EMPLOYMENT TRIBUNALS (SCOTLAND)

Case Number: 4104258/2020

Hearing held at Glasgow on 22 – 25 June 2021

Deliberations: 28 and 29 June 2021

Employment Judge D Hoey
Tribunal Member A Grant
Tribunal Member R Dearle

Mr Martin Campbell	**Claimant** **Represented by:** **Mr Horan (Counsel)** **Instructed by Messrs Unionline**
Securitas Security Services (UK) Limited	**Respondent** **Represented by:** **Mrs Young (Counsel)** **Employed by Respondent**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous judgment of the Employment Tribunal is each of the claims is ill founded and each is dismissed.

REASONS

1. The claimant had raised claims for unfair dismissal and a breach of section 15 (unfavourable treatment because of something arising in consequence of disability) and sections 20 and 21 (the duty to make reasonable adjustments) of the Equality Act 2010.

2. The hearing was conducted remotely via Cloud Video Platform (CVP) with the claimant's agent, the claimant and the respondent's agent attending the entire hearing, with witnesses attending as necessary, all being able to contribute to the hearing fairly. There were a number of connection issues and IT concerns but these were overcome with the parties working together to ensure the hearing could fairly proceed. Breaks were taken during the evidence to ensure the parties were able to put all relevant questions to the witnesses. While there were some connection issues, these were overcome. The Tribunal was satisfied that the hearing had been conducted in a fair and appropriate manner, with the practice direction on remote hearings being followed, such that a decision could be made on the basis of the evidence led.

Case management

3. At the start of the hearing it was clear that the issues to be determined had not been focussed. No statement of agreed facts had been produced and there were a number of issues with regard to the productions.

4. The respondent's agent asked to introduce a number of documents that had been produced late. The claimant's agent objected to inclusion of the documents. We decided to allow the documents as it was in the interests of justice to allow them to be produced but we gave the claimant's agent time to take instructions in relation to them to ensure the parties were on an equal footing. The parties were given until the start of the second day to finalise the list of issues, the statement of agreed facts and the productions. They worked together to do so and no further issues arose.

5. We agreed a timetable for the hearing of evidence and the parties worked together to assist the Tribunal in achieving the overriding objective, in dealing with matters justly and fairly taking account of the issues, cost and proportionality.

6. A statement of agreed facts and a list of issues were produced which assisted the Tribunal and the parties in focussing the issues in this case. Robust case management ensured that the Hearing was concluded within the allocated time (and the Tribunal sat earlier and later in the days it heard evidence to ensure this was done).

Issues to be determined

7. The issues to be determined are as follows (which is based on the agreed list and which has been revised to reflect the specific requirements of the legislation).

Unfair dismissal

1. What was the reason for the claimant's dismissal?

2. If that reason is capability on the grounds of ill health, was it reasonable (having regard to section 98(4) Employment Rights Act 1996) for the respondent to have dismissed the claimant, and, in particular, given that:-

    a. The respondent dismissed the claimant when the employer was in receipt of their own Occupational Health Report by their own GP confirming that with a modification of the claimant's terms and conditions of employment and shift pattern

    b. Presenting as an alternative to dismissal, a zero hours contract that meant that his income would reduce from a guaranteed £378 per week to zero, and with even less of security and control over shift pattern and locations of work where he was asked to undertake his duties and with even less of security and control over shift pattern and locations of work where he was asked to undertake his duties

c. Mechanistically appling their absence management procedure and allow a dismissal to be driven by their HR function instead of the manager conducting the capability and / or attendance hearing, to take the decision to terminate an employee's employment themselves.

3. In the alternative, if the reason was some other substantial reason being the claimant's refusal to accept offers of suitable alternative work in June and July 2019, was it reasonable (having regard to section 98(4) Employment Rights Act 1996) for the respondent to have dismissed the claimant, and, in particular, given the 3 issues above.

4. If the claimant was dismissed unfairly, did he contribute to his own dismissal by failing to accept an offer of a reduction of hours in his contract of employment from 42 hours to 36 hours offered to the claimant on 1 April 2019, taking account of the fact that the claimant also refused 4 months of working in a core role offered by his manager Mr Maini in or around July 2019, by refusing to accept a contract of employment as a mobile patrol officer offered to the claimant in or around July 2019.

5. If the claimant did contribute to his dismissal, by what percentage?

6. If the claimant was dismissed unfairly, would he have been dismissed in any event under the **Polkey** doctrine as no core role has arisen within the respondent's business to date.

Disability

7. It is agreed the claimant was disabled within the meaning of the Equality Act 2010 and that the only impairment relied upon by way of a disability was fibromyalgia.

8. It is agreed that the claimant was disabled by 15th April 2020.

9. It is agreed that that the respondent had actual knowledge of disability by 15 May 2020.

Unfavourable treatment because of something arising in consequence of disability (section 15 Equality Act 2010)

10. The unfavourable treatment relied upon is the claimant's dismissal.

11. Was the claimant's long term absence a reason arising as a consequence of his disability?

12. If so, did the respondent treat the claimant unfavourably because of something arising in consequence of his disability, did the claimant dismiss the claimant because of his absence?

13. Was the aim relied upon by the respondent, namely to fulfil its contractual obligation to its customers to cover hours of work and to be able to plan the workforce a legitimate aim?

14. If so, was the respondent's treatment of the claimant a proportionate means of achieving that legitimate aim?

Breach of the duty to make reasonable adjustments (sections 20 and 21 Equality Act 2010)

15. It was agreed that the respondent knew of the disability by 15 May 2020.

16. Are any of the following items a provision, criteria, or policy (a PCP):

    (a) dismissal due to the length of a long term absence, whether or not a further period of leave / absence would have facilitated a return to work.

    (b) The policy of moving to dismissal due to the length of absence without exercising their discretion to extend the period of absence they would sustain before moving to dismissal.

(c) The policy of requiring employees to accept a zero hours contract in return for the respondent not dismissing them and seeking further reasonable adjustments.

17. If any of the above are PCPs, did the respondent apply the aforementioned PCPs to the claimant?

18. Did the PCPs put the claimant at a substantial disadvantage compared to someone without the claimant's disability?

19. Did the respondent know or could it reasonably have been expected to know that the claimant was likely to be placed at the disadvantage?

20. What steps could have been taken to avoid the disadvantage? The claimant suggests:

(a) Offer the claimant a core role

(b) Extend the claimant's employment by 2 months

(c) For the claimant to remain on his 42 hour contract until a core role was found for the claimant

(d) To exercise the respondent's discretion to account whether the claimant's absence could be sustained for a further period

(e) To allow the claimant a further period of "leave" to facilitate the claimant's return to work

21. Was it reasonable for the respondent to have to take those steps and when?

22. Did the respondent fail to take those steps?

Remedy

23. What is the claimant's week's pay?

24. What periods since the claimant's dismissal:

    a. would the claimant have worked?
    b. would the claimant have been off sick?

25. Are the claimant's heads of damages (Basic Award, Compensatory award, pension, statutory rights, injury to feelings)

26. When does the claimant's losses commence?

27. How long do the claimant's losses continue for?

28. Is the claimant's contraction of COVID 19 an intervening act thereby stopping the claimant's losses?

29. Under section 207A Trade Union and Labour Relations (Consolidation) Act 1992, has the claimant failed to comply with the ACAS code of practice on disciplinary and grievance procedures by failing to appeal both his dismissal and grievance?

30. If the claimant has failed to comply with the ACAS code of code on disciplinary and grievance procedures, was that failure unreasonable?

31. Is it just and equitable for the Tribunal to apply a reduction or increase to the compensation, if so, what percentage should the claimant's compensation be reduced?

Evidence

8. The parties had agreed a bundle of 256 pages.

9. The Tribunal heard from the claimant, Mr Maini, the claimant's line manager (the dismissing officer), Ms Cleary, Employment Relationship Manager, Mr McLaren, Account Manager and Mr Maybury, Protective Services Branch Manager. The witnesses had each provided a written witness statement and they were cross examined and asked further relevant questions.

Facts

10. The Tribunal is able to make the following findings of fact which it has done from the evidence submitted to it, both orally and in writing. The Tribunal only makes findings that are necessary to determine the issues before it (and not in relation to all disputes that arose nor in relation to all the evidence led before the Tribunal). Where there was a conflict in evidence, the conflict was resolved by considering the entire evidence and making a decision as to what was more likely than not to be the case.

Background

11. The respondent is a security guarding business which provides security officers to provide security and surveillance services to a variety of clients' premises on a nationwide basis.

12. The respondent has 2 types of security officers. Firstly they have core security officers who have, generally, a fixed shift pattern (which can include day and night shifts). Secondly they have relief security officers who have a minimum number of guaranteed hours but generally have no fixed shift pattern and cover whatever shifts are needed on a week by week basis which can include day and night shift. Both core and relief officers are required to be flexible and can be required to cover other shifts or duties as required. The key difference is the fact that relief security officers have no fixed shifts and cover such hours as are needed by the respondent, usually the absence of core officers.

13. The job description of a relief security officer states that the purpose of the relief security officer role is to "provide security services at various locations across a defined geographical area as required." Under "Personal Specification" the minimum requirements included that the relief security officer "be available as and when called upon to cover shifts, occasionally at short notice". A full driving licence and own transport was highly desirable. A minimum requirement was also to "be willing and able to work shifts covering days, nights and weekends".

Contract of employment

14. On 25 May 2018 the claimant commenced employment as a relief security officer. He was issued with a contract of employment which he signed. His hourly rate of pay was to be no less than the national minimum wage "and subject to variation". He was guaranteed 42 hours of work each week.

15. Under "Job Title and Duties" it was stated that "In accepting a relief officer's contract, you accept that you will be working across different sites, often at short notice and will be expected to cover a wide geographical area. You may be required to undertake other duties from time to time as the company may reasonably require".

16. The place of work was to be across customer sites within a reasonable distance as agreed in line with the respondent's requirements to provide a security service.

17. "Hours of work" were to be as above (42 hours) but were "subject to variation". The contract stated: "If you do not work in any particular day or week you will not be entitled to pay, apart from any holiday or sickness pay to which you are entitled for that period. As a relief officer should you be offered work and unreasonably refuse work and claim for payments or other benefits, [that] will reflect your refusal to accept work offered".

18. Hours of work were to vary subject to a rostered shift pattern and the claimant would be paid for hours worked.

19. The contract stated that: "You will need to demonstrate considerable flexibility with these hours, which will vary from time to time in accordance with the business or customer needs. The company may change the length of your daily shift to suit the customer site requirements. Shift patterns are subject to variation and any such changes will be notified to you in advance where reasonably possible to do so".

Policy documents – Sickness Absence Policy

20. The Sickness Absence Policy, which is non-contractual, outlined the respondent's approach to the "management of sickness absence". It stated that the respondent was "committed to improving the health well-being and attendance of all employees and values the contribution employees make to the business success." Given absence impacts upon service delivery it was stated to be vital that the respondent set out procedures for reporting and management of sickness absence.

21. The aims of the Policy included ensuring employees encountering genuine illness are supported to make a full recovery, to ensure employees attend work regularly and they inform their line manager if they are unable to work. Help and counselling was to be offered to "solve any problems associated with poor attendance" and employees were to be formally notified and advised where an improvement in attendance is needed via welfare reviews and appropriate communications and procedure. The Policy also set out the procedure for employees who failed to meet the required attendance standards.

22. Employees' responsibility included taking personal responsibility for their own welfare and keeping the respondent informed of any reason why they were unable to attend work and keeping the respondent informed of any illness which might impact on their current or future ability to attend and carry out work.

23. During extended absence periods employees were under a responsibility to keep the respondent informed of their situation in person and not just via fit notes.

24. Employees also had a responsibility to cooperate with the respondent with regard to any adjustments to their job or duties, hours or working conditions resulting from recommendations by a doctor or where there was deemed to be a risk to health, safety or wellbeing.

25. The respondent's responsibility was to ensure regular attendance at work by employees to meet customer expectations coupled with a concern for health and wellbeing of staff.

26. Every line manager was responsible for managing absenteeism of their teams. For long term sickness, line managers were expected to keep in regular or appropriate contact with employees and to hold regular review meetings. That may require line managers to telephone employees or make home visits to support employees.

27. Following a single period of absence the line manager should hold a return to work interview and record this to reflect the reason for the absence and duration. These meetings should process through formal welfare review meetings and if appropriate result in disciplinary action on capability grounds.

28. Long term absence was defined to mean "an absence expected to be more than four weeks".

29. Under "notification procedures" a process was set out requiring employees to contact their line manager on the first day of absence with the reason for absence, anticipated duration, action being taken (such as visiting the doctor), contact number and any work issues that the line manager requires to know.

30. For absence over 7 days a fit note should be submitted with the line manager being informed at regular intervals as to the position.

31. An independent medical examination may be required to determine the position.

32. Under "Unacceptable levels of sickness absence" the policy stated that "Whilst empathising with genuine periods of sickness absence, the company is unable to operate efficiently with an unacceptably high level of absenteeism. If an employee's level of sickness becomes unacceptable (eg more than 3 episodes of sickness during a rolling six month period or absence of more than 10 days) the employee may be asked to attend a capability review meeting even though their absence may be certified".

33. Under the heading “Welfare Review Meetings” the purpose of such a meeting was said to be to discuss the employee’s absence record and the reasons for it. A maximum of 2 welfare meetings would be held depending on whether attendance improves. A warning may be issued following such a meeting.

34. If attendance does not improve a disciplinary hearing could be convened on grounds of capability and the hearing would consider whether the employee could continue to provide a regular and efficient service in accordance with their contract of employment. Dismissal would only be considered after “due consideration and the employee has been given opportunities to improve”.

35. Under the heading “Medical Capability Hearings (for employees with long term absence”) the Policy stated that where an employee has long term sickness absence and the respondent is concerned about the employee’s ability to undertake regular work the employee may be invited to a medical capability hearing. This meeting would be arranged following regular review meetings or contact with an occupational health specialist or GP report. The purpose of the meeting was to consider whether the employee is able to return to their duties within a reasonable time or whether there were any reasonable adjustments that could be made or deployment options to assist a return within a reasonable period. If it is concluded that the employee is not able to return to work within a reasonable period of time a possible outcome could be dismissal on medical grounds.

Policy documents – Grievance Policy

36. The grievance policy provides a procedure for employees to freely express a complaint or concern and to resolve matters without unnecessary or undue delay. The Policy is expressly stated not to cover appeals against disciplinary action which is dealt with under the disciplinary procedure (which the Tribunal did not see).

37. An employee can raise a formal grievance which would lead to a meeting being convened to establish the full details of the complaint. If appropriate,

further investigations could be undertaken and the employee informed of the outcome of the process. There is an appeal available within 7 days.

38. Employees are entitled to bring a companion to such a meeting which could be a colleague or a relevant trade union official.

How shifts were run at Govan and Scotstoun

39. The respondent carried out security services on behalf of the Government at Govan and Scotstoun yards, which were on opposite sides of the River Clyde, around 10 to 15 minutes' drive from each other (via the Clyde tunnel).

40. The respondent had a number of core staff based at Scotstoun and Govan. These included supervisors and second in command officers. The remaining officers were core officers. There were around 12 core officers in Scotstoun and 9 in Govan.

41. The claimant understood he would be required to work between Govan and Scotstoun and that he could be called upon with relatively short notice. As a relief officer he would be given 42 hours of work each week and required to carry out such shifts as reasonably given to him, sometimes at short notice. There were only around 25 occasions when the claimant was given less than 48 hours' notice (within the last year when he was at work), with the vast majority of the claimant's shifts having been planned in advance.

42. The claimant could be required to attend either Scotstoun or Govan and on occasion Bishopton, around 20 minutes by car.

43. The claimant's line manager was Mr Maini who was site security manager for the sites at Govan and Scotstoun. He was responsible for both sites, including with regard to finalising the rota and who provided relief cover when (and where). His line manager was Mr McLaren who was Account Manager for BAE systems. Mr McLaren was ultimately responsible for 17 sites across the UK, comprising 180 officers and 9 direct reports.

44. A rota system was in operation whereby each month a rota was created and issued to the officers. It was common for the rota to change since at short notice relief officers could be required to cover absence or other fluctuation in the respondent's client's demands.

45. The respondent's client demands varied frequently and depended upon how long ships were on site, which was often for unknown periods and the position could change.

Discussion with line manager in July 2018

46. The claimant carried out his relief officer duties for around 2 months. On or around 18 July 2018 the claimant met with his line manager, Mr Maini. The claimant explained to him that he felt anxious, stressed and was finding it difficult to sleep. The nature of the relief role was causing the claimant issues, particularly the hours, differing locations and irregular shift patterns. The role was causing the claimant to become stressed and he was thinking of leaving the company.

47. Mr Maini sympathised with the claimant and explained that the nature of the relief officer role was that there could be uncertain locations (since the claimant could be required to work at Scotstoun or Govan and sometimes Bishopton) and often at short notice. The claimant could also be required to work different shifts. Mr Maini explained that he worked hard to create as best a structure to each relief officer's working pattern as possible but due to operational requirements that was not always possible. Mr Maini explained that this was the same for all relief officers and Mr Maini did not want the claimant to leave as he had been a hard worker.

48. Mr Maini explained to the claimant that there may be changes in the business which would be positive for security and that the claimant should remain in post as they would sort the situation out. The claimant understood that this meant Mr Maini would look for a core role for the claimant but this was not what Mr Maini had said (or meant).

49. The claimant decided not to resign and remained in post carrying out his relief officer role.

50. As a result of the claimant having told Mr Maini about the stress he encountered with the relief role, and in particular the unpredictability, in or around September 2018 Mr Maini advised the claimant that one of the core officers would be absent for a period of time due to surgery. Mr Maini told the claimant that he would be happy to roster the claimant to temporarily cover the core officer's shift until the officer returned, if that would reduce the stress the claimant felt. The claimant was advised that once the officer returned, the claimant would resume his normal relief officer duties. The claimant was appreciative of the position and agreed with the suggestion.

51. The claimant covered the core officer's absence providing him with a regular shift pattern at a specific location. He considered that would be beneficial to his health.

52. When the core officer was scheduled to return to duties, around November 2018, Mr Maini had a discussion with the claimant and explained that there was another core officer absent on sick leave and that Mr Maini would be able to schedule the claimant to cover that shift pending the core officer's return. The claimant worked in that role from November 2018 until March 2019. He also worked extra shifts as required.

