EMPLOYMENT TRIBUNALS

Claimant: **Mr J Farley**

Respondent: **London Borough of Waltham Forest**

Heard at: **East London Hearing Centre (by Cloud Video Platform)**

On: **29, 30 June, 1, 2, 6 and 7 July 2021**

Before: **Employment Judge Gardiner**

Members: **Ms A Berry**
Ms J Houzer

Representation

Claimant: In person

Respondent: Mr R O'Dair, counsel

This has been a remote hearing which has not been objected to by the parties. The form of remote hearing was by Cloud Video Platform. A face to face hearing was not held because the relevant matters could be determined in a remote hearing.

JUDGMENT

The judgment of the Tribunal is that:-

The Claimant's complaint that his dismissal was an act of discrimination arising from disability, contrary to Section 15 Equality Act 2010, succeeds.

The Claimant's complaint of unfair dismissal succeeds.

The remainder of the Claimant's complaints are not well founded and accordingly are dismissed.

There will be a one-day Remedy Hearing to determine the remedy due to the Claimant in relation to the complaints on which he has succeeded.

REASONS

1. Following a sickness absence review meeting held on 19 October 2018, the Claimant was dismissed from his employment as a Procurement Delivery Manager. The Claimant argues that this was an unfair dismissal. He also argues that it was an act of disability discrimination. In these proceedings he also complains about events occurring in the months leading up to his dismissal, which he alleges are further acts of disability discrimination, under different jurisdictions provided by the Equality Act 2010. All claims are contested by the Respondent.

2. This has been a six-day long hearing to determine the Claimant's complaints. It was held over Cloud Video Platform. The Claimant represented himself. The Respondent was represented by Mr Richard O'Dair of counsel. At the outset of the hearing, the Tribunal was provided with an Agreed Chronology of relevant dates, and a Cast List identifying the individuals concerned with the events which are the subject of the Claimant's claims. In addition, both parties had prepared their own lists of issues, albeit that there were substantial similarities between both versions. Time was taken at the outset to discuss the issues to clarify what was truly in dispute. This led to the production of a revised List of Issues at the start of the second day of the hearing. The List of Issues was only finalised once the Claimant had concluded his evidence.

3. The Claimant confirmed at this point that he was no longer pursuing the pay claim raised in the first of the two employment tribunal claims. As a result, this claim was withdrawn and he was content for it to be dismissed upon withdrawal.

4. Whilst it is regrettable it was not possible to finalise the issues before the start of the hearing, the Tribunal is satisfied both parties understood what was going to be decided. Neither side was disadvantaged as a result of the stage at which the issues were finalised.

5. Oral evidence was heard from the following individuals, in the following order:

    a. The Claimant
    b. Rashid Jussa
    c. David Levy
    d. Daniel Proctor
    e. Rob Manning
    f. Kathryn Stevens
    g. Esther Beaumont

6. Reference was made to documents in an agreed bundle of documents. This bundle comprised 1030 PDF pages. Although the PDF pages did not match the page numbers which had been printed on the documents themselves, the Tribunal was able to navigate its way around the bundle with the assistance of Mr Farley and Mr O'Dair. References in these Reasons to page numbers are references to the PDF page numbers.

7. It was agreed at the outset that the Tribunal would hear evidence on liability but not on remedy. The issue of remedy would only be considered if the Claimant was successful in whole or in part.

8. At the conclusion of the case, both sides exchanged written closing submissions. They each spoke to their submissions and commented on each other submissions, as well as answering questions from the Tribunal. The Tribunal took time to deliberate for the remainder of day 5 (6 July 2021), and on the morning of day 6 (7July 2021). Judgment was given at 2pm on day 6.

Factual findings

9. The Respondent is a local authority in London. The Claimant started his employment with the Respondent on 13 July 2015. His local authority pay grade was PO4. Initially his role was titled Procurement Manager, although it is accepted he did not have line management responsibility for other employees. Under his contract of employment [377], he was expected to work a 36 hour week. The Claimant was permitted to work these hours in a compressed work pattern over a four-day week. This enabled him to study for a Chartered Institute of Procurement & Supply (CIPS) qualification on the fifth day of the working week. His employment was subject to a six-month probationary period. During that period, he could be dismissed on a week's notice. Thereafter he was entitled to one week's notice for each year of continuous service up to a maximum of three months' notice where employment has lasted for 12 years or more [382]. In his dismissal letter, he was given two months' pay in lieu of notice. He has not sought to challenge that payment as inadequate. Accordingly, we infer that two months' notice was his notice period at the time of his dismissal.

10. When he started work, the Claimant's line manager was Kathryn Stevens. The Claimant's undisputed evidence is that Ms Stevens was happy with the Claimant's performance. As a result, his probation ended earlier than the six-month period provided in his employment contract.

11. In September 2016, the Respondent started a restructure of the Corporate Procurement Team in which the Claimant worked. As part of the restructure, three new positions of Supply Chain Specialist were created and advertised. These roles were graded at PO6 and were therefore more senior positions than the Claimant's role. The Claimant applied for this promotion opportunity. He was unsuccessful. Shortly afterwards, there was a second recruitment process to recruit again at that level. Although the Claimant participated in this further process, his application was again rejected.

12. The Claimant met with David Levy, Director of Supply Chain, to discuss the outcome of the restructuring process and to hear the Claimant's concerns. The Claimant told him he considered that there had been a lack of transparency and equal opportunities with the restructuring process. Mr Levy told the Claimant he considered him an asset to the team and that he valued his contribution.

13. Following this meeting, the Claimant applied for voluntary redundancy. The application was rejected. The Claimant was told there was not a business case to

support redundancy, because the Respondent was taking on staff rather than shedding staff at this point.

14. The Claimant's factual case is that from this point onwards he was singled out by Ms Stevens for micromanagement and constant analysis and negative criticism of his work. He describes all meetings from then onwards as "fraught with aggression and impatience" on Ms Stevens' part. His evidence is that in her role as his line manager, Ms Stevens never had a single positive word to say to him.

15. This version of events is strongly disputed by Ms Stevens. She says she treated the Claimant fairly and appropriately. Where she criticised the Claimant, this was because the criticism was warranted by the Claimant's underperformance. Her evidence is that the Claimant consistently underperformed during the period from Autumn 2016 until December 2017. This evidence is corroborated by David Levy, who told the Tribunal that Ms Stevens regularly raised concerns about the Claimant's performance at his regular 1-2-1 meetings with her.

16. In early December 2016, Ms Stevens met with the Claimant to discuss issues with his timekeeping [406]. This is confirmed by an email on 9 December 2016. He was asked to complete a timesheet on a daily basis, setting out an accurate record of the hours he had worked. He was warned that any recurrence of the discrepancies may lead to formal action being taken, in accordance with the Respondent's disciplinary procedure.

17. At about the same time, December 2016, the Claimant was informed he could not carry out his duties in compressed hours on four days each week. This was a consequence of the increased demand for procurement delivery work that required procurement officers to be working in the office throughout the working week. In order to continue working towards his CIPS qualification, the Claimant was offered two days paid leave per module, plus a half days' leave for each exam [886].

18. Ms Stevens carried out three reviews of the Claimant's performance – a mid-year appraisal on 11 November 2016, an end of year appraisal on 22 May 2017 and a mid-year appraisal in the following financial year which took place on 20 October 2017. Her evidence is that the Claimant had not prepared properly for each of these meetings, failing to provide evidence of the extent to which any of the agreed objectives had been delivered. This was despite Ms Stevens explaining to the Claimant at length how he might evidence delivery of each of his objectives. Following each of the appraisal meetings, an appraisal form was completed on the Respondent's SAP system. The Claimant was scored out of five in relation to each of his objectives. A score of 1 represented "outstanding" performance and a score of 5 represented "unacceptable performance".

19. At the end of year appraisal in May 2017, Ms Stevens allocated a score of 3 for one of his objectives and awarded scores of 4 for all of the other objectives. This equated to "needs development".

20. On 27 June 2017, Ms Stevens held a meeting with the Claimant to set and agree his objectives for the 2017/2018 year. The Claimant was asked to suggest any development or training requirements. The Claimant was unable to identify any area requiring personal development.

