EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr S Moghul	**v**	**Slough Borough Council**

Heard at: Watford **On**: 10-14 August 2020

Before: Employment Judge George
Mr D Sagar
Mrs A Brosnan

Appearances

For the Claimant: In person
For the Respondent: Mr C Cuckney, Solicitor

JUDGMENT

1. The claim of unfair dismissal is not well founded and is dismissed.

2. The claims of disability discrimination and harassment are not well founded and are dismissed.

3. The claim of victimisation is not well founded and is dismissed.

REASONS

Background

1. These claims arise out of the claimant's employment by the respondent local authority as a business support officer which started on 1 September 1997 and ended by notice of dismissal with effect from 6 July 2018. The claimant was given 12 weeks' pay in lieu of notice for which he was not required to work.

2. After a period of conciliation which ran from 28 September to 28 October 2018 the claimant brought claims of unfair dismissal, various strands of disability discrimination, harassment, and victimisation. He also alleged breach of contract and that there was annual leave accrued on termination of employment for which he had received no compensatory payment. He relied upon the disability of anxiety and depression and musculoskeletal

pain. The claim was presented on 31 October 2018. The respondent defended the claims.

The Issues

3. On 7 August 2019, at a preliminary hearing conducted by Employment Judge Alliott, the money claims, by which I mean the breach of contract claim and unauthorised deduction from wages in respect of unpaid annual leave, were dismissed on withdrawal.

4. Following a direction by Employment Judge Alliott at that hearing, a list of issues was prepared by the respondent's solicitors and agreed with the claimant's then representatives. That is to be found at pages A49 to A55 of the bundle. At the start of the hearing before us, it was amended, by agreement. The amendments were set out in the document circulated by the Tribunal to the parties on Day 3 of the hearing. The main alterations were to reflect that the respondent had, since the date of the agreed list of issues, conceded that the claimant was at all material times a disabled person by reason of his alleged disability of musculoskeletal pain, anxiety and depression and also to further define the PCPs and the substantial disadvantage said to have been incurred by the claimant.

5. Following the oral evidence of Mrs Bhatti, it was conceded in closing submissions on behalf of the respondent that the respondent accepted that they had knowledge of disability from November 2017 onwards. So that was no longer an issue that we needed to decide.

6. The issues remaining to be decided by us following that concession are:

<u>Unfair Dismissal</u>

6.1 What was the principal reason for dismissal and was it a potentially fair one in accordance with s.98(1) and (2) of the Employment Rights Act 1996 ("ERA")? The respondent asserts that it was capability.

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

6.3 If the dismissal was procedurally unfair, what adjustment, if any, should be made to any compensatory award to reflect the possibility that the claimant would still have been dismissed had a fair and reasonable procedure been followed?

<u>Disability Discrimination: s.13 of the EQA</u>

6.4 Has the respondent subjected the claimant to the following treatment:

6.4.1 Employer creating a stressful situation by giving the claimant tasks that were inappropriate for him in his condition i.e. as he was returning from long term sickness absence and was expecting light duties. G Bhatti was also creating a stressful situation by being hostile to the claimant in how she spoke with him as set out here already, and she ignored claimant's email advice about how he could be supported back to work (see para.7.1 of the grounds of claim).

6.4.2 Failing to follow OH advice on phased return of one hour a day (para 7.1 of grounds of claim);

6.4.3 Given additional tasks without training or explanation such as being asked by G Bhatti to take minutes of a meeting on the first day back of the phased return. When the claimant asked questions about tasks that had been assigned to him he was not provided with help or support from G Bhatti (para 7.2 of grounds of claim);

6.4.4 Refused to accommodate part time working (para 7.2 of grounds of claim);

6.4.5 Did not consider a transfer or other options (para 7.2 of grounds of claim);

6.4.6 Dismissal (para 7.2 of grounds of claim);

6.4.7 Respondent created artificial situation to justify dismissal (para 9 of grounds of claim).

6.5 Was the 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? The claimant relies on the following comparators, GS and JC and hypothetical comparators.

6.6 Are GS and JC suitable comparators?

6.7 If so, was this because of the claimant's disability and/or because of the protected characteristic of disability more generally?

6.8 Did the respondent act too hastily in terminating the claimant's employment?

6.9 Did the respondent give sufficient weight to the available medical evidence as at the time of the dismissal?

<u>EQA section 15, discrimination arising from disability</u>

6.10 Did the following things arise in consequence of the claimant's disability;

6.10.1 The claimant's sickness absence?

6.11 Did the respondent treat the claimant unfavourably as follows:

6.11.1 The claimant relies upon the alleged acts set out in paragraph 6.4 above.

6.12 Did the respondent treat the claimant unfavourably because of his sickness absence?

6.13 If so, has the respondent shown that the unfavourable treatment was a proportionate means of achieving a legitimate aim? The respondent relies on the following as its legitimate aim:

6.13.1 Protecting the efficiency of the service provided to the respondent's residents; and

6.13.2 Ensuring that the cost of delivering that service remained at an acceptable level.

<u>EQA, section 19: indirect disability discrimination</u>

6.14 A "PCP" is a provision, criterion or practice. Did the respondent have the following PCPs: (a) the requirement to undertake full time working and (b) the requirement to have absences limited to what was acceptable under their sickness absence policy.

6.15 Did the respondent apply the PCP to the claimant at any time?

6.16 Did the respondent apply (or would the respondent have applied) the PCP to persons without a disability-related sickness absence?

6.17 Did the PCPs put people sharing the claimant's disability of muscular skeletal pain and depression at the particular disadvantage alleged, namely the inability to comply with the PCPs and consequent risk of dismissal? Did the PCPs put the claimant to that disadvantage?'

6.18 If so, has the respondent shown the PCP to be a proportionate means of achieving a legitimate aim? The respondent relies on the following as its legitimate aim:

6.18.1 Protecting the efficiency of the service provided to the respondent's residents; and

6.18.2 Ensuring that the cost of delivering that service remained at an acceptable level.

<u>Reasonable adjustments: EQA sections 20 &21</u>

6.19 A "PCP" is a provision, criterion or practice. Did the respondent have the following PCPs: (a) the requirement to undertake full time working and (b) the requirement to have absences limited to what was acceptable under their sickness absence policy.

6.20 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 the claimant was unable to comply with the PCP and was therefore at risk of being dismissed?

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

6.22 If so, were the steps that were not taken that could have been taken by the respondent to avoid any such disadvantage?

6.22.1 Reduced hours

6.22.2 Adequate additional support and help from colleagues,

6.22.3 Changes to the claimant's working environment (which the claimant explained meant a fixed desk instead of a hot desk);

6.22.4 Working remotely (from home);

6.22.5 Reduced responsibilities.

6.23 If so, would it have been reasonable for the respondent to have taken those steps at any relevant time?

<u>EQA, section 26: harassment related to disability</u>

6.24 Did the respondent engage in conduct as follows:

6.24.1 The claimant relies upon the same alleged treatment as is relied upon in paragraph 6.4 above.

6.25 If so, was that conduct unwanted?

6.26 If so, did it relate to the protected characteristic of disability?

6.27 Did the conduct have the purpose or (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) the effect of violating the claimant's dignity or creating an intimidating, hostile degrading, humiliating or offensive environment for the claimant?

<u>EQA, section 27: victimisation</u>

6.28 Did the claimant do a protected act? The claimant relies on the following:

6.28.1 Requesting reasonable adjustments;

6.28.2 Continuing to request reasonable adjustments; the respondent accepts that the claimant requested reasonable adjustments.

6.29 Did the respondent subject the claimant to any detriments as follows;

6.29.1 Requesting the claimant to undertake stressful work on his first day back;

6.29.2 Not allowing the claimant to work part time or reduced hours.

6.30 If so, was this because the claimant did a protected act and/or because the respondent believed the claimant had done, or might do, a protected act?

Additional issues:

6.31 Did the respondent carry out a reasonable investigation about the employee's condition and the likelihood of the claimant being able to return to work?

6.32 Did the respondent consult with the claimant before making the decision to dismiss?

6.33 Did the respondent make reasonable efforts to explore alternatives to dismissal such as reasonable adjustments, flexible working and/or suitable alternative employment?

6.34 Had it been decided in early December 2018 or thereabouts or sooner, that the claimant was to be dismissed from his job in light of the role being advertised on 8 December 2018 and TR's conversation with the claimant which was overheard by LL.

6.35 In January 2018, the claimant received a recommendation from Occupational Health to have a one hour a day phased return. Did the respondent unilaterally change this to two hours?

6.36 The claimant emailed support information to his line manager G Bhatti as his line manager. Did she ignore this advice?

6.37 Being asked to take on the minute taking role in an open plan setting by G Bhatti, so that everyone could hear about his phased return task-setting?

6.38 Was giving the claimant a special chair, a reasonable adjustment that the respondent could have made?

6.39 Did G Bhatti say to the claimant that if you can go to a GP appointment why can't you come to work?

6.40 Is paying for the claimant's recommended counselling session (£95 plus VAT) a reasonable adjustment that the respondent could have made?

The hearing before us

7. We had the benefit of a bundle of documents that was divided into a number of sections which contained the documents that are set out in the index to that bundle. On the first day of the hearing, the claimant indicated that there were a number of documents that had not been included on which he wished to rely. On enquiry, it appeared that certain of the documents were in the nature of submissions made in correspondence by the claimant. It was accepted that they were comments on applicable law that the claimant could make and they were taken into account in that way. A number of other documents were found to be in the bundle.

8. That left two documents which were numbered document A and document B which were the subject of contested applications by the claimant who wished to be able to rely upon them. For reasons that we gave on day one and do not repeat here, document A was inserted into the bundle, its four pages starting G66-69. Ultimately, that course was agreed to by the respondent.

