EMPLOYMENT TRIBUNALS

Claimant: Mr G Williams

Respondent: British Telecommunications PLC

HELD AT: Manchester **ON:** 27 and 28 July 2020
5 October 2020
6 October 2020
(in Chambers)

BEFORE: Employment Judge Ainscough
Ms L Atkinson
Ms B Hillon

REPRESENTATION:

Claimant: Mr J Williams, Father
Respondent: Mr S Proffitt, Solicitor Advocate

JUDGMENT

The judgment of the Tribunal is that:

1. The claimant was a disabled person by reason of anxiety between 22 August 2018 – 20 September 2018.

2. The claim of disability discrimination contrary to section 21 of the Equality Act 2010 is successful.

3. The claim of unfair dismissal contrary to section 94 of the Employment Rights Act 1996 is successful.

REASONS

Introduction

1. The claimant was dismissed from his role as a call adviser for the respondent, a telecommunications company, on 20 September 2018. The claimant commenced early conciliation on 23 November 2018 and received an ACAS early conciliation certificate on 18 December 2018. The claimant presented his claim for unfair dismissal on 16 January 2019. On 13 February 2019 the respondent submitted a response.

2. At a case management hearing on 15 November 2019, Employment Judge Horne granted the application of 11 March 2019 to amend the claim to include a claim of disability discrimination. The claimant presented further and better particulars of the disability discrimination complaint on 5 April 2019, and the respondent submitted amended Grounds of Resistance on 6 February 2020.

Issues

3. The issues were to be determined were as follows:

Disability

(a) Did the claimant have a disability, namely a mental impairment of stress and anxiety, as defined in section 6 of the Equality Act 2010 from August 2018 until 20 September 2018?

Unfair Dismissal

(b) It is accepted that the claimant was dismissed:

(i) What was the reason or principal reason for dismissal?

(ii) Was it capability or was it some other substantial reason?

(iii) Was it a potentially fair reason?

(iv) Did the respondent act reasonably in all the circumstances in treating it as a sufficient reason to dismiss the claimant?

(c) The claimant contends that:

(i) The respondent should have made allowances for having caused his stress and anxiety in the first place by giving him an appropriate warning;

(ii) The respondent disregarded Occupational Health advice;

(iii) The respondent should have taken into account the claimant's pattern of improving attendance over the years; and

(iv) The respondent should, as an alternative to dismissal, have kept the claimant in employment and allowed him to attend Pathway appointments.

Disability Discrimination – duty to make reasonable adjustments

(d) Did the respondent know or would it reasonably have been expected to know that he claimant had the disability from August 2018?

(e) Did the respondent apply the following provisions, criteria or practices ("PCP"):

(i) Requiring employees to attend work reliably or be dismissed; and

(ii) A requirement that employees on sick leave return to work?

(f) Did the PCPs put the claimant at a substantial disadvantage compared to someone without the claimant's disability in that:

(i) His stress and anxiety made it more difficult for him to attend work reliably; and

(ii) His stress and anxiety preventing him from returning to work at the time requested.

(g) Did the respondent know or could it reasonably have been expected to know that the claimant was likely to be placed at these disadvantages?

(h) What steps could have been taken to avoid the disadvantage? The claimant suggests:

(i) by allowing the claimant to remain in employment; and

(ii) waiting until the claimant was well enough to return.

(i) Was it reasonable for the respondent to have to take those steps?

(j) Did the respondent fail to take those steps?

Time Limits

(k) Given the date the claim form was presented and the date of early conciliation, any complaint about something that happened before 23 August 2018 may not have been brought in time.

(l) Was the discrimination complaint made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:

(i) Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?

(ii) If not, was there conduct extending over a period?

(iii) If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?

(iv) If not, were the claims made within a further period that the Tribunal thinks is just and equitable?

Remedy

(m) Is the claimant entitled to an award for injury to feelings?

(n) Is the claimant entitled to compensation for financial losses caused by a discriminatory dismissal?

(o) Is the claimant entitled to a basic award?

(p) Is the claimant entitled to a compensatory award?

(q) Is there a chance that the claimant would have been fairly dismissal anyway if a fair procedure had been followed or for some other reason?

(r) If so, should the claimant's compensation be reduced?

(s) If the claimant was unfairly dismissed, did he cause or contribute to the dismissal by blameworthy conduct?

(t) If so, would it be just and equitable to reduce the claimant's compensatory award?

(u) Would it be just and equitable to reduce the basic award because of any conduct of the claimant before the dismissal?

Evidence

4. The parties agreed a joint hearing bundle that ran to 320 pages. The claimant and the representatives appeared before the Tribunal in person and the respondent witnesses attended via Cloud Video Platform. The claimant gave evidence on day one and day two. Antoinette Scouler, the claimant's second line manager, gave evidence on day two.

5. At the reconvened hearing, the claimant's father gave evidence in relation to the disability issue and Conal Duffy, who heard the claimant's appeal against dismissal on behalf of the respondent, gave evidence. Submissions were made at the end of day three and the panel sat in chambers on day four to make its decision.