21. On 20 October 2017, the Claimant met with Ms Stevens. Again, Ms Stevens' account is that the Claimant failed to provide evidence he had met his objectives. The Claimant's position at the meeting was that he was performing well. There was some feedback from clients which had been generally positive. Ms Stevens' perspective, having sought the views of those colleagues in specialist procurement roles who had been working with him over this period, was that the Claimant was still underperforming. Evidence subsequently provided by the Claimant was either out of date or did not substantiate he was performing at the level expected of a PO4 Procurement Delivery Manager.

22. At the midyear performance appraisal on 20 October 2017, the Claimant told Ms Stevens that she was behaving towards him in a hostile manner. His evidence is he had a number of meetings with Ms Stevens's line manager, Mr Levy, in which he told Mr Levy that Ms Stevens' approach was making him demotivated and disillusioned, and that this was having a negative effect on his health.

23. Having heard evidence from both the Claimant and Ms Stevens, and viewed the Claimant's appraisals, we find that the Respondent had genuine concerns about the standard of the Claimant's performance.

24. The parties agree that until November 2017 the Claimant was not disabled. It is agreed he was a disabled person by reason of his hypertension from November 2017 onwards; by reason of his work-related stress anxiety and depression from March 2018 onwards and by reason of his chronic kidney disease from August 2018 onwards. Whilst it is agreed that the Respondent knew or ought to have known that these were disabilities by these dates, there is no direct evidence either in the Claimant's witness statement or in the documents to which we have been referred in the bundle of documents which links any symptoms of hypertension to the Claimant's performance at work during the period until the end of 2017.

25. As a result of the later point at which the Claimant became disabled, the low performance scores achieved by the Claimant in these three prior appraisals up to and including October 2017 cannot have been prompted by the Claimant's disability. The Tribunal finds that they were the result of genuine concerns about the quality of the Claimant's performance.

26. On 14 December 2017, the Respondent held an informal capability meeting with the Claimant. Because the Claimant asked to have his union representative present, Mr Levy also decided to attend to support Ms Stevens during the meeting. Various concerns were discussed about the Claimant's performance.

27. On 15 December 2017, the Claimant emailed Mr Levy and Ms Stevens [468]. He said he found the meeting informative and productive; and he had taken on board the issues discussed. He drew a distinction between the generally positive feedback he had received from clients or suppliers, and issues which were driven by the Head of Supply Chain (HoS) – Ms Stevens. He noted that there were relationship issues which existed with his current line manager and suggested that her assessment of his performance was subjective. He ended his email by saying that "a precedence has now been set, and in the interest of fairness, there is an expectation that should future issues of failed projects, complaints, portal mistakes etc arise with other team members, that an equal amount of resource and effort to instruct HR processes be demonstrated across the board".

28. On 18 December 2017, the Claimant's union representative advised him that he needed to take out a Fairness at Work grievance against Ms Stevens [473]. The Claimant chose not to do so at that point, explaining this in his evidence to the Tribunal as it was because he did not want to be seen as a troublemaker.

29. A record of the Respondent's concerns was subsequently sent to the Claimant reflecting what had been discussed during this meeting as part of an informal improvement plan. It was sent on 21 December 2017 [474]. In the same email, Mr Levy told the Claimant that his line manager would switch to Esther Beaumont with immediate effect. His email told him that "this was not a reflection on Kathryn, rather it was designed to enable him to focus on the main issues ie that of his performance to the required standard of a PO4 procurement delivery manager". In his witness statement, Mr Levy said he did so in order that the Claimant did not have any ongoing excuse for any further underperformance.

30. Thereafter, Ms Stevens had no line management responsibility for the Claimant. She had little to do with the Claimant on a day-to-day basis, although she and the Claimant continued to be based in the same office.

31. In January 2018, the Claimant was nominated for Employee of the Year award. This nomination came from the Housing Team. The Claimant was not shortlisted for the award.

32. During the first few months of 2018, Mrs Beaumont met with the Claimant on a regular basis. These meetings took two forms. There were the regular 1-2-1 meetings she held with all those she line managed. There were also additional meetings held with the Claimant as part of the informal capability procedure. However, during the first half of 2018, the Claimant had three distinct periods of sickness absence. From 6 February 2018 to 16 February 2018, the Claimant was absent for nine days with what was classified as Stress/Depression. This led to a referral to occupational health, a consultation on 9 March 2018 and a report dated 15 March 2018. The occupational health report noted that the capability procedure, which the Claimant perceived to be unfair, had triggered panic attack symptoms and anxiety symptoms "as the Claimant perceives working in a hostile environment". He had been on anti-depressants since January 2018 and was scheduled to undergo counselling therapy. Occupational Health were asked whether redeployment applied. The answer was "At the present time, redeployment is not an option. However, should Mr Farley's perceived work related stress issues not be resolved to his satisfaction, redeployment to a suitable role is advisable. However, this will need to be discussed and agreed between Mr Farley and management". There was no discussion in the occupational health report about whether the Claimant's condition satisfied the definition of disability in the Equality Act 2010.

33. From 13 March 2018 to 3 May 2018, the Claimant was absent for a further period of 37 days, again with "Stress/Depression". One of the GP Fit Notes during this period of time refers to depression. The others refer to "anxiety and stress". The third and final absence started on 4 July 2018 and continued until his dismissal. As a result, Mrs Beaumont only had three specific performance improvement meetings with the Claimant, on 11 January 2018, 1 February 2018 and 6 June 2018.

34. These extended absences prevented the Claimant from meeting with Mrs Beaumont more regularly to discuss the performance objectives set as part of the capability procedure. They also made it more difficult for the Claimant to demonstrate that he had met these objectives. At the informal stage sickness meeting on 2 May 2018, the Claimant asked for information on his employment options.

35. On 11 May 2018, Mrs Beaumont mentioned redeployment, secondment or alternative roles at the Respondent. At that time, the Respondent had a redeployment policy. This granted those able to participate in the policy a degree of preferential treatment in securing alternative roles within the Respondent. It applied to those who were at risk of redundancy and in circumstances of "medical redeployment including reasons relating to disability". In the latter category, the policy provided as follows:

> "Where the Council's Occupational Health Adviser advises that whilst the current post is no longer suitable, other posts in the Council may be. In these cases, the Occupational Health Adviser outlines to the manager what the restrictions are for the individual in considering alternative posts.
>
> It should be remembered that reasonable adjustments should be made to assist staff undertake their current role where possible. The services of Access to Work can be used to advise and if necessary fund this. Managers must seek assistance from their Directorate HR Unit."

36. However, Mrs Beaumont's reference to redeployment was a reference to redeployment under the capability procedure. In an email sent at 08:53 on 11 May 2018, she stated as follows:

> "With regards the redeployment option, I have liaised with our HR department who have advised that redeployment due to capability concerns, is a possibility. The redeployment policy states the following:
>
> > **Employee raises a concern about their capability**
> >
> > If, at either the Informal or First Formal Stage of the process, the employee recognises that they are under performing and voluntarily requests that they be demoted to a lower graded post, if one is available within the same team, this must be considered, or for a redeployment opportunity, if these options are viable, with the necessary justification. Redeployment arrangements will be treated in line with the appropriate policy. It is important to ensure that any redeployed role is suitable and that the skills and attributes of the employee and role are suited. The employee must be able to perform the duties to the required satisfactory standard.
> >
> > A meeting must be arranged with the employee to discuss these concerns.

> If the employee believes that they are no longer capable of undertaking the role, the redeployment process must be explained to the employee and if mutually agreed arrangements can be made.
>
> The outcome of the meeting will be confirmed in writing by the Manager to the employee within 5 working days and must include notice of dismissal if the employee has opted for redeployment. Please refer to section 6.0 Notice of dismissal on the grounds of incapability for further details.

HR have advised that should you want to explore the redeployment option, you would be given notice of dismissal, based on the length of service and your grade, and then HR would search for redeployment options (one grade above/below and the same grade as your current grade) alerting you to all appropriate vacancies."

37. This redeployment required the Claimant to resign first before he could be considered for another role. In that regard, it was different from redeployment for medical reasons under the redeployment policy.

38. By way of response on 17 May 2018, the Claimant said he was no longer interested in seeking redeployment. This was because, as he had discussed with his union representative, unless the redeployment was carried out under the medical redeployment policy, an employee seeking redeployment was required to resign his substantive post.

39. Up until May 2018, the Claimant did not raise any complaint about the way he was line managed by Mrs Beaumont. Indeed, his evidence about the way he was managed by Mrs Beaumont is that it felt like a breath of fresh air and a welcome break from his past relations with Ms Stevens [w/s para 51].