9. Document B we agreed to take into account as a third witness statement by the claimant subject to the deletion of one paragraph. The claimant had therefore prepared three witness statements, one which was dated 30 June 2020 and was concerned with the issue of whether he as a disabled person. The second witness statement ran to 10 paragraphs and is in the witness statement bundle at pages B1-B3; that is referred to as the claimant's second statement in these reasons. The third statement is document B, subject to the deletion of one paragraph, and is in the form of an email to the respondent dated 7 August 2020.

10. The respondent relied on the oral evidence of three witnesses. In addition, the claimant wished to rely on a witness statement prepared and signed by JC which is four paragraphs long. Mr C was unable to attend the tribunal to give evidence due to his ill health and we agreed to take his statement into saccount and to give it such weight as seemed appropriate given the other evidence in the case. We had explored with the claimant the feasibility of Mr C giving evidence by CVP and warned him that if any of Mr C's evidence was contested by any of the witnesses giving oral evidence then the likelihood was that we would prefer the evidence of the witnesses whose evidence had been tested under cross-examination. The claimant was content for us to admit the written statement of Mr C into evidence on that basis. The claimant also asked for us to take into account a statement of LL, who did not attend for cross-examination and give it such weight as we thought appropriate. LL's statement confirmed that he had overheard the conversation between the claimant and TR referred to in paragraph 6.34.

11. The respondent called three witnesses, Gunett Bhatti, who was the claimant's line manager and who managed his absence under the

attendance management procedure; Joseph Carter, who is a director of transformation and he took a decision under the strategic director review; and also Alan Sinclair who conducted the appeal. Each of them prepared witness statements and were cross-examined upon them by the claimant. Mr Sinclair gave evidence by CVP.

12. In the event, a significant amount of the factual background to the claim was not in dispute. In particular, the claimant did not dispute to any material extent the dates and reasons given for his sickness absence in the respondent's report to the strategic director review dated 21 June 2018 that starts at page C1 of the bundle.

Findings of Fact

13. We make our findings of fact on the balance of probabilities taking into account all of the evidence, both documentary and oral, which was admitted at the hearing. We do not set out in this judgement all of the evidence which we heard but only our principle findings of fact, those necessary to enable us to reach conclusions on the remaining issues. Where it was necessary to resolve conflicting factual accounts we have done so by making a judgment about the credibility or otherwise of the witnesses we have heard based upon their overall consistency and the consistency of accounts given on different occasions when set against contemporaneous documents where they exist.

14. The respondent has a managing absence policy: page B1 and following. We had regard to the whole of the policy and the timescales set out in it. We made particular reference to the following:

"**Redeployment**

34 At both formal meetings (Stage One and Stage Two) the manager/supervisor may agree to give consideration to redeployment following advice from Occupational Health. Any possible redeployment will be handled under the Council's Redeployment Procedure. Please note that redeployment periods will be time bound and failure to find alternative work may lead to termination of employment with notice.

Returning to Work

35 all employees, regardless of whether their absence was short or long term, will have a return to work meeting with their manager/supervisor, and complete and sign the Sickness Certification Form. Managers can use the Self Certification Form as an aid to conduct the return to work meeting.

36 in addition, in cases of long-term sickness absence it is also good practice for managers/supervisors to discuss and/or consider the following:-

- Establish the reasons for the absence, ascertain if the illness is likely to recur and ensure that the employee is aware of and understands this procedure and whether formal action is to be considered;

- Check that the employee is able to work normally or if a temporary change in duties is required and whether any changes are needed to the workplace to ensure the employee's continued health. (Advice can be sought from the Occupational Health Service);

- Update the employee of any changes/key events that have occurred during his/her absence;

- Complete and sign the Sickness Certification Form (even where a Fit Note has been issued).

- Prior to a return to work meeting following long-term sickness, it is good practice to refer the employee to Occupational Health.

37 in some cases it could be recommended by Occupational Health or an employee's GP that a phased return to work or restricted duties is appropriate. The actual return to work arrangements should be discussed and agreed with the employee prior to any return to work.

During a phased return, the hours and/or duties should be increased gradually so that by the end of the period, the employee has returned to their full substantive ours/duties.

A phased return is a short-term temporary arrangement and should usually last no longer than 4 to 6 weeks. An employee undertaking a phased return, will receive full pay regardless of the hours worked. If the employee is unable to return to their contracted hours then the employees hours will varied (sic) on a permanent basis and their salary will be adjusted accordingly.

…

44 long-term sickness absence is defined as physical or mental illness, which prevents the employee from attending work or impairs their ability to carry out full duties competently and without risk to themselves or others. Any period of sickness for weeks or more (sic) is treated as long-term sickness.…

45 The triggers for reviewing these cases are where:

- Absence for 4 consecutive weeks or absences for a total of six weeks in a six-month period; and/or

- Where it is understood that the employee is likely to be absent for a prolonged period due to illness.

…

49 when an employee's sickness absence gives cause for concern, a formal meetings stage one will be arranged. The employee will be:-

- Given 5 working days written notice;

- At advised of the purpose of the meeting;

- Advised of the right to be accompanied by a Trade Union representative or work colleague;

- Given a copy of this procedure."

15. In broad terms, there are formal meetings at stage 1 (the arrangements for which are set out in paragraph 49 of the policy) and at stage 2, for which the arrangements are a carbon-copy of those in paragraph 49 (see paragraph 59). The expectations of a manager managing an employee's sickness absence at stage one are set out in paragraphs 49 to 57 and at stage in paragraphs 58 to 66 of the policy. At the end of the formal stage 1, a decision is taken as to whether or not there has been satisfactory improvement in attendance. If there is no such improvement - as set out in paragraph 57;

> "e.g. a deterioration in the record for short term absences or there is no clear indication of an early return to work (in the case of long term absences) then at the latest interim review meeting at Stage One the employee should be advised that the Formal Meeting (Stage Two) will be convened."

16. The difference with Stage 2 is that at the end of that stage, the manager can consider referring the case to a Strategic Director Review where there has been no clear indication of an early return to work or a deterioration in the record of short term absences. That is not the only possible outcome of Stage 2: the review period might be extended where there is some improvement or a significant and satisfactory improvement will lead to an end to the formal process. The consequence of a Strategic Director's Review is a termination of employment is a possible outcome. Therefore, at all of the various review meetings at stage 2 the employee should be warned that that is a possible outcome. A right of appeal is conveyed by paragraph 70.

17. The claimant's employment started on 1 September 1997: page B15. He told us that he started work for Slough Borough Council as a school leaver and had therefore worked for them throughout his working career. He was appointed business support officer on 23 February 2017. In June 2017 he was diagnosed with musculoskeletal problems and his sickness absence started on 26th of that month. He provided a sickness absence certificate certifying that he was unfit to work until 9 July because of low back pain: page D44. That was then followed by another certificate indicating he would be unfit for a further month due to low back pain (page D45) and his GP records of 19 July show that it was recorded, additionally, at that time that the claimant was suffering no motivation and sleep disturbances. It is recorded that he started on anti-depressants at that point. There was no reference to mental health problems in the MED3 certificate.

18. Because he had been absent for four weeks, the respondent referred the claimant to occupational health. The first occupational health report was dated 2 August 2017 (page D84). The next certificate of sickness absence (dated 5 August) referred to low back pain with reactive depression and certified that the claimant would be unfit for one month. This is the point at

which the GP notifies the respondent for the first time through the sickness certificates that the claimant is suffering from reactive depression.

19. There is another occupational health report dated 30 August (page D86) and a further sickness absence certificate recording low back pain, reactive depression and that the claimant is under pain clinic investigations and management. That is dated 6 September certifying the claimant to be unfit for a further month (page D43).

20. There was then a stage 1 meeting on 21 September 2017. The claimant was represented by TR, trade union representative. Tt was noted that his absence at that point was caused by lower back pain and reactive depression. It was also noted that nothing had been previously mentioned prior to the deterioration of the claimant's health and the start of his period of absence that would have enabled his line manager to make any necessary adjustments to support him in work prior to his absence. It was accepted that he was presently not fit to return to work but agreed that actions that had been recommended by the occupational health should be implemented when he was fit.

21. Those recommendations included a phased programme for re-integration back to full work hours and duties, a reduction of workload, not being required to do duties that would entail heavy lifting and arrangement for assessment by Postureright to recommend an appropriate chair or make adjustments to his existing chair. The report contains a statement that they would like the claimant to take regular breaks so that he was not sitting in the same position for too long and they advised him to use the quiet room to sit away from the desk when required because it was next to the service area and easily accessible. There were to be weekly updates with the line manager.

22. A stress risk assessment was carried out at that stage, although, in the event, it was updated in the following January when the claimant returned to work. A review date of three months was set, and the claimant was warned that any future absences in the review period of three months might result in a referral to stage 2. The outcome letter following the 21 September 2017 stage 1 meeting is at page C31.

23. In a further occupational health report (dated 4 October at page C33) it was reported that no adjustments at that stage would allow a return to work but a physiotherapy assessment was planned. A further stage 1 review meeting took place on 12 October when there was a discussion of a phased return to work of one hour per day and a review was set provisionally for after the occupational health meeting.

24. In early November the next MED3 certificate was received which covered the period to 7 January. That was to some extent an indication that there was a deterioration in the claimant's circumstances in that it was anticipated he would be unfit for two months, whereas previously he was certified for one month at a time.

25. The occupational physiotherapist meeting took place on 15 November. The report is at page C38 and it is dated 21 November. It is recorded by the physiotherapist that the claimant is unsure what caused his symptoms.

> "He has recently been reviewed by a consultant who has informed him that his symptoms are not musculoskeletal related and referred him to a pain management service."

It was therefore concluded that physiotherapy input was no longer indicated and he was referred to the occupational health physician.