6. Following questions from the Tribunal, the respondent produced a document entitled "Attendance Procedure" dated January 2019 that had not previously been disclosed to the claimant. That document was added to the agreed bundle of documents.

Relevant Legal Principles

7. The unfair dismissal claim was brought under Part X of the Employment Rights Act 1996.

8. The primary provision is section 98 which, so far as relevant, provides as follows:

> **"(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 sub-section (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 sub-section if it … relates to the capability…. of the employee for performing work of the kind which he was employed by the employer to do,**
>
> **(3) (a) capability in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality.**
>
> **(4) Where the employer has fulfilled the requirements of sub-section (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 reasonable 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".**

9. If the employer fails to show a potentially fair reason for dismissal, dismissal is unfair. If a potentially fair reason is shown, the general test of fairness in section 98(4) must be applied.

10. In the case of **International Sports Co Ltd v Thomson 1980 IRLR 340, EAT**, the Employment Appeals Tribunal determined in cases of frequent short term absences an employer should:

> **"review the pattern of absences and the reason for them;**
>
> **warn the employee of the required improvement in attendance, giving him or her the chance to make representations; and**
>
> **consider whether the required improvement in attendance has materialised. If not, dismissal is likely to be reasonable."**

11. This process would not be deemed reasonable if the employee was suffering from an underlying health condition. For example, in **Jones v Interserve Project Services Ltd ET Case No.3302615/09** the Tribunal upheld the complaint of unfair dismissal because the claimant was clearly suffering from depression and the respondent had failed to obtain a medical report prior to dismissal.

12. In the case of **Lynock v Cereal Packaging Ltd 1988 ICR 670, EAT**, the Employment Appeals Tribunal determined that were there is no suggestion of a connected underlying health condition, there is no requirement for an employer to obtain a medical report prior to dismissal.

13. In **Wilson v Post Office 2000 IRLR 834, CA**, the Court of Appeal held that some other substantial reason is the reason for dismissal if an employee is dismissed for a failure to comply with the employers attendance policy, rather than capability as the employer is not primarily concerned with the employees ability to do the job.

14. The discrimination claim was brought under section 21 of the Equality Act 2010, which in accordance with section 20 sets out the following duty:

> **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.**
>
> **(4) ….**
>
> **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.**
>
> **(3) A provision of an applicable Schedule which imposes a duty to comply with the first, second or third requirement applies only for the purpose of establishing whether A has contravened this Act by virtue of subsection (2); a failure to comply is, accordingly, not actionable by virtue of another provision of this Act or otherwise.**

15. An employer is only under a duty to make a reasonable adjustment if an employee is a disabled person within the meaning of section 6 of the Equality Act 2010 which provides:

> **A person (P) has a disability if –**
>
> **i. P has a physical or mental impairment, and**
>
> **ii. the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.**

16. The Equality Act 2010 (Disability) Regulations 2010 SI 2010/2128 specifically exclude addiction to substances, which includes dependency, from the definition of disability.

17. The Guidance on matters to be taken into account in determining questions relating to the definition of disability 2011, clarifies that whilst an addiction to a substance will be excluded from the definition, a person who also suffers from depression may still qualify as a disabled person.

18. The Guidance also clarifies that substantial means more than a minor or trivial effect and long-term effect means it lasted for at least 12 months or is likely to last for at least 12 months or the rest of life. Paragraph 5 of Schedule 1 to the Equality Act 2010 provides that an impairment will have a substantial and adverse effect on normal day to day activities if, but for measures taken to correct, it would continue to, or would be likely to, have that effect.

19. In the case of **J v DLA Piper UK LLP 2010 ICR 1052, EAT** the Employment Appeals Tribunal determined that the question of impairment can be answered after the Tribunal has determined the substantial adverse effect on normal day to day activities. This case also established that a medicalisation of an adverse reaction to normal life events will not qualify as an impairment on the basis that the adverse reaction was unlikely to be long term.

20. In accordance with Schedule 8 of the Equality Act 2010, in order to succeed with a claim for a failure to make reasonable adjustments, a claimant must prove not only that the respondent had knowledge of the claimant's disability but also had knowledge of the substantial disadvantage caused by the relevant provision, criterion or practice.

21. If the employer does have knowledge of both the employee's disability and the substantial disadvantage, any adjustment required must avoid the disadvantage and be reasonable.

22. In **Griffiths v Secretary of State for Work and Pensions 2017 ICR 160, CA,** Lord Justice Elias said :

> **'So far as efficacy is concerned, it may be that it is not clear whether the step proposed will be effective or not. It may still be reasonable to take the step notwithstanding that success is not guaranteed; the uncertainty is one of the factors to weigh up when assessing the question of reasonableness.'**

Findings of Fact

23. The claimant was employed by the respondent as an agency worker from 2007 until 2010. In November 2010 the claimant was offered a permanent contract under which he worked in the respondent's Call Centre, until his dismissal on 20 September 2018.