40. Mrs Beaumont met with the Claimant on 10 May 2018 to carry out his end of year appraisal. There is a significant evidential dispute about the appraisal process. The Claimant contends that there was no indication that Mrs Beaumont had any concerns about his performance. He believes that the meeting ended with him receiving an overall score of 3 for his performance. This is disputed by Mrs Beaumont. Her evidence is that there were still significant concerns about his performance by that point.

41. The Claimant contends that he was unable to provide his own comments after this meeting, and that Mrs Beaumont's scores changed to record that he was now underperforming. On 11 May 2018, the Claimant raised an incident with the IT service desk in relation to the written appraisal record. The Claimant's evidence was that IT told him it was being dealt with by HR. None of the Respondent's witnesses explained the eventual outcome of the incident logged with the IT service desk.

42. Given the issues that the Tribunal needs to determine, it is not necessary for the Tribunal to make detailed factual findings in relation to this appraisal. The Claimant's central argument is that it provides evidence of collusive behaviour of bullying and harassment between Mrs Beaumont and Ms Stevens, given that his

comments on the end of year appraisal form were the same comments he argues he entered at the mid-year stage. However, there is no evidence to support the Claimant's suspicion that Ms Stevens had any role in the outcome of the end of year appraisal. We do not consider that this is a plausible inference from the format of the end of year appraisal. The comments on the end of year appraisal from Ms Stevens were the comments she had entered back in October when she was still line manager. The electronic system for collating comments to populate the end of year appraisal form specifically retained comments made at the midyear stage. This explains why both Ms Stevens comments and the Claimant's comments from that review remained on the appraisal form. Having heard evidence from Ms Stevens we accept that she took no further part in the assessment of the Claimant's performance after she was specifically removed as the Claimant's line manager.

43. We accept that the scores given by Mrs Beaumont, as recorded on the appraisal form, reflected Mrs Beaumont's assessment of the Claimant's performance uninfluenced by Ms Stevens midyear approach. These scores were discussed with the Claimant at the appraisal meeting. We accept the evidence from Mr Procter contained in his witness statement dated 27 August 2020, as to the various stages in the appraisal process that took place until the appraisal form was finalised.

44. We note that the Claimant provided his signature on the appraisal document on 31 May 2018 [591], as well as the following comment:

> "Having reviewed the above, I confirm that this is not the correct appraisal form which I completed and submitted for review and comments. Incident Reference Number IN00036428 was raised on 11 May 2018 advising that my appraisal was not received by Esther Beaumont and disappeared from my SAP screen … Additionally I have challenged via the Formal Grievance all previous Appraisals with Kathryn Stevens delivered in an environment fraught with hostility"

45. On 23 May 2018, before the conclusion of the 2017/2018 process, the Claimant lodged a formal grievance, known in the Respondent's procedures as a Fairness at Work complaint [807]. There were four specific complaints made. Two related to incidents in December 2016 – the decision to withdraw the Claimant's compressed hours, and the decision to monitor the Claimant's timekeeping. These two were considered as part of the Fairness at Work process. Two further issues were not considered as part of that process. This was a complaint about the half year appraisal meeting on 20 October 2017 and a complaint about the Informal Performance Capability meeting on 14 December 2017. These were excluded from the Fairness of Work process because they were each subject to their own procedures.

46. The grievance into the Claimant's December 2016 concerns was investigated by Rashid Jussa, Families Performance and Information Manager. He worked in the same general area within the Respondent but did not work with the Claimant. He interviewed both the Claimant and Kathryn Stevens in two separate meetings. During his meeting with the Claimant, the Claimant was asked whether he would consider mediation with Ms Stevens. His response was that "two years have passed", so he doesn't believe this will help. He continued that "there is so much underlying context in relation to Kathryn, so much has occurred now that [he] would

rather just get on with it" [912]. He added that no one had previously suggested mediation with Ms Stevens.

47. Mr Jussa issued his conclusions in a letter dated 24 July 2018. His conclusion was that there had been no unfair treatment, bullying or discrimination. However, he recommended that there should be mediation to help Ms Stevens and the Claimant to find a common perspective and to move on from the events. The Claimant was told he had the right to appeal against the outcome. The Claimant did not lodge an appeal, although the procedure provided for an appeal if an employee was dissatisfied with the outcome.

48. In the meantime, on 6 June 2018, Mrs Beaumont held an informal capability meeting with the Claimant. She considered that the Claimant had demonstrated the required improvement in eight of the fifteen areas identified in the performance improvement plan. However, he had failed to improve in seven of the areas. Three further areas of concern had been added. At this meeting the Claimant challenged the correctness of the appraisal document he had previously signed. The Claimant was reassured that the appraisal document was correct. On 12 June 2018 Mrs Beaumont wrote to the Claimant to confirm the outcome of the meeting, recording that the Claimant's overall rating was 5 – unsatisfactory. On 26 June 2018, Mrs Beaumont wrote to the Claimant to invite him to a formal meeting under the capability process. Because the Claimant was on sick leave by the time that the meeting was scheduled to take place, there was never any formal capability meeting to consider the Claimant's performance.

49. By 16 July 2018, the Claimant had been off sick for about 10 days, his most recent absence starting on 4 July 2018. At that point, Mrs Beaumont invited the Claimant to a first formal sickness absence meeting to be held on 27 July 2018. By that point, he had been off sick for 68 days since 17 August 2017. The meeting was postponed and took place on 20 August 2018. It was hoped that the Claimant would return to work on 3 September 2018, on the expiry of his current Fit Note. The Claimant was told he was expected to have no more than 4 working days off sick from 3 September 2018 until the end of the calendar year, and no more than 8 days off sick from 3 September 2018 over the following 12 months. He was issued with a written warning and told that this would remain on his file for 12 months and his sickness would continue to be monitored. At the meeting, the Claimant raised the issue of redeployment, although the extent to which this was discussed is unclear.

50. In August 2018, the Claimant indicated he was willing to engage in mediation. However, Mr Levy decided that mediation would be pointless as the Claimant and Ms Stevens no longer worked together. He therefore did not implement the recommendation made by Mr Jussa. In any event, from 4 July 2018 the Claimant was off sick. Mediation would not have been offered whilst the Claimant was absent from work.

51. Because the Claimant had not returned to work as hoped on 3 September 2018, Mrs Beaumont referred the Claimant to Occupational Health to assess his current fitness to return to work. He was seen by Occupational Health on 13 September 2018 and a report was produced on 20 September 2018. In that report, prepared by Mary Fitzpatrick, Occupational Health Adviser, his current state of health was

noted. She recorded that he suffered from panic episodes and his anxiety and depression scores remain high. He regarded the situation in which he found himself to be embarrassing and that it had caused him reputational damage. He was fearful of what would happen, had become withdrawn and was avoiding contact with friends and family. He was not sleeping and is recorded as finding the situation he found himself in at work as "extremely distressing". He was currently taking prescribed medication to manage his mood which he had been taking since earlier in the year. Ms Fitzpatrick stated that his current absence was likely to continue until the matters of concern were addressed to his satisfaction. These were recorded as "the way in which he perceives he is being managed and the way this has made him feel at work". She noted that he finally felt unable to continue working in July, after receiving distressing news about his most recent appraisal. He did not require adjustments but a resolution of his concerns.

52. Ms Fitzpatrick was asked whether redeployment applied. The answer was "redeployment could be a consideration if the current matters cannot be resolved to Mr Farley's satisfaction".

53. Because of the way that the Occupational Health report was worded, the Respondent's HR advisor, John Marsden recommended that Mrs Beaumont seek clarification as to redeployment. As a result, Mrs Beaumont emailed Occupational Health seeking clarification as to the advice on redeployment. The email was sent on 4 October 2018. It asked "what is meant exactly by redeployment. Is Medigold recommending redeployment as a general action or as *medical redeployment*, as this distinction is particularly important, with regard to our internal policies". There is no evidence that the Respondent provided Medigold with a copy of those policies or explained the importance of the distinction further. In addition, Ms Fitzpatrick was asked what would amount to a suitable resolution to the Claimant's concerns.

