EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4102903/2019

Held in Glasgow on 10, 11 and 12 February 2020

Employment Judge S MacLean
Tribunal Member I Ashraf
Tribunal Member D Calderwood

Mr D Hunter	**Claimant** **Represented by:** **Mr G Cunningham - Advocate**
CDS (Superstores International) Ltd	**Respondent** **Represented by:** **Mr P Grant-Hutchison - Advocate**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgement of the Employment Tribunal is that the claims are dismissed.

REASONS

Introduction

1. In his claim form sent to the Tribunal's office by his solicitor on 14 March 2019 the claimant has ticked at section 8.1 of the claim form that he was unfairly dismissed and discrimination against on the grounds of disability. In section 8.2 the claim form refers to a paper apart in which facts are narrated. There is reference to unfair dismissal (failure to consider his health conditions and likely date of return to work; failure to offer a right of appeal; failure to offer the opportunity of a phased return to work); discrimination on the ground of disability. He was treated unfavourably "in consequence of his disability" (dismissed). The respondent failed to consider making reasonable adjustments. He was dismissed because of his disability. The dismissal is

automatically unfair. Alternatively, the dismissal arose in consequence of his disability.

2. In the response the respondent admits that the claimant was dismissed but asserts that his dismissal was for incapability because of long term ill-health. The claimant does not have two years qualifying service required to bring a claim under section 98 of the Employment Rights Act 1996 (the ERA). The respondent accepted that the claimant is disabled in terms of the Equality Act 2010 (EqA).

3. The claim form does not make specific statutory references to the types of disability discrimination being claimed. From the claim form and the clarification in the notes of the preliminary hearing for case management the Tribunal considered the claims before the Tribunal were of direct discrimination, in terms of section 13 of the EqA; discrimination arising from disability in terms of section 15 of the EqA; and failure to make reasonable adjustments in terms of section 20 of the EqA.

4. The parties agreed that the evidence-in-chief would be given in the form of a witness statement which would be taken as read by the Tribunal before the final hearing. Witness statements were received by the Tribunal along with an indexed set of productions.

5. At the final hearing the respondent confirmed that it agreed that:

    a. Dismissal amounts to unfavourable treatment.

    b. The claimant's dismissal was because of his sick absence.

    c. Part of the claimant's sick absence was because of his disability.

    d. The respondent was under a duty to make reasonable adjustments in respect of the claimant's disability.

6. The claimant led at the final hearing and was asked some supplementary questions by Mr Cunningham. The claimant was then cross-examined and re-examined in the normal way. Witness statements were also provided by Sharon Irwin, Cluster Manager and Mark Steven, Area Manager (formerly

Store Manager of the Glasgow store). They were cross-examined and re-examined in the normal way.

7. The Tribunal has set out facts as found that are essential to the Tribunal's reasons or to understanding the important parts of the evidence. Mr Cunningham and Mr Grant-Hutchison provided the Tribunal with written submissions which they gave orally at the end of the hearing.

8. The Tribunal's approach was to consider the issues that it had to determine which were as follows:

    a. Was the claimant dismissed because of his disability?

    b. Was the claimant dismissed by the respondent because of something arising in consequence of his disability?

    c. If the claimant was dismissed because of something arising in consequence of his disability can the respondent show that this treatment was justified?

    d. Did the respondent apply a provision criterion or practice (PCP)? If so, what was it?

    e. Did the PCP put the claimant in pursuance with his disability to substantial disadvantage compared to persons not so disabled?

    f. [Was the PCP justified as a proportionate means of achieving a legitimate aim?]

    g. Did the PCP place the claimant at a substantial disadvantage in comparison with persons who are not disabled and if so did the respondent know, or could reasonably have been taken to have expected to know that the claimant's apparent disability was likely to mean that he was placed at a disadvantage? If so did the respondent take such steps as was reasonable to have avoided that disadvantage.

    h. What level of compensation is appropriate?

Relevant law

9. Direct discrimination is defined in section 13 of the EqA. The provision is satisfied if there is less favourable treatment because of a protected characteristic. There must be less favourable treatment than an actual or hypothetical comparator whose circumstances are not materially different from the claimant (section 23 of the EqA).

10. Section 15(1) of the EqA defines discrimination arising from disability. The provision requires there to be: (a) unfavourable treatment; (b) because of "something; (c) the "something" has to have arisen in consequence of the claimant's disability; and (d) which the respondent cannot show was a proportionate means of achieving a legitimate aim. Section 15(2) of the EqA states that section 15(1) does not apply if the respondent shows that it did not know, and could not reasonably have been expected to know, that the claimant had the disability.

11. [Section 19 of the EqA defines indirect discrimination. The requirements of the section state that a PCP is discriminatory in relation to protected characteristic if: (a) the respondent applies or would apply the PCP to persons with whom the claimant does not share the characteristic; (b) it puts or would put persons with whom the claimant shares the characteristic at a particular disadvantage when compared with persons with whom the claimant does not share it; (c) it puts, or would put, the claimant at that disadvantage; and (d) the respondent cannot show it to be a proportionate means of achieving a legitimate aim.]

12. Section 20 of the EqA defines the duty to make reasonable adjustments. To succeed, there requires to be: (a) a PCP applied by the respondent which; (b) puts the disabled person at a substantial disadvantage; (c) in relation to a relevant matter in comparison with persons who are not disabled; and (d) a failure by the respondent to take such steps as it is reasonable to have to take to avoid the disadvantage. Section 21 of the EqA states that a failure to make reasonable adjustments is discrimination.

13. Schedule 8 of the EqA provides further provision on the issue of reasonable adjustments. Paragraph 2(2) states that a reference to a PCP is a reference to a PCP applied by or on behalf of the respondent. Paragraph 2(3) states that a relevant matter is that which is specified in the first column of the applicable table in Part 2 of the schedule. Part 3 of schedule 8 of the EqA provides for limitations on the duty to make reasonable adjustments. Paragraph 20 provides that the respondent is not subject to the duty to make reasonable adjustments if the respondent does not know, and could not reasonably be expected to have known (in essence) that the claimant (i) has a disability and (ii) is likely to be placed at the disadvantage referred to.

14. Section 23 of the EqA states that on a comparison of cases for the purposes of section 13, 14 and 19 of the EqA, there must be no material difference between the circumstances relating to each case. Section 23(2) of the EqA specifically states that the circumstances relating to a case include a person's abilities if on a comparison for the purposes of section 13 of the EqA the protected characteristic is disability.

15. Section 39 of the EqA provides that an employer must not discriminate against an employee by dismissing them.

16. Section 136 of the EqA provides that if there are facts from which the court decides, in the absence of any other explanation, that a person contravened the provisions of the EqA the court must hold that the contravention occurred.

Findings in fact

17. The respondent is a company having its head office in Plymouth. The respondent trades as "the Range" and has 13 stores the Scottish region the largest of which is the Glasgow store.