53. During this period Mr Maini explained to the claimant that as another core officer was on sick leave on the same shift, Mr Maini would schedule the claimant to remain on that shift and cover the core officer's shift. That ensured there was a degree of continuity on that shift and was beneficial to the claimant's health. Mr Maini made it clear that the claimant would return to his relief role upon the core officer's return to work. The core officer did not return until 29 April 2019.

54. On 26 April 2019 Mr Maini issued the rota for the next few weeks. In preparing the rota Mr Maini had tried to keep the claimant on a relatively structured shift pattern which was similar to the core shift pattern, namely 2 shifts on days

and 2 shifts on nights alternately. In April 2019 the claimant was scheduled to work in Scotstoun only twice, with the remainder of his shifts in Govan. That was similar to the shift pattern the claimant had been given before.

Claimant's working pattern

55. On average the claimant had worked 43.5 hours per week during the time he was at work. The claimant's line manager had sought to give the claimant as much notice as possible as to his shifts and to provide a degree of structure.

56. While the clamant was contracted to carry out 42 hours per week he would often be offered more hours. He was not contractually obliged to accept such additional hours but he believed he had to do so and did so where additional hours were asked of him.

57. For the majority of April 2019 the claimant had been given at least 2 weeks' notice of the shift pattern he was being asked to work, as most of his April shifts were communicated to him in March and he was mostly based at the same site.

58. The claimant's work pattern in April 2019 was very similar to the work pattern he followed in November 2018.

Claimant and his medical condition

59. Prior to joining the respondent (from around 2017) the claimant had been receiving medical treatment for possible chronic fatigue syndrome. Those treating the claimant were unsure if the claimant had that impairment or whether it was ME or fibromyalgia. The claimant had been given medication for some time. The medication the claimant had been receiving did not change in April 2020.

60. From 2017 the claimant had been experiencing symptoms of pins and needles, pains, stiffness, IBS, fatigue, anxiety, stress and depression. He had difficulty concentrating (which the claimant described as brain fog, one of the worst symptoms he believed), sleeping and walking distances.

61. The claimant had been in consultation with his GP since 2017 in connection with medical issues and had been prescribed medication. In August 2017 the claimant had been diagnosed as having "peripheral vascular disease" when carrying out another role. Fit notes had been issued, and he had suffered from anxiety and depression. This had not been disclosed to the respondent as the claimant did not consider it relevant.

62. In February 2018 the claimant's GP recorded that the claimant had seen the physio in respect of leg pains. The GP noted that this could be related to fibromyalgia symptoms.

Respondent issue letter changing hours but claimant told to ignore

63. On 1 April 2019 a letter was issued by HR to a number of staff, including the claimant, which stated that "with effect from 15 March 2019" working hours were to change to 36 hours per week. The letter asked the employee to sign and return, confirming acceptance. The claimant did not do so. The claimant was told by his line manager that this letter had been issued in error and the change would not be effective. The hours he was offered did not change.

Claimant goes off work with stress

64. On 29 April 2019 the claimant contacted his GP and advised that he was "feeling stressed at work". The note the doctor recorded on the GP system (which was obviously not seen by the respondent) stated that the claimant felt anxious and low mood and had been "previously working part time but now increased his work". The claimant had not in fact increased his work. It also said "sore legs, with work too. People go off and he is having to cover. Says he will need to speak with his boss."

65. The claimant was concerned about reverting to the relief role which caused him stress. He was fearful of the lack of structure and the unpredictable nature of the role.

66. The claimant submitted a self-certificate citing "stress" as the reason for his absence from 29 April 2019. On 2 May 2019 the claimant's GP signed a fit

note stating the claimant was unfit for work covering the period from 2 May 2019 until 30 May 2019. On 30 May 2019 a further fit note was issued to 27 June 2019 again stating the claimant was not fit for work. The fit noted cited "stress" only.

Contact with claimant during absence

67. During the claimant's absence Mr Maini contacted the claimant via text message to enquire as to how he was doing and that he was there if the claimant needed to talk. Mr Maini held the claimant in high regard. The claimant had not responded.

Claimant rejects offer of fixed hours

68. On 11 June 2019 following a concern about sick pay raised by the claimant, his line manager, Mr Maini, emailed the claimant to resolve the sick pay issue. He ended the email saying: "I don't want to put any undue pressure on you and I am looking to try and get some stability for you. I'm keen to get you back to work as you are a valued member of the team. You're a good grafter at the end of the day and I appreciate the work you do for me. We will be looking after HMS Trent under care and maintenance up to the end of October this year. I could, if you like, fit you into the shift pattern for this with effect from 1st July. That will then give around 4 months of what you know you will be working. Let me know what you think."

69. The claimant did not respond to the email and Mr Maini sent a text to the claimant asking if he had received it and what his thoughts on it were. The claimant messaged Mr Maini back and said that it would be something he would be interested in and that a shift at the Govan site would be great. Mr Maini had not previously mentioned which site the claimant would work.

70. Mr Maini messaged the claimant back to explain he had got the ship wrong (since he had mentioned HMS Trent which was incorrect) and that it would be another of the ships on the same shift pattern and at Scotstoun.

71. The claimant replied saying he did not trust Mr Maini as he had been promised a core role in Govan and would likely go back on his word. He therefore declined the offer and remained absent by reason of sickness.

Claimant wants to discuss mental health issues

72. During June 2019 the claimant had been advised by his GP to take another 8 weeks off work. On 19 June 2019 the claimant had contacted Ms Carlin, whom he believed to be a manager, who was an account administrator. The claimant asked to speak to whomever in the respondent deals with mental health and he was given the contact details of Ms Cleary, the Employee Relations Manager. She was stated to be the employee Relationship Manager for the BAE Account.

Mr Maini believes claimant wants a core role or nothing

73. That email from Ms Carlin had been sent to the claimant and Ms Cleary and then to Mr Maini for information. Mr Maini replied to Ms Carlin, copying his response to Mr McLaren. He stated:

74. "I take it by this email Mr Campbell has been in touch?

75. Did he say what his issue was? As I took it from the conversation I had with him that he is not really going to be happy unless he gets on a full time shift at Govan. To give you a bit of background. He was taken on last year as relief officer and he knew that from the start. It was all explained to him by Mr McLaren. I did manage to slot him in to a shift for a while when a couple of the guys were on long term sick leave. However, this was only temporary which was explained to him at the time and he appeared to accept this. I then informed him that he would be going back on to relief but there may be an opportunity for something similar in the very near future. However, within a couple of shifts of him being back on relief, he blew out with stress (quote from him on the phone to me: "I'm stressed about being on relief. It's like being in the jail!".)

76. The other week I did try and offer him a bit of stability for a few months (more than likely until the end of October at least) looking after one of the ships on a similar shift pattern. Now there had been no mention of what site it would be on and when I texted him the following day he was very much up for it. (Quote "Hi Kevin thanks for your email. Four months in Govan on a rota sounds grand to me"). However when I mentioned to him that the 3 remaining shifts would be at Scotstoun he decided it wasn't for him (and even hinted that I would renege on what I had offered). He then went on to say that he would phone HR to find out what his options were.

77. It might look like I am being cynical, however, just reading between the lines of this just smacks to me that unless he gets his own way he will continue with his absence."

78. The latter comment was Mr Maini's opinion. He believed this because when he initially offered the claimant the adjustment to work a structured shift on a ship and shift pattern based at Govan the claimant agreed but when he found out the work was to be done at Scotstoun he declined. Mr Maini believed that he had offered the claimant a reasonable adjustment that dealt with the claimant's concerns but that the claimant did not wish to accept anything that was not a core role.

Claimant speaks with Ms Cleary

79. The claimant had a discussion with Ms Cleary in early July. The claimant explained that the relief role caused him stress. Ms Cleary said a welfare meeting would be set up to explore the position. She explained that Mr McLaren would attend the meeting as he was in charge of the sites.

Welfare meeting takes place – 8 July 2019

80. On 8 July 2019 a welfare meeting took place which the claimant attended with Mr McLaren and the claimant's companion. The claimant was told the purpose of the meeting was to understand the claimant's position. The claimant explained he had received another line for 2 months. He was reminded this role was a relief at Scotstoun and Govan. The claimant said he liked Govan

and had spoken to Mr Maini who said he would get the claimant on a particular ship for 4 months but had gone back to him as he had told him the wrong ship. The claimant said it was “changing all the time”.

81. The claimant was told that this was the nature of relief work. The claimant said things had dragged out and he never wanted relief as he wanted a core position. He said he had been told he would cover sick leave and that Mr Maini would speak to Mr McLaren as to future vacancies.

82. Mr McLaren asked when this was, to which the claimant said “end of March” He explained he had been given a rota with days at Govan and Scotstoun. He said he it hard to find a manager to speak to. Mr McLaren said he would look into the communication issues. He also said that he needed to see how to resolve matters. Going “back to basics” he said there were no core positions available at Scotstoun and Govan.

83. The claimant said “that is what annoyed me. I was no told I was being put all over.” Mr McLaren explained that this was the nature of relief work.

84. The claimant said “if I was told that last August I would have left. I would only continue if I was getting core. I don’t like moving about, not knowing where I was going from one week to the next.”

85. Mr McLaren asked if the claimant would have handed his notice in August and he said he would had he known back then that there were no core positions.

86. Mr McLaren undertook to look in the Glasgow branch to see what vacancies existed. The claimant said he would be interested in that “but not retail”. He wanted it resolved one way or another.

87. Mr McLaren noted that the contract the claimant had entered into was a relief officer contract. The claimant replied stated “I will work on a core position not relief”.

88. Mr McLaren explained he did not have any core positions to which the claimant said that he was long term sick and signed off as unfit to work. He

said: “We just need to come to an agreement”. Mr McLaren state that he did not know how else to resolve matters as he understood there were no core roles available. He noted there were ships in for a few months.

89. The claimant explained that he was offered a “good few months” on one ship which changed to another and that he was being moved constantly. Mr McLaren said he assumed that Mr Maini must have been saving that role for the claimant in the hope a core role arose. The claimant said he felt he had been misled and would rather have been told straight as he would have given his notice and left the company.

90. Mr McLaren said he had not been aware and that he had not been involved. The claimant had assumed Mr McLaren had been aware and said he would leave it with him to see if any core positions arose that are not retail.

91. Mr McLaren asked how he could resolve it if there were no core positions. The claimant then said: “I would need to see if I can be let go due to nothing being suitable and not being fit to work”. Mr McLaren explained that “after a period of time” the claimant would be referred to occupational health to see if he was fit for work. The claimant said he was happy to go down that route.

92. Mr McLaren asked the claimant for his definition of a core position and he replied stating that “you can work and have something in place for a year”. Mr McLaren noted that the claimant had never been working core hours. The claimant said that he had been filling (or covering for) core positions. Mr McLaren explained that is what relief officers do – covering core hours, for holidays and sickness.

93. The claimant explained that he liked the core cover and he thought he would get something in 3 months which is why he said he felt the company had let him down. Mr McLaren explained that the company had been offering the claimant work per his contract as there had been no other positions available other than the work offered.

94. The claimant said; “I am just not happy. I feel stressed with the situation. I will see how I go after the 2 months.”

95. Mr McLaren said he would see what he could do. He said: “I just feel that you are holding us to ransom. You will return from sick if you are given a core position but will remain if you are not given one.” The claimant replied that he would take advice from his doctor.

96. Mr McLaren said he felt there has been miscommunication. There was no difference between the work to be done on both ships as the work was in the same pattern.

97. The claimant said he felt he had been misled .The not talking about it was what had stressed him out.

98. Mr McLaren explained that Mr Maini looked after both sites and a lot of officers and that he was trying to help the claimant as he wanted him to return to work.

99. The claimant said the best way was to refer him to occupational health. Mr McLaren said “Why not resign” (in reference to what the claimant had suggested he would have done before had he known the situation). The claimant said that he would not do so because he would not be entitled to anything. Mr McLaren said he would need to take advice as dismissal could be an option.

100. Mr McLaren explained that it appeared to him that the claimant would return to work only if he was offered a core position to which the claimant said he would take his doctor’s advice.

101. Mr McLaren said the claimant had not been promised a core role. The claimant agreed but stated that there would be something to sort the situation out and he felt totally misled.

Claimant calls Ms Cleary

102. Shortly after the 8 July 2019 meeting the claimant contacted Ms Cleary and said he was not happy as to how the welfare meeting had gone as Mr McLaren had reminded him that he was on a relief contract. The claimant was concerned about the hours and shift patterns. Ms Cleary explained that the

claimant did not need to work beyond his contractual hours, namely 42 hours a week. She told the claimant to contact her again if he was still unhappy.

Mr McLaren looks for alternatives

103. On 9 July 2019 Mr McLaren asked the managers within the Glasgow branch whether or not there were any core roles available. At this stage there was none and the only roles available were relief officer roles.

104. Mr McLaren emailed the claimant to confirm there were only relief roles in Glasgow but he had identified a core position that was a driver. The claimant had previously been a taxi driver for around 20 years. Mr McLaren explained that he had asked the relevant manager to contact the claimant with further details.

105. Mr Maini and Mr McLaren had had a discussion and Mr Maini had explained to Mr McLaren that the claimant was absent by reason of stress, which had been caused because of the relief role. Mr Maini had advised Mr McLaren that the claimant had been offered around 4 months of structured work which the claimant had declined when learning it was in Scotstoun.

106. Mr Maini had been under the impression, as a result of his discussions with the claimant, that the claimant did not like being a relief officer, which had caused him stress.

Claimant offered permanent driver role

107. On 10 July 2019 the manager sent an email to the claimant setting out details of the role, which was a permanent night shift role from 7pm until 7am. The shift pattern was likely to be 5 on and 2 off. The hourly rate was £8.75 and there would be a trial period, with the shift commencing at Bellshill.

108. On 10 July 2019 the claimant replied to Mr McLaren stating that he had spoken to the manager but the position was unsuitable as it required constant night shifts and extended commuting time. He would not know what hours he would be working and would be paid less per hour.

Claimant remains off sick

109. A further fit note was procured on 28 August 2019 to 30 September 2019 stating the claimant remained unfit for work due to “stress”.

110. On 29 September 2019 a further GP statement is submitted citing “stress” as the reason for absence.

111. On 16 December 2019 a further GP statement was submitted covering the period from 16 December to 6 January 2019 stating “stress” as the reason.

Occupational health information sought

112. Following the onset of the pandemic, Ms Cleary and Mr McLaren were surveying long term absent staff. Mr McLaren decided that it was time to refer the claimant to occupational health given the duration of the absence.

113. By the end of March 2020 the claimant was asked to and did complete the forms to allow a referral to occupational health which were processed.

Occupational health report

114. On 15 April 2020 an occupational health report was produced. The report was produced following the occupational health physician’s discussion with the claimant over the telephone and information within the occupational health referral form.

115. While the Tribunal did not see the referral form, the referral had been actioned by Ms Cleary who had set out the background. She had set out the background that relief officers cover work for core officers with guaranteed hours but the need for flexibility.. She noted that there few core officer vacancies arise.

116. She explained that the claimant had been off work with stress from 30 April 2010 due to struggling with the relief pattern which was making him ill due to no structure and specific shift pattern. To support the claimant the respondent

had found an ad hoc role for 4-6 months, 12 hours per day which the claimant had declined.

117. A welfare meeting had been conducted during which the claimant had been advised that there were no core working roles but the search would be widened. The claimant was offered a mobile officer role but declined due to not wanting to work nights. The claimant had said that he would be able to return to work in a core role which he felt would alleviate stress.

118. The occupational health physician noted that the claimant had explained within a few months as a relief security officer he spoke to his line manger as he was having difficulty coping with the irregular nature of the work. The claimant explained that the work related issues resulted in him feeling the strain which led to him feeling unable to cope.

119. Based upon what the claimant had told the physician she concluded that the claimant's GP had diagnosed the claimant with a long term medical condition which presented with psychological symptoms. The claimant had explained he was trying different medication which was intended to stabilise psychological symptoms. Finding the right medication had taken time.

120. The physician stated that the claimant had a long term condition known as fibromyalgia which was diagnosed about a year ago. She explained that some individuals present with a variety of symptoms but the type of treatment the claimant had been prescribed is often used to stabilise those types of fibromyalgia symptoms. The condition can spontaneously resolve and many work with the symptoms.

121. The physician stated that: "Based on our interview the claimant's main reasons for absence are due to psychological symptoms rather than symptoms of his fibromyalgia."

122. The physician explained that the claimant's sleep had been erratic. The claimant's long term medical condition presented with psychological symptoms which include anxiety which cause palpations and disturbance of mood.

123. His psychological symptoms were ongoing and continuing to impact on his day to day activities which could impact work. She opined that "it may be several more months of treatment before the claimants symptoms settle to a state where he can contemplate returning to work." Some individual could respond to treatment quicker and so regular dialogue should take place and if management were supportive and flexible this could support a return to work.

124. The claimant was able to engage with management in discussions. The physician note that the claimant had "identified a work related issue" and she advised management to meet the claimant to discuss the work related issue and propose solutions. That could be a non-medical barrier to him returning to work once his medical condition had stabilised.

125. The physician was of the view the claimant was a disabled person.

126. The physician had been asked whether a core role would be a suitable adjustment to allow him to return to work. The physician had explained that the claimant had told her that a core role involved regular shift patterns which can be viewed several months into the future. That included regular day working and planned night working. The claimant had explained that the core role would involve a set geographical site and routine work pattern.

127. She said: "*In my view individuals with a medical condition with this type of psychological symptoms, regular good work, a regular routine, a set pattern of work, regular hours, regular daytime working and a routine are helpful and supportive in maintaining health and well-being.*"

128. She stated that once his symptoms "are stabilised" on his medication, his long term medical condition would not impact on his ability to undertake regular work. She would support consideration of such a role as a suitable adjustment.

129. In response to the question as to whether his condition would prevent him working a relief role, the response was: "*The claimant has a long term medical condition which presents with psychological symptoms. Avoiding irregular*

hours, irregular shift patterns, irregular night working and lack of routine are likely to support the claimant with his long term medical condition".

130. It was only upon receipt of the occupational health report that the respondent discovered the claimant had a disability. They had no knowledge of it prior to that point as the claimant had not referred to fibromyalgia or anything relating to that, the claimant and his GP having referred only to "stress" as the reason for his absence.

Review meeting to be convened

131. On 30 April 2020 Mr McLaren wrote to the claimant. The letter was as follows: "*I am writing further to your occupational health appointment that you had on 15 April 2020. We have now been provided with a report from our Occupational Health Provider and would like to arrange a web ex telephone meeting with you to discuss the report in more detail and discuss your medical capability*."