24. The claimant worked in the call centre which was tasked with stopping customers from leaving the service offered by the respondent. Antoinette Scouler was the manager of the call centre.

25. During the claimant's employment the respondent operated an attendance procedure which was last updated in January 2019. The attendance procedure which applied to the claimant's employment was the procedure prior to the update in January 2019.

26. The policy provided for a system involving an initial formal warning issued by a line manager and then a final formal warning issued by a line manager before progressing to a third decision stage which would be conducted by a second line manager. The outcome of the decision stage could be dismissal. The employee is entitled to appeal, and that appeal is heard by a third line manager. The policy provided that half day absences would be included in the calculation of attendance management

27. The respondent also operated a stress assessment policy called "STREAM". As part of this process, if an employee is off work with stress related sickness absence, they are given an opportunity to complete a STREAM questionnaire on their return. The purpose of the questionnaire is to assist the respondent with managing the employee's stress at work.

28. The claimant had periods of intermittent sickness of half day to three days, from August 2011 until a substantive period of long-term sickness which began on 3 July 2018.

29. In November 2014, the claimant was invited to a second line manager review with Antoinette Scouler to discuss his attendance record.

30. In March 2015 the claimant was informed that his attendance was causing concern. By November 2015 the claimant was invited to a meeting with his line manager after which he was issued with an initial formal warning for 6 months. By 15 September 2016 the respondent was of the view that the claimant's attendance had not sufficiently improved and issued a final formal warning for 6 months.

31. On 21 April 2017 the claimant attended a decision meeting with Antoinette Scouler. During that meeting, the claimant's trade union representative argued that he should not have been issued with a final formal warning in September 2016 because the initial formal warning had expired in May 2016. In addition, the claimant argued that a half day absence should not form part of the calculation of absence.

32. During that meeting Antoinette Scouler agreed that the claimant's Bradford factor had improved and that half day absences should not be taken into account on a single basis.

33. On 25 April 2017 the claimant was dismissed from the respondent's employment by Antoinette Scouler.

34. The claimant appealed against his dismissal and on 6 June 2017 was reinstated to his employment with the respondent. The claimant was also informed that he would be returned to a final formal warning stage of the attendance process that was to be backdated to the date of his dismissal and would run for a period of 12 months. The rationale given for the upholding of the appeal included the fact that the appeal handler, Clare Scott, was of the view that the claimant had now put steps in place to address his migraines and prevent further absence. The claimant returned to work on 12 June 2017.

35. The claimant was absent from work on 22 February 2018 for one day with tiredness and stress. The claimant was also absent on 2 March 2018 for half a day with tiredness and stress. On 12 March 2018 the claimant was absent for half a day with toothache.

36. Following this absence, Antoinette Scouler invited the claimant to a second line manager review to discuss his absence. The meeting took place on 28 March 2018.

37. During that meeting the claimant described having difficulties sleeping and taking medication. At the conclusion of that meeting the claimant was advised that any further absences could result in further sanctions.

38. In April 2018 the claimant was investigated for misconduct as a result of attending work late on a number of occasions. On the last such occasion, on 13 April 2018 the claimant informed his line manager, Chris Mee, that he was taking medication to help his sleep as a result of his depression. The claimant also complained of a lack of support since his return to work in June 2017.

39. On 7 June 2018 the claimant had half a day sickness absence for a migraine.

40. On 30 June 2018 the claimant took an overdose and received hospital treatment.

41. On 3 July 2018 the claimant visited his General Practitioner with his mother and admitted to substance abuse over the last 12 months. The claimant was signed off from work and referred to Pathways for counselling. The claimant's absence from work was recorded as "stress/anxiety".

42. On 26 July 2018 the claimant had an absence review meeting with his line manager, Chris Mee. During that meeting, the claimant admitted he had a problem with substance abuse.

43. The claimant was invited to a second line manager review meeting with Antoinette Scouler on 22 August 2018.

44. At the outset of the meeting Antoinette Scouler stressed that she was looking for a commitment of a date for the claimant's return to work. The claimant disclosed that he had started taking cocaine and as a result had an overdose on 30 June. The claimant explained that he had been referred to Pathways on 3 July, undergone an assessment on the same date and been assigned a key worker.

45. Antoinette Scouler challenged the claimant's attendance at Pathways and queried whether there had been a delay because he had been visiting his mum in Spain. The claimant asserted that he had been for the assessment and was encouraged to go to Spain before he started his counselling. The claimant informed Antoinette Scouler that he was attending Pathways every day. Antoinette Scouler informed the claimant that the respondent would support his attendance at Pathways on his return to work.

46. During the meeting the claimant informed Antoinette Scouler that he was not ready to return to work because it was a trigger for his substance misuse and he did not want to relapse. It was also recorded that by that stage the claimant had been absent for 50 days at a cost of £100 per day. It was noted that an agent was expected to deal with 26 calls per day and therefore, 936 additional calls had been answered by the claimant's colleagues.

