Case Number 1307258/2019
Type V

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**AND**	**Respondent**
Mr W Gethen		**Jaguar Land Rover Limited**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL
(RESERVED JUDGMENT)

HELD AT Birmingham **ON** 19 – 22 January 2021

EMPLOYMENT JUDGE GASKELL **MEMBERS: Ms S Outwin**
Mr K Palmer

Representation
For the Claimant: **Ms A Dannreuther (Counsel)**
For Respondent: **Mr R Barker (Counsel)**

JUDGMENT

The judgment of the tribunal is that:

1 The claimant was fairly dismissed by the respondent. His claim for unfair dismissal is not well-founded and is dismissed.
2 The respondent did not, at any time material to this claim, act towards the claimant in contravention of Section 39 of the Equality Act 2010. The claimant's complaints of discrimination for a matter arising from disability and a failure to make adjustments, pursuant to Section 120 of that Act, are dismissed.

REASONS

Introduction

1 The claimant in this case is Mr Wayne Gethen who was employed by the respondent, Jaguar Land Rover Limited, from 24 May 2014 until 6 June 2019 when he was dismissed. The claimant's substantive employment was preceded by approximately one year's employment with the respondent through an agency. The reason given by the respondent at the time of the claimant's dismissal was incapability.

2 The claimant consulted ACAS on 31 August 2019; and an ACAS Early Conciliation Certificate was issued on 2 September 2019. By a claim form presented to the tribunal on 12 September 2019, the claimant brings claims for

unfair dismissal; disability discrimination; and unpaid notice pay. There was a suggestion also of a claim for breach of contract. By a judgement of Employment Judge Johnson issued on 31 March 2020, the claims for unpaid notice pay and breach of contract were dismissed upon being withdrawn by the claimant. The strands of discrimination which are alleged are discrimination for a reason arising from disability - prohibited by Section 15 of the Equality Act 2010 (EqA); and a failure to make adjustments as required by Section 21 EqA.

3 In its response to the claims, the respondent admits that claimant was dismissed but avers that he was dismissed for a reason relating to his capability and that the dismissal was fair. The respondent further admits that, at all times material to these claims, by reason of suffering from Post-traumatic Stress Disorder (PTSD); Anxiety; and Depression, the claimant was a disabled person as defined in Section 6 and Schedule 1 EqA. The respondent admits that the claimant's incapacity to perform his role arose from his disability - and that, accordingly, he was dismissed for a reason arising from disability. But, it is the respondent's case that the claimant's dismissal was objectively justified (Section 15(1)(b) EqA). The respondent denies any failure to make adjustments as required by Section 21 EqA. It is also the respondent's case that the claims for a failure to make adjustments were presented out of time and that the tribunal has no jurisdiction to consider them.

4 The Hearing was conducted by Cloud Video Platform (CVP) with the parties; their representatives; the witnesses; and the panel all taking part remotely. At the conclusion of the evidence and submissions, judgment was reserved. The panel convened using CVP to discuss the case and make our decision.

The Evidence

5 The tribunal heard evidence from three witnesses. The claimant gave evidence on his own account but did not call any additional witnesses. The respondent called two witnesses: Mr Lee Loveridge - Maintenance Strategies Senior Manager whose decision it was to dismiss the claimant; and Mr Ian McArthur - Manufacturing Engineering Director for Powertrain who dealt with the claimant's appeal.

6 We were provided with a Hearing Bundle running to some 274 pages. We have considered the documents within the Bundle to which we were referred by the parties during the course of the Hearing.

7 The claimant was an honest witness but at times his evidence was vague; inconsistent and contradictory. Examples of these concerns are: -

(a) It was a central feature of the case that during the claimant's sickness absences his line manager, initially Mr Scott Murphy and later Mr Steve Jackson, required him to telephone twice each week to maintain contact. During his evidence and cross-examination, the claimant's position with regard to this varied: from, on the one hand, pursuing his principal case that he was unable to comply with such a requirement because of the nature of his disability (and was therefore placed at a substantial disadvantage); to, on the other hand, insisting that he had always been compliant.

(b) Towards the end of the first day of the Hearing, confronted with a note of a meeting which appeared to be inconsistent with the his case, the claimant denied that the signature appearing on the meeting note was not his. He went on to suggest that this applied to the signature appearing on other meeting notes as well. The suggestion was sufficient to cause some alarm as it had never previously been suggested by the claimant that the notes were inaccurate or that the signatures were not his. Overnight respondent was to consider its position; and may have needed to call additional witnesses. However, at the beginning of the second day of the Hearing, the claimant retracted its position and acknowledged that the signatures were his. We were still left unsure as to whether he now acknowledged that the meeting records were accurate.

(c) At Paragraph 27 of the his witness statement, the claimant spoke of an incident in December 2018 when he claims to have had to chase Mr Jackson to ensure that he would be paid is correct sick pay. He went on to explain that the day after making that telephone call is trade union representatives found the claimant's sick note in Mr Murphy's drawer - and it was alleged that Mr Murphy was attempting to withhold the claimant's sick pay. At the commencement of his evidence, the claimant had to admit that this Paragraph of his witness statement was inaccurate because, by the time Mr Jackson was his line manager, Mr Murphy had left the respondent's employment and it could not be the case that, in December 2018, Mr Murphy had any part in the concealment of a sick note. The claimant explained that the incident had happened at an earlier date and that it was Mr Murphy who was implicated. However, this is an example of the readiness with which the claimant made serious allegations without proper thought as to their accuracy.

(d) The claimant gave evidence regarding his return to work after a period of absence in April/May 2018 when he was placed on a temporary role scorching black door pads. The claimant explained that, whilst undertaking this role, he was working in complete isolation which was beneficial to his mental health condition. After three days he was required to return to his usual role as a production operator which would involve extensive contacts with other employees and would be detrimental to his condition. The claimant explained in evidence, that upon being asked to return to his

normal role, he consulted his trade union who advised him to return to sick leave. The respondent does not recognise the temporary role as providing complete isolation. But, what is inconsistent about the claimant's account of this incident is that there appears to be no step taken by the claimant or the trade union to advise the respondents that the claimant would be better off left in the temporary role for as long as possible.

8 We found the evidence given by Mr Loveridge and Mr McArthur to be clear; consistent; and compelling. Their evidence remained consistent under cross-examination; they were consistent with each other; and their evidence was consistent with contemporaneous documents.

