EMPLOYMENT TRIBUNALS

Claimant: Mr S Wickstead

Respondent: Openreach Limited

Heard at: Liverpool, remotely **On:** 14,15,16,17 June 2021

Before: Employment Judge Aspinall
Tribunal non legal member Mr Wells
Tribunal non legal member Mr Williamson

Representation
Claimant: Mr Moosa
Respondent: Miss Kight

REASONS

Background

1. By a claim form dated 24 April 2019 the claimant brought complaints of unfair dismissal and disability discrimination. He had worked for the respondent, as an ethernet design planner, from 16 November 1987 until his dismissal on 14 February 2019. The respondent said the reason for his dismissal was capability.

2. The matter came to a case management hearing before Employment Judge Benson on 2 October 2019 and was listed for final hearing today.

The List of issues

3. The issues between the parties which potentially fall to be determined by the Tribunal are as follows:

(i) Was the claimant a disabled person in accordance with the Equality Act 2010 ("EQA") at all relevant times because of the following condition(s): Sleep Apnoea; diabetes and/or hypertension

(ii) Were all of the claimant's discrimination complaints on the basis of the conditions of diabetes and hypertension presented within the time limits set out in

sections 123(1)(a) & (b) of the Equality Act 2010 ("EQA")?

(iii) What was the principal reason for dismissal and was it a potentially fair one in accordance with sections 98(1) and (2) of the Employment Rights Act 1996 ("ERA")?

(iv) If so, was the dismissal fair or unfair in accordance with ERA section 98(4), and, in particular, did the respondent in all respects act within the so-called 'band of reasonable responses'?

(v) If the claimant was unfairly dismissed the claimant seeks reinstatement and compensation.

(vi) Did the following thing(s) arise in consequence of the claimant's disability (or disabilities):

a. The claimant's inability to meet his performance targets

(vii) Did the respondent treat the claimant unfavourably as follows:

a. By dismissing the claimant.

(viii) Did the respondent treat the claimant unfavourably by dismissing the claimant because of the failure to meet his performance targets?

(ix) If so, has the respondent shown that dismissing the claimant was a proportionate means of achieving a legitimate aim? The respondent should plead in its amended response what it relies upon as its legitimate aim(s):

(x) Alternatively, has the respondent shown that it did not know, and could not reasonably have been expected to know, that the claimant had the disability or disabilities?

(xi) Did the respondent not know and could it not reasonably have been expected to know the claimant was a disabled person?

(xii) A "PCP" is a provision, criterion or practice. Did the respondent have the following PCP(s):

A performance review policy that required employees to reach specified targets or receive a next level warning.

(xiii) Did any such PCP put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled at any relevant time?

a. If so, did the respondent know or could it reasonably have been expected to know the claimant was likely to be placed at any such disadvantage?

b. If so, were there steps that were not taken that could have been taken by the respondent to avoid any such disadvantage? The burden of proof does not lie on the claimant, however it is helpful to know what steps the claimant alleges should have been taken and they are identified as follows:

i. To adjust the targets set on 21 May 2018 against which the claimant was monitored;

ii. To adjust the targets against which the claimant was monitored between 2 July and 10 August 2018;

iii. To adjust the targets against which the claimant was monitored between 29 August and 28 November 2018;

iv. To adjust the targets against which the claimant was monitored between 14 January 2019 and 14 February 2019.

c. If so, would it have been reasonable for the respondent to have to take those steps at any relevant time?

(xiv) If the claimant succeeds, in whole or part, the Tribunal will be concerned with issues of remedy and in particular, if the claimant is awarded compensation and/or damages, will decide how much should be awarded.

The Hearing

Documents

4. There was a bundle in five parts amounting to 519 pages.

Oral Evidence

5. The Tribunal heard evidence from the claimant who gave his evidence in a straightforward way. When asked about why he didn't meet the targets his responses at hearing, in his witness statement and at the time in contemporaneous documents related to computer problems and skill issues and inadequate training. We attached more weight to the contemporaneous evidence than the responses under cross examination which attempted to give more emphasis to his health.

6. We heard from Mr Donald who gave evidence in support of the claimant.

7. We heard from Mr Campbell the claimant's line manager, Mr Hull who made the decision to dismiss and Ms Robinson who heard the appeal against dismissal for the respondent. Each gave their evidence in a straightforward way.

8. We agreed a timetable for conduct of the hearing. The parties disagreed about who should go first, though this was not a strong position from either side. The claimant's preference was that the respondent lead with evidence of the reason for dismissal and the respondent said that claimant had the burden of proof in discrimination and should go first. The Tribunal adjourned to consider the issue.

9. We decided that as the reason for dismissal was alleged by the claimant to be his disability or something arising in consequence of it, we would find it helpful and in accordance with the overriding objective of dealing with the case fairly and justly to hear the claimant's evidence first.

The Facts

10. The claimant worked for the respondent as an ethernet design planner from 16 November 1987 until he was dismissed on notice with his notice taking effect on14 February 2019.

11. From December 2015 Mr Campbell was his manager. In 2016 he was on an informal performance improvement plan for a month. In March 2017 he took on a new role. He was one of a cohort of 9 people taking on the new role; 3 of them including the claimant were long standing BT employee internal transfers and 6 were apprentices from elsewhere in BT.

12. The new role comprised a number of elements, but it was agreed at the outset that the cohort would concentrate first on upskilling in three key areas which, in the respondent's terminology were; PNR, BSU and PPP. There were other experienced planners in the department who also did two other tasks.

13. By August 2017 Mr Campbell when comparing the claimant to other members of his cohort of nine formed the view that the claimant was not performing as well as the others. The claimant was slower and his productivity in terms of output was lower than the others. In August 2017 the claimant was put on an informal coaching plan for a month. He achieved the targets set by that plan. On 31 August 2017 the claimant and Mr Campbell met and discussed his performance. Mr Campbell wrote to the claimant on 31 August 2017 recording their discussion and setting out what he deemed to be reasonable expectations for performance times for core tasks that the claimant was required to undertake. The letter said:

> *"we discussed the typical task time turnaround of experienced members (as below)*
>
> *BSU reasonable expectation in hours 0.69, 41 minutes*
>
> *PPP 2.3, 138 minutes*
>
> *PNR 0.53 hours 32 minutes"*

14. The targets that Mr Campbell set for the claimant were based on times taken by experienced workers for each of the three tasks.