47. The claimant was informed that as the meeting was a second line manager review, if there was no imminent return to work date, the matter would move to a decision stage. The claimant informed Antoinette Scouler that he was looking at returning to work on 20 September 2018 after 4 weeks annual leave. Antoinette Scouler informed the claimant that she could not support that date as it was too far in the future.

48. On the same date, the claimant met with Occupational Health. The Occupational Health physician was asked to assess the claimant's likely date of a return to work, if there were any self-help options, and further if he was likely to render reliable service and attendance in the future.

49. On 28 August 2018 the Occupational Physician advised the respondent that the claimant was suffering from stress related substance abuse that had been a problem for two years but had worsened in March 2018 and that there was still a concern that he could relapse. The Occupational Physician advised that a return to work should be deferred for a period of 4-6 weeks to allow the claimant to consolidate his recovery and then he should undertake a phased return over a four week period. The Occupational Physician advised that the claimant was engaging in all recommended treatment and that it would be counterproductive to attempt a return to work too soon. It was the view that the claimant would provide reliable attendance provided he did not relapse.

50. The claimant was subsequently invited to a decision meeting on 19 September 2018 with Antoinette Scouler. At the meeting Antoinette Scouler advised the claimant that he had been advised at the second line manager review meeting that should his absence last much longer she would need to consider his future with the respondent, and as a result of him still being absent he had been invited to this meeting.

51. It was put to the claimant that he had delayed his Pathways treatment by going to Spain. The claimant reiterated that on 3 July 2018 following an assessment, he had been given an appointment with a keyworker but that appointment was some two weeks later. As a result, he said he went to Spain to visit his mother before the appointment. It was asserted on behalf of Chris Mee that the claimant had informed him that he had delayed the start of his treatment so that he could attend Spain. The claimant refuted this suggestion. The claimant explained that there was a delay in starting treatment because of unavailability of a keyworker. Antoinette Scouler said that she may speak to Pathways to establish what had happened.

52. The claimant informed Antoinette Scouler that he was looking to return to work on 24 September. Antoinette Scouler informed the claimant that she was looking at whether he could sustain regular service and asked for reassurances. The claimant informed Antoinette Scouler that he was doing everything he could by visiting Pathways, accessing the employee assistance programme and visiting the Occupational Health doctor. In addition, he offered to return to work two weeks prior to that advised by the Occupational Health physician.

53. The claimant was asked why he had not sought help sooner after his dismissal in April 2017 and denied that the substance misuse had been a problem at the time of his dismissal. The claimant was asked why he did not admit that he was struggling, and the claimant admitted that it was only after the overdose that he realised he had a problem.

54. On 20 September 2018 the claimant was informed that his employment had been terminated with effect from 22 September 2018.

55. In the rationale for dismissal, Antoinette Scouler cited the impact of additional work on the claimant's colleagues and the respondent being able to meet the objectives of the business. In addition, Antoinette Scouler took account of the claimant's previous attendance history and dismissal.

56. It was Antoinette Scouler's view that the claimant could have reached out for support sooner but failed to do so, and could have visited his GP earlier. Antoinette Scouler's believed that had the claimant done this, his absences could have been avoided. Antoinette Scouler was not convinced that the claimant did not delay his treatment with Pathways in order to visit his mother in Spain. Antoinette Scouler was also concerned that the claimant was going on holiday for 3.5 weeks and would not have the support from Pathways during this holiday.

57. On 24 September 2018, the claimant notified the respondent that he wished to appeal his dismissal.

58. Clare Scott was originally appointed as the appeals manager, but subsequently Conal Duffy took over the appeal and met with the claimant on 25 October 2018.

59. The claimant's grounds of appeal were that his attendance had in fact improved, he had not delayed attending Pathways, he had not delayed recovery by

taking a 3.5 week holiday, that Antoinette Scouler had misunderstood the substance abuse and that Antoinette Scouler had failed to financially balance the claimant's performance with the impact on the business.

60. In addition, during the appeal hearing, the claimant's trade union representative queried why the claimant had been subject to a second line review meeting in March and contended that it was early in the process and that the criteria had not been met for a second line manager review meeting.

61. On 14 November 2018 the claimant was informed that his appeal had been unsuccessful and was provided with the rationale dated 7 November 2018. In reaching that decision, Conal Duffy considered the claimant's attendance record, the impact on the business, the support the claimant had received from his line management and the appropriateness of their actions.

62. It was Conal Duffy's view that the claimant's absence was not sustainable for the business. Conal Duffy accepted that the Pathways treatment had not been delayed, but this issue was irrelevant because he was concerned with the claimant's attendance pattern and the impact it had on the business. Conal Duffy took the view that deferring the return to work by 4-6 weeks was unsustainable and that Antoinette Scouler was correct to hold the second line manager review in March.

