EMPLOYMENT TRIBUNALS

Claimant: Mr. L Bhusal

Respondent: Jaguar Land Rover Ltd

Heard at: Birmingham (hybrid – partly via CVP)

On: 25, 26, 27, 30 November, 1, 2, 3 December 2020

Before: Employment Judge Meichen, Mr. Khan, Mrs. Ellis

Appearances:
For the claimant: in person
For the respondents: Ms. Kight, counsel

JUDGMENT dated 3 December 2020 having already been sent to the parties and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided. Oral reasons were given at the end of hearing on 3 December 2020 and so these written reasons are based on a transcript of the recording of the oral reasons.

REASONS

Introduction

1. By his ET1 dated 19 May 2019 the claimant brought claims for unfair dismissal, direct disability discrimination, failure to comply with the duty to make reasonable adjustments (in relation to the claimant's disability of back pain), direct race/sex discrimination, harassment related to race and harassment related to disability.

2. The respondent accepts that the claimant was a disabled person due to back pain, anxiety and depression, a heart condition and hypertension. The respondent also accepts that they had knowledge of the claimant's disabilities. The tribunal had an agreed list of issues before it (which is reproduced below) and the parties confirmed this was a complete list of all the issues we were asked to determine.

3. This was a hybrid hearing. The Judge and the panel members attended the tribunal in person save for a few days when one panel member attended remotely. The parties, the representative and the witnesses all attended remotely. The claimant represented himself throughout the hearing but he has been instructing solicitors who we understand were continuing to provide him with some assistance.

Witnesses

4. The respondent's five witnesses all gave evidence and were cross examined.

5. The claimant also gave evidence and was cross examined.

6. The claimant had two witnesses. The first was Mr. Wilding. The tribunal read his statement but he did not attend to give evidence. The claimant told us this was because he had not been able to contact Mr Wilding for some time. We informed the parties that we would attach such weight as we could to Mr Wilding's statement in the circumstances. In the end the tribunal's view was that Mr. Wilding statement was of very limited evidential value anyway as he had left the respondent in October 2016.

7. The claimant's second witness was his partner. Just before she was due to give evidence, we received an email from the claimant explaining that he was extremely worried about her giving evidence as she is in the early stages of pregnancy.

8. We reviewed the position with the parties and we observed that the claimant's partner's statement gave evidence primarily to comment on the injury to feelings which she says she witnessed the claimant suffer as a result of his treatment by the respondent. This was essentially a remedy issue and we had already agreed with the parties that we would determine remedy separately after we had determined liability. As a result, it was agreed by all parties that we would read the claimant's partner's statement but take into account that it was not accepted by the respondent. The respondent indicated they would challenge the statement during cross examination at the remedy stage since it was not necessary to do so at the liability stage.

Possible amendment

9. At the start of the hearing, it was observed that the claimant's witness statement made reference to claims of whistleblowing. However, there were no such claims in the agreed list of issues which was based on the pleaded case and the claimant had not made any application to amend. The claimant was therefore asked if he wished to make an application to amend to include any whistleblowing claims. The claimant initially indicated that he may wish to make such an application. However, the tribunal pointed out that at the preliminary hearing on 19 June the claimant had clearly agreed that all the claims he wished to bring were in the list of issues. We observed that the claimant had been represented at that hearing. In light of that the claimant confirmed that he did not wish to apply to amend to include any claims for whistleblowing.

Issues with the evidence

10. During the first 3 days of the hearing both parties produced further documents which had not been disclosed earlier and which they wished to rely on. These documents were fairly limited in number and neither party

opposed them being added to the bundle. The tribunal therefore permitted the parties to adduce this further evidence.

11. At the start of day 4 of the hearing (which was a Monday) the claimant announced he wished to rely on 5 further documents which had not been previously disclosed and were not in the bundle. By this time the claimant had already completed giving his evidence. The claimant also mentioned that he wished to rely on an audio recording of a meeting with his trade union representative which he had covertly recorded prior to the dismissal meeting on 30 January 2019. The recording had not been previously disclosed either.

12. The tribunal explained the claimant would have to provide copies of all the new documents and provide the recording to the respondent prior to the tribunal considering whether the claimant should be permitted to adduce the new evidence. The tribunal informed the claimant that we would revisit the issue once the claimant had provided the evidence to the respondent.

13. By the end of day 4 of the hearing the respondent's evidence was complete and the tribunal raised the issue of the recording with the claimant. The tribunal wished to understand how long the recording was so that we could understand how long it may take to listen to. At that stage the claimant revealed that in fact the recording was not only of the meeting he had with his trade union representative but also the dismissal meeting which followed.

14. It seemed from what the claimant said that he was intending to edit the recording before providing a copy of it to the respondent. The tribunal made it clear to the claimant that this was not acceptable and that he must disclose the entire recording to the respondent. The tribunal also wished to understand why the claimant had not disclosed or even mentioned this recording any earlier. It was clearly potentially relevant and the claimant had been instructing solicitors throughout (albeit they were not actually representing him at this hearing). The claimant's explanation as to why he had not disclosed the recording any earlier was in our view unclear and difficult to understand. The tribunal concluded that he had this recording in his possession since 30 January 2019 but had failed to disclose it without any good reason.

15. We decided to finish early on day 4 so that the claimant could provide the new evidence to the respondent and the respondent could have some time to consider it overnight. We explained that if the respondent needed more time a request could be made at the start of day 5.

16. At the start of day 5 the respondent was ready to explain their position in response to the claimant's application to adduce further evidence. The respondent opposed the claimant's application. During the discussion which followed the following essential points were made on behalf of the respondent:

a. Firstly, the new documentary evidence was irrelevant.

b. Secondly, the recording of the claimant's meeting with his Trade Union Representative was irrelevant.

c. Thirdly, although the recording of the dismissal meeting was potentially relevant, on analysis the recording broadly matched the minutes of the meeting which were in the bundle and therefore it did not add anything.

d. Fourthly, it would be unfair to admit this evidence at such a late stage. It would cause disruption and delay including more costs. The respondent's counsel would need to take instructions from witnesses after they had heard the recording and the witnesses would have to be recalled. Realistically this would necessitate the case going part heard. This would all be disproportionate and not in accordance with the overriding objective, particularly as the claimant did not have a good reason for having failed to disclose the evidence any earlier.

17. In light of the respondent's position the tribunal decided that it was necessary to hear from the claimant in some detail about why he said the new evidence was relevant and why it should be admitted at such a late stage. We explained that as a professional tribunal we would be able to put the evidence out of our minds if we decided in the end that the claimant should not be permitted to rely on it.

18. As a result of these discussions with the claimant the tribunal decided firstly that the documentary evidence provided by the claimant was not relevant. In the main it related to issues which had arisen after the claimant's dismissal. We decided that the evidence would not assist us to determine any of the issues which we had to determine. We therefore decided not to permit the claimant to adduce this evidence. The inevitable delay and disruption this would cause would not be proportionate to the potential relevance of the evidence. We took into account the points raised by the respondent as summarised above and concluded that it would not be in accordance with the overriding objective to permit the claimant to adduce the evidence so late.

19. In relation to the recording, we went through this in a fair amount of detail with the claimant. Dealing firstly with the claimant's meeting with his trade union representative, we could not see how this was relevant as it was a private meeting between the claimant and his representative. Any issues which the claimant wished to rely on could and should have been raised in the dismissal meeting with the respondent.

