EMPLOYMENT TRIBUNALS

Claimant: Mr W Rogerson

Respondent: Busways Travel Services Limited

RESERVED JUDGMENT

Heard at: North Shields

On: 23rd and 24th November 2020
(deliberations 27 November 2020)

Before: Employment Judge Sweeney

Members: Stan Hunter and Russell Greig

Representation:

For the Claimant: Richard Ryan, counsel
For the Respondent: Edward Nuttman, solicitor

The unanimous Judgment of the Tribunal is as follows:

1. **The complaint of unfair dismissal is well founded and succeeds**.

2. **The complaint of wrongful dismissal is well founded and succeeds**.

3. **The complaint of disability discrimination by way of unfavourable treatment because of something arising in consequence of disability is well founded and succeeds.**

4. **The complaint of disability discrimination by way of failure to make reasonable adjustment is well founded and succeeds.**

REASONS

The Claimant's claims

1. By a Claim Form presented on 13 December 2019, the Claimant brought claims of unfair and wrongful dismissal and disability discrimination for contravention of sections 15 and 20 - 21 Equality Act 2010. The Respondent denied the claims. It contended that it fairly and lawfully dismissed the Claimant for a reason related to ill health capability.

The Hearing

2. The Claimant gave evidence on his own behalf. The Respondent called one witness, Stephen Todd, Assistant Operations Manager.The parties had prepared a bundle of documents consisting of 143 pages (with some additions). The Claimant had intended to call evidence from Malcolm Laws, a trade union representative. However, he was unavailable as he had been infected by Covid-19. The Claimant then obtained a short statement from a Mr Gillespie whom he proposed to call in substitution for Mr Laws, on the basis that he supposedly covered the same ground. However, Mr Gillespie then notified the Claimant's representatives that he too was unavailable due to contracting Covid-19. Mr Ryan applied to substitute an unsigned statement from Mr Gillespie for that of Mr Laws. Mr Nuttman objected on the basis that Mr Gillespie's statement was new evidence, in that his statement was different to that of Mr Laws and it had always been open to the Claimant's representatives to call him but who had chosen not to. We did not permit Mr Ryan's application. We could see no reason why one unavailable witness's unsigned statement should be swapped for the unsigned statement of another unavailable witness. Mr Nuttman had not prepared on the basis of the statement from Mr Gillespie. We said we would read a signed statement from Mr Laws when it arrived. In the end this never materialised and the Claimant's case proceeded on the evidence of the Claimant only.

The issues

3. There was some initial discussion about the issues at the outset of the hearing. The agreed list of issues was contained on pages [**37a-37c**] of the bundle. We have reproduced them in the appendix to this judgment. We explained that we did not understand the proposed 'PCP' at paragraph 4.3.1 of the agreed issues. Mr Ryan agreed that it made no sense. He applied to amend the issues to rely on two alternative PCPs: the first was a 'requirement for consistent attendance at work to fulfil the duties of the role' and the second was the Respondent's practice of issuing notice of dismissal to absent employees at the 12 weeks of absence. Mr Nuttman had no objection to amendment to include the PCP but objected to the application to add the second on the basis that the Respondent would be prejudiced in the proceedings and that this prejudice would outweigh any caused to the Claimant in not allowing the amendment. He submitted that the Respondent would be unable to deal with issues such as whether there was

substantial disadvantage to other non-disabled employees; and that had it been notified earlier the Respondent would have been able to investigate whether this was a practice that was applied in other cases. We adjourned to consider the application. We agreed with Mr Nuttman and allowed the Claimant to amend the PCP to include the first but not the second and gave our reasons to the parties at the time.

4. There was no dispute as to whether the reason for dismissal in this case related to capability. Mr Nuttman confirmed also that there was to be no issue taken as to whether the Claimant's dismissal was caused by his own actions. As to the wrongful dismissal claim, Mr Ryan indicated that the Claimant's case was that the notice issued on 18 April 2019 had been withdrawn and it was the letter of 26 July 2019 that terminated the Claimant's contract of employment and that in doing so the Respondent failed to give the requisite 12 weeks' notice of termination.

Findings of fact

5. Having considered all the evidence before it (written and oral) and the submissions made by the representatives on behalf of the parties, the Tribunal finds the following facts.

6. The Respondent is a bus transport operator and a subsidiary of Stagecoach Group plc. It operates bus services in Newcastle, South Shields, Sunderland, Hartlepool and Teesside. The Claimant was employed as a Bus Driver from June 1989 until his employment was terminated in July 2019.

The Respondent's policies

7. The Respondent has a policy in place for the management of, among other things, long-term sickness absence: Attendance Policy & Procedure (**pages 49-58**). The policy explains that a manager will hold a meeting with the employee after 4, 8 and 12 weeks of sickness absence.

8. In respect of the third interview (after 12 weeks' absence) the policy states:

"At the third interview at the end of twelve weeks the manager will:

- *Ascertain what progress has been made*
- *Review any medical reports*
- *Establish the likely duration of the absence*
- *Remind the employee that the employment may be at risk*
- *If appropriate, set a date for a further review (particularly bearing in mind any impending medical appointments) and a date at which point dismissal (with or without pension depending on medical opinion) will be considered if the employee is still unable to return to work. It should be*

explained that in the event of that stage being reached alternative employment would also be considered at that time. A letter should be sent confirming the facts and the action to be taken.

In the event that the employee is still unable to return to work and the manager, in the light of all the information considers that further time for recovery should be allowed, further interviews will be held on similar lines to the above to keep progress under review.

After allowing a reasonable period for recovery, if there is no prospect of an early return to work, the manager will obtain up to date medical opinion from the Occupational Health Physician and the employee's GP or Specialist if appropriate in respect of the likely duration of the absence, the permanency of the incapability in respect of the job held and any appropriate alternative employment. The manager will then convene a formal interview within this procedure. At this interview consideration will be given to the available medical information and any information provided by the employee. If there is no prospect of a return to work within a reasonable timescale as appropriate to the needs of the Company, the options considered will be:

- *The appropriateness of allowing a further defined timescale for recovery in the light of all the available information*
- *Available alternative employment*
- *Dismissal on the grounds of medical incapability. If the opinion of the Occupational health Physician is that the incapacity of the employee is likely to be permanent, dismissal will be on the grounds of permanent medical incapability…*
- *In the event of dismissal, a letter confirming the decision will be sent to the employee*

When the decision is that of dismissal due notice will apply as stipulated in the employee's contract of employment."

The Claimant's sickness absence in 2017

9. In 2017, the Claimant was admitted to hospital to have his gallbladder removed as a result of which he was absent from work for a number of weeks. Mr Todd met with the Claimant during the period of his absence in accordance with the attendance policy. The third meeting was held on 23 October 2017 (by which date the Claimant had been absent for 15 weeks). Mr Todd had available to him information from Occupational Health dated 17 August 2017, which indicated that if his operation was successful the Claimant should be able to return to work after about 12 weeks (**page 59g-59h**). This gave Mr Todd been a good indication of the likely timescale for recovery and return to work.

10. Nevertheless, at this third meeting Mr Todd gave the Claimant 12 weeks' notice of dismissal with a termination date of 20 January 2018. Mr Todd confirmed in evidence that he gave notice to terminate employment because Mr Rogerson had passed the twelve weeks' mark. Mr Todd explained to the Claimant on that

occasion that his last day of employment would be 20 January 2018 'unless you return prior to this date'. (see notes of the meeting on **page 59p**) In that event, he said the notice would be rescinded. Mr Todd specifically told the Claimant that his notice would be rescinded because the occupational health report made it reasonably clear that he would recover post-operation and get back to work during the notice period.

11. In his evidence to the Tribunal Mr Todd said that he believed he had no discretion to do anything other than give notice of termination of employment, whatever the medical evidence said. His understanding was that if the employee was absent from work for 12 weeks, dismissal was mandated at the third meeting even if the medical advice is that the employee will return. Mr Todd gave notice of dismissal because he believed he had no other option. He said, however, that he would continue to look at the Claimant's situation during the notice period.

12. This was, as Mr Todd accepted in cross-examination, a misreading of the policy. He now accepts that he did have a discretion, as can be seen from **page 58**, reproduced above.

13. Mr Todd wrote to the Claimant on 23 October 2017 confirming that the date of termination of his employment was to be Saturday 20 January 2018 but if he '*returned to work on the aforementioned date or within the 12 week notice period the decision to place you on notice will be rescinded*'. The letter also stated that the Claimant had the right to appeal against the decision (**page 60**). The Claimant did not appeal. He returned to work in early January 2018. Upon his return to work, nothing further was said to him about the dismissal letter, or about notice having been given or about it being rescinded. No further letter was written formally rescinding or withdrawing the notice. The parties simply proceeded on the basis that the notice had been rescinded.

The Claimant's sickness absence in 2019

14. We move now to the events in 2019. In January the Claimant started to experience shortness of breath. A persistent cough that had troubled him for about five years or so, got worse. He was having dizzy spells and generally felt tired with lapses in concentration. He visited his GP who referred him to a specialist and an appointment with Dr Rangar, Consultant Respiratory Physician at Sunderland Royal Hospital, was arranged for 18 January. The Claimant was signed off sick from 24 January 2019. The initial fit note recorded 'multiple symptoms – generally unwell with exacerbation at work. Under investigation' (**page 103**). As with the previous occasion, it fell to Mr Todd to manage the Claimant's sickness absence.

First 'care and concern' meeting

15. The Claimant was signed off again from 21 February 2019. The fit note now referred to 'suspected airway hypersensitivity to fumes at work. Under specialist investigations' (**page 102**). On 22 February, Mr Todd referred him to Occupational health (**page 61**). On 28 February, he attended a 'Care and Concern' meeting with Mr Todd (**page 62**). This was the first of the three meetings under the Attendance policy. It was agreed that there should be another meeting after occupational health had reported back. The phrase 'care and concern' is not one that is used in the policy. Mr Todd said that it is simply the name given by the Respondent to discuss ill health and absence related to ill health under the attendance policy.

16. Occupational Health duly reported on 01 March 2019 (**page 69-70**). They confirmed that the Claimant had suffered from a cough for approximately 5 years and now also felt out of breath on exertion although he had not coughed since 15 February 2019. The occupational health physician advised that he was temporarily unfit for work while undergoing tests into the underlying cause of his breathing difficulties.

Second care and concern meeting

17. Mr Todd held a further Care and Concern meeting on 21 March 2019 (**pages 72-73**) – the second meeting under the policy. At this meeting, the Claimant explained that he was to be referred to the RVI for breathing tests to check lung capacity. The Claimant said that he wanted to come back to work. Mr Todd told the Claimant to 'keep him in the loop' about the blood tests and told him that they would meet again.

18. On 4 April 2019 Mr Todd wrote to invite the Claimant to a further 'Care and Concern' meeting (**page 74**). He warned him that, unless there was a return to work date in the foreseeable future, his employment was at risk of being terminated.