15. On 22 September 2017 the claimant passed an informal coaching plan and this was confirmed in an email. It said if he fell below the expectations again within the next year he would be placed on a formal plan.

16. In December 2017 Mr Campbell reviewed the claimant's performance against his cohort for parts of October and November 2018. He found that the claimant was completing an average of 9.3 BSU's, PPP's, and PNR's per week and the others were completing 11.81.

17. The data used at hearing for this period of comparison showed an error in that the average had been calculated using a denominator of 4 when in fact the claimant had only worked 3 of the weeks – it was not clear from the data if the comparator cohort had been adjusted to reflect weeks worked or not.

18. By the end of November the cohort progressed from achieving 11.81 to 13.8 completions. The cohort were also moving on to carrying out more than just the 3 areas of performance. The claimant's productivity was below that of his cohort and he was still working on only the 3 areas.

19. Mr Campbell perceived that the gap between the claimant's performance and that of the rest of the cohort was widening but he knew that the claimant had difficult personal circumstances at this time and decided not to take any action but to review it in early January.

20. In January 2018 the claimant's performance was less than half that of his cohort. He achieved 7.25 average completions in December when they achieved 17.66 and in January 2019 he achieved 5.3 when they achieved 14.

21. Mr Campbell spoke to the claimant about underperformance but no action plan was implemented in January as the claimant's external stressful life events were continuing.

22. On 7 February 2018 Mr Campbell met the claimant for a one to one meeting. The claimant had achieved a four week average completions of 7.25 compared to the experienced planners average of 17.66 in December and in January he had achieved 5.3 against their 14. Mr Campbell recorded that the claimant's house move had gone through. He recorded that the claimant was taking diabetes medication and was concerned about a family member's health, (there were acute circumstances that were very stressful for the claimant) and that these were contributing factors to his poor performance.

Poor Performance meeting invitation

23. On 15 February 2018 the claimant was invited to a first formal meeting under the Performance Process to take place on 23 February 2018. The meeting was to discuss:

> *Low productivity of PNR's BSU's and PPP's and the poor quality of PPP's produced.*

Sickness absence

24. The claimant went on sickness absence which was stress-related from 16 February 2018 until he returned to work on 16 April 2018. During his sickness absence he used the respondent's employee assistance programme.

The Workplace Passport

25. On 24 April 2018 the claimant completed a Workplace Passport detailing health conditions. It recorded that he had type 2 diabetes and high blood pressure which was controlled by medication.

26. The claimant was referred to Occupational Health (OH).

Performance meeting

27. On 21 May 2018 the claimant had a performance meeting with Mr Campbell. The claimant was to be given an informal warning for his performance in the first month following his return to work but the date of that warning was held off pending the outcome of the OH referral. The claimant was told he would go on a performance plan. His target was to be 30 completions. Mr Campbell had arrived at this by looking at the reasonable expectation for completion times for the completion of PNR's BSU's and PPP's by experienced planners (the timings from the 31 August 2017 letter).

28. In view of his recent return from stress related absence the start of the claimant's plan was postponed until 2 July 2018 to give him more time to settle in and adjust. This was part of what the respondent called a "glide path" approach to improving performance over time with support. The plan was to include access to a support colleague as and when needed and weekly one to one's for review.

23 May 2018 Occupational Health meeting

29. The OH report following the May meeting stated that the claimant was diabetic with recent poor control and suffered from high blood pressure but was on controlled medication. It reports him suffering fatigue, poor concentration and memory issues. OH said that the claimant's target of 30 completions should be reduced and commented:

> *"It seems unlikely that there is a specific medical condition causing the performance issues."*

Warning imposed and appealed

30. On 21 June 2018 Mr Campbell gave the claimant a First Formal Warning. The claimant wanted to lodge a grievance at this time but he was advised by Mrs Wardle from HR that the route was an appeal. The claimant appealed and Mr Hull was appointed to hear the appeal. The appeal hearing took place on 11 July 2018. Mr Hull upheld the decision to impose the First Formal Warning.

The 9 July 2018 Action Plan

31. The claimant was on a formal action plan from 9 July 2018 which set him a target of 30 completions per week in his standard role. The targets were staggered so that they increased gradually for each of the four weeks. He was measured on quantitative output and on a qualitative measure of having met gold standard or not. The claimant consistently throughout this and subsequent plans met the gold standard in the quality of his work. The claimant did not meet the quantitative targets for weeks three and four.

First formal performance plan

		target	achieved
Week	9 July 2018	10	12

1			
Week 2	16 July 2018	15	15
Week 3	23 July 2018	20	17
Week 4	30 July 2018	28.5	17

32. On 24 July the claimant was told that the plan would be extended for two weeks. Mr Campbell had spoken to HR and they decided between themselves, but without consulting the claimant, to apply a 5% reduction to target so as to act on OH advice that the target should be reduced. The report had not said by how much it should be reduced.

Extension to first plan outcomes

Week 5	6 August 2018	28.5	17
Week 6	12 August 2018	28.5	19

33. The claimant had been supported by a union representative throughout his return to work. In early August 2018 Mr Donald became the representative offering the claimant support. Mr Donald attended each meeting after this date with the claimant.

34. By early August 2018 the claimant was feeling tired at work, struggling to concentrate and experiencing memory problems. He was having "micro sleeps" where he nodded off for just a second or two, at work. He did not tell anyone about his micro sleeps. When he came home from work he was having to have a sleep which meant that his evening activities were disrupted. He didn't tell anyone at work about that either.