26. That appointment took place with Dr Giagounnidis on 20 November 2017 and is at page C40. A return to work was not recommended at that stage. Dr Giagounnidis seems to have spent a considerable amount of time listening to the claimant and understanding the nature of his condition and his report would no doubt have been of assistance to the managers. Amongst other things he records a discussion about whether the claimant should travel to Pakistan for an extended period of annual leave. It appears from the oral evidence to the Tribunal that this passage of annual leave had been pre-booked earlier in the year. There was then some discussion about whether a long-haul flight would be appropriate given the pain that the claimant was suffering. Dr Giagounnidis' opinion is that it would be of benefit to him and he says: "I think the planned trip is likely to do some good to Mr Moghul if an exacerbation of the physical aspects of the pain can be avoided. This is likely to be the case." and that was because Dr Giagounnidis was of the view that the dominant problem that Mr Moghul was suffering was that of depression and that travel to the family reunion would be of benefit to him.

27. Prior to that meeting, there had been a stage 1 final review on 20 November 2017, the report is at page C43 and Ms Bhatti recorded that the claimant's GP had diagnosed him with a possible psychological disorder rather than actual back pain. There were further discussions about a return to work on one hour a day to help him regain normality especially as depression was mentioned but that was not progressed. Mrs Bhatti decided at that point that, since the sick note showed that the claimant would be unfit past the end of the review period, the case would proceed to stage 2 because there was no improvement in the sickness during the review period. It was recorded on 20 November 2017 that the claimant disagreed with the recommendation of the physiotherapist that he try to return to work one hour per day. Contrary to Mrs Bhatti's recollection, it seems clear from the outcome letter that the visit to Pakistan was discussed in that meeting.

28. A stage 2 meeting took place on 27 November 2017, the outcome of which is at page C47. It is a meeting that was conducted by CD and it is clear that she has received and has read the report of Dr G. Part of the relevance of that is that Dr G notes in his report that the disability related provisions of the Equality Act 2010 are likely to cover the claimant's health and management need to consider reasonable adjustments under the Act. However, it is fair to say that he could not think of any adjustments at that stage which would be likely to allow a sustained return to work. So, it was

accepted by Mrs Bhatti in oral evidence that it was from receipt of that report that the respondent had knowledge that the claimant should be regarded as disabled under the Equality Act 2010.

29. At the meeting of 27 November 2017, a timetable was set for reviews on 14 December, 4 January and 25 January 2018. Additionally, a warning was given that was recorded in the outcome letter at C48:

> "I do need to advise you that failure to make a significant and satisfactory improvement within this period may result in your referral to a strategic director review. The outcome of this strategic director review could be termination of employment."

As an aside we note that the referral to the strategic director review in fact took place on 25 May.

30. The claimant was on annual leave from 11 December 2017 to 4 January 2018. In December there was an advertisement placed by the respondent for a business support officer role and one of the matters that we need make findings about is the claimant's allegation that this was his role; that the respondent was seeking a replacement for him as early as December 2017. In support of this allegations, he also relates a conversation that he had with TR (his union representative), who on the claimant's account, said to him at about this time that if he went on annual leave "you will not be coming back to no job". The claimant argues and we will come back to this, that those two matters taken together are evidence that a decision by the respondent to dismiss him was in fact taken in around December 2017. This is the conversation which was apparently overheard by LL.

31. On his return from annual leave, there was a second stage review meeting on 4 January 2018 as planned and it was agreed that the claimant, who was feeling rather better, would start a phased return to work after the next occupational health meeting. That took place on 16 January and the report is at C51. It recommended a return to work of one hour per day for two weeks then increasing his hours by one hour every further two weeks as he worked towards normal full-time hours. One of the allegations by the claimant is that the respondent changed this to two hours without his knowledge and we return to this issue later on in these reasons.

32. On 20 January 2018, there was a request put through for a risk assessment to take place of the work placement of the claimant's chair when he returned; see page F18. On the claimant's return to work on 22 January 2018, he forwarded an email that he had received from LL of the Department of Work and Pensions to Mrs Bhatti; see the additional documents that were added as pages G66-69. Attached to this email was a letter which set out adjustments and assistance that the claimant might wish to urge his employer to consider and contained links to further sources of information. This is relied upon by the claimant as being a protected act for his victimisation claim and he also complains that the information in it was ignored by Mrs Bhatti.

33. The claimant says that on his first day back at work, he was told to take minutes of a meeting scheduled for the following day. In his oral evidence he accepted that the request might have been a few days later or even the following week. His allegation is that it was an unreasonable request for him to undertake a task that was too stressful and required levels of concentration that he was not capable of but the respondent told him, "this is your job you have to do this".

34. We find on the basis of the contemporaneous notes of the catch-up meetings by Mrs Bhatti that it was probable that he was requested on 29 January to record minutes on 30 January. It is possible that he was told that it was part of his job description and we make further findings about these contested matters further on. The claimant also alleges that he requested a dedicated desk on return, and that this was refused. The certificate from his GP which covered the period from his return to work to 2 February said that he was advised to work one hour a day with reasonable adjustments to his workload. There was a back to work meeting on 22 January the notes of which are at C53.

35. A further stage 2 review meeting took place on 25 January 2018 (at which the claimant was unrepresented, by consent) and Mrs Bhatti extended the period of the sickness absence review by three months. The warning that if there was not a satisfactory improvement during the review period the claimant's employment was at risk of termination was repeated. On the same day, Postureright attended to assess the claimant's chair. His chair was adjusted and the claimant confirmed that as adjusted the chair was comfortable; page F16. A recommendation was made for an alternative make of chair that could be purchased if he were to find his adjusted chair uncomfortable. The claimant's oral evidence to us was that, as adjusted, the chair was comfortable. It appeared that, in fact, his criticism of the respondent's arrangements was not about the chair itself but that the hot desking system meant that there was a risk that another person would sit in his chair and adjust it. Our conclusion in that is that the respondent did all that it reasonably could have done in relation to this issue because, as was accepted by the claimant, a label was put on the chair to indicate that it had been adjusted for his comfort and was for his use. When cross-examined about this, the claimant accepted that there was such a label but argued that he should have been given a dedicated desk.

36. There was a further catch up between Mrs Bhatti and the claimant on 25 January and a stage 2 review one-to-one on 5 February 2018. The claimant at that point requested a permanent desk. Also at that meeting, a training and development plan was introduced; page C66. In further one-to-one meetings on 7 February and 21 February it is reported that the claimant was struggling with some of the tasks that he had been allocated.

37. The claimant had a GP's appointment in early March to discuss panic attacks which by then he was encountering on a number of nights each week and which seem to have had significant impact upon him.

38. There was a stage 2 second review meeting on 5 March 2018 (page C82) and an occupational health review on 6 March 2018 which recommended that he continue at the hours that he had by then reached, namely four hours a day. He was then working 1-5pm. His hours had temporarily increased to five hours a day earlier that week but were dropped back down to four hours a day following that occupational health review.

39. After a further one-to-one with Mrs Bhatti on 6 March, the claimant was absent due to sickness on 7 March with panic attack, anxiety with depression and chronic pain. The claimant alleges that, on this date, when he rang in to say that he was sick and would not be coming to work, Mrs Bhatti said to him: "If you are not well enough to come to work why are you well enough to attend the GP?". This is denied by Mrs Bhatti.

40. There was a return to work meeting on 8 March 2018 and a later meeting to discuss the occupational health reports, pages C.94 and 95. Then there was a further one-to-one meeting on 19 March 2018, page C97. The claimant had to leave work because of sickness on 20 March following an emergency occupational health appointment, page C101.

41. It is alleged by the claimant that, on 30 April 2018, Mrs Bhatti said to him that his GPs will only put down what he tells them on the sick note. He was upset at what he took to be the inference that what he told them was not genuine. He had been absent from 6-19 April 2018 with chronic low back pain, anxiety and depression, returned to work back at four hours a day on 20 April, page C103, and was then absent from 30 April to 7 May 2018.

42. There was a telephone consultation with occupational health during that sickness absence on 2 May which recommended a return to work on 8 May 2018 with a phased return. There seems to have been some discussion about redeployment during that meeting which is noted in the outcome letter at page C105.

43. It is alleged by the claimant that, the day after he returned to work, i.e. on 9 May, Ms Bhatti said to him words to the effect: "We pay you full time money but part time work is being done". There was a one-to-one meeting on 14 May, which is noted at page C107, and on 23 May the claimant started a period of sickness absence certified initially to 29 May 2018. The cause of the absence is stated to be panic attacks but he was subsequently certified unfit to work from that point to 2 July 2018.

44. There was a final stage 2 meeting at the start of that sickness absence on 25 May 2018, a few days after the claimant started that period of sickness absence. The claimant was represented by his TU representative and asked if he could go on part-time hours temporarily (rather than work part-time as part of a phased return to working full time). The decision taken by Mrs Bhatti at that final stage 2 meeting, was that the case should be referred to a strategic director review.

45. The claimant was notified of that by a letter on the same day, which is at page C112. He was provided with a copy of the sickness absence policy

and Mrs Bhatti indicated to him that she would prepare a full report on the case and submit it to Mr Carter for consideration. She warned that she had no other option but to refer this matter to a strategic director on the grounds that "you have not met your obligation to work owing to absence. I need to advise you that this could lead to your employment being terminated." Under the respondent's policy that report does not go to the affected employee and there is no face-to-face meeting with the director carrying out the strategic director's review. That is what happened in the present case.

46. The claimant had sickness certificates that covered his subsequent period of absence. On 6 June 2018, it appears that one of the claimant's relatives contacted Mrs Bhatti in relation to reporting his sickness absence and it is said by the claimant that Mrs Bhatti told his relative: "He's been off for a year what are we supposed to do for him?"

47. There are updated occupational health reports following the preparation of Mrs Bhatti's report on 21 June, there is one dated 22 June 2018 and a further one on 29 June 2018 which is at D104. It seems to us to have been prepared in anticipation of the expiry of the claimant's then most recent MED3 certificate. The occupational health professional reports:

> "Mr Moghul has been suffering with depression for some time. He has recently been certified sick during this time and has finally managed to see a psychiatrist who has looked at his medication and amended it substantially taking his anti-depressant medication to almost double the amount. The psychiatrist is reviewing him on a twice weekly basis at present, his fit note expires on Monday 2 July 2018 so he will be fit to return to work."