20. Turning to the dismissal meeting itself and the claimant's recording of that, the tribunal wished to understand what the claimant may wish to rely on which was not contained in the minutes of the meeting that were already in the bundle. In our discussion it became clear that the points the claimant wished to rely on were in fact already contained in the minutes and the claimant accepted that was the case. We therefore decided there was no prejudice or unfairness to the claimant in refusing this application. Accordingly, we decided that it would not be in accordance with the overriding objective to permit the claimant to rely on this evidence and we therefore refused the claimant's application in relation to the audio recording of the dismissal meeting as well.

Our assessment of the claimant

21. We should at this stage refer to a particular point which arose in the discussion of the recording and the minutes of the dismissal meeting. In his oral evidence the claimant had said that in the dismissal meeting he made a comment to the effect that he was fit and ready to return to work if the respondent could arrange mediation and/or for him not to work with the people who were the subject to his grievance. When it was pointed out in cross examination to the claimant that that comment was not reflected in the minutes, he claimed that the minutes were inaccurate.

22. In the discussions over the recording however the claimant admitted that the recording did not demonstrate that he had said he was ready to return to work. Instead, the claimant explained, in terms, that his case was the respondent should have inferred from his complaint that nobody had asked him what roles he could do that he was saying he was fit to return to work. This complaint was already contained in the minutes. It was then that the claimant confirmed that the recording did not therefore add anything of relevance to the minutes which were already in the bundle.

23. The tribunal felt that what happened over the claimant's recording reflected badly upon the claimant and his credibility. He had covertly recorded not only the dismissal meeting but a meeting with his own representative as well. He had then failed to reveal those recordings despite his disclosure obligations and despite being professionally represented. The claimant had only revealed the existence of the recording on day 4 of the hearing, and even then he was not immediately straightforward about the full extent of it. He had no good reason for failing to disclose earlier and it seemed he had only done so when felt he may be able to deploy it to his advantage.

24. The claimant had also admitted that the recording did not support what he had said in his oral evidence about the contents of the meeting.

25. We took all of this into account when assessing the claimant's credibility, along with how the claimant had come across whilst giving his evidence. We found that he had regularly failed to answer questions directly and often tried to divert his answer away from the question he was being asked. This gave the impression that the claimant was being evasive and meant his evidence could be confusing, vague and difficult to understand.

26. For those reasons we found that the claimant was not a reliable witness.

The issues

27. We were provided with an agreed list of issues at the start of the hearing. The liability issues which we had to determine were as follows.

Time limits/limitation issues

28. Were all of the Claimant's complaints presented within the time limits set out in sections 123(1)(a) & (b) of the Equality Act 2010 ("EQA") / sections 23(2) to (4), and 111(2)(a) & (b) of the Employment Rights Act 1996 ("ERA")?

    Dealing with this issue may involve consideration of subsidiary issues including: whether there was an act and/or conduct extending over a period, and/or a series of similar acts or failures; whether it was not reasonably practicable for a complaint to be presented within the primary time limit; whether time should be extended on a "just and equitable" basis; when the treatment complained about occurred; etc.

    It was agreed that given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before 11 January 2019 was potentially out of time.

Unfair dismissal

29. What was the principal reason for dismissal and was it a potentially fair one in accordance with sections 98(1) and (2) of the Employment Rights Act 1996 ("ERA")?

30. Was dismissal for capability within the range of reasonable responses open to the Respondent?

31. If so, was the dismissal fair or unfair in accordance with ERA section 98(4), and, in particular, did the respondent in all respects act within the so-called 'band of reasonable responses'?

32. Did the Respondent consult the Claimant regarding the reasons for their absence?

33. Did the Respondent make reasonable efforts to facilitate the Claimant's return to work?

34. Did the Respondent reasonably believe that the Claimant was unfit to carry out their job (with any reasonable adjustments)?

35. Having regard to ERA section 98 (4) (a), the size and administrative resources of the Respondent, did it act reasonably in treating it as a sufficient reason for dismissing the Claimant?

36. Having regard to ERA Section 98 (4) (b); did the Respondent act in accordance with equity and the substantial merits of the case?

Direct discrimination – sex, disability, and race

37. Were the circumstances of Miss Asta[1] – race and sex; Mr Alberti (race) - and/or a hypothetical comparator materially the same as the Claimant's?

38. Has the respondent subjected the claimant to the following treatment?

[1] We believe the references in the list of issues to "Miss Asta" means Esther Haines.

a. Regarding “Miss Asta”, on 28 July 2017 – the claimant says that there were 4 or 5 “Managers”, all of whom were white males, supporting “Miss Asta” (an agency worker) in her dispute with him. Miss Asta is a white female, and C says this is less favourable treatment due to race (he is Asian) and sex. He does not know the names of the managers save one, “Bob Uzar”.

b. Dismissing him – this is said to be direct disability discrimination.

c. Refusing to offer the claimant an “off track” job up to the date of his dismissal – the claimant says this is race discrimination and his comparator is Daniel Alberti, who the claimant believes to be of white European origin and was given an “off track” job on 23 March 2015. The perpetrators of the discrimination in this case are said to be John Prendeville and Mick Turner.

39. Was that treatment “*less favourable treatment*”, i.e. did the respondent treat the claimant as alleged less favourably than it treated or would have treated others (“comparators”) in not materially different circumstances?

40. If so, was this because of the claimant’s sex/race/disabilities as appropriate and/or because of those protected characteristics more generally?

Failure to make reasonable adjustments

41. Did the Respondent apply the following as a provision, condition, or practice (“PCP”)?

a. Requiring workers including the claimant (from on or about 5 July 2017) to carry out work which involves a substantial amount of standing, lifting and/or carrying, and/or requiring them (and the claimant) to support other workers by activities which involve a substantial amount of those activities? The claimant alleges he made repeated requests for such work.

b. Throughout the claimant’s sickness absence and up to the date of his dismissal, failing to offer him alternative roles which would not involve substantial amounts of standing, lifting and/or carrying.

42. Did any such PCP put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled at any relevant time, in that: he was unable to do work which involved substantial amounts of standing, lifting and/or carrying due to his back pain?

43. If so, did the respondent know or could it reasonably have been expected to know the claimant was likely to be placed at any such disadvantage?

44. If so, were there steps that were not taken that could have been taken by the respondent to avoid any such disadvantage? The burden of proof does not lie on the claimant; however, it is helpful to know what steps the claimant alleges should have been taken and they are identified as follows:

    a. Allocating work which was not "track work" and/or did not involve significant amounts of standing, lifting and/or carrying.

    b. Permitting the claimant to continue in the "CME" role he was permitted to do in early 2017.

    c. Offering the claimant alternative roles (which did not involve substantial amounts of standing/lifting and/or carrying) and/or trial periods during his sickness absence.