132. The letter explained that due to the pandemic, the meeting would be held remotely at which Mr McLaren and Ms Cleary would attend. The letter continued: "*During this meeting, I can confirm that we will discuss the medical report we have received and also discuss any possible adjustments that could be made to your role or suitable alternatives. A possible outcome of this meeting could be your dismissal from our employment on the basis of medical capability. However, I would like to assure you that we will make every effort to support you as an employee*."

Medical review meeting – 15 May 2020

133. On 15 May 2020 a review meeting took place with the claimant and his companion in attendance with Mr McLaren and Ms Cleary. Mr McLaren explained the purpose of the meeting was to discuss the occupational health report. The claimant said he was feeling better but COVID 19 had impacted upon his health. He was looking to get back to work.

134. The claimant confirmed he had read the occupational health report and agreed with its contents. The meeting explored the background, noting the claimant had said he was struggling with the relief role within around 2 months. The claimant had understood his manager was looking for a core role for him. Mr McLaren explained that such a decision would have been his, given the level of responsibility, and that there had been some miscommunication.

135. The claimant explained that he had covered for core officers' illness which Mr McLaren explained was the purpose of the core role. The claimant repeated that if he had known there were no core roles available he would have resigned from the role.

136. The claimant stated that he had been diagnosed with fibromyalgia but the treatment was working. The claimant explained that this was not the main reason for being on long term sickness as it was due to the stress and anxiety of the relief role, having no fixed patterns of hours.

137. The claimant believed that he could return to work if the adjustments set out in the report were implemented. Mr McLaren noted that the report stated that the claimant may not be able to return to work for several months but the claimant said if a regular shift pattern could be found for him he could return to work immediately. He said he would do overtime but would like the choice outside of his fixed shift pattern. The claimant repeated that he would not be happy returning as a relief officer. The claimant explained that he would be happy to look throughout the company for a core role but he would not work in retail. He said that "to support his condition he would need regular hours with a fixed shift pattern". The claimant also stated that he would preferably work day shift with fewer hours. He could not work a relief pattern due to the unpredictability and not knowing or being able to plan.

138. Mr McLaren explained to the claimant that there were no core positions available but he would look at other accounts to see if there were any other relevant vacancies. The meeting was adjourned until 20 May 2020 to allow Mr McLaren to look into what positions were available.

Mr McLaren seeks alternative roles

139. Between 15 and 20 May 2020 Mr McLaren made contact with the Glasgow office to identify what positions were available. There were no core roles nor other vacancies across the business.

Reconvened meeting takes place – 20 May 2020

140. On 20 May 2020 a reconvened review meeting took place with the claimant and his companion, Mr McLaren and Ms Cleary. Mr McLaren explained that he could not find a core role within the business and there was none in the Glasgow branch.

141. The meeting moved to consider dismissal and ways of avoiding dismissal. The claimant asked that he remain on the books for 2 months which could allow a transfer to take place if a role arose. Mr McLaren explained that there were no core roles available.

142. The claimant's companion had suggested that a casual contract be considered, which would allow the claimant to remain employed on an as and when basis and seek a core role. Mr McLaren offered the claimant this opportunity, advising him that his service with the company would not be affected and he would have time to consider core roles. Mr McLaren undertook to contact the claimant if any core roles arose. The claimant agreed to consider the terms of that contract.

143. The claimant was advised that if the contract was not something he wished to progress the respondent would consider medical dismissal since the adjustments recommended by the occupational health physician could not be supported, It was still open to the claimant to apply for a core role if one became available following any such dismissal.

Email to claimant with options: casual contract or consider dismissal

144. On 20 May 2020 Ms Cleary sent the claimant an email providing a template casual contract. He was told to check the terms of the contract and if

agreeable, contact Mr McLaren. It was confirmed that there would be no detrimental effect on his continuous service.

145. The email confirmed that there were 2 options discussed at the meeting. The first option was to accept the casual contract "to allow a greater timescale during the current COVID19 climate" to search for a core position as an adjustment. The email noted that there were currently no core positions within the organisation and that if any vacancies arose they would advise the claimant.

146. The second option, if the claimant decided not to change from a relief to a casual contract, was for the business to consider medical termination. The reasons for this were stated to be that due to the claimant's own admission he could not fulfil a relief contract, which is his current contract, now or in the future as this will exacerbate his medical condition. The business had a duty of care to employees and in this instance could not facilitate a core position. As there is none and none anticipated, dismissal would be considered.

147. The claimant had been given a copy of the minutes of both meetings and had asked that they be adjusted. The claimant said that on 20 May when Mr McLaren had been asked if he had chosen to dismiss him he said it was "company policy and had been instructed by HR to do so" and that he had been asked to disclose who in HR had given the advice.

Claimant reminded of his options

148. Ms Cleary replied to the claimant stating thar Mr McLaren had tried to support the claimant's return to work. As there were no core roles available the meeting had been reconvened on 20 May to explore other options, which included medical dismissal. An alternative to dismissal, a zero hours contract, had been raised which was then considered. The claimant therefore had 2 options – move to a casual contract for 3 months to look for core work or continue to consider medical dismissal (and apply for core roles if and when they arise). It had always been Mr McLaren's decision, supported by HR. It

was not appropriate to disclose the HR business partner given it was Mr McLaren's decision as to how to proceed.

Claimant declines offer of zero hours contact

149. By email of 28 May 2020, the claimant advised Mr McLaren that he did not wish to move to the casual contract and asked that he resolve matters in a way that all are happy with the outcome.

Respondent decides to dismiss claimant

150. On 28 May 2020 Mr McLaren wrote to the claimant referring to the medical capability hearing on 20 May 2020. The purpose of that meeting had been to discuss the medical report, consider the prospect of the claimant's return to work and to consider adjustments. The meeting had noted that the claimant had been absent since 30 April 2019 due to ill health and that the medical report had stated the following adjustment would be required to facilitate a return to work: "*A core role which involves a regular shift pattern which can be viewed for several months in advance with regular shift patterns including regular day working and planned night working set within a geographical area to enable a routine patten of work. Due to your long term medical condition which presents with psychological symptoms you should avoid irregular hours, irregular shift patterns, irregular night working and lack of routine*."

151. The letter stated that based on the recommendations within the Report and at the previous meeting on 20 May, Mr McLaren had considered all potential alterations to the claimant's current role and alternative roles across the business to facilitate those requirements but there are no such roles.

152. Mr McLaren also stated that: "*unfortunately there is no time frame for when a core position would become available and it is not considered reasonable to keep someone employed indefinitely when they are not medically capable to work their current role.* "

153. The letter went on: "*During the initial welfare meeting dated November 2019 it was discussed that you would take alternative employment within Securitas*

and I established that there was a position with Securitas Mobile". He noted the claimant had declined that role and stated on several occasions that he was not willing to take a position in retail which drastically reduced the number of roles.

154. Mr McLaren noted the claimant had not identified any other adjustments to facilitate his return to work. The option of moving to a casual contract had been offered to allow the claimant to remain in the business for around 2 months to establish if a core position becomes available but this had been declined by the claimant.

155. Mr McLaren stated that he had then considered alternatives and the only option was to terminate the claimant's employment by reason of ill health/capability. The claimant would be paid his notice, based on a pay rate of £9.54 per hour, working 42 hours a week. He was also to be paid his accrued holidays.

156. The claimant was also offered the right of appeal.

Respondent requires flexible resource

157. The sites in question were dynamic as the respondent's client's requirements changed regularly. The security staff levels on site fluctuate and to accommodate the fluctuating demands a large pool of relief officers are dedicated to the site to deliver the security service. Core positions rarely arise due to the fixed nature of such roles. No core roles became available during the capability process nor to the date of the Hearing and it was not possible to create such a role during that period.

Alternative core roles as at date of dismissal

158. The claimant believed that there were core officer roles available which he contended should have been offered to him as opposed to dismissing him.

159. One of those individuals, Mr Owens, had been a core officer until 2015, at which point he became a relief officer. He had retired in July 2019. He did not have a core role.

160. The second individual was Mr Shearer. He was a second in charge officer, which was essentially a depute supervisor, which required training (and was not a role the claimant could do). Mr Shearer left around August 2019.

161. The third officer was Mr Wheeler who was also a second in charge officer. He left around February 2019.

162. The fourth officer was Ms Jones who left the respondent's employment around February 2020.

163. When these individuals left the respondent's employment, they were not replaced. Their roles were covered by relief officers due to the uncertainty in demand from the respondent's client and the fluctuating requirements. There was insufficient work to fill the vacancies with core roles as the respondent relied upon flexibility of resource, there being insufficient work to justify permanent core role replacement.

164. From March 2020 the effect of the pandemic was such that relief officers were being relied upon to cover absence. There was no requirement for permanent core roles during the pandemic with the respondent relying upon relief roles given the fluctuating and uncertain demands for security officers. It was not possible due to the nature of the respondent's business and the client demands to offer a permanent core role to the claimant nor to create such a role.

Claimant appeals

165. By email dated 1 June 2020 the claimant appealed against his dismissal. The grounds for his appeal were: "Mr McLaren's handling of this matter and stress caused". He stated that at the first meeting Mr McLaren had asked the claimant to resign three times and threatened that when occupational health found him fit for work, what would he do then? The claimant said he was intimidating. He had no interest in the claimant's well-being and was informed at an early stage that work patterns and less hours were necessary for his mental and physical health. The response was to offer a mobile job with less pay and more hours.

166. The appeal letter stated that the occupational health report's advice stated that he could have a phased return. While Mr McLaren had initially been supportive at the meeting on 15 May 2020 saying he would look at finding work to suit, on 20 May he had referred to dismissal. The claimant had said there was no rush as keeping him on the books cost the company nothing and was not prepared to give up his contractual rights. Insufficient time had been given to consideration of the matter.

167. On 3 June 2020 the national operations manager acknowledged the claimant's appeal and confirmed he would be in touch to arrange an appeal meeting. He also enclosed the grievance policy as the claimant had indicated that he wished to lodge a grievance too.

Grievance lodged

168. On 10 June 2020 the claimant lodged a grievance. He stated that he began working for the respondent on 25 May 2018 as a relief security guard on a 42 hour per week contract, though he said he worked between 50 and 72 hours a week.

169. He said that for 2 months he worked 12 hours shifts alternating between day and night and on different sites and was always on call. "These shift patterns coupled with not knowing where or when I was working in advance eventually took its toll and my disrupted sleep pattern led me to becoming anxious and stressed". He said he spoke to his line manager and explained he needed to know his shift patterns and was doing too many hours. He had asked for a core position as that would give him advance notice of where and when he was working and days off so he could plan a year in advance. The claimant said at the time there were no positions available but at the end of August there were to be big changes and things would be sorted.

170. In early September 2018 the claimant said he spoke to his line manager and was told to take over a core position while someone was on long term sickness which would give him time to identify an alternative. This continued until December when the employee returned and the claimant was told to

cover another core position during absence and that a core position would be considered.

171. At the end of March 2019 the claimant again spoke to his manager and said he had something in mind and would sort it with Mr McLaren. When the rota was issued the claimant believed he had been put back to a relief position. He could not contact his line manager and felt low, stressed and anxious. He contacted his doctor who advised the claimant was not fit for work due to stress.

172. The claimant stated that he did not receive any support when off work but when he contacted Ms Cleary she was supportive and tried to offer positive solutions and arranged a meeting with Mr McLaren for July 2019. When the claimant arrived at the meeting in July Ms Cleary was not present.

173. The claimant stated that during the meeting Mr McLaren was intimidating and asked him to resign 3 times and that as he did not have an offer of a core position in writing there was nothing he could do. He said that Mr McLaren indicated it was only he who could decide to create core positions. The claimant said he was threatened with occupational health. The claimant said he would go with the advice of his GP and that Mr McLaren was not happy. "After around an hour or so he ran out of rants and the meeting was over".

174. The grievance letter stated that the next day details of a job had been given to him which involved longer hours for less pay. As he wanted less hours and a stable work pattern the position was not acceptable. That was the last contact from Mr McLaren until occupational health was brought in whose report advise that a phased return after several months would be beneficial.

175. The claimant said that the meeting on 15 May 2020 seemed positive and alternative positions would be sought but 2 working days later "the real Mr McLaren was back". The letter said: "HR had instructed him to dismiss me". The claimant said when he offered to remain on the books, and not cost the respondent money. The only offer was to give up his contract and become a zero hours employee, which was refused by the claimant.

176. The claimant said that Mr McLaren had constructed a scenario whereby it seemed as though he was giving support knowing that dismissal would follow. He said this was constructive dismissal and the company had failed him by disregarding advice of occupational health and failed in their duty of care, best practice "and disability confidence". "Their actions gave no consideration to the Equalities Act 2010".

177. On 11 June 2020 the national operations manager sent a letter to the claimant stating that a grievance meeting had been arranged for 16 June 2020.

178. The claimant contacted ACAS and commenced early conciliation on 11 June 2020.

Grievance hearing 23 June 2020

179. On 23 June 2020 a grievance hearing took place with the claimant and his companion, with Mr Maybury, Protective Services Branch Manager with an HR Business Partner present to take notes. Mr Maybury noted that there was a grievance and an appeal. The claimant explained that he was confused between a grievance and appeal and thought they were all connected as procedures had not been followed. He confirmed that he had appealed against his dismissal.

180. The claimant was told that the appeal would be dealt with separately and the focus would be on his grievance. The claimant explained that his grievance was that he had been working long and irregular shifts for 2 months which took a roll on his health and made him stressed. He asked his line manager for regular shifts. He wanted core hours. At the time there were no vacancies but he was told things would change by August and that his manager would look for a permanent role. This carried on until December and then until end of March when a rota was issued. The claimant was not happy as he had been returned to a relief role and got stressed about it. He told his doctor who told him to take time off. He then spoke to Ms Cleary who had helped but she was not present at the welfare meeting at which Mr McLaren asked the claimant to resign three times. The claimant said it was supposed to be a

welfare meeting but was ”outrageous”. He had been offered an alternative role but it was for more hours and less money.

181. The claimant accepted that he was on a 42 hour relief officer contract and that he had been told he did not need to work beyond his 42 hours but the claimant did not consider that helpful. While they offered occupational health the claimant considered Mr McLaren to be unsympathetic and intimidating. He believed he had stood up and asked him to resign.

182. The claimant said there were opportunities after the meeting where he could have offered a core position since at least 3 people had left though ill health or retirement. During those 3 times the claimant said he should be offered a position. He believed they were core positions in Govan and Scotstoun. These were roles of people off sick and he believed he should have been considered right away for them. He believed the roles were “Mel, Dougie and Norman”.

183. The claimant explained that he had offered to remain on the books for a few months. Mr Maybury asked if after that time and there were no core positions would the claimant be in the same place and he said that was why time should have been given.

184. Mr Maybury explained that this was stepping into the dismissal appeal territory. The claimant said that Ms Cleary had talked about reduced hours and working day shifts but Mr McLaren did not offer a phased return or core position. It was about resigning.

185. The claimant explained that they were supposed to be looking for a core position but did nothing. The claimant said he felt as if they “just kept dangling a carrot. If they just told me there would be nothing after the 2 months then ok.” He explained that he had been covering core shifts but kept being reminded he was a relief officer and was stressed out.

Grievance investigation

186. Mr Maybury interviewed Ms Carlin on 30 June 2020. Ms Carlin denied that Mr McLaren had ever been intimidating. Her view was that Mr McLaren always

made people feel comfortable as he understands how stressful it can be for people. At no point did she see Mr McLaren stand up. The only time resignation was mentioned was about the claimant not getting a core position and the claimant had said he did not resign in August.

187. Mr Maybury also interviewed Ms Cleary on 30 June 2020. She explained that she had empathised with the claimant as he had been unable to perform a relief role and that other positions would be considered. The nature of the relief role was discussed. She told Mr Maybury that core roles rarely arise and relief officers cover absence of core roles. The claimant had effectively been working core hours when he covered but he preferred Govan to Scotstoun. The claimant did not want a relief role. The core roles arose rarely. She explained that the company had offered him fair alternatives. The claimant's line manager was very good at identifying the best shift patterns for his workers as he wants to retain then.

188. Mr Maybury also interviewed Mr McLaren on 1 July. Mr McLaren denied being intimidatory. He explained that resignation was mentioned as he had said he would have resigned in August had he known there were no alternative roles and nothing had changed. Mr McLaren believed he had done all he could to support the claimant, such as allow him his companion (who was a friend and not technically permitted in terms of the policy).

189. Mr McLaren explained that there were no core positions available. The core officers that left were positions that were never filled. There are around 70 officers and relief is dedicated to that site – Govan and Scotstoun. Relief officers are engaged to cover both sites. They are given 42 hours a week. It is a relief officer role and they cover both Govan and Scotstoun.

190. Mr McLaren explained that 2 core officers left between July and September 2019. One was a supervisor and the second in charge stepped up and the other was covered by a relief officer. He had not contacted the claimant as he did not wish to exacerbate his condition. Mr McLaren explained he only found out about the claimant's condition when he received the occupational health report at the end of April 2020.

191. When the 2 core officers left they were replaced by relief officers. This was because the customer had fluctuating demands which could change on a monthly basis and was better covered by relief officers.

192. Mr McLaren explained that Govan and Scotstoun are about 10 minutes drive from each other and he had taken HR guidance and conducted a welfare meeting.

193. The claimant had been offered 4 months of work on the same ship but declined. His line manager had said he would try and sort him out by giving him stability which the claimant interpreted as meaning he would be given a core role but that was not offered by his line manager.

194. Mr Maybury had tried to speak with the claimant's companion but he did not wish to participate in the process.

Outcome of grievance

195. On 7 July 2020 Mr Maybury wrote to the claimant noting his concerns were that Mr McLaren had been intimidating, core officer roles had not been offered to him and he did not get the minutes in a reasonable time. Although other matters were covered they were better dealt with in the appeal against dismissal.

196. With regard to the complaint that Mr McLaren had been intimidating, had stood up and asked the claimant to resign 3 times, Mr Maybury explained he had spoken to those who had witnessed the behaviour and the complaint had not been established. Reference was made to resignation because that was what the claimant had said he would have done at the time had he known there were no positions. That allegation was not upheld.

197. With regard to there being other core positions that were not offered to the claimant, the core officers that left were not replaced by core officers but due to customer demands were replaced by relief officers. The flexibility of hours was key to this decision.