48. Then further down it is recommended that:

> "Mr Moghul should commence on four hours per day for the next two weeks and he will have a number of appointments coming up which he will need to attend with the psychiatrist and it is likely to take four weeks for him to get the maximum benefit from his increased medication but his mood should gradually improve. Memory will continue to be an issue due to the medication and I have advised him to write things down to assist with memory."

49. A phased return to work started on 3 July and, according to Mrs Bhatti's oral evidence which we accept, on 4 July she told the claimant that she knew a decision had been taken by Mr Carter but she did not know what it was. On 5 July the claimant told us he gave Mrs Bhatti a copy of his up to date specialist report. This is the letter by Dr Sanjay Garg, which is at D48 of the bundle, dated 4 July 2018 and it says:

> "I am writing this letter to confirm that Mr Moghul has been under the care of Slough Crisis Resolution and Home Treatment Team since 18/06/2018. Around June 2017 Mr Moghul first noticed pain in his legs, pins and needles in his hands, found it hard to concentrate and then it progressed to feeling low in mood. His depressive symptoms had progressively got worse. The working diagnosis is of severe depression with panic attacks without psychotic symptoms. His current medications are: …"

and then Dr Garg lists quantities and doses of Sertraline, Gabapentin and Zopiclone. The Gabapentin is medication that he is to take for two weeks and then to stop. The person to whom it is directed is invited to contact Dr Garg if they need any more information.

50. Mrs Bhatti's evidence to us was that she did not recall receiving this report. It was common ground that later that same day the outcome letter of Mr Carter, which is at C114, was given to the claimant. The claimant vividly described to us the upset that it caused him to receive that letter when he was not expecting it.

51. It is dated 4 July 2018 and it records that Mr Carter is satisfied that the claimant's attendance record does not demonstrate satisfactory attendance as "you have been absent from work for a total of 195 working days out of 257 working days during the period from 26 June 2017 to 1 July 2018." Further details of the rationale are given over the following two pages but essentially Mr Carter considered that there had been periods of time when the claimant returned to work, but he had not returned to his full contracted hours of 37 hours a week despite attempts to support him to increase those hours. He also considered that all possible options had been exhausted, referring in particular to an extended phased return, management support, adjusted workload, risk assessment, extended annual leave. He rationalises the respondent's refusal of the claimant's request for part-time work in the following way. He says:

> "It was declined as the service cannot accommodate a part-time role. It was explained to you that by the very nature of phased returns you have been working part-time hours since 22 January 2018 and you have still not been able to maintain the satisfactory level of attendance and mutual obligation to work as you had further periods of absence during this time."

He also refers to the absence level having had a negative impact on service delivery and being unsustainable because other staff had to pick up the additional workload in order to keep up the service demands.

52. In relation to that we accept that the email of CD of 8 March 2018, which is at G53, sets out accurately the impact on the service and the staff. She records that:

> "Other staff are complaining of becoming increasingly stressed as they are having to pick up his workload as well as their own. Therefore this is now a major issue as not only are we without this post as when Sheeraz is in he struggles to complete tasks accurately and in a timely manner but we are also using valuable management time to continue to train, guide and re-do work that he has done incorrectly or not at all despite implying he has completed it."

53. In his oral evidence to us, the claimant accepted that his medical condition was the cause of the difficulties he was having at work and we stress, as we said during the course of the hearing, that this is not a question of fault, it is not said to be any fault of the claimant's that he was suffering these problems.

54. The letter from Mr Carter gave formal notice that his employment would be terminated on 6 July and he was to be paid 12 weeks' pay in lieu of notice. Initially there was a miscalculation of that notice pay, hence the claimant's original claim for unauthorised deduction from wages or breach of contract, but at the last hearing it was confirmed that that had now been sorted out.

55. The claimant appealed against his dismissal on 12 July 2018 by a letter that is at C116. His grounds for appeal, broadly speaking, were firstly, that he is disabled with depression and the Council have at all times had full knowledge of his disability. Next he argued that he was required to work 37 hours per week in an open plan office - which he found increasingly difficult to comply with - and that he had asked informally and formally in writing for reasonable adjustments to take account of his disability, including by making a request to work part-time, which request had been unreasonably refused.

56. The third ground of appeal was that it was unfair and discriminatory to dismiss him when the council was aware that he is disabled and has been genuinely ill as a result of disability and therefore unable to attend the level of attendance required. He argued that he would be able to undertake his job with reasonable adjustments, one of which would be a reduction in working hours.

57. The fourth ground of appeal was that he had not been asked to particularise what adjustments were possible and had simply been dismissed and that, despite his phased return to work, he had not been assisted by the respondent.

58. He argued, fifthly, that he was aware of others who have had long-term illnesses but had not received notice to terminate their employment and that there had been a failure to make reasonable adjustments including part-time working and working from home with the right IT support because his job does not require him to be physically present. It can be seen that there is some overlap between the various grounds of appeal.

59. The appeal was heard in person eventually on 1 October after an original hearing was postponed and the notes of the appeal hearing are at C128. Mr Sinclair decided, after consideration, to reject the appeal and the outcome was given on 3 October 2018, page C136.

60. We turn to the specific factual allegations made by the claimant which are relied upon as unlawful acts in the list of issues and set out our findings upon them, insofar as they are not already captured above. The same factual allegations are alleged to be direct disability discrimination, discrimination arising in consequence of disability, disability related harassment and victimisation. They are particularised in paragraph 6.4 above (under direct disability discrimination) and, in our primary findings about whether or not the claimant has shown, as a matter of fact, that the allegedly unlawful act occurred as alleged, we refer to the sub-paragraph numbers 6.4.1 to 6.4.7 for ease of reference.

61. We deal first with the allegation at paragraph 6.4.1, and we break this down into a number of separate parts because it is something in the nature of a composite allegation. We consider first whether the respondent "created a stressful situation by giving tasks that were inappropriate to the claimant in his condition", whether there was a failure to give light duties and whether there was a lack of support.

62. In general, we found Mrs Bhatti to be an impressive witness. She produced detailed notes of one-to-one hearings which we accept reflect discussions that actually took place. A sympathetic attitude was displayed by her not just in her evidence in the tribunal, but throughout her management of the respondent as it appears from the notes of the one-to-ones and indeed as the claimant seems to have acknowledged at the time.

63. The claimant's own evidence about specific events seems to us to have been clouded by the strong emotion that, quite understandably, he feels about the situation that he was in. He does not seem to us to be deliberately seeking to mislead, but his reliability is adversely affected by that.

64. When he returned to work, his first task was that of issuing ID badges, page C53. He moved on to journaling, page C57, and at each stage the tasks were carefully explained to him, he was given support, he was given guidance. He was only assigned one task at a time. As we have already said, it is not a question of fault, it does not reflect badly on the claimant that he was struggling with his performance. Whether it is the effect of the illness itself, or, possibly, the effect of the medication, he struggled to complete these tasks. Indeed, he accepted frankly in his oral evidence that he was struggling and the details of, for example, the alleged inaccuracies in journaling that the claimant did not take serious issue with are set out at page C61. This is just one example from the notes of the one-to-one meetings where it is clear that intensive support was being given by management and needed to be given in order for the claimant to carry out tasks that were within the scope of his job description. We therefore reject the allegation that the respondent created a stressful situation for the claimant. He was not given tasks that were inappropriate for him, he was given light duties, he was given a considerable amount of support.

65. It was alleged that Mrs Bhatti, in particular, was hostile to the claimant in how she spoke to him. The claimant makes the generalised allegation that she picked on the littlest faults without informal chat and then there are the four specific allegations made in the claimant's third witness statement, paragraphs 5, 6, 7 and 8.

66. Our conclusion is that Mrs Bhatti was actively managing the claimant but she had a service to run that was under considerable pressure. The alleged comments are wholly at odds with our impression of her as a manager. We also bear in mind that the claimant's second statement, paragraph 7, conflates the incidents that he later claims to have happened on 7 March and 30 April and therefore there is an inconsistency between the claimant's

two statements. Bearing in mind our impression of Mrs Bhatti as a supportive manager, the fact that our impression is borne out by the contemporaneous documents, the inconsistency in the claimant's account of these incidents and the fact that they are seen through the prism of strong emotion, our conclusion is that the claimant's account of these incidents should be rejected and we find that Mrs Bhatti was not hostile towards the claimant in the way that she spoke to him. We reject the claimant's account of the four specific incidents and do not accept that Mrs Bhatti said the words alleged.

67. It is alleged that she ignored the claimant's email advice about how he could be supported back to work. This is a reference to the claimant's email of 22 January 2018 by which he forwarded to her an email dated 12 January that he had received from LL of DWP. Mr L had provided the claimant with advice about an employer's responsibilities towards disabled people. The subject heading of the email is: "Job retention" and therefore it seems to us to be clear that the claimant was trying to find ways of being retained. He does not include any comment in his covering email; he forwarded LL's email letter and the attached letter.

68. It seems to us that, although he did not say so in so many words, the claimant was effectively saying "I've received this information it's relevant to me." He intended to convey to Mrs Bhatti by forwarding the email that he thought he was disabled by reason of reactive depression, severe anxiety, panic attacks and back pain. He needed strategies to support him in a return to work and was intending to convey to her that this information, these suggestions might help him. That seems to us to be what the claimant was intending to convey by forwarding the email and it should be taken together with the conversation that he had with Mrs Bhatti at about the same time.

69. It seems to us probable that that is how Mrs Bhatti understood the letter because she forwarded it to HR. She was following their advice and she sought their advice on it. We accept her evidence that they advised her that the council was already doing much of what was set out in the letter. The claimant criticises Mrs Bhatti for not reverting to him with questions but we accept that Mrs Bhatti was reassured by the HR advisor, SR, that adjustments such as those on the letter were being considered and at no time has the claimant pointed to a specific individual adjustment from that list that is not otherwise part of his case. Furthermore, we find that the overwhelming majority of these matters were being considered in the arrangements put in place by the respondent for a return to work. There was a gradual phased return on full pay for a longer period of time than the four to six weeks anticipated under the policy; he had received paid counselling; he had reduced tasks; he was given training; he was given management support; and therefore our conclusion is that the letter was not ignored even though it was not specifically referred to in conversations with the claimant.