45. If so, would it have been reasonable for the respondent to have to take those steps at any relevant time?

Harassment

46. Did the Respondent engage in any conduct related to disability and / or race, as follows:

    a. On or about 4 March 2013, did Scott Smith shout abuse and react aggressively when the claimant was working on the Gate House and stopped him from entering the site as his pas did not work (p11 of attachment to ET1, race related);

    b. On or about 1 February 2014, did Mick Perkins tell the claimant that his application to work on reception at the respondent's OH department was not being progressed because the claimant did not have excellent spoken and written English? (race)

    c. On or about 27 March 2015 (p15/16 attachment to ET1) did Mick Perkins knowingly fail to review the handling and physical burdens on the claimant when he was fitting parts to Jaguar model 760 and 761? (race related)

    d. On or about 24/02/16, did Group Leader Mike Auchinlade (?) say "If the back pain is that serious, I shouldn't come to work. Why are you here, then?" (disability related)

    e. On or about 3 April 2017, when C was working on CME, did John Prendeville approach him smelling of alcohol, and tell him he "had another job for him at the end of line 8"? (disability related)

f. On or about 5 July 2017, did John Prendeville tell C to take on a track job or be sacked, and pressurise him to be a support worker (p2 and 19/20, claim form attachment)? (disability related)

g. On or about 3 April 2017, did John Prendeville pressurise C to attend a WHA (Health assessment) meeting? (disability related)

h. On 28 July 2017 (see above) by managers supporting "Miss Asta" in her dispute with the claimant over a chair – race related.

i. On 28 July 2017, by Bob Uzar telephoning C when C was at a counselling session and rudely demanding to know where he was? (related to disability/race)

j. On 24 January 2019, continuing with a capability hearing? (disability related)

47. If so, was that conduct unwanted?

48. If so, did it relate to the protected characteristics set out above?

49. Did that conduct have the purpose (taking into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect) or effect of:

    a. violating the Claimant's dignity; or

    b. creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

A summary of the essential law to be applied

50. Firstly, we must bear in mind the burden of proof provisions of the Equality Act 2010 ("EA"). Section 136(2) Equality Act 2010 sets out the applicable provision as follows: "*if there are facts from which the court could decide in the absence of any other explanation that a person (A) contravened the provision concerned the court must hold that the contravention occurred".* Section 136(3) then states as follows: *"but subsection (2) does not apply if A shows that A did not contravene the provision".*

51. These provisions require the employment tribunal to go through a two-stage process in respect of the evidence. The first stage requires the claimant to prove facts from which the tribunal could conclude that the respondent has committed an unlawful act of discrimination.

52. The second stage, which only comes into effect if the claimant has proved those facts, requires the respondent to prove that he did not commit the unlawful act. That approach has been settled since the case of Igen Ltd v Wong [2005] IRLR 258 and has been reaffirmed recently in the case of Efobi v Royal Mail Group Limited [2019] IRLR 352.

53. It is also well established that the burden of proof does not shift to the employer simply on the claimant establishing a difference in status and a difference in treatment. Those bare facts only indicate the possibility of discrimination. They are not, without something more, sufficient material from which the tribunal could conclude that the respondent had committed an unlawful act of discrimination. These principles are most clearly expressed in the case of Madarassy v Nomura International plc 2007 [IRLR] 246.

54. In addition to the above case law has shown that mere proof that an employer has behaved unreasonably or unfairly would not by itself trigger the transfer of the burden of proof, let alone prove discrimination (see in particular the case of Bahl v The Law Society and others [2004] IRLR 799).

55. It is not necessary in every case to go through the two-stage process. In some cases, it may be appropriate simply to focus on the reason given by the employer ("the reason why") and, if the Tribunal is satisfied that this discloses no discrimination, then it need not go through the exercise of considering whether the other evidence, absent the explanation, would have been capable of amounting to a prima facie case under stage one of the Igen test. The employee is not prejudiced by that approach, but the employer may be, because the Tribunal is acting on the assumption that the first hurdle has been crossed by the employee (see Brown v London Borough of Croydon [2007] IRLR 259).

56. The claimant's direct discrimination claim falls under section 13 EA which provides that*: "a person (A) discriminates against another (B) if because of a protected characteristic A treats B less favourably than A treats or would treat others".*

57. Regarding the claimant's claim of a failure to make reasonable adjustments the relevant parts of the EA are as follows:

> *20 Duty to make adjustments*
> *(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.*
> *(2) The duty comprises the following three requirements.*
> *(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.*
> *. . .*
>
> *21 Failure to comply with duty*
> *(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.*
> *(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.*

Schedule 8, Part 3, paragraph 20
20. Lack of knowledge of disability, etc.
(1) A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know—
. . .
(b) in any case referred to in Part 2 of this Schedule, that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement.

58. In Environment Agency v Rowan [2008] IRLR 20 the EAT said that in considering a claim for a failure to make adjustments the tribunal must identify the following matters without which it cannot go on to assess whether any proposed adjustments are reasonable:

a. the PCP applied by / on behalf of the employer;
b. the identity of non-disabled comparators where appropriate;
c. the nature and extent of the substantial disadvantage suffered by the claimant.

59. The onus is on the claimant to show that the duty arises i.e., that a PCP has been applied which operates to their substantial disadvantage when compared to persons who are not disabled. The burden then shifts to the employer to show that the disadvantage would not have been eliminated or alleviated by the adjustment identified, or that it would not have been reasonably practicable to have made this adjustment. For the duty to arise, the employer must have knowledge of the disability and the substantial disadvantage.

60. A 'practice' involves an element of repetition - even if that is only in relation to one employee (Nottingham City Transport Ltd v Harvey UKEAT/0032/12). The concept of a 'PCP' does not encompass all one-off decisions made by employers during the course of dealings with particular employees. This was confirmed in the case of Ishola v Transport for London [2020] EWCA Civ 112. A practice must also be applicable to both the disabled person and his or her non-disabled comparators.

61. Regarding the claim of harassment section 26 EA states as follows:

(1*) A person (A) harasses another (B) if—*
(a) A engages in unwanted conduct related to a relevant protected characteristic, and
(b) the conduct has the purpose or effect of—
(i) violating B's dignity, or
(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B
. . .
(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—
(a) the perception of B;
(b) the other circumstances of the case;
(c) whether it is reasonable for the conduct to have that effect.

62. In GMB v Henderson [2017] IRLR 340, the Court of Appeal suggested that deciding whether the unwanted conduct "relates to" the protected characteristic will require a "consideration of the mental processes of the putative harasser".

63. The test as to whether conduct has the relevant effect is not subjective. Conduct is not to be treated, for instance, as violating a complainant's dignity merely because she thinks it does. It must be conduct which could reasonably be considered as having that effect. However, the tribunal is obliged to take the complainant's perception into account in making that assessment.

64. In the case of Land Registry v Grant [2011] EWCA Civ 769, [2011] ICR 1390, Elias LJ focused on the words *"intimidating, hostile, degrading, humiliating or offensive"* and observed that: *'Tribunals must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment.'*

65. Regarding the claimant's claim for 'ordinary' unfair dismissal the relevant parts of the ERA state:

> *94 The right*
> *(1) An employee has the right not to be unfairly dismissed by his employer.*
> *. . .*
> *98 General*
> *(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—*
> *(a) the reason (or, if more than one, the principal reason) for the dismissal, and*
> *(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.*
> *(2) A reason falls within this subsection if it—*
> *. . .*
> *(a) The capability of the employee for performing work of the kind which he was employed to do*
> *. . .*
> *(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—*
> *(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and*
> *(b) shall be determined in accordance with equity and the substantial merits of the case.*

66. It is for the respondent to show that the reason for dismissal was potentially fair. The potentially fair reasons for dismissal include capability which is the reason relied on in this case.

67. As with dismissals for other potentially fair reasons in a capability dismissal (which in this case is argued to be on account of ill-health absence) the tribunal must determine whether dismissal for such reason falls within the band of reasonable responses open to an employer. In these types of cases, the essential framework for the Tribunal to consider was set out by the EAT in Monmouthshire County Council v Harris EAT 0332/14. Her Honour Judge Eady observed: '*Given that this was an absence-related capability case, the employment tribunal's reasoning needed to demonstrate that it had considered whether the respondent could have been expected to wait longer, as well as the question of the adequacy of any consultation with the claimant and the obtaining of proper medical advice'*.