Third care and concern meeting

19. That meeting – the third under the policy - took place on 18 April 2019 (**pages 75-76**). The Claimant explained that the doctors were no further forward with a diagnosis; that he had not had the results from the blood tests. The Claimant expressed his frustration by the lack of diagnosis and that he had still not had a referral date to the RVI. He told Mr Todd that he was not coughing but his exercising was not going well and he had no energy. He said that he had been prescribed Fluoxetine for depression. He emphasised that he hoped possibly to come back to work at the end of his fit note and that he had a GP appointment on 30 April.

20. As the Claimant had expressed his hope of returning at the expiry of the latest fit note on 31 April 2019, Mr Todd told him that he would aim to get the Claimant

in for an occupational health visit in the week commencing 22 April 2019. However, he also explained to the Claimant that, as he had been off work for 12 weeks, in line with the attendance policy he was placing him on 12 weeks' notice of termination. Mr Todd believed, as he had back in 2017, that he had no option but to give notice of dismissal.

21. Although men had been in this position before, the position as of 18 April 2019 (unlike the position in October 2017) was that the future looked much more uncertain to Mr Todd, and indeed to the Claimant. There was no diagnosis. There was no medical report saying that the Claimant should be able to return in a few weeks or so. Mr Todd said in evidence to the Tribunal that he had no reason to believe that the Claimant had sleep apnoea when he issued the notice of dismissal and we agree; he had none.

22. Mr Todd did not say to the Claimant that his notice would be rescinded if he returned to work during the notice period (as he had back in October 2017). However, Mr Todd told the Claimant that '*technically'* his last day of employment '*would be'* Saturday 13 July 2019. There was a dispute between the parties as to the use of this word 'technically' which we address in our conclusions. At this juncture we simply record our finding that we reject Mr Todd's evidence in cross-examination that he did not know why he used the word. Mr Todd, we find, used the word deliberately and for a reason. We find that its meaning was understood by both him and by the Claimant. Mr Todd then wrote to the Claimant the same day (**page 77**) confirming the notice of dismissal in writing. In the final paragraph, Mr Todd referred to the Claimant's right to appeal the decision which must be done within 7 days of receipt of the letter.

23. As with the situation back in October 2017, the Claimant did not appeal. He saw no need to as he believed that if he returned to work before 13 July 2019 (which he expected to) the notice would be rescinded or revoked. This belief was based on his previous experience in October 2017, on his genuine belief that this was the general practice of the Respondent and also, importantly, on his understanding of Mr Todd's description that 13 July 2019 was 'technically' to be his last day of employment.

24. Although Mr Todd issued the Claimant with notice of dismissal, he referred the Claimant to Occupational health again. Occupational Health reported on 25 April 2019 confirming that he remained unfit for work (**pages 79-80**). The report identified that the cough had resolved but that the main issue affecting the Claimant was shortness of breath and excessive tiredness during the day. The Claimant had by this time found himself becoming increasingly tired. He had difficulty walking for more than 5 minutes without becoming fatigued and was unable to play a simple board game with his family without falling asleep.

25. This report contains the first reference to obstructive sleep apnoea (OSA). The Claimant was tested for OSA recording a high score (known as an 'Epworth score') of 17 (the meaning of the scores is found at **page 141b**). The occupational health physician advised the Claimant to speak to his GP regarding a referral to a sleep clinic. We reproduce part of the report below:

    "He is hoping to be able to return to work in about four to six weeks, but we are not clear how his health will be at that time. If he did want to try, I think it would probably be safe enough to do so, especially if the cough has resolved. I would very much doubt that fumes or anything at work is anything to do with his tiredness and fatigue now, which is quite extreme, and certainly moving around and being active is probably going to be better for sleepiness, than being sedentary, but it depends whether he could concentrate enough to do it. It would be better to have his sleep studies done at least before he comes back to get a diagnosis of airways mask, which very quickly, within a few days, tends to improve sleep quality and daytime drowsiness etc."

26. It can be seen from the above extract that the doctor refers to an 'airways mask'. Mr Todd confirmed in evidence that he was reasonably familiar with the condition of OSA and understood what an airways mask was. This was unsurprising to us given the nature of the operations he was supervising. A bus driver with OSA is a serious issue for a bus company, the driver and of course, the general public. Mr Todd had two other drivers at his garage who had been diagnosed with OSA and who continued to operate as bus drivers. Although he had not dealt personally with their initial period of absence he understood that they had received a diagnosis and that from there things were turned around 'pretty quickly', as he put it.

27. Mr Todd was aware of the symptoms of lapses in concentration and tiredness associated with OSA and referred to 'one guy' at work who had who had fallen asleep pouring a cup of coffee. Mr Todd knew from his experience that the 'airways mask' was the usual form of treatment for the condition and that it was known to produce rapid results once a person started to use it. He had been told that the mask can work within a few days of use. He understood that, provided it is treated and managed, a person with OSA can drive a bus. We have no doubt that Mr Todd understood the use of the airways mask to be an effective treatment for OSA and that its benefits would ordinarily be felt within a reasonably short period of time after treatment started. When Mr Todd read the report from occupational health.

28. Returning to the sequence of events, on 27 April 2019 the Claimant attended an appointment with a Consultant ENT, Mr Waldron, at SPIRE healthcare (page 114). He paid privately for this. He did so because he was keen to understand what the problem was. He was also alarmed by the high Epworth score recorded by occupational health and he wanted a second opinion.

29. In Mr Waldron's report at **page 114** he says:

> "*He has a history of snoring for over the last five years which has been increasing. This tends to be worse on his back but there has been no episode of apnoea noted. He has symptoms of daytime fatigue but not always associated with sleepiness. He tends to get to bed at 22.30pm but not falling asleep immediately until after 23.00pm. When he does awake during the night it can often take him some time to return to sleep. He takes no alcohol, is a non-smoker with no pharyngeal symptoms.*
>
> *We discussed the background to his symptoms and the spectrum of sleep disordered breathing. We discussed that his awakening may be more related to reflux symptoms and a trial of Gaviscon in the first instance. He appreciates that investigations could be considered and this will be under the respiratory team auspices in any event."*

30. Mr Waldron carried out an OSA test recording an 'Epworth score of 10'. He noted no reported history of apnoea but that he had continuing symptoms of fatigue and dyspnoea and was under investigation with Dr Rangar.

31. The Claimant submitted a third fit note on 30 April 2019 covering the period to 16 June 2019 (**page 100-103**).

Fourth care and concern meeting

32. Mr Todd next met with the Claimant on 17 May 2019 to discuss the most recent occupational health report (the one at **page 79-80**). Although referred to in the invite letter at **page 81**, as a 'follow up meeting' and not a 'care and concern' meeting, Mr Todd confirmed in evidence that there was no significance to this and it was part of the 'care and concern' process. At this meeting the Claimant told Mr Todd that he disagreed with the Epworth score of 17. He explained that he had since seen Mr Waldron, who had recorded a score of 10. The Claimant believed the Consultant's opinion to be superior to that of the occupational health physician and said as much to Mr Todd. He told Mr Todd that he was feeling better in himself but was still not quite the way he was. He said he hoped to be back at work by 16 June 2019. He explained that he had a further appointment with his doctor on 30 May 2019 who was to go through the results of the tests he had back in January.

33. We find that the Claimant was desperate to return to work. It was, for him, a race against the clock, to return to work before the expiry of his notice in the firm belief that by doing so his employment was safe and he would continue to work as a bus driver for the Respondent. Therefore, buoyed by what Mr Waldron had said, he was strongly urging Mr Waldron's report on Mr Todd to effect his return to work.

34. Mr Todd was also, we find, proceeding on the basis that if the Claimant returned during his notice period his employment would continue. However, he understood the impact of the scores. He said to the Claimant on 17 May that as the PCV licence is personal to the Claimant it was the Claimant's responsibility to find out what they meant and to get a better understanding of the levels, as they affected his ability to drive a bus. The Claimant said he would find out.

35. On 30 May 2019, the Claimant attended an appointment with Dr Rangar who believed the cough was likely related to gastroesophageal reflux disease (**page 115**). Dr Rangar added:
'

"As he has no history of upper airway obstructive symptoms or apnoeas collaborated by his wife's history nor excessive daytime somnolence we have not pursued a sleep study today."

36. The Claimant was again buoyed by this. In anticipation that he would be fit enough to return to work, he planned to do so after two weeks' annual, leave which he had arranged from 16 June 2019. His most recent fit note expired on that date and his intention was to return to work on 01 July 2019.

Fifth care and concern meeting

37. On 20 June 2019 Mr Todd wrote to the Claimant asking him to attend a further Care and Concern meeting on 25 June (**page 84**). The Claimant telephoned Mr Todd to remind him that he was on leave that day. Mr Todd agreed that that the Claimant could take a day off in lieu if he attended the meeting during his period of leave. Therefore, they met on 25 June 2019, the notes of which are at **pages 85-86**. The Claimant was accompanied by his trade union representative.

38. The Claimant updated Mr Todd on his visit to Dr Rangar on 30 May 2019. The Claimant said he felt well enough to return. At this stage, from Mr Todd's perspective, there was no diagnosis of OSA and the Claimant was saying he was ready to come back to work. Everything seemed to Mr Todd to be on track for the Claimant to return to work and thereby avoid the termination of his employment on expiry of the notice of dismissal.

39. However, Mr Todd was still conscious of the issue regarding the two Epworth scores. He told the Claimant that he would like to double check with OH that he was fit to return. As he was aware of the impact of a high Epworth score on the role of a bus driver we find he wanted assurance for himself and also for the Claimant prior to allowing him to return. He told the Claimant he would send him to occupational health, the Claimant will come back, undertake refresher training and they will take it from there. Mr Todd reminded the Claimant to take all relevant paperwork to the occupation health physician appointment so that he would have the full picture.

40. We must, at this juncture, address one issue of dispute that arose in these proceedings. Mr Todd referred at this meeting to the Claimant's claim against the company. This was a reference to the Claimant's previous intimation of personal injury action against the company (believing his cough to be the result of exposure to diesel fumes). We are satisfied that Mr Todd did not mention this in any sinister way. He simply raised it because of the suggestion that diesel fumes at work had caused the Claimant to cough. He simply wanted to understand whether the Claimant still saw exposure to fumes as a risk to his health as had previously been postulated. We reject any suggestion that Mr Todd or the Respondent was motivated to terminate his employment because he had intimated pursuing a personal injury action. This was very much a side-issue. On the contrary, we conclude that Mr Todd did not want to lose a bus driver if he could help it. He was genuinely keen for and wanted the Claimant to return to work, which is why he emphasised that the Claimant should take everything he had to the next occupational health appointment.