70. In paragraph 6.4.2, the claimant accuses the respondent of failing to follow occupational health advice on a phased return of one hour a day. What happened in relation to this was that on 18 January 2018, following an occupational health meeting on 16 January, CD asked the occupational health physician indirectly if it was possible for the claimant to return on two hours a day rather than one hour a day because it gave him more time to settle in and carry out some tasks. We see that on page G13-14. Page G13 contains the response that the occupational health physician has agreed to the suggestion of a phased return initially on two hours per day. The request could not have been made by CD very much quicker because the report is only a few days earlier than her request.

71. According to Ms D's email to the claimant (page G17), which the claimant accepted was probably accurate, there was a telephone conversation between Ms D and the claimant on the Thursday before he was due to return on the Friday where CD asked him to return for two hours. The claimant responded by saying that that was a breach of the agreement and CD replied they were following altered occupational health advice.

72. Our conclusion is therefore that the respondent did not go against occupational health advice in asking the claimant to return for two hours a week. Given the claimant's state of mind, we accept as a matter of fact that he was upset but we consider it to have been a reasonable request by management for the reasons outlined by Ms Dhillon in her email.

73. Mr Sinclair is criticised for saying in the appeal hearing that the respondent does not have to follow occupational health advice. As we say, our conclusion is that in fact the respondent did not fail to follow occupational health advice. However, in relation to this specific comment by Mr Sinclair, we can see from the report that occupational health make recommendations to management and state expressly that it is for management to decide if these recommendations can be accommodated. That was the context of any comment by Mr Sinclair.

74. Turning to the question of taking minutes of the meeting (paragraph 6.4.3). The claimant was asked on 29 January 2018 to record the minutes of the meeting scheduled to take place the next day. The claimant's evidence on this point has changed. Initially he said it was his first day back, then it was two to three days later or possibly later than that and then he accepted that he could have got his dates muddled. He accepted that it was within his job description to be asked to take minutes. He had done it before. It was simply that he did not feel ready to do it and therefore should not have been asked to do it.

75. It does not seem to us to have been an unreasonable request given that he did take the minutes as he was asked. He did as he was told. He had a lot of support in doing the task. Mrs Bhatti reviewed it. CD gave prompts as to what needed to be captured. He was directed to a template. He was given an itemised agenda to follow. It was not unreasonable, with all that support, to encourage him to do what he did not think he was capable of when the management were trying to find tasks that were in his job description to

encourage him to resume his role. Had he not had support, that would be a different matter. Afterwards, Mrs Bhatti went through four different versions of the minutes with the claimant and this reinforces our conclusion that she was supportive towards him.

76. We turn to part-time working (paragraph 6.4.4.). As a matter of fact, the claimant was doing part-time working when he returned to work. He achieved a maximum of five hours a day, 12 to 5 pm on 5 March but that dropped to four hours a day thereafter, on occupational health advice. When he returned to work after the intermittent sickness absences from March to May, each time he was working four hours per day. What he asked for on 25 May 2018 was temporary part-time working which would presumably have involved a temporary change to his contract on reduced pay. This was rejected by Mrs Bhatti on the basis that the needs of the service required the post to be full-time due to the service having become responsible for additional sites and the increased workload. She also reasoned that the claimant's sickness absence was high even when he was part-time working and our conclusion is that those were her genuine reasons for rejecting the request.

77. The claimant pointed to GS as a comparator in relation to part time working. She is a permanent part-time business support officer working in the same department. No evidence was produced by either party about the reasons why she was working part-time but it was accepted that she is not disabled, unlike the claimant. It was accepted by him that she had been a part-time worker for a number of years.

78. We note that the recruitment exercise which starting December 2017 was to a full-time post. We accept the respondent's evidence on this that this was not a recruitment to the claimant's job and we reject his supposition about this. It was filled as a full-time worker.

79. Had GS been *moved* from full-time working to part-time working during the period under consideration and during the period of expansion of workload then in our view she would be a suitable comparator for the direct disability discrimination case. If we are wrong about that, we are quite satisfied that the reason why part-time working was rejected in the claimant's case was not the fact of his illness itself (see paragraph 76 above).

80. It could be argued that the fact that GS was working part-time shows that the job can be done part-time. The evidence was a little bit thin from the respondent on this but on balance we accept their evidence that they needed two other full-time posts given that one of the posts was a part-time post and we accept that the structure of the business was such that this was a requirement. Mr Carter also referred to the additional cost of having two part-time workers compared with one full-time worker but the principal reason was that the allocation of work meant that it was not possible to reduce either full-time post to a part-time post. The claimant accepted that he could not really challenge that evidence, because it was a management issue.

81. As I say, we have concluded that the job that is advertised and appears in the bundle at page E4-E7 was not the claimant's job. That remained open to him and we accept that page E8 shows the requisition for a replacement to be recruited that was only signed after the claimant's appeal was rejected.

82. We accept the claimant's evidence that his trade union representative in December 2017 said to him something to the effect that if he went away for three weeks' annual leave he wouldn't be coming back to a job. However, we accept unreservedly that this comment did not reflect a decision that had been made by the respondent. Such a decision, such a view is completely inconsistent with the extended phased return, the extended review period and with the management support that he thereafter received. Whatever the trade union representative said to the claimant, that did not reflect the position of the respondent, for whom he did not speak.

83. We then turn to the question of a transfer or other options (paragraph 6.4.5.) and under this heading consider ill health retirement and redeployment.

84. The claimant has criticised the respondent for taking occupational health advice on whether he met the requirements for ill health retirement without speaking to him. We consider that Mr Carter's evidence on this point made perfect sense. It seems to us to be common sense that one does not raise the hopes of an employee that ill health retirement might apply unless one knows whether the criteria are likely to be met. The report of the occupational health advice on 29 June 2018 seems to us to be consistent with the opinion that Mr Carter said he received that the claimant would not meet those requirements. We say that because, in that report, the OH professional expresses the opinion that the claimant is fit for work and such an opinion is likely to mean that the claimant would not meet the requirement for ill health retirement. We do not criticise the respondent for the steps they took in relation to ill health retirement.

85. So far as redeployment is concerned, we look at the mention of redeployment in the policy at page B6. The manager may agree to give consideration to redeployment following advice from occupational health. This is first mentioned in the one-to-one notes on 8 March 2018 at pages C94-96. Those notes, which are of an informal chat at which Mrs Bhatti and CD both appear to have been present, include some open conversations between them including the following.

> "GB was honest with SM and said that SM was unable to complete his allocated task without constant management support and at level 5 SM should not require constant handheld approach. For each task assigned GB/KD had to do together with SM as SM was unable to complete."

86. There is then at page C96 the following.

> "CD advised SM that SM should have a serious conversation with his GP and have a think on what is best for him and what he needs to do as the level of work that is required within SM's remit needs attention to detail and accuracy and this is proving to be difficult due to SM's lack of concentration. CD advised SM that

maybe he should think about making lifestyle changes as CD does not want SM to get further stress and anxiety when he is unable to complete his assigned tasks. CD advised maybe SM should also think about another area of work that might be more suitable, explore other areas of work as maybe this level of admin might not be suitable with SM's current medical condition. SM advised he would speak with his GP and would think on what to do."

It was then confirmed by Mrs Bhatti in the meeting that what was referred to there were other opportunities within the Council.

87. At some point, the claimant applied unsuccessfully for a different full-time post within the Council and on 19 March 2018 there was a return to this conversation; see page C97. It appears that the claimant had not thought any further about talking to his GP about whether other posts would be suitable for him.

88. Mr Carter and Mr Sinclair both claimed to have looked to see what was available and said that there was nothing. There is no documentary evidence of that in the bundle and we might have expected that there would be. The question was raised of occupational health, see page C106, and they answered:

"We discussed his desire to be redeployed and Mr Moghul feels he may recover quicker if there were an opportunity to change jobs. However, he realises this is only possible if there are opportunities available. I did advise that he would need to be working his full hours before this could be considered but in the meantime, he could apply for other roles if he wished."

89. That is in the report dated 2 May 2018. In fact, in contrast to the occupational health professional's then advice that the claimant was fit to work, we accept that the claimant was frequently telling Ms Bhatti that he was struggling to do the tasks that were required of him.

90. So occupational health advised that he should be working full-time before being considered for redeployment. This position seems to us to be potentially a curious one. If that is their general position, then redeployment of a full time employee unable to return to work would never be considered unless an individual was working full-time hours and that seems to be contrary to the respondent's policy that redeployment should be considered on occupational health advice.

91. However, our conclusion is that Mrs Bhatti's actual reasons for not referring the question of redeployment to Ms D were different. Those were that the claimant had, and this was her oral evidence which we accept, always claimed that he was not feeling well and should not be at work and in light of that expressed view and the claimant's passivity when the question was discussed between him and Ms Bhatti and CD, she did not consider redeployment further. It was not raised directly with the claimant after March 2018.

92. It is accepted that the respondent dismissed the claimant (paragraph 6.4.6).

93. As to paragraph 6.4.7, we reject the allegation that the respondent created an artificial situation. It is clear that the sickness absence and the reason for the sickness were entirely genuine in this case.

94. A change to the working environment: paragraph 6.22.3. As we explain at paragraph 33 and 34, when properly understood, this was a complaint that there was no dedicated or fixed desk so that he could receive management support – not because of the physical attributes of the desk or the chair. There had been a risk assessment, Postureright had adjusted the claimant's chair and thereafter it was suitable. Theoretically, there was the potential that his chair could have been used by others but, in our view, Mrs Bhatti took all reasonable steps to ensure that the chair was available for his exclusive use. As to the request for a dedicated or fixed work desk, the claimant agreed that the same desk was available for him two to three days a week when he would be seated next to Mrs Bhatti for her to support him. Mrs Bhatti's evidence was that it was more often than this. The level of support that appears in the one-to-one bears out that she was continually helping him and, in our view, nothing further could reasonably have been done in relation to this.