68. The need to consult and the need for an employer to establish the genuine medical position is crucial. This has been emphasised since at least the case of East Lindsey District Council v Daubney 1977 ICR 566.

69. Ultimately, we must consider whether dismissal fell within the range of reasonable responses open to a reasonable employer. We remind ourselves that it is not for us to substitute our own view for that of the respondent.

70. The band of reasonable responses test applies to all aspects of the dismissal process including the procedure adopted: Sainsburys Supermarkets Ltd v Hitt [2003] IRLR 23. As part of our decision making the tribunal will consider whether there were any procedural flaws which cause unfairness.

71. Guidance on that part of the exercise was given by the Court of Appeal in the case of OCS v Taylor [2006] ICR 1602, which clarified that the proper approach is for the tribunal consider the fairness of the whole of the disciplinary process. The Court stated that our purpose is to determine whether, due to the fairness or unfairness of the procedures adopted, the thoroughness or lack of it of the process and the open-mindedness (or not) of the decision-maker, the overall process was fair, notwithstanding any deficiencies at a particular stage.

72. The Court went on further to say that the tribunal should not consider the procedural process in isolation but should consider the procedural issues together with the reason for dismissal as it has found it to be and decide whether, in all the circumstances of the case, the employer acted reasonably in treating the reason it has found as a sufficient reason to dismiss.

The relevant law in relation to time limits and our approach to them in this claim

73. The date before which any issue viewed individually is out of time is 11 January 2019. This means the complaints relating to the claimant's dismissal are in time.

74. Section 123 Equality Act 2010 states:

> *123 Time limits*
> *(1) Subject to sections 140A and 140B, Proceedings on a complaint within section 120 may not be brought after the end of—*
> *(a) the period of 3 months starting with the date of the act to which the complaint relates, or*
> *(b) such other period as the employment tribunal thinks just and equitable.*
> *. . .*
> *(3) For the purposes of this section—*
> *(a) conduct extending over a period is to be treated as done at the end of the period;*
> *(b) failure to do something is to be treated as occurring when the person in question decided on it.*
> *(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—*
> *(a) when P does an act inconsistent with doing it, or*
> *(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.*

75. The claimant relied on there being a "continuing act" - in the sense that the individual acts he is complaining of should be viewed as sufficiently similar to constitute conduct extending over a period.

76. The effect of the claimant's argument is that he says that the acts which occurred prior to 11 January 2019 should be treated as part of the same course of conduct as the acts occurring afterwards and therefore all acts of discrimination are in time. This argument can only succeed if we find there are acts of discrimination which are in time.

77. The respondent disputes that the acts complained of by the claimant can be classed as a continuing act. The allegations concern different individuals to those responsible for the matters giving rise to allegations during the period that is in time. There is also a long gap between the earlier allegations and those around the time of dismissal.

78. We think it is appropriate to focus firstly on the allegations which are in time. The in-time allegations include the allegations relating to the claimant's dismissal and therefore on any view they incorporate the most important matters in this claim. If we uphold any of the allegations which are in time, we will consider whether there has been a continuing act.

79. If we do not uphold any of the in-time allegations (or we find there has not been a continuing act) we will consider whether there should be an extension of time on just and equitable grounds. If we conclude in the claimant's favour on that point then we will consider the out of time allegations in detail.

Our findings of fact

80. We made the following findings of fact which we found necessary for us to properly determine the issues which were before us.

81. The claimant was employed by the respondent from 27 October 2008 until he was dismissed for the stated reason of capability with pay in lieu of notice with effect from 30 January 2019.

82. When the claimant was initially employed by the respondent he was hired as a First Line Officer working at one of the respondent's gatehouses. This was a role in the Business Protection Department and the purpose of the claimant's role was to protect the respondent's assets and maintain a safe environment for colleagues and visitors. He was responsible for allowing people in and out of the organisation and his tasks involved checking ID passes and patrolling the site.

83. On 1 March 2015 the claimant transferred to a position on the respondent's assembly line. That came about as the claimant had volunteered for such a position. In 2016 the claimant transferred to a different part of the assembly line which was the door line. Again, that came about as the claimant volunteered for that position.

84. On 25 February 2016 the claimant went off sick. He returned for a short period of time in April 2016 and again in July 2016 but he was otherwise off absent through sickness until 10 November 2016.

85. On 5 January 2017 the claimant was put on the respondent's restricted workers program which was in recognition of the fact that he was only fit for restricted duties as a result of problems with his back. The claimant was then given a number of roles which did not involve heavy lifting, carrying, bending or standing for long periods of time. In this period the claimant was under sick notes from his GP which confirmed he was fit for work but with restrictions.

86. In July 2017 the claimant was moved to a position on the IPT section of the production line. Although this role was on the production line it took account of the claimant's restricted worker status. The claimant was essentially doing light duties; he was involved in placing stickers on cars and doing some electrical testing. In that role he was not required to do any substantial amount of carrying or lifting or bending or standing. He was provided with a chair that he could use at his workstation in order to assist him to manage his back condition.

87. There were issues with the claimant's access to that chair however. In particular on 28 July 2017 the claimant realised that his chair had been taken and replaced with a broken chair. The person who had swapped the chair was Esther Haines. The claimant believed it was not the first time she had done that, and he was plainly upset and aggrieved that his chair had been taken and replaced with the broken one. When the claimant went to get his chair back from Esther Haines, she said it didn't belong to him and there was a confrontation between them.

88. On 9 August 2017 the claimant was signed off as unfit for work with stress, anxiety and depression. He then remained signed off as not fit for work until his dismissal in January 2019; nearly 18 months later. The claimant did not return to work for the respondent at any stage prior to his dismissal.

89. The claimant's GP actually signed him off as unfit for work for a considerable time after he had been dismissed; until at least July 2019.

90. During the period that he was still employed by the respondent the claimant was signed off with back pain and hypertension in addition to the conditions of stress and anxiety.

91. On 6 September 2017 the claimant raised a grievance. In his grievance the claimant made allegations of race and disability discrimination and harassment amongst other matters. The grievance was lengthy and detailed. The claimant was plainly aware of his rights; indeed, he specifically referred to the possibility of him bringing an employment tribunal claim.

92. On 1 November 2017 the claimant attended an attendance review meeting. That meeting was conducted by Stuart Codwalleder and it was explained at the start of the meeting that the purpose was to discuss how the claimant was, and what the respondent could do to support him to get back to work. At the meeting Mr Codwalleder checked that the claimant was happy with his trade union representation and asked him to explain in more detail what his work-related stress was related to. In addition to explaining the problems which he had experienced at work the claimant also explained some personal issues which were making things difficult for him outside of the work environment.

93. The claimant attended a grievance meeting on 21 June 2018 and he was then given feedback at a meeting on 13 September 2018. This was followed by an outcome letter sent on 17 September 2018. The outcome was the grievance was not upheld.

94. The claimant appealed the grievance decision through 2 different appeal stages but was unsuccessful at each stage. The claimant's appeal rights in relation to his grievance were effectively exhausted by 23 January 2019, when he was told that his stage 3 grievance appeal had been unsuccessful.

95. We regard the delay in dealing with the claimant's grievance as unsatisfactory. In our view the delay was substantial and we were not provided with an adequate explanation for it.