9 Where there is a conflict in the factual evidence given by the claimant and that given by the respondent's witnesses, we prefer the evidence of the respondents witnesses. It is upon this basis that we have made our findings of fact.

The Facts

10 The claimant's substantive employment with the respondent commenced on 24 May 2014. Prior to this, he had worked for the respondent through an agency for approximately 12 months. From the commencement of his employment the claimant had regular sickness absences. There were nine periods of absence in his first 12 months of employment. These were for a variety of medical reasons unrelated to the claimant's mental health.

11 In 2015 the claimant was diagnosed with depression; although, it was not until 2017 that he was first recorded as being absent from work due to anxiety. The claimant's mental health problems were exacerbated by two significant incidents of personal violence against him occurring on 12 February 2017 and then again on 25 January 2018. The respondent has conceded that at all times material to this claim the claimant was a disabled person. Certainly, this was the case from February 2017 onwards.

12 The respondent operates a very generous sick pay scheme entitling employees to up to 2 years full pay during sickness absence. The respondent also operates an exacting Attendance Management Policy (AMP) and requires an employee absent due to ill-health to maintain a significant level of contact with local managers during the period of absence. During the five years of his employment with the respondent, the claimant was absent for a total of 640 working days including some absences of significant length (January 2017 - April 2018; 8 May 2018 – 31 July 2018 and 16 November 2018 onwards).

13 It was a consistent requirement of the respondent that, during these periods of absence, in addition to submitting appropriate sick notes from his GP, the claimant should telephone his line manager twice each week. There were numerous occasions in the period throughout the claimant's employment up to the commencement of his final absence in November 2018 when he has been challenged about his failure to comply with reporting requirements. These challenges either occurred during a return to work interviews; or correspondence informing the claimant that because of his failure is absence was unauthorised and that his sick pay would be withheld; and sometimes the threat of disciplinary action.

14 The claimant's evidence to the tribunal was that, because of his anxiety and depression, he found making such a telephone call particularly difficult and that the requirement to do so therefore placed him at a disadvantage. Prior to November 2018, there is no record or evidence of the claimant ever having informed the respondent that reporting by telephone twice per week was difficult for him because of his illness. There is no medical evidence from Occupational Health (OH) or from the claimant's GP to support such a proposition.

15 It is the claimant's case that, on 16 November 2018, the claimant informed Mr Jackson of his difficulty. The claimant has produced its telephone log to show that there was a call to Mr Jackson that day (which is unsurprising as this was his first day of what was to be his final absence). But, obviously there is nothing in the telephone log to confirm the contents of the discussion. We do not accept the claimant's assertion that he informed Mr Jackson of the difficulty caused by the requirement to report twice each week. We reach this conclusion because the claimant has produced a document which purports to be his diary of significant events. The first entry in the diary is dated 7 November 2018; the next entry is on 10 December 2018. It follows that, if there had been a significant conversation on 16 November 2018, we could reasonably expect it to have been recorded in the claimant's diary but it was not. Although this was not explored in evidence, we have considered the possibility that the diary entry for 7 November 2018 should in fact be a reference to 17 November 2018 - but even then there is no record made by the claimant of his informing Mr Jackson that twice-weekly reporting caused difficulty. The issue of twice weekly report was raised at a meeting on 22 January 2019. In that meeting, the claimant explained that he had failed to keep contact as required because of problems with his phone. He did not suggest that there were problems caused by his illness. Further, after discussion with his trade union representative, claimant confirmed at that meeting that he was able to, and would in future, telephone Mr Jackson each Monday and Friday.

16 On this question of maintaining telephone contact, it is very clear from the evidence, and it is an inherent part of the claimant's case, that the claimant was well able to contact the respondent whenever he wished to do so - particularly

whenever there was a suggestion or fear on his part that his company sick pay was not to be paid on time. The claimant has never explained why the making of one type of telephone call was problematic whereas another obviously was not.

17 During his various absences from work, the claimant was regularly referred to OH. In the bundle we have 15 OH reports dated between 19 January 2017 – 21 May 2019. One of the reports states that OH had been unable to contact the claimant's; two others refer to appointments which the claimant failed to attend. In the main the OH reports are uncontroversial and do not contain any recommendations for workplace adjustments. The reports consistently advise that the claimant is receiving all necessary and appropriate professional help via his GP. OH reports dated 3 May 2018 and 28 February 2019 recommend that the claimant is allocated a role where news not surrounded by a large number of people as this exacerbated his anxiety.

18 We accept the evidence of Mr Loveridge and Mr McArthur that there were a variety of workstations in the respondent's factory involving differing degrees of interaction with other workers - but none which could truly be said to provide "lone working". Mr Loveridge and Mr McArthur were both quite clear that the claimant's normal role placed him at the lower end of workplace interactions - most alternative placements would involve more contact with others. There was a short period in May 2018 when the claimant was placed in a temporary role scorching black door pads. The claimant's case is that this was an ideal role placing him in complete isolation. Mr Loveridge and Mr McArthur do not recognise the role as such; and do not believe it provided any greater exclusion from others than the claimant's substantive role. When the claimant was asked after three days to return to his substantive role, his case is that, acting on trade union advice, he simply went off sick. He has provided no explanation as to why he did not raise the issue with the respondent and make clear that the temporary role was ideally suited to him and request its extension.

19 In the period up to November 2018, there are numerous records of meetings held whilst the claimant was absent from work and/or upon his return to work in which the claimant was offered support from the respondent for the provision of counselling and other professional services. On such occasions the claimant declined the respondent's help on the basis that he was receiving such help through his GP. In our judgement, the suggestion made by the claimant in evidence that he would have been assisted in an early return to work if the respondent provided counselling for him privately so as to avoid waiting for NHS provision is totally without merit.

20 During, and following, the claimant's many absences from work there were regular meetings for absence management and return to work meetings. The records show that at such meetings in April 2018; May 2018; and July 2018,

despite the claimant's absences having reached levels which would trigger formal action under the AMP, because of the nature of the claimant's illness, positive decisions were taken not to activate the AMP at those times. These various meeting provided the claimant with ample opportunity to explain if he felt that he was being improperly or badly treated by the respondent in relation to his illness. No such concerns were raised.