18. David Garland is the respondent's Head of Human Resources (HR). He is based in Plymouth. His role is to advise on employment issues and manage policies and procedures. Day to day human resource duties are undertaken by the Office Manager in each store.

19. Area Managers manage the profitability, legal security, health and safety aspects of the stores within their region. Each store has a Store Manager who operates autonomously bit reports to an Area Manager.

20. Employees are based in a store. From time to time employees may be required to be travel to other stores within a reasonable travelling distance if required. Usually this is short term urgent cover and rarely for a period of more than one week [as this impacted the performance of other stores.].

21. The Office Manager in each store is primarily responsible for ensuring adherence to security procedures, health and safety requirements, company rules and regulations. This also includes maximising sales, meeting audit requirements and generally ensuring that day to day operations such as human resources, cash office, warehouse, administration and front-end operations all run smoothly. The Office Manager is an important part of the management team.

22. Mark Steven was the Store Manager of the Glasgow store for five years until his promotion to Area Manager on 4 February 2019. Sharon Irwin is Store Manager of the respondent's new store in Paisley. In 2017-18 she was Cluster Manager of the Glasgow, Wishaw and Kilmarnock stores with responsibility for handling any appeal hearings concerning employees working in these stores.

23. In the Glasgow store in June 2017 Mr Steven had a Deputy Manager and two Sales Managers reporting to him. The Warehouse Supervisor had stepped down as a Departmental Manager. He therefore had training, management skills and experience including opening and closing the store. This was not part of his remit as a Warehouse Supervisor.

24. On 22 June 2017 the respondent employed the claimant as Office Manager at the Glasgow store. He had over 20 years' experience managing stores with previous employers. The claimant was the only Office Manager in the Glasgow store. He was a valuable member of the management team.

25. The respondent issued the claimant with a statement of main terms and conditions of employment which he signed on 23 June 2017 (the Terms and Conditions).

26. The Terms and Conditions include the following provisions:

    a. Statutory sick pay will be paid in line with statutory regulations.

    b. The respondent may at any time require the claimant to undergo a medical examination by the practitioner of the company's choice the cost of which will be the responsibility of the respondent.

    c. The respondent reserves the right to terminate employment by giving four weeks' notice after the claimant has been employed for four weeks to four years.

    d. The respondent's aims are (i) to make sure that no job applicant, existing member of staff, contractor or customer is less favourably treated on the grounds of their sex, marital status, sexual orientation, disability, race, religion, colour, nationality ethnic origin or age; and (2) no one is disadvantaged by conditions, requirements or practices which cannot be shown to be just and fair.

27. The respondent's Staff Handbook refers to standards of conduct including absence/attendance. The trigger point for absences for formal action to be taken is an employee being absent on three or more separate occasions over a 26-week rolling period. Long term absence is an absence of three weeks or more. The Staff Handbook does not state what procedure is to be followed for long term absence. This is managed by the absent employee's line manager who will meet with the employee to discuss the nature and duration of their illness and expected date of return.

28. While Mr Steven treated every ill health absence differently he usually arranged a meeting with the employee after the third weeks' absence to discuss the nature of the illness and how to assist the employee's return to work. Mr Steven would follow with a letter and if appropriate arrange a further meeting after six weeks' absence asking for medical records to see the nature

of the illness; whether it is long term; and if the employee is able to return to work. Any further meeting would depend on the nature of the illness.

29. Around 6 November 2017 the claimant became ill. He was signed off work until 23 November 2017 due to "abdominal pains". On 23 November 2017 the claimant was signed off for a further four weeks due to "abdominal pain/colonic polyps". On 21 December 2017 the claimant was signed off work for 42 days due to "abdominal pains/polyps".

30. On 9 January 2018 the claimant met Mr Steven at the Glasgow store to discuss the claimant's absence from work. Amanda Findlay, Deputy Manager was also present (the January Meeting). Mr Steven wanted to find out if the respondent could assist the claimant's return to health and answer any queries the claimant might have about his absence. Mr Steven wanted to know the progress that the claimant was making in his recovery and any further details that he might have about his condition so that he could understand how the respondent might support the claimant's return to work. The claimant said that he was having tests and that he was going in for a pre-op-assessment in February 2018. The claimant anticipated the operation was to remove the polyps. As the claimant was unable to provide a likely date of return Mr Steven said that the company may wish to contact his doctor to establish the exact prognosis of his condition. The claimant therefore signed a medical report consent form. The claimant was updated on developments within the Glasgow store. Mr Steven wrote to the claimant following the January Meeting recording what was discussed.

31. On 1 February 2018 the claimant was signed off work for a further 42 days due to "abdominal pains/colonic polyps".

32. The claimant underwent an operation around 27 February 2018. The claimant is a disabled person within the meaning of section 6 of the EqA. The respondent was at the material times aware of the claimant's disability.

33. On 13 March 2018 Mr Steven wrote to the claimant inviting him to attend a further meeting on 4 May 2018 to discuss his progress and any necessary support which the respondent could provide to assist his recovery and to gain

an understanding of when the claimant would be likely to be in a position to return to work. Mr Steven indicated that it was practice to ask for a medical report where it was felt it may assist the respondent in gaining a further understanding of the employee's condition. If appropriate it would be discussed as part of the meeting.

34. The meeting took place on 10 May 2018 at the claimant's home (the May Meeting). Mr Steven was accompanied by Matt McGowan, Sales Manager. The claimant said that the polyps had been removed and that he was recovering from the operation as he had been in an induced coma which required emergency surgery and required to stay in hospital. The claimant had since attended hospital as an outpatient and had been informed that there was a 40 percent possibility of the cancerous cells/polyps returning. The claimant at some point would be going for chemotherapy to reduce his percentage to 25 percent. However, the claimant was currently unfit for treatment. He had made some progress over the last two weeks but was unable to provide a likely date of return to work. Mr Steven asked the claimant to complete a medical consent form so that the respondent could contact the claimant's GP to establish the prognosis for his condition. The claimant said that he was keen to get back to work. He asked who was undertaking his role. Mr Steven said that that Ms Findlay was overseeing checkouts and he had been overseeing administration, audit and the health and safety side of things. Ms Findlay had been absent on compassionate leave for the last five weeks. Mr Steven said it would be great to have the claimant back but emphasised the importance that the claimant fully recovered and was signed off by his doctor before this could happen. Mr Steven also referred to looking at there being a phased return to work. Mr Steven wrote to the claimant following the May Meeting recording what was discussed.

35. On 25 May 2018 the claimant was signed off work for 91 days due to "bowel cancer surgery".

36. On 29 May 2018 the respondent received a report from the claimant's GP, about the claimant's condition (the May Report). The GP confirmed that the claimant had undergone surgery to remove most of his large bowel due to

multiple polyps. Unfortunately, due to complications following the claimant's initial surgery he required several other operations over the following days. As a result, the claimant had lost weight, was frail, easily exhausted and was left with a stoma bag. The claimant also required to undertake a range of medication and supplements to facilitate his recovery. The GP confirmed the pathology report confirmed that one of the polyps was cancerous. Further having consulted the oncologist it had been decided that the claimant would not undergo chemotherapy treatment on account of the risks associated with it. The claimant would instead be subject to close monitoring to ensure that the cancer did not return. The GP confirmed that in his medical opinion the claimant would not be fit to return to work for a further four to six months subject to the claimant "remaining cancer free over this period" and in returning to work a phased return was anticipated.

