months, to me she was only looking at the more minor issues which are my neck and my shoulder which have improved over the last couple of months and the fact that I can restart my neck physiotherapy knowing that the cage is in the correct place and the bone is starting to fuse. With regards to my chest I have a report going as far back as 1999 stating that this is a permanent condition that would deteriorate and lots of OHS reports stating the same thing over and over again. I would love to know

how Dr Macaulay may think my chest will improve as my surgeon and pain clinic consultant have completely different opinion to the BT doctor."

38. On 30 March 2017, Mr Murray sent his meeting notes, plus the recording of the meeting to the claimant. He noted that the recording lasted for 34 minutes and then cut out, while the meeting had been recorded as lasting some 50 minutes. In response, the claimant stated that the minutes of the meeting had one very important piece of information missing and that is that Dr Edwards (who had conducted the claimant's last OHS appointment) had mentioned medical retirement to him. She had stated that if he had been correct in what he was saying, he would be suitable for medical retirement and as an independent medical practitioner she would be able to sign the certificate. She added that this was the reason why he was contesting the assessment taken by Dr Macaulay. On 31 March 2017 Mr Murray sent the papers to Ms Vickers. She responded asking for the details of the report to which the claimant was referring in relation to medical retirement and on 3 April 2017 Mr Murray said he had never seen such report, that the information was from the claimant.

39. Mr Murray prepared a resolution rationale under the attendance procedure following the meeting with the claimant on 29 March 2017. The outcome was that it was decided to terminate the claimant's employment on the grounds of impaired capability due to ill health. It was noted that it was proposed to support him retiring on RITIE and an estimate had been provided to the claimant of his enhanced benefits.

40. On 18 April 2017, Mr Murray wrote to the claimant notifying him of the decision and sending him a copy of the decision rationale. He also enclosed a written statement of estimated pension terms that would apply under RITIE. Mr Howlett signed receipt of this letter. On 19 April 2017, Emma Vickers confirmed that RITIE had been authorised by Mr Murray for the claimant.

41. On 20 April 2017, the claimant notified the respondent that he was going to appeal the decision to terminate his employment without giving any further details. Emma Vickers arranged for the appeal process to be undertaken..

42. On 25 April 2017, Miss Vickers submitted a detailed analysis of the claimant's disability and circumstances, seeking a definitive opinion on medical retirement.

43. In exchanges between the claimant and Miss Vickers, between 4 and 11 May 2017 it was clarified how the assessment for medical retirement would be made and also indicated that if the claimant had any concerns about the assessment and the decision to terminate his employment, the appeal process was the place to do it.

44. On 11 May 2017, Martin Holloway wrote to the claimant indicating that he would like to meet on 12 June 2017 for an appeal meeting. On 18 May

2017, Dr Macaulay provided a definitive medical retirement opinion in which she indicated that the medical retirement criteria for payment of ill health related pension benefits are likely to be met. The ongoing plan was for a medical retirement certificate to be signed. That certificate was signed on 25 May 2017 and a formal letter of notification confirming his medical retirement was sent to him on 26 May 2017.

45. On 6 June 2017, the claimant wrote to Mr Holloway indicating that he wished to withdraw his appeal on the basis he believed having a third line manager from the same team conduct the appeal would not be appropriate. He noted that if the appeal meeting was with a third line manager from a different team he would carry on with the appeal. The claimant indicated that he would pursue the matter through ACAS and the Employment Tribunal. On 12 June 2017, Mr Holloway wrote to the claimant encouraging him not to withdraw his appeal and seeking to make it absolutely clear that he was not aware of any of the circumstances of the case and that he had not discussed it in any detail with any of his existing line management team and that he would be coming with a fresh pair of eyes. On 14 June 2017, the claimant responded that he doesn't intend to reconsider his decision. The claimant's effective date of termination was 13 July 2017.

The Decision

46. We have been unable to reach a unanimous decision in relation to the claim of unfair dismissal.

47. The majority decision is held by the members only and finds that the Appellant was unfairly dismissed for the following reasons. The respondent did not follow its own detailed absence management policy, despite Line Managers being aware of it and being trained. The respondent did not maintain sufficient direct contact with the claimant during the time that he was on sick leave and especially immediately prior to the resolution meeting held on 29 March 2017. While this did not directly affect the decision to dismiss the claimant it reflects the general approach of the respondent towards the claimant. However it would have provided an understanding of the progress of the claimant's during his absence.