95. We also were urged by the claimant to consider that JC was a comparator. In fact, Mr C's evidence in his witness statement deals with his participation in the management absence process itself and not with his position as a potential comparator. In those circumstances, there was a paucity of evidence before us about his situation. However, we are quite satisfied that such evidence as is available suggests that although he has been absent for a considerable period of time it is in connection with a condition where the prognosis is that at particular date there will be a step change in his condition. For that reason, we have concluded that his situation is not sufficiently similar to the claimant's for him to be a suitable actual comparator or for his treatment to have evidential value when deciding the claimant's claim. There was no clear evidence from either party about the length of time that JC has been absent nor whether he has been or is being managed under the Attendance Management Policy.

The Law

96. When, as here, dismissal is admitted, the tribunal must consider whether it was fair or unfair in accordance with s.98 Employment Rights Act 1996 (hereafter ERA 1996) which, so far as is relevant provides,

> "Section 98 Employment Rights Act 1996
> (1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show-
>
> (a) the reason (or, if more than one, the principal reason) for the dismissal, and
>
> (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

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

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

(b) …

(3) In subsection (2)(a) –

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

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal was 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."

97. When assessing whether or not the employer acted reasonably or unreasonably in deciding to dismiss for the reason that they did the tribunal must not substitute its own opinion about whether the employee should have been dismissed but should recognise that they is, in most cases, a range of responses open to the reasonable employer: O'Brien v Bolton St Catherine's Academy [2017] I.C.R 737 CA.

98. If the tribunal finds that the dismissal was unfair and has to go on to consider whether there should be deductions from compensation then, on the authority of Polkey v A E Dayton Services Limited [1987] IRLR 503, compensation may be reduced on the basis that had the employer taken the appropriate procedural steps which they did not take then that would not have affected the outcome.

99. The claimant also complains of a number of breaches of the Equality Act 2010 (hereafter the EQA) in reliance upon the protected characteristic of disability. Section 136 of the 2010 Act reads (so far as material):

> "(1) This section applies to any proceedings relating to a contravention of this Act.
>
> (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
>
> (3) But subsection (2) does not apply if A shows that A did not contravene the provision."

100. This section applies to all claims brought before the Employment Tribunal under the EQA. By s.39(2) EQA an employer must not discriminate against

an employee by dismissing them or subjecting them to any other detriment. By s.39(4) there is a similarly worded prohibition on victimisation. Section 40 EQA contains a prohibition on harassment in employment.

101. Section 13 (1) of the EQA explains what is meant by direct discrimination and reads:

> "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."

102. Section 15 EqA provides as follows:

> "15 Discrimination arising from disability
> (1) A person (A) discriminates against a disabled person (B) if—
> (a) A treats B unfavourably because of something arising in consequence of B's disability, and
> (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.
> (2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability."

103. The structure of the obligation upon an employer to make reasonable adjustments in relation to disabled employees so far as it is relevant to this claim is found in ss. 20, 21, 39 and 136 and Schedule 8 EqA 2010.

    103.1 By s.39(5) the duty to make reasonable adjustments is applied to employers;

    103.2 By s.20(3) that duty includes the requirement where a PCP applied by or on behalf of the employer puts a disabled person, such as the claimant, at a substantial disadvantage in relation to his employment in comparison to persons who are not disabled to take such steps as are reasonable to have to take to avoid the disadvantage.

    103.3 By s.21 a failure to comply with the above requirement is a failure to comply with a duty to make reasonable adjustments. The employer discriminates against their disabled employee if they fail to comply with the duty to make reasonable adjustments.

104. The definition of harassment is contained in section 26 of the Act and, so far as relevant, provides 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.

(2) …

(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."

105. Victimisation is defined in s.27 EQA to be where a person (A) subjects (B) to a detriment because B does a protected act, or A believes that B has done, or may do, a protected act. In the present case, the respondent alleges that claimant did not do an act which amounts to a protected act within the meaning of s.27(2). By that subsection, each of the following is a protected act:

"(a) Bringing proceedings under the Act;
(b) giving evidence or information in connection with proceedings of the Act;
(c) doing any other thing for the purposes of or in connection with this Act;
(d) making an allegation that a person has contravened this Act."

106. The importance of breaking down the different elements of the statutory definition of discrimination arising in consequence of disability was emphasised by Mrs Justice Simler in Pnaiser v NHS England [2016] I.R.L.R. 160 EAT at paragraph 31,

"the proper approach can be summarised as follows:

(a) A tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises.

(b) The tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a s.15 case. The 'something' that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.

(c) Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A's motive in acting as he or she did is simply irrelevant […].

(d) The tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is 'something arising in consequence of B's disability'. That expression 'arising in consequence of' could describe a range of causal links. Having regard to the legislative history of s.15 of the Act (described comprehensively by Elisabeth Laing J in *Hall*), the statutory purpose which appears from the wording of s.15, namely to provide protection in cases where the consequence or effects of a disability lead to unfavourable treatment, and the availability of a justification defence, the causal link between the something that causes unfavourable treatment and the disability may include more than one link. In other words, more than one relevant consequence of the disability may require consideration, and it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability.

(e) For example, in *Land Registry v Houghton* UKEAT/0149/14, [2015] All ER (D) 284 (Feb) a bonus payment was refused by A because B had a warning. The warning was given for absence by a different manager. The absence arose from disability. The tribunal and HHJ Clark in the EAT had no difficulty in concluding that the statutory test was met. However, the more links in the chain there are between the disability and the reason for the impugned treatment, the harder it is likely to be to establish the requisite connection as a matter of fact.

(f) This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.

(g)[…].

(h) Moreover, the statutory language of s.15(2) makes clear […] that the knowledge required is of the disability only, and does not extend to a requirement of knowledge that the 'something' leading to the unfavourable treatment is a consequence of the disability. Had this been required the statute would have said so. […]

(i) As Langstaff P held in *Weerasinghe*, it does not matter precisely in which order these questions are addressed. Depending on the facts, a tribunal might ask why A treated the claimant in the unfavourable way alleged in order to answer the question whether it was because of 'something arising in consequence of the claimant's disability'. Alternatively, it might ask whether the disability has a particular consequence for a claimant that leads to 'something' that caused the unfavourable treatment."

107. Section 15 EQA, like s.13, requires the tribunal to look into the mind of the decision taker and ask what were the factors (conscious or subconscious) which materially influenced his or her decision. Then the tribunal has to ask whether that something arose in consequence of disability which is an objective test: City of York Council v Grosset UKEAT/0015/BA.

108. An employer's potential defences require them first to show that they did not know and could not reasonably have been expected to know that the claimant was disabled. Following a concession made by the respondent, this was no longer relied upon in the present case. The other potential defence is to show that the detrimental treatment was a proportionate means of achieving a legitimate aim; the defence of justification.

109. It has been confirmed by the EAT in Land Registry v Houghton (UKEAT/0149/14) that the correct approach to justification of discrimination arising from disability is the same as to justification of indirect discrimination, namely the test propounded in Hampson v DES [1989] ICR 179. What is required is an objective balance between the discriminatory effect of the condition and the reasonable needs of the party who applies the condition.

110. Although the test of proportionality under s.15 EQA and that of whether the dismissal was fair or unfair in all the circumstances under s.98(4) are different tests, they are unlikely to produce a different result in most cases.

111. So far as a claim of breach of the duty to make reasonable adjustments is concerned, It is clear from paragraph 4.5 of the Equality and Human Rights Commission (EHRC) Code of Practice Employment (2011) that the term PCP should interpreted widely so as to include "any formal or informal policies, rules, practices, arrangements, criteria, conditions, prerequisites, qualifications or provisions."

112. In relation to the operation of s.136 EQA in reasonable adjustments claim, the equivalent provision of the antecedent legislation was interpreted in Project Management Institute v Latif [2007] IRLR 579 EAT in relation to an allegation of a breach of the duty to make reasonable adjustments to mean that the claimant must not only establish that the duty has arisen but that there are facts from which it could reasonably be inferred, absent an explanation, that it has been breached. This requires evidence of some apparently reasonable adjustment which could be made.

113. The section 27(2)(c) EQA strand of the definition of a "protected act" has been interpreted to include an assertion of rights under the Act in a very broad sense, even if it is not focused on any particular part of the Act: Aziz v Trinity Street Taxis [1988] I.C.R. 534 CA.

114. When considering whether or not the alleged perpetrator has subjected the employee to a detriment "because" they have done a protected act it is sufficient if we find that they consciously or subconsciously they had been influenced by the fact of the employee's previous complaints: Nagarajan v London Regional Transport [199] I.C.R. 877 HL.

Conclusions

115. We now set out our conclusions on the issues, applying the law as set out above to the facts which we have found. We do not repeat all of the facts here since that would add unnecessarily to the length of the judgment, but we have them all in mind in reaching those conclusions.

116. Direct disability discrimination: paragraphs 6.4 to 6.9 above. For the reasons we have already explained (see paragraphs 60 to 93 above), we find that not all of the incidents alleged in paragraph 6.4 happened in the way alleged by the claimant and we refer back to those findings.

117. As to paragraph 6.5 to 6.7, we are quite satisfied that the reason for dismissal was capability because of sickness absence over a long period of time. There was not less favourable treatment than others in not materially different circumstances and we are satisfied that the respondent would have dismissed others with similar levels of sickness absence who had failed to sustain attendance on a phased return. GS and JC are not suitable comparators (see paragraphs 76 to 80 and 95 above) and we are quite satisfied that the reason for the treatment which we have found to have occurred was not the disability itself.

118. The issues set out at paragraph 6.8 and 6.9 go to the question of the proportionality of the decision to dismiss, rather than whether it was an act of direct discrimination. They will be considered in relation to the allegation of discrimination arising from disability. In reality, having listened to the claimant's submissions, it seems to us that the claimant's complaint is actually that the respondent did not take his disability into account enough and treated him unfavourably because of his absences, not that he was treated less favourably because of his disability.