37. On 30 July 2018 Mr Steven met with the claimant at his home (the July Meeting). Mr Steven was accompanied by Ms Findlay who took notes. Mrs Hunter was present.

38. At the July Meeting Mr Steven discussed the May Report. The claimant advised that his Consultant Surgeon was "talking about a year" and the claimant felt this was more realistic and accurate.

39. Mr Steven updated the claimant about the Glasgow store. He said that it was hectic. Mr Steven explained the new cluster manager structure and advised of Ms Irwin appointment. In the Glasgow store the stocktake and audit went well. The Warehouse Manager had resigned which had a direct impact because he could do key holding and his replacement could not. The Warehouse Manager had also provided cover and Mr Steven was struggling to get management cover.

40. As the claimant had been unable to attend work for approximately nine months with a further seven months absence envisaged Mr Steven regretfully had to review the claimant's continued employment. As a senior member of the management team the claimant's continued absence had caused

considerable operational issues through no fault of his, but the respondent could not leave this matter unresolved indefinitely.

41. Mr Steven informed the claimant that the next steps would be to invite him to attend a capability review meeting where the circumstances surrounding the claimant's continued absence would be reviewed after which a decision would be made. The claimant was angry about the decision. He was not being paid. He felt that resources could be pulled from other surrounding stores.

42. On 11 August 2018 Mr Steven wrote to the claimant inviting him to attend a formal capability hearing on 17 August 2018 to discuss the May Report and the timescales the Consultant Surgeon had discussed with the claimant. The claimant was advised of the right to be accompanied and that the hearing may result in one of the following outcomes:

    a. No further action being taken.

    b. Allowing a further time before a final decision is made

    c. Dismissal with contractual notice.

    The claimant was informed that if he was dismissed, he would have the right of appeal.

43. On 17 August 2018 the claimant met with Mr Steven at the formal capability hearing. The claimant indicated that he expected to be returning to work on a phased return basis sometime within approximately three months with the GP's advice. The claimant said that the Consultant Surgeon had estimated a year and the claimant may need to have further surgery, but he would not know until September 2018 when he had a further appointment with the Consultant Surgeon. The claimant would be attending his GP on 23 August 2018 to see if he could be signed off to be able to return to work. It was agreed that the claimant would contact Mr Steven after the consultation with the GP.

44. The claimant contacted Mr Steven around 23 August 2018 and advised that he had been given another a statement of fitness to work that he was not fit to work for 91 days which would take him to 22 November 2018. At that point

there was to be another assessment by the GP; review of progress and the possibility of a phased return. There was no guarantee as it would all depend on what progress had been made.

45. Mr Steven considered that the claimant was unable to give a definitive date of return. The claimant's continued absence had become unsustainable as all the current managers had to undertake parts of the claimant's duties on top of their own roles and duties. This had been compounded when the Warehouse Manager had resigned as he had been able to provide some support within the management structure. Managers were having to work full weekends every three to four weeks to cover absence and holidays. They were about to enter the peak season which would require night shifts and have an impact on stock availability and customer service. Mr Steven decided regretfully that the claimant's employment should be terminated on 28 August 2018 based on:

> "You have been unable to attend work from 6 November 2017. You are still recovering from bowel cancer surgery which took place in February 2018 and cannot give us a definitive date for your return to work in the near future."

46. The claimant was given a payment in lieu of notice along with outstanding holiday pay and was advised of his right to appeal. This was confirmed in writing.

47. Following a conversation with the claimant on 29 August 2018 Mr Steven wrote to the claimant confirming that the time limit for his appeal was extended until 7 September 2018 given the delay in providing various documents.

48. The claimant sent his appeal to David Garland on 30 August 2018. The claimant stated that he had been treated unfairly. He thought the decision to dismiss was premature. The appeal continued:

> "Although I cannot give a definitive date of return I have provided a provisional date of November 2018 subject to medical advice. My expected date of return has been misrepresented in your correspondence. I do not, as your letter stated, expect my job to be held open indefinitely.

I have offered to return as a phased return when possible. You stated I should not return unless fully fit, thereby delaying my return longer.

I feel I have been treated unfairly on the grounds of my illness and discriminated against on grounds of disability."

49. The appeal also referred to ACAS Code of Practice that it was not acceptable for an employer to set a limit on the length of time an employee can be off sick before dismissing him regardless of the circumstances.

50. The claimant consulted with his Consultant Surgeon on 20 September 2018. In the letter from the Consultant Surgeon to the GP the Consultant Surgeon said that the claimant told him that he thought that plans were in place for him to have a phased return in a month or so and then received correspondence about being sacked. The Consultant Surgeon stated that he would see the claimant in February/March when, "Hopefully by that point he will have returned to gainful employment and be in a better place to contemplate what happens next."

51. The capability dismissal appeal hearing took place on 21 September 2018 at the claimant's home. It was conducted by Sharon Irwin, Cluster Manager. Charlie Lafferty, Deputy Manager took notes.

52. During the capability dismissal appeal hearing the claimant said that in his view his illness had not been properly understood and had been given inaccurate consideration by the respondent. The claimant wanted copies of previous correspondence and to know the basis of the decision to terminate his employment. Ms Irwin explained that the basis was that the claimant had been unable to attend work with no definitive date of return. She referred to the May Report which suggested a return date on or around November 2018 whereas the claimant said his Consultant Surgeon thought it would be up to a year from the date of his operation before he would be able to return to work. The claimant informed Ms Irwin that "up to a year" could include a reduced timeframe of six months. He considered that Mr Steven's decision was premature. The claimant confirmed that his preferred outcome was

reinstatement. When asked if he would be able to start back in November 2018 the claimant replied, “Yes as a ball park figure.”

53. On 5 October 2018 Ms Irwin wrote to the claimant summarising what was discussed at the capability dismissal appeal hearing and advising of the outcome. Ms Irwin explained that she understood the rationale of Mr Steven’s decision to terminate the claimant’s contract on grounds of capability. However, as the claimant stated at the capability dismissal appeal hearing that he was looking to return to work in November 2018 she decided to overturn the decision to terminate the claimant’s contract and reinstate him with no loss of service. Ms Irwin also made the claimant aware that she was reserving the right to review this situation if the claimant was unable to return to work in November 2018. She would also review the decision if the claimant did return to work in November 2018 and then after a short period of time commence another period of long-term absence related to his current health conditions. The decision would be a review based on the evidence that was available to her at that time. The claimant was advised that any reasonable adjustments to assist him in returning to work should be discussed with Mr Steven who should also be contacted before any potential return date in November 2018. Ms Irwin confirmed that the appeal process and her decision was final and that there would be no further right of appeal.