21 On 16 November 2018, the claimant commenced a period of sickness absence. From the very start, there were issues between the claimant and Mr Jackson regarding the requirement for the claimant to telephone twice each week. On 30 November 2018, Mr Jackson issued the claimant with a verbal warning (given in the absence of the claimant; but in the presence of his trade union representative) regarding this. On 15 January 2019, Mr Jackson wished to hold an Absence Review Meeting (ARM) but the claimant failed to attend. The ARM was rescheduled for 22 January 2019.

22 The claimant attended that meeting accompanied by his trade union representative Mr Burns. At first, the claimant explained that he had been unable to maintain telephone contact because he did not have a phone. He then went on to assert that he had attempted telephone contact but could not get a reply so he had ceased trying. Mr Jackson explained that he was unaware of any missed call from the claimant. Without further reference to the absence of a phone, the claimant then confirmed that he would telephone Mr Jackson every Monday whilst not attending work. In response, Mr Jackson indicated that he would like phone calls on Mondays and Fridays. The claimant at first refused; but Mr Jackson insisted saying this was a requirement which he imposed on all absent employees. There was no suggestion at all from the claimant that his mental health was an obstacle to his making the telephone calls as requested.

23 There was then an adjournment requested by the claimant for him to consult with Mr Burns. When the meeting resumed, Mr Burns confirmed that the claimant would call each Monday and Friday. The claimant later confirmed this himself.

24 At the outset of the meeting, the claimant indicated that counselling which he had been receiving via his GP was not working; and that he was to be referred to a psychiatric nurse. Later in the meeting, Ms Ahern (HR Officer present at the meeting) indicated that the respondent could assist with references for counselling or other professional help. To this the claimant responded "*no thanks I have my counsellor*".

25 The problems with the claimant maintaining a satisfactory level of contact with respondent continued; and the claimant failed to attend the next scheduled

ARM on 13 March 2019. For these reasons, the management of the claimant's ongoing absence was escalated to Mr Loveridge.

26 The claimant's first meeting with Mr Loveridge was on 22 March 2019. The claimant attended with his trade union representative; Ms Ahern was also present. At that time, the claimant was absent with a sick note due to expire on 6 April 2019. Mr Loveridge asked whether the claimant anticipated being in a position to return to work when the sicknote expired. The claimant indicated that he would not be fit. The claimant explained that he was having counselling which had been arranged by his GP. Mr Loveridge explained that he intended to obtain a capability review from the respondents medical practitioner. Mr Loveridge reminded the claimant of the need to maintain contact as arranged and he provided the claimant with his own contact details in case there were difficulties in contacting Mr Jackson or other local line managers. Finally, Mr Loveridge provided the claimant with details of an income protection scheme which the respondent operated through Aviva. This would enable the claimant to apply for insurance based income long-term if he was medically unfit to return to work and likely to remain so indefinitely.

27 The next ARM took place on 7 May 2019. The claimant was present with his trade union representative; the meeting was conducted by Mr Loveridge; and Ms Ahern was in attendance. The capability review with the respondent's medical practitioner was fixed for 21 May 2019; the claimant's medical certificate was next due to expire on 17 May 2019; and again, the claimant explained that he would not be fit to return to work at that time. The claimant explained that his counselling had stopped; there was nothing more that the counselling service could do for him. He went on to explain that he had been referred to a mental health nurse and was due for a telephone assessment on 28 May 2019. The claimant stated that he was lucky to get an assessment so soon as there was a long waiting list - but he had been through too much trauma for him to be kept waiting.

28 On 21 May 2019, the claimant attended for his capability review conducted by Occupational Health Physician, Dr Elizabeth McDarmaid. Dr McDarmaid had access to the claimant's GP notes and records. In summary, Dr McDarmaid's conclusions were as follows: -

(a) The claimant was unfit for work either with or without restrictions.
(b) The obstacle to the claimant's return to work were his ongoing mental health problems.
(c) It was not possible to advise on a likely timescale for recovery. The claimant's symptoms had been ongoing for more than two years without any significant improvement. Improvement could be expected in the long term given appropriate medical treatment.

(d) The claimant should be able to return to his full duties once his mental health problems were overcome.
(e) The mental health problems were likely to recur in the future. It was not possible to predict the likely frequency or duration of any future recurrences.
(f) There were no steps which the respondent could take to assist. The claimant was receiving all appropriate medical care for his condition.
(g) Significantly, the claimant was now taking appropriate medication. There have been times past when he had failed to take medication as directed.

29 Following the capability review, by letter dated 29 May 2019, the claimant was invited to a capability review meeting to take place on 6 June 2019. In the letter of invitation, the claimant was advised that one possible outcome of the meeting would be the termination of his employment on grounds of capability.

30 The capability review meeting went ahead on 6 June 2019. The claimant was present with Mr Tony Phillips, senior trade union representative. The meeting was conducted by Mr Loveridge with Ms Ahern in attendance. The claimant's absence record was reviewed as was the report from Dr McDarmaid. The claimant confirmed that he was still unfit for work and could offer no indication as to when he would be fit to return. He informed Mr Loveridge that he was again being referred for counselling within the NHS and that there was a suggestion that he needed anxiety management therapy. Mr Phillips explained on the claimant's behalf that in the past he had not taken his medication regularly but he was doing so now. It was Mr Phillips view that there were roles in the body shop which the claimant could do. The claimant did not appear to support Mr Phillips' view - indicating that he needed to control his anxiety before he would be fit for work. Mr Loveridge asked the claimant whether he had considered the Aviva scheme; it was apparent that the claimant had not engaged with that scheme at all.

31 After a short adjournment to consider the position, Mr Loveridge explained that, in the light of the medical report, his judgement was that there was no reasonable prospect of the claimant being able to return to work. Accordingly, he had decided to terminate the claimant's employment on the grounds of capability. The claimant's dismissal would be effective immediately but he would be paid in lieu of his notice period. The outcome of the meeting was later confirmed in writing by letter dated 10 June 2019.

32 At the end of the meeting, Mr Phillips immediately gave verbal notice of appeal on the grounds of disability and mental health. He referred to the respondent's obligations under EqA.