10 August 2018 final formal warning meeting

35. The claimant attended a performance review meeting with Mr Donald and Mr Campbell. The above outcomes were noted and agreed and Mr Campbell told the claimant he could be at risk of dismissal for poor performance. At this meeting the claimant told Mr Campbell that he was struggling with memory and concentration and had contacted RehabWorks to get help and advice. Neither the claimant nor Mr Donald made any explicit link between ill health and performance and no request was made for adjustments. The emphasis in the meeting was on the claimant's stressful external life events. On 29 August 2021 Mr Campbell wrote to the claimant telling him he was issued a Final Formal Warning and informing him of his right to appeal.

36. A second formal performance plan began on 28 August 2018. The claimant again had staggered quantitative targets increasing to 30 completions over six weeks.

	Target	Target	Achieved
Week 1	29 August 2018	20	10
Week 2	5 September 2018	22	5
Week 3	12 September 2018	24	11
Week 4	19 September 2018	26	13
Week 5	26 September 2018	28	14
Week 6	3 October 2018	30	7
Week 7	10 October 2018	30	11
Week 8	17 October 2018	30	10
Week 9	24 October 2018	30	11
Week 10	31 October 2018	30	12
Week 11	& November 2018	30	14

37. During this period the claimant was experiencing IT problems that led to computer downtime for him. He also had difficulty accessing software that other planners could access. He had to get colleagues to complete part of the tasks for him. He lost the opportunity to gain skill himself in use of that software.

Performance review meeting 5 September 2018

38. Mr Campbell met with the claimant because the claimant had completed a stress risk assessment and this had come back as amber showing the claimant to be experiencing stress. The claimant said his stress was caused by both external life issues and the performance plan itself and problems with IT. The claimant told Mr Campbell he had an appointment coming up with RehabWorks. Mr Campbell understood the use of RehabWorks to be in relation to the claimant's stress caused by external life issues.

18 September 2018 appeal meeting

39. Mr Hull conducted the appeal. The claimant told Mr Hull that he thought the target of 30 was "aspirational" and that as he had achieved 19 completion there was evidence of his performance improving. The claimant told Mr Hull that he was seeing RehabWorks about his stress. The claimant raised the computer downtime problems again. Computer issues was the reason put forward by the claimant for not meeting targets on the plan.

5 October 2018 outcome letter

40. Mr Hull considered the case after the meeting and decided to uphold the Formal Final Warning.

31 October 2018 meeting with Martin Hull

41. On 12 October 2018 Mr Campbell wrote to the claimant telling him that the

poor performance would now go to a decision meeting with Mr Hull on 31 October 2018. It had been scheduled for 16 October but Mr Campbell put it back to allow himself more time to review the claimant's performance on plan. The claimant emailed Mr Hull on 31 October again raising issues about the impact of computer downtime on his performance. During the meeting the claimant told Mr Hull that he thought the performance plan should have been suspended until he had a fully working IT set up.

42. The claimant told Mr Hull he was tired and had poor concentration. The claimant showed Mr Hull the referral letter for him to go for oxygen saturation monitoring and he told Mr Hull that he was being investigated for a possible sleep disorder.

43. On 7 November 2018 Mr Hull told HR that the claimant was being investigated for a possible sleep disorder and HR put a note to that effect on an electronic record.

Dismissal

44. On 21 November 2018 the claimant received a letter of dismissal giving three months notice. The letter gave unsatisfactory performance as the reason for dismissal and recited the performance plan outcomes. It also said that Mr Hull acknowledged that there had been computer downtime but that this had been taken into account on the plan. The letter of dismissal also said:

> *"I have taken account of the health issues you have raised but note that the OHS report of 25 May 2018 stated that there is no medical reason why you should not be able to render reliable service."*

45. The letter referred to support that had been in place through buddying and coaching and more than two years in the role, as factors affecting the decision.

Grounds for appeal

46. The claimant appealed the decision to dismiss. His grounds for appeal were set out in an email to the respondent dated 22 November 2018. He referred to a grievance and appeal. The grounds (as extracted from a full email using the claimant's language) were:

- *I don't think the full impact of the computer problems has been recognised – I needed a full computer rebuild – I didn't have all the programs available to the rest of the team.*

- *I voiced my concerns over the targets – I never agreed 30 a week were realistic.*

- *I wasn't happy with the procedure for the way I received the dismissal letter.*

- *I am still getting help from RehabWorks and have been referred for oxygen saturation monitoring "to record the oxygen in your blood when*

you are sleeping" This could also shed light on any problems it has caused me, and a contributing factor to not reaching my full work potential".

47. At this time the claimant was on notice and had been put on garden leave by the respondent so did not have access to his work computer. He sent a second email to HR including grounds of appeal on 23 November 2018, they were: effects of IT on performance, new laptop should have been provided, no alternative roles offered "*which could have helped with my medical conditions" "ongoing treatment with RehabWorks" "appointment on Wednesday 28 November relating to a possible sleep disorder at my local hospital".*

21 December 2019 appeal hearing

48. Ms Robinson conducted the appeal. The claimant had Mr Donald to accompany him. The claimant raised the computer issues; that the hardware didn't work and that he did not have access to the same desktop applications that he needed to complete his work that others had. He raised the issue of targets and how they were arrived at. He did not mention his health as a factor affecting his performance in what was a two and a half hour meeting. Neither he nor Mr Donald asked for any adjustments based on health.

49. Ms Robinson went away to consider the appeal and decided to allow the claimant a further four week period of performance on a coaching plan when she could be sure he had the correct hardware and software in place.

10 January 2019 meeting

50. Mrs Robinson met with the claimant on 10 January 2019 to discuss the terms of the coaching plan. The claimant told Ms Robinson at that meeting that he had been diagnosed with obstructive sleep apnoea. He told her that his was an explanation for the memory concentration and tiredness problems he had been having.

51. The claimant started his 3rd formal performance plan on 14 January 2019. He had a new laptop and no technical issues though he was still not as skilled in use of the software as those colleagues who had had good access to it for some time. There were again staggered quantitative targets which had not been agreed with him. They had been shared with him and neither he nor Mr Donald wrote to object to the targest or request any adjustment to them for health reasons.