Submissions

Respondent's Submissions

63. It is the respondent's primary contention that the claimant is not a disabled person within the meaning of section 6 of the Equality Act 2010 because addiction, including dependency, does not meet the statutory definition. The respondent submits that stress is a reaction and not an impairment itself, but does concede that anxiety may well be a mental impairment. However, the respondent contends that the anxiety is inextricably linked with gambling and drug use and the third part of the claimant's condition is work related stress. The respondent contends that the first two conditions cannot be relied upon for mental impairment.

64. The respondent reminded the Tribunal of the case of **J v DLA Piper UK LLP 2010 ICR 1052, EAT** that reactions to work or adverse life events are not sufficient for the definition. It is the respondent's case that this is squarely within the medicalisation of work problems and therefore does not suffice.

65. The respondent submits that the claimant's dismissal and financial difficulties were the source of his anxiety and that the Tribunal cannot take into account the post claim events. It is the respondent's case that the claimant was dealing with his dependency and he was going to be alright. The respondent contends that the claimant does not have an underlying mental health impairment. It is the respondent's case that the claimant was not in work in July because of his addiction and once that is discounted, there is no long-term effect.

66. The respondent submits that the claimant's managers did not have the requisite knowledge of any disability. It is contended that the managers only knew

about the drugs and gambling and that the claimant was stressed about work. The respondent reminded the Tribunal that the claimant conceded that he did not raise disability or discrimination in his appeal letter.

67. The respondent is of the view that the reason for the dismissal was either capability or some other substantial reason: there is no dispute and it is based upon the Tribunal's findings of fact.

68. The respondent submits that it is not suggested that it did not get any information that it should have got, and any failure to contact Pathways was remedied by the appeal. Any procedural point made is about the expiry of the final formal warning in April 2018. The respondent contends that it was in a position to make a determination on the information it had before it. It had exhausted the requirement to carry out an investigation but it was entitled to take the decision it took within the range of reasonable responses. The question for the respondent was whether the claimant would sustain acceptable attendance, and to say that he would recover was not enough. There was a risk of relapse and the history of attendance had to be considered. The Tribunal were warned against stepping into the respondent's shoes and determining that they had to start from scratch once the final formal warning had expired.

69. The respondent accepts that it applied the first provision, criterion or practice, and if the claimant is disabled he would be at a substantial disadvantage, but that it was not reasonable to make the adjustment that the claimant required. This would not have achieved an effective workforce.

70. The respondent denies that it applied the second provision, criterion or practice. It is the respondent's case that a provision, criterion or practice needs to be applied to all and not just what is said in a conversation between a manager and an individual. There is no evidence that this policy or practice was applied to others.

71. The respondent reminded the Tribunal that the burden is on the claimant to apply for an extension of time and there is no evidence of this. The unfair dismissal claim is in time but the discrimination claim is out of time as this was added following an amendment application.

Claimant's Submissions

72. It is the claimant's case that he worked for ten years on a full-time contract. He was first dismissed in 2017 for one absence yet the respondent recognises that absence is inevitable. The claimant contends that his attendance improved year on year and that his first dismissal was procedurally defective. It is the claimant's case that the dismissing officer in the first case was in fact the same dismissing officer in this case.

73. The claimant contends that the stress caused by the warnings worsened after his dismissal in 2017, and he knew if he was off sick for one day he would lose his job. The claimant contends that managers knew he was suffering from stress. The claimant believes he did not receive support and the drug abuse was to cope with the problems - it was a vicious circle.

74. The claimant contends that he was entitled to visit his mother in Spain on the advice of Pathways, and that he offered to return to work earlier than the Occupational Health physician had recommended. The claimant believes the financial impact of his absence has been exaggerated by inclusion of weekends in the calculation and he has never been required to work weekends.

75. The claimant's view is that he had improved and that this was missed by Conal Duffy. It is the claimant's case that stress and anxiety amounts to a disability and there was a duty to make adjustments.

Discussion and Conclusions

Disability

76. The relevant period for establishing whether the claimant is a disabled person is from 22 August 2018 until 20 September 2018 on the basis that the claimant's complaints relate to provisions, criteria or practices imposed during this period.

77. The Tribunal has only been provided with GP records from January 2018. However, it is the claimant's evidence that he has been suffering from stress and anxiety since 2013.

78. The claimant's occupational sickness record, and in particular that relied upon by Antoinette Scouler at the meeting on 28 March 2018, reveals intermittent absences from 2012 onwards for a variety of reasons including diarrhoea, nausea and vomiting, headache and migraine. The latter absences from February 2018 include the reason "tiredness and stress". The longest absence period, which began on 3 July 2018, was for stress and anxiety.

79. It is the claimant's evidence that, following his first dismissal in April 2017, he suffered from anxiety that had a substantial and adverse effect on his normal day-to-day activities. The Tribunal heard evidence from both the claimant and his father that his father was unable to make contact with the claimant in April and May 2017. The claimant's father admitted that from June 2017 to July 2018 he did not see the claimant; and he described the claimant's mood as low. The claimant's father admitted that prior to April 2017 the claimant's mood had been better.