96. During his period of absence, the claimant attended numerous appointments with occupational health and they generally recorded their view as being the same as the claimant's GP, i.e., the claimant was not fit for work. However, the exception to that was on 25 July 2018 when the claimant attended a further occupational health appointment and they at that stage expressed a different view which was that the claimant was fit for work but that he could not return due to the grievance issues.

97. This was discussed with the claimant at a further attendance review meeting on 15 August 2018. The claimant was expressly asked at that meeting if he agreed that he was fit to return to work. The claimant said that he was going to go with the advice from his doctor. As we have recorded the claimant's doctor's position was that the claimant was unfit for work. We regard this as a clear indication that the claimant's position was that he wanted to follow the advice of his GP; in other words, his view was that he was not fit for work.

98. On 20 September 2018 the respondent made an occupational health capability referral. The purpose of this referral was to establish if the claimant was fit to return to work in any capacity. The occupational health doctor produced a capability report on 24 January 2019 following a meeting with the claimant that same day. That report recorded the occupational health view that the claimant was not only unfit for a full role but he was also unfit for a restricted role or a gradual return to work. Furthermore, the doctor was asked if it was conceivable that the claimant could return to work in a reasonable time period. His response to that was that he thought there was no feasibility of a return to work for the claimant. The doctor made reference to the claimant's sense of injustice over his grievance issues, and identified that as a barrier to return in conjunction with the claimant's health issues.

99. We should note at this stage that the claimant disputes the contents of the occupational health doctor's report of 24 January 2019. In particular the claimant asserts that his position during the consultation with the doctor was that he was fit and ready to return to work, but this was not recorded in the report. We do not accept the claimant's evidence on that point for the following reasons:

(i) Firstly, there is no reason at all for the occupational health doctor to misrepresent the situation.

(ii) Secondly, the report explains that the claimant was given an opportunity to read it and point out any errors, but he never identified this alleged omission.

(iii) Thirdly, the key parts of the report were read out to the claimant at the meeting on 30 January and he did not dispute the contents of the report at that meeting either.

(iv) Fourthly, the contents of the occupational health's doctor's report are consistent with the views of the claimant's own GP which the claimant had already indicated he wished to follow.

100. Following the occupational health report, the claimant attended a capability meeting on 30 January 2019. At that meeting the claimant, who was represented by his trade union, did not challenge the occupational health view. What he instead did was to point out that he had not had the opportunity to trial roles at the respondent during the period of his absence. It was, however, unclear what the purpose was of the claimant

making this point and in fact his trade union representative simply said that they wished for it to be recorded.

101. In our view the reason why the claimant had not trialed any roles during his period of absence was clear and obvious. It was because he had been signed off as not fit to work and there was no indication that he might be fit for work on restricted duties or with other adjustments in place. As we have already outlined when occupational health expressed the view that the claimant might be fit for work, he said that he wished to instead to follow the view of his doctor who said he was unfit for work. We do not think that the respondent could reasonably be expected to infer from the claimant's assertion that he had not been offered trial roles that the claimant was in fact suggesting that he was fit for work. We do not understand why if that was in fact the claimant's position he simply didn't clearly say so. We take into account the claimant was represented by his trade union and if that was indeed his position, we consider it would have been easy for him to say so, either directly himself or through his representative.

102. We find that the reality is that the claimant did not as part of this meeting or at any point leading up to this meeting say that he was fit to return to work either at all of with adjustments. The claimant did not suggest that he may be able to return with mediation or if he was to work at a different part of the plant away from those who were the subject of his grievance.

103. In fact, we find that the claimant expressed views in the meeting of 30 January which strongly suggested he was not ready to return even disregarding the effects of his medical conditions. In particular the claimant commented at the meeting on 30 January that he didn't have faith in the company, that he didn't trust management anymore and that he was feeling like he didn't want to be there. In our judgement the respondent was reasonably entitled to think of those assertions as evidence that the claimant was not really in a position to even consider returning to work.

104. In light of all of that at the end of the meeting Mr. Taylor, who was the respondent's decision maker, announced his decision to dismiss. That decision was subsequently confirmed in writing. Mr. Taylor's conclusion was that the claimant should be dismissed on the grounds of capability as there was no foreseeability of a return to work date and the claimant had already been absent for nearly 18 months.

105. The claimant appealed the decision to dismiss him by a letter dated 6 February 2019. In his appeal letter the claimant asserted that he was at that stage ready, able and willing to return to work with adjustments. We are satisfied that was a complete change in his position and that was not a view that he had expressed at any earlier stage. We find that change in position was not supported by any medical evidence and indeed it was contradicted not only by occupational health but by the claimant's own GP who, as we have already explained, had signed him off as not fit for work for the entirety of the period leading up to the dismissal (and also post dismissal at least up until July 2019). In the period we are concerned with the claimant's GP, whose view he had said he wished to follow, had never

recorded a view that the claimant may be fit to return to work with adjustments or anything of that nature.

106. Mr. Barker, who heard the claimant's appeal, first met with the claimant on 4 March 2019. We should say that, following the case law guidance that we have outlined already, when considering the process of this case we have taken account of the entirety of the process up to and including the appeal. In this case we felt that the appeal process was notably thorough and it was right that it was so thorough in view of the claimant's apparent change in position regarding his ability to return to work in his appeal letter. We think Mr Barker acted entirely reasonably in attempting to establish why the claimant was saying that and if it was supported by any medical evidence. It was a reasonable approach as Mr. Barker had to consider whether what the claimant was saying was in fact realistic.

107. Mr. Barker's task however was made much more difficult because, despite the view which he had expressed in his appeal letter, at the meeting on 4 March the claimant became equivocal about what he actually wanted following his appeal. As a result of the claimant's ambivalence, it was unclear whether he was saying he could return to work and wanted to do so, or not.

108. We reviewed the notes of the 4 March meeting in some detail and also heard considerable evidence about the meeting. What is clear to us is that during the meeting Mr. Barker directly and repeatedly asked the claimant what he wanted as an outcome. In light of what had been said in the claimant's appeal (and again taking into account that the claimant was represented by his trade union) we would have expected the claimant to clearly say that he wished to return to work (probably in a restricted role) as he now believed he was able to do so. However, the claimant did not clearly say that and Mr Barker was plainly left confused by the claimant's failure to directly state his position and in particular his failure to clearly assert that he wished to return to work.

109. In the meeting on 4 March the claimant said that he was still experiencing pain and stress and anxiety and he was also still concerned about his grievance. The claimant raising those concerns did not support the suggestion that he was well enough to return to work. In light of this lack of clarity Mr. Barker quite reasonably, and in our view quite rightly, sought further advice from occupational health.

110. The occupational health doctor's views were first expressed in emails of 7 March in which he suggested the claimant may respond to treatment for his back condition but a return to work remained unlikely due to the claimant's mental health condition and his sense of injustice and loss of trust. The occupational health doctor's view was then confirmed following a further consultation with the claimant on 28 March. In the report following that consultation the occupational health doctor again confirmed his view that the claimant was not fit for work and there was no foreseeable return to work. The report referred to the claimant continuing to experience high levels of perceived back pain which he was unable to cope with, his mood being very low and him still being distressed by the grievance.

111. Plainly this report was inconsistent with the claimant's assertion in his appeal letter that he was fit and ready to return to work. In light of that new evidence Mr. Barker held a further meeting with the claimant on 10 April where he set out the occupational health view and responded to the claimant's appeal points. We were impressed with the level of detail which Mr Barker went through when dealing with the claimant's individual appeal points. We think this was a thorough appeal which properly and reasonably answered each of the points which the claimant had raised. Mr. Barker had reasonably sought to clarify matters which were unclear as a result of the confusion over the claimant's position.