33 The appeal was conducted by Mr McArthur at a meeting held on 19 July 2019. The claimant attended with two trade union representatives including Mr Mick Graham the plant convener. Ms Ahern was also in attendance. As indicated above, notice of the appeal had been given verbally; no detailed grounds had been provided; and nothing had been put in writing by the claimant or his representatives. At the outset of the appeal meeting, Mr Graham explained that the grounds were that the sanction (of dismissal) applied was too severe given the claimant's medical history. Mr McArthur enquired whether, some six weeks down the line from the capability review, the claimant was now able to indicate a realistic date for his return to work. The claimant was unable to do so. Upon considering the position, Mr McArthur reached the same conclusion as had Mr Loveridge. The medical information indicated that there was no realistic prospect of a return to work; and accordingly, he upheld the dismissal decision and refused the appeal. This decision was confirmed in writing by letter dated 22 July 2019.

34 Under the respondent's procedures, there is a further level of appeal available but only with trade union support. No further appeal was pursued in this case.

The Law

35 **The Equality Act 2010 (EqA)**

Section 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.

Section 20: Duty to make adjustments

(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.

(2) The duty comprises the following three requirements.

(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

Section 21: Failure to comply with duty

(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.

(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.

Section 39: Employees and applicants

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

(*a*) as to B's terms of employment;
(*b*) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;
(*c*) by dismissing B;
(*d*) by subjecting B to any other detriment.

(5) A duty to make reasonable adjustments applies to an employer.

Section 123: Time limits

(1) Proceedings on a complaint within section 120 may not be brought after the end of—

(*a*) the period of 3 months starting with the date of the act to which the complaint relates, or
(*b*) such other period as the employment tribunal thinks just and equitable.

(3) For the purposes of this section—

(*a*) conduct extending over a period is to be treated as done at the end of the period;
(*b*) failure to do something is to be treated as occurring when the person in question decided on it.

(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—

(*a*) when P does an act inconsistent with doing it, or
(*b*) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

Section 136: Burden of proof

(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.

Schedule 8 – Part 3: Limitations of the Duty [to make adjustments]
Paragraph 20: Lack of knowledge of disability etc.

(1) A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know—

(*a*) in the case of an applicant or potential applicant, that an interested disabled person is or may be an applicant for the work in question;
(*b*) [in any case referred to in Part 2 of this Schedule], that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement.

36 **The Employment Rights Act 1996 (ERA)**

Section 94: The Right not to be unfairly dismissed

(1) An employee has the right not to be unfairly dismissed by his employer.

Section 98: General Fairness

(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) relates to the conduct of the employee,
(c) is that the employee was redundant, or
(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

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

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

37 **Decided Cases**

Igen Limited –v- Wong **[2005] IRLR 258 (CA)**

The burden of proof requires the employment tribunal to go through a two-stage process. The first stage requires the claimant to prove facts from which the tribunal could that the respondent has committed an unlawful act of discrimination. The second stage, which only comes into effect if the complainant has proved those facts, requires the respondent to prove that he did commit the unlawful act. If the respondent fails then the complaint of discrimination must be upheld.

Madarassy v Nomura International Plc **[2007] IRLR 245 (CA)**

The burden of proof does not shift to the employer simply on the claimant establishing a difference in status (eg race) and a difference in treatment. Those bare facts only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that the respondent had committed an unlawful act of discrimination. Although the burden of proof

provisions involve a two-stage process of analysis it does not prevent the tribunal at the first stage from hearing, accepting or drawing inferences from evidence adduced by the respondent disputing and rebutting the claimant's evidence of discrimination.

Morse –v- Wiltshire County Council **[1999] IRLR 352 (EAT)**

A tribunal hearing an allegation failure to make reasonable adjustments must go through a number of sequential steps: It must decide whether the provisions of EqA impose a duty on the employer in the circumstances of the particular case. If such a duty is imposed it must next decide whether the employer has taken such steps as it is reasonable all the circumstances of the case for him to have to take.

Smith –v- Churchills Stairlifts plc **[2006] IRLR 41 (CA)**

The test is an objective test; the employer must take "such steps as it is reasonable to take in all the circumstances of the case". What matters is the employment tribunal's view of what is reasonable.

Tarbuck –v- Sainsbury's Supermarkets Limited **[2006] IRLR 664 (EAT)**

There is no separate and distinct duty of reasonable adjustment on an employer to consult the disabled employee about what adjustments might be made. The only question is objectively whether the employer has complied with his obligations or not. If the employer does what is required of him than the fact that he failed to consult about it, or did not appreciate that the obligation even existed, is irrelevant. It may be entirely fortuitous and unconsidered compliance but that is enough. Conversely if he fails to do what is reasonably required it avails him nothing that he has consulted the employee.

Project Management Institute –v- Latif **[2007] IRLR 579 (EAT)**

In order for the burden of proof to shift to the respondent, the claimant must not only establish that the duty to make reasonable adjustments has arisen but also that there are facts from which it can reasonably be inferred that it has been breached.

Environment Agency –v- Rowan **[2008] IRLR 20 (EAT)**

An employment tribunal considering a claim that an employer has discriminated against an employee by failing to comply with the duty to make reasonable adjustments must identify:

(a) the provision criterion or practice apply by or on behalf of the employer, or

(b) the physical feature of the premises occupied by the employer, and
(c) the identity of non-disabled comparators, and
(d) the nature and extent of a substantial disadvantage suffered by the claimant.

Unless the tribunal has gone through that process it cannot go on to judge if any proposed adjustment is reasonable.

DWP –v- Alam **[2010] ICR 665 (EAT)**
Wilcox –v- Birmingham CAB Services Limited **[2011] EqLR 810 (EAT)**

The duty to make adjustments is not engaged unless the employer knows (or ought to know) of both the disability and the substantial disadvantage.

Royal Bank of Scotland –v- Ashton **[2011] ICR 632 (EAT)**

Before there can be a finding that there has been a breach of the duty to make reasonable adjustments an Employment Tribunal must be satisfied that there was a provision criterion or practice that placed the disabled person, not merely at some disadvantage viewed generally but, at a disadvantage that was substantial viewed in comparison with persons who are not disabled.

Adedeji v UH Birmingham NHS Trust **[2021] EWCA Civ 23 (CA)**,

The best approach for a tribunal in considering the exercise of the discretion under Section 123(1)(b) is to assess all the factors in the particular case which it considers relevant to whether it is just and equitable to extend time, including in particular the length of, and the reasons for, the delay.

Wilson –v- Post Office **[2000] IRLR 834 (CA)**

Categorisation of the true reason for a dismissal under Section 98(1) and (2) ERA is a question of legal analysis the and a matter for the tribunal to determine.

Taylor –v- Alidair Limited **[1978] IRLR 82 (CA)**

In a capability dismissal the correct test of fairness is whether the employer honestly and reasonably held the belief that the employee was not competent and whether there was a reasonable ground for that belief.