198. Mr Maybury noted that the claimant had been offered a stable shift pattern in 2019 for 4 consecutive months but that was refused by the claimant. In the absence of any other core positions, the allegation was not upheld.

199. The final grievance about not receiving minutes timeously was not upheld.

200. The claimant was given the right to appeal.

Appeal made and then withdrawn

201. By letter of 8 July 2020 the claimant stated that he wished to appeal. He said that Mr Maybury "tried to twist the facts and has not listened to what had been said and done at each stage of the meetings". He stated that he hoped to take matters to a Tribunal.

202. On 17 July 2020 an Area Director of the respondent wrote to the claimant to fix an appeal meeting in relation to the grievance which was to take place on 20 July.

203. On 29 July Mr Austin, HR adviser emailed the claimant noting that he did not attend for his appeal meeting and asked if he still wished to appeal in which case another meeting would be arranged.

204. The claimant replied on 30 July saying that he no longer wished to appeal. The claimant confirmed on 17 August 2020 that he also no longer wished to appeal against his dismissal. The claimant had secured legal advice and given he no longer wished to return to work, he decided (with the benefit of legal advice) that he would not appeal.

205. On 13 August 2020 the claimant raised his claim.

206. Following the claimant's dismissal, his medication remained the same as it had been during his employment.

Earnings and mitigation

207. While working for the claimant he had earned £9.54 gross per hour (which was the rate used to calculate his notice pay and was not challenged by the

claimant) and worked a contractual minimum of 42 hours per week, with overtime available if he wished to work it. He was aged 58 at the date of dismissal.

208. The claimant had and continues to have his SIA licence to allow him to be a security officer but his driving licence had been suspended. The claimant applied for around 9 roles but had been unsuccessful.

209. From 24 December 2020 the claimant contracted long COVID which resulted in him being unfit to work. His health deteriorated in May 2021 when he suffered a seizure. The cause is being investigated but could be diabetes. It is unclear when the claimant will return to fitness that would allow him to return to work.

210. In terms of his contract with the respondent, his entitlement to sick pay had been exhausted by the date of his dismissal.

Benefits

211. The claimant was in receipt of Employment Support Allowance following his dismissal.

Observations on the evidence

212. We found each of the witnesses generally to be credible. They did their best to recollect the position.

213. The claimant was absolutely clear that he believed he had been promised a core role and the failure to offer him that role resulted in him feeling let down. He said he would have resigned had the respondent been straight with him. It was clear, as Mr McLaren admitted, there had been a breakdown in communication. We found that Mr Maini had not offered the claimant a core role but had tried to support the claimant not least by suggesting he would do his best to help him. That was interpreted by the claimant to mean he would be given a permanent core role but that was not what was said or meant.

214. As the claimant believed he was to be given a core role, when that did not materialise he considered that the respondent had misled him and was seeking to dismiss him. In fact the respondent valued the claimant and wanted him to return to work but given the prevailing circumstances there were no core roles available.

215. We found Mr Maini did his best to recollect matters. While there were some areas where he had changed his position, we found this was due to his recollection rather than any desire to mislead the Tribunal. Mr Maini was clear in wanting to help the claimant and assist him in his return to work but Mr Maini clearly became frustrated when the claimant did not accept what Mr Maini considered to be reasonable attempts to help him resolve the difficulties he had. Mr Maini genuinely believed that the claimant wanted a core role or would remain absent. That was in fact likely to have been the case from the facts.

216. Ms Cleary was clear and consistent in her approach. Again while her oral evidence supplemented in some respects the evidence in her witness statement, she was not attempting to mislead the Tribunal but ensure a fulsome account was given of the position.

217. The same applied to Mr McLaren who was generally clear and consistent. He wanted to help the claimant return to work but absent a core role nor any suggestion by the claimant as to alternatives to the relief role that he would accept, there was little more he could do.

218. There were few material factual conflicts that we required to resolve for the purposes of determining the issues but the first issue was whether the claimant said he was suffering from chronic fatigue syndrome when he spoke with Mr Maini in 2018. The claimant said he had told Mr Maini this but this was not something Mr Maini said was mentioned as he would have dealt with it given his wife has it. We found Mr Maini's evidence on this point to be more likely than not to be the case. We found that it was likely that the claimant would have said that he was stressed out rather than making specific mention of chronic fatigue syndrome. There were no other references to this by the

claimant and at the time it was not clear what the medical position was given the tests the claimant was undergoing.

219. We also preferred Mr Maini's evidence to the claimant with regard to the claimant's suggestion that he had been promised a core role. While the claimant believed that Mr Maini had essentially promised him a core role in July 2018 that was not what he had been told. Mr Maini had wanted to persuade the claimant to remain in post and not to proceed with his resignation as the claimant initially suggested. Mr Maini was keen to support the claimant and noted that there may be changes to the business in the coming months which the clamant took to mean that a core role would be found for him. That was not something Mr Maini said as he did not know what the future held and it was unlikely that any such roles would become available (and there was therefore no reason for him to make any undertaking in that regard to the claimant). The day to day operations were a matter for Mr Maini and not Mr McLaren. We did not find it more likely than not that Mr Maini had said to the claimant that he would speak to Mr McLaren to try and find him a core role. That was not a matter for Mr McLaren and there were no core roles available. It was a matter for Mr Maini to determine as it was his site. Mr McLaren was clear in that Mr Maini had not asked him about a core role for the claimant, which is consistent with Mr Maini's position.

220. With regard to the claimant's discussion with Ms Cleary in early July 2019, we accepted the evidence of Ms Cleary that during the call in July 2019 the claimant did not refer to fibromyalgia. He referred to the relief role causing him stress. We accepted Ms Cleary's evidence that the first she became aware of fibromyalgia was when she read the occupational health physician's report. That was, to us, more likely than not, from the facts before us to be what happened. The claimant did not mention fibromyalgia to anyone else nor the specific medical position, and throughout his discussions he was always clear (as was his GP) to refer only to stress.

Law

221. The relevant legal principles can be summarised as follows.

Unfair Dismissal

222. The unfair dismissal claim was brought under Part X of the Employment Rights Act 1996. Section 98(1) places the burden on the employer to show the reason or principal reason for the dismissal and that it is one of the potentially fair reasons identified within Section 98(2), or failing that some other substantial reason.

223. The potentially fair reasons in Section 98(2) include a reason which:-

> "relates to the capability or qualifications of the employee for performing work of a kind which he was employed by the employer to do".

224. Section 98(3) goes on to provide that "capability" means capability assessed by reference to skill, aptitude, health or any other physical or mental quality.

225. Where the respondent shows that dismissal was for a potentially fair reason, the general test of fairness appears in Section 98(4):

> "…the determination of the question whether the dismissal is fair or unfair (having regard to the reasons shown by the employer) –
>
> (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
>
> (b) shall be determined in accordance with equity and the substantial merits of the case".

226. It has been clear ever since the decision of the Employment Appeal Tribunal ("EAT") in **Iceland Frozen Foods Limited -v- Jones** 1982 IRLR 439 that the starting points should be always the wording of Section 98(4) and that in judging the reasonableness of the employer's conduct a Tribunal must not

substitute its decision as to what was the right course to adopt for that of the employer. In most cases there is a band of reasonable responses to the situation and a Tribunal must ask itself whether the employer's decision falls within or without that band. This approach was endorsed by the Court of Appeal in **Post Office –v- Foley; HSBC Bank Plc –v- Madden** 2000 IRLR 827.

227. The application of this test in cases of dismissal due to ill health and absence was considered by the EAT in **Spencer –v- Paragon Wallpapers Limited** 1976 IRLR 373 and in **East Lindsey District Council –v- Daubney** 1977 IRLR 181. The **Spencer** case establishes that the basic question to be determined when looking at the fairness of the dismissal is whether, in all the circumstances, the employer can be expected to wait any longer, and if so how much longer. Matters to be taken into account are the nature of the illness, the likely length of the continuing absence, and the overall circumstances of the case. In **Daubney**, the Employment Appeal Tribunal made clear that unless there were wholly exceptional circumstances, it is necessary to consult the employee and to take steps to discover the true medical position before a decision on whether to dismiss can properly be taken. However, in general terms where an employer has taken steps to ascertain the true medical position and to consult the employee before a decision is taken, a dismissal is likely to be fair.

228. The Employment Appeal Tribunal considered this area of law in **DB Shenker Rail (UK) Limited –v- Doolan** UKEATS/0053/09/BI). In that case the Employment Appeal Tribunal (Lady Smith presiding) indicated that the three stage analysis appropriate in cases of misconduct dismissals (which is derived from **British Home Stores Limited –v- Burchell** 1978 IRLR 379) is applicable in these cases. The Court of Session in November 2013 decided **BS v Dundee City Council 2014 IRLR 131** in which at dismissal the employee had been off sick for about 12 months (after 35 years' service) with a fit note for a further four weeks. The Court reviewed the earlier authorities and said this at paragraph 27:

> "Three important themes emerge from the decisions in Spencer and Daubney. First, in a case where an employee has been absent from work for some time owing to sickness, it is essential to consider the question of whether the employer can be expected to wait longer. Secondly, there is a need to consult the employee and take his views into account. We would emphasize, however, that this is a factor that can operate both for and against dismissal. If the employee states that he is anxious to return to work as soon as he can and hopes that he will be able to do so in the near future, that operates in his favour; if, on the other hand he states that he is no better and does not know when he can return to work, that is a significant factor operating against him. Thirdly, there is a need to take steps to discover the employee's medical condition and his likely prognosis, but this merely requires the obtaining of proper medical advice; it does not require the employer to pursue detailed medical examination; all that the employer requires to do is to ensure that the correct question is asked and answered."

Jurisdiction of discrimination claims

229. The complaints of disability discrimination were brought under the Equality Act 2010. By section 109(1) an employer is liable for the actions of its employees "in the course of employment".

Burden of proof

230. The Equality Act 2010 provides for a shifting burden of proof. Section 136 so far as material provides 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."

231. The section goes on to make it clear that a reference to the Court includes an Employment Tribunal.

232. It is for a claimant to establish facts from which the Tribunal can reasonably conclude that there has been a contravention of the Act. If the claimant establishes those facts, the burden shifts to the respondent to show that there has been no contravention by, for example, identifying a different reason for the treatment.

233. In **Hewage v Grampian Health Board** 2012 IRLR 870 the Supreme Court approved guidance previously given by the Court of Appeal on how the burden of proof provision should apply. That guidance appears in **Igen Limited v Wong** 2005 ICR 931 and was supplemented in **Madarassy v Nomura International plc** 2007 ICR 867. Although the concept of the shifting burden of proof involves a two stage process, that analysis should only be conducted once the Tribunal has heard all the evidence, including any explanation offered by the employer for the treatment in question.

234. However, if in practice the Tribunal is able to make a firm finding as to the reason why a decision or action was taken, the burden of proof provision is unlikely to be material.

235. It was confirmed by Lord Justice Mummery in the Court of Appeal that it is not always necessary to address the two-stage test sequentially (see **Brown v London Borough of Croydon** 2007 ICR 909*)*. Although it would normally be good practice to apply the two-stage test, it is not an error of law for a tribunal to proceed straight to the second stage in cases where this does not prejudice the claimant. In that case, far from prejudicing the claimant, the approach had relieved him of the obligation to establish a *prima facie* case.

236. In this case the Tribunal has been able to make positive findings of fact without resort to the burden of proof provisions.

Discrimination arising from disability

237. Section 39(2)(c) of the Equality Act 2010 prohibits discrimination against an employee by dismissing him. Section 15 of the Act reads 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".

238. Paragraph 5.6 of the Equality and Human Rights Commission Code of Practice ("the Code") provides that when considering discrimination arising from disability there is no need to compare a disabled person's treatment with than of another person. It is only necessary to demonstrate that the unfavourable treatment is because of something arising in consequence of the disability.

239. In order for the claimant to succeed in his claims under section 15, the following must be made out:

(a) there must be unfavourable treatment (which the Code interprets widely saying it means that the disabled person 'must have been put at a disadvantage' (see para 5.7)).

(b) there must be something that arises in consequence of the claimant's disability;

(c) the unfavourable treatment must be because of (i.e. caused by) the something that arises in consequence of the disability;

(d) the alleged discriminator cannot show that the unfavourable treatment is a proportionate means of achieving a legitimate aim

(e) Useful guidance on the proper approach was provided by Mrs Justice Simler in the well-known case of **Pnaiser v NHS England** 2016 IRLR 170:

"A Tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises. The Tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a s.15 case. The "something" that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it."

240. Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and the respondent's motive in acting as he or she did is simply irrelevant.

241. There are two causation issues. Firstly, the unfavourable treatment must be "because of something" which gives rise to the same considerations as in direct discrimination with the focus on the alleged discriminator's reasons for the treatment (**Dunn v Secretary of State** 2019 IRLR 298). The Tribunal must identify what the reason was, the reason being a substantial or effective reason, not necessarily the sole or intended reason.

242. Secondly the "something" must more than trivially influence the treatment but it need not be the sole or principal cause (**Hall v Chief Constable** 2015 IRLR 893 and **Pnaiser** above). It is enough if the unfavourable treatment is the cause of the something (irrespective of whether the respondent knew the

something arose as a consequence of the disability – **City of York v Grosset** 2018 EWCA Civ 1105). This is a matter of objective fact decided in light of the evidence (**Sheikholeslami v University of Edinburgh** 2018 IRLR 1090 and **Risby v London Borough of Waltham** UKEAT/0318/15/DM) and there may be a number of links in the chain and more than one relevant consequence may need consideration.

244. Paragraph 5.8 of the Code notes that "there must be a connection between whatever led to the unfavourable treatment and the disability".

245. The fundamental matter for the tribunal to determine is therefore the reason for the impugned treatment (see **Cummins Ltd v Mohammed** UKEAT/39/20). We have applied the reasoning of HHJ Tayler in this aspect of the claim.

246. As to justification, in paragraph 4.27 the Code considers the phrase "a proportionate means of achieving a legitimate aim" (albeit in the context of justification of indirect discrimination) and suggested that the question should be approached in two stages:-

- is the aim legal and non-discriminatory, and one that represents a real, objective consideration?
- if so, is the means of achieving it proportionate – that is, appropriate and necessary in all the circumstances?

247. As to that second question, the Code goes on in paragraphs 4.30 – 4.32 to explain that this involves a balancing exercise between the discriminatory effect of the decision as against the reasons for applying it, taking into account all relevant facts. It goes on to say the following at paragraph 4.31:-

> "*although not defined by the Act, the term "proportionate" is taken from EU directives and its meaning has been clarified by decisions of the CJEU (formerly the ECJ). 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 [unfavourable treatment] is the only possible way of achieving a legitimate aim; it is sufficient that the same aim could not be achieved by less discriminatory means."

248. The Code at paragraph 4.26 states that *"it is for the employer to justify the provision, criterion or practice. So it is up to the employer to produce evidence to support their assertion that it is justified. Generalisations will not be sufficient to provide justification. It is not necessary for that justification to have been fully set out at the time the provision criterion or practice was applied. If challenged, the employer can set out the justification to the Employment Tribunal."*

249. In ***Chief Constable v Homer*** 2012 ICR 704 Baroness Hale stated that to be proportionate a measure has to be both an appropriate means of achieving the legitimate aim and reasonably necessary in order to do so. She approved earlier authorities which emphasised the objective must correspond to a real need and the means used must be appropriate with a view to achieving the objective and be necessary to that end. It is necessary to weigh the need against the seriousness of the detriment.

250. The question is whether the action is, objectively assessed, a proportionate means to achieve a legitimate end. The employer has to show (and the onus is on the employer to show) that the treatment is a proportionate means of achieving a legitimate aim. The Tribunal can take account of the reasonable needs of the respondent's business but the Tribunal must make its own judgment as to whether the measure is reasonably necessary. There is no room for the range of reasonable response test.

251. The Tribunal is required to critically evaluate, in other words intensely analyse, the justification set out by the employer. The assessment is at the time the measure is applied and on the basis of information known at the time (even if the employer did not specifically advert to the justification position at that point). Flaws in the employer's decision-making process are

irrelevant since what matters is the outcome and now how the decision is made.

252. There must firstly be a legitimate aim being pursued (which corresponds to a real need of the respondent), the measure must be capable of achieving that aim (ie it needs to be appropriate and reasonably necessary to achieve the aim and actually contribute to pursuit of the aim) and finally it must be proportionate. The discriminatory effect needs to be balanced against the legitimate aim considering the qualitative and quantitative effect and whether any lesser form of action could achieve the legitimate aim.

253. Chapter 5 of the Code contains useful guidance in applying the law in this area and we have had regard to that guidance.

Reasonable Adjustments

222. Section 39(5) of the Equality Act 2010 provides that a duty to make reasonable adjustments applies to an employer. Further provisions about that duty appear in sections 20 and 21 and Schedule 8. This is considered in chapter 6 of the Code. That paragraph states: “A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know, … that an interested disabled person has a disability and is likely to be placed at the disadvantage”.

223. Therefore the duty does not apply if the employer did not know, and could not reasonably be expected to know that the employee had a disability and was likely to be placed at the disadvantage in question by the PCP (Schedule 8 paragraph 20) (for which see **Wilcox v Birmingham CAB** 2011 EqLR 810).

224. An employer will be taken to know of the disability if it is aware of the impairment and the consequences. There is no need to be aware of the specific diagnosis. If an employer has no actual knowledge of the disability, the Tribunal must consider whether there was constructive knowledge, namely, whether the employer ought to have known of the disability from the facts before the employer at the time (**McCubbin v Perth** UKEATS/25/13).

225. If the employer did not know of the disability (or ought not reasonably to have known) the duty to make reasonable adjustments it not engaged. The same applies if the employer did not know, or could not reasonably have known, of the alleged substantial disadvantage.

226. The Court of Appeal in **Gallop v Newport City Council** 2014 IRLR 211 said that it is essential for a reasonable employer to consider whether an employee is disabled, and form their own judgment. In that case the employer relied on advice from Occupational Health that the claimant was not 'covered' by the Equality Act 2010, and had then unquestioningly adopted that unreasoned opinion. Whilst ordinarily an employer will be able to rely on suitable expert advice, this cannot displace their own duty to consider whether their employee is disabled, and it is impermissible simply to rubber stamp a proffered opinion.

227. In **Donelien v Liberata UK Ltd** 2018 IRLR 535, Underhill LJ emphasised that an unquestioning reliance on an unreasoned report will not prevent a finding of constructive knowledge.