48. In relation to the dismissal the respondent took the decision to dismiss too quickly. The last OHS report made it clear that the claimant might improve with treatment over the following three to six months. The report gave hope for future improvement of the claimant's condition. The justification for dismissing him was not reasonable because he was an employee with more than 20 years service. While the claimant suffered a significant underlying disability it had been managed by the respondent making reasonable adjustments. The justification for dismissing the claimant on the grounds of efficiency has not been made out and the impact on the respondent's business has not been accurately defined.

49. The respondent did not adhere to the welfare policy. It undertook no search for alternative jobs or to establish what work could be possible for the claimant. The respondent has claimed that the absence of he claimant incurred additional cost but were unable to show what these were or the impact on other members of the workforce. It is accepted that the issue of medical retirement arose as a result of a comment made during the OHS assessment on 31 January 2017 and the claimant believed he was entitled to such a retirement.

50. The invitation to the Resolution meeting states that medical retirement would be discussed and that Mr Murray had sought advice on this issue but there is no mention of other considerations such as alternative roles. This set the tone for the meeting and indicates that the outcome was predetermined and was the reason why the meeting focussed on this issue almost exclusively.

51. The respondent, which has significant resources and is a major employer, was aware of an indication that the claimant's condition might improve over a period of 3 months. It is accepted that at the meeting on 29 March 2017 the claimant indicated that he wished to return to work. The respondent should have waited to see if the claimant's condition improved and then, in light of any improvement, considered his ability to return to work and if so, to explore in what capacity. At that time there should have been an adjusted job search in line with the respondent's own procedures. This could have been accomplished by seeking a further OHS report in early May 2017 with a view to having a report available before the end of May. If there had been no improvement the respondent should have then considered medical retirement which was something that the claimant clearly wanted to be considered in the event of no improvement.

52. The respondent was wrong to have acted when it had no definite prognosis for the claimant before it, and the timeframe for receiving a more definitive diagnosis was short given length of the claimant's service and length of absence to that point. As a result the dismissing officer was ill equipped to make any decision regarding the claimant's employment because the medical evidence was incomplete. In the absence of a definite prognosis there was no justification for holding the resolution meeting which was in any event poorly conducted. There was no proper note keeping and the lack of proper recording equipment has resulted in only partial records of that meeting.

53. However, it must be noted that in the event the claimant 's condition did not improve over the following three months. Any subsequent OHS report would have clearly shown that the claimant was incapable of any further work for the respondent. This was not merely in relation to his current position but in all respects. It is accepted that the claimant condition would not have allowed him to return to work in any capacity and that no adjustments could have been made to allow him to return to work. The respondent would have been in a position to review the claimants

condition after three months when he would have been fairely dismissed i.e. not 17 October 2017.

54. The Tribunal is satisfied that the claimant had no justification to withdraw his appeal. There is no credible evidence to suggest that the designated appeal officer would have been biased or predetermined in his opinion. The claimant will have to take the consequences in terms of a reduction in his award of compensation.

55. The minority decision of Judge James is that the claimant was not unfairly dismissed. It is accepted that the respondent did not maintain regular contact with the claimant in accordance with its own policy but this has had no material bearing upon the issues before the Tribunal. It was clear throughout the relevant period that the claimant was unable to return to work and additional contact with the claimant would not have affected the outcome.

56. It is accepted that in accordance with the respondent's own policies and in light of the OHS report dated 6 February 2017 the respondent was entitled to call the resolution meeting. It is regrettable that the recording of the meeting was incomplete. The notes taken by Mr Murray are accepted as being accurate. It is not accepted that the claimant expressed a desire to return to work at that meeting. It is clear that at the OHS assessment on 31 January 2017 that the consultant mentioned to the claimant the possibility of a medical retirement. That consultant was entirely independent of the respondent and held no authority from the respondent to mention medical retirement. The claimant pursued this by making inquiries with the respondent prior to the resolution meeting. It was as a result of those inquiries that medical retirement was mentioned in the letter inviting the claimant to the Resolution meeting.