112. A particularly important clarification in our judgement was that Mr. Barker confirmed that although the claimant was being considered for a return to work on the production line that included adjusted production line roles, which is what the claimant was doing prior to going off sick. What that meant was that, if he returned, the claimant would be in a production line role but the role would be light duties or otherwise adjusted so that it was suitable for the claimant to undertake. We mention that point in particular because the claimant has throughout these proceedings sought to characterise the respondent's position as being that he was only being considered for a return to a full non-adjusted production line role. We do not think that was an accurate characterisation. There was never any suggestion that the claimant would be taken off the restricted worker program if he returned, or that he would be required to work in a role which was not adjusted for him.

113. It seems clear to us that the decision the claimant should be placed on restricted duties had been taken prior to him going off sick and there was never any indication that decision was going to be reversed.

114. The claimant said to Mr. Barker on 25 March was that he could only see himself returning to a production role once his back had been treated and once his stress levels were down. He did not put forward any timescales to when he thought that may happen. Taking the claimant's position into account in conjunction with the occupational health view which we have already outlined Mr Barker therefore concluded that there was in fact no new evidence suggesting a return to work was possible for the claimant within any foreseeable timescale and he therefore decided he would dismiss the claimant's appeal.

115. We shall now turn to make our findings on the claims which are or may be in time.

Our findings on the claim of direct disability discrimination

116. The claimant relies on dismissal as the less favorable treatment. In our judgement the claimant has not presented any evidence to show a prima facie case that the reason for dismissal was disability. We have not made any findings of the fact which we could infer that the reason for dismissal was disability.

117. We consider that there is a clear reason for dismissal which is not disability; that is the respondent's finding that the claimant was not

capable of doing the work he was employed to do. That finding was supported by: the fact that the claimant had been off work for nearly 18 months, the medical evidence from the claimant's own GP, the medical evidence from occupational health and that fact that the claimant himself was at best equivocal over whether he would be able to return to work.

118. We therefore accept that the reason for dismissal was the finding that the claimant was not capable of doing the work he was employed to do. In the circumstances the claimant has failed to show a prima facie case of discrimination. Moreover, we are entirely satisfied that a non-disabled person who was similarly incapable of work would also be dismissed. The treatment was not therefore less favourable and it was not because of the claimant's disability. Accordingly, this claim must fail.

Our findings on the claim of direct race discrimination relating to the respondent failing to offer the claimant an "off track" position

119. The claimant complains that on 23 March 2015 Daniel Alberti, who the claimant believes to be of white European origin, was given an "off track" job whereas the claimant, an Asian employee, was not. The perpetrators of this discrimination are said to be John Prendeville and Mick Turner. The claimant seeks to argue there was an ongoing failure to provide him with an off-track role right up until the date of his dismissal.

120. Our understanding is that the difference between on and off track position is as follows. On track positions are roles on the production line. Off track positions are roles when the employee works on the car after the vehicle has come off the production line. Such roles typically involved testing the various features of the cars. The respondent's evidence, which we accept, was that such roles are desirable and tend to be given to employees with long service in consultation with the trade union. The claimant's evidence, which we also accept, was that when he first applied for a production role in 2015, he was hoping to be placed in an off track role. As we have already outlined however that did not happen and the claimant was instead assigned to work initially on line 6 and then on the door line department.

121. Applying Section 123 Equality Act we think the failure to place the claimant in an off track role must have occurred when the decision was made to put him in an on track position. That was in March 2015.

122. The claimant has not produced any evidence supporting his assertion that he made any subsequent requests to be removed from an on-track position and we do not accept that he did so. The respondent did not at any stage do anything inconsistent with its decision to move the claimant to on rather than off-track. We therefore find that this allegation is out of time (by around 2.5 years) and cannot be said to be ongoing until the date of dismissal. However, we considered the merits of the claim anyway as the claimant had asserted it was in time.

123. The claimant has not presented any evidence which could indicate that the reason why he was not given an off-track role was race. We have not

made any findings of fact from which we could infer that the reason was race.

124. In any event the respondent was able to conclusively show that there was a clear non-discriminatory reason for why the claimant was not moved to an off track position. This was because of a need for those people working off track to have a valid driving license - which the claimant did not have. The claimant accepted through his union during the grievance process that was in fact the case.

125. In those circumstances we are entirely satisfied that there was a non-discriminatory reason as to why the claimant could not work in an off track role and why one was not offered to him. An employee of a different race who also did not have a driving license would not be given an off track role either.

126. This means that we must conclude that there was no less favourable treatment and the treatment complained of was not because of the claimant's race. Accordingly, this claim would fail even if it was not out of time.

Our findings on the claim of harassment by continuing with a hearing on 24 January 2019

127. The only allegation of harassment that is in time is that on 24 January 2019 the respondent continued with a "capability hearing" and this is alleged to be disability related harassment.

128. The only meeting which took place on 24 January is the consultation between the claimant and the occupational health doctor which we have already described.

129. The claimant has not provided any evidence to substantiate the assertion that this meeting may have constituted an act of disability related harassment. In fact, the tribunal was unclear as to why the claimant may have believed it to be an act of harassment. In his witness statement at paragraph 23 the claimant simply records that the occupational health capability review took place on that day. He provides no explanation as to why that was unwanted conduct or why it may have had the purpose or effect required by Section 26 of the Equality Act. The review took place in the context of the claimant's absence and the absence might be said to be related to disability however it is unclear why the claimant believes that the act of continuing the review is related to disability. We do not accept that that act is related to disability.

130. The issue was raised in cross examination and the claimant's answers made his case no clearer. It might be inferred that the reason why the claimant is aggrieved about this meeting is because of his belief that the occupational health doctor failed to accurately record his position that he was fit to return to work. However, we have already found that we do not accept that the occupational health doctor mis-recorded anything. Moreover, bearing in mind that the claimant did not dispute the contents of the occupational health report it remains unclear how the claimant could

assert that continuing with the appointment was unwanted or that it had the necessary purpose or effect required to show harassment. We find that continuing with the meeting was not unwanted conduct and it did not have the purpose or effect required to constitute harassment.

131. We conclude there is no evidence before the Tribunal to support the claim that the continuation of this occupational health appointment was harassment related to disability and the claim must fail.

Our finding on the claim of failure to make reasonable adjustments

132. The claimant alleges that the following 2 matters amount to a PCP:

a. Requiring workers including the claimant (from on or about 5 July 2017) to carry out work which involves a substantial amount of standing, lifting and/or carrying, and/or requiring them (and the claimant) to support other workers by activities which involve a substantial amount of those activities.

b. Throughout the claimant's sickness absence and up to the date of his dismissal, failing to offer him alternative roles which would not involve substantial amounts of standing, lifting and/or carrying.

133. The claimant relies on his back pain as putting him at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled any relevant time in that he was unable to do work which involved a substantial amount of standing, lifting and or carrying due to his back pain.

134. It appears to us that in reality the PCP in both cases was a practice of requiring workers including the claimant to carry out work which involves a substantial amount of standing, lifting and or carrying and/or requiring workers including the claimant to support other workers doing those activities.

135. The alleged failure to offer the claimant alternative roles which would not involve substantial amounts of standing, lifting and or carrying appears not to be a PCP but a reference to step which the claimant says would have been reasonable for the respondent to take to alleviate the substantial disadvantage.