228. The Employment Appeal Tribunal considered this issue in **Kelly v Royal Mail Group Ltd** UKEAT/0262/18 which emphasised that it is not sufficient for an employer merely to rubber-stamp in that case the medical advisors' report and that it must make his own factual judgment as to whether the employee is disabled. The respondent in that case gave independent consideration to the matter rather than unquestioningly following Occupational Health reports. It was relevant to note that from the information available to the employer from the claimant, there had been no suggestion from the claimant that there was any adverse effect on his day-to-day activities and there was nothing to alert the claimant's managers to the need to look behind the conclusions of the information they had obtained. In light of all the information available to the employer, this is not a case where it could be said that they had knowledge that the claimant has a disability. Particular consideration was given to the lack of any evidence that the claimant's condition was likely to be long-term and/or that it had an adverse effect on his day-to-day activities.

229. When **Gallop** was remitted to the Tribunal it was unsuccessful because the decision maker did not in fact have knowledge of disability and that was upheld by the Employment Appeal Tribunal in **Gallop v Newport City Council (No 2)** 2016 IRLR 395.

230. The question of whether an employer could reasonably be expected to know of a person's disability is a question of fact for the Tribunal (**Jennings v Barts and The London NHS Trust** UKEAT/0056/12*)*. In that case the Employment Appeal Tribunal suggested that an employer should concentrate on the impact of the impairment, not on any particular diagnosis.

231. Langstaff P in **Donelien v Liberata UK Ltd** UKEAT/0297/14 *(*affirmed by the Court of Appeal 2018 IRLR 535) warned that when considering whether a respondent 'could reasonably be expected to know' of a disability, it is best practice to use the statutory words rather than a shorthand such as 'constructive knowledge' as this might imply an erroneous test. The burden is on the employer to show it was unreasonable to have the required knowledge.

232. The importance of a Tribunal going through each of the constituent parts of section 20 was emphasised by the Employment Appeal Tribunal in **Environment Agency v Rowan** 2008 ICR 218 and reinforced in **Royal Bank of Scotland v Ashton** 2011 ICR 632.

233. As to whether a “provision, criterion or practice” (“PCP”) can be identified, the Code at paragraph 6.10 says the phrase is not defined by the Act but “should be construed widely so as to include for example any formal or informal policy, rules, practices, arrangements or qualifications including one off decisions and actions”. The question of what will amount to a PCP was considered by the Employment Appeal Tribunal in **Nottingham City Transport Limited v Harvey** UKEAT/0032/12 in which the President Mr Justice Langstaff (dealing with a case under the Disability Discrimination Act 1995 and the Disability Rights Commission’s Code of Practice from 2004, both now superseded by the provisions summarised above) said of the phrase “provision, criterion or practice” in paragraph 18: “Although those words are to be construed liberally, bearing in mind that the purpose of the statute is to eliminate discrimination

against those who suffer from a disability, absent provision or criterion there still has to be something that can qualify as a practice. "Practice" has something of the element of repetition about it. It is, if it relates to a procedure, something that is applicable to others than the person suffering the disability. Indeed, if that were not the case, it would be difficult to see where the disadvantage comes in, because disadvantage has to be by reference to a comparator, and the comparator must be someone to whom either in reality or in theory the alleged practice would also apply. These points are to be emphasised by the wording of the 1995 Act itself in its original form, where certain steps had been identified as falling within the scope to make reasonable adjustment, all of which, so far as practice might be concerned, would relate to matters of more general application than simply to the individual person concerned."

234. This was applied in **Ishola v Transport for London** [2020] EWCA Civ 11, LJ Simler, whose reasoning we have applied. It is possible for a PCP to be a "one off" provided it has the character of a PCP, in other words it could be something the employer might well adopt as a PCP. Just because it has not been applied before does not, by itself, mean it is not a PCP.

235. For the duty to arise, the employee must be subjected to "substantial disadvantage in comparison to a person who is not disabled" and with reference to whether a disadvantage resulting from a provision, criterion or practice is substantial, section 212(1) defines "substantial" as being "more than minor or trivial". The question is whether the PCP has the effect of disadvantaging the disabled person more than trivially in comparison to those who do not have the disability *(***Sheikholeslami v University of Edinburgh,** 2018 IRLR 1090*).*

236. The obligation to take such steps as it is reasonable to have to take to avoid the disadvantage is one in respect of which the Code provides considerable assistance, not least the passages beginning at paragraph 6.23 onwards. A list of factors which might be taken into account appears at paragraph 6.28 and includes the practicability of the step, the financial and other costs of making

the adjustment and the extent of any disruption caused, the extent of the employer's financial or other resources and the type and size of the employer.

237. Paragraph 6.29 makes clear that ultimately the test of the reasonableness of any step is an objective one depending on the circumstances of the case. Examples of reasonable adjustments in practice appear from paragraph 6.32 onwards. Paragraph 17.8 to 17.12 discusses working hours and how adjusting hours of work can be a reasonable adjustment in some cases.

Submissions

238. Both parties made detailed submissions which are detailed below. The claimant's agent made oral submissions and the respondent's agent provided written submissions which the claimant's agent had considered. His oral submissions provided the claimant's response to each of the issues arising. The respondent's agent also had the opportunity to respond to the claimant's agent's submissions too. We have taken into account the full submissions from the parties and refer to these, as appropriate, below.

Submissions for claimant

Section 15 claim

239. The claimant's agent stated that the parties had agreed that the claimant had become a disabled person by 15 April 2020 which was the date the Occupational Health physician's report was produced. It had also been agreed that the respondent had actual knowledge of disability by 15 May 2020.

240. The claimant's agent noted that each of the claims arise from around this time since the issues are essentially predicated up on the dismissal (and the application of the PCPs at the time of dismissal or at least when the respondent was considering dismissal). It was therefore submitted that no issues as to knowledge of disability arise.

241. The claimant's agent noted that it was necessary to prove the absence was in consequence of his disability, the fibromyalgia relied upon. The claimant's agent noted that the decision maker, Mr McLaren, had read the occupational health physician's report and this had analysed the interplay between the disability and its psychological consequences. That, it was submitted, was the sole reason for the claimant's absence, the disability.

242. Therefore from 15th April 2020 the decision maker knew of the disability and the psychological consequences. The claimant had suffered stress and therefore the link had been established. It was submitted that fibromyalgia causes psychological manifestations such as absence from work because of stress and pins and needles and unable to sleep. That is what the report said. The claimant's agent said that any idea the respondent believed that the claimant's stress was unrelated to fibromyalgia was "nonsense" as they knew it from the report.

243. It was obvious that the claimant's disability was directly connected to his long term sickness absence and the respondent knew it.

244. The claimant's agent also submitted that the respondent clearly used long term absence as the reason to dismiss the claimant which was a detriment, unfavourable treatment.

245. While the respondent says the claimant did not accept the alternative roles, there were good reasons for the claimant's actions. No reasonable employer would have offered such roles given the terms of the respondent's own occupational health report. A reasonable employer would offer nothing other than regular hours and a regular shift pattern. It was "ridiculous" to offer a zero hours contract which was akin to "offering a blind employee the opportunity to man the lighthouse".

246. The claimant's disability caused his absence which in turn led to the two meetings in May and the claimant's dismissal.

247. The claimant's agent argued that there was no justification. He submitted that there was no evidence to justify the dismissal. No evidence had been led

about this. If the aim was to fulfil contractual obligations to customers to cover hours and plan workforce effectively dismissal of the claimant did not achieve that aim since it cost nothing to keep the claimant on the books. There were no additional costs and no additional management time was needed.

248. Further, how was the perceived goal of fulfilling contractual obligations to customers and to be able to plan workforce affected by dismissing the claimant?

249. In any event dismissal was not a proportionate means of achieving such an aim since dismissing the claimant did not make any difference whatsoever.

Reasonable adjustment claim

250. The claimant's agent submitted that the key point here was the PCP. The claimant's agent referred to Simler J's judgment in **Ishola** (see paragraph 38 and 39) which noted that a "practice" can be something that has not happened before provided that it could be repeated. A PCP does not need to have been applied to anyone else provided there was some indication that it would be done again in the future.

251. The claimant's agent also noted that consideration should be given to the evidence before the Tribunal. The Policy which had been discussed in evidence related to sickness absence but this had not been followed as the line manager had not been the person who steered the procedure. It was clear that even the long term absence section had not been followed.

252. It is unclear what policy was being followed given the nature of the paperwork and even Ms Cleary had failed to raise any concerns despite knowing the policy was not followed. It had emerged that the HR adviser had been involved, micro managing the respondent every single step of the way.

253. It was argued that the evidence was inconsistent and in some ways extraordinary such that Mr McLaren eventually argued that it was the claimant's fault he did not say he would have accepted the relief role with adjustments. He didn't have answers to many of the points put to him.

254. The policies applied were clear and as set out in the ET1. These were policies which were unwritten. It was clear that Mr McLaren was in constant conversation with his HR adviser even although he said it was his decision. It was not credible that there were no written communications. It was clear that in the absence of anything from the respondent, these policies were to be inferred.

255. The respondent had not led evidence from the HR adviser who was clearly at the hub of the process. There was no explanation for him not being led in evidence. HR were there at every stage in the dismissal process. Had he given evidence he could have set out what policy was followed but in the absence of that evidence the Tribunal should uphold the claims. The respondent had failed to clarify the issue. Mr McLaren's evidence was not to be believed.

256. The claimant's agent argued that the PCPs were applied to the claimant and they put the claimant and disabled people generally at a disadvantage since they were more likely to face disciplinary/dismissal sanctions.

257. The respondent had been unable to satisfactorily explain the position with regard to reasonable adjustments given the terms of the Equality and Human Rights Commission Code of Practice which highlights the factors that should be taken into account. One important issue was the effectiveness of the adjustment. It was obvious the adjustment would be effective if they found him a role that met his requirements. It would cost nothing and the respondent had significant resources and could afford it.

258. The adjustments claimed to have been reasonable were allowing a further period of leave for the respondent to be able to comply with the occupational health physician's recommendations, allow a further period of leave to facilitate circumstances when the claimant could have returned to work or to exercise discretion to allow further time to enable the claimant to return to work.

259. The claim for reasonable adjustments should be upheld.

Unfair dismissal claim

260. Given the foregoing it was submitted that this claim should be upheld given there had been unlawful disability discrimination. No reasonable employer would do what the respondent did. In particular no reasonable employer would dismiss when the occupational health report suggested adjustments could be made to retain the claimant in employment. No reasonable employer would suggest a zero hours contract as an alternative to dismissal. No reasonable employer would mechanistically apply their absence management procedure and allow dismissal to be driven by HR rather than the manager running the process.

261. At the very least the claimant should have been given another meeting to allow him to set out why dismissal should have been avoided. While the letter inviting him to a meeting set out the pathway for the discussion, a reasonable employer would have set up a separate meeting.

262. The dismissal was unfair.

263. With regard to remedy there could be no **Polkey** reduction as there was no misconduct of the claimant in evidence. He would not have been dismissed had a fair procedure been followed since he could have remained in a relief role with adjustments.

264. Compensation should be increased given the unreasonable failure of the respondent to investigate matters, thereby in breach of the ACAS Code. The investigation meeting with Mr McLaren took 21 minutes. It was not a necessary investigation but “21 minutes of box ticking”.

265. With regard to loss, it was accepted that the claimant was unfit for work from around Christmas 2020, thereby suffering 7 months loss of earnings valued at around £10,226 with pension loss of £279.16. Given the claimant had fallen ill he should get 2 week’s sick pay.

Respondent’s submission

266. The respondent's agent submitted that the context of the claims is important to understand the position properly. The claimant was formerly a taxi driver. He had no experience of security work. The claimant worked very hard and was committed. He was a good worker. From the facts it was argued that the claimant identified early on, within a couple of months, that relief security work was not for him. He didn't like the job and he wanted to resign.

267. In total the claimant worked for 8 months and had been absent for 13 months. Despite that the respondent wished to keep the claimant and believed he had a future. Steps were taken to look for core work. The rota was changed to accommodate the claimant and the work pattern was not dissimilar to what he had worked. It gave him structure.

268. In reality the claimant was not given "real" relief work, in the sense of last minute cover. He had been given a stable pattern with reasonable notice. He had worked on average 43.5 hours per week and not the 50 to 70 hours he had suggested. The claimant's description of his actual work was inconsistent with the reality. He went absent in April 2019 despite the adjustments that had been made. It was too stressful for him.

269. The claimant was asked what he wanted. He said it was regular work in the same location. It was the notion of being on call that caused him the most stress. But the core function of a relief officer is to be on call. If you are not on call you cannot be a relief officer. While the claimant suggested he would have gone for an adjustment to his relief role it was clear that in reality he was telling his employer that he could not do the relief officer work.

270. The claimant's length of service was relevant in assessing reasonableness. It was clear that the claimant did not want to be a relief officer. He wanted to be a core officer but there were no other roles available.

Unfair dismissal

271. It was submitted that the reason for the claimant's dismissal was capability on health grounds. The reason why the claimant was dismissed was because he was off on long term sickness and could not return to his role as a relief officer.

By 20 May 2020, the respondent did not have a date by which the claimant could return to work, having been off work at that point for over a year. The respondent's Occupational Health did not provide a date when the claimant could return to work and the Claimant stated in 15 May 2020 meeting, *"he feels he could return to work immediately if offered a core position"*

272. In the alternative, the respondent argued that the reason for dismissal was for some other substantial reason because the claimant was not prepared to accept suitable alternative roles offered to him. The respondent offered the Claimant a 4 month role within 2 months of the claimant going off sick. The claimant declined the role. Had the claimant accepted this role, it would have enabled him to have remained in employment. The claimant also refused another core role of Out of Hours Security Service Delivery Officer. As a final alternative the claimant could have taken on a casual contract that would have given him continuous service which was also a suitable alternative role, that would have enable the claimant to adjust his rota of work to suit himself in accordance with the work offered to him.

Reasonableness of dismissal

273. It was submitted that the claimant's dismissal was fair and within the range of reasonable responses and was not unreasonable.

274. In accordance with **BS v Dundee City Council**, the respondent obtained the most up to date medical information in respect of the claimant's absence by referring the Claimant to occupational health on 2 April 2020. The respondent considered the Occupational Health doctor's report, before making its decision to dismiss approximately a month or so later on 28 May 2020.

275. The respondent did have regard to all the factors espoused in **Spencer v Paragon Wallpapers Ltd** of the nature of the illness and the job; the applicability and clarity of an employer ill health policy; the needs and resources of the employer; the effect on other employees; the likely duration of the illness; how the illness was caused; the effect of sick-pay; alternative employment; and length of service.

276. The nature of the claimant's illness was "stress". That was brought about by the fact that the claimant did not like his role as a relief officer. This is what the claimant told his GP on 29 April 2019. The occupational health physician stated on 15 April 2020 *"Mr Campbell explained to me, that within a couple of months of taking the job, he spoke to his line manager as he found he was having difficulty coping with the irregular nature of the work."* The claimant told Mr McLaren at the meeting on 8 July 2019: "*I want to only continue if I am getting core. I don't like moving about and not knowing where I am going from one week to the next"* and also at the meeting on 15 May 2020: *"MC stated this was not his main reason for being on the LTS, it was due to the stress and anxiety of the relief role, no fixed shift pattern or hours etc…"*. The claimant also told Mr Maybury at his grievance hearing: "F*or 2 months I was working long hours and irregular shifts, eventually this took a toll on me. I become stressed[……] I finished my shift, phone my doctor. It stayed open for me he told me I was stressed and not to go back in, take some time off.."*

277. The claimant confirmed again and again that it was stress that was keeping him from attending work. The occupational health physician concluded in her report that the reason for his absence was due to psychological symptoms, rather than symptoms of his Fibromyalgia. It is clear that the claimant's psychological symptoms were not in any way related to the claimant's Fibromyalgia.

278. The claimant did not present any medical evidence that his disability of Fibromyalgia was worsened or acerbated by his relief officer role. In fact, all the medical evidence shows that there was no difference in the claimant's medication nor the dosage following the claimant going off work. Contrary to what the claimant asserted, the occupational health physician does not confirm that Claimant's assertion that his Fibromyalgia condition was worsened because of his stress.

279. It was notable that the claimant's GP did not sign the claimant off immediately when the claimant calls him on 29 April 2019 to complain of stress. Furthermore, neither does the claimant's GP recommend any treatment. The

symptoms the claimant complained of sore legs are symptoms the claimant first reported on 14 August 2017 before he started to work for the respondent and on 19 February 2018.

280. The respondent's sickness policy was clear, and it was applied fairly to the Claimant. The claimant was classed as an employee on long term absence and did not return to work. In those circumstances the part of the policy that applied to him, was the sections at the end of the policy headed *"Welfare Review meetings*" and "*Medical Capability Hearings (for Employee's with long term absence)"*.

281. The needs of the respondent were to ensure that the service provision was in accordance with the contract for security services with the customer and to ensure that their employees' contractual hours of work were met. Mr McLaren's evidence confirmed that the BAE systems contract was dynamic having peaks and troughs. The respondent needed to cover any core roles that became available through natural wastage with relief officers, to ensure it had the flexibility to match the peaks and troughs.

282. Furthermore, the respondent was under a contract to provide a certain number of hours to the customer and this included the claimant's hours of work. Thus, there was a necessity that someone carry out the work the claimant was employed to do, which was to cover the core officers. The fact that the claimant was not in the workplace put extra pressure on the claimant's work colleagues and other relief officers, who would have to cover the claimant's hours of work.

283. There were no core roles in the wider business and the respondent could not create core roles as this was subject to the requirements of the client.

284. By the time of his dismissal the claimant had been off work for 13 months. The claimant had exhausted his sick pay and there would have been additional costs of holiday and administrative costs to continue to have the claimant on the books with no prospect of him returning to work.

285. There was no treatment being recommended to the claimant that would have resulted in him being able to deal with his relief officer role and therefore return to work at some point in the future. Nor would any of the reasonable adjustments suggested have worked. Although the claimant asserted in his evidence that he would have been happy with those adjustments in the occupational health physician's report, the adjustments had already been tried in 2018 & 2019, when Mr Maini gave the claimant cover core work and they had not resulted in the claimant remaining in work, but actually going off sick.

286. Just before the claimant went off sick he was given stability in April 2019 by way of a regular shift pattern of 2 day and 2 nights covering a core position. Yet having been giving this stability, the claimant still went off sick.