54. Around October 2018 the claimant attended the three-month follow up clinic with the Consultant Anaesthetist in Intensive Care. During that discussion the Consultant Anaesthetist noted that the claimant was planning to go back to work in November 2018. The claimant was however a bit concerned about this as he got tired and did not feel that he necessarily had energy levels to complete a full day in his office. However, he had been given reassurances that his return to work would be phased and that this would be taken into account.

55. Around 25 October 2018 his Consultant Surgeon wrote to the claimant about the results of an ultrasound scan.

56. On 21 November 2018 the claimant consulted his GP who issued a statement of fitness to work stating that the claimant was not for to work for 91 days and his GP would need to assess him at the end of this period.

57. On 23 November 2018 the claimant attended the clinic with the Consultant in Medical Oncology.

58. In view of the claimant's failure to return to work and subsequent a statement of fitness to work dated 21 November 2018 Ms Irwin wrote to the claimant on 27 November 2018 inviting him to a reconvene capability dismissal appeal hearing. She explained that had it been known that the claimant would be absent until 26 February 2019 that a possible outcome of the capability dismissal appeal hearing was that the claimant would not have been reinstated to his role. That decision was predicated on the claimant being able to return to work in November 2018. The claimant was therefore requested to attend a reconvened capability dismissal appeal hearing to consider whether reinstatement was appropriate given that the claimant had not returned to work and that a further fit note had been received. The claimant was asked to attend the meeting and to make such submissions as he may wish and to provide an update in relation to medical advice that he had received. The claimant was asked to obtain a letter from his GP (or any other medical practitioner who currently has responsibility for his care) to provide written response to a series of questions about the claimant's capacity to return to work within varying timescales and whether any reasonable adjustments were required.

59. On 13 December 2018 the Consultant Surgeon wrote to the claimant about the results of a scan and said that he would see him in February 2019 as arranged.

60. On 15 December 2018 the claimant spoke to Ms Irwin by telephone. The claimant told her that he would not be attending the reconvened capability dismissal appeal hearing. The GP would not be supplying medical report providing the answers to Ms Irwin's queries. The Consultant Surgeon was the best person to provide those answers and the claimant's next consultation

with him was not until February 2019. The claimant indicated that he would require further procedure, but this would not take place until after his consultation with the Consultant Surgeon in February 2019. The date of any further procedure would also be dependent on the claimant's health. Following that procedure, a further period of recovery would be required but it was not known how long this period would be and the claimant could not confirm when he would be able to return to work.

61. The claimant also advised that he had undergone further tests (CT scan, blood test and an ultrasound) because he was still experiencing pain. He was awaiting results from these tests. He had also been prescribed anti-depressants by his GP and that he was experiencing symptoms of depression.

62. The claimant said that given the size of the respondent's business they should have the resources available to fill his position while he was absent. Ms Irwin indicated that the respondent did not have such resources at its disposal. The claimant was employed at the Glasgow store and it required a full management team in order to function efficiently. The claimant's absence had placed an unsustainable pressure on that store and other members of the management team. The store was also in the lead up to the peak period and therefore the claimant's absence resulted in considerable operational issues. Ms Irwin also indicated that she would like to meet with the claimant but that if he would not be attending then the hearing would take place in his absence.

63. On 28 December 2018 the reconvened capability dismissal appeal hearing took place in the claimant's absence.

64. Ms Irwin considered that the basis of her original decision to reinstate the claimant was because he had indicated that it was his intention to return to work in November 2018. This had not come to fruition and from the discussion on 15 December 2018 the claimant's position was that he was now unable to confirm when he would return to work and it would certainly be after February 2019. In light of the claimant's comments during that telephone conversation, his failure to provide medical documentation and the absence of any clear

return to work date Ms Irwin reversed her decision to reinstate the claimant thereby confirming the original decision reached by Mr Steven to terminate the claimant's employment on grounds of capability. This decision was communicated to the claimant by letter dated 28 December 2018. In that letter it was confirmed that the decision was final and that there would be no further right of appeal.

65. During the claimant's absence other employees at the Glasgow store were undertaking his duties.

66. The claimant consulted his Consultant Surgeon on 2 February 2019. In the letter from the Consultant Surgeon to the GP the Consultant Surgeon referred to the discussion about further surgical procedure. There was reference to the claimant's dismissal but not to him being fit for work. The Consultant Surgeon recorded the claimant saying that he "struggled to get round Strathclyde Loch a few weeks ago and hitting a wall half way round". The Consultant Surgeon inferred from this that the claimant's physiological reserve might not be great.

67. The claimant was discharged by his Consultant Surgeon on 27 March 2019. The claimant continued to consider having chemotherapy and further surgery. The claimant has been consulting his GP regularly and has signed off for work since 6 November 2018. He is claiming Universal Credit.

68. The claimant has been applying for volunteering jobs in April 2019. He took up a volunteering role with Larkhall and District Volunteer Group on 17 May 2019. Notwithstanding his GP issuing a fit note on 15 August 2019 stating that the claimant is not fit to work for 91 days from August 2019 the claimant has been applying unsuccessfully for jobs in the retail sector. On 15 November 2019 the GP issued the claimant's a statement of fitness to work that he was not fit to work for 91 days when the position would be reviewed.

Observations on witnesses and evidence

69. The Tribunal considered that the claimant gave his evidence honestly based on his recollection of events. The Tribunal was mindful that the evidence related to the time when the claimant was recovering from a life threatening

and debilitating condition. The Tribunal felt that his evidence was at times unreliable and contradicted contemporaneous notes and correspondence. While the Tribunal acknowledged that these were the respondent's documents they were not challenged at the time and there was no reason for the Tribunal to conclude that they were in any way inaccurate.

70. The Tribunal considered that Ms Irwin had the advantage of sitting in the Tribunal hearing room while the claimant was giving evidence. That said the Tribunal considered that she gave her evidence candidly and made appropriate concessions. The Tribunal considered that she was a credible and reliable witness. She conceded that she had received no formal equality training, but had she consulted with HR.

71. The Tribunal considered that Mr Steven was a persuasive witness who gave his evidence truthfully, professionally and without embellishment. The Tribunal had no hesitation in concluding that Mr Steven's decision to dismiss the claimant was reached reluctantly and with much regret. Mr Steven also conceded that he had not received formal equality training from the respondent. He said that he and one to one conversations with HR for advice.

72. As indicated above in relation to the disputed evidence the Tribunal considered that the evidence of the respondent's witnesses was more reliable than the claimant's evidence given that it was consistent with contemporaneous notes.

73. In relation to the capability dismissal appeal hearing the Tribunal considered that the claimant did convey that he was planning to go back to work in November 2018. The Tribunal formed that view because it was consistent with Ms Irwin's understanding, the contemporaneous notes and with the claimant's discussion with the Consultant Anaesthetist in Intensive Care which took place at around the same time.