80. It was the claimant's evidence that up until April 2017 he had good mental health and was only using cocaine socially once a month. The GP records provided record that the claimant had been using drugs since July 2017 and in February and March 2018 that the claimant was suffering from insomnia and was prescribed sleeping tablets. By July 2018 the GP records record that the claimant had become dependent on cocaine.

81. The GP records reveal that on 24 August the claimant was still taking sleeping tablets as he had difficulty sleeping. The claimant was not working and had asked to work reduced hours. The claimant was attending Pathways treatment, and at the meeting with Antoinette Scouler on 22 August, his trade union representative described work as the "trigger" for his condition.

82. The Tribunal accepts the claimant's evidence that he was suffering from a mental impairment of anxiety following his dismissal in April 2017. From that time, he became socially withdrawn and could not sleep. The absences and medication prescribed in February and March 2018, reflect his struggle.

83. The mental impairment of anxiety substantially and adversely effected the claimant's normal day to day activities from April 2017. Throughout 2017 he remained socially withdrawn and from the beginning of 2018 he was having trouble sleeping and had been prescribed sleeping tablets. By July 2018, because the claimant remained socially withdrawn, continued to suffer with insomnia and had taken an overdose, this effect had become long term.

84. It is accepted that the claimant's drug and gambling addiction was a way of coping with the impairment, rather than the impairment itself. The effect of the claimant's addictions has been discounted because addiction is specifically excluded from the legal definition of disability.

85. The Tribunal accepts that by late August/early September the claimant was able to socialise and go on holiday, and whilst the substantial and adverse effect appeared to be diminishing as a result of the treatment received by the claimant, the medical records, including the Occupational Health report, warn of a risk of relapse should he suffer a trigger of his mental impairment. The claimant admitted this at the meeting of 22 August 2018.

86. The Tribunal concludes that in the absence of treatment, the claimant would continue to suffer a substantial and adverse effect on the performance of his normal day to day activities.

87. The Guidance on the definition of disability states if substantial adverse effects are likely to recur, they are to be treated as if they were continuing. The Tribunal therefore accepts that, as a result of the likelihood of recurrence of the mental impairment of anxiety, the claimant was suffering from a long-term mental impairment during the relevant period.

Failure to make reasonable adjustments

PCP 1

88. The Tribunal finds that the respondent did apply the first provision, criterion or practice. There was a requirement for all employees to attend work reliably or be dismissed. Whilst the attendance policy provided by the respondent during the hearing was not applicable to the claimant's employment, we accept that it would have been similar to that applied. This policy provides for dismissal if there is a failure to achieve improvement following repeated absence.

89. Managers are encouraged to ensure that they have a robust business rationale before taking any decisions to terminate employment and not to uphold appeals. Both Antoinette Scouler and Conal Duffy make reference to the financial impact on the business, colleagues and customers as the justification for the claimant's dismissal.

Substantial disadvantage

90. Given the nature of the claimant's disability, it was more difficult for him to attend work from April 2017 onwards. As a result, the claimant was subject to a substantial disadvantage when he was dismissed on 20 September 2018.

Knowledge

91. The Tribunal has determined that the respondent had knowledge of the claimant's disability during the relevant period.

92. In February and March 2018 the claimant had two periods of stress related tiredness absence and informed Antoinette Scouler in the meeting of 28 March 2018 that he was suffering from sleep deprivation and taking medication.

93. In April 2018 the claimant was subject to a misconduct investigation as a result of lateness and describes being prescribed sleep tablets to deal with the insomnia caused by depression.

94. The respondent's underperformance policy requires managers to consider the making of reasonable adjustments where mental or other health issues have been identified. On 19 April 2018 the claimant's line manager agreed to change the claimant's shifts from early shifts to late shifts to accommodate his difficulty sleeping.

95. By 26 July 2018 the claimant had an absence review meeting with his line manager and was offered the BT passport to incorporate any long-term adjustments. The claimant was also offered the Employee Assistance Programme, which he accepted.

96. Due to the claimant's prolonged period of absence for stress and anxiety he was referred to an Occupational Health physician. On 28 August 2018 the physician advised the respondent that the claimant had been suffering from stress related substance abuse for the past two years, and that it had worsened since March 2018. The Occupational Health physician records a risk of relapse.

97. The Tribunal also concludes that the respondent had knowledge that the provision, criterion or practice would place the claimant at the substantial disadvantage of dismissal, because his line manager had already sought to make adjustments to his shift in April 2018 and provided him with the necessary support in July 2018 to maintain his attendance at work. If the respondent did not have such knowledge it is unlikely that such adjustments would have been made.

Reasonableness of adjustments

98. The claimant contends that it would have been a reasonable adjustment for the respondent to allow him to remain in employment whilst he recovered and improved his attendance at work.