287. Although the claimant stated in the meeting on 15 May 2020 that he would have considered working days and less hours and having the ability to plan, when this was offered to him by way of the 4 month role initially at HMS Trent, then corrected to HMS Spey in June 2019 and the 36 hour contract; the claimant did not accept either of these options.

288. The claimant was consulted regarding the reason for his absence and any solutions that would have him return to work on 8 July 2019, 15 May 2020 and 20 May 2020. The claimant only identified obtaining a core position as the solution to his absence. The claimant wanted not to be on call, to have shorter hours and to be based at one location but he never told his employer about these adjustments that he claims would have had him not go off sick and or remain in the workplace. At no point did the claimant state he would agree to changes to his role that would reduce the effect of the relief nature of the role but not eliminate it. He wanted a core role.

289. The claimant did not mention the 2 core roles that he now says he should have been given in any of the meetings with the respondent before his dismissal and the claimant admitted that Mr McLaren was in a better position to know what work would be available.

290. Contrary to the claimant's case that there was a "policy" of asking employees to accept zero hours contracts as an alternative to dismissal, in the meeting of 20 May 2020 it was suggested by the claimant's companion to offer the Claimant a casual contract to preserve the claimant's continuity yet the Claimant turned down the offer even with written assurances and the fact that it was his companion's suggestion.

291. It is clear that whilst the claimant agreed with some of the occupational health physician's recommendations, he did not agree with her report that he would need his medication to settle for several more months before he could contemplate returning to work. This is because the claimant said on 15 May 2020 only 1 month after the report that he could return to work immediately if he was given a core role.

292. The case of **BS v Dundee City Council** confirms that medical evidence should be balanced against the employee's view. The occupational health physician suggested regular hours and days and one site would be enough for the claimant with which the claimant clearly disagreed having previously rejected proposed adjustments by Mr Maini in April 2019.

293. The prospect of the claimant returning to work was dependent on the claimant being offered a core role. The respondent did not have any core roles to offer the claimant and so the claimant had no prospect of returning to work. The claimant stated at 15 May 2020 meeting, *" he could not work a relief pattern due to the not knowing and not having the ability to plan anything"*. It was therefore clear that the claimant would not return to work unless he had a core role.

294. Notwithstanding that, the claimant asked for an extension of his employment for 2 months. However, Mr McLaren explained the view that the claimant needed several more months of treatment before the claimant could consider returning to work meant that he was not being given a specific timescale by which he could expect to see the claimant return to work. The claimant said that he wanted an internal transfer, but there were no internal roles to slot the claimant into. Furthermore, it is difficult to see what an extension of 2 months

would have achieved in the context of the claimant having already been off work for 13 months.

295. The claimant only worked for the respondent for less than a year (from June 2018-April 2019); although he was employed for 2 years.

296. The claimant also asserted that the respondent mechanistically applied the sickness absence procedure and allow the dismissal to be HR driven. The claimant provided no evidence to support this allegation and cross examined the respondent's witnesses on the basis that the sickness absence policy was not followed at all!

297. It was submitted that it the respondent did look at multiple alternatives to dismissing the claimant throughout the process, in particular the following:-

(a) When the claimant came to his line manager in July 2018, Mr Maini found alternative cover core work for the claimant whilst other core officers were off work for various reasons, ensuring the claimant had a stable and consistent shift pattern. The claimant was said to be happy with this.

(b) The claimant was offered a reduced number of hours in April 2019 and the claimant failed to agree to the change.

(c) Mr Maini's offer of a stable work pattern for month of May 2019

(d) The respondent looked for alternative employment for the claimant in July 2019.

(e) The respondent offered the claimant a core position that would ensure a stable consistent work pattern of the claimant as Out of Hours Security Service Delivery Officer in July 2019

(f) The outcome of 15 May 2020 meeting was for Mr McLaren to "*contact other Securitas Accounts and to look at other areas for Securitas core positions"* which Mr McLaren did.

(g) Following the claimant's companion's suggestion in the meeting on 15 May 2020, the claimant was offered a casual contract with guaranteed tenure of 3 months of work and assured it would not affect his service. This would have given the claimant the flexibility to choose when and where he worked and for how many hours.

298. It was argued that the claimant's failure to accept the proposed alternatives amount to unreasonable rejections by the claimant. If he could not return to work because he did not have a core role and he was made a reasonable offer of a core role, then it was reasonable in all the circumstances to dismiss the claimant because he could not do his relief officer role.

Fairness

299. It was argued that the claimant was fairly dismissed. The respondent's response was within the range of reasonable responses to dismiss the claimant. The claimant argued the respondent did not follow its own sickness policy. The claimant failed to demonstrate how any failings affected the claimant detrimentally. It cannot be unfair that a line manager who the claimant has stated that he does not trust following the offer the work at HMS Trent did not undertake the sickness procedure or that when the claimant asked to speak about his mental health, he spoke to the respondent's Employee Relationship Manager before the formal part of the sickness process was instigated. This did not in any way detrimentally affect the claimant.

300. The claimant argued he was ignored but this was not the case. Mr Maini called the claimant and texted him to check his welfare. It may have been that the claimant did not think this was enough, but it certainly cannot be classified as ignoring the claimant.

301. The sickness absence policy required no more than the line manager to make appropriate contact with the employee which was followed. The claimant did not return to work, so the return to work part of the policy was wholly irrelevant.

The sickness absence policy required no more than 2 welfare review meetings and that happened with the claimant on 8 July 2019. Although the meeting on 15 May 2020 and 20 May 2020 was called welfare review meetings, they were in effect a medical capability hearing as the claimant was clearly on long term absence. This was the process that the respondent followed and was in accordance with the Respondent's sickness absence policy.

302. The respondent balanced the Occupational Health advice against what the claimant said and came to the view that there were no adjustments that could be made. The Tribunal must not substitute its own view.

303. It was argued that the dismissal was therefore fair.

Disability discrimination

Reason for absence

304. The respondent submitted that the evidence demonstrates that the claimant's disability had nothing to do the claimant's long term absence for the following reasons:

(a) The claimant has said that within a couple of months of his employment with he told his line manager, Mr Maini, that he did not like the relief nature of his role and could he move to a core position. It is accepted that the claimant told Mr Maini that he was stressed because of his role, however, there is no evidence that he told his GP that at that stage he was stressed. In the circumstances, it is fair to say that at that stage, whilst in communication with his GP regarding the medication for his Fibromyalgia the claimant did not mention anything about his stress or anxiety. If the stress was affecting the claimant's Fibromyalgia, then you would have expected the claimant to have mentioned this to his GP at that stage.

(b) In January 2017 the claimant appears to have been diagnosed with anxiety and depression. However, this was before the claimant started to work at the respondent. In those circumstances, this diagnosis could have nothing to do with the respondent and the claimant's role as a relief officer that did not start until June 2018. Furthermore, at no point during the claimant's employment with the respondent does the claimant tell his GP that his symptoms of anxiety or depression has increased as a result of his stress at work or is there a change to his prescription.

(c) It is only on 29 April 2019, that the claimant tells his GP he is feeling stressed at work. The claimant tells his GP that it is the amount in hours of work that is causing the stress, not the irregularity of his shift pattern. However, this was around the same time that the claimant was offered a 36 hour contract which would have reduced his hours, which the claimant failed to agree to. Clearly if it was actually the number of hours of work that was the problem for the claimant, he would have accepted the 36 hour contract, and not state that he was willing to do overtime as he did at the meeting on 15 May 2020.

(d) What the claimant tells his GP on 29 April 2020, is simply untrue. At no point was the claimant on a 20 hour contract. The claimant was not working 50-70 hours per week. In the 2 weeks preceding the 29 April 2020 the claimant worked two 36 hour weeks. Whilst the claimant had worked a 72 hour week, 3 weeks before 29 April, this was far from the norm and the last time the claimant worked a 72 hour week before that was in August 2018!

(e) There was no change in the claimant's medication in dosage or additional medication prescribed in relation to the claimant's Fibromyalgia, following his absence from work. One would have expected some change immediately following the claimant's absence from work if his absence was related to his Fibromyalgia.

(f) The claimant's medication does change in January 2020 but the reason for the change does not appear to have anything to do with the claimant's stress at work but because of the claimant's preference. By this stage the claimant has not been at work 10 months. It is difficult to see how the claimant could have remained stressed as he had not been working a relief role for 10 months.

(g) Again, the claimant is not truthful with his GP when on 6 January 2020 he states that he is in *"dispute with work"*. There was no dispute with the respondent. The claimant had not raised a grievance or complaint at that stage. At the meeting on 8 July 2019, Mr McLaren agrees to look for a core position for the claimant which he does, and the claimant is told it would be a while before he could be referred to Occupational Health. The claimant states he wants the respondent to *"go down that route"*. The outcome of the meeting is the aforementioned agreed way forward which is pursued by the respondent. In those circumstances it cannot be right for the claimant to characterise the issue as a dispute.

(h) At the meeting 15 May 2020, the claimant admitted that he had been diagnosed with Fibromyalgia and that *"this was not the main reason for being on the LTS, it was due to the stress and anxiety of the relief role, no fixed pattern or hours etc."* This fundamentally obliterates any notion that the claimant's absence from work was because of his disability.

(i) Notwithstanding, throughout the claimant's long term absence, there is no causal link between the claimant's absence from work and the claimant's disability. The claimant was absent from work because of stress. Thus, there was no causal link or links between the claimant's disability and the unfavourable treatment he received.

306. The claimant failed to establish a link between his disability of Fibromyalgia and the stress he experienced because he did not like the relief officer role. There is no medical link or factual link. The claimant's long term absence had nothing to do with his Fibromyalgia. If the claimant says now that did, this is

not what was said to the employer at the time. The claimant told Mr McLaren it was stress, not Fibromyalgia. Certainly, the medical evidence available did not contradict this. Without this link, the Tribunal cannot make a finding that the claimant was discriminated against.

Reason for dismissal

307. It was argued that the respondent did not discriminate against the claimant when dismissing him for long term absence for the following reasons.

308. The claimant said that he told Mr Maini that he had chronic fatigue and that he wished to resign. If the claimant's condition had anything to do with the respondent wanting to get rid of the claimant, surely, they would have accepted his resignation then but they persuaded him to stay.

309. The claimant had been off for some 2-3 months by June 2019 and yet Mr Maini contacted the claimant to offer him core cover work to enable the claimant to return to work. Clearly this work would not have been offered if the respondent was using the claimant's long term absence as an excuse to dismiss the claimant.

310. It was argued that there was no causal link between the claimant's long term absence and the claimant's disability. The claimant stated that he had been diagnosed by his consultant in early 2019 with Fibromyalgia, who wrote a letter to his GP about the diagnosis. However, there was no evidence of this letter and no reference whatsoever to this letter in the claimant's GP notes where you would expect to see it. If the claimant's GP considered that the claimant's diagnosis of fibromyalgia was affected by his stress, one would have expected it to have been mentioned by the GP. However, there is no mention of it.

311. There is no mention of any exacerbation of symptoms of the claimant's Fibromyalgia by additional stress by the claimant's GP and no increase in the medication that the claimant was already taking. In fact, the Claimant says in

the meeting on 15 May 2020, he "*has been diagnosed with Fibromyalgia however is being treated for this and the treatment is working. MC stated this was not his main reason for being on the LTS…"*

312. The reason for the claimant's dismissal was because he had no return date to work as a relief officer and would only return if offered a core position. The respondent had no core positions and the claimant suggested no other reasonable adjustments to be made that would enable him to return to work. This had nothing to do with the claimant's disability.

313. In short there is no evidence of any link between the disability and the absence. The occupational health report is clear in saying disability is not the cause. The GP records provide no link and there is nothing in what the claimant reported to his GP supporting the link. There is nothing to link the stress the claimant suffered because of the relief role "in any way shape or form to his fibromyalgia".

314. The respondent's agent also noted that all of the symptoms the clamant had were symptoms he had encountered since 2017. The same symptoms he was now arguing arose from his disability were those he had as a taxi driver and in other jobs. They were unrelated to whether in the workplace or not. The issue that arose in this case was separate and distinct. The claimant's fibromyalgia was under control and was not connected to the absence.

Justification

315. The respondent's aims were to ensure workforce planning and to be able to meet its contractual obligations to both the client and its employees.

316. The respondent's aims of workforce planning and ensuring it met its contractual obligations were legitimate aims applied in a proportionate manner. The claimant was not dismissed within a short period of time, but after 13 months and once his sick pay had expired. The respondent looked at temporary solutions as a way of balancing the needs of the claimant and the business needs. The respondent was prepared to commit to finding solutions

for the claimant for a significant period of time of a year. The claimant was consulted repeatedly for his view before being dismissed.

317. The respondent's agent noted that the justification evidence had been present in Mr McLaren's evidence who was clear as to the need for fluctuating resource and of the need to plan ahead. He had explained the aims of the business, workforce planning and customer requirements. The aim was proportionately achieved since the claimant had made it clear for months that he could not do the job he had been employed to do.

Failure to make reasonable adjustments

318. The respondent submitted that firstly it was not under a duty to make any reasonable adjustments for the claimant as the PCP's did not put the claimant at substantial disadvantage in relation to his dismissal in comparison with a person not disabled.

1. The respondent relied upon the distinction made by the EAT between symptoms of low mood and anxiety caused by clinical depression and those derived from the medicalisation of work problems in the decision of **J v DLA Piper UK LLP [2010] UKEAT/0263/09/RN**. [See paragraph 33 (3) & 42] to support the respondent's argument that the claimant's stress was not related to the claimant's disability. It is proffered that the case of **Herry v Dudley Metropolitan Council UKEAT/0100/16/LA** confirms this. Judge Richardson's statements at paragraph 56 of the decision are apt and applicable to the facts of this case. Judge Richardson says *"Although reactions to adverse circumstances are indeed not normally long-lived, experience shows that there is a class of case where a reaction to circumstances perceived as adverse can become entrenched; where the person concerned will not give way or compromise over an issue at work, and refuses to return to work, yet in other respects suffers no or little apparent adverse effect on normal day-to-day activities. A doctor may be more likely to refer to the presentation of such an entrenched position as stress than as anxiety or depression. An Employment*

Tribunal is not bound to find that there is a mental impairment in such a case." It is clear that the Claimant was such a person.

2. All of the claimant's sick lines state the reason why the claimant was off work was stress. The claimant says he experienced by virtue of the irregularity and the number of hours that the claimant was required to do are part of his role as a relief officer. This did not in any way relate to the claimant's fibromyalgia which was the Claimant's disability.

3. It was argued that the PCPs are not PCP's but one off decisions. The claimant failed to establish any PCP's that were applied to the claimant by the respondent. The duty to make reasonable adjustments did not arise until 15 April 2020. By that time there were no reasonable adjustments that could have been made to the role. The claimant stated the very notion of being on call was causing him stress. The respondent would not have been able to remove the notion as it was part of the nature of the relief role. Without the on call element it would not be a relief role it would be a core role. The respondent did not have any core roles it could slot the claimant into because it needed the roles that arose through natural wastage to meet the contractual hours of the relief officers and avoid possible redundancies**.** By 28 May 2020, no reasonable adjustments would have removed the disadvantage to avoid dismissal.

4. The respondent could not have been under a duty to make reasonable adjustments until they knew about the claimant's disability and the respondent did not know about the claimant's Fibromyalgia until the Occupational Health report on 15 April 2020. There was no way for the respondent to have known of the claimant's disability other than the Occupational Health report. If the Tribunal find that the claimant's stress was related to his disability the earliest respondent's duty arose was on or after 15 April 2020.

5. This is particularly important in relation to the core roles that the claimant says that the respondent should have offered him. The claimant says

he should have been offered Mr Wheeler's role and/or Mr Shearer's core role. However, Mr Shearer left at the end of August 2019. At that time the respondent did not know about the claimant's disability and could not have been expected to know. Mr Wheeler did not leave until March 2020, and again this was before the respondent knew about the claimant's disability. Mr Shearer's role is one of second in charge. This is a role to cover the supervisor role. The claimant was not experienced enough in security to carry out this role as of 31 August 2019 and even by May 2020 he only had practically under a year worth of security experience. The claimant admitted he could not do the second in charge role. It was not a reasonable adjustment it would not have removed any disadvantage. The respondent filled Mr Wheeler's role with relief officers to ensure that they had enough work as HMS Trent left.

6. Even if the respondent is deemed to have known about the claimant's Fibromyalgia disability the Occupational Health report clearly states that the stress was not related to the disability *"based upon our interview today Mr Campbell's main reason for absence are due to his psychological symptoms, rather than symptoms of his Fibromyalgia"*. In the circumstances, there was no duty upon the respondent to make reasonable adjustments in relation to the claimant's absence from work. Furthermore, nothing that the respondent did would or could do removed any significant disadvantage caused by the disability as there was no disadvantage to the claimant caused by the claimant's disability.

7. The claimant says that the respondent was under a duty to offer him a core role. However, the offering of a core role is a decision not a PCP. Simler LJ's analysis in **Ishola** supports the respondent's case that the act of dismissal is not a PCP. It was not the respondent's policy to dismiss the claimant. This is demonstrated by the fact that the respondent looked at alternatives to dismissal and held 3 meetings with the claimant to avoid dismissal.

8. It was also argued that there was no "policy" by the respondent of moving to dismissal due to the length of absence without exercising their discretion to extend the period of absence they would sustain before moving to dismissal. The claimant asserted that Mr McLaren told him that he had to dismiss him because he was told to by HR. However, not only is this alleged statement of Mr McLaren's not in the notes of the meeting on 15 or 20 May. When the claimant raised it with Ms Cleary, she confirmed that it was not the case that it was HR's decision.

9. The respondent did not apply a policy of requiring employees to accept a zero hours contract in return for the respondent not dismissing them and seeking further reasonable adjustments. There was no such policy. The respondent adjourned the 20 May 2020 meeting to seek HR advice given it was the claimant's companion's suggestion. Clearly an adjournment would not have been necessary if it was the respondent's policy to offer casual contracts to avoid dismissal.

10. In any event it is the respondent's case that the offering of a core role was not a reasonable adjustment in the circumstances. The respondent had offered the claimant a core role, when the Out of Hours Security Service Delivery Officer role was offered in July 2019. The claimant did not accept the role. Clearly as far as the claimant was concerned it was not a reasonable adjustment to offer a core role. Notwithstanding, if it was a reasonable adjustment for the respondent to have offered the claimant a core role, the respondent fulfilled their obligation when the offered the claimant the Out of Hours Security Service Delivery Officer role.