Lynock –v- Cereal Packaging Limited **[1988] IRLR 510 (EAT)**

in determining whether to dismiss an employee with a poor record of sickness absence and employers approach should be based on sympathy understanding

and compassion. Factors which may prove important include: the nature of the illness; the likelihood of the illness recurring; or of some other illness arising; the length of the various absences and the periods of good health between them; the need of the employer to have its work done; the impact of the absences on those who work with the employee; the adoption and exercise of a policy in connection with absence due to sickness; the importance of a personal assessment in the ultimate decision; and the extent to which the difficulty of the situation and the position of the employer have been explained to the employee. A disciplinary approach, involving warnings, is not appropriate in a case of intermittent sickness absence - but the employee should be cautioned that the stage has been reached when it has become impossible to continue with the employment.

Crease v Lloyds TSB Bank plc ET Case No.2340796/09

The claimant had been signed off work suffering from an adjustment disorder. She did not want any contact with her work team as this would cause her distress, but she submitted a medical disclosure form and contacted the employer each time she met her consultant. Despite this, the employer started to phone her every fortnight. The claimant's employment was terminated and it was found she had been unfairly dismissed on the ground, *inter alia*, that the employer had exacerbated her condition by constantly pressuring her, contrary to the medical advice and the claimant's own wishes.

Polkey –v- AE Dayton Services Ltd. **[1987] IRLR 503 (HL)**

In a case of incapacity, an employer will normally not act reasonably unless he gives the employee fair warning and an opportunity to improve and show that she can do the job.

Monmouthshire County Council v Harris **UKEAT 0332/14 (EAT)**

In an absence-related capability case, the Tribunal's reasoning needed to demonstrate that it had considered:

(a) Whether the respondent could have been expected to wait longer;
(b) The question of adequacy of any consultation with the Claimant; and
(c) The obtaining of proper medical advice.

S v Dundee City Council **[2014] IRLR 131, Ct Sess (Inner House)**

The tribunal must expressly address a number of relevant factors in all the circumstances of the individual case. Such factors include:
(a) Whether other staff are available to carry out the absent employee's work;
(b) The nature of the employee's illness;

(c) The likely length of his or her absence;
(d) The cost of continuing to employ the employee;
(e) The size of the employing organisation; and
(f) (balanced against these factors), the unsatisfactory situation of having an employee on lengthy sick leave.

East Lindsey District Council v Daubney **1977 ICR 566, (EAT)**

Unless there are wholly exceptional circumstances, before an employee is dismissed on the ground of ill health it is necessary that he should be consulted and the matter discussed with him, and that in one way or another steps should be taken by the employer to discover the true medical position.

Wheeler v Governing Body of Ellesmere Port Catholic High School **Case No.2408130/15 (ET)**

The Employment Tribunal found that it was "incumbent" on the employer to discuss with the employee the medical condition and consult on a number of matters', including 'the employee's opinion of his own medical condition, the medical evidence, phased return… and possibility of alternative employment'.

Iceland Frozen Foods v Jones **[1982] IRLR 439 (EAT)**
Post Office –v- Foley & HSBC Bank plc –v- Madden **[2000] IRLR 827 (CA)**

It is not for the tribunal to substitute its own view but to consider whether the respondent's decision came within a range of reasonable responses by a reasonable employer acting reasonably.

Sainsbury's Supermarkets Limited –v- Hitt **[2003] IRLR 23 (CA)**

The objective standards of the reasonable employer must be applied to all aspects of the question whether an employee was fairly and reasonably dismissed.

38 **The ACAS Code**

Although it is not directly relevant in a case of dismissal by reason of capability, we have considered the ACAS Code of Practice 1 on Disciplinary and Grievance Procedures 2009 ("the ACAS Code") and the ACAS Guide: Discipline and Grievances at Work (2011). The Code and the Guide provide assistance in assessing the fairness or otherwise of the procedure adopted by an employer prior to dismissal.

The Claimant's Case

Disability Discrimination

Failure to Make Adjustments

39 There are two elements to the claimant's claim that the respondent failed to make reasonable adjustments and was accordingly non-compliant with its obligations under Section 21 EqA: -

Working in Close Proximity to Others

(a) This complaint arises following an OH report made on 13 March 2018 which made the following recommendation "*Mr Gethen is gaining support for anger management and would benefit from being placed on a temporary role which requires minimal interaction with fellow associates*". The claimant's case is that shortly after this recommendation was made he was placed to a temporary role "*scorching black door pads*" which complied with the recommendation as it provided for lone working. However, his case is that he remained in the role for only three days before being transferred back to his substantive role with the result that he again went on sickness absence.

The Requirements for Telephone Contact

(b) It is the claimant's case that, because of his mental health condition, the making of regular telephone calls to his line managers was difficult for him. And, accordingly, the requirement for him to call twice each week placed him at a significant disadvantage.

40 Although it is not pressed by the claimant as a failure to make adjustments, we have also considered under this heading his repeated allegations that at, various times during the history of his absences, the respondent had an obligation to refer the claimant for counselling or other professional services.

Discrimination for a Reason Arising from Disability

41 It is the claimant's case that:

(a) He was dismissed as a result of his absences through sickness.
(b) Those absences are "*something arising from his disability*".
(c) His dismissal was "*unfavourable treatment*".

(d) His dismissal was not a proportionate means of achieving a legitimate aim.

Proportionality

41 A legitimate aim must be "legal, should not be discriminatory in itself, and must represent a real, objective consideration." The claimant's case is that the respondent's stated legitimate aim of "maintaining satisfactory attendance levels for the purposes of manufacturing R's products" entails a subjective element (satisfactory attendance levels) that will need to be tailored to the requirements of the disability legislation (e.g. lower attendance levels may be required in the case of an employee with a disability requiring disability-related absence) to be lawful. Nonetheless, assuming the aim to be legitimate, the claimant submits that the respondent could have achieved its aim of maintaining satisfactory attendance levels for the purposes of manufacturing it's products by less discriminatory means.

42 The claimant's evidence is that the respondent "*has an absentee member of staff who is deployed into various roles to cover sickness*". Mr McArthur confirmed that the respondent "*cycled absence cover*" to cover the claimant's absences. Given, in particular, the size and administrative resources of the respondent, the claimant submits that the respondent was able to cover absences from a resourcing perspective so as to maintain its manufacturing output.