The Claimant's return to work

41. On 01 July 2019 the Claimant attended an occupational health appointment, first thing in the morning. He then immediately reported for duty. The first thing he was required to do was to undertake a driving assessment. He drove an 'out of service' bus for a short period under supervision. He passed the assessment and was told he could return to full duties right away. There was a disagreement that day regarding the taking of the lieu day that Mr Todd had agreed with the Claimant. The Claimant learned that Mr Malcolm Bell, who was Mr Todd's manager, had said he could not have the lieu day. This angered the Claimant who asked his trade union representative to speak with Mr Todd. In his evidence Mr Todd was asked whether there was anything in paragraph 23 of the Claimant's witness statement with which he disagreed. Mr Todd said there was not. We find that the account given by the Claimant in paragraph 23 of his statement is an accurate account of what happened. He took the rest of 01 July off as his lieu day.

42. In the subsequent report of that occupational health appointment, which was sent to Mr Todd that same day, occupational health advised that the Claimant's cough had resolved but that he still had disrupted sleep and could be awake for an hour or two at times and had difficulty getting to sleep but this could be for a variety of reasons. They reported that the Consultant saw the sleepiness as more a case of disrupted sleep than sleep apnoea and an RVI letter at the end of May showed an excess of sleepiness was no longer a problem so he did not need sleep studies at that point in time (**pages 88-89**). The report was essentially telling Mr Todd that the Claimant was able to return to work as a bus driver as sleep apnoea appeared to have been ruled out. Mr Todd saw the report as positive. He was, of course, aware that the Claimant had been issued

with a notice of dismissal and that the date of termination was now only 12 days away. He did not raise this with the Claimant.

43. Therefore, having passed his refresher course and occupational health having confirmed he was able to drive, the Claimant returned to full duties. On 02, 03, 04 and 05 July he did a full shift driving his bus as normal. He took his 'lieu day' on 10 July and attended a training course, called a 'blue badge' course on 11 July 2019. He also drove as normal between the 5th and the 11th but It was not clear on how many days. However, in all, he certainly drove his bus for 5 days and attended a course during the period 01 to 12 July 2019. The 'blue badge' course was an essential full day course which he was required to attend and pass if he was to continue to operate as a bus driver. It is essential for renewal of a driver's 'blue badge' PSV certification. It was envisaged by Mr Todd that the Claimant would continue to drive a bus and he lined up the Claimant for attendance on the course on his return to work.

44. During Mr Todd's evidence Mr Todd confirmed that, as he saw things, the Claimant had returned to work on 01 July 2019 and was capable of doing the job; that had he not gone off on 12 July, his employment would have continued. We find, on the balance of probabilities, that as of 01 July 2019 and certainly by no later than 11 July 2019, Mr Todd's state of mind was that the Claimant had returned to work and that the notice of termination was not to take effect. That was also, we find, the state of mind of the Claimant.

45. In cross-examination Mr Todd said that, had he got a chance to talk to the Claimant after he returned to work on 01 July 2019, it would have been to say to him that his employment was continuing, although he added 'subject to medical evidence'. We find that Mr Todd's additional remark 'subject to medical evidence' was an afterthought for the purposes of defending the Respondent's position in these proceedings. Mr Todd already had, as a 'double check', the medical advice in the form of the Occupational Health Report of 01 July 2019. That was the whole point of sending him back to occupational health on 25 June in readiness for his return to work. Mr Todd had agreed on 25 June that, subject to medical confirmation by occupational health, the Claimant was to return to work. To suppose that these meetings, the occupational health reviews, the refresher training and the arrangements made for the Claimant's attendance on the 'blue badge' course, that all this effort was made simply to enable the claimant to return to work to see out the remaining days of his notice, is unrealistic. The effort was put in on the understanding that if he returned tor work with occupational health confirmation his notice was withdrawn.

46. We reject Mr Todd's evidence that he did not have a chance to speak to the Claimant to discuss whether his notice should be revoked or reviewed. He had ample opportunity to discuss it and it was, after all, an extremely important topic for both Mr Todd and the Claimant. As he well knew, the Claimant was desperate to continue in employment. Mr Todd also had the opportunity prior

to the 01 July 2019 during the Care and Concern meeting on 25 June 2019 to remind the Claimant that his employment was ending on 13 July 2019.

47. When asked in re-examination by Mr Nuttman what he would have done with regards to the 13 July date had he had a chance to speak to the Claimant, Mr Todd said that he would have reviewed it; that he would have given the Claimant a timescale of about 3 months as an indication for a sustained return to work. We reject this, again, as an afterthought for the purposes of defending the Respondent's position in the proceedings.

48. On 10 July 2019, the Claimant attended another appointment at the Royal Victoria Infirmary ('RVI') with Doctor Hilary Tedd, Consultant Respiratory Specialist. In her letter of 15 July 2019 (**pages 116-117**) Dr Tedd records a 'new diagnosis of severe obstructive sleep apnoea'. She said:

'*With regard to sleep apnoea, given that Mr Rogerson is a professional bus driver it is clearly imperative that we ascertain whether he has obstructive sleep apnoea or not urgently. As a result I have arranged for him to have a sleep study urgently at the Freeman – this has confirmed severe sleep apnoea. I am more grateful to my colleagues in the sleep service for setting him up on CPAP therapy the next day, given that he is a professional driver. He will be seen next week for clinical review with regard to his CPAP therapy and compliance.'*

49. The letter had been dictated 5 days after the visit which is why the doctor was able to refer to OSA having been confirmed. As alluded to in her letter, she saw the Claimant on 10 July and arranged an immediate referral to Mr James Oliver, Senior Respiratory Physiologist, later that same day. The Claimant went straight from Dr Tedd's office to Mr Oliver's consultation room.

50. Mr Oliver provided the Claimant a sleep monitor for him to use overnight and asked the Claimant to come back to see him the following day. The Claimant called Mr Todd from the consultation room to ask for time off to return to hospital on 11 July. However, Mr Todd declined the request because the Claimant was due to attend the blue badge training course. Therefore, the Claimant arranged instead for his son to return the monitor to Mr Oliver on 11 July.

The events of 11 July 2019

51. The Claimant attended work on 11 July 2019 to undertake the blue badge course. Mr Oliver called him that morning from the hospital. He told the Claimant that he had OSA and that he needed to start him on treatment straight away. He told the Claimant that he should not drive in the meantime and that he would monitor him for a week whilst on treatment. This was a blow to the Claimant. We accept the Claimant's evidence that Mr Oliver described it to him as a massive problem for the Claimant, given his occupation.

52. Without doubt, the most significant factual dispute between the parties is about what happened on 11 July 2019 and we must resolve that dispute. The Claimant says that he immediately reported the conversation he had with Mr Oliver to Mr Todd, explaining that Mr Oliver confirmed that he had sleep apnoea and a serious problem. When it was put by Mr Nuttman to the Claimant that Mr Todd denied any recollection of speaking to him on 11 July, the Claimant was incredulous in his response.

53. Mr Todd, in is evidence, said that the Claimant did not mention anything on 11 July about his discussion with Mr Oliver and that the first he got to know that he had a diagnosis of OSA was on Monday morning (15 July) when he came to the depot.

54. The Claimant did not attend work and self-certified on Friday 12 July 2020. He had to do this because Mr Oliver had told him he must not drive and he had not been offered any alternative non-driving duties. He went to see Mr Oliver that Friday and he was immediately started on CPAP (continuous positive airway pressure) therapy. This involves the use of the 'airways mask' referred to by the occupational health physician in the report of 25 April 2019 and the form of treatment which was familiar to Mr Todd. The Claimant was and still is required to use CPAP every night while asleep. In his evidence, which we accept, he described the effects of OSA and the benefits of the CPAP treatment. When he started using the mask he felt the benefits immediately. There was a couple of occasions when he did not wear the mask. He said he felt the effects of the OSA the following day after a night without use of the mask; that it was difficult to appreciate the sensation without experiencing it. It is as if his body closes down, that he is like a shell and he cannot function properly. Since then he uses the mask religiously.

55. On Monday 15 July 2019, the Claimant went to the garage/depot with his trade union representative, Malcolm Laws, to speak to Mr Todd. The Claimant updated Mr Todd on the views of Dr Oliver and Dr Tedd and explained that he was using the CPAP machine and that he was going back that week to get the results. He said that he expected to be back at work shortly after that, by 23 July 2019. Mr Todd said he felt this was optimistic and the Claimant said he still hoped to be back by then. The Claimant then left the depot. At no point during the conversation did Mr Todd raise the fact that the Claimant's employment had terminated on 13 July 2019 and at no point did the Claimant or his union representative ask what the position was with respect to his continued employment given the date of termination of employment of 13 July 2019 as set out in the notice of dismissal. If any one of the three men had considered that the Claimant's employment had terminated on 13 July 2019 we would have expected, at the very least, the subject to have been raised by one of them but especially by Mr Todd.

56. Mr Todd made a note of the 15 July 2019 discussion which is found at **page 91**. At the bottom of the page he has recorded the telephone number for Mr Oliver, which was given to him by the Claimant at that meeting. He then records that he rang the number on 22 July 2019 at 12.30 and again at 13.05pm but that there was no answer. The note refers to 22.09.19 but Mr Todd accepted that this should read 22.07.19. There is no reference in the note (even as a 'note to self') to the Claimant's employment having terminated on 13 July 2020.

57. If Mr Todd is to be believed and the Claimant did not speak to him on 11 July 2019, that would mean Mr Todd would have been entirely in the dark as to why the Claimant was absent on 12 July 2019. Mr Todd would have arrived at work that day to find the Claimant not there and with no explanation for his absence. In such circumstances he would, we expect, be bound to be curious. Yet, when he saw him on Monday 15 July 2019 he did not ask what happened the previous week, where he had been on Friday or why the Claimant had not spoken to him on Thursday before finishing work. Nor did he think to mention to the Claimant that his employment had ended on 13 July 2019 and that, as things stood on 15 July 2019 the Claimant was no longer employed by the Respondent. He did not mention any of this on Monday 15 July because Mr Todd regarded the notice as having been withdrawn and that the Claimant was, in fact, still an employee. He had also been told about Mr Oliver's call by the Claimant on 11 July 2019. By the time he met the Claimant on Monday 15 July he was aware that Mr Oliver had diagnosed OSA, albeit he only knew this from the Claimant. However, he had no reason to disbelieve the Claimant, who had been straight with Mr Todd throughout. If, on 15 July 2019, either Mr Todd or the Claimant or both had been of the view that his employment had terminated on 13 May 2019 it is surprising that Mr Todd agree to meet with him again and that he did so on 22 July.

58. We reject Mr Todd's evidence and accept that of the Claimant. We are in no doubt that, on 11 July 2019, the Claimant told Mr Todd about the conversation he had just had with Mr Oliver and that he had been told he had sleep apnoea which was said to be a serious problem for him. It would go against the grain of the Claimant's behaviour up to then for him to say nothing to Mr Todd. The Claimant had always kept Mr Todd informed of his health He had been back to work driving a bus on the understanding that his job was safe. The news from Mr Oliver was a serious blow to him. He was expecting to be at work the following day (Friday) driving a bus. He was now told he must not drive. It is exceedingly unlikely that he would have gone home that day without mentioning any of this to Mr Todd. Mr Todd was taken aback by the news – as he knew the impact it would have on the Claimant's ability to drive.