136. There is no evidence that the respondent generally failed to offer adjusted roles to employees who needed them. In fact, the evidence surrounding the restricted workers program shows that workers were frequently placed into adjusted roles which took account of their needs and restricted abilities. More specifically in relation to the claimant he was in fact placed in adjusted roles prior to going off sick in August 2017, and he was in such a role from 5 July 2017.

137. There is no suggestion that the claimant would have been placed on full duties if and when he was fit and well enough to return to work. It is apparent from the medical evidence that the claimant's back problem

persisted throughout his absence and was part of the reason why he was signed off as unfit for any work. There was nothing to support the claimant's assertion that the back problem only affected his ability to carry out the full manual role. The option was open for the claimant to return to a restricted role if he was fit to do so. This all reinforces our conclusion that there was no PCP around the alleged failure to offer the claimant alternative roles.

138. We do not think the reasonable adjustments claim is in time and we do not think it can be said to have amounted to a continuing act going up to the date of dismissal. The claimant was not in work or fit for any work after he commenced his absence in August 2017. As such any duty to make adjustments based on a PCP of requiring the claimant to do certain types of work was not in play thereafter. We do not think it can possibly be said that a PCP of this nature was applied to the claimant after August 2017.

139. However, as the claimant asserted that there was a continuing act in relation to the alleged failure to make reasonable adjustments going right up until the dismissal, we have considered the claim on its merits.

140. We find that the claim would fail on the facts anyway, i.e. we do not find the facts which the claimant relied upon to make out the claim. As we have already outlined in the period leading up to the claimant going off sick in August 2017 the claimant was working in a restricted role, which the claimant accepted was compatible with the adjustments which occupational health had identified in their most recent reports on him. The specific role was in the IPT section and it involved the claimant putting stickers on cars and doing some electrical testing. He was provided with a chair. The role did not require the claimant to do a substantial amount of standing, lifting or carrying and in that role, he was not required to support other workers by doing a substantial amount of those activities.

141. We heard evidence from Mr Woodall, which we accept, that the roles in IPT are identified as roles particularly suitable for those employees who have physical restrictions essentially because they involve light duties. That was the reason why the claimant had been placed there in 2017. Mr Woodall explained, and we accepted, that the duties the claimant was doing - electrical testing, harness routing and placing on of stickers - were light duties which did not involve substantial amounts of standing, lifting or carrying. Other workers in the IPT section had similar restrictions as the claimant and it was in effect seen and accepted by all as a suitable work environment for such workers. Mr Woodall's evidence on these points was not challenged by the claimant and we accepted it in full.

142. Whilst the claimant was off sick, he was not required by the respondent to carry out work at all because he was considered by his GP and by occupational health to be unfit for work altogether. We also repeat our earlier finding there was never any suggestion on the part of the respondent that if the claimant was to return that he would be taken off the restricted workers program and required to do full duties. The decision that the claimant was to do light duties only with the benefit of a chair was

made prior to the claimant going off sick. That decision was never reversed and there was no basis for the claimant to assume it would be.

143. As we have already emphasised it should also be borne in mind that the claimant's absence throughout was certified by his GP as being that he was unfit for work altogether and not that he may be fit for an amended role. There was never any medical certificate after the claimant started his sickness absence which indicated the claimant may be fit for work with adjustments. None of the documentary evidence before the tribunal substantiates the claimant's assertion that he raised that he was fit and ready for work at any stage prior to his dismissal and we do not accept that assertion.

144. For those reasons we find that the PCP relied upon by the claimant – i.e. a requirement to carry out work which involves a substantial amount of standing, lifting and/or carrying, and/or a requirement to support other workers by activities which involve a substantial amount of those activities - was not applied to him at any time in the relevant period which is on or after the 5th July 2017.

145. The claimant was not placed at the substantial disadvantage relied upon at any time in that period; he was not in any sense required or expected to do duties involving standing or lifting or carrying that he was unable to do due to his back pain.

146. Therefore the duty to make reasonable adjustments did not arise and this claim would in any event fail and be dismissed.

Our findings on the claim of unfair dismissal

147. We are satisfied that the reason for the dismissal was the respondent's finding that the claimant was not capable of doing the work which he was employed to do. The respondent held a genuine belief in the claimant's lack of capability and there were reasonable grounds for this belief. There was in fact ample evidence to support the respondent's finding:

(i) The occupational health report which stated that not only was the claimant not fit for work but he was also unfit for even amended duties and there was no foreseeable return to work.

(ii) The medical evidence from the claimant's own GP who signed him off as not fit for work with no possibility of restricted duties.

(iii) The fact the claimant had been unfit for work and had in fact not worked for the respondent for nearly 18 months.

(iv) The claimant's own position which was that he did not consider he was not ready to return to work. As we have explained above, we think the claimant's suggestion at the appeal stage that his position may have changed was at best equivocal.

148. We would also refer to the claimant's failure to challenge the occupational health report at the dismissal meeting or attempt to produce any different medical opinion from his own GP.

149. The respondent has therefore satisfied us that the reason for dismissal was the potentially fair reason of capability. We accept the respondent had a genuine and reasonable belief that the claimant was not capable of doing the work he was employed to do, even with adjustments. There were plainly in our view reasonable grounds for that conclusion (summarised above).

150. We also take into account the further evidence obtained at the appeal where the occupational health doctor reached the same conclusions: that the claimant was not fit for work and that there was no foreseeable return to work.

151. As we have already set out the claimant's own position at the appeal meetings undermined the assertion in his appeal letter - which was also not supported by any medical evidence – that he was fit and ready to return to work.

152. In our view then the evidence obtained at the appeal stage reinforces our conclusion that the respondent's belief that the claimant was unfit for his duties even with reasonable adjustments was genuinely and reasonably held. We accept that the reality which the respondent was faced with was that there was no foreseeable return to work for the claimant and we think we must judge the respondent's decision in light of that reality.

153. Although we find the respondent failed to resolve the grievance within a reasonable timescale, we do not think this is a matter which caused any unfairness to the claimant in terms of his dismissal. By the time of the dismissal meeting the grievance had gone through 3 different stages of grievance hearing in 6 meetings and the claimant remained dissatisfied and unable to move on from it.

154. There is no evidence to support the claimant's assertion that he said at the dismissal meeting that all he needed was some mediation and then he might be able to return to work. In fact, that assertion is inconsistent with the evidence which we have seen and which was before the respondent. We did not accept the claimant's evidence on that point. All of the evidence pointed to the claimant not being in a position to overcome the fact that his grievance had not been upheld and him feeling unable to return to work because of his sense of injustice, in addition to the medical issues. In our judgement the respondent made reasonable efforts to facilitate a return to work for the claimant through its various meetings with him but this was not possible in view of these factors.

155. In those circumstances we find that dismissal was within the range of reasonable responses. The respondent has acted reasonably in all the circumstances.

156. We have not identified any procedural flaw which caused real unfairness to the claimant. We note that the claimant was accompanied throughout the process by trade union representatives and in fact sometimes more than one representative attended the same meeting.

157. The claimant attended two case management absence review meetings - 1 November 2017 and 15 August 2018 - at which he had the opportunity to discuss the reasons for his absence and his fitness for work. On both occasions there was no indication that the claimant was fit to return.

158. Medical opinion was properly obtained and considered by Mr. Taylor and Mr. Barker. The medical opinion was not taken as read and the claimant clearly had the opportunity to comment on it and the reasons for his absence generally at both the dismissal meeting and the appeal meetings. In our view then there was proper consultation. The medical evidence obtained was up to date at the points in time when the decision makers made their respective decisions.