74. At the hearing the claimant said that he would have returned to work in February 2019. He referred to a letter dated 11 October 2019 addressed to his solicitor from the Consultant Surgeon which states, "I do think that [the claimant] would be able to return to work in or around February 2019". This

was an attempt to “fill in the blanks” in a medical report which was obtained by his solicitor as part of these proceedings on 25 September 2019. The claimant was also signed off work for most of 2019 and 2020 and claiming Universal Credit.

75. The supplementary set of productions contained the claimant’s medical records. The Tribunal did not consider the claimant’s fitness to work was specifically considered by the Consultant Surgeon at the consultation in February 2019. The claimant’s recovery from the earlier operation and the possibility of further procedure was not the only issue relating to the claimant’s fitness to return to work. He was being prescribed anti-depressants and was also scheduled to see the Consultant in Medical Oncology. The Tribunal considered the GP, who had access to the specialist assessments; was seeing the claimant regularly; discussing with the claimant his ability to work; and providing fitness to work certificates was best placed to assess the claimant’s fitness to work in February 2018 and afterwards. The Tribunal therefore did not find that the clamant was fit to return to work in February 2019.

Submission for the claimant

76. The claimant submitted that he made complaints under sections 20, 15 ,13 and 19 of the. He relies on the dismissal on 28 December 2018 as the dismissal that is material to his claims, as well as the events leading up to that dismissal. The claimant relies on facts and circumstances in support of the claims arising out of or in connection with the dismissal on 28 December 2018.

77. The Tribunal was referred to the guidance set out in the EHRC Code of Practice on Employment (2011); section 136 of the EqA; *Igen Ltd v Wong* [2005] ICR 931; *Madarassy v Nomura International plc* [2007] ICR 867.

78. Section 20 imposes a duty on an employer to make reasonable adjustments. The duty is the employer’s alone. The fact that the respondent required the claimant to obtain a medical report form his GP before the reconvened capability dismissal appeal hearing does not satisfy any duty that the respondent had to obtain contemporary medical advice from a suitably

qualified medical practitioner before taking the decision to dismiss. That practitioner is the Consultant Surgeon and his advice would have been that the claimant was or would have been fit to return to work in or around February 2019.

79. The duty applies to all stages of employment, including dismissal and the appeal process after dismissal (section 108 of the EqA). The duty requires positive discrimination in favour of a disabled person. The Tribunal was referred to the guidance in *Environment Agency v Rowan* [2008] ICR 218 at para [27]. While the test under section 20 of the is a comparative one, there is no need to identify a comparator whose circumstances are the same as the disabled person's (*Fareham College Corporation v Walters* UKEAT/0076/09; EHRC Code, para 6.16). The comparators in this case are employees who are not disabled and who are less likely to be absent and less likely to be subject to absent management and dismissed. Whether or not an adjustment is reasonable is an objective test and is a matter for the Tribunal to determine. The Tribunal may substitute its own view for that of the employer (*Smith v Churchills Stairlift plc* [2006] ICR 524 at para [44]; EHRC Code, para 6.29). It is sufficient for a proposed adjustment have some prospect of removing the disadvantage. There is no need for the Tribunal to find that there is a "good" or a "real" prospect (*Leeds Teaching Hospital NHS Trust v Foster* UKEAT/0552/10/JOJ at para 17). The reasonable responses test under section 98 of the Employment Rights Act 1998 that test that would apply in non-disability ill-health/ capability dismissals does not apply in disability cases.

80. It is enough for there to be a prospect that the adjustment will be effective. It was practicable to defer the decision to dismiss until after the claimant had seen the Consultant Surgeon or to have instructed his own occupational health report; there was no additional cost in simply deferring the decision until the claimant has seen the Consultant Surgeon, the cost of an occupational health report is an ordinary cost of being a responsible employer and there was no evidence of material disruption; the Respondent is a large company with a turnover of 1 billion pounds and net profits of 57 million

pounds in the year to 3 February 2019; the respondent was not in need of any financial assistance because it is a huge, prosperous employer.

81. The claimant relies on the following PCPs:

a. The respondent's absence management policy which is the process by which the respondent ensures the employee's attendance at work and made the claimant liable to be dismissed for non-attendance at work.

b. A requirement placed on the claimant by the management to obtain a medical report from his GP (*British Airways v Starmer* EAT/0306/05/SM; [2005] IRLR 863)**.**

c. The respondent's practice or policy of not using an occupational health referral system for employees.

d. The respondent's practice of allowing the manager to decide whether to obtain a medical report or putting the onus on the employee to obtain medical reports in connection with the ill health, the prognosis and a likely return to work date.

e. The respondent's absence management policy or procedures whereby he was not allowed a second appeal after the dismissal on 28 December 2019.

f. The respondent's practice of only bringing in help for short absences.

82. The respondent dismissed the claimant because of the length the period of his absence coupled with the absence of a return to work date, either to full duties or on a phased return basis. A reasonable adjustment would have been deferring the hearing due to take place on 28 December 2019 to allow the claimant time to attend his appointment with the Consultant Surgeon on 1 February 2019. That could have been done on 15 December 2018 when the respondent knew that the claimant's GP could not provide that opinion that had been requested. The respondent also knew that it was the GP's view that

it was the Consultant Surgeon who was best placed to provide that advice. The Consultant Surgeon has provided an opinion that supports the position that the claimant would have been able to return to work in or around February. That timescale was supported by Ms Irwin's evidence in relation to the timescales for return as set out in her letter to the claimant dated 27 November 2018. Such a short deferral would have been reasonable in all the circumstances. Financial considerations were not part of the respondent's decision to dismiss. That is supported by the fact that this is a substantial employer with substantial financial resources. Ms Irwin's evidence that the claimant's absence was having a major impact on the business is not supported by evidence of any detail. More evidence is required.

83. A reasonable adjustment would have been to allow the claimant a right of appeal against the dismissal. In respect of the first dismissal, the process lasted 36 days. The respondent advised the claimant of the second dismissal by letter dated 28 December 2018. Adding 36 days to allow for an appeal takes us to 1 February 2019. That was the date of which the claimant had his appointment with his Consultant Surgeon whose opinion is that he would have been able to return to work in or around February 2019. It is within the earliest return timescale posited by the respondent and within the second timescale. This would have had a similar impact as simply deferring the decision to dismiss.

84. A reasonable adjustment would have been for the respondent to have instructed a medical report rather than requiring the claimant to do so. Had that been done at or around 15 December 2018 then there are prospects that the report would have supported a return to work in or around February 2019. That is supported by the ordinary good workplace practice, an employer should obtain relevant medical evidence before dismissing an employee for ill health absence.

85. It would have been a reasonable adjustment for the respondent to have sought assistance or advice from Access to Work.

86. Turning to the section 15 claim, the claimant was dismissed because of his absences. That treatment is unfavourable. The absence arose in consequence of his disability. The respondent concedes that it treated the claimant unfavourably because of something arising from his disability.