99. The Tribunal noted that Antoinette Scouler requested Occupational health advice but then chose to ignore that advice when reaching her decision to dismiss. When challenged about this during the course of the hearing, it was Antoinette

Scouler's view that Occupational Health advice was only one factor that she needed to consider and was not determinative. Whilst the Tribunal agrees with that general proposition, it appears that Antoinette Scouler completely discounted the advice that had been given.

100. It is the Tribunal's view that by the time the claimant became a disabled person and his absences were related to his disability, Antoinette Scouler had formed the view that the claimant was unreliable. As a result, Antoinette Scouler's mind was closed to any adjustments that would have assisted the claimant to remain in the workplace.

101. The Tribunal does not accept that the claimant's attendance record was unreliable. The claimant did have intermittent sickness, but the respondent's own policy recognises that some absences will be unavoidable. Prior to July 2018, the claimant had no more than three days off, and invariably was off for one day or half a day, between 2012 to 2018. Neither of the respondent witnesses were able to give evidence about the acceptable levels of attendance or the triggers for the instigation of the attendance procedure. The attendance policy provided did not contain this detail. The evidence provided was that it was a decision of the Human Resources department as to when the level of attendance fell below standard. The Tribunal finds that there was no transparency and that there is a real risk of employee being judged on different standards.

102. The Tribunal does not accept that it would have been unreasonable for the respondent to allow the claimant to return to work in accordance with the advice of the Occupational Health physician. Antoinette Scouler gave evidence about the actual cost of the claimant's absence, but could not provide a rationale for the figure of £100 cost per day or why when calculating this cost, weekend days were counted even though the claimant did not work weekends. We heard evidence from the claimant that his performance was such, that when at work, he achieved what was required.

103. The Tribunal concludes that it would have been reasonable to keep the claimant in employment because once a phased return to work had been achieved, the claimant's ability to perform his role would not be impacted and his attendance would be reliable.

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104. The claimant also contends that the respondent applied a provision, criterion or practice that an employee was required to return to work from sick leave. The respondent contends that this is a fundamentally flawed claim because the allegation made by the claimant is that this was said to him by Antoinette Scouler at the meeting on 22 August 2018 and was not applied by the respondent as a general policy to employees.

105. However, the Tribunal disagrees. There is a requirement for employees to return to work from sick leave. At the very outset of the meeting on 22 August 2018 Antoinette Scouler reminded the claimant that his continued absence could not be sustained and she wanted a commitment of a return to work date. When the

claimant informed her that he was looking at 20 September 2018, Antoinette Scouler informed the claimant that this was too long a period. At the end of the meeting she told him she wanted a return to work date "now", and asked him to update her once he had seen the Occupational Health physician.

106. The Occupational Health physician report was not available to Antoinette Scouler at that meeting. The requirement that the claimant return to work is borne out by the fact that the existence of the report appears to have made no difference when provided on 28 August 2018. By 5 September 2018 Antoinette Scouler had invited the claimant to a decision meeting at which he was ultimately dismissed.

107. The Occupational Health report recommended that the claimant have a 4-6 week absence with a phased return for four weeks. Antoinette Scouler did not consider this appropriate and nor did she take heed of the advice that the claimant was likely to carry on performing well provided he was afforded this further time off and a phased return.

Substantial disadvantage

108. The claimant was put at a substantial disadvantage of the risk of dismissal because he was not well enough to return to work for another 4-6 week period. The robust application of the provision, criterion or practice was evidenced in the claimant's offer to come back sooner than advised by the Occupational Health physician.

109. The claimant suffered the substantial disadvantage because the letter on 5 September 2018 and the transcript of the decision meeting on 19 September 2018 refer to his continued absence as the cause the decision meeting and his dismissal. The claimant was unable to return to work sooner, and certainly not by 5 September, although he was making efforts to get there by mid September.

Knowledge

110. Antoinette Scouler knew from the meeting on 22 August 2018 that the claimant would not be able to comply with the requirement to return to work earlier than advised by the Occupational Health physician. In light of the second line review meeting on 22 August 2018, Antoinette Scouler knew the next stage was a decision meeting and wasted no time in sending the invite to that meeting on 5 September 2018.

Reasonableness of adjustments

111. The claimant contends that the respondent should have followed the Occupational Health physician's advice and allowed him to return to work in the 4-6 week period with the four week phased return to work. The Tribunal agrees that this would have been a reasonable adjustment.

112. The Tribunal reiterates that it does not understand how Antoinette Scouler reached the cost to the business figure, nor is able to reconcile it with the advice given, that the claimant would be able to perform in his role on his return with reliable attendance.

Time Limit

113. The claimant complains of acts of discrimination that occurred on 22 August 2018 and on 20 September 2018. The claimant lodged early conciliation on 23 November 2018 and received a certificate on 18 December 2018. The claimant lodged his Employment Tribunal claim on 10 January 2019. The primary time limit for the second failure to make reasonable adjustments claim expired on 21 November 2018. Therefore, this claim is out of time.