Week 1	14 January 2019	20	16
Week 2	21 January 2019	23	14
Week 3	28 January 2019	27	21
Week 4	4 February 2019	30	20

52. The claimant did not meet the quantitative targets. He asked for an OH referral and for delay in the termination date of his employment. Ms Robinson agreed to refer him to OH. At the end of the four week plan Ms Robinson concluded that the claimant had not met targets and decided to uphold the

decision to dismiss.

53. Mrs Robinson did not reassess the targets on her four week plan when hearing the claimant had Sleep Apnoea nor did she do this at the end of the four weeks. Ms Robinson sent a letter of dismissal dated 12 February 2019.

Claimant's grievance

54. The claimant lodged a formal grievance on 13th February 2019 but was told that the appeal process was still underway. The claimant's employment came to an end on 14 February 2019

14 March 2019 OHS meeting

55. On 14 March 2019 the claimant saw the OH physician who reported:

> *"As per the previous OH report from May 2018 I support recommendations regarding reduction in expected work output / targets taking account of his combination of health conditions which may impair his performance. The extent of the adjustment as well as its reasonableness is for management to consider in accordance with operational feasibility.*
>
> *Performance may have been impaired taking account of his sleep apnoea symptoms and may continue to be affected compared to his peers who do not have this condition, however, given that he is now on treatment and reporting improvement in function, the impact on performance should not be as great."*

56. The respondent received this report. The claimant wrote to the respondent on 25 March 2019 chasing an outcome on his appeal and saying that he was feeling a lot better after using the equipment for the treatment of sleep apnoea and with the good progress he made with RehabWorks felt he could do a good job for the respondent.

57. The respondent received the OH report. Ms Robinson sent her appeal outcome letter on 27 March 2019 dismissing the claimant's appeal. The letter addressed each of the claimant's grounds of appeal. On the health issue Ms Robinson said:

> *On 10 January 2019 you informed me that you had been diagnosed with Obstructive Sleep Apnoea Syndrome. Given that we had already reduced targets for the plan I felt reasonable adjustments had been made to potentially accommodate any impact as a result of the condition. As a result of the diagnoses concerning your new health condition in the latter stages of the process and at the request of you / your CWU rep there has been a recent OHS report dated 13 March 2019…..as per above the target is 30- with 20% reduction which may be reasonable to accommodate, the target would be 24. Taking into consideration the reduction and the extended 21 weeks of coaching, the highest you reached was 21 and this was for only one week, all of the weeks varied, with the week prior to this being just 14, therefore overall unfortunately was still way off target and there has been no consistent improvement with output.*

I also note that you are encouraged to undertake CBT via RehabWorks in support of your coaching plans for some time, however you declined saying you didn't think it would be of any help to you stop you eventually agreed to take up the support and this has been in place in September 2018. The advice from RehabWorks is that you have been improving in sessions. It is disappointing that you didn't take this option up earlier as suggested by your line manager.

Although current OHS suggest this may improve with treatment, previous OHS (May 18) said performance issues are likely to be external stressors or capability issue, therefore concerns continue with ability to maintain consistently and provide the level of output and performance required.

Your last day of service remains 14 February 2019."

58. The claimant brought his tribunal claim.

Relevant Law

59. The disability discrimination complaints were brought under the Equality Act 2010. Section 6 defines a disability as follows:

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

60. The section goes on to provide that any reference to a disabled person is reference to a person who has a disability.

61. The word "substantial" is defined in section 212(1) as meaning "more than minor or trivial". It would be reasonable to regard difficulty carrying out activities associated with toileting or caused by frequent minor incontinence as having a substantial adverse effect on normal day to day activities.

62. There are some additional provisions about the meaning of disability in Schedule 1 to the Act. Paragraph 2 provides that the effect of an impairment is" long-term" if it has lasted for at least 12 months or is likely to last for at least 12 months, and that:

> "**If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur."**

63. In assessing the likelihood of an effect lasting for twelve months account should be taken of the circumstances at the time the alleged discrimination took place. Account should also be taken of both the typical length of such an effect on an individual and any relevant factors specific to this individual for example general state of health or age.

64. Under paragraph 5 of Schedule 1,

> **"An impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities if**
>
> **(a) measures are being taken to treat or correct it, and**
>
> **(b) but for that, it would be likely to have that effect."**

Guidance

65. Section 6(5) of the Act empowers the Secretary of State to issue guidance on matters to be taken into account in decisions under section 6(1). Section D of the guidance contains some provisions on what amount to normal day-to-day activities, and paragraph D3 provides:

> **"In general day-to-day activities are things people do on a regular or daily basis, and examples include shopping, reading and writing, having a conversation or using the telephone, watching television, getting washed and dressed, preparing and eating food, carrying out household tasks, walking and travelling by various forms of transport and taking part in social activities. Normal day-to-day activities can include general work-related activities and study and education-related activities, such as interacting with colleagues, following instructions, using a computer, driving, carrying out interviews, preparing written documents and keeping to a timetable or shift pattern."**

Burden of Proof

66. The Equality Act 2010 provides for a shifting burden of proof. Section 136 says:

> "(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."

67. 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.

68. 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.

69. 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.

Time limits

70. The time limit for Equality Act claims appears in section 123 as follows:

> **"(1) Proceedings on a complaint within section 120 may not be brought after the end of –**
>
> **(a) the period of three months starting with the date of the act to which the complaint relates, or**
>
> **(b) such other period as the Employment Tribunal thinks just and equitable …**
>
> **(2) …**
>
> **(3) For the purposes of this section –**
>
> **(a) conduct extending over a period is to be treated as done at the end of the period;**
>
> **(b) failure to do something is to be treated as occurring when the person in question decided on it".**

71. A continuing course of conduct might amount to an act extending over a period, in which case time runs from the last act in question. Hendricks v Commissioner of Police of the Metropolis [2003] IRLR 96 considered the circumstances in which there will be an act extending over a period.