54. Medigold's response was provided on 10 October 2018 [735]. The response was worded as follows:

> "This is a management issue. The gentleman's anxiety relates to circumstances at work. Management would need to take these matters up with him. It is not appropriate for me to get involved. By redeployment, I do not mean that he is medically unfit for his role but that a role in a different area might be a solution to the problem"

55. The day before, 9 October 2018, Mrs Beaumont wrote to the Claimant inviting him to a Final Formal Sickness Hearing, which would take place on 19 October 2018. The letter said that it would be chaired by Mr Levy, and Mrs Beaumont would present the management case.

56. The letter contained the following paragraph:

> "After your last meeting with your manager, you were advised that they would be moving this matter onto the next stage if your attendance did not improve. It follows that, although the chair will take into account your interests and all the options available, his chief concern must be the service needs of the Council and its customers. The possible outcomes of this

meeting may be, as a last resort, a final written warning, transfer, demotion or dismissal from the Council's service"

57. At the meeting on 19 October 2018, the HR representative present clarified that the reference in the letter to "transfer" was a reference to redeployment.

58. In advance of the meeting, Mrs Beaumont prepared a written case setting out the management position for the meeting. In accordance with the invitation letter, this was to have been sent to the Claimant at least 5 working days before the meeting. The report summarised the extent to which the Claimant had been absent from work and the latest medical opinion from Occupational Health. It set out the relevant parts of the Occupational Health report. It then said that "a request has been made to Medigold on the 4th October 2018, to confirm what resolution [the Claimant] is seeking, as this has not been stated". It did not refer to there being any response from Medigold.

59. There is no evidence in the bundle of documents indicating that this email of 10 October 2018 from Medigold was forwarded to Mr Levy, who would be conducting the hearing, or to the Claimant. In the notes of the meeting at paragraph 28, Mrs Beaumont was asked by Mr Levy whether Medigold had responded to this request [745]. We infer from this question that Mr Levy had not been provided with Medigold's response in advance of the meeting.

60. The Management Case went on to set out the impact on the Respondent's service of the Claimant's absence. It suggested that the Management team have now been forced to bring in interim resource, namely "2 x Procurement Delivery Managers", to support with project delivery. In her evidence, Mrs Beaumont clarified that this was extra resource needed in response to the increase in the workload, boosted by the Respondent providing a similar service for the London Borough of Redbridge, as well as because of the Claimant's absence.

61. The Management Case concluded with a recommendation. This did not expressly recommend dismissal. However, it stated that "the chair of the hearing should consider the Claimant's high level of sickness absence and the effects on the Council's service, and make a determination in relation to his service and the likelihood of being able to give regular and efficient service at the moment and in the future". In her evidence Mrs Beaumont accepted that she was not asking for any of the alternatives to dismissal to which she had referred in her invitation letter. She was effectively recommending that the Claimant be dismissed.

62. At the meeting, Mr Levy considered the Claimant's past level of sickness absence and present health, as stated in the Occupational Health report. As already stated, he asked if there had been a response from Medigold to the specific query raised about redeployment. The meeting notes record Mrs Beaumont as saying that "they could not comment on what resolution [the Claimant] was seeking". She did not comment on whether Medigold were recommending "medical redeployment".

63. During the meeting, the Claimant explained his current health difficulties as the result of the behaviour he had received from Ms Stevens. He added that the outcome of the end year appraisal in 2017/18 was the "proverbial straw that broke the camel's back". He considered Mrs Beaumont's final comments and scoring

were contradictive. He referred to the environment as “deceptive, collusive, bullying and harassment, especially where directed hostility is evident”. This had impacted on his health, both physical and medical. He said his hypertension, mental health issues and kidney disease had occurred as a direct correlation with the treatment he had experienced.

64. Mr Levy referred the Claimant to the Occupational Health comment in their report that “redeployment could be a consideration if the current matters cannot be resolved to [the Claimant’s] satisfaction”. He asked the Claimant if his position on redeployment had changed. The Claimant said it had but “noted that in [Mrs Beaumont’s] report she says that redeployment was not possible”. At this point, Mrs Beaumont said that “under [the Respondent’s] policy, redeployment was only possible on medical grounds but Medigold is not recommending redeployment on medical grounds. Therefore, [the Claimant] could only be redeployed if he resigned his post”.

65. The Claimant was asked about his expectation in relation to mediation. He replied that he was still getting projects from Ms Stevens and added that it may not be possible to remove all interaction with Ms Stevens. We interpret his answer as indicating that he was seeking mediation with Ms Stevens, rather than mediation with several colleagues, as the Respondent contends. That appears to be the focus of the subsequent exchanges as recorded in the notes of the meeting.

66. When this meeting took place, Mrs Beaumont did not understand that the Claimant’s health conditions satisfied the definition of disability in the Equality Act 2010. As a result, she did not understand that the Respondent was under a legal duty to consider whether reasonable adjustments were required, including any adjustments to the redeployment policy.

67. Mr Levy wrote to the Claimant on 22 October 2018 to communicate the outcome of the meeting [752]. He listed the factors he had taken into account in reaching his decision that the Claimant should be dismissed. These included the following:

> “You considered redeployment in May 2018 but declined this offer because you said this would put yourself at risk of redundancy”

68. The outcome letter did not specifically deal with the point made by the Claimant during the final formal meeting that his position on redeployment had changed, and he should now be considered for redeployment. There is no reference in the outcome letter to the Claimant being disabled, and no reference to there being any consideration to whether the Respondent was under a legal duty to make reasonable adjustments. We infer from this absence that when he made his dismissal decision, Mr Levy did not consider that the Claimant was disabled. Nowhere in his witness statement does he say that he addressed his mind to the issue of whether the Claimant was disabled.

69. As a result, there was not specific consideration given either by Mrs Beaumont or by Mr Levy to whether the Respondent should make any specific reasonable adjustments. There was no consideration given as to whether the medical redeployment policy applied given the wording of the Occupational Health advice and the terms of the medical redeployment policy.

70. The impact of the Claimant's continued sickness absence was that projects needed to be reallocated to other team members and external temporary resources needed to be hired, which had implications for the Respondent's budget for providing this service. The Claimant did not seek to challenge the Respondent's evidence as to the impact of his absence on the Respondent's ability to provide the service.

71. The Claimant chose to appeal against his dismissal. His appeal was unsuccessful.

Legal principles

Direct disability discrimination

72. Section 13 of the Equality Act 2010 is worded as follows:

> (1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

73. The Claimant seeks to compare himself against the treatment of the successful candidate, or to how a hypothetical comparator would have been treated. Such a hypothetical comparator must in all other respects be in a comparable position to the Claimant apart from his disability.

74. The focus is on the mental processes of the person that took the decision said to amount to discrimination. In the present case, that is the mental processes of Ms Stevens, Mrs Beaumont and Mr Levy. The Tribunal should consider whether they consciously or unconsciously were influenced to a significant (ie a non-trivial) extent by the fact that the Claimant was disabled, rather than by its consequences. Their motive is irrelevant.

75. Section 136(2) of the Equality Act 2010 is worded as follows:

> (2) If there are facts from which the Court could decide in the absence of any other explanation, that a person (A) contravened the provision concerned, the Court must hold that the contravention occurred;
> (3) But subsection (2) does not apply if A shows that A did not contravene the provision.

76. Guidance on the burden of proof was given by the Court of Appeal in *Igen v Wong* [2005] ICR 931. This guidance has subsequently been approved by the Court of Appeal in *Madarassay v Nomura International plc* [2007] ICR 867 and by the Supreme Court in *Hewage v Grampian Health Board* [2012] ICR 1054 (at paras 22-32).

77. The burden of proof starts with the Claimant. It is for the Claimant to prove facts from which the Tribunal could infer, in the absence of a satisfactory explanation, that the treatment was in part the result of him being a disabled person.

78. In order for the burden of proof to transfer from the Claimant to the Respondent, it is well established that it is insufficient for the Claimant merely to show a difference

in status and detriment treatment (see *Madarassay* at paragraph 54). In *Network Rail Infrastructure v Griffiths-Henry* [2006] IRLR 865, Elias J at paragraph 15 said that the mere fact that a unsuccessful candidate was a black woman and successful candidates were white men would be insufficient to be capable of leading to an inference of discrimination in the absence of a satisfactory non-discriminatory explanation. To shift the burden of proof a claimant must also prove something more. That is, in the present case the Claimant must prove facts from which the Tribunal could infer that there is a connection between the protected characteristic of disability and the detrimental treatment, in the absence of a non-discriminatory explanation.