114. It was accepted by the parties that the unfair dismissal claim and the first failure to make reasonable adjustments claim, were brought within the primary three month time limit.

115. As the second reasonable adjustments claim is out of time, the Tribunal must consider, in accordance with section 123 of the Equality Act 2010, whether the claimant has made complaints of discriminatory conduct extending over a period that ends with his dismissal on 20 September 2018.

116. It is the Tribunal's decision that there was discriminatory conduct extending over a period ending with the dismissal on 20 September 2018. The manager responsible for the application of both provisions, criteria and practices was Antoinette Scouler. Antoinette Scouler insisted that the claimant return to work from sickness absence prior to the date he was medically advised to do so, and it is his failure to do that which causes Antoinette Scouler to invite him to the decision meeting which ultimately leads to his dismissal.

Unfair Dismissal

The reason for the claimant's dismissal

117. The claimant was dismissed for "some other substantial reason" – his attendance record. The Tribunal finds that the claimant was capable of doing his job; it was his attendance record that caused his dismissal. In addition, it was his attendance record that influenced the decision of the appeal handler to refuse the claimant's appeal against dismissal.

Did the respondent act reasonably in all the circumstances

118. The procedural starting point is the claimant's reinstatement in June 2017 and the reissue of the final formal warning from April 2017.

119. In her evidence, Antoinette Scouler confirmed that the attendance procedure applied to the claimant's circumstances, but said that the policy was a guide and not determinative. This caused the Tribunal to question the determining factors.

120. The Tribunal had to ask for a copy of the attendance procedure that was applicable at the time of the claimant's employment, but was only provided with the most recent version, which had been updated in January 2019. The respondent could not produce the procedure used in 2017 and 2018, and we heard anecdotally that the HR department had said there had been no change, but received no specific evidence on this point.

121. The cause of the claimant's final formal warning in 2016, and reissued in April 2017, was a Bradford factor score. There is no reference to the Bradford factor score in the January 2019 attendance procedure, but it is clear from the transcript of the decision meeting in April 2017 that this was a factor for the issue of the final formal warning.

122. Antoinette Scouler accepted that the calculation of the Bradford factor which caused the first final formal warning in 2016 was wrong, but it was right to issue the final formal warning because the initial formal warning had only just ended and the claimant had been absent two weeks later. The existence of the final formal warning led to the decision meeting and the claimant's dismissal in April 2017.

123. Following the issue of the final formal warning in April 2017 the claimant was next absent in February and March 2018, with one day's absence and two half day absences respectively.

124. The meeting in March 2018 was a second line manager review not a decision meeting, which Antoinette Scouler maintains she was entitled to hold in the circumstances. The Tribunal does accept that, in accordance with the policy provided, Antoinette Scouler was entitled to hold this meeting.

125. Following the claimant's sickness for half a day on 7 June 2018, the HR department contacted his line manager, Chris Mee, on 8 June 2018 advising him to review the position and if necessary consider issuing an initial formal warning. By this date the final formal waring had expired. This process was not followed.

126. Instead, by 3 July, the claimant had suffered an overdose and gone off sick. There was an absence review meeting on 26 July and by 14 August the claimant had received a letter from Antoinette Scouler inviting him to a second line manager review. The Tribunal accepts that there is no requirement, in the policy provided, for the respondent to go back to the start of the attendance management process once a warning has expired.

127. However, notwithstanding this, the Tribunal was not provided with any evidence as to the triggers for the instigation of the attendance procedure. Antoinette Scouler was asked on a number of occasions whether she could identify those triggers, but she simply said that it was a HR led process and they advised the managers when they needed to take formal action. Conal Duffy corroborated this view.

128. Similarly, Antoinette Scouler could not rationalise how she had reached the figure of £100 per day as a cost to the business each day that the claimant was absent. Further, neither she nor Conal Duffy could account for why the respondent's policy calculated weekends in the number of days absent as a cost to the business, when the claimant didn't work weekends.

129. The Tribunal finds that there was no transparency in the attendance procedure. The respondent could trigger the attendance procedure without justification and use calculations that could not be reasonably explained. Respondent employees could not know, with any certainty, when and why they

would be subject to this procedure. The Tribunal certainly didn't understand why the claimant's absences had triggered such meetings nor how or why the respondent had calculated the true cost of the claimant's absence.

130. As a result, the Tribunal finds that the respondent did not act reasonably in all the circumstances by dismissing the claimant. The attendance policy lacked transparency and neither the dismissing manager nor the appeals manager could justify why the claimant's attendance was unacceptable and therefore, the basis for the claimant's dismissal.

131. The Tribunal is of the view that the claimant's dismissal was not within the range of reasonable responses and was therefore unfair.

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Employment Judge Ainscough

Date 2 December 2020

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON
15 December 2020

FOR THE TRIBUNAL OFFICE