> "The concepts of policy, rule, practice, scheme or regime in the authorities were given as examples of when an act extends over a period. They should not be treated as a complete and constricting statement of the indicia of "an act extending over a period." I agree with the observation made by Sedley LJ, in his decision on the paper application for permission to appeal, that the Appeal Tribunal allowed itself to be side-tracked by focusing on whether a "policy" could be discerned. Instead, the focus should be on the substance of the complaints that the Commissioner was responsible for an ongoing situation or a continuing state of affairs in which female ethnic minority officers in the Service were treated less favourably. The question is whether that is "an act extending over a period" as distinct from a succession of unconnected or isolated specific acts, for which time would begin to run from the date when each specific act was committed."

Early Conciliation Provisions

72. Section 18A of the Employment Tribunals Act 1996 contains a requirement that before a person (the prospective claimant) presents an application to institute relevant proceedings relating to any matter, the prospective claimant must provide to ACAS prescribed information in the prescribed manner about that matter.

73. The prescribed period means prescribed in Employment Tribunal procedure regulations. In relation to claims for disability discrimination the prescribed period is three months.

Discrimination arising from disability

74. Section 15 of the Equality Act 2010 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".**

75. A Section 15 claim will not succeed if the respondent shows that it did not know, and could not reasonably have been expected to know, that the claimant had the disability.

76. Scott v Kenton Schools Academy Trust [2019] UKEAT 0031 considered the test, under Section 15, of something arising in consequence of the disability. HHJ Auerbach said at paragraph 41 of the judgment:

> *"The test has been examined in prior authorities now on a number of occasions, as well as other aspects of Section 15. The most useful guidance to be found in one place, I think, is that in the decision of the President of the EAT, as she then was, Simler J, in Pnaiser v NHS England & Another [2016] IRLR 170 where she drew the threads together of the previous authorities, as follows:*
>
> > *31. ……the proper approach to determining section 15 claims …. can be summarised as follows:*
> >
> > > *(a) 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.*
> > >
> > > *(b) 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 section15 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.*

> *(c) Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A's motive in acting as he or she did is simply irrelevant: see Nagarajan v London Regional Transport [1999] IRLR 572. ..*
>
> *(d) The Tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is "something arising in consequence of B's disability". That expression 'arising in consequence of' could describe a range of causal links. Having regard to the legislative history of section 15 of the Act (described comprehensively by Elisabeth Laing J in Hall), the statutory purpose which appears from the wording of section 15, namely to provide protection in cases where the consequence or effects of a disability lead to unfavourable treatment, and the availability of a justification defence, the causal link between the something that causes unfavourable treatment and the disability may include more than one link. In other words, more than one relevant consequence of the disability may require consideration, and it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability.*

I observe that the tenor of all of this guidance is that, whilst it is a causation test, and whilst there must be some sufficient connection between the disability and the something relied upon in the particular case in order, for the "in consequence test" to be satisfied, the connection can be a relatively loose one."

Duty to make Reasonable Adjustments

77. Section 39(5) Equality Act 2010 applies to an employer the duty to make reasonable adjustments. Further provisions about the duty to make reasonable adjustments appear in Section 20, Section 21 and Schedule 8.

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

78. The words "provision criterion or practice" (PCP) are not defined in The Equality Act 2010. The Commission Code of Practice paragraph 6.10 says the phrase "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".

79. The importance of a Tribunal going through each of the constituent parts of the provisions relating to the duty to make reasonable adjustments was emphasised by the EAT in Environment Agency –v- Rowan [2008] ICR 218 and reinforced in The Royal Bank of Scotland –v- Ashton [2011] ICR 632. The Tribunal must consider:

a. What is the PCP ?

b. How does that PCP put the claimant at a substantial disadvantage in comparison with persons who are not disabled ?

c. Can the respondent show that it did not know and could not reasonably have been expected to have known that the claimant was a disabled person and likely to be at that disadvantage ?

d. Has the respondent failed in its duty to take such steps as it would have been reasonable to take to have avoided the disadvantage ?

80. The question of what will amount to a PCP was considered by the Employment Appeal Tribunal in 2018 in Sheikholeslami v The University of Edinburgh UK EATS 2018 Mrs Justice Simler considered the comparison exercise. At paragraph 48:

> "*It is well established that the duty to make reasonable adjustments arises where a PCP puts a disabled person at a substantial disadvantage compared with people who are not disabled. The purpose of the comparison exercise with people who are not disabled is to test whether the PCP has the effect of producing the relevant disadvantage as between those who are and those who are not disabled, and whether what causes the disadvantage is the PCP. That is not a causation question…There is no requirement to identify a comparator or comparator group whose circumstances are the same or nearly the same as the disabled person's circumstances."*
>
> *"The PCP may bite harder on the disabled group than it does on those without a disability. Whether there is a substantial disadvantage is a question of fact assessed on an objective basis and measured by comparison with what the position would be if the disabled person in question did not have a disability."*

81. In Ishola v Transport for London [2020] EWCA Civ 112 Lady Justice Simler considered what might amount to a PCP at para 35:

> *"The words "provision, criterion or practice" are not terms of art, but are ordinary English words…they are broad and overlapping, and in light of the object of the legislation, not to be narrowly construed or unjustifiably limited in their application."*

82. And at paragraph 37:

> *"In my judgment, however widely and purposively the concept of a PCP is to be interpreted, it does not apply to every act of unfair treatment of a particular employee. That is not the mischief which the concept of indirect discrimination and the duty to make reasonable adjustments are intended to address. If an employer unfairly treated employee by an act or decision and neither direct discrimination nor disability -related discrimination is made out because the act or decision was not done/made by reason of disability or other relevant ground, it is artificial and wrong to seek to convert them by a process of abstraction into the application of a discriminatory PCP."*

83. As 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".

84. The Equality and Human Rights Commission Code of Practice on Employment (2011) provides in relation to reasonable adjustments at paragraph 6.24:

> *"There is no onus on the disabled worker to suggest what adjustments should be made (although it is good practice for employers to ask)".*

And at paragraph 6.28:

> "*The following are some of the factors which might be taken into account when deciding what is a reasonable step for an employer to have to take:*
>
> - *Whether taking any particular steps would be effective in preventing the substantial disadvantage*
> - *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*
> - *the availability of the employer financial or other assistance to help make adjustment (such as advice through Access to Work) and*
> - *the type and size of the employer*

Unfair dismissal

85. Section 95(1) of the Employment Rights Act 1996 ("ERA") provides:

> **(1) For the purposes of this Part an employee is dismissed by his employer if … and … only if- (a) the contract under which he is employed is terminated by the employer (whether with or without notice).**

86. Section 98 of ERA provides:

> **(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show-**
>
> **(a) the reason (or, if more than one, the principal reason) for the dismissal, and**
>
> **(b) that is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.**
>
> **(2) A reason falls within this subsection if it relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do.**

(3) ….

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

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case.

87. The reason for dismissal is the set of facts known to the employer, or the set of beliefs held by him, that causes him to dismiss the employee: *Abernethy v, Mott, Hay and Anderson* [1974] ICR 323, CA.

88. In applying the test of reasonableness, the Tribunal must not substitute its own view for that of the employer. It is only where the employer's decision falls outside the range of reasonable responses that the dismissal should be held to be unfair. This proposition is just as true when it comes to examining the employer's investigation as it is for the assessment of the decision itself: *J Sainsbury plc v. Hitt* [2003] ICR 111.

89. In Spencer v Paragon Wallpapers Ltd [1976] IRLR 373 a sickness absence case, Phillips J said:

> "*Every case depends on its own circumstances. The basic question which has to be determined in every case is whether, in all circumstances, the employer can be expected to wait any longer and, if so, how much longer?"*

90. Relevant circumstances include the nature of the illness, the likely length of the continuing absence and the need of the employers to have done the work which the employee was engaged to do.

91. In Lynock v Cereal Packaging [1988] IRLR510 the EAT considered the range of factors which may be taken into account including; the nature of the illness, the likelihood of reoccurring or some other illness arising, the length of the various absences in the space of good health between them, the need of the employer for the work done by the particular employee, the impact of the absences on others who work with the employee and the extent to which the difficulty of the situation and the position of the employer has been made clear to the employee so that the employee realises that the point of no return, the moment when the decision was ultimately being made may be approaching.

92. The EAT in Lynock emphasised that the appropriate approach for the employer to take is one of understanding and not a disciplinary approach.

93. In O Brien v Bolton St Catherine's Academy [2017] EWCA Civ 145 the claimant was a senior teacher at the school who had been absent on sick leave

for a year. She was dismissed for capability reasons, the respondent stating that there was unsatisfactory evidence as to a likely return to work date. At internal appeal the claimant adduced new evidence in the form of a fit note that she was fit to return to work. The respondent rejected that evidence and dismissed the claimant. The claimant brought claims for unfair dismissal and disability discrimination together with other claims. The Employment Tribunal rejected some of her claims but found that she had been unfairly dismissed and that her dismissal was an act of discrimination arising out of her disability. The respondent appealed the Tribunal's decision and, on the unfair dismissal and discrimination arising out of a disability arguments, it was reversed by the EAT.

94. The Court of Appeal allowed the claimant's appeal and reinstated the Tribunal's finding. The majority decision was that the Tribunal had not erred in law in its findings on the reasonableness of waiting a little longer. The Tribunal had found that it would be reasonable for the school to have obtained its own evidence to confirm the claimant's argument at appeal that she was fit to return to work, but that need only occasion a short delay and there was no real evidence that serious further damage would be done during that time. In a dissenting judgment Davis LJ considered that the issue was "how much longer did this employer have to wait".

95. The question of how long it is reasonable for an employer to wait in an unfair dismissal claim may overlap with the consideration of a proportionality defence where a claimant also brings a claim under section 15 Equality Act 2010.

96. The O'Brien case also addressed the issue of the consideration of the reasonableness (and proportionality for the Section 15 claim) of the employer's response as at the date of dismissal or the date of appeal. The Court of Appeal, by majority decision, said "as a matter of substance her dismissal was the product of the combination of the original decision and the failure of her appeal, and it is that composite decision that requires to be justified" and cited its own earlier decision in *Taylor v OCS Group Ltd [2006] EWCA Civ 702.*

Applying the Law to the Facts

Time limits

Were the claimant's discrimination complaints on the basis of the conditions of diabetes and hypertension presented within the time limits set out in section 123 Equality Act 2010?

97. The claimant's last act of discrimination complained of took place on 14 February 2019. That gave a primary limitation date of 13 May 2019. The claimant entered early conciliation on 8 April 2019 and achieved an early conciliation certificate on 16 April 2019 giving 8 days to be added to the primary limitation date to achieve a deadline date for commencing proceedings in the Employment Tribunal on 21 May 2019.

98. On 18 June 2019 the claimant made a written application to include diabetes and hypertension as disabilities upon which he relied. That application came before employment Judge Benson at the preliminary hearing for case management purposes on 2 October 2019. Employment Judge Benson allowed

the amendment subject to determination by final hearing of the time points.

99. The complaints in relation to diabetes and hypertension are brought out of time. The factors that we have taken into account in determining whether or not to exercise our discretion to extend time on the grounds that it would be just and equitable to do so are the length of delay and the reason for the delay

Length of delay and reason for delay

100. The claimant's complaint in relation to diabetes and hypertension is brought some 19 weeks out of time. Exercising the discretion should be the exception and not the rule. The claimant did not advance any particular reason for delay other than to say that it was all new to him at the time. We considered:

(1) the claimant had been supported by his trade union throughout 2018 and 2019;

(2) the delay is a long delay of 19 weeks;

(3) the claimant was aware that he had diabetes and hypertension and had reported them to his employer prior to termination of employment;

(4) the claimant knew that diabetes was a disability and had reported this to his employer prior to termination of employment;

(5) the claimant was a capable litigant in person when he brought Tribunal proceedings himself claiming the protected characteristic of disability, relying on his obstructive sleep apnoea syndrome. His original claim form was amended to include disability discrimination.