59. No arrangements had been made to stop the Claimant's pay by 13 July 2019. The Claimant, who was paid weekly, was paid up to 26 July 2019. During the hearing, the Respondent confirmed that payroll run was on a Tuesday for payment on a Thursday. A final payment was paid to the Claimant in August

(see **page 143**: the day is obscured but we infer it was 1st, that being a Thursday) in respect of the week commencing 21 July 2019.

60. Returning to the sequence of events as we have found them, the Claimant visited his GP on 19 July 2019 and was provided with a further fit note taking him up to 07 September 2019 (**page 102**). The fit note refers to: '*Obstructive sleep apnoea and therapy recently started. Work related diesel from exposure causing hypersensitivity cough awaiting therapy for*'. On the same day he saw Mr Oliver again. Mr Oliver's letter (**page 122-123**) was not typed until 17 September 2019. However, he confirmed the diagnosis of OSA. He said that he was pleased with the Claimant's progress and that it was early days in terms of treatment and that he was to be reviewed by the occupational lung clinic in September.

61. On 22 July 2019, the Claimant had yet a further meeting with Mr Todd at which he told him of the recent diagnosis, that he was being treated and that they would review the results and whether he could drive. He gave Mr Todd the fit note which was to take him to 07 September 2019. Still Mr Todd did not say that the Claimant's employment had terminated on 13 July. He took the fit-note and simply said: "I don't know where we are going to go from here". It was on this day that Mr Todd rang to speak to Mr Oliver, albeit without success (as noted on **page 91**). The Claimant was still being paid.

The letter of 26 July 2019 confirming the Claimant's dismissal

62. On 26 July 2019 Mr Todd wrote to the Claimant saying that the notice of termination of 13 April 2019 had not been revoked and that the Respondent considered his employment to have terminated on 13 July 2019 (**pages 92-93**).

63. In the letter, Mr Todd said among other things:

'Upon a return to work on 1 July 2019 you were examined by occupational health before taking up driving duties…. You were certified as fit to work.

- *You were able to return to work on 1 July and work until 12 July but unfortunately, you could not sustain the return.*

- *On 13 July you commenced sickness absence again, which was your last scheduled date of employment under your notice period. This has not yet been agreed to be revoked given our wish to see you maintain a return.'*

64. Mr Todd went on to say in the letter that he had reviewed whether or not it was appropriate to offer an extension to the Claimant's employment by agreement but in the circumstances decided against this.

65. The Claimant was surprised to receive the letter because as far as he was concerned, he had returned to work on full duties on 01 July 2019 and was again on sick-leave. He had been to see Mr Todd and submitted a fit-note. As far as he was concerned, that notice had been revoked.

66. Mr Todd said in evidence that he wrote this letter because the Claimant had come in on 15 July 2019 believing he was still at work. We reject this explanation. Mr Todd had gone on to meet the Claimant on 22 July 2019 and also attempted to call Mr Oliver to get an update on the Claimant's health. Mr Todd believed the Claimant still to be employed on 15 July 2019 and also on 22 July 2019.

67. Although Mr Todd said that he did not at any stage take advice from anyone, including his manager, Mr Bell, prior to writing the letter of 26 July 2019, we reject this evidence as highly implausible. We find, on the balance of probabilities, that Mr Todd sought and took advice from someone (who we do not know) about what to do with the Claimant and about the letter of 26 July 2019.

68. The Claimant was not offered any alternative duties whether at the point of issuing the notice of dismissal, during the period of his sickness absence or on 12 or 13 July 2019. No consideration at all was given by Mr Todd to alternative employment prior to the 13 July 2019, nor indeed between then or 26 July 2019. The Tribunal asked Mr Todd whether he actually gave any consideration to alternative employment. Mr Todd said that he did not. He said that he did not ask around the patch as he would normally do – the patch being other depots operated by the Respondent. In addition to the Sunderland depot, the Respondent has a depot at South Shields and 2 in Newcastle (and others further afield). When asked why he did not do this, Mr Todd put it down to oversight.

69. On 4 September 2019, the Claimant attended a consultation with Dr McFarlane at the RVI (**page 118-119**). He advised that he was safe to drive a car but that he should inform DVLA of his recent diagnosis and treatment. He was discharged from the Occupational Lung Disease Clinic. The Claimant was declared fit to drive a PSV from 4 September 2019, which was before the expiry of the fit note issued by his GP on 19 July 2019. His PSV license is reviewable and renewable on a yearly basis. He is required to use CPAP nightly. His nightly measurements are recorded digitally and retained on his medical records at the RVI, so they can be verified by DVLA to support his year to year PSV licence.

70. On 14 November 2019 DVLA wrote to the Claimant to say that they had written to his consultant on 24 September 2019 and that his case would remain on hold until the consultant report was received. On 11 December 2019, DVLA wrote again to say that from this point in time the Claimant is on a Medical Review

licence, renewable annually. On 24 December 2019 DVLA wrote to the Claimant's GP confirming this and that his diagnosis requires a regular medical review in order for him to be issued with a driving licence.

71. Mr Nuttman put to the Claimant in cross examination that he was deliberately withholding correspondence and information from the DVLA regarding his ability to drive – a matter in respect of which the Claimant was recalled to give evidence. We reject the suggestion that the Claimant was withholding or concealing anything. We are satisfied that he has been open and honest about matters and that he gave his evidence truthfully and in a measured way.

72. Under the DVLA Guidelines Accessing Fitness To Drive – Guide for Medical Professionals, [**page 141**] excessive sleepiness due to a medical condition including mild obstructive sleep apnoea syndrome has an automatic prohibition on a licence holder's ability to drive. Driving can only resume after symptom control and if it was not achieved in 3 months DVLA has to be advised because it could lead to a permanent restriction. The medical requirements for a group 2 licence holder (which includes Bus Drivers) are far stricter than for group 1 licence holders (normal drivers).

Relevant law

Termination of employment by notice

73. As a general proposition of law, once a party gives notice of termination of a contract of employment it cannot unilaterally withdraw that notice: **Riordan v War Office [1961] 1 W.L.R. 210**. The parties may, however, mutually agree that the notice is withdrawn and that the employment is to continue, notwithstanding the expiry of the notice period. In the absence of agreement, however, the notice will stand and the employment will terminate on expiry of the notice.

Implied contractual terms

74. Contractual terms may consist of implied terms. A term can only be implied if the tribunal concludes that it would have been the intention of the parties to include it at the time the contract was made. A term may only be implied if it is necessary to do so. Examples of where it may be necessary to imply a term tare where it is necessary in order to give the contract business efficacy, or because it is the custom and practice to imply the term in contracts of the particular kind, or that it is so obvious that the parties must have intended it. Sometimes a contract may be performed in such a way as to demonstrate that a particular term exists, even though it has not been expressed. However, as with all implied terms the exercise is to ascertain the intention of the parties when the contract was first made or, depending on the circumstances, at some subsequent point when it is argued that the contract has been varied.

Unfair dismissal

75. It is for the employer to show the principal reason for dismissal and that it is a reason falling within section 98(2) or that it is for some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

76. A reason for dismissal '*is the set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee*': **Abernethy v Mott, Hay and Anderson** [1974] ICR 323, CA. In a more recent analysis in **Croydon Health Services NHS Trust v Beatt** [2017] ICR 1240, CA, Underhill LJ said that the 'reason' for dismissal connotes the factor or factors operating on the mind of the decision maker which causes them to take the decision. It is a case of considering the decision-maker's motivation.

Capability

77. A reason which relates to the capability of an employee for performing the work he was employed to do is a potentially fair reason for dismissal (section 98(2)(a)). 'capability' is defined in section 98(3)(a) as capability assessed by skill, aptitude, health or any other physical or mental quality. An employee's ill health, may give rise to a potentially fair dismissal as it may relate to his capability to perform the work he was employed to do, for example, where the ill health leads to long-term or frequent short-term absences over a long period.

Reasonableness – section 98(4)

78. If the employer establishes the reason, the next step is to consider section 98(4) of the Act. Section 98(4) poses a single question namely whether the employer acted reasonably or unreasonably in treating the reason for dismissal as a sufficient reason for dismissing the Claimant. While an unfair dismissal case will often require a tribunal to consider what are referred to as 'substantive' and 'procedural' fairness it is important to recognise that the tribunal is not answering whether there has been 'substantive' or 'procedural' fairness as separate questions – they feed into the single question under section 98(4).

79. In **DB Schenker Rail (UK) Ltd v Doolan [**2010] UKEAT/0053/09 the EAT confirmed that the sufficiency of the employer's belief in the grounds for dismissal is governed by the **Burchell** test:

    79.1.1. It had a genuine belief that ill-health was the reason for dismissal;
    79.1.2. It had reasonable grounds for its belief;
    79.1.3. It carried out a reasonable investigation.

80. The approach to be taken when considering s98(4) is the well-known band of reasonable responses, summarised by the EAT in **Iceland v Frozen Foods**

Ltd v Jones [1983] I.C.R. 17. It is important that the Tribunal does not substitute its own view as to what was the right course of action.

81. A Tribunal is bound to have regard to events between the issuing of the notice and the date of dismissal for both the purposes of determining the reason for dismissal and in assessing the reasonableness of it for the purposes of section 98(4): **Alboni v Ind Coope Retail Ltd** [1998] IRLR 131, CA, para 12 per Simon Brown LJ.

82. In cases of ill-health capability dismissals, the EAT offered some guidance in **Spencer v Paragon Wallpapers Ltd [1977] I.C.R 301**, where Phillips J said:

"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?"

83. A number of factors will generally be relevant in considering the reasonableness of the employer's decision to terminate in ill-health cases: the availability of other staff to carry out the absent employee's work, the nature of the illness, the likely length of the absence, the cost of continuing to employ the employee, the size of the organisation, Further, the importance of consultation was stressed in the following passage from the judgment of the EAT in **East Lindsey District Council v Daubney** [1977] IRLR 181:

"Unless there are wholly exceptional circumstances, before an employee is dismissed on the ground of ill health it is necessary that he should be consulted and the matter discussed with him, and that in one way or another steps should be taken by the employer to discover the true medical position. We do not propose to lay down detailed principles to be applied in such cases, for what will be necessary in one case may not be appropriate in another. But if in every case employers take such steps as are sensible according to the circumstances to consult the employee and to discuss the matter with him, and to inform themselves upon the true medical position, it will be found in practice that all that is necessary has been done."

84. A reasonable employer should consider whether there is available any alternative employment which the employee may be able to do.

Disability

85. Section 6(1) EqA 2010 provides that "*a person (P) has a disability if P has a physical or mental impairment, and the impairment has a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities".*

86. The burden of proving disability lies on the Claimant (**Kapadia v London Borough of Lambeth [2000] IRLR 699 (CA)**).

87. The Equality Act 2010 states that "substantial" means *"more than minor or trivial"* (section 212). The "likelihood" of a substantial adverse effect lasting for 12 months must be assessed at the date of the act of discrimination.