79. If such facts are established, then the burden of proof transfers to the Respondent to establish on the balance of probabilities that the protected characteristic formed no part of the reasoning for the decisions.

Failure to make reasonable adjustments

80. The Tribunal must assess whether the Respondent applied a Provision, Criterion or Practice (referred to by the acronym "PCP") which placed the Claimant at a substantial disadvantage in comparison to those employees not sharing his disability. If so, the duty to make reasonable adjustments is engaged. The Tribunal must then consider whether a reasonable adjustment might have eliminated or reduced that disadvantage.

81. In order for the disadvantage suffered by the employee to be "substantial" it must be more than minor or trivial: *Griffiths v Secretary of State for Work and Pensions* [2017] ICR 160 at paragraph 21.

82. Paragraph 20 of Schedule 8 to the Equality Act 2010 is worded as follows:

> An employer is not subject to a duty to make reasonable adjustments if the employer does not know and could not reasonably be expected to know … that the employee has a disability and is likely to be placed at a disadvantage.

83. The burden of proof is on the Claimant to establish the existence of the provision, criterion or practice and to show that it placed him at a substantial disadvantage - see *Project Management Institute v Latif* [2007] IRLR 579 at paragraph 45. In other words, to establish that the duty to make reasonable adjustments has been engaged.

84. Thereafter the onus remains on the Claimant to identify the potential reasonable adjustments with a sufficient degree of specificity to enable the Respondent to address them evidentially and the Tribunal to consider the reasonableness of providing them. At the point where the duty to make reasonable adjustments has been engaged, and the Claimant has identified one or more potential reasonable adjustments, the burden of proof is reversed. The Respondent must then show, on the balance of probabilities, that the adjustment could not reasonably have been achieved – *Latif* at paragraphs 53-54.

85. The reasonableness of the steps to be taken to avoid the disadvantage is to be determined on an objective basis: *Griffiths v Secretary of State for Work and Pensions* [2017] ICR 160 at paragraph 73.

86. Guidance as to the considerations that are relevant in assessing reasonableness is provided in paragraph 6.28 of the Employment Statutory Code of Practice. The Tribunal is required to have regard to this Code when considering disability discrimination claims.

Discrimination arising from disability

87. Section 15 Equality Act 2010 is worded as follows:

(1) A person (A) discriminates against a disabled person (B) if-

a. A treats B unfavourably because of something arising in consequence of B's disability; and

b. A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

88. The first issue for the Tribunal to assess is whether the impugned treatment was influenced to any significant extent by any consequences of the disability. This requires a focus on the reasoning in the mind of the person who took the decision which is criticised. The Tribunal needs to consider the conscious or unconscious thought processes of the alleged discriminator, keeping in mind that their actual motive in acting as they did is irrelevant.

89. In *York City Council v Grosset* [2018] ICR 1492, the Court of Appeal considered the extent of knowledge that was required under Section 15(1). In short, there is none. If there is a causal link between the consequences of the disability and the dismissal, it is not necessary that the decision maker knew of that connection (see paragraph 39).

90. Section 15(2) provides a limited statutory defence. That is that there is no discrimination arising from disability if the Respondent shows that it did not know, and could not reasonably have been expected to know, that the Claimant had the disability. However, as Sales LJ put it in *Grosset* "if the defendant does know that there is a disability, he would be wise to look into the matter more carefully before taking unfavourable action" (paragraph 47). By reference to an example at paragraph 5.9 of the EHRC Employment Code of Practice, he stated (at paragraph 51) that "it is not suggested that the employer has to be aware that the employee's loss of temper was due to her cancer, but only that the employer should be aware that she suffers from cancer (ie so that the employer cannot avail himself of the defence in subsection 15(2))".

91. If the impugned treatment was influenced by any consequences of the disability, then it is for the Respondent to show under Section 15(1)(b), on the balance of probabilities, that the decision was justified. That requires that the Tribunal form its

own assessment of whether the dismissal was a proportionate means of achieving a legitimate aim. This is a different analysis from the range of reasonable responses approach required when considering an unfair dismissal claim.

92. In assessing proportionality, the Tribunal must assess whether on a fair and detailed analysis of the working practices and business considerations involved, the decision was reasonably necessary in order to achieve the legitimate aim (*Hardys & Hansons Plc v Lax* [2005] ICR 1565). There must be an objective balance between the discriminatory effect and the reasonable needs of the employer. When determining whether or not a measure is proportionate it will be relevant for the Tribunal to consider whether or not any lesser measure might have served the employer's legitimate aim. The severity of the impact on the employer of the continuing absence of an employee who is on long-term sickness absence will, no doubt, be a significant element in the balance that will determine the point at which their dismissal becomes justified (see *Ali v Torrosian* UKEAT/0029/18/JOJ at paragraphs 16-18 per HHJ Eady QC).

93. In *Griffiths v Secretary of State for Work and Pensions* [2017] ICR 160, Lord Justice Elias said (at paragraph 26):

> "An employer who dismisses a disabled employee without making a reasonable adjustment which would have enabled the employee to remain in employment — say allowing him to work part-time — will necessarily have infringed the duty to make adjustments, but in addition the act of dismissal will surely constitute an act of discrimination arising out of disability. The dismissal will be for a reason related to disability and, if a potentially reasonable adjustment which might have allowed the employee to remain in employment has not been made, the dismissal will not be justified".

94. In *O'Brien v Bolton St Catherine's Academy* [2017] ICR 737 Underhill LJ stated at paragraph 53:

> "… it is well-established that in an appropriate context a proportionality test can, and should, accommodate a substantial degree of respect for the judgment of the decision-taker as to his reasonable needs (provided he has acted rationally and responsibly), while insisting that the Tribunal is responsible for striking the ultimate balance; and I see good reason for such an approach in the case of the employment relationship."

95. However, it does not follow that the Tribunal has to be satisfied that any suggested lesser measure would or might have been acceptable to the decision-maker or otherwise cause him to take a different course. That approach would be at odds with the objective question which the tribunal has to determine. The Tribunal when making its objective assessment may take account of subsequent evidence (*Birtenshaw v Oldfield* UKEAT/0288/18/LA at paragraphs 38 and 39).

96. So far as is relevant, the EHRC Employment Code of Practice states as follows:

> 5.11 Unfavourable treatment will not amount to discrimination arising from disability if the employer can show that the treatment is a proportionate means of achieving a legitimate aim. This 'objective justification' test is explained in detail in paragraphs 4.25 to 4.32

> 4.30: Even if the aim is a legitimate one, the means of achieving it must be proportionate. Deciding whether the means used to achieve the legitimate aim are proportionate requires a balancing exercise. An Employment Tribunal may wish to conduct a proper evaluation of the discriminatory effect of the provision, criterion or practice as against the employer's reasons for applying it, taking into account the relevant facts.
>
> 4.31 EU law views treatment as proportionate if it is an 'appropriate and necessary' means of achieving a legitimate aim. But necessary does not mean that the provision, criterion or practice is the only possible way of achieving the legitimate aim; it is sufficient that the same aim could not be achieved by less discriminatory means.
>
> 4.32 The greater financial cost of using a less discriminatory approach cannot, by itself, provide a justification for applying a particular provision, criterion or practice. Costs can only be taken into account as part of the employer's justification for the provision, criterion or practice if there are other good reasons for adopting it.

5.21: If an employer has failed to make a reasonable adjustment which would have prevented or minimised the unfavourable treatment, it will be very difficult for them to show that the treatment was objectively justified.

Unfair dismissal

97. Section 94 Employment Rights Act 1996 provides a right not to be unfairly dismissed. A dismissal will be a fair dismissal if it is for a potentially fair reason, and the employer acted reasonably in treating it as a sufficient reason for dismissing the employee (Section 98 Employment Rights Act 1996).

98. The reason relied upon here is capability, specifically the extent of the Claimant's sickness absence and the lack of immediate prospect that the Claimant would be fit to return to his substantive post.

99. Where an employee has been absent from work for some time, it is essential to consider whether the employer can be expected to wait longer for the employee to return (*Spencer v Paragon Wallpapers Limited* [1977] ICR 301). This requires consideration of all the circumstances of the case, balancing relevant factors. These include whether other staff are available to carry out the absent employee's work; the nature of the employee's illness, the likely length of his or her absence; the cost of continuing to employ the employee, and the size of the employing organisation. Secondly a fair procedure is essential. This requires, in particular, consultation with the employee, a thorough medical investigation in order to establish the nature of the illness and its prognosis; and consideration of other options; in particular alternative employment within the employer's business.