101. We found there was nothing to prevent the claimant from having brought proceedings relying on diabetes and hypertension at the same time as he commenced proceedings relying on obstructive sleep apnoea syndrome on 24 April 2019. There was no reason for the delay save that the claimant added the additional conditions later to bolster his complaint. In the circumstances it would not be just and equitable to extend time. The only condition upon which the claimant may rely on in this case is his obstructive sleep apnoea syndrome.

Was the claimant disabled for the purposes of the Equality Act 2010 by reason of his sleep apnoea at the relevant time?

102. The relevant time is the dates of the acts of discrimination complained of. The earliest date of an act of discrimination complained of is the failure to reasonably adjust targets on 21 May 2018. The next period was between 2 July and 10 August 2018 when there is an allegation of failure to reasonably adjust targets. The next period runs from 29 August 2018 until 28 November 2018 and again relates to a failure to reasonably adjust targets. The claimant then complains about his dismissal as an act of discrimination. He was made aware of the termination of his employment when he was handed a letter to that effect on 21 November 2018.

103. Was the claimant disabled on 21 May 2018? Section 6 of the Equality Act 2010 requires the claimant to establish that he was suffering from an impairment that was substantial and had a long-term adverse effect on his ability to carry out his normal day-to-day activities at that date.

104. *Normal day to day activities:* Miss Kight made a submission that the claimant's work duties fell outside normal day-to-day activities within the definition of disability. We reject that submission. The Guidance on the matters to be taken into account in determining questions relating to the definition of disability 2011 SI 2011/1159 at paragraph D8 deals with specialised activities and provides that in some instances work-related activities are so highly specialised that they would not be regarded as normal day-to-day activities. The example given in the Guidance is that of a watch repairer carrying out delicate work with highly specialised tools. Other examples include high level musical performers or professional athletes. The claimant's work was not of that highly specialised character. It required him to use a computer and to use bespoke software but those were things that he and the other 8 people in his cohort were learning to do. We consider using a computer and learning how to use new software applications within the context of his job formed part of normal day-to-day activities for the claimant.

105. *Impact substantial or minor / trivial?* Was the impact of the condition on his ability to perform those normal day-to-day activities substantial in the sense of it being more than minor or trivial? In his Workplace Passport the claimant had reported on 24 April 2018 feeling tired sometimes. We also accept his oral evidence that from January 2018 he had felt tired during the daytime. His Disability Impact Statement evidence also reported him experiencing tiredness in April and May 2018.

106. We considered that the impact of his condition as at 21 May 18 was minor. We reached this decision because of the claimant's oral evidence that he was able to carry out his normal day-to-day activities at this time such as drive, get up and washed and dressed and come to work, perform at work (albeit not to a standard that the respondent was content with) cook and keep house for himself and his daughter and care for his daughter. He wasn't able to tell us things that he couldn't do at that time. He was not disabled as of the date of the first act of discrimination complained of, the failure to reasonably adjust on 21 May 2018 therefore this part of his complaint must fail.

107. By 1 August 2018 we find that the impact of the claimant's condition on his ability to perform his normal day-to-day activities had become substantial. This is because:

(1) On 23 May 2018 he had met with Occupational Health at page 161 of the bundle and had reported fatigue, poor concentration, and memory problems. The report records that he has expressed concerns about this;

(2) He had been to see his GP, at an unspecified date between May and August 2018 (we did not have full GP records for this period in our bundle) because he reported to his line manager on 1 August 2018 that he had told the GP had concerns about his memory and the GP

had administered a memory test and did not have ongoing concerns about the claimant's memory;

(3) He had reported to his line manager on 1 August 2018 his own concerns about tiredness, poor concentration and memory;

(4) He was having micro sleeps or nodding off for moments during his working day (but he did not tell Mr Campbell about these micro sleeps until January 2019);

(5) On page 351 of the bundle we note that the claimant's concerns about his health were recorded on the plan by Mr Campbell;

(6) He was having to have a sleep as soon as he got home from work in order to be able to carry on with his evening;

(7) He was waking feeling unrefreshed and fatigued.

108. We conclude that the impact of his condition at that time was that it was limiting what he could do both at work and outside of his working hours and therefore was having a substantial adverse effect on his ability to perform normal day-to-day activities at that time.

109. *Long term:* As at 1 August 2018 though, the claimant's condition was not long-term. At that point Occupational Health had done nothing more than record it, they had not deemed it necessary to act upon what the claimant had said. The GP had administered a rudimentary memory test but had not referred the claimant on anywhere. As at 1 August 2018 although his condition was having a substantial adverse effect it had not lasted 12 months, and was not likely, seen at that date, to last 12 months from onset.

110. The condition became long-term, for the purposes of Section 6, after the claimant revisited his GP and reported ongoing issues with tiredness, micro sleeps, memory and poor concentration. We accept the claimant's oral evidence that he reported these matters to his GP (in the absence of GP records) because of the corroborating evidence of the GP referring him by letter dated 19 October 2018 to a specialist for oxygen saturation monitoring. In the absence of a date for that GP visit we have relied on the date of 19 October 2018, the date of the referral letter, as the date by which the claimant's condition was likely in the sense of could well happen to last 12 months from its point of onset.