11. The respondent also argued that it was not a reasonable adjustment to extend the claimant's employment by 2 months. As no further core roles became available for the claimant during May-July 2020, the respondent had no difficulty in asserting that it could not have been reasonable to have extended the claimant's employment by 2 months. The claimant had a year to look for alternative core roles.

12. The claimant also stated that it was a reasonable adjustment for the respondent to keep him in his 42 hour contract role until a core role was found for the claimant. The respondent had already looked for alternative roles for the claimant in July 2019 and continued to look in May 2020. The respondent could not be expected to have kept the claimant's role open indefinitely. This was especially where the respondent knew there was no prospect of core roles becoming available for the claimant on the client contract because of the dynamic nature of the customer's operational requirements. In the wider organisation, the claimant had not identified any roles that he said that he would have done or were available.

13. The respondent did consider whether the claimant's absence could be sustained for a further period as the claimant had asked for his employment to be extend by 2 months. The respondent had concluded that there was little to no point in extending the claimant's employment as he said he would only return into a core role and there was no core roles available for him to slot into.

14. It was not a reasonable adjustment for the respondent to facilitate a further period of leave. The claimant did not ask to use his annual leave to extend his employment and the claimant did not raise this issue at all. In any event, the respondent's position is the same as applicable to the 2 month request. It was submitted that there was no point in extending the claimant's employment as he had run out of sick pay and he would not return unless offered a core role, which was not available.

No PCPs and no disadvantage

15. The substantial disadvantage that the claimant relied upon is his dismissal. The respondent argued the dismissal could have been avoided had the claimant accepted any of the adjustments that were offered. He did not. It was not reasonable to do more.

16. The respondent's agent argued that the evidence led by the respondent had been truthful and considered. While not every point had been included in the witness statements and memories had not been perfect, the witnesses did their best to present their recollections. There was absolutely no evidence of the PCPs relied upon. The claimant had no evidence of anyone else to whom these policies did or may apply. It was common for HR to support decision makers since that was their role and their advice was not relevant since the relevant evidence was from the decision maker themselves.

17. The duty to make reasonable adjustments on the pleaded case had not been made out. In any event there was no link between the reason why the claimant was absent from work and his disability. He was not off work because of his disability and so no adjustments would get the claimant back to work, since they did not pertain to his disability. The claimant was off work because of stress, unrelated to his disability.

18. It was submitted that the respondent had offered the claimant structured alternatives but these had been declined by the claimant.

Additional points

19. The respondent's agent argued that the Tribunal should take into account additional points.

20. The claimant accepted that he could not do the second in charge roles and therefore could not have fulfilled those roles which were left open by Mr Shearer and Mr Wheeler.

21. The claimant did not ask for his hours to be reduced but took on extra shifts. When offered a reduction of hours by his employer he went to his line manager to ensure that his hours would not be reduced rather than sign the agreement.

22. The claimant confirmed that there were no core roles available outside the BAE Systems contract and he had refused a core role in 2019. The

claimant refused cover of a core role in June 2019 which would have lasted until November 2019.

Remedy

23. The claimant had exhausted his sick pay given his absence and so no contractual sick pay would have been paid. As the claimant was unfit for work from Christmas 2020 no compensation should be awarded.

24. The respondent's agent indicated that she did not agree with the claimant's calculations in his schedule of loss as to a week's pay and pension loss and left this matter to the Tribunal to apply, if necessary, in light of pay slips that had been included in the Productions.

25. Any injury to feelings should be at the lower end of the band

26. The claimant contributed to his own dismissal. He did not tell the respondent about what other reasonable adjustments could be made at that time in May 2020 and more importantly how that would be consistent with him doing a relief officer role. Even if the respondent had extended the claimant's employment on the basis of using his leave or for the 2 months that he asked for; as no core roles became available he would have been dismissed in any event.

27. Since dismissal he failed to apply for any Security Officer roles at all. He has applied for roles he had no experience in since he was a taxi driver for 20 years before becoming a Security Officer. He failed to mitigate his loss.

28. It is clear from the claimant's evidence that since December 2020, the claimant has not been able to work and he is currently not able to work. The claimant has long COVID. In those circumstances, even if the claimant was employed up to December 2020, he would have been fairly dismissed within a month of this date.

29. If the claimant is to be awarded any compensation, it is the respondent's case that it must be reduced by 25%. The claimant failed to comply with the ACAS code of practice on disciplinary and grievance procedures by failing to attend his grievance and dismissal appeals. The claimant stated in cross examination that he did so on advice by his solicitor but in actual fact the claimant said that he did not want to return to work.

Decision and discussion

319. The Tribunal spent a considerable period of time considering the evidence that had been led and the submissions made by both parties which were fully taken into account. Having considered the evidence led, the Tribunal was able to reach a unanimous view. We shall deal with each issue in turn, so far as relevant.

Unfair dismissal

What was the reason for the claimant's dismissal?

320. We considered the reason for the dismissal, the set of facts or beliefs in the dismissing officer's mind that led to the claimant's dismissal. We concluded the reason for the claimant's dismissal was because of capability, his inability carry out the role for which he was engaged, the relief officer role. His dismissal was therefore for a potentially fair reason.

If that reason is capability on the grounds of ill health, was it reasonable (having regard to section 98(4) Employment Rights Act 1996) for the respondent to have dismissed the claimant, and, in particular, given that:-

a. The respondent dismissed the claimant when the employer was in receipt of their own Occupational Health Report by their own GP

confirming that with a modification of the claimant's terms and conditions of employment and shift pattern dismissal could have been avoided.

b. Presenting to an employee as an alternative to dismissal, a zero hours contract that meant that his income would reduce from a guaranteed £378 per week to zero, and with even less of security and control over shift pattern and locations of work where he was asked to undertake his duties and with even less of security and control over shift pattern and locations of work where he was asked to undertake his duties

c. Mechanistically apply their absence management procedure and allow a dismissal to be driven by their HR function instead of the manager conducting the capability and / or attendance hearing, to take the decision to terminate an employee's employment themselves.

320. Having established the reason for dismissal we turn to consider whether the respondent acted fairly and reasonably in dismissing the claimant for that reason, taking account of size, resources, equity and the substantial merits and in light of the specific challenges raised.

Genuine belief in incapability honestly held

321. From the evidence before the respondent at the time, the respondent genuinely believed that the claimant was incapable of carrying out the role for which he had been engaged. The respondent had offered the claimant and number of alternative options to seek to provide him with some structure but ultimately the claimant refused. The respondents genuinely and honestly believed the claimant was incapable of carrying out his role.

Investigation into position

322. The respondent sought an up to date medical report and spoke with the claimant. Regrettably the occupational health report is unclear. It specifically stated that the claimant was absent not because of his fibromyalgia but for

psychological reasons and separately says psychological symptoms can be a consequence of fibromyalgia. On one view the report suggests that the psychological symptoms that caused the claimant to be absent from work were entirely separate psychological symptoms that stemmed from his disability. On another view the stress could potentially be related to his disability but that is not at all clear.

323. In any event the respondent knew that the claimant was likely to be a disabled person in terms of the Equality Act. Armed with that knowledge they sought to ascertain what, if any, alternatives to dismissal existed.

324. The claimant had been absent for a large number of months. He had repeatedly stated that the reason why he was unable to return to work was because of the stress that the relief role had caused for him, which he discovered within around 2 months of commencing employment.

325. Attempts were made to provide the claimant with some form of structure and work patterns but these did not succeed. The claimant was of the view that if he remained on a relief contract he would become too stressed and therefore did not want to consider such a role.

326. While he initially accepted the offer to work given to him by Mr Maini, he rejected it once he discovered the location. He believed that there was a risk of further uncertainty and had convinced himself that without a core role, he could not return to work. That was in essence what he had told the respondent. He felt the unpredictability of the relief contract was simply too stressful for him. He decided he could not trust Mr Maini.

327. The claimant had understood his line manager to have essentially promised him some form of permanent role but in fact his line manager had said that he would try and help him if any such role arose. No such role did arise. The claimant at that point had decided that he would not return to work unless a core role was offered.

328. The respondent did not carry out a perfect process but the test is not perfection but rather whether or not the process adopted was one which a

reasonable employer could follow. We concluded that the process that was followed fell within the range of responses open to a reasonable employer facing the facts of this case.

Procedure was fair

329. While the claimant's absence had not been managed entirely in keeping with the respondent's policy, the respondent believed that the claimant was unfit for work due to stress. They sought to keep in touch and sought the input of an occupational health physician.

330. While the policy was not applied to the letter we accepted the respondent's submission that the claimant had not been adversely treated as a result of the failures. It was not unreasonable or detrimental for Mr McLaren to conduct the meetings, when the claimant had suggested he did not trust his line manager. Equally there was nothing detrimental to the claimant when he spoke to the respondent's Employee Relationship Manager before the formal part of the sickness process was instigated. This did not in any way detrimentally affect the claimant. The claimant's line manager did not keep in touch with him in a structured way but he did keep in touch with the claimant sporadically. Other than offer the claimant a core contract, which did not exist at that time, there was little the respondent could do (and nothing else was suggested could have been done). Meetings were arranged with the claimant who knew what the purpose of the meetings were.

331. The respondent then met with the claimant to discuss the occupational health physician's report having obtained an up to date medical report. In the letter inviting the claimant to that meeting, the respondent was clear in telling the claimant that the purpose of the meeting was to discuss the report and consider ways of procuring the claimant's return to work. It was also made clear that dismissal was something that could result in the absence of alternatives being identified. The claimant knew therefore that the purpose of the meeting was to explain how he could return to work, whether by making reasonable adjustments or otherwise and that it was his chance to tell the respondent what he believed could be done to avoid dismissal, in the absence

of anything being suggested by the respondent, given what they had done to that point.

332. The claimant's position was that he would only accept a core role and he believed he had been let down by not being given such a role. While it was suggested during the hearing the claimant would have accepted a relief role with certain restrictions, in terms of shift and location, from the information before the respondent at the time of dismissal, it was clear from what the claimant had communicated to them that nothing short of a core role, with the permanence that brings, would have sufficed. At no stage did the claimant tell the respondent that he would return to work if his relief role was adjusted in certain ways and the respondent acted reasonably in believing that there was no alternative in the circumstances. The claimant was clear that he wanted to be able to plan ahead for around a year and in his mind nothing short of a core role would allow him to do so. He believed the uncertainty of the relief role, even if he was given structured shifts, was too stressful for him.

333. There were no core roles available either in the lead up to the claimant's dismissal or subsequently, in light of the business situation facing the respondent. While core officers had left the business, given the challenges facing the respondent these roles were not replaced by core officers. Instead the respondent used relief officers to cover the shifts needed. It was not possible to give the claimant the certainty he wanted as the work was not there to justify it. It was not possible to give the claimant fixed regular shift patterns in the one location. It was possible to give the claimant a degree of structure to his shifts, which was something the respondent had already done but that had not worked and the claimant had gone absent.

334. Had the claimant indicated at any stage to the respondent that he would be prepared to remain as a relief officer and that he was prepared to look at some form of restrictions to that role it is possible that some progress might have been achieved but the claimant had been clear that nothing short of a core role would be acceptable to him. That was the information before the respondent at the time of dismissal. That was what the claimant had said at

the meetings, irrespective of what the occupational health physician's position. Despite the physician saying the claimant was not fit for work, the claimant was clear in saying he would return to work immediately if a core role was offered to him. Absent that offer, he remained unfit to work on an indefinite basis with no prospect of a return, irrespective of what the respondent did.

335. His position was entrenched and the respondent reasonably concluded that to be the claimant's position from the information before them. They had offered the claimant a number of opportunities to avoid dismissal which would have alleviated a number of his concerns, but as they were not part of a core role the claimant rejected them.

336. In the absence of any core role, and given the claimant was not prepared to consider any alternative, it was reasonable and fair for the respondent to consider dismissal. While some reasonable employers may not have dismissed, an equally reasonable employer on the facts of this case, in our judgment, could have decided to dismiss the claimant (and follow the process that was followed).

Specific challenges to dismissal

337. With regard to the specific challenges as to the fairness of the dismissal, the first was that to dismiss the claimant when the respondent was in receipt of their own Occupational Health Report confirming that with a modification of the claimant's terms and conditions of employment and shift pattern dismissal could be avoided was unfair, was not a reasonable position in our view. The claimant's position had been clear during the process and irrespective of what the physician said, following the telephone call with the claimant, it was not unreasonable for the respondent to proceed to dismiss the claimant. The process and decision fell within the range of reasonable responses.

338. The second challenge was that presenting to an employee as an alternative to dismissal, a zero hours contract that meant that his income would reduce from a guaranteed £378 per week to zero, and with even less of security and

control over shift pattern and locations of work where he was asked to undertake his duties and with even less of security and control over shift pattern and locations of work where he was asked to undertake his duties was unfair. In context, however, that was provided to the claimant at his own companion's suggestion. The respondent by the stage of offering this had exhausted all reasonable alternatives. The claimant wanted time to see if a core role would become available, despite the respondent concluding, from the information before them, no such positions were likely to become available. The respondent offered the claimant the zero hours as an attempt to assist the claimant. They acted reasonably in so doing. The claimant equally reasonably refused the request but that did not render the dismissal unfair.

339. The final specific challenge to the fairness of the dismissal was to mechanistically apply their absence management procedure and allow a dismissal to be driven by their HR function instead of the manager conducting the capability and / or attendance hearing, to take the decision to terminate an employee's employment themselves. This was not made out on the facts since, as the claimant accepted in cross examination, the decision to dismiss was Mr McLaren and his alone. While he took HR advice, which was what HR was there to do, it was clear that he made his own mind up having considered all the options open to him. He acted reasonably in so doing.

340. We did not consider the failure to retain the claimant "on the books" for a few months to result in the dismissal being unfair. The occupational health report stated that it could take a few months for the claimant to consider returning to work but the claimant had specifically said he would return immediately if a core role was available. There was no information before Mr McLaren to suggest there would be any core roles available then or in the future. That was the only reason the claimant wanted to remain "on the books" but there were no core roles coming up and there was nothing before Mr McLaren to suggest that was going to change.

341. The respondent was satisfied that there were no core roles available and that none was likely to arise. There was little prospect of any core roles arising, and none did so.

Fairness of dismissal

342. We uphold the respondent's agent's submissions with regard to the fairness of the dismissal. The respondent had obtained up to date medical information in respect of the claimant's absence and considered that evidence along with the claimant's position. The respondent fairly balanced all the issues arising taking account of the claimant's position and the circumstances facing the business and the impact upon the business. The respondent had waited a sufficient period of time before dismissing.

343. The nature of the claimant's illness was "stress" as set out by the claimant and recorded by his GP and at the welfare meetings. It was the stress of the relief role that was keeping him from attending work.

344. The respondent's sickness policy was clear, and was applied fairly to the claimant since the claimant was on long term absence and had not returned to work. The respondent applied the long term absence section of the policy to the claimant and dealt with the issues arising in a fair and reasonable way.

345. The claimant was engaged on a 42 hour a week contract and his absence required to be covered. The respondent had to balance the claimant's position with the needs of the business and the impact on other staff.

346. We considered it important that there was no treatment being recommended to the claimant that would have resulted in him being able to deal with his relief officer role (which had caused him stress and to be absent). There was nothing the claimant had suggested would have resulted in him being fit to return in the short to medium term, absent the offer of a core role. Thus there was no reasonable prospect of a return to work in the near future since in the absence of any core roles, which was likely the position, since it was Mr McLaren who would have known if any such roles were likely to arise, there was no prospect of a return to work. The claimant was ready to return to work

immediately if a core role could be offered to him, otherwise he would remain absent from work on an indefinite basis.

347. The adjustments the respondent had offered to the claimant in 2018 and 2019 sought to address the claimant's concerns and offered him structured work patterns but they had not resulted in the claimant remaining in work. Further just before the claimant went off work sick he was given the option of stability in April 2019 by way of a regular shift pattern of 2 day and 2 nights covering a core position. That did not prevent the claimant's absence since it was not a core role and not something the claimant would accept.

348. We did not accept the claimant's argument that the respondent mechanistically applied the sickness absence procedure and allowed the dismissal to be HR driven. The respondent fairly waited a reasonable period of time and made a reasonable attempt to find alternatives to dismissal. There was none. We upheld the respondent's submission that various alternatives to dismissal were explored but the claimant was not prepared to accept them.

349. We considered the question of whether the employer can be expected to wait longer and concluded that it was fair and reasonable to dismiss at the time the respondent did. Secondly, we considered the extent to which the claimant was consulted was reasonable. His views were taken into account along with the occupational health report. The claimant had essentially said he could not return to work unless a core role was made available to him. There was no such role and we did not consider it reasonable for the respondent to construct such a role on the fact. Thirdly, the respondent had taken time to get a report on the diagnosis and prognosis. They understood the issues facing the claimant and how to resolve them but regrettably were unable to do so and decided to dismiss. Their actions fell within the range of responses open to a reasonable employer.

350. Taking a step back we conclude that the procedure that was followed fell within the range of responses open to a reasonable employer. We also find that the decision to dismiss the claimant, from the facts available to the respondent at the time, was a decision that was open to a reasonable

employer. We recognised that we must not apply our view but instead consider whether the procedure followed and the decision to dismiss fell within the range of responses open to a reasonable employer on the facts.

351. In all the circumstances the respondent acted fairly and reasonably in dismissing the claimant by reason of capability, taking account of size, resources equity and the merits of the case. The claimant's dismissal was fair.

352. As we considered that the claimant's dismissal was fair, we did not need to consider the other issues with regard to unfair dismissal.

Disability

What is the claimant's alleged disability?

353. It was agreed the claimant was disabled and that disability was fibromyalgia (and nothing else).

Date from which the claimant is disabled

354. It was agreed that the claimant was disabled by 15 April 2020.

When did the respondent have knowledge of the disability?

355. It was agreed that that respondent had actual knowledge by 15 May 2020. We did not consider the respondent to have any knowledge, actual or constructive, prior to 15 May 2020. The only suggestion for the claimant's absence was stress. It was only upon receipt of the occupational health physician's report that fibromyalgia was stated. The earliest date on which the respondent knew, or could reasonably know, the claimant was disabled was therefore 15 May 2020.

Unfavourable treatment because of something arising in consequence of disability (section 15 Equality Act 2010)

Did the respondent treat the claimant unfavourably by dismissing him.

356. We concluded dismissal was unfavourable treatment. That is self evident.

Did the claimant's absence arise in consequence of the claimant's disability?