119. So we move to the allegation of unlawful treatment contrary to s.15 EQA, discrimination arising from disability. Did the respondent treated the claimant unfavourably because of something connected with his disability, such as his sickness absence?

120. The respondent had actual knowledge that the claimant was disabled from their 25 November 2017 receipt of the occupational health physician's report and that is now conceded.

121. The sickness absence undoubtedly arose in consequence of the claimant's now admitted disability of musculoskeletal pain and depression (para.6.10). We therefore go on to consider whether the sickness absence, consciously or subconsciously had a material influence on the respondent's treatment of the claimant which we have found occurred on the allegations listed in paragraph 6.4.

122. So far as the allegation set out in paragraph 6.4.1 is concerned, the claimant has not made out those facts.

123. So far as the allegation set out in paragraph 6.4.2 is concerned, the claimant has not made out the facts alleged because occupational advice changed.

124. So far as the allegation set out in paragraph 6.4.3 is concerned, the claimant has not made those out on the facts.

125. So far as the allegation set out in paragraph 6.4.4 is concerned, the respondent did refuse the claimant's request to move temporarily to doing his role on a part-time basis, that is doing the role of business support officer on a part-time basis on about 25 May 2018 (see page C110).

126. The reasons why Ms Bhatti refused the claimant's request to move temporarily to working part-time as business support officer on 25 May 2018

were first, the business needs for the claimant's business support officer role to be carried out on a full time basis (given the demands on the business and the working patterns of the other members of the department) and, secondly, the claimant's inability to sustain part-time working without sickness absence and intensive management support. Therefore, part of her reason was that of sickness absence and that arose in consequence of disability. As a result, the issue at paragraph 6.12 is made out in relation to the issue of part-time working. We therefore need to go on to consider whether the refusal of that request was a proportionate means of achieving a legitimate aim (paragraph 6.13).

127. Our conclusion, after careful consideration is that the respondent has shown that it was a proportionate means of achieving a legitimate aim. The claimant was not achieving sustained attendance as a part-time worker and therefore the proposition had, in effect, been tested. The claimant had not been able to sustain four hours per day during his phased sickness return and was being given a very high degree of support. Even when he was in attendance for four hours a day, he was not achieving the level of independence expected of someone at his grade. The decision to refuse the claimant's request for part-time working was apt to achieve the legitimate aim of protecting the efficiency of the service provided to the respondent's residents because the service would be less efficient if the claimant's role was only being filled part time. The consideration of the respondent of his request to move to part-time working was somewhat cursory but sufficiently well thought through and logical despite that. We cannot say that no reasonable employer would have given it this level of consideration in all the circumstances.

128. So far as the allegation set out in paragraph 6.4.5 is concerned, the respondent rejected ill health retirement as an idea because the claimant did not meet the requirements and therefore we are satisfied that it was not because of the claimant's sickness absence. That allegation also covers the question of redeployment and the respondent did reject redeployment as an option for the claimant so that as a factual allegation of unfavourable treatment is made out.

129. Did the respondent reject the question of redeployment because of the claimant's sickness absence? In March 2018, the respondent did not pursue discussion of redeployment because the claimant did not discuss what would be suitable for him with his GP and then resume the discussion with his managers. Mrs Bhatti's evidence was that it was briefly discussed and the claimant had said that it was not on the top of his list.

130. It seems clear to us that the claimant did not push the question of redeployment to a different job with Mrs Bhatti rather than part-time working in his existing role. He applied unsuccessfully for one other full-time role. In the hearing before us, he did not point to specific vacancies for which he says he should have been considered.

131. Our finding is that, apart from the discussion with the claimant in March 2018, Mrs Bhatti had considered it with SR (the Human Resources advisor) and occupational health and her perspective was that the claimant had always claimed that he did not feel well enough and should not be at work, that he needed to be able to do some work before he could be considered for redeployment. Occupational health were not supporting redeployment because they advised that the claimant should be working full time before it could be considered. It seems to us that these reasons are clearly influenced to a material extent by the claimant's sickness absence and that paragraph 6.12 is made out in relation to the failure to offer the alternative of redeployment.

132. Given those were Mrs Bhatti's reasons (that the claimant was not pushing redeployment, had always said he did not feel well enough to work, he needed to be able to so dome work before he could be considered for redeployment but was visibly struggling and occupational health were not supporting redeployment), has the respondent shown that her decision not to refer to CD the question of whether redeployment should be considered a proportionate means of achieving a legitimate aim?

133. We accept that the rejection of redeployment was apt to achieve the legitimate aim of protecting the efficiency of the service to the respondent's residents because that is served by having people in post who are able to work independently to the level of their job responsibility.

134. Was the decision a proportionate means of achieving that aim? This has been a finely balanced judgment. The claimant was saying that he was struggling in tasks. He had the ability to apply for other roles. His emphasis was on adjustments to the existing role and he did not make a request to be put on the redeployment register as such.

135. Many employers would have made more active enquiries about the nature of the jobs that were available at an earlier stage and communicated those to the claimant. The claimant criticises Mrs Bhatti for not discussing it with him after March 2018 and we do bear in mind that in general it could be said that large employers in the public sector have a range of posts at different levels, some which were potentially part-time. However, on balance, taking account of the claimant's passivity, the fact that it was mentioned to him in March 2018 and he did not return to it, his frequent statements that he was struggling to be at work at all and the level of management support needed for him to achieve a minimal output at that time, we have concluded that the respondent's rejection of possible consideration of redeployment was proportionate.

136. The respondent did dismiss the claimant. We set out our conclusions in relation to the dismissal below.

137. So far as the allegation set out in paragraph 6.4.7 is concerned, that was not made out on the facts.

138. We consider whether or not the respondent applied PCPs to the claimant in relation both to the indirect discrimination allegation (paragraphs 6.14 & 6.15) and failure to make reasonable adjustments (paragraphs 6.19 & 6.20). We accept that those two PCPs were applied to the claimant.

139. Starting with the allegation of indirect discrimination, we go on to consider paragraph 6.16 and conclude that the respondent undoubtedly would have applied the same PCPs to people who did not have disability related sickness absence because the policy applies broadly. They would have limited their requirement of full-time working to those who had full-time contracts. However, we reject the indirect disability discrimination case because we do not consider that there is evidence from which we can find that people sharing the claimant's disability of musculoskeletal pain and depression would be put to a particular disadvantage by the PCPs. That disability covers a wide range of effects and we have no evidence of the impact on others with those conditions from which we could draw that conclusion.

140. Then turning to the reasonable adjustments claim, we find that the claimant was put to a substantial disadvantage by the PCPs of full-time working and the requirement to have limited absences because he was at risk of dismissal (paragraph 6.20 and 6.21). The respondent had knowledge of the disability from November 2017 and knew of the risk to the claimant's continued employment since they were managing him under the absence management policy.

141. We therefore go on to consider the particular steps that the claimant argues should have been taken (paragraph 6.22).

    (a) Paragraph 6.22.1 argues for reduced hours. Our finding is that reduced hours were given and no further reasonable reduction in hours would have reduced the risk of dismissal;

    (b) Paragraph 6.22.2 argues for adequate additional support. He was given intensive additional support and no further support would have been a reasonable step for the respondent to take;

    (c) Paragraph 6.22.3. The changes which the claimant required to his work situation were limited to a fixed desk and our conclusion is that no further reasonable changes could have been made. He had a desk next to Mrs Bhatti for a minimum of two to three days a week and the adjusted chair was protected for his use.

    (d) Paragraph 6.22.4. As far as remote working is concerned, the claimant admitted that his role could not have been done in total from home. Additionally, it is inconsistent with the need for management support that he should request to work from home. This was unlikely to have led to effective work on his part and unlikely to have reduced the risk of his dismissal. For these reasons, it would not have been a reasonable adjustment in the claimant's case.

(e) Paragraph 6.22.5. He did have reduced responsibilities. He was given one task at a time. He was given a lot of support in doing those tasks.

142. We have therefore concluded that there is no step that the respondent failed to take that it would have been reasonable for it to take to avoid the disadvantage of the risk of dismissal.

143. Turning to the allegation of disability related harassment (paragraphs 6.24 to 6.27), for the most part, the allegations are not made out on the facts for reasons which we have already explained. The exceptions are the refusal to accommodate part-time working, the refusal to consider redeployment and dismissal.

144. The reason why we have decided to reject the harassment claims based upon these actions is that we have concluded that the conduct did not have the purpose or effect of harassment within the meaning of s.26(1)(b) of the EQA. We accept that it was not the purpose of the respondent's witnesses for the decisions to reject part-time working, redeployment or dismissal to have the harassing effect on the claimant.

145. We take into account the claimant's perception. However, viewed subjectively, it is not reasonable to consider that rejection of temporary part-time working has the harassing effect in circumstances where the business could not support it and the claimant had not sustained satisfactory attendance and unsupported work at the level expected of him when working for a maximum of 4 hours a day. We do not consider it to be reasonable to consider it to have the harassing effect that redeployment was not actively considered in circumstances where the claimant did not pursue it in the discussion at the time it was raised. We set out our conclusions in relation to the dismissal below.

146. We turn to the allegation of victimisation. The claimant argues that he made a protected act when he forwarded the email from LL to Mrs Bhatti on about 22 January 2018. Although they accept that he did make requests for the particular adjustments which have been the subject of these proceedings, it is contended by the respondent that the email of 22 January 2018 did not amount to a protected act within the meaning of s.27 EQA.

147. Applying the definition in s.27(2)(c) EQA and the guidance on the meaning of protected act in the case of Aziz v Trinity Street Taxis, we conclude that the email of 22 January 2018 was a protected act. No other specific request for reasonable adjustments was, in the event, relied on by the claimant. Mrs Bhatti forwarded it on to HR.