Unfair Dismissal

43 The claimant acknowledges that he was dismissed for a potentially fair reason namely capability.

44 The claimant's case is a that, in his particular circumstances, and having regard to the size and administrative resources available to the respondent, the respondent should have waited longer to enable his recovery and ultimate return to full operational duties.

45 It is the claimant's case that the respondent failed to properly consult with him with regard to his medical condition; his recovery; and the prospects of his return. He avers that the respondent failed to properly understand Dr McDarmaid's final report: the respondent interpreted the report as assessing that there was no foreseeable return to work - whereas the claimant asserts that a proper interpretation of the report was simply that a return was unlikely within the next three months. The claimant also avers that the respondent should have obtained a medical opinion from his GP.

The Respondent's Case

Disability Discrimination

Failure to Make Adjustments

Working in Close Proximity to Others

46 The respondent denies it applied a PCP requiring the claimant to work in close proximity to others. The evidence of the respondent's witnesses was to the effect that the claimant's role was one of the more isolated of the roles available.

47 If it is found the respondent did apply such a PCP, the respondent contends the duty to make an adjustment can only arise when the claimant was fit to attend work, subject to an adjustment being made. The claimant was certified unfit for work in any capacity (and by his own evidence) from 16 November 2018.

48 Given that the duty to make such an adjustment must therefore have arisen before 16 November 2018, the respondent submits the claim is out of time.

49 Notwithstanding the above, the respondent submits it would be unreasonable to make adjustments in order that the claimant does not work in close proximity to others given that (a) he did not work in close proximity to others, as above; and (b) given the nature of its work environment.

50 Finally, the respondent submits that moving the claimant to such a role (if one existed) at any point from 16 November 2018 would not have ameliorated any disadvantage, given the claimant was unfit to work in any capacity whatsoever.

The Requirements for Telephone Contact

51 The respondent accepts it applied a PCP requiring the claimant to make contact twice a week by telephone. The respondent denies that this put the claimant to a disadvantage or that it ought reasonably have known that it did for a number of reasons: -

(a) The claimant's evidence at the time for being unable to make contact was for reasons unrelated to his condition.
(b) On numerous occasions, the claimant was able to make contact - mainly in respect of pay.

(c) There is no medical evidence to support the claimant suffering such a disadvantage; and
(d) The claimant did not raise with anyone the fact that it caused him any disadvantage.

52 In any event, the respondent gave evidence that reporting requirements are adjusted depending on the circumstances of individual employees and contends that its requirement for the claimant to make contact twice a week, in the circumstances, was reasonable.

53 The respondent also submits that this claim is out of time. Such a PCP was applied to the claimant as of 22 January 2019. If there was a failure to make a reasonable adjustment, the failure occurred on 22 January 2019 and the claim is out of time.

Discrimination for a Reason Arising from Disability

54 The respondent accepts that dismissal is unfavourable treatment and that the claimant's dismissal was a consequence of his absence, which arose from his disability.

55 The respondent relies upon the legitimate aim of ensuring satisfactory attendance levels – particularly in a manufacturing environment given the impact of operations/productivity – and submits dismissal in these circumstances is a proportionate means of achieving that aim.

56 Under cross-examination, the claimant accepted it is reasonable for an employer to expect regular attendance from employees, especially in manufacturing/production.

Unfair Dismissal

57 The respondent relies upon capability as potentially fair reason for dismissal. The respondent submits it is clear 'capability' was the reason for dismissal.

58 The respondent submits that there is seemingly no challenge in respect of the process/procedure followed by the respondent in dismissing the claimant. The respondent submits the process it followed was fair and reasonable in that there were regular meetings with the claimant prior to his dismissal; it was clear to him the purpose of those meetings; and the potential outcome of the process. The claimant was represented by the TU at all meetings and he was afforded the right to appeal his dismissal.

60 The evidence before the respondent was that: -

(a) The claimant's attendance levels were very poor.
(b) The doctor said he was unfit for work.
(c) The doctor said it was impossible to predict likely frequency and duration of relapses.
(d) The doctor said she was unable to advise on timescales for recovery.
(e) The doctor said the claimant would not be fit to return to work for at least 3 months and no timescale was advanced.
(f) The doctor said the claimant was unfit for any adjusted/restricted role.
(g) The claimant himself was reporting as unfit for work and could not say when he would return.

61 The respondent submits it was clear that the claimant was incapable of fulfilling his role, or any other role. In the circumstances dismissal fell well within the range of reasonable responses.

Discussion

Disability Discrimination

Failure to Make Adjustments

Working in Close Proximity to Others

62 The claimant's evidence on this is that the need for isolated working was identified by OH on 3 May 2018. And that upon his return to work in April/May 2018 he was placed into the temporary role which provided for lone working and met his requirements. His complaint is that, after just three days in the temporary role, he was moved back to his substantive role. In evidence, the claimant stated that when this happened he raised a the issue with his trade union representative and was advised to "*get a sick note*" and return to sickness absence.

63 This account is inconsistent with the contemporaneous documents. The OH appointment at which the recommendation for isolated working was made was on 13 March 2018. (3 May 2018 is the date identified for the next OH appointment it appears to have been rescheduled for 1 May 2018 and on that date the claimant failed to attend.) At the time of the 13 March 2018 OH report, the claimant was absent on sickness absence and had been since 19 February 2018. The claimant returned to work you on 9 April 2018 and remained in work until a single day's absence on 1 May 2018. Thereafter he commenced a sustained period of absence on 8 May 2018 which continued until the end of July 2018. There is simply no identifiable occasion upon which the claimant returned

to work; was placed in a position of isolated working; and then returned to sickness absence after three days.

64 Whilst the recommendation in the 13 March 2018 OH report is there to be seen, it is difficult to understand why, if this recommendation was not being met, the claimant with full trade union support throughout, at no stage raised it as an issue. (We do not suggest a that the obligation was upon the claimant to raise this. But it is a factor which assists us in resolving the evidential conflict between the claimant's evidence and that of the respondent's witnesses.)

65 Neither Mr Loveridge nor Mr McArthur were involved in the claimant's management in 2018. But, their consistent evidence was that the claimant's substantive role was among the most isolated in the respondent's factory; and that the temporary role referred to by the claimant was no more isolated. Accordingly, their retrospective evidence is that the OH recommendation was complied with.