357. This was not an easy question to answer and we have taken considerable time and care in looking at the evidence before us in the course of this Hearing. Having analysed the evidence carefully we concluded that the claimant's absence did not arise in consequence of the claimant's disability and we upheld the respondent's agent's submissions in that regard. We did so for the following reasons.

358. We did not find the occupational health report clear as to the reason for the claimant's absence. On one view it is clear since it specifically considers this question and states that the disability was not a reason for the absence. It says: "Based on our interview today Mr Campbell's main reasons for absence are due to his psychological symptoms, rather than symptoms of his fibromyalgia." That appears to suggest his disability was not a reason for his absence.

359. We must apply the legal test in this area and apply the legislation. The 'something' that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.

360. There must be some connection between the 'something' (the absence) and the claimant's disability (fibromyalgia); the former had to arise in some way as a consequence of the latter.

361. We considered this carefully and found in this case on the evidence before us that the only reason for the claimant's absence was the stress having a relief officer role created for the claimant. The unpredictable nature of the role led to the claimant suffering stress. We found that stress was in no sense whatsoever connected to the claimant's disability.

362. While the claimant's disability could lead to (or create) stress, that was not in any sense the stress that prevented the claimant from working. From the evidence before us, the stress arising from the claimant's disability was

entirely unconnected to the stress that led to the claimant's absence from work. The cause of the stress was not the disability but the role on the facts.

363. We carefully considered the evidence before us and concluded that it had not been established, on the balance of probabilities, that a reason for the claimant's absence was the disability relied upon, fibromyalgia.

364. Other than the occupational health physician's report, which was based on a telephone call with the claimant, there was no other medical evidence that assisted us. The occupational health physician did not give evidence and all we had was the report (which was unclear). The claimant's GP notes did not provide any evidence as to the reason for the claimant's absence at the material times other than by reference to "stress".

365. While the physician's report said the "main reasons" for the claimant's absence, we considered from the evidence before us if we could infer that this meant the claimant's disability was in some way a reason (in the sense required by the authorities) but from the facts we found no such connection and we did not consider it fair to make such an inference based on the evidence before us.

366. The claimant repeatedly advised the respondent that the reason why he was absent was the stress the relief role caused for him. That was what the claimant had told his GP. There was no evidence that the claimant told his GP his disability had caused him stress. The fit notes produced by the GP cited stress as the reason for his absence. At no stage did the claimant suggest his disability had caused the stress which led to his absence. The claimant was consistent in his approach throughout his time with the respondent that it was the relief role which caused him to suffer stress which in turn led to his absence. If the stressor was removed, the relief role, (and a core role offered), the stress would cease and the claimant could immediately return to work.

367. Taking the claimant's evidence alongside the occupational health physician's report, bearing in mind the occupational health physician made their decision

based upon what the claimant told her, and based on the evidence before us, we find that the reason for the claimant's absence was in no sense whatsoever connected to his disability, fibromyalgia.

368. It was relevant to note that there was no change in the claimant's medication in dosage or additional medication prescribed in relation to fibromyalgia, following his absence from work which could be viewed as supporting the analysis that his absence was not linked to his fibromyalgia.

369. At the meeting on 15 May 2020 the claimant stated that he had been diagnosed with fibromyalgia but he said *"this was not the main reason for being on the LTS, it was due to the stress and anxiety of the relief role, no fixed pattern or hours etc."* That supported the position set out by the Occupational Health physician which was that the absence was not connected to the disability. That was not surprising given the occupational health report stemmed from a discussion with the claimant.

370. The claimant was absent from work because of stress which arose from the relief role. The claimant did not like the unstructured nature of the role which led him to suffer stress.

371. Considering matters carefully and applying the legal test above we found that the disability did not have anything other than a minor or trivial influence on the unfavourable treatment. It did not amount to an effective reason for or cause of it. On that basis the section 15 claim is ill founded. The respondent did not therefore treat the claimant unfavourably because of something arising in consequence of his disability.

Was the aim relied upon by the respondent, namely to fulfil its contractual obligation to its customers to cover hours of work and to be able to plan the workforce a legitimate aim?

372. If we were wrong in the foregoing, we considered the other issues. The respondent says that its aims were: fulfilling its contractual obligation to its customers to cover hours of work and to be able to plan the workforce.

373. Had we required to consider justification, we would have concluded that the aim relied upon by the respondent was a legitimate aim. It required to meet its contractual obligations with its client and required to properly plan ahead with regard to the provision of security cover. The aim was, in principle, legitimate in our view.

If so, was the respondent's treatment of the claimant a proportionate means of achieving that legitimate aim?

374. We would then have considered whether or not the aim was proportionately achieved by dismissing the claimant. This was not an easy issue to consider and we examined the evidence before us carefully.

375. We considered that dismissal of the claimant was an appropriate and reasonably necessary way to achieve the aim since whilst dismissing the claimant did not help the respondent meet its contractual aims with its client, it did assist the respondent in planning ahead with regard to security cover. The respondent was unable to easily plan ahead given the uncertainty of the claimant's position. The claimant was contractually entitled to 42 hours per week work but the respondent would not know given the claimant's position whether or not he would be able to carry out those duties. It presented difficulties in planning. Dismissal on the facts was appropriate and reasonably necessary way to achieve the aims.

376. We considered whether there were less discriminatory ways to achieve the aim. Given there were no core roles available at the time in question, it was not possible to offer the claimant a core role. Given the claimant had made it clear that he would accept nothing short of a core role, there was no alternative for the respondent to consider.

377. While in re-examination the claimant said he would have "jumped" at a relief register role that had been restricted in terms of shifts and times, we considered from the information before us that in fact the claimant would not have accepted such a position. He had been clear and consistent throughout his time with the respondent that nothing short of a core role would suffice

and he would not return to work unless such a role was offered to him. Absent the existence of such a role, there was no less discriminatory way of achieving the aim in this case.

378. There were no core roles available and the claimant had made it clear he would not accept anything less than a core role. That remained the position to the date of the Hearing. The failed attempts at offering structured shifts and revisions to the relief role had abjectly failed. It was only a core role that would have retained the claimant. We did not consider that it would be reasonable from the facts for the respondent to construct a core role for the claimant given the prevailing position.

379. We carried out the balancing exercise. We considered the effect dismissal had upon the claimant and balanced that with the needs of the respondent. We considered that there was no alternative for the claimant on the facts. The respondent had waited a reasonable period of time and had reasonably concluded that there was no core role available and unlikely to be any such roles.

380. Dismissal was, in our view, a proportionate means of achieving the respondent's legitimate aim.

381. In short, we critically evaluated the respondent's position from the facts. We are satisfied the aim was legitimate and it was pursued in this issue. We are satisfied that the measure was capable of achieving the aim as it was appropriate and reasonably necessary to achieve the aim and did actually contribute to it. Finally the aim was proportionate having balanced the discriminatory effect against the aim both in terms of its qualitative and quantitative effects (and whether any lesser form of action could achieve the aim).

382. We were satisfied in all the circumstances that had we required to consider justification, the legitimate aim had been proportionately achieved by the respondents on the facts.

Breach of the duty to make reasonable adjustments (sections 20 and 21 Equality Act 2010)

Did the respondent know or could it reasonably have been expected to know that the claimant had the disability? From what date?

383. We found that the respondent first knew of the claimant's disability (and the date from when it could only reasonably have known of his disability) was upon their receipt of the occupational health physician's report when the respondent was first told of the claimant's disability, namely 15 May 2020. It is therefore only from that date that the obligation with these sections is engaged.

Are any of the following a provision, criteria, or policy:

a. dismissal due to the length of a long-term absence, whether or not a further period of leave / absence would have facilitated a return to work.

b. The policy of moving to dismissal due to the length of absence without exercising their discretion to extend the period of absence they would sustain before moving to dismissal.

c. The policy of requiring employees to accept a zero hours contract in return for the respondent not dismissing them and seeking further reasonable adjustments.

384. We firstly considered whether the 3 matters relied upon amounted to a provision, criterion or practice in light of the authorities in this area.

385. The first was "dismissal due to the length of a long-term absence, whether or not a further period of leave / absence would have facilitated a return to work". The practice relied upon here appears to be the practice of ignoring an occupational health report and proceeding to dismiss workers who are absent. In principle we accepted this was capable of amounting to a provision, criterion or practice. It was clearly in principle not a one-off act and could be something that could be a practice.

386. The second was "the policy of moving to dismissal due to the length of absence without exercising their discretion to extend the period of absence they would sustain before moving to dismissal." This was really another way of saying the previous practice, that is, deciding to dismiss employees because of their length of absence without allowing more time. Again, in principle, this could amount to a provision, criterion or practice. It was clearly in principle not a one off act and could be something that could be a practice.

387. The third was "the respondent applied a policy of requiring employees to accept a zero hours contract in return for the respondent not dismissing them and seeking further reasonable adjustments". This was a suggested policy of giving employees who are absent on long term sickness an ultimatum of accept a zero hours contract or be dismissed. Again in principle this could amount to a provision, criterion or practice. It was clearly in principle not a one off act and could be something that could be a practice.

Did the respondent apply any of the aforementioned PCPs to the claimant?

388. We accepted the respondent's submissions in relation to this issue. We were entirely satisfied from the evidence before this Tribunal that none of the PCPs relied upon had been established in evidence. None of the PCPs in this case were PCPs applied by the respondent at all.

389. We accepted the evidence of Mr McLaren that the approach he took was that set out in the Sickness Absence Policy and that he considered each case on its merits, exercising his discretion in light of the applicable facts. There were no other PCPs applicable.

390. Form the evidence before us there was no PCP that dismissal due to the length of a long term absence, whether or not a further period of leave / absence would have facilitated a return to work. Mr McLaren was clear that he would have considered delaying dismissal if there was a prospect of a reasonable return to work. In this case he concluded there was no reasonable prospect of a return from the information available. There would have been no dismissal if there was a realistic prospect of a return to work. In this case

there was no core role available and the claimant said he would not return to work until such a role became available. Had there been some way in which the claimant (and other workers absent on long term sick) could return to work within a reasonable period of time, dismissal would not follow. The first PCP had not been established from the facts in this case.

391. With regard to the second PCP, we found that there was no PCP of moving to dismissal due to the length of absence without exercising discretion to extend the period of absence they would sustain before moving to dismissal. We found that the contrary was the case as the respondent had a policy to consider each case on its facts and exercise discretion based upon the facts. Dismissal was not inevitable and could have been avoided if there was a reasonable prospect of a return to work in some capacity. As with the preceding PCP, this had not been established in evidence. The respondent had no policy of ignoring the facts and proceeding to dismissal and instead would look carefully at the facts and avoid dismissal where it was reasonably feasible to do so.

392. Finally in relation to the third PCP relied upon we found that there was no policy of requiring employees to accept a zero hours contract in return for the respondent not dismissing them and seeking further reasonable adjustments. From the evidence before us this was the only occasion a zero hours contract had been issued as an alternative to dismissal and it had been raised by the claimant's companion. There was no policy requiring a worker to accept that or avoid dismissal. The policy was to consider all options available at the time and only dismiss if there were no alternative options. In appropriate cases the respondent would not dismiss, even if an employee did not accept a zero hours contract. That would occur where there was a reasonable likelihood of a return to work on the particular facts. There was no practice of requiring employees to accept a zero hours contract or be dismissed.

393. In this particular case there were no alternatives to dismissal and the respondent decided, at the claimant's companion's request, to offer a zero hours contract. The claimant wished to retain his continuity of service and

have some time to see if a core role became available. There was no evidence that this had either been done before or would be done again. From the evidence before us it was a one off situation that applied to the claimant only. It was in no sense a provision, criterion or practice that had been applied by the respondent on the facts before us.

394. Form the evidence before us the claimant has failed to establish any of the PCPs relied upon and as a result this claim fails.

Did the PCPs put the claimant at a substantial disadvantage compared to someone without the claimant's disability?

395. Had the respondent applied the PCPs to the claimant we would not have been satisfied that the PCPs would have put the claimant at a substantial disadvantage compared to someone without the claimant's disability. This is because on the facts before us the claimant's disability was not a reason for his absence. The PCPs in question would have not avoided dismissal given the disability was unrelated to the reason for his absence. In other words, someone without the claimant's disability would have been treated in precisely the same way as the claimant (and others with his disability) since they would both have been absent on long term sickness and would have been dismissed. There was no evidence before us from which we could find the claimant was put at a substantial disadvantage compared to someone who was not disabled since they would be treated in precisely the same way.

Did the respondent know or could it reasonably have been expected to know that the claimant was likely to be placed at the disadvantage?

396. Had the section been engaged, we would not have found that the respondent reasonably could have been expected to know of the disadvantage. This would have been because the claimant's disability was in no sense whatsoever the reason for his absence given the facts. The reason for his absence was stress. The respondent would not have known someone with the claimant's disability would have been placed at the disadvantage. There was no material before the respondent that would allow it to know or be

reasonably expected to know that someone with the claimant's disability was likely to be placed at the disadvantage.

What steps could have been taken to avoid the disadvantage and was it reasonable to have taken these steps (and if so when)? The claimant suggests:

a. Offer the claimant a core role

b. Extend the claimant's employment by 2 months

c. For the claimant to remain on his 42 hour contract until a core role was found for the claimant

d. To exercise the respondent's discretion to account whether the claimant's absence could be sustained for a further period

e. To allow the claimant a further period of "leave" to facilitate the claimant's return to work

397. The duty to make reasonable adjustments is to take such steps to reasonably remove the substantial disadvantage. The steps need to be reasonable. We took account of the Code in this regard and in assessing whether, had the elements of the legislation been established, the steps contended were reasonable.

398. The first step, to offer the claimant a core role, would have removed the disadvantage if the duty was engaged but it was not reasonable on the facts because there was no core role available to offer the claimant. We considered whether or not it would have been reasonable, in any event, for the respondent to create such a role but we considered that it would not have been. The respondent required flexibility and had offered the claimant a structured shift pattern which did not work. From the facts before us we did not consider it would have been reasonable to create a core role for the claimant given the need for flexibility and the fluctuating demands placed on the respondent and in light of its staffing position.

399. The second step, to extend the claimant's employment by 2 months, was something we considered would not have been effective in removing the disadvantage. The respondent was of the view there were no core roles available and none likely to arise. Further, the occupational health physician stated that the claimant was not fit to consider returning to work for at least 2 months. No steps were being taken, medically or otherwise, that could reasonably be considered as likely to change the situation facing the claimant and the respondent. There was no evidence that the position would be any different in 2 months. At best, on the evidence of the physician, the claimant might be able to think about a return, but on the claimant's own evidence, he was not prepared to consider anything other than a core role. On that basis delaying the claimant's dismissal would have made no difference whatsoever and on that basis it was not a reasonable step on the facts.

400. The third suggested adjustment was for the claimant to remain on his 42 hour contract until a core role was found for the claimant. In principle retaining the claimant as an employee indefinitely could remove the disadvantage but we did not consider this adjustment to be reasonable on the facts. There was no suggestion of a core role becoming available in the near future. The claimant had been absent for a lengthy period of time and given the facts no core role was likely to become available. It was not reasonable to retain the claimant on an indefinite basis without there being some prospect of a return to work. It would not have been a reasonable step to take on the facts.

401. The fourth step was to exercise discretion whether the claimant's absence could be sustained for a further period. Again absent any reasonable indication of a change in the short to medium term we did not consider this adjustment to be reasonable. There was no evidence that suggested the position would change and delaying the inevitable was not reasonable in our view.

402. The final step suggested was to allow the claimant a further period of "leave" to facilitate the claimant's return to work. In some sense the respondent offered this by way of the zero hours contract but the claimant did not wish to

lose his other terms and conditions. There was no suggestion of a return to work unless a core role was offered and in the absence of any evidence suggesting the availability of such a role we did not consider offering a further period of leave to be reasonable.

403. In relation to each of the proposed steps we considered the points arising in the Code. We did not consider any of the steps to be practicable on the facts. The respondent was a large organisation and cost was not a major impediment as such but the key issue for us was the fact that in our view because it was not practicable or reasonable for the respondent to create a core role, none of the other steps would have made any difference and the disadvantage would remain.

404. We took a step back to assess the claim in relation to the alleged breach of the duty to make reasonable adjustments. We had to consider the pleaded case and the particular PCPs relied upon in this case. We did so carefully and in light of the evidence before us. The PCPs relied upon were not applied to the claimant (and were not applicable to the respondent's business).

405. We also found no link between the reason why the claimant was absent from work and his disability. He was not off work because of his disability and so no adjustments would get the claimant back to work, since they did not pertain to his disability. The claimant was off work because of stress, which we found was entirely unrelated to his disability on the facts.

406. It was submitted that the respondent had offered the claimant structured alternatives but these had been declined by the claimant and patently did not work since the claimant went absent. We found on the facts that there were no further steps the respondent could take which would reasonably remove the substantial disadvantage to which the claimant was put.

407. The respondent had made reasonable adjustments by virtue of their offers to the claimant of alternatives and their attempt to offer him some form of structured work. These had not worked. At the point the respondent became aware of the claimant's disability, upon receipt of the occupational health

physician's report, there were no core roles available and there remained no core roles available. We did not consider the steps suggested by the claimant to have been reasonable on the facts.

408. This claim is therefore ill founded.

409. We found that each of the claims raised was ill founded and it was not necessary to consider remedy.

Observations

410. We noted in this case that the issues arose principally because of miscommunication which was regrettable. The claimant had understood that his line manager had promised him a core role and he had decided that anything short of this would be unacceptable. The lack of absolute clarity in communication, ideally written communication, was a factor that led to the claimant's misunderstanding of the position which in turn affected how he perceived the respondent. That was regrettable since if the claimant had understood the position he would have been able to assess how best to proceed.

411. Moreover had the claimant properly understood what the respondent wanted to do, namely support his return to work and genuinely help him remain an employee of the business, we considered that the claimant might well have interacted better with the respondent and been more flexible as to his approach which could potentially have led to a different outcome. It was unfortunate that this had not occurred in this case. The claimant had been a good worker and the respondent genuinely wanted to assist him return to work. Sadly the absence of a core role, the fact it was not reasonable to construct one for the claimant and the claimant's decision to accept nothing less than a core role at the time resulted in the unfortunate situation arising. This was not the fault of the claimant or the respondent.

412. Finally we wished to finally thank both parties for their working together to assist the Tribunal in achieving the overriding objective.

Employment Judge: David Hoey
Date of Judgment: 16 July 2021
Entered in register: 21 July 2021
and copied to parties