148. The email was forwarded to Mrs Bhatti at the time of the return to work and therefore a question arises as to whether it pre-dates some of the actions relied on by the claimant, namely request to undertake stressful work on his first day back. However, notwithstanding that, we are quite satisfied that the claimant was asked to carry out the tasks which were assigned to him because they were part of his job description and because Ms Bhatti wanted him to be carrying out a range of tasks. The claimant may have found them

to be stressful, but they were not unreasonable tasks to ask someone in his position to do and therefore the alleged connection between the protected act and the request to carry out specific tasks is not made out (paragraph 6.30).

149. As far as not allowing him to work part-time or reduced hours is concerned, that was not because of the letter that was emailed on 22 January. The reasons for those actions are set out above.

Conclusions in relation to dismissal

150. We turn then to the allegation of unfair dismissal contrary to s.94 of the ERA and the question of whether there was a reasonable investigation (paragraph 6.31). We also consider whether the dismissal was an act of discrimination arising in connection with disability or one of harassment.

151. We were concerned to note that, following date of the report to the strategic director, there were two further occupational health reports dated 22 and 29 June 2018. The second such report records the opinion that the claimant is fit to return to work. The managing absence policy does not provide for the employee to see the report for the strategic director and there is no opportunity for the employee to make submissions or provide evidence directly to them. The point at which the employee has the opportunity to influence the strategic director's review is at the Stage 2 review meetings. We therefore considered whether under the policy Mr Carter would see the up to date medical evidence. It is a fundamental requirement of a fair capability dismissal policy that the dismissing officer should have the most up to date information about the medical condition and the prognosis.

152. We took into account paragraph 6 of Mr Carter's statement which is expressed in somewhat conditional terms as was his oral evidence where he said that he would have received them from SR. The appeal notes seem to indicate that he was seized of the factual point that the claimant's medical advice suggested he was fit to return to work at the time that he made his decision but he accepted that he did not know that the claimant was actually in work from 3 July onwards. The majority of us find that SR of HR did forward to Mr Carter the occupational health reports on 22 June and 29 June 2018 as he evidenced in his statement and that is referred to in the appeal notes. The minority member is not persuaded of Mr Carter's evidence in this respect because of the absence of documentary evidence demonstrating that it was transferred and the conditional nature of Mr Carter's evidence.

153. The tribunal was initially concerned that the final opportunity under the policy for the employee to influence the decision to dismiss appears to be the final stage 2 review meeting rather than the decision of the director who is the person who decides to dismiss under the policy. It seems to us that if an employer has such a policy it is imperative that they make sure that the employee knows that when their case is transferred to the director, dismissal is a possible outcome. But this was stated at every outcome letter at stage 2 and repeated at the meeting on 25 May 2018. It is a trade union

agreed policy which seems to us to be relevant and the claimant was represented by his trade union representative.

154. The claimant may not have expected that when he went to work on 5 July 2018 he would receive a letter of termination that day, but we are satisfied that he knew it was a possible outcome of the decision of Mr Carter. Had it not been the case, as is found by the majority, that the most up to date occupational medical evidence was before Mr Carter we would have been concerned about the fairness of the process. It is necessary that the decision maker has available the most up to date information and, since the majority conclusion is that the last two reports were sent to Mr Carter, we consider that the respondent did give sufficient weight to the occupational health advice.

155. The claimant's evidence was that he gave Dr Garg's letter of 4 July to Mrs Bhatti on 5 July. Therefore, on any view it came to the respondent after the decision was made. Having read the letter, our opinion is that it does not, in fact, change the available medical evidence about the claimant's illness or prognosis. It would not have changed the nature of the medical evidence had it been available to Mr Carter. If anything, it suggests that the claimant's symptoms had got progressively worse.

156. Given all of that the Tribunal's unanimous view is that it was a reasonable investigation.

157. As to paragraph 6.32, we find that there was ample consultation with the claimant at stage 1 and stage 2 of the process in the meetings that we have outlined in our findings. Despite the lack of opportunity to make submissions directly to the decision maker, this was a reasonable consultation in all the circumstances.

158. Looking at the various sundry issues that are mentioned in the additional issues set out in paragraphs 6.31 to 6.40 above,

    158.1 The respondent made reasonable efforts to explore alternatives to dismissal such as reasonable adjustments. The claimant was working flexibly. On balance, such exploration as there was of suitable alternative employment was within the range of reasonable responses.

    158.2 The respondent had not, we find, decided to dismiss the claimant prior to July 2018.

    158.3 The respondent did not unilaterally change the return to work from one to two hours.

    158.4 Mrs Bhatti did not ignore the letter of LL.

    158.5 In our view, it was not an unreasonable request to ask the claimant to take minutes and, to the extent that this is a complaint about the circumstances in which the request was relayed, that allegation is

inconsistent with our finding that Mrs Bhatti was a supportive line manager.

158.6 The claimant accepted that the chair he was given was suitable.

158.7 We have rejected the allegation that Ms Bhatti said to the claimant: "If you can go to a GP appointment why can't you come to work".

158.8 So far as the claimed additional counselling sessions is concerned, we conclude that it was within the range of reasonable responses for the respondent to not pay for any additional counselling in the light of that which had already been provided.

159. Our conclusions on the claim of unfair dismissal are that the reason for the dismissal was capability, in the sense that the claimant was incapable due to ill health to carry out the role for which he was employed.

160. The decision to dismiss was fair in all the circumstances. We have considered the question of hastiness and particularly whether it could be argued that it was hasty to dismiss given that the 29 June 2018 occupational health advice was that the claimant was fit to return to work and, unknown to Mr Carter, the claimant had just started a phased return to work. We have concluded that it was not, given the history of unsuccessful phased returns on full pay when the policy envisages a phased return that is designed to last only four to six weeks. By the time of his dismissal, phased returns to work had been attempted over a period of more than five months (22 January 2018 to 6 July 2018) including fairly long periods of absence. The policy states that each of the two formal stages are, ordinarily, up to 3 months. The claimant moved to Stage 2 on 20 November 2017, three months after the first stage 1 meeting on 21 September 2017 and 6 months after the start of his sickness absence. It was at the point of moving the process to Stage 2 that the respondent had actual knowledge that the sickness absence was disability related. The Stage 2 review period was extended by three months on 25 January 2018. At the end of that extended (now six month) review period, the decision was taken by Mrs Bhatti to refer the case to the strategic director's review.

161. Taking the procedure as a whole, including the appeal, there was a full opportunity for the claimant to put forward his arguments. The appeal hearing was in person. We have considered the notes of the appeal and are satisfied that Mr Sinclair gave genuine and thorough consideration to the claimant's criticisms of the original decision of Mr Carter. Any concerns we had about the fact that the procedure does not provide for a hearing at the strategic director review stage are allayed by the right to a comprehensive appeal. Mr Sinclair was aware that the claimant had been declared fit to return to work at the point of dismissal and it was open to him to conclude that that did not mean that the pattern of unsuccessful returns to work was likely to change.

162. The claimant essentially argues that more account should have been taken by the respondent of his disabling illness when he was a loyal employee

from the time that he left school more than 20 years before with exemplary service, but overall the question for us is how much longer can an employer in this situation be expected to wait before an employee returns to give effective service. Even taking into account the obligations that undoubtedly were on this respondent to make reasonable adjustments to the claimant's working conditions, we accept that it was not reasonable for this respondent to wait any longer. Alternatives to dismissal were considered and rejected and those decisions (on part-time working and redeployment) were within the range of reasonable responses for reasons which we have already explained.

163. We therefore are satisfied that the dismissal was fair. We do not go on to make specific findings in relation to percentage chance that the claimant would have been dismissed in any event.

164. The dismissal is also raised as a claim of s.15 EQA discrimination and harassment. We refer to our findings in paragraph 117 above. The reason for dismissal was capability because of sickness absence over a long period of time. That sickness absence arose in consequence of disability and we go on to consider whether the decision to dismiss was a proportionate means of achieving a legitimate aim.

165. The two aims relied upon are protecting the efficiency of the service provided to the respondent's residents; and ensuring that the cost of delivering that service remained at an acceptable level. We do not see that the second (keeping the cost of delivering the service at an acceptable level) is a legitimate aim on its own. We accept that the aim of the managing absence policy under which the claimant was dismissed is to protect the efficiency of the service provided by the department in which the claimant worked. Dismissing an employee who is unable to sustain reliable service is capable of achieving that aim. The question is whether, in the light of the claimant's criticisms of the procedure followed and the actions towards him, the dismissal was a proportionate means of achieving that aim.

166. There was evidence before us of the impact on the service of the claimant's absence and of having, in effect, to carry someone who was making extremely limited steps towards being fit to carry out the full range of his duties (see the email of CD referred to in paragraph 52 above). The claimant was receiving full pay, not only was he struggling to complete tasks accurately but the respondent was using management time to continue to train him. The increases to his full hours had plateaued. The claimant had had intermittent sickness absence between 22 January and 25 May and then a longer period of sickness absence until early July 2018. There was nothing before Mr Sinclair at the appeal stage which indicated that the reported fitness to return to work was likely to lead to sustained attendance and a return to his full hours. Alternatives to dismissal were given reasonable consideration. In all those circumstances, the decision to dismiss was a proportionate means of achieving a legitimate aim.

167. Finally, the dismissal is also argued to be an act of disability related harassment. Our reason for rejecting this claim is that, viewed objectively, it does not seem to us to be reasonable to regard a decision to dismiss which was a reasonable one to take in all the circumstances, as having the harassing effect as that is defined in the statute. That is not to say that we criticise the claimant for his view that insufficient weight was given to his long and loyal service. That was only part of the picture. By reason of s.26(4)(c) of the EQA, that is a necessary precondition of a finding of harassment. We find that the respondent did not have the purpose of harassing the claimant when it decided to dismiss him and, taking into account s.26(4)(c), our view is that dismissal did not have the harassing effect either. The disability related harassment claim is dismissed.

Employment Judge George

Date: …5 October 2020 ……..

Sent to the parties on: ..15/10/2020

Jon Marlowe
For the Tribunal Office