159. We did have a concern that the respondent failed to follow its' own procedure in one respect. The procedure anticipates that a Welfare Officer be appointed in cases of long-term absences to support the employee. It seems to us this case would have been apt for such an appointment to be made and that the policy provided for that in a case of this nature. However, that was not done and our finding is that the appointment of a Welfare Officer to assist the claimant was not considered because of a misapprehension on the part of the respondent that a Welfare Officer would only be appointed in cases of bereavement. That is not what the policy says and as we have mentioned that we think it would have been an appropriate step for the respondent to have taken in this case.

160. On balance however, we are satisfied that that omission did not cause any unfairness to the claimant. As we have already recorded there was a series of meetings with the claimant including the attendance review meetings, the grievance meetings the occupational health appointments, the dismissal meeting and the appeal meetings where the claimant could clearly explain how he was feeling and ask for any support if he wanted it. The claimant was assisted by his trade union throughout and he could utilise them as a means of raising any concerns if he wished to.

161. We found that if the claimant did feel able to be supported back into work he could simply have said so clearly, but he never did. The claimant also never suggested what support he may need or provide any sort of timescale as to when he suggested that he might be able to return to work. In the circumstances our view is that the respondent could not reasonably be expected to wait any longer and this dismissal was fair.

162. That means that the claimant's claim for unfair dismissal must be dismissed.

Our findings on the out of time claims

163. We have now considered all of the claimant's complaints which are or may be in time, and we have concluded that each allegation has failed. As part of our assessment, we have taken into account the evidence which we saw and heard relating to the claimant's out of time complaints

of discrimination but we were not referred to anything which might be considered to be relevant background evidence supporting the in-time complaints. We shall now consider whether we have any jurisdiction to hear the complaints which were brought out of time (i.e. those relating to acts alleged to have occurred prior to 11 January 2019). The out of time complaints which we have not considered are:

a. Direct race discrimination relating to an allegation that 4 or 5 white male managers supported Esther Haines when the claimant had the dispute with her over the chair on 28 July 2017.

b. Nine acts of alleged race or disability related harassment which are said to have occurred between 4 March 2013 and 28 July 2017.

164. In this case the claimant relied on showing there was an act of discrimination extending over a period in order to bring all of the allegations of discrimination in time. Following the decision of the Court of Appeal in Hendricks v Metropolitan Police Commissioner [2003] IRLR 96 the burden was on the claimant to prove, either by direct evidence or inference, that the alleged incidents of discrimination were linked to one another and were evidence of a continuing discriminatory state of affairs covered by the concept of an act extending over a period. There was no suggestion in this case of a continuing act which should be approached as being a rule or a regulatory scheme which during its currency continues to have a discriminatory effect.

165. As the claimant has failed on the allegations of discrimination which are in time this means there can be no continuing act which would bring the earlier acts in time. We would also observe that there was a gap of about 18 months between the last out of time allegation (28 July 2017) and the first in time allegation (24 January 2019). We do not think there is any basis on which we could have concluded that there was an act extending over a period in view of that gap. We did not see any link at all between the out of time allegations and the in time ones.

166. Accordingly, the tribunal only has jurisdiction to hear the earlier allegations if they were brought within such other period as we think just and equitable.

167. We remind ourselves that the just and equitable test is a broader test than the reasonably practicable test found in the Employment Rights Act 1996. We should take into account any relevant factor.

168. Although the tribunal has a wide discretion it is for the claimant to satisfy the tribunal that it is just and equitable to extend the time limit. There is no presumption that the Tribunal should exercise the discretion in favour of the claimant. It is the exception rather than the rule. These principles were clearly expressed in the case of Robertson v Bexley Community Centre 2003 IRLR 434:

> *"It is also of importance to note that the time limits are exercised strictly in employment and industrial cases. When tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should*

do so unless they can justify failure to exercise the discretion. Quite the reverse. A tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time. So, the exercise of discretion is the exception rather than the rule."

169. There is no requirement that a tribunal must be satisfied that there is good reason for a delay in bringing proceedings. However, whether there is any explanation or apparent reason for the delay and the nature of any such reason are relevant matters to which the Tribunal should have regard. See Abertawe Bro Morgannwa University Local Health Board v Morgan [2018] IRLR 1050.

170. A list of relevant factors which may (not must) be taken into account are set out in British Coal Corporation v Keeble [1997] IRLR 336 derived from section 33(3) of the Limitation Act 1980, which deals with discretionary exclusion of the time limit for actions in respect of personal injuries or death. Those factors are: the length of and reasons for the delay; the extent to which the cogency of the evidence is likely to be affected by it; the extent to which the respondent had cooperated with requests for information; the promptness with which a claimant acted once aware of facts giving rise to the cause of action; and steps taken by the claimant to obtain appropriate professional advice once he or she knew of the possibility of taking action.

171. In this case the first difficulty for the claimant is that he has not presented a positive case as to why it would be just and equitable to extent time. In our judgment this factor weighs against the exercise of a discretion in the claimant's favour.

172. We do not think it would be just and equitable to extend time to consider the matters pre dating 11 January 2019 for the following additional reasons:

a. The claimant has not presented any evidence as to why he did not bring a claim earlier. For the reasons we shall now set out we found that the claimant did not have any good reason for failing to bring his claim earlier.

b. There is no evidence that the claimant would have been unable to bring a claim earlier. Although the claimant had been signed off work for a long period there is no evidence that he was incapacitated during that period and indeed there was evidence before us demonstrating that he had been active in other projects relating to his film production company.

c. It is clear from his grievance submitted in September 2017 that the claimant was aware of his rights under the Equality Act but he had not acted properly to bring the claim any earlier despite having also been aware from at least that stage of the possibility of bringing a Tribunal claim.

d. The allegations are historic and substantially out of time at between around 5 years out of time at the most and around 1.5 years out of time at

the least. The claimant has therefore delayed bringing his claim for a substantial period, and for no good reason.

e. The respondent has clearly struggled to obtain direct witness evidence in relation to a number of the historic allegations (some of which involved individuals who have left the business) and was reliant on constructing its case from documentary evidence which did not tell the whole story. This indicated the cogency of the evidence has been affected by the delay.

f. Although the respondent had delayed his dealing with the grievance, we did not consider that as a determinative factor when the claimant already knew from the time when he submitted the grievance that he was able to bring the tribunal claim.

g. The claimant had access to professional advice as he was represented by his trade union. He had access to the union's solicitors who he had consulted with in 2016 in relation to personal injury matters. He also told us he had taken advice from the CAB and done internet searches from around the time he submitted his grievance. The claimant had unreasonably and inexplicably delayed despite this access to information and advice.

h. We considered all the evidence to which we were referred in respect of the out of time claims and we concluded that we had not been referred to any compelling evidence which indicated the claimant had been or may have been discriminated against. There was nothing to indicate the out of time complaints were meritorious.

173. In those circumstances we decline to extend time to allow the claimant to rely on the out of time allegations of discrimination. The claims pre dating 11 January 2019 have not been brought within a period which we think is just and equitable and we do not therefore have jurisdiction to hear them.

Our overall conclusion

174. Our overall conclusion is that the above reasons we do not have jurisdiction to hear the claims predating the 11th January 2019 and the claims after that fail.

175. All of the claims of the claimant are therefore dismissed.

Employment Judge Meichen

10 February 2021