88. Section B1 of the Guidance states, *"the requirement than an adverse effect on normal day-to-day activities should be a substantial one reflects the general understanding of disability as a limitation going beyond the normal differences in ability which may exist among people"*.

89. An impairment will be treated as having a substantial adverse effect on a person's ability to carry out normal day-to-day activities if:

89.1. Measures are being taken to treat it or correct it; and

89.2. But for the measures, the impairment would be likely to have that effect.

Section 15 Equality Act 2010: discrimination because of something arising in consequence of disability

90. Section 15 provides:

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

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

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

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

91. The focus of section 15 is in making allowances for a person's disability: **General Dynamics Information Technology Ltd v Carranza** [2015] I.C.R. 169, EAT, para 32. An employer cannot discriminate against a disabled person contrary to section 15 if, at the time of the unfavourable treatment, it did not know that the Claimant had a disability and could not reasonably have been expected to know that.

92. For a claim under section 15 to succeed, there must be something that led to the unfavourable treatment and this 'something' must have a connection to the claimant's disability. Paragraph 5.9 of the EHRC Employment Code states that the consequences of a disability 'include anything which is the result, effect or outcome of a disabled person's disability'.

93. In **Pnaisner v NHS England and anor** [2016] IRLR 170, the EAT summarised the proper approach to section 15. First, the tribunal must identify whether the claimant was treated unfavourably and by whom. It then has to determine what caused that treatment — focusing on the reason in the mind of the alleged discriminator, possibly requiring examination of the conscious or unconscious thought processes of that person. The 'something' need not be the sole reason for the unfavourable treatment but it must be a significant or more than trivial reason for it. In considering whether the something arose 'in consequence of' the claimant's disability', this could describe a range of causal links. This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.

94. There is no requirement that the employer be aware of the link between the disability and the 'something' when subjecting the employee to the unfavourable treatment complained of: **City of York Council v Grossett** [2018] I.C.R. 1492.

95. An employer will avoid liability under section 15 if it shows that the unfavourable treatment was a proportionate means of achieving a legitimate aim. In the EHRC Employment Code, paragraph 4.30 states that the means of achieving a legitimate aim must be proportionate. In deciding whether the means used to achieve the aim are proportionate the Tribunal is required to carry out a balancing exercise. To be proportionate a measure had to be both an appropriate means of achieving the legitimate aim and reasonably necessary: **Homer v Chief Constable of West Yorkshire** [2012] I.C.R. 704, SC, per Baroness Hale @ paras 24-25.

Sections 20-21 Equality Act 2010: failure to make reasonable adjustments:

96. The focus of section 20 EqA is on affirmative action: **General Dynamics Information Technology Ltd v Carranza** [2015] I.C.R. 169, EAT, para 32. The duty is set out thus:

> (3) 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.

97. It is imperative to correctly identify the 'PCP''. Without doing this, it is not possible to determine whether it has put the disabled person at a substantial disadvantage or what adjustments are required. The question that has to be asked is whether the PCP put the disabled person at a substantial disadvantage compared with a non-disabled person. The duty is triggered where an employee has become so disabled that he can no longer meet the requirements of his job

description: **Archibald v Fife Council** [2004] I.C.R 954, HL. In such a case, he is exposed to the risk of dismissal on the ground that he is no longer able to do the job he is employed to do.

98. The employer must take such steps as it is reasonable to take to avoid the disadvantage (section 20(3)). It is well established that 'steps' are not merely the mental processes, such as the making of an assessment but involve the practical actions which are to be taken to avoid the disadvantage: **General Dynamics Information Technology Ltd v Carranza**, @ para 35.

99. Any modification of, or qualification to, the PCP in question which would or might remove the substantial disadvantage caused by the PCP is capable of amounting to a relevant step under section 20(3). There is no requirement that the adjustment must have a good prospect of removing the disadvantage. It is enough if a tribunal finds there would have been a prospect of the disadvantage being alleviated: **Leeds Teaching Hospital NHS Trust v Foster** EAT 0552/10. The only question is whether it was reasonable for it to be taken.

100. As to comparators, in **Fareham College Corporation v Walters** [2009] IRLR 991, the EAT (Cox J) said:

"*in many cases the facts will speak for themselves and the identity of the non-disabled comparators will be clearly discernible from the provision, criterion or practice found to be in play*".

Knowledge of disability and disadvantage

101. In considering whether the employer can be said to be subject to a duty to make reasonable adjustments, the Tribunal must consider the knowledge of the Respondent. The law is clearly articulated in **Department of Work and Pensions v Alam** [2010] IRLR 283. The employer is not under a duty to make reasonable adjustments if it did not know or could not reasonably have known:

a. That the employee was a disabled person, and

b. That he was likely to be placed at a substantial disadvantage by the relevant PCP

Burden of proof

102. Section 136 EqA, otherwise known as the burden of proof provision, lays down a two-stage process for determining whether the burden shifts to the employer. However, it is not obligatory for Employment Tribunals to apply that process. Whether there is a need to resort to the burden of proof provision will vary in every given case. Where there is room for doubt as to the facts necessary to establish discrimination, the burden of proof provision will have a role to play. However, where the tribunal is in a position to make positive findings on the evidence one way or the other, there is little to be gained by

otherwise reverting to the provision: **Hewage v Gampian Health Board** [2012] I.C.R. 1054.

103. In cases where the tribunal is not in a position to make positive findings, s136(2) means that if there are facts from which the tribunal could properly conclude, in the absence of any other explanation, that A had harassed B, it must so conclude unless A satisfies it otherwise. In considering whether it could properly so conclude, the tribunal must consider all the evidence, not just that adduced by the Claimant but also that of the Respondent. That is the first stage, which is often referred to as the 'prima facie' case. The second stage is only reached if there is a prima facie case. At this stage, it is for A to show that he did not breach the statutory provision in question. Therefore, the Tribunal must carefully consider A's explanation for the conduct or treatment in question: **Madarassy v Nomura International plc** [2007] I.C.R. 867, CA; **Igen Ltd v Wong** [2005] I.C.R. 931, CA.

Submissions

104. Both representatives prepared written submissions which they supplemented with oral submissions. We hope to do no disservice to their submissions by not setting them out here. We took into account those written and oral submissions. We refer in more detail to some aspects of them in our conclusions section.

Discussion and conclusion

Implied term that notice would be rescinded

105. At the outset of the hearing when discussing the issues, we were rather sceptical of the Claimant's contention that his employment was not terminated on 13 July 2019 but in fact on 26 July 2019. We were initially dubious of the legal basis for contending that the Claimant's employment had not ended on 13 July 2019. The Claimant set out to persuade the Tribunal that there was a standard practice in all cases, as agreed with the Claimant's trade union, the GMB, that a notice of dismissal would be rescinded if the employee returned to work during the notice period (paragraph 5, page of the Details of Claim, **page 16** of the bundle). This standard practice was, Mr Ryan contended, incorporated into the Claimant's contract of employment (see issue 6, **page 37c**). He placed reliance on a letter of 03 March 2015 from the Respondent's managing director at the time to the Regional Officer of Unite (**page 59**). However, that letter does not support the argument that there was such a standard practice and agreement with the trade union that this would apply in all cases. We reject the argument that there was such an agreement or standard practice such as to be incorporated into the Claimant's contract of employment.

106. There was simply insufficient evidence to enable the Tribunal so to conclude. Indeed, we would be very surprised if any employer would agree to such a term.

Withdrawal of notice in the Claimant's case

107. However, that by no means disposed of the issue of whether the Claimant's employment had terminated on 13 or July or on some subsequent date. Mr Ryan submitted that the evidence showed that the notice had in fact been withdrawn. Mr Nuttman disagreed. We accept what Mr Nuttman says in paragraph 40 of his submissions that before a notice of dismissal can be withdrawn there has to be actual agreement or consensus – that is essential. However, we disagree that such agreement may not be implied by conduct and we disagree that it is not open to us to infer an agreement to withdraw from the conduct of the parties in this case.

108. We conclude that, as of 01July 2019, Mr Todd and the Claimant had agreed that the notice of dismissal issued on 18 April 2019 was withdrawn and that his employment was to continue beyond 13 July 2019. It was not expressed by Mr Todd to the Claimant in so many words but they both understood this to be the case. If we are wrong that they had agreed on this by 01 July, we have no doubt that they had so understood and agreed it by 11 July 2019 at the latest.

109. The analysis of the process by which people reach agreement on any given matter will vary from case to case. In some it will be easy to see where, when and how the parties reached agreement. In others it will be more difficult to determine whether any agreement has been reached and communicated. It is not always straightforward, or even necessary, to identify the precise mechanics of agreement. The essential question is whether the parties had agreed to withdraw the notice. We conclude that they had. We imply that agreement from their overall conduct from 18 April 2019 right up to 22 July 2019.

110. First there was the meeting on 18 April and the use of the word 'technically' in describing the 13 July 2019 as being the Claimant's last day of employment. We conclude that Mr Todd used that word for a reason. Proceeding on a misreading of the policy he believed he was 'technically' compelled by the attendance policy to issue notice after 12 weeks' absence so that 'technically' the Claimant's employment would end on 13 July. However, he did not believe that the Claimant's employment would necessarily terminate then. That would depend on what happened between then and 13 July. He had in mind the possibility that the Claimant might be fit enough to return to work during the notice period. That is what he intended to convey to the Claimant and that is how the Claimant understood it by use of the word 'technically' and by referring the Claimant again to occupational health. The letter of termination

differed from that issued in October 2017 and made no reference to the notice being rescinded should he return to work. The reason for the difference was that the position as of 18 April 2019 was less clear than in October 2017, when Mr Todd had a diagnosis, a date for an operation and a period of recovery identified in the occupational health report. There was more uncertainty in April 2018. However, in the weeks that followed, Mr Todd and the Claimant were keen to get an understanding of his prospects of returning with a view to saving his employment and they proceeded on the mutual understanding that if the Claimant was declared fit and returned to work in that period, the notice would be withdrawn and what Mr Todd regarded as a 'technical' dismissal would not take effect.

111. We conclude that it was at the meeting of 25 June 2019, that Mr Todd agreed, provided occupational health confirmed him as fit to work, that the Claimant would return and by implication, that the notice was withdrawn. This agreement to withdraw the notice was not set down in writing, nor was it spoken of in terms of it having been 'withdrawn', 'rescinded' or 'revoked'. Nor was the agreement as a result of any implied term in the Claimant's contract of employment based on standard practice or on any agreement reached between the Respondent and the GMB. It was simply the understanding that Mr Todd and the Claimant had come to on the facts of his case.

112. The Claimant was then confirmed as fit to work by occupational health on 01 July 2019. He then completed his refresher assessment and returned to work – on the now mutual understanding that the notice had at that point been withdrawn. They had, as Mr Todd had said on 25 June 2019 'taken it from there'. They did indeed take it from there: the Claimant went on to drive his bus on full shifts; he attended an essential course on 11 July 2019, being refused time off because it was an essential course; Mr Todd took no steps to ensure that his final pay was to be calculated to 13 July 2019; the Claimant continued to be paid after 13 July 2019.