100. In *East Lindsey District Council v Daubney* [1977] ICR 566, Phillips J said: "Unless there are wholly exceptional circumstances, before an employee is dismissed on the ground of ill health, it is necessary that he should be consulted and the matter

discussed with him, and that in one way or another steps should be taken by the employer to discover the true medical opinion".

101. In assessing the reasonableness of a decision that the employer cannot be expected to wait longer for the employee to return, it is not the role of the Tribunal to decide whether, if the Tribunal had taken the decision, it would have waited longer. Rather it must consider whether a decision to dismiss at that point in time given the medical position and the alternative options available fell within the band of reasonable decisions open to a reasonable employer. In other words, the dismissal will be fair if a reasonable employer could have dismissed given the extent of the ill health absence and the medical prognosis, even if another reasonable employer could have decided that the absence was insufficiently lengthy and the prognosis sufficiently positive such that dismissal was not yet warranted.

102. In assessing both the reasonableness of the investigation and of the decision to dismiss, it is not the role of the Tribunal to decide whether it considers that the investigation was sufficient. Rather it must consider whether the investigation fell within the band of reasonable investigations and whether the outcome fell within the band of reasonable outcomes open to a reasonable employer. In other words, the dismissal will be fair if a reasonable employer could have dismissed for incapacity, even if another reasonable employer could have decided that the medical position did not yet warrant dismissal.

103. The Tribunal must evaluate the significance of the procedural failing, because "it will almost inevitably be the case that in any alleged unfair dismissal a Claimant will be able to identify a flaw, small or large, in the employer's process": *Sharkey v Lloyds Bank Plc* UKEATS/0005/15/JW at paragraph 26.

104. The procedural issues should be considered together with the reason for the dismissal. This is because the two interact with each other. The Tribunal's task is to decide whether, in all the circumstances of the case, the employer acted reasonably in treating the reason as a sufficient reason to dismiss. When considering whether the employer acted reasonably the Tribunal has to look at the question in the round and without regard to a lawyer's technicalities (*Taylor v OCS Group Limited* [2006] ICR 1602 at paragraph 48, approving dicta from Donaldson LJ in *Union of Construction, Allied Trades and Technicians v Brain* [1981] ICR 542 at 550). This need for a holistic approach has been reiterated in later cases, notably *Sharkey v Lloyds Bank Plc* UKEATS/0005/15/JW and *NHS 24 v Pillar* UKEATS/005/16/JW.

Conclusions

Direct disability discrimination

105. The Claimant alleges he suffered direct disability discrimination in five respects:

    a. Being put on performance monitoring from December 2017;
    b. Being put on sickness absence monitoring from March 2018 onwards;
    c. The Respondent's ongoing failure until dismissal to entertain the Claimant's request for redeployment first made on 2 May 2018 without the need to resign his post;

d. The Respondent's ongoing failure to arrange mediation with Kathryn Stevens from 23 May 2018 until the end of its HR processes with him;
e. Dismissal.

Knowledge

106. A prerequisite for a direct disability discrimination claim is that the individuals who are alleged to have committed acts of direct disability discrimination knew that the Claimant was disabled. We accept that the Claimant's line managers, namely Ms Stevens and Mrs Beaumont, and also Mr Levy when conducting the sickness review meeting, were aware of the Claimant's sickness absence and the reasons for this absence. However, we conclude that none of the individuals responsible for the matters raised in this claim knew that the health conditions from which the Claimant was suffering, namely hypertension, anxiety and depression and chronic kidney disease, amounted to disabilities either individually or in combination. This is clear from the absence of any reference to disability in the way that the referrals to Occupational Health were drafted by or on behalf of Mrs Beaumont, from the management case prepared for the final sickness review hearing and from the notes of that hearing, as well as from the evidence we have heard from all three Respondent witnesses.

Performance monitoring

107. So far as performance monitoring from December 2017 onwards, we find that the only reason why Ms Stevens instigated the informal stage of the capability process was because of her genuine perception that the Claimant was significantly underperforming, as recorded in her October 2017 midyear appraisal. The midyear appraisal was carried out at a point in time when, even on the Claimant's own case, he was not a disabled person. Further, as at December 2017, the only respect in which the Claimant was under a disability was in relation to his hypertension. Ms Stevens would have instigated informal performance monitoring in relation to a person who was perceived to be underperforming to an equivalent extent and whose situation was equivalent in all material respects apart from their hypertension.

Sickness absence monitoring process

108. For the same reason, we reject the direct disability discrimination claim in relation to the instigation of the sickness absence monitoring process in March 2018. This was instigated because the Claimant's absence level had reached the trigger of 8 days set out in the Sickness Absence Procedure. This trigger applied regardless of the reason for the ill health. Whilst Mrs Beaumont knew that the Claimant was alleging his ill health stemmed from the treatment he had received from Ms Stevens, we do not infer from this that the reason for Mrs Beaumont's treatment was related to the Claimant having a disability. Mrs Beaumont would have instigated the sickness absence monitoring process at this time with a non-disabled employee whose situation was equivalent in all other respects.

Request for redeployment

109. The Respondent's failure to entertain the request for redeployment was not taken because of the Claimant's protected characteristic of being a disabled person.

Rather it was taken because the Claimant was unwilling to resign. Resignation was a necessary precondition for redeployment under the capability redeployment procedure that the Respondent was purporting to apply. A non-disabled person who was also subject to performance monitoring would also have been refused redeployment unless they were willing to resign.

Refusal to arrange mediation

110. Mr Levy's decision to refuse to arrange a mediation between the Claimant and Ms Stevens was taken because Ms Stevens was no longer the Claimant's line manager. Mr Levy did not see any benefit in arranging such a process in circumstances where Ms Stevens and Mr Levy did not have any need to work with each other. He did not consider that mediation with Ms Stevens would improve the working relationship with Mrs Beaumont. To him, it was the Claimant's ability to work effectively under Mrs Beaumont's line management that was important. It was not in any way influenced by the Claimant's status as a disabled person. The Claimant is correct to point out that Mr Levy's decision not to proceed with mediation was taken without any prior consultation with the Claimant. However, we do not consider that this is any basis for inferring he took this decision because the Claimant was disabled.

Dismissal decision

111. The Respondent's dismissal decision was taken because of the extent of the Claimant's sickness absence, which had reached a total of 128 days by 19 October 2018, coupled with the occupational health advice that there was little prospect that the Claimant would return to work in the same role unless the Claimant's concerns were addressed to his satisfaction. It was not taken because the Claimant was a disabled person. We do not draw any inferences from the fact that Mr Levy regarded the occupational health evidence as sufficient and did not regard it necessary to commission further medical evidence from the Claimant's GP or from a mental health specialist. Nor do we draw any inference that the decision to dismiss was influenced by the Claimant's status as a disabled person in circumstances where it appeared that the ill health was work-related, in that it stemmed from the Claimant's perception of how he had been treated by his line managers.

112. As a result, we reject each of the respects in which the Claimant says he has suffered direct disability discrimination.

Failure to make reasonable adjustments

PCP relating to performance monitoring

113. The first PCP relied upon by the Claimant is the practice that employees who significantly fail to comply with their performance objectives are liable to be subject to performance monitoring. The Respondent accepts that it did have such a practice.

114. We need to consider whether the Claimant was placed at a substantial disadvantage as a result of this practice, given the effects of his various conditions

which amount to a disability. We conclude that this practice did not put the Claimant at a substantial disadvantage, given his various health conditions.

115. There is no evidence that the Claimant had any health condition at the time of the October 2017 midyear appraisal. It was the poor performance recorded on this appraisal that led to the informal performance monitoring that started in December 2017. In relation to the end of year appraisal in May 2018, the Claimant has not provided any evidence to show that his health substantially impacted on the way he carried out his tasks during the times he was fit enough to be at work. Therefore, we reject the Claimant's contention that this PCP put him at a substantial disadvantage.

116. As a result, it is not necessary for us to consider whether the alleged reasonable adjustments were required to be taken to avoid any disadvantage. In any event, the three alleged reasonable adjustments do not specifically relate to the impact of the performance monitoring process.