66 We note that after the OH appointment on 13 March 2018, prior to the claimant's dismissal, there were a further 10 OH reports. Nowhere is this recommendation repeated; nowhere is it suggested that it had not been complied with.

67 In that same period, there were a minimum of eight meeting between the claimant and managers at which the claimant's absence record was discussed. The claimant always had trade union representation; the issue of isolated working was never raised. In our judgement, the only conclusion available to us is that in the claimant's substantive role the requirement for isolated working was met in the best way reasonably available to the respondent. We accept the evidence of Mr Loveridge and Mr McArthur on this point.

68 We remind ourselves of the case of ***Project Management Institute –v- Latif***. The claimant must establish not only that the duty to make adjustments has arisen; but also, that there are facts from which it can reasonably be inferred that it has been breached. Our judgement is that the claimant has simply not establish facts from which such an inference can be drawn. Accordingly, this claim for failure to comply with the duty to make adjustments must fail.

69 It remains unclear to us precisely where the claimant's places this allegation of failure to make adjustments within his overall claim. Is it a failure extending over a period in the spring/summer of 2018? Or an ongoing failure which ultimately contributed to the claimant's dismissal? If it is the first of these two alternatives, then the claim is clearly out of time. Most likely the initial time limit will have expired in August 2018 (a date conceded by Ms Dannreuther in her closing submissions). The claim form was presented on 12 September 2019

following ACAS conciliation which commenced on 31 August 2019. We are reminded that the claimant was absent from work with mental health problems from 8 May 2018 - 31 July 2018 and again from 16 November 2018 until his dismissal. In the light of this Ms Dannreuther submits that it would be just and equitable for the tribunal to exercise its discretion and extend time. Of course, the application of justice and equity must apply to both parties; and this is a case where the very first time that the claimant alleged a breach of the duty to make reasonable adjustments was in his claim form some 15 months after the relevant events. The claimant would have a stronger claim for an extension of time if he or his trade union representatives had raised the issue either as a formal grievance or otherwise on any one of the many opportunities that they had to do so. Or if the claimant had raised the issue that any of the many subsequent OH appointments which he attended. In our judgement the fact that nothing was raised and no claim commenced would render it unjust and inequitable towards the respondent to allow such a claim to proceed now. We have dismissed the claim on its merits. But, for the sake of completeness, had we not done so, we also find that it is out of time and that we lack jurisdiction to consider it.

The Requirements for Telephone Contact

70 The respondent concedes that it applied a PCP requiring the claimant to telephone managers twice each week during his sickness absence. The questions therefore which the tribunal must address are: -

(a) Whether this requirement caused the claimant disadvantage by reason of his disability?
(b) Whether the respondent's managers knew or ought to know of the disadvantage?
(c) What steps might reasonably have been taken to avoid the disadvantage?

71 In our judgement, this claim fails at the first hurdle. There is simply no evidence that the requirement of twice weekly telephone contact was a cause of any disadvantage to the claimant. At no stage did the claimant report at OH appointments at the telephone contact requirements was a problem. At no stage did OH suggest that some other contact arrangement would be preferable. At no stage did the claimant report to managers that the telephone contact requirement was difficult because of his disability – indeed, the claimant advanced other reasons for his failure to make contact. And, objectively the claimant appears to have had no difficulty in making telephone contact when he perceived it to be to his advantage to do so - when chasing to ensure that he was paid. At the meeting on 22 January 2019 the claimant's trade union representatives specifically agreed to twice weekly reporting by telephone. The case of ***Crease v Lloyds TSB Bank plc*** is simply not to the point: in that case the employer's level

and method of contact was contrary to the medical advice and the claimant's own wishes.

72 Even if we were now to accept the claimant's bare assertion that he was disadvantaged by the requirement unsupported by any medical or contemporaneous evidence, there would still be no basis at all to conclude that his line managers knew or to have known of the disadvantage.

73 Accordingly, this element of the claim for failure to make adjustments must also fail on its merits.

74 So far as time issues are concerned, there was a clear decision made on 22 January 2019 that, whatever gone before, the claimant was now required to report twice weekly by telephone so long as his absence continued. Our judgement is that time started to run then; and the primary time limit expired on 21 April 2019. The claimant first notified ACAS of his claims a little over four months out of time. Bearing in mind that the claimant had trade union representation; bearing in mind the specific agreement of his trade union representative to the reporting requirement; and bearing in mind that there was never any suggestion from the claimant or elsewhere that the reporting requirement was a cause of disadvantage, our judgement is that it simply would not be just and equitable to extend time. Once again, we have dismissed this claim for failing to make adjustments on its merits – but, had we not done so, we would in any event are found that the claim was out of time and that we lacked jurisdiction in respect of it.

Failure to Refer for Counselling etc.

73 As stated in Paragraph 40 above, we have considered whether, pursuant to Section 21 EqA, the respondent had a duty to refer the claimant for counselling or other professional services so as to obtain the necessary help or treatment for him more quickly than would be available under the NHS. The claimant has not presented this as a reasonable adjustments claim; but, brings it in as a matter of general fairness in his unfair dismissal claim. However for the following reasons we find the claimant arguments to be wholly without merit and slightly absurd: -

(a) The claimant says that he was never offered any such help by the respondent. But records of meetings clearly show that he was repeatedly offered such help and that on each occasion he refused because he was already receiving the appropriate services through his GP.
(b) On 22 January 2019 the claimant informed Mr Jackson that counselling was not working and he was being referred to a mental health nurse. In

that meeting, Ms Ahern asked if a reference via OH would be of assistance - the claimant declined.

(c) On 22 March 2019, the claimant told Mr Loveridge that he was receiving counselling through his GP.

(d) On 7 May 2019, the claimant told Mr Loveridge that the counselling had stopped - there was nothing more than the counselling service could do for him. And that he had been referred to a mental health nurse - he had been lucky to obtain an appointment as quickly as he had.

(e) At no stage did OH suggest that the services which the claimant was receiving via his GP were inadequate or were being delivered too slowly. In our judgement, it is a ridiculous suggestion that the claimant's line managers in the factory should be the ones to make a decision - not suggested by the claimant; not suggested by the trade union; and not suggested by OH, that the claimant should be referred to such services.

74 Accordingly, having considered the possibility, we find that the failure to refer to outside professional services was not a breach of the obligation to make adjustments.