113. The reality is that the Claimant and Mr Todd, in the context of what we are concerned with, are men of few words. By that we mean to say that we would not expect them to express themselves with precision. That is not to say that they are not capable of doing so. They could have done so. However, they are just as capable of communicating an understanding to each other by a combination of their use of language, by their actions, by their omissions and by their silence. It was, we conclude, so obvious to both of them that certainly by 11 July 2019 at the latest, the notice of termination of 18 April 2018 had been withdrawn that neither saw the need to directly express it verbally or in writing in those terms.

114. Contrary to the case advanced by the Respondent, we have concluded that there was no expectation in Mr Todd's mind, nor any agreement to the effect that the notice would only be withdrawn if the Claimant had demonstrated

a ‘sustained’ return to work. It was not explained what a ‘sustained’ return to work was or when it would have been determined. This notion of a ‘sustained’ return to work is something which we conclude only occurred to the Respondent to say after 22 July 2019, when on or shortly after that date, it was decided not to permit the Claimant to return to work and to contend that his employment had in fact terminated on 13 July. The Claimant’s fit note had expired on 16 June 2019. From then to 30 June 2019 he was on annual leave and occupational health had confirmed him fit to work on 01 July 2019. His pay was not stopped. Mr Todd confirmed in evidence that, by the time the Claimant went off on 12 July 2019 (following Mr Oliver’s call) as far as he was concerned the Claimant was staying in employment beyond 13 July 2019.

115. As far as both men were concerned then, as of 01 July 2019 the Claimant was back to work and declared medically fit to drive a bus. Mr Nuttman tried to rescue the situation in re-examination by asking what Mr Todd would have said had he had the chance to speak to the Claimant prior to 13 July 2019. However, we find that it was not a case of not having the time to speak to the Claimant. Mr Todd saw no need to speak to him because he knew that the Claimant understood his employment was to continue beyond 13 July 2019. That is why no arrangements had been made to stop the Claimant’s pay by 13 July 2019. The Respondent continued to pay the Claimant beyond 13 July and up to 26 July 2019. We conclude this payment beyond 13 July 2019 was not an error or oversight but was consistent with the reality: that the notice of dismissal had been withdrawn. Mr Todd saw no need to point out to the Claimant what both of them understood to be the case. Had Mr Todd felt that the Claimant believed that his employment was not to terminate on 13 July 2019 we would have expected him to have put the Claimant right on this. He did not. Had the Claimant believed Mr Todd to be proceeding on the basis that his employment was to terminate on 13 July 2019, we would have expected him to mention this to Mr Todd. He did not.

116. Further, we do not accept Mr Todd’s evidence that he would have said the Claimant needed to show a sustained return to work before the notice could be withdrawn or extended. There had never been any reference to the Claimant’s need to or his failure to ‘sustain’ a return to work before the letter of 26 July 2019 (**page 92**). There was no such expectation in Mr Todd’s mind. We find that was important to Mr Todd was a declaration from medical advisers that the Claimant was fit to drive a bus. That was the purpose in referring him to occupational health during the notice period – to see if the claimant’s employment could be saved.

117. We reject the Respondent’s contention that the letter of 26 July 2019 **page 92-93**) was simply subsequent confirmation of a contract which had terminated on 13 July 2019 and that it was written because it appeared to Mr Todd that, on 15 July 2019, the Claimant believed he was still an employee.

118. We infer that, after Mr Todd tried unsuccessfully to speak to Mr Oliver he took advice from others, probably at the very least his line manager. We infer that the letter was written on 26 July 2019 because the Respondent found itself in what it considered to be an unsatisfactory situation. The Claimant had been absent for some time while investigations were underway; he had returned to work in circumstances where both he and Mr Todd had disregarded the notice of dismissal. Yet now, here he was with the Claimant being unable to drive a bus due to OSA meaning they would have to start again to manage his absence. Although Mr Todd said in evidence that he did not take advice at any stage, we rejected this as implausible and highly unlikely. It is more likely than not, and we so concluded by inference, that Mr Todd took advice on the situation and on the content of the letter of 26 July 2019 on **page 92-93**. At that point it is likely to have emerged that the Claimant had not been formally notified that his notice had not taken effect. We mean no discourtesy to Mr Todd when we say that the following passage in the letter is unlikely to be his own creation: '*any notice of dismissal, once issued, cannot be revoked without the clear agreement of both parties. In the circumstances, your employment ended on 13 July 2019 and whilst I acknowledge your ill health, you have not worked, or presented yourself for work since that date*.'

Wrongful dismissal

119. The letter of 26 July 2019 was, in effect, a letter terminating the Claimant's employment with immediate effect. As such, the Respondent was, we conclude in breach of contract in failing to provide lawful notice of termination, having withdrawn the previous notice of termination issued on 18 April 2019.

120. Having arrived at our conclusions on the contractual issues regarding the termination, we turn now to consider the reason for dismissal.

Reason for dismissal

121. We conclude that the principal reason Mr Todd dismissed the Claimant on 26 July 2019 was that he had been absent from work on and after 12 July 2019 and it was believed that he would remain absent from work for a period of time as a direct result of his diagnosis of OSA. Mr Todd had also been influenced by the Claimant's previous absence record up to 18 April and between then and 01 July 2019. When looked at alongside his previous absence record, Mr Todd considered this state of affairs to be unacceptable to the business. That was, we conclude, the set of beliefs held by Mr Todd and which constitutes the reason for the Claimant's dismissal. The principal reason was one related to the capability of the Claimant for performing the work he was employed to do and therefore a potentially fair reason for dismissal within section 98(2)(a) Employment Rights Act 1996.

122. We now turn to the reasonableness of the decision to dismiss.

Unfair dismissal

123. Mr Todd gave notice on 18 April 2019, as he had back in October 2017, because the Claimant had reached the 12 weeks absence point and he did not believe that he had any discretion in the matter. Unlike October 2017, there was no reference in the April 2019 letter to the notice being rescinded should the Claimant return to work during the notice period. However, that is not to say that Mr Todd was not prepared to reconsider the position during the notice period should he be fit to return. In evidence he said that he would look at it. We conclude that his reason for not specifically refer to rescinding the notice was because as of 18 April 2019 there was no information before him that gave him reason to believe that the Claimant was likely to return to work during the notice period.

124. It would be easy to fall into the trap of concluding that as a reasonable employer would not have misinterpreted its own policy, believing that it lacked discretion that the decision to issue the notice of dismissal was unfair. However, a reasonable employer, interpreting the policy correctly and understanding that it had a discretion, could reasonably have issued the notice of dismissal in the Claimant's case on 18 April 2019 given that he had been absent for 12 weeks, with no sign of a return to work within a reasonable time frame.

125. We conclude that despite the unreasonable reading of the policy by Mr Todd, considered objectively, it was not outside the band of reasonable responses for Mr Todd to issue the notice of termination on 18 April 2010, especially bearing in mind that he had intended to keep matters under review during the notice period, as a reasonable employer would. It is the issuing of the notice of dismissal that we must consider. It was within a band of reasonable responses to give the Claimant notice of dismissal on 18 April 2019 (with or without a misreading of the discretion).

126. Mr Todd did keep the position under review thereafter and acted as any reasonable employer would. He met with the Claimant for updates and referred the Claimant to occupational health. When it came to the meeting on 25 June 2019 it looked as if the Claimant was able to return to work. All that remained, from the perspective of both Mr Todd and the Claimant, was for occupational health to confirm that the Claimant was fit to return to work. The position changed as of 01 July 2019, when the Claimant was in fact declared fit to work as a bus driver.

127. Having found that the Respondent and the Claimant had agreed that the notice was withdrawn following his return to work and upon confirmation from occupational health that he was fit to do so, we conclude that the Respondent acted unreasonably in then dismissing the Claimant on 26 July 2019. We

conclude from our findings that the Respondent, in writing the letter of 26 July 2019, was seeking to take advantage of the absence of any written or directly expressed statement from management that the notice of 18 April 2019 had been rescinded or withdrawn.

128. No reasonable employer, in the circumstances of this case, having already acted on the withdrawal of the notice of dismissal but then learning of the diagnosis of OSA, would have terminated the Claimant's employment without obtaining an up-to-date specialist medical report on the diagnosis of OSA and prognosis. No reasonable employer would, as we infer happened in this case, have taken advantage of the absence of a written or expressed statement of the withdrawal of the notice of dismissal.

129. A reasonable employer, acting reasonably, would have obtained that further medical update and would have discussed the position with the Claimant in light of that up-to-date medical information. It would seek to discuss what alternative duties there may be in the meantime, for example whether there was any opportunity for light duties to be undertaken. A reasonable employer would, prior to making a decision to dismiss, would have considered what alternative employment or light duties there were in the nearby depots.

130. The Respondent did none of this. In our judgement, its decision to dismiss was outside the band of reasonable responses of a reasonable employer.

131. We would add that, although confident of our conclusions, even if we were wrong as to the the notice of termination having been withdrawn, this would not affect our judgement that the dismissal of the Claimant was unfair. We have found as a fact that Mr Todd was made aware of Mr Oliver's diagnosis on 11 July 2019. A reasonable employer would not have allowed the notice to expire without further discussion or consideration in the circumstances of this case. By 11 July 2019, Mr Todd was fully aware that once diagnosed, with proper treatment (CPAP) a person could continue to operate effectively as a bus driver. He knew and understood this from his own experience. He had two drivers with diagnosed OSA operating effectively. He knew – and had been told by occupational health – that once treatment started, the use of the mask tended to result in quick improvements. Applying the law as stated in **Alboni v Ind Coope Retail** and considering the reasonableness of the decision to dismiss throughout the whole of the period right up to the date of termination, we are satisfied (even if we had held the employment to have terminated on 13 July 2019) that to allow it to do so without extending it so as to make further inquiries and discussing an extension of the period of notice in light of the further information would be outside the response of a reasonable employer.

132. We next consider the discrimination issues, beginning with the question of the Claimant's status as a disabled person within the meaning of section 6 Equality Act 2010 and the Respondent's knowledge of this.

Disability – was the Claimant a disabled person at the material time?