87. When considering the respondent's defence, the three-stage objective test is (1) is the objective sufficiently important to justify limiting a fundamental right; (2) is the measure rationally connected to the objective; and (3) are the means chosen no more than is necessary to accomplish the objective? (*Elloy de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69). The onus is on the employer to show that the unfavourable treatment is justifiable.

88. The respondent did not meet that test. The aim relied upon by the respondent is "the satisfactory operational performance of the Glasgow store". Whilst that is an obvious and reasonable objective for a business, it must be understood in the context of the claimant requiring only a further five weeks from the date of dismissal. In that context, the objective is not rationally connected to the objective. The claimant was an experienced employee and the respondent chose to lose his services rather than allow him a further five weeks to obtain the advice from the Consultant Surgeon. The dismissal is more than was necessary to achieve that objective.

89. Turning to the section 13 claim he respondent dismissed the claimant by letter dated 28 December 2018. The dismissal was an act of discrimination. That is a breach of section 39(2)(c) of the EqA. The claimant does not have to prove that the dismissal was consciously motivated (*Nagarajan v London Regional Transport* [199] ICR 877 at 894 C-D (HL)). A finding of a Tribunal of subconscious bias is sufficient (*Essop and ors v Home Office (UK Border Agency)* [2017] ICR (SC (E)) 640**.**

90. The claimant does not have to prove that the dismissal was solely because of his disability. For the claimant to succeed, it is sufficient for the Tribunal to infer from the evidence that, regardless of motive or intention, "an important or significant cause" of the less favourable treatment was the claimant's

disability. A Tribunal may rely on deductions or inferences from the surrounding circumstances to arrive at a finding of discrimination.

91. The claimant relies upon the lack of equality training, his evidence that his impression was that the respondent had formed the view that he would simply be a problem if he returned to work, the fact that the concerns expressed about the store's performance only began after the May Report; the concerns expressed by Ms Irwin about the risk of further surgery and time off should he return to work, the fact of requiring the claimant to obtain his own medical report point to discriminatory stereotyping mindset: the claimant has cancer and is at risk of his cancer recurring and he will continue to have absences into the future. Those factors support a finding of direct discrimination.

92. With regard to section 19, the PCP is the policy of not using an occupational provider to advise on employees who are on sickness absence and not bringing in outside help. An employee with a disability such as the claimant's is more likely than a non-disabled person to require high level medical care. Assessing fitness to return to work in those circumstances is best provided by professionals. The claimant was clearly disadvantage due to the lack of expert medical advice that was before the employer when the decision to dismiss was made.

93. In general, the pool for comparison should consist of the group which the provision, criterion or practice affects (or would affect) either positively or negatively, while excluding workers who are not affected by it, either positively or negatively. There is no requirement that the PCP in question put every member of the group sharing the particular protected characteristic at a disadvantage. *Essop v Home Office (UK) Border Agency* [2017] ICR 640.

94. In this case, the pool would be other workers who are subject to absence management but who are not disabled. That would be all employees because all employees are subject to absence management if they become absent. There may be room for a discussion as to whether the pool should only include those who are in fact absent, but that seems to be too narrow. The relevant

reason for absence is ill health. The same arguments against justification apply to section 19.

95. In relation to remedy the Tribunal was referred to the schedule of loss. The claimant argues that this is a middle Vento band case. A discriminatory dismissal is not apt to be categorised as an isolated incident (*Voith Turbo Limited v Stowe* [2005] ICR 543).

Submissions for the respondent

96. The claimant has an insufficient qualifying period to claim ordinary unfair dismissal. The Note of preliminary hearing on 25 October 2019 summarises the claim as comprising various complaints of disability discrimination all as detailed in the Note following a preliminary hearing on 31 May 2019. The respondent accepts that the claimant was disabled in terms of the EqA, but otherwise the claim is denied in its entirety.

97. Under section 39(2)(c) of the EqA it is unlawful to directly discriminate against an individual with a protected characteristic by dismissing them. However, the evidence does not show that this is what occurred, and it is doubtful that the claimant is asserting that such occurred. The claimant's own evidence at its highest was that he had suspicions that Mr Steven wanted to get rid of him because he was disabled. Ms Irwin strongly and convincingly denied any such suggestion. It is also unlikely that the claimant is maintaining a claim of automatic unfair dismissal that is free standing from the discrimination claim.

98. If the claimant is asserting indirect disability discrimination it is far from certain what is the provision, criteria in procedure. There has been no fair notice of it. There is a potential defence of proportionality available which is essentially the same as that asserted by the respondent in response to the claim under section 15 of the EqA.

99. The claimant states that his dismissal is unfair. It is assumed that he states in that it is an act of discrimination in terms of section 15 of the EqA. The respondent says that the dismissal was a proportionate means of achieving a

legitimate aim: the smooth running of the business and relieving pressure on those covering the claimant's duties over a period of time.

100. The claimant also maintains that there has been a failure of the respondent to make reasonable adjustments in terms of section 20 and 21 of the EqA.

101. In this case the scope for interaction between the dismissal and reasonable adjustment is severely restricted. The only detriment alleged by the claimant in his claim is dismissal. Such was the severity of the claimant's condition that he was either able to return to work or not. The evidence of the respondent's witnesses was that they would have assisted in a phased return and in any other reasonable adjustments had he been able to return. The respondent did make adjustments, but no reasonable adjustments were ever going to overcome the disadvantage experienced by the claimant as a result of his disability. In particular the adjustments suggested by him in his statement would not allow him to return to work by November 2018 or indeed later.

102. In terms of section 15(b) it is submitted that the evidence is clear that the "treatment" i.e. the dismissal was for a legitimate purpose. Both Mr Steven who took the original decision to dismiss and Ms Irwin who ultimately took the decision did so because they wish and to ensure the proper functioning of the Glasgow Store. The overwhelming evidence before Mr Steven was to the effect that there was no definite or even likely date for the claimant's return. The best that could be said for the claimant was that he might return at some time between November 2018 and February 2019. This best was not good enough. Mr Steven was aware of the Christmas season coming up and justifiably decided to dismiss. The claimant did not return to work in November 2018 but his representations that it was likely that he would do so bought him more time. Had Mr Steven's decision been upheld by Ms Irwin any claim to the Tribunal would be likely to be unsuccessful. In this context the Tribunal was cautioned against accepting any argument based on the respondent having a duty to wait "just a little longer".

103. Two months of continued pressure on the staff who were carrying out the claimant's duties unduly passed and Ms Irwin, it may be said, somewhat

charitably reverses Mr Steven's decision. She does so on the basis of the claimant's assurances albeit guarded assurances that he will be returning to work in November 2018. At the capability dismissal appeal hearing the claimant submitted that Mr Steven's decision was premature – a position that he continues to adopt. Ms Irwin would have been justified in rejecting the argument of prematurity.

104. When Ms Irwin was considering the matter again, in what can be best described as a reconvened appeal hearing, she was faced with a still more focused return date, and the very real possibility that the Consultant Surgeon would have said that the claimant should not return to work. In any event there was also at the very least a possibility that the claimant would require further surgery.