PCP relating to trigger level for sickness absence procedure

117. The second PCP relied on by the Claimant is that the Respondent had a trigger level for sickness absence above which members of staff face the threat of or actual dismissal. The Claimant was unable to identify what this trigger level was, or where it was to be found in the Respondent's sickness management policy. The Respondent's case is that there was only one trigger level in the Respondent's policy. This was that the informal sickness management policy was triggered once an employee had been absent for 8 working days in any 12-month period.

118. We agree with the Respondent's position in relation to its policy. The relevant wording is as follows:

> "To ensure that the Council fulfils its managing sickness policy and procedure objectives, the council monitors all its employee sickness absences on an on-going basis and each of the triggers can be applied throughout the sickness stages. The Council has adopted the following sickness triggers to monitor its employees:
>
> - 8 working days of sickness absence in any 12-month period; or
> - 3 periods of sickness absence in any 3 month period, or
> - a pattern of sickness absence"

119. The wording of the policy makes it clear that it was each manager's responsibility to ensure that the relevant trigger was applied consistently across all service areas. At paragraph 7.5, the policy provides that "the setting of further sickness targets beyond the initial corporate triggers staged above in section 5, can be a challenging one. The new targets to be set must be based on the individual absence/health circumstances of the employee and the level of absence accrued. However, it is important to note that the targets must be realistic and support the aims of the council".

120. We accept that the initial 8-day trigger did place the Claimant at a substantial disadvantage in comparison to employees who were not disabled. Because of his disability, he took more sickness absence than a person who was not disabled, and

therefore was liable to come within the scope of the sickness management process at the point at which he had taken 8 days of sickness absence. However, we do not accept it would have been a reasonable adjustment to have lengthened or removed this level of sickness absence to trigger the policy. No particular consequences flowed for the Claimant in being within the scope of the policy other than that his health would be more closely monitored. This was potentially an advantage for him in that the potential cause of the sickness could be investigated and addressed by appropriate action. In the Claimant's case, the result of being part of the managing sickness process was that he was referred to occupational health in March 2018.

121. Thereafter, the sickness policy did not place the Claimant at a substantial disadvantage, because it did not set further triggers which applied to all employees. It made it clear that further triggers should be set depending on the individual absence/health circumstances of the employee and the level of absence accrued.

122. Given our analysis of the particular PCP relied upon, neither mediation nor redeployment would have been a reasonable adjustment to the only trigger level – eight days sickness absence - which was of general application.

PCP regarding redeployment

123. The third PCP relied upon by the Claimant was the requirement for those who were subject to the capability process that they would only be considered for redeployment to another position within the Respondent if they resigned from their current role. The Respondent accepts that this was a feature of the capability procedure. The Claimant says that this requirement put him at a substantial disadvantage given his disability.

124. We find that the Claimant was at a substantial disadvantage as a result of this particular requirement given the consequences of his disability. This requirement meant that he had to secure an alternative position within his notice period, which was two months. Given his sickness absence to that point, the Claimant would have found it more difficult to secure an alternative position within that timescale than someone who had been subject to equivalent performance management but who was not disabled.

125. However, we do not consider that this would have been a reasonable adjustment to the capability policy, in circumstances where the Respondent already had a separate medical redeployment policy as discussed below. That provided the possibility of participating in the redeployment process if the health condition came within the terms of that policy.

Other alleged PCPs or reasonable adjustments

126. No other PCPs were identified by the Claimant at the outset of the case, or at the point where the issues were finalised, once the Claimant had concluded his evidence. In his written submission at the conclusion of the case, the Claimant effectively sought to introduce a new reasonable adjustment claim, which would have been based on a different and unspecified PCP. This was that disability related sickness absence should be discounted. This was never raised as an issue

when the issues were discussed at length, nor was it explored in evidence with the Respondent's witnesses. Accordingly, it does not arise for decision.

Discrimination arising from disability

Informal capability process

127. We do not find that the decision to place the Claimant on the capability process in December 2017 was less favourable treatment because of something arising in consequence of the Claimant's disability. It was taken because of the Claimant's poor performance as noted in the October 2017 midyear appraisal.

Placing Claimant in the Managing Sickness Procedure

128. We accept that the decision to place the Claimant in the Managing Sickness Procedure was less favourable treatment because of something arising in consequence of the Claimant's disability. It was taken for a reason related to the Claimant's disability related sickness absence, namely because of the number of days of sickness absence he had taken whilst on sick leave. He had hit the trigger of 8 days.

129. This decision was a taken in order to pursue a legitimate aim. This was the need to manage and reduce insofar as is reasonably possible employee sickness absence in order to maintain the efficiency and effectiveness of its workforce and prevent sickness absence causing a detrimental impact on other employees and the provision of the Respondent's services.

130. It was a proportionate means of achieving that aim to have a trigger point to start the process and to set the trigger point at eight days sickness absence. It enabled the Respondent to closely monitor the reason for ongoing sickness absence. The Procedure states that the approach to be taken is tailored to individual circumstances, as quoted above.

Redeployment

131. In relation to redeployment there are two potential routes whereby an employee of the Respondent can benefit from the redeployment process. The first is where an employee subject to the capability procedure resigns in order to seek redeployment. The second is where an employee qualifies for the redeployment process as a result of redundancy or "medical redeployment including reasons relating to disability".

132. The Respondent's failure to redeploy under the capability process was not for a reason relating to the Claimant's disability, but rather because the Claimant refused to resign.

133. The Respondent's failure to redeploy under the redeployment process instigated as a result of redundancy or medical factors was because it took the view that the Claimant's condition did not fall within the terms of the medical redeployment policy. This failure was not the result of a consequence of the Claimant's disability.

Mediation

134. In relation to mediation, the refusal to convene a mediation between the Claimant and Ms Stevens was not taken because of something in consequence of the Claimant's disability. Rather it was taken because there was no ongoing working relationship with Ms Stevens, and therefore it was considered that it would not be a worthwhile process.

Dismissal

135. The Respondent accepts that the decision to dismiss the Claimant was unfavourable treatment because of something arising in consequence of the Claimant's disability. It was taken because of the extent of the Claimant's sickness absence. The key issue is whether the treatment was a proportionate means of achieving a legitimate aim.

136. We accept that the Respondent had a legitimate aim, as recorded above, namely the need to manage and reduce insofar as is reasonably possible employee sickness absence in order to maintain the efficiency and effectiveness of its workforce and prevent sickness absence causing a detrimental impact on other employees and the provision of the Respondent's services.

137. In deciding the issue of proportionality, we need to balance the discriminatory effect of the treatment on the Claimant with the reasonable needs of the Respondent. Clearly a decision to dismiss the Claimant for a reason relating to his disability had a significant discriminatory effect. On the other hand, the Claimant's continued employment in a position whilst being on sick leave was having a potentially disruptive effect on the Respondent's business, in terms of the need for existing staff to cover his cases and the need to engage other staff on a temporary basis. We accept the evidence from Mrs Beaumont that there was a risk that the procurement team would fail to deliver the Cabinet approved Annual Procurement Plan (witness statement paragraph 38). However, in her evidence, Mrs Beaumont did not quantify the extent of this risk, nor the consequences for the Respondent if this Plan was not delivered in all respects. In his evidence, Mr Levy referred to the Claimant's absence as creating a budget pressure (witness statement paragraph 26) but did not quantify the extent of the budgetary pressure or the potential consequences of this pressure.

138. Relevant to the balancing exercise is whether the Respondent fully and properly applied its policies to the Claimant before reaching the decision that there was no option but to dismiss. We find that the Respondent did not properly apply its Redeployment Policy (as relating to redundancy and medical conditions) to the Claimant.

139. We make this finding for the following reasons:

    a. The Respondent accepts that it ought to have known that the Claimant was disabled by reason of work-related stress, anxiety and depression from March 2018 onwards.

b. Therefore, it ought to have known that the Claimant's sickness absence from March 2018 onwards for what was recorded on the Respondent's system as "anxiety and depression" was disability related sickness absence.

c. As a result, when the Respondent referred the Claimant to occupational health, in March 2018, it ought to have specifically asked occupational health to address the Claimant's health situation at work in the light of the requirements of the Equality Act 2010, and again when a further referral was made in September 2018.

d. Given the contents of the occupational health advice as provided, the Respondent ought to have appreciated that the Claimant fell within the terms of the medical redeployment policy. This applied to "medical redeployment including reasons relating to disability", which was stated to be "where the Council's occupational health adviser advises that whilst the current post is no longer suitable, other posts in the Council may be. In these cases, the occupational health adviser outlines to the manager what the restrictions are for the individual in considering alternative posts".