Discrimination for a Reason Arising from Disability

75 It is common ground between the parties that the claimant's historical absences from January 2017 onwards and his continuing absence from November 2018 onwards arose from his disability.

76 There is one area where it appears to us that the parties may be slightly at cross purposes. In her closing submissions, Ms Dannreuther refers to the claimant's absences (plural) as something arising from his disability and she claims that the respondent was dismissed as a result of his absences (plural). She refers to Paragraph 26 of the response to the claim as effectively conceding this. However, Paragraph 26 refers to the claimant's absence (singular). The distinction may be significant.

77 This is not a case where the claimant was dismissed because his total absences over a given period had passed a particular threshold or trigger point. (In evidence, the claimant conceded that his total levels of absence had passed certain thresholds but the respondent had not enforced its Absence Management Policy against him.) This instead was a case where the respondent's focus was on the claimant's current absence - ongoing since 16 November 2018; and crucially, the fact that in the respondent's judgement there was no prospect of a return to work against any particular timescale.

78 Of course, the period of absence under review - 16 November 2018 onwards, was itself something arising from the claimant's disability; and the

respondent concedes that he was dismissed because of that absence. And the fact that, due to his ongoing disability, absence was likely to continue indefinitely. Quite rightly therefore, the parties have identified that the issue here is *objective justification*.

79 Ms Dannreuther points to the size and resources of the respondent and to the fact that the respondent actually has in place floating employees available to cover the work of colleagues absent due to ill-health. On this basis she suggests that the dismissal of the claimant was not a proportionate means of achieving what she concedes to be a legitimate aim namely the respondent's operational efficiency. What Ms Dannreuther does not address, is the extent of such provision. Despite the resources available to the respondent, is it suggested that employees should be permitted to remain absent due to ill-health indefinitely; and that cover for their work should be provided from an infinite pool of designated employees; is it suggested that this provision should extend if necessary to every substantive employee - all off sick, all being covered from such a pool. Because these propositions are utterly absurd, the question which must be addressed is at what point is it justified for an employee in the claimant's situation to be dismissed?

80 By the time of his dismissal, the claimant had been absent from work continuously for a period of seven months. And the disabling condition causing that absence also caused earlier lengthy absences interspersed by only relatively short periods in work. In our judgement, what was crucial to the respondent's decision was whether there were any prospects of an early (or any) return to work. The prospects of such a return were discussed with the claimant at every meeting: he was given every opportunity to set out his prognosis. The most relevant meetings are 22 January 2019; 22 March 2019; 7 May 2019; 6 June 2019; and 19 July 2019. At none of those meetings did the claimant offer any suggestion as to when he would be able to return.

81 The Claimant saw Dr McDarmaid on 21 May 2019: her conclusions are set out in Paragraph 28 above. Ms Dannreuther suggests that Dr McDarmaid was offering the real possibility that the claimant would be in a position to return after a further period of absence of three months. But that is not what Dr McDarmaid says: what she says is that the claimant would not be able to return on a date any earlier than three months - but she could put no timescale on the matter beyond that. (In our judgement, it is significant that, by the time of the appeal meeting, two months had elapsed since Dr McDarmaid's appointment, but the claimant did not suggest any progress towards return had been made.)

82 Our judgement is that the respondent was clearly pursuing legitimate aim - it could not allow employees to remain off sick indefinitely with no prospect of return. And that the medical evidence; together with the information gleaned from

the claimant that the meetings; was such that the respondent was entitled to conclude that there was no realistic prospect of return. Accordingly, it was proportionate, by June 2019, on the basis of the information available to it, for the respondent to terminate the claimant's employment.

83 Accordingly, we conclude that the claim for discrimination for a matter arising from disability is without merit and must fail.

Unfair Dismissal

The Reason for Dismissal

84 It is common ground between the parties and we formally find that the reason for the claimant's dismissal was the respondent's belief that he was incapable of carrying out the requirements of his role - and that there were no adjustments which could be made to improve the situation. Accordingly, the claimant was dismissed for a potentially fair reason pursuant to Section 98(1) & (2) ERA.

General Fairness

85 We have considered carefully the guidance available to us from the cases of ***Lynock –v- Cereal Packaging Limited*** and ***Monmouthshire County Council v Harris***. We are quite satisfied that both Mr Loveridge and Mr McArthur formed the genuine opinion that the claimant was incapable of performing any kind of work for the respondent; that there were no adjustments which the respondent could make which would improve the situation; and that there was no realistic prospect of the situation improving within any given timescale.

86 The respondent had carried out exhaustive enquiries into the claimant's medical situation and the prospect of improvement. Ms Dannreuther suggests that a report should have been obtained from the claimant's GP: we note that Dr McDarmaid did have access to the claimant's GP notes and records and an earlier report from the claimant's GP. In our judgement there was ample evidence to justify the conclusion reached by Mr Loveridge and Mr McArthur - and frankly, no evidence available to them upon which they could reach any alternative conclusion.

87 Applying the guidance provided in ***East Lindsey District Council v Daubney*** and ***Wheeler v Governing Body of Ellesmere Port Catholic High School***, we are quite satisfied that the level of consultation and discussion with the claimant went beyond that which was essential. At each and every relevant meeting, the claimant was asked about any possible return; and was asked what assistance the respondent might be able to provide. At each of these meetings

the claimant was accompanied by trade union representatives who were given the opportunity to speak on his behalf where necessary; and to consult with him privately whenever they wished. Again, the information gleaned from those meetings, in our judgement, fully justified the conclusion which Mr Loveridge and Mr McArthur reached.

88 The suggestion that, before dismissing the claimant, the respondent should have referred him for private counselling or psychiatric services is, in our judgement, absurd for the reasons set out in Paragraph 73 above.

89 In our judgement, whilst it could always be argued that an employer could have waited longer; or could have obtained one more medical report; the decision which Mr Loveridge took and which was upheld by Mr McArthur was clearly within the range of reasonable responses available to this employer - and the dismissal was fair.

Conclusions

90 For the reasons which we have set out, we find that the has not established before us any facts upon which we could properly conclude that, at any material time, the respondent discriminated against the him on the grounds of his disability; or a matter arising therefrom. Nor that it failed in its duty to make reasonable adjustments. The claim for disability discrimination is accordingly dismissed.

91 We find that the claimant was fairly dismissed by the respondent. His claim for unfair dismissal is not well-founded and is dismissed.

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Employment Judge Gaskell
22 February 2021