105. When considering the merits of the case the Tribunal must focus on what was known to the respondent and what could have been reasonably known by them at the time of dismissal. The respondent was entitled to rely on the the May Report updated by a fitness to work certificate and the claimant's evidence.

106. The Tribunal should not find it within judicial knowledge that a reference to occupational health would have been helpful nor would such a referral have been a reasonable option for a medium-size company having no experience of such organisations. The claimant's actual situation in February 2019 is only relevant to quantum and even then, the evidence is not helpful to the claimant.

107. The Tribunal was referred to *O'Brien v Bolton St Catherine's Academy* [2017] IRLR 547; *City of York v Grosset* [2018] IRLR 746 and *Lynock v Cereal Packaging Limited* [1988] IRLR 510.

108. In relation to the claimant's schedule of loss the Tribunal was invited to take account of the period that he would not have been at work. The Tribunal was reminded of the claimant's evidence which conflicted with the fitness notes. The Tribunal was also asked to consider what weight should be given to the Consultant Surgeon's letter dated September 2019.

109. The claimant relies on one act of discrimination – his dismissal in December 2018. While he disagreed with it must have been clear to the claimant why that decision was taken. The decision is at the lower end of the Vento bands as at March 2019 when the claim was presented. Any award should be no greater than £3,000.

110. It is arguable that the ACAS code does not apply to this situation. In any event there was no unfairness in procedure.

Discussion and deliberations

111. The Tribunal understood that the claimant accepted that his dismissal was not automatically unfair in terms of the ERA. His position was that he says he was dismissed because he was disabled and that was unfair. In relation to his claims under the EqA the claimant relied on the protected characteristic of disability. It was not disputed that the claimant was a disabled person in terms of section 6 of the EqA.

Direct discrimination claim

112. The Tribunal first considered the direct discrimination claim under section 13 of the EqA. For this claim to succeed the claimant must satisfy the Tribunal that because of his disability he was treated less favourably than the respondent treats or would treat others.

113. The less favourable treatment relied upon by the claimant was his dismissal. The claimant did not suggest an actual or hypothetical comparator. The Tribunal did not understand there to be an actual comparator who was in the same position as the claimant in all material respects. The parties did not suggest a hypothetical comparator. The Tribunal considered that a hypothetical comparator would be an Office Manager working in the Glasgow store, not having the claimant's particular disability, but who had been sick absent from work for the same length of time with uncertainty about the date of return to work.

114. The Tribunal considered that the reason for the claimant's dismissal was that his length of absence was unsustainable and there was uncertainty about the

date for his return to work. In the Tribunal's view the respondent would have treated the hypothetical comparator in the same way. The Tribunal acknowledged that neither Ms Steven nor Ms Irwin had received formal equality training but they both sought advice from HR before reaching their decision. Mr Steven raising concerns about the Glasgow store with the claimant coincided with Mr Steven receiving the May Report but also with the absence on bereavement leave of the Deputy Manager and the resignation of the Warehouse Supervisor. While the claimant's formed the impression that the respondent thought he would be a problem if he returned to work that was not the impression informed by the Tribunal. Mr Steven obtained the May Report; was keen to have the claimant return to work and mentioned a phased return. Ms Irwin overturned the original dismissal and reinstated the claimant knowing that the claimant had cancer and there is at risk of his cancer recurring. When she decided that the claimant's employment was to be terminated the claimant had provided an update in relation to the medical advice he had received. His current statement of fitness to work expired on 26 February 2019. The Tribunal was not satisfied on the evidence that the claimant was dismissed because of his disability.

Discrimination arising from disability

115. The Tribunal considered that the claimant's length of absence and the uncertainty about his return to work date was something arising from his disability. The claimant also claimed that his dismissal was unfavourable treatment under section 15 of the EqA. The Tribunal's view the claimant's dismissal was unfavourable treatment by the respondent because of something arising in consequence of his disability.

116. The Tribunal then turned to consider if the respondent showed that this treatment justified: a proportionate means of achieving a legitimate aim.

117. Mr Steven and Ms Irwin said that they wished to ensure the operational performance of the Glasgow store. The Tribunal considered that this was a legitimate aim.

118. The Tribunal turned to consider if dismissing the claimant was a proportionate means of achieving that aim. The Tribunal found that during the claimant's absence his role was being covered by other managers working in the Glasgow store. The Warehouse Manager was also able to provide some assistance because of his previous experience in a promoted role. The Deputy Manager was on bereavement leave for around five weeks in April/May 2018 then the Warehouse Manager left in July 2018 and his replacement did not have that experience which put the remaining managers under additional pressure. In August 2018 the respondent was approaching its peak season. Mr Steven's understanding was the claimant had no definite date of return. The claimant thought that he might return in November 2018 or possibly February 2019.

119. The Tribunal considered whether the respondent could have appointed a Warehouse Manager with managerial experience. That was not a requirement of the Warehouse Manager's role and the salary did not include that responsibility. The Tribunal did not consider that the legitimate aim could have in any event been achieved by this as it would still have placed an increased burden on the other managers who were covering other aspects of the claimant's role.

120. The Tribunal then considered if the legitimate aim could be achieved by delaying the decision to dismiss the claimant pending clarification of the claimant's expected date of return. The Tribunal found that Ms Irwin re-instated the claimant to his role as he stated his intention to return to work in November 2018. It therefore seemed to the Tribunal that in August 2018 the legitimate aim could still be achieved by delaying the dismissal. However, the Tribunal agreed with the respondent's submission that this could not go on indefinitely. The Tribunal was not convinced that delaying the decision to dismiss the until his consultation in February 2019 would have achieved the legitimate aim as the Tribunal did not find that the claimant was fit to return to work in February 2019 and in the meantime the existing managers were continuing to cover the claimant's duties.

121. The Tribunal considered if the legitimate aim could be achieved by asking an Office Manager from another store to cover the claimant's absence. The Tribunal noted that this was not done routinely other than for very short periods of say a week. If the cover was for a longer period, the operation of the other store would be affected. The Tribunal had regard to the fact that the respondent understands its business and how to achieve the best commercial outcome. In the Tribunal's view while there was no doubt about the claimant's desire to return to work, there was uncertainty about the length of his absence. The Tribunal did not consider this was an option open to the respondent in the absence of a definite date of return even on a phased basis.

122. The Tribunal therefore concluded that the claimant's dismissal was a proportionate means of achieving a legitimate aim.

Indirect disability discrimination

123. The Tribunal then referred to the submissions in relation to an indirect discrimination claim under section 19 of the EqA. The Tribunal was not satisfied on its reading of the claim form that the claimant had made an indirect discrimination claim. It noted that the respondent did not respond to such a claim in its response. From the note of the preliminary hearing on 31 May 2018 there appeared to be reference in the discussion issues for determination in indirect discrimination claim. There was no application to amend the claim form to include an indirect discrimination claim and from the information before the Tribunal neither it nor the respondent were aware of the provision, criterion or practice relied on by the claimant until receiving the submissions.