133. We conclude that the Claimant was a disabled person within the meaning of section 6 Equality Act 2010 and that he was disabled, on the balance of probabilities, from about mid-April 2019. On 01 March 2019 he was reporting shortness of breath on exertion quite easily (**page 69**). By 18 April he was reporting a lack of energy (**page 75**). By 25 April 2019 he had been reporting excessive tiredness and difficulty doing normal day to day activities (**page 79**). It is more likely than not that the effects of OSA on the Claimant were not immediate or sudden but had developed gradually over a period of time. He may not have felt the effects of OSA on a daily basis, but he experienced it on a sufficiently regular basis. The Claimant's main concern in the early part of his absence in 2019 was a cough and shortness of breath. Whether these symptoms were related to OSA we do not know. However, we conclude that by mid-April 2019 and certainly by 18 April 2019, the tiredness (which was subsequently attributed to OSA) had increased to such an extent that it was having a more than minor or trivial effect on his ability to carry out normal day to day activities. We accept what the Claimant says in paragraphs 3 to 13 of his impact statement (**pages 40-42**). The effects he describes would continue to this day were it not for the CPAP treatment. We also accept what the Claimant says in paragraphs 14 to 16 of his impact statement. It was not disputed that, untreated, OSA would mean that the Claimant would be unable to drive. As of 11 July 2019 (in addition to the adverse effects referred to above), he was unable to drive and remains unable to drive any vehicle as a direct result of the diagnosis. He can only drive subject to medical clearance which requires confirmation that the condition is being treated. He must apply on a yearly basis for renewal of his PSV licence.

134. Having regard to our findings, to the unchallenged impact statement and his oral evidence of the effect of OSA on him, we conclude that the OSA was a physical impairment which had a substantial adverse effect on his ability to do day to day activities (sleeping, walking, concentrating sufficiently to be able to play a simple board game and driving). The effects he describes were more than minor or trivial. They go beyond the normal differences in ability which exist among people. Given the long-term nature of OSA, we conclude that some of these effects were, as of 18 April 2019 likely to last at least 12 months and by 11 July 2019 all of those effects were likely to do so. Without doubt, the effects on his ability to drive would continue for at least that length of time. On 12 July 2019 the Claimant was started on CPAP treatment. Where an impairment is subject to treatment it is to be treated as having a substantial adverse effect if, but for the treatment, the impairment is likely to have that effect. Having been diagnosed with OSA on 11 July 2019, the Claimant was unable to drive. But for the treatment, as at 11 July 2019, the impairment was

likely to have resulted in him being unable to drive for at least 12 months. The alleged act of discrimination being the dismissal (whether that be 13 July or as we have found, 26 July 2019) we conclude that the Claimant was a disabled person at the material time.

Knowledge of disability

135. Neither Mr Todd, nor anyone else within the Respondent organisation could reasonably have known that the Claimant was a disabled person until late into the sequence of events. Mr Todd did not know and could not reasonably have known that the Claimant was a disabled person when he issued the notice of dismissal on 18 April 2019. However, we conclude that by 11 July 2019, Mr Todd could reasonably be expected to know that the Claimant was a disabled person within the meaning of the Equality Act. In arriving at this conclusion we have asked ourselves what did Mr Todd know before 11 July 2019? Up until that date he was aware that the Claimant had scored high on the Epworth score on 25 April 2019. He was aware of the matters reported in the occupational health report, i.e. that that had difficulty sleeping at night; that he fell asleep very easily during the day; that he had difficulty playing a board game; that he had difficulty walking even 5 minutes without becoming fatigued. He was aware that there had been investigations into whether the Claimant had OSA and that there were two different Epworth scores. Mr Todd also had an understanding of OSA as a long-term condition and had an understanding of the effects of the condition through other drivers. With all of this, we might have expected to conclude that even before 11 July 2019, Mr Todd knew (or could reasonably be expected to have known) that the Claimant's ability to carry out normal day-to-day activities was substantially adversely affected and that the length of such adverse effects was highly likely to exceed 12 months.

136. However, there was still uncertainty. On 17 May 2019, the Claimant had referred Mr Todd to what Mr Waldron had said and that he had recorded a lower Epworth score of 10 (within a normal range). On 16 June 2019 the Claimant's sick note expired. On 25 June 2019 the Claimant said he was returning to work after his holiday on 01 July 2019. Mr Todd then received the occupational health report on 01 July 2019 which confirmed that OSA appeared to have been ruled out. The Claimant then worked 5 full shifts without any apparent issues. We have considered all of this carefully. This is one of those cases where the diagnosis, unusually, was all important. Without the diagnosis, Mr Todd could not reasonably have known that the effects that the Claimant had been experiencing (which Mr Todd had never disputed) were likely to last at least 12 months. In light of the information he was provided with, the Respondent has satisfied us that it (Mr Todd in particular) did not know and could not reasonably have been expected to know, before 11 July 2019, that the Claimant had a disability. However, everything changed on 11 July 2019 when the Claimant explained to Mr Todd that Mr Oliver had confirmed the diagnosis of OSA and that he had a 'massive problem'.

137. We conclude that Mr Todd placed some weight on the existence or non-existence of a diagnosis. He referred to the situation back in October 2017 where there had been a 'diagnosis' of gallstones, contrasting that position with the lack of a diagnosis of OSA in 2019. He recognised the long-term nature of the condition. He understood that, without treatment, the Claimant would experience significant fatigue during the day and would be unable to drive. When he was told of this 'massive problem' on 11 July 2019, everything preceding then came together and made sense. As from 11 July 2019 we conclude that the Respondent has failed to show that it did not know and could not reasonably have been expected to know that the Claimant had the disability.

138. We next considered whether the dismissal was discriminatory.

Section 15: unfavourable treatment because of something arising in consequence of the Claimant's disability

139. There is no dispute that 'dismissal' of the Claimant constituted unfavourable treatment and that Mr Todd was the person who dismissed him. In accordance with the law as summarised in **Pnaisner v NHS** England, we must consider first what caused Mr Todd to dismiss the Claimant, focusing on the reason in his mind at the time he did so – asking whether he was consciously or unconsciously significantly influenced by 'something which arose in consequence of the Claimant's disability'.

140. We have concluded that the principal reason for dismissal was the absence and perceived future absence of the Claimant from work since 11 July 2019. It is also the case that the whole of the period of absence from 24 January 2019 consciously operated on the mind of Mr Todd. The absence of the Claimant from January to 18 April 2019 was not 'because of something arising in consequence of the Claimant's disability' because, on our findings, the Claimant was not disabled until about 18 April. However, he was disabled by 11 July 2019 and the most significant influence on Mr Todd's decision to terminate was the absence of the Claimant since that date and a perceived absence going forward. That is the 'something' for the purposes of section 15.

141. The next question is whether the Claimant's absence arose in consequence of his disability. We conclude that it did. The condition of OSA resulted in the diagnosis which led directly to his absence from work. In the absence of any other duties being allocated to him he was compelled to self-certify his absence from work. Having regard to paragraph 5.9 of the EHRC Employment Code, we conclude that the Claimant's absence from work on and after 12 July 2019 arose directly in consequence of the diagnosis his OSA. Once the diagnosis had been confirmed by Mr Oliver, the Claimant was unable to drive a bus (or any vehicle for that matter). But for the diagnosis he would not have taken self-certified sick leave on 12 July 2019 and would not have remained off work on 13 July and thereafter.

142. What led to his absence from work up to 01 July 2019 was more complicated because of the presence of a combination of factors: his cough and breathlessness, his OSA (albeit at that point undiagnosed) and a period of annual leave from 16 June 2019. From January 2019 to 18 April 2019, we are unable to conclude from the evidence that there was a sufficient connection between his disability (OSA) and his absence. However, from about 18 April 2019, based on our findings of fact above (see para 24 and the OH report of 25 April 2019) we conclude that there was a sufficient connection (in the **Grossett** sense) between his (as yet diagnosed) OSA and his absence to lead us to conclude that the Claimant's absence from 18 April 2019 up to 16 June 2019 (the first day of his annual leave) arose in consequence of his disability. There is a much stronger connection between the Claimant's disability and his absence from 12 July 2019 to 26 July 2019 (or 13 July 2019, that being, on the Respondent's case, the date of dismissal). In fact, but for the diagnosis of OSA the Claimant would not have been absent on 12 July 2019. His absence on that day and in the days thereafter was directly in consequence of the diagnosis – and the diagnosis was in consequence of the existence of OSA.

143. That Mr Todd, in deciding to dismiss the Claimant, was partly influenced by the absences up to 18 April 2019 does not detract from our conclusion. It is enough that the 'something' which arose in consequence of the Claimant's disability had a significant influence on the decision to dismiss. We conclude that it did. Indeed, the most significant issue for Mr Todd was the absence since 11 July 2019 and the anticipated future absence. In the letter of dismissal (**page 92**) Mr Todd expressly refers to the Claimant not having presented for work since 13 July and to the fact that he is certified unfit for work for 7 weeks.

144. Therefore, we conclude that the Claimant was treated unfavourably because of something arising in consequence of his disability. We would observe that our conclusion as to the date of termination makes no difference to this conclusion. Whether the dismissal took effect on 13 July 2019 by allowing the notice issued on 18 April 2019 to expire or, as we have found, on 26 July 2019, the position is that on both dates Mr Todd knew or could reasonably have known that the Claimant was disabled and by dismissing him, treated the Claimant unfavourably because of something 'absence' arising in consequence of his disability.

145. What remains to be determined is whether the Respondent has satisfied the Tribunal that dismissal of the Claimant was a proportionate means of achieving a legitimate aim, which we consider next.

Section 15 Equality Act: Justification

146. In seeking to justify the Claimant's dismissal, the Respondent advanced as a legitimate aim the need to run a reliable and regular bus service. We accept

that the Respondent had this legitimate aim in mind when it dismissed the Claimant.

147. The main issue was that of proportionality. Mr Nuttman submitted that the Respondent had advanced cogent evidence that the dismissal was proportionate. We respectfully disagree. The Respondent advanced no evidence on the question of proportionality. Mr Todd was the only witness called to give evidence at the hearing on behalf of the Respondent. We had no evidence as to the needs of the business at the date of or around the date of dismissal. We had no evidence as to the cost of recruiting and training a replacement. All that we had was the submission from Mr Nuttman that it is common sense that a bus driver must drive a bus and that the Respondent could not be expected to continue to operate with the Claimant being unable to drive a bus. Mr Ryan's response to this submission was that the position was a little more sophisticated than that.

148. If, by being more sophisticated than that, Mr Ryan meant that the Respondent is required to do more than simply advance a submission to satisfy section 15(1)(b), we agree with him. The law requires us to carry out a balancing exercise. We must consider the impact on the Respondent of continuing to employ the Claimant and weigh that against the impact on the Claimant of terminating his employment. We must carry out this exercise based on the evidence before us. The Claimant gave evidence of the impact of the decision to terminate his employment on him: the financial consequences and the effect on his well-being. The Respondent has provided no evidence of the impact on its ability to run a regular and reliable bus service. We do not accept the description given by Mr Nuttman in paragraph 35 of his written submissions that the Respondent had 'led clear and cogent evidence'. We accept that 'employees need to work' (but that goes for every business, large and small) and is no more than a self-evident observation that does not really take matters very far. We did not hear evidence from the Respondent on the issue of whether a bus driver's duties could be incorporated into another employee's role. Again, we are prepared to and do accept that only a bus driver (or another employee who is a bus driver) can drive a bus. Again, that is self-evident.