140. Therefore, had the Respondent appreciated the significance of the Claimant's status as disabled, and given the occupational health advice as to redeployment, at the final sickness review hearing, the Respondent ought to have treated the Claimant as being subject to the medical redeployment policy. Had it done so, the Claimant would have been given priority in recruitment to suitable vacancies over those who were not part of the Redeployment Policy. Depending on whether there were other candidates for suitable roles who were also within the redeployment process, this may have avoided the need to take part in a competitive interview process.

141. This was never considered by Mr Levy at the time of the final sickness review hearing before taking his dismissal decision. Whilst we bear in mind the need to give a substantial degree of respect to the decision-maker, we do not consider that Mr Levy's approach to redeployment was rational and responsible. It did not engage with the application of the medical redeployment policy.

142. Further, *Birtenshaw* makes it clear that we do not need to be satisfied that redeployment would or might have been acceptable to Mr Levy or otherwise cause him to take another course. We need to form our own objective judgment on whether this was an appropriate course of action. The Respondent argues that redeployment had already been tried, in transferring the Claimant to be managed by Mrs Beaumont. We do not regard this as redeployment within the terms of the Respondent's policy. Rather it was performing the same job with a different immediate line manager, albeit under the same second line manager, David Levy.

143. In forming our own objective judgment, it is not necessary for the Tribunal to be satisfied that the Claimant would have achieved redeployment to a different role had he been subject to the medical redeployment policy. It is sufficient that this might have been an appropriate lesser step than dismissal that might have served the Respondent's legitimate aim.

144. In assessing the reasonableness of putting the Claimant in the medical redeployment process rather than dismissing him:

a. The onus is on the Respondent to show that the decision to dismiss was a proportionate means of achieving its legitimate aim, and that the lesser step of redeployment would not be appropriate;

b. we can have regard to any evidence advanced by the Respondent on this issue, which was not considered at the time. However, neither Mr Levy nor Ms Beaumont provided evidence in their witness statements explaining why redeploying the Claimant would have been futile, even if that step had been technically open to the Respondent under the medical redeployment policy. Therefore, no positive evidential case was advanced by the Respondent on this issue, although the Respondent argued that he would be an unattractive candidate for alternative roles because he was subject to an ongoing performance management;

c. it is relevant that the Claimant would have been potentially eligible to be considered for medical redeployment under the Respondent's redeployment policy without the need to resign since May 2018, when the issue of redeployment was raised in May 2018. By that point, the Respondent now accepts ought to have known that the Claimant was disabled. This would mean potential redeployment away from the procurement area within Mr Levy's responsibility. Therefore 78 working days of sickness absence between 4 July 2018 and the dismissal meeting on 19 October 2018 had taken place during a period when the Claimant was potentially eligible to be considered under the redeployment policy; but had not been so considered. This was highly relevant to how this lengthy period of absence should have be evaluated in the balancing exercise at a final sickness review meeting.

d. the duration over which the Claimant could be considered for medical redeployment to a different role was a matter for the Respondent's discretion – either by way of decision at the final sickness review meeting or thereafter in the light of the current state of vacancies and the prospects that redeployment might be successful. At its shortest, it could have been considered during the Claimant's notice period, for which the Claimant had been paid in lieu of receiving his contractual notice. Had redeployment only been explored for the notice period, it does not appear that the cost to the Respondent would have been any greater, nor would have been significantly more disruptive to the Respondent's operations than immediate dismissal.

e. However, in circumstances where it would be reasonable and proportionate to offer the Claimant the opportunity to participate in the redeployment process rather than dismiss him immediately, the duration and the prospects of redeployment would be matters to be considered at a Remedy Hearing.

145. As a result of conducting the required balancing exercise, we do not find that the Respondent has shown that the decision to dismiss the Claimant immediately on 19 October 2018 rather than delay dismissal in order to explore redeployment was a proportionate means of achieving a legitimate aim. Dismissal was therefore an

act of discrimination arising from disability, contrary to Section 15 Equality Act 2010.

Unfair dismissal

146. We find that the reason for the Claimant's dismissal was a fair reason, namely capability. We accept that Mr Levy took the decision to dismiss the Claimant, given his view of the extent of the sickness absence up to the final sickness review meeting, and the medical advice that there was little prospect that the Claimant would be fit for work in the foreseeable future unless his concerns were addressed.

147. We next need to consider whether the Respondent acted reasonably or unreasonably in treating the Claimant's sickness as a sufficient reason for dismissal. The Claimant refers to features which he argues rendered the dismissal unfair.

148. His first argument is that the dismissal decision was outside the band of reasonable responses because the Respondent did not sufficiently investigate his state of health. He argues that the employer should have approached his GP for a report, or alternatively sought a report from a mental health specialist. He accepts he did not raise this at the time of the final sickness review meeting. We do not consider that any reasonable employer would have carried out further medical investigation from these sources, given the way in which the occupational health report was worded. This report did not suggest any further medical evidence was necessary. The Occupational Health Adviser was able to answer all of the employer's questions without advising that further input from specialists would be necessary. A reasonable employer would not have been bound to approach the Claimant's GP directly, in circumstances where the Claimant had not invited such an approach.

149. Next, the Claimant argues that a mediation should have been organised to repair the damaged working relationship with Ms Stevens. This was, after all, the recommendation made following the outcome of the Fairness at Work process. We agree with the Claimant some employers may well have decided to organise a mediation, given that this had been recommended. However, we disagree that the failure to do so meant that the Respondent's dismissal decision fell outside the band of reasonable responses. It was open to a reasonable employer to decide, as the Respondent decided, that a mediation between the Claimant and Ms Stevens would not serve any useful purpose. The two no longer had any working relationship. Even if this relationship was restored, it would not alter the outcome of the appraisal conducted by Mrs Beaumont, which the Claimant had regarded as "extremely distressing". Shortly after that appraisal process had concluded, the Claimant had started the most recent period of sickness absence from which he had not returned to work.

150. The next point relied upon by the Claimant as showing the unfairness of his dismissal, was the Respondent's failure to offer him redeployment. This had been referred to in the Occupational Health report as a potential consideration if the current matters could not be resolved to the Claimant's satisfaction. As we have held above in our consideration of Section 15 discrimination, the Claimant's situation fell squarely within the terms of the Respondent's medical redeployment

policy, given he was disabled and unable to fulfil the requirements of the role unless his concerns were adequately addressed.

151. The medical redeployment policy does not state that redeployment cannot be explored in the Claimant's situation, namely where incapability proceedings are in progress. Therefore, it ought to have been applied to the Claimant. We note that the letter sent to the Claimant inviting him to the final sickness absence meeting referred to the possible outcome of transfer, which was explained during the meeting as a reference to the redeployment process. Yet Mr Levy did not consider whether the redeployment process applied. A reasonable employer would have considered whether the employer's own medical redeployment policy applied. Failing to do so took the decision to dismiss outside the band of reasonable responses to the Claimant's health situation.

152. We also consider whether the dismissal was procedurally unfair on the basis that Medigold's response to Ms Beaumont's questions was not sent to Mr Levy and was therefore not considered by him before making his decision. We bear in mind we have to decide whether this failure was outside the band of reasonable procedures, and weigh the gravity of this procedural flaw in the light of a holistic consideration of the fairness of the process, both in terms of the substance and the procedure, as explained in *Taylor v OCS*. We do not consider that the answer from Medigold is substantially different from what had already been written in the occupational health report. Part of the response from Medigold was shared by Mrs Beaumont in response to Mr Levy's question during the final sickness review meeting in any event. Had this been the only procedural fault, we do not consider that this omission alone would have taken the procedure outside the band of reasonable responses. It does not render the dismissal unfair.

153. It will be necessary for the Tribunal to decide at a Remedy Hearing what the outcome would have been if the Claimant had been referred for redeployment on 19 October 2018, rather than dismissed.

Time limits

154. The issue of time limits does not apply, because the only act of discrimination which we have upheld is the act of dismissal. The Respondent accepts that this allegation of discrimination is in time, as is the unfair dismissal claim.

Employment Judge Gardiner
Date: 30 July 2021