124. The claimant's submissions state the PCPs being relied upon in an indirect discrimination claim are not using an occupational health provider to advise on employees who are on sick absence; and only bringing in outside help from other stores where absences are short term.

125. While the Tribunal accepted that these were PCPs which would the affect all the respondent's employees who were long term absent due to ill health, it was not convinced that not using an occupational health provider placed the

claimant at a disadvantage. On 21 November 2018 the claimant had a statement of fitness to work saying that he was not fit to return to work for 91 days and his GP would need to assess him at the end of this period. If the claimant's GP was unable to provide a prognosis beyond February 2019 the Tribunal considered that an occupation health referral which in its experience was likely to be a telephone consultation with an occupational health nurse would not have provided Ms Irwin with any more medical information than she had from the claimant following the telephone conversation on 15 December 2018.

126. As regards the PCP of only bringing in outside help from other stores where absences are short term, the Tribunal considered that would also affect all the respondent's employees who were long term absent due to ill health and those employees with disabilities were more likely to be long term absent that non-disabled employees. However, the Tribunal considered that it is a legitimate aim for the respondent to ensure that each of its stores has sufficient staff cover to ensure efficient running of each store and fairness among staff. For the reasons set in relation to the claim under section 15 the Tribunal considered that not bringing in outside help from other stores for the claimant's long term was proportionate given the absence of a definite date of return even on a phased basis.

Reasonable adjustments

127. The Tribunal then turned to the claim under sections 20 and 21 of the EqA. The Tribunal asked if the respondent's applied a provision, criterion or practice (PCP)?

128. The claimant relied on the following which he said were PCPs:

a. The means by which the respondent manages ill health absenteeism to ensure attendance at work.

b. The requirement placed on the claimant to obtain a medical report from his GP.

c. The policy of not using an occupational health referral system for employees.

d. Allowing managers to decide to write to the GP or ask the employee to do so directly.

e. The absence management policy which does not allow a second appeal after the dismissal on 28 December 2018.

f. Only relocating staff from other stores on a short-term basis.

129. The Tribunal appreciated that a PCP is not defined in the statute but required to be construed widely. The Tribunal considered that while the claimant's Terms and Conditions provided that the respondent had the right to require him to undergo medical examination at its cost the respondent's policy on absence/attendance lacked detail about how that was to be done. Mr Steven and Ms Irwin had different approaches: Mr Steven wrote to the GP setting out questions and asking for a report; Ms Irwin set out in a letter to the claimant the questions on which she wanted that claimant to ask his GP (or any other medical practitioner who currently has responsibility for his care) to respond in writing. On the evidence before it the Tribunal did not understand the respondent to refer employees on long term sick absence to an occupational health referral service.

130. The Tribunal considered that the substantial disadvantage that these PCPs placed the claimant in comparison with people who are not disabled was being dismissed on 28 December 2018 rather than his continued employment being reviewed around February 2019.

131. The Tribunal considered that the claimant's disability resulted in him being absent from work for a prolonged period and there was uncertainty when he would be fit to return to work.

132. The respondent was aware of the claimant's disability and of the requirement to make reasonable adjustments. Mr Steven did not following his usual practice in relation to the claimant's absence. The first absence meeting was the January Meeting after around ten weeks' absence (rather than three

weeks) and the May Meeting was after six months' absence (rather than six weeks). Mr Steven obtained the May Report and had further meetings with the claimant.

133. The Tribunal considered that throughout the claimant's absence he wanted to return to work but only when medical advice supported him doing so. The claimant had a number of consultant specialists with whom he was consulting from time to time in 2018/2019. The claimant consulted regularly with his GP who in the context of issuing statements of fitness to work discussed the claimant's ability to work. The GP's view at 21 November 2018 was that the claimant was not fit to return to work for 91 days and his fitness needed to be assessed at this end of this period (26 February 2019). The Consultant Surgeon had not seen the claimant since September 2018 and was not scheduled to see him until February 2019.

134. The Tribunal considered that while it would have been reasonable, helpful and expedient had Ms Irwin written to the GP rather than asking the claimant to do so the Tribunal did not consider that or a referral to occupational would have avoided the claimant being dismissed in December 2018 or later. Ms Irwin knew that the GP did not consider that the claimant was fit to return to work until at least 26 February 2019 when he would be seen. The claimant was not scheduled to see the Consultant Surgeon until February 2019 whom he had last seen in September 2019. Ms Irwin had already indicated that she may not have reach the decision that she did had she known in November 2018 that the claimant would not be returning to work until at least February 2019. Ms Irwin also had an update from the clamant about his medical situation during their telephone conversation on 15 December 2018. The Tribunal considered that at 28 December 2018 there was uncertainty about the date of the claimant's return to work by the doctors with whom the claimant had been consulting. There were reviews scheduled for February 2019 but there was no indication that the claimant would be returning in February 2019.

135. As regards allowing a right of appeal against Ms Irwin's decision, the Tribunal considered that the claimant had been given a right of appeal in September 2018 against a decision taken in late August 2018. There was no suggestion

that there was ever a second right of appeal nor did the Tribunal understand that it was usual to review decisions taken at appeal. It seemed to the Tribunal that the decision on 5 October 2018 to reinstate the claimant subject to a right of review was an adjustment which avoided the claimant being dismissed in August 2018 when he believed that he would return in November 2018. On 28 December 2018 Ms Irwin considered the evidence available to her "at that time" which included medical information that was available from the GP and the claimant. The Tribunal considered that the Consultant Surgeon was unlikely to have been able provide a report without consulting with the claimant and that was not scheduled until February 2019. The Tribunal considered that allowing a second appeal would have involved another manager more senior to Ms Irwin and further delay which would not have avoided the claimant's dismissal because for the reasons previously explained the Tribunal was not satisfied on the evidence before it the claimant would have returned to work in February 2019.

136. In relation to asking a colleague from another store to cover the claimant's absence the Tribunal noted that when Ms Irwin overturned Mr Steven's decision because of the claimant's potential return in November 2018 the respondent did not ask a colleague from another store to cover his absence. The claimant held the position of Office Manager which was part of the management team. The Tribunal did not consider that it was reasonable for another store to be under resourced at management level for an indefinite period when there was a lack of certainty about the claimant's return to work nor was it convince that by so doing the claimant would not have been dismissed.

137. The Tribunal considered the respondent did take steps to avoid the claimant being dismissed during his long-term absence because of his disability. However, given the claimant's ongoing health issues and uncertainty about when he would be fit to return to work in any capacity, the Tribunal concluded that no reasonable adjustments would have avoided his dismissal

138. Having reached the conclusions, it did the Tribunal did not require to consider remedy. The Tribunal dismissed the claims.

Employment Judge: S MacLean
Date of Judgment: 20 April 2020
Entered in register: 07 May 2020
and copied to parties