149. However, the Respondent was able to operate the same service during the period of the Claimant's absence. That there would have been a 'strain' on the Respondent in delivering that service we accept. However, the burden here is on the Respondent to show that the treatment (the dismissal) was a proportionate means of achieving the legitimate aim of providing a reliable and regular service. We know nothing at all of the extent of the 'strain' on the Respondent. We do not know how many other employees were absent or expected to be absent at the time of dismissal. We do not know to what extent the cost of paying the Claimant led to difficulties in providing a regular or reliable bus service. It is well established that it is not enough merely to make an assertion or submission that a dismissal was a proportionate means of

achieving a legitimate aim. There must be some evidence that this is so. In this case, the Respondent led no evidence and has failed to show the Tribunal that it acted proportionately by terminating the Claimant's employment. We accept the evidence of the impact of the dismissal on the Claimant in terms of the financial cost to him and the effects on his mental well-being. There was an option open to the Respondent in July 2019, which was to refrain from dismissing when it did, obtain further medical update on the effects on the Claimant of the CPAP treatment and afford the Claimant a further period of time to monitor the benefits of the treatment and get back to driving a bus (thus helping the Respondent achieve its legitimate aim of providing a reliable service). It was open to the Respondent to lead evidence to show that this would have been disproportionate; that the time and cost of doing so was unreasonable compared to the time and cost of recruiting a replacement; that they were already struggling to run buses to the timetables. That sort of evidence, which might be described as 'cogent' was entirely absent. We conclude that the Claimant's complaint of discrimination because of something arising in consequence of his disability succeeds.

150. We are conscious that the approach to justification under section 15 Equality Act 2010 and the approach to section 98(4) are different exercises. We also note the observations of the Court of Appeal in **O'Brien v Bolton St Catherine's Academy** (referred to by the Respondent's submissions in paragraph 36) that the two tests are objective and should not ordinarily lead to different conclusions. We emphasise that we have considered section 98(4) in its own terms recognising that there is no burden of proof on the Respondent to satisfy us that its decision to dismiss was reasonable. However, we are fortified in our conclusions on both unfair dismissal and section 15 discrimination in that both analyses have not led to dissonant conclusions.

Section 20-21 Equality Act: Failure to make reasonable adjustments

151. Mr Ryan submitted that the 'PCP' was the *'requirement for employees to consistently attend work and fulfil their duties'*; that this put the Claimant at a substantial disadvantage as he was unable to do this as a result of the diagnosis of OSA, which placed him at risk of dismissal. Those without his disability would not be placed at this disadvantage. Mr Nuttman accepted that this PCP was applied by the Respondent but submitted that there was no failure to make reasonable adjustments because the adjustments contended for were not reasonable, (should the Tribunal conclude that the Claimant was disabled).

152. We conclude that the PCP did place the Claimant at the substantial disadvantage of being exposed to the risk of dismissal. The identity of the non-disabled comparators is discernible from the PCP: they are other bus drivers without OSA – they would not be exposed to the same risk because they are not substantially disadvantaged by the basic requirement that they attend work to fulfil their duties.

153. As regards Mr Todd, we conclude that he knew, or ought reasonably to have known as of 11 July 2019 and undoubtedly by the date of dismissal on 26 July 2019, that the requirement for the Claimant to attend work and carry out the role of a bus driver was likely to place him at that substantial disadvantage compared to other bus drivers without his disability in light of the fact that diagnosis of OSA rendered the Claimant unable to drive until approved by medical experts and DVLA. We conclude that the Respondent was, therefore, under a duty to take such steps as were reasonable in all the circumstances to avoid the disadvantage.

154. The Claimant's case was that the Respondent was under an obligation to take such steps as were reasonable to avoid the disadvantage by rescinding or extending notice beyond 13 July 2019 and that the failure to do so constituted a failure to make reasonable adjustments or by failing to give him further time for the treatment to take effect prior to taking the decision to dismiss him. The submission that there had been a failure to rescind the notice had to be read as secondary to Mr Ryan's argument in oral submissions that the notice had in fact been withdrawn - either as a result of a term agreed with the GMB or implied by custom and practice, or by mutual agreement in this particular case as demonstrated by the conduct of the parties. Mr Ryan's primary contention was that the Claimant was dismissed on 26 July 2019 and that, in doing so, the Respondent failed to give the requisite 12 weeks' notice; that the Respondent, knowing of the disadvantage to the Claimant and understanding CPAP treatment to produce fairly quick results, should have allowed time for that treatment before dismissing on 26 July 2019.

155. In light of our conclusion that the Respondent did, in fact, withdraw or rescind the notice of termination issued on 18 April 2019, the complaint of failure to make a reasonable adjustment by failing to rescind the notice must fail in that there was no failure to make the reasonable adjustment contended for.

156. That left the other postulated adjustments in paragraphs 4.6.2 and 4.6.3 of the list of issues. Allowing the Claimant time for the treatment to take effect before taking any decision to dismiss on 26 July 2019 (i.e. refraining from or delaying any decision on dismissal) constitutes a 'step' within the meaning of section 20 EqA. The next question is whether it was a step which would avoid the disadvantage to the Claimant (the risk of dismissal). Applying the law as we understand it we have asked ourselves to what extent would the taking of this step avoid the disadvantage caused to the Claimant by the requirement to attend work to fulfil his duties? To what extent would this have been an effective step in enabling him to return to work to drive a bus? We conclude that by taking the combined steps of affording the Claimant some time for his treatment to take effect and obtaining further medical advice regarding his OSA, treatment and the likely timescale for return before taking any decision on dismissal, that

this would have had a prospect of avoiding dismissal. We so conclude based on the evidence that that other bus drivers who had a formal diagnosis of OSA were able to operate effectively while living with the ongoing treatment of CPAP therapy.

157. The Claimant had proved facts from which we concluded, as of 26 July 2019, there was a prospect of him being confirmed as fit to drive a bus following CPAP treatment in the near future. Based on the evidence we have heard and on our findings set out above, it was, in our judgement, reasonable to take the practical step of giving him further time for the treatment to take effect and to obtain further information from the medical specialist Mr Oliver or occupational health, prior to making a decision whether to terminate the Claimant's employment. We recognise that there would be a cost to the Respondent in doing so, through the continued payment of contractual sick pay. However, there was no evidence that this cost would have outweighed the alternative: namely, the recruitment and training costs of securing a replacement bus-driver. We have regard to the fact that all operations will operate to managed budgets but also that the Respondent is a substantial undertaking. In the end it is a question of judgement as to whether the steps were reasonable to take and we conclude that they were.

158. We conclude therefore that, at the time of the decision to dismiss, the Respondent had failed to take such steps (in particular those set out in paragraphs 4.6.2 and 4.6.3 of the list of issues on **page 37c**) as was reasonable in all the circumstances to avoid the substantial disadvantage to the Claimant by the application of the above PCP. Had Mr Todd taken those steps and obtained a clearer picture of the prognosis and when the Claimant might be expected to receive medical clearance to drive, there would have been a prospect that this would have avoided termination of the Claimant's employment.

Remedy

159. In light of our conclusions a remedy hearing will be necessary, at which the Tribunal will consider the Claimant's claim for financial losses and in light of the finding of unlawful disability discrimination, for an award of injury to feelings. The Tribunal will have to determine the chances that the Claimant might lawfully and fairly been dismissed after 26 July 2019.

160. We consider that it is right that we hear full evidence and argument on this aspect of the case. The Tribunal has found that as of the date of dismissal (the discriminatory act) the Respondent failed to make reasonable adjustments and, had it done so, there was a prospect of the Claimant's employment continuing. We have also found that the Claimant was fit to drive a PSV in September 2019 (that is not in dispute). This was not known at the date of dismissal. What we were not able to conclude was whether the Respondent might still have fairly and lawfully dismissed the Claimant at some point after 26

July 2019. We will need to hear further evidence and submissions on this. Whether the date of declaration of the Claimant's fitness to drive a PSV may have been any different had he not been dismissed on 26 July 2019 is something that will have to be addressed at the remedy hearing. The Tribunal will expect to hear evidence and full argument on the issues of 'Polkey' and its equivalent for the purposes of assessing compensation for discrimination: see **Abbey National plc v Chagger** [2010] I.C.R. 397, CA.

161. Directions for the Remedy Hearing will be issued separately from this reserved judgment.

Employment Judge Sweeney

26 January 2021

APPENDIX

Unfair Dismissal

(1) Did R have a potentially fair reason for dismissing C under section 98(2) ERA 1996?

(2) R contends that the potentially fair reason was capability;

(3) Did R have a genuine belief in C's lack of capability?

(4) Did R conduct a reasonable investigation, having regard to the circumstances of the case?

(5) Was the decision to dismiss within the band of reasonable responses open to a reasonable employer?

(6) If the dismissal was unfair due to procedural deficiencies to what extent would remedying those deficiencies have altered the outcome? What reduction should be made to any compensatory award under the principles of 'Polkey'?

Disability

(7) Is C disabled within the meaning of section 6 Equality Act 2010 by way of sleep apnoea and airway hypersensitivity cough?

(8) Was C disabled at all material times related to his claims?

(9) Was R aware or ought it reasonably to have been aware that C was a disabled person?

Discrimination arising from disability

(10) Did R treat C unfavourably because of something arising in consequence of his disability/disabilities?

(11) The unfavourable treatment complained of is dismissal;

(12) The something arising in consequence of his disability is his inability to attend work;

(13) If R did treat C unfavourably because of something arising from his disability can R show that this treatment was a proportionate means of achieving a legitimate aim?

Failure to make reasonable adjustments

(14) Was R under a duty to make reasonable adjustments for C?

(15) Did a PCP put C at a substantial disadvantage because of his disability in comparison with employees who are not disabled?

(16) It is C's case that the following PCP placed him at a substantial disadvantage: the requirement for consistent attendance at work to undertake the duties of his role (amended from the original list of issues, paragraph 4.3.1);

(17) Did R not know, or could R not be reasonably expected to know that C had a disability or was likely to be placed at the disadvantage?

(18) Did R take such steps as was reasonable to have to take to avoid this disadvantage in accordance with section 20(3) EqA?

(19) It is C's case that R failed to take such steps as was reasonable to avoid the disadvantage C faced by

a. failing to withdraw or rescind the notice of dismissal issued on 18 April 2019;
b. failing to give C further time for his treatment to take effect before taking the decision to dismiss him;
c. failing to seek further medical advice regarding his conditions, treatment and the likely timescale for return before taking any decision to dismiss him.

Wrongful dismissal

(20) Was C dismissed with notice in accordance with section 86(1) ERA 1996?

Breach of contract

(21) Did R have a standard practice, as agreed with the member's trade union (the GMB) that notice would be rescinded if an employee returned to work during the notice period?

(22) If R did have such a practice did this form part of C's contractual terms and conditions?

(23) If R did have such a practice which formed part of C's contract did R breach C's contract by failing to rescind the notice issued upon C's return to work?

Remedy

(24) If C's claims succeed, in whole or in part, is C entitled to compensation?