57. Virtually the whole of the available transcript of the resolution meeting is taken up with a discussion of medical retirement. The transcript covers period of 34 minutes out of a total time of 50 minutes. It is a significant proportion of the meeting. It is clear that the claimant and his union representative are actively pursuing a medical retirement. Following the meeting the claimant e-mailed Mr Murray and it is produced verbatim above. It is clear from that message that the outcome sought by the claimant is medical retirement. He is at pains to state that he is pursuing this outcome not merely based upon his recent medical difficulties but on the basis of his long term difficulties as well. In addition on 30 March 2017 he was sent a copy of Mr Murray's notes and a transcript of what had been recorded. In response the claimant stated that one important piece of information had been omitted from the records namely that the consultant, who had conducted the OHS assessment on 31 January 2017 had been the person who had referred him to medical retirement. Before the Tribunal the claimant has asserted that he spent a great deal of time during the resolution meeting explaining that he wanted to return to work. Had that been the case the claimant would have also referred to it in response to the notes and transcript.

58. The Tribunal finds that the claimant did not emphasise any desire to return to work. Rather the claimant sought medical retirement and his union representative pursued this quite forcefully to the point of stating that any other outcome from the resolution meeting would be challenged.

59. It is noted that the award of a medical retirement is likely to be the most expensive outcome to the respondent as it would result in the claimant being treated as if he had reached retirement age with full pension contributions and with the pension payments starting immediately. The cost to the pension fund, for which the respondent would be responsible to reimburse, would be very significant. Accordingly it is unlikely to have been the predetermined outcome of the Resolution meeting.

60. The claimant had made inquiries about medical retirement. He knew that it was only awarded to employees who were unable to perform any further work for the respondent by reason of ill health. He had the advice of a union representative to assist him. By seeking a medical retirement the claimant was effectively stating that he was unable to do any further work for the respondent. In those circumstances and in light of medical and OHS evidence to the effect that the claimant was not fit for work and only might become fit in the future, the respondent was entitled to conclude that the claimant was not capable of any work and the dismissal was fair.

61. It is noted that the claimant was notified of the award of a medical retirement on 26 May 2017 and he withdrew his appeal on 6 June 2017. The claimant has stated that this was because he did not think he would get a fair hearing but as has already been stated there is no evidence to suggest that the designated appeal officer would have been biased or predetermined in his opinion. However the timing of the withdrawal is noted and the conclusion is that the real reason for withdrawing his appeal was the fact that he had obtained what he was seeking - a medical retirement.

62. The Tribunal unanimously dismisses the claims of disability discrimination. It is clear that throughout the time that the claimant was absent from work i.e. from 15 July 2016, until his dismissal he was unfit to undertake any work for the respondent and nor was there any prognosis that he would be able to return to work in his present condition. The prospects for improvement in that condition were remote. His dismissal was not an act of direct discrimination. The majority decision is that the dismissal was unfair on the basis that it was premature by three months. The unanimous decision of the Tribunal is that the claimant would have been fairly dismissed either at the time of the dismissal or three months later.

63. The claimant has asserted that he was expecting a discussion regarding his future role with the respondent and if necessary what adjustments could have been made to allow him to return to work. It is clear that at the resolution meeting did not discuss other roles or adjustments but the Tribunal is unanimous that such considerations were otiose at that time.

At the time of the Resolution meeting the claimant was incapable of any work and he pursued that assertion himself. There was no medical evidence to indicate what the claimants capabilities might be in the future. Accordingly any assertion that there was unfavourable treatment or a failure to make reasonable adjustments on the part of the respondent is unsustainable. Any failure on the part of the respondent to maintain contact with the claimant during his absence in line with the strict letter of the respondent's policy has been discussed above and had no material bearing upon the respondent's decisions.

64. In making the findings in relation to disability discrimination the Tribunal notes that over a number of years the respondent has made a number of significant adjustments to the claimant's work and his workplace in order to maintain him in employment. It cannot be said that the respondent has been unresponsive to identified needs in the past or making adjustments to satisfy those needs.

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Employment Judge James

Date: 30 / 1 / 2019

Sent to the parties on:

12 / 2 / 2019
For the Tribunal Office

_____
Regional Employment Judge Foxwell

(corrected version signed pursuant to Rule 63)

Date: 3 February 2021

Sent to the parties on:

3 February 2021

For the Tribunal Office