111. *Employer's knowledge of disability:* Turning now to the respondent's state of knowledge of the claimant's disability. At a meeting on 31 October 2018 the claimant showed Mr Hull a referral letter for oxygen saturation monitoring. Shortly thereafter on 7 November 2018 Mr Hull spoke to HR. We saw an extract from the HR caseload system recording that the claimant had an appointment for investigation into a possible condition relating to low oxygen levels. Mr Hull's evidence was that he could not remember whether he told HR or HR told him about the investigation into a possible condition relating to low oxygen levels. We find it more plausible that the information came from the claimant to Mr Hull on 31 October 18 and was relayed by Mr Hull to HR in the follow-up telephone conversation on 7 November 2018. We find that from 31 October 2018 the

employer ought reasonably to have known that the claimant had a disability. We say this because:

(1) Mr Hull knew about the referral for oxygen saturation testing;

(2) The claimant told Mr Hull on 31 October 2018 that he was struggling with tiredness, poor concentration and memory issues;

(3) Mr Hull could at that date have looked at the performance monitoring document and seen historic reference to those issues;

(4) The respondent knew that the claimant had been reporting that he felt tired from January 2018;

(5) The Occupational Health report recorded concerns about fatigue, poor concentration and memory;

(6) The claimant had spoken to his GP about concerns about his memory and told Mr Campbell on 1 August 2018 that he had been tested for poor memory.

112. We therefore find that from 31 October 2018 the claimant was disabled by reason of the condition that subsequently came to be labelled sleep apnoea syndrome, and the respondent knew or ought reasonably to have known of his disability.

113. Prior to this date the acts of discrimination complained of in relation to the failure to reasonably adjust targets from 21st of May 2018, and on the plan from 2 July to 10 August 2018 and on plan from 29 August up until the date of 31 October 2018 cannot succeed and stand dismissed. It is not necessary to consider time points on those issues.

114. From 31 October 2018 the appropriate approach to be taken was one of understanding and not a disciplinary approach.

<u>Reasonable adjustments complaint</u>

115. We now turn to consider the reasonable adjustments complaints insofar as it relates to the failure to adjust targets from 31 October 2018 until 28 November 2018 and the failure to adjust targets from January to February 2019. This part of the claimant's claim fails.

116. The claimant relied on a PCP of **the operation of a performance review policy that required employees to reach specified targets or receive a next level warning**. We find that that PCP (30 completions or next level) was applied to the claimant between 31 October and 28 November 2018. The PCP was also applied (20,23,27 then 30 completions or next level) for four weeks in January to February 2019.

117. *Substantial disadvantage:* The claimant had a disability. He did not make explicit in this case what he said was the substantial disadvantage. His implicit

case was that **he was less able than others without his disability to meet the targets.**

118. The respondent applied the PCP to the claimant and his cohort. It is the PCP that must put the claimant at the substantial disadvantage. The disadvantage must be linked to the disability. In Sheikholeslami Simler J said

"Whether there is substantial disadvantage as a result of the application of a PCP in a particular case is a question of fact assessed on an objective basis and measured by comparison with what the position would be if the disabled person in question did not have a disability"

119. What we saw and heard in evidence both oral and the contemporaneous documentation, in relation to the October and November targets was that it was not the PCP that put the claimant at a substantial disadvantage as a disabled person. It was the technical issues, computer downtime and lack of access to software.

120. In relation to the January to February 2019 disadvantage we find that the the technical issues were no longer so significant a cause of his non performance because Ms Robinson made sure he had working equipment in the form of a new laptop and access to the software but we find that the claimant was still experiencing a skill gap in that he had not had access to the software to the same extent as other colleagues prior to that date due to technical issues. He needed upskilling now that he had his computer and software working. Again applying Sheikholeslami, the disadvantage was not because of the PCP in January and February 2019. It was because of the historic technical issues which had left him less skilled than others. During January and February his performance was improving with him moving from 16 completions to 20 after four weeks. This supported our view, based on the claimant's oral evidence, that he wasn't as good or as fast on the systems as his colleagues who had had more access to them. It is notable that the claimant always maintained a gold standard for the quality of his work though he was slower, because he had had less experience of them, and had to ask for help more often than others. The claim for reasonable adjustment fails because the PCP did not cause the substantial disadvantage.

121. If we are wrong about this and the PCP was causing substantial disadvantage then the reasonable adjustment complaints will fail on knowledge of that substantial disadvantage.

122. In Secretary of State for Department of Work and Pensions v Alam 2010 ICR 665 The Employment Appeal Tribunal considered knowledge of substantial disadvantage. The claimant had been telling his employer at both the dismissal and appeal meetings that it was his computer and technical issues, use of software and access to the software that was affecting his performance. The respondent was not on notice of substantial disadvantage as result of the PCP attributable to disability. It was on notice of disadvantage as a result of computer, technical and skill issues.

123. If we are wrong about the knowledge of substantial disadvantage in relation to the January and February 2019 plan, because by then the claimant

had told Ms Robinson he had been diagnosed with sleep apnoea, then we would have found that the adjustments made on that plan would have been reasonable adjustments. The claimant was not formally consulted about the level of the target setting but he had had opportunities to discuss the plan and did not at any stage, despite being union represented, make an explicit written request for an adjustment because of his health. The reality in this case was that at the time the claimant's underperformance against target was due to his lack of skill.

124. In January and February 2019 the claimant was still performing only 3 task areas whereas colleagues had moved on to the full range of duties. He was permitted to remain on just those three. He was given a reduced target and a target that was increasing over a four week period. An OH report had been requested. Those adjustments, if the claimant had succeeded in establishing substantial disadvantage as a result of his disability and employer's knowledge of the substantial disadvantage, would have been reasonable adjustments so that the duty to adjust would have been met at that time.

125. That is not to say that we condone the fact that the respondent did not discuss the targets with the claimant prior to their implementation in January 2019 on the final plan. Best practice would require the respondent to propose adjustments and fully and meaningfully consult about them. The reality in this case was that neither the claimant nor his experienced trade union representative Mr Donald ever asked for a reasonable adjustment or protested about the targets on the January plan. We also saw the reasonableness of adjustment in the bigger context of the respondent having been addressing under performance for the claimant since 2017, having postponed implementation of performance management measures to have regard to the claimant's external life stressors, having put in place coaching and one to one meetings and regular review meetings with the line manager, access to RehabWorks for the claimant's stress and occupational health referral. We saw it in the context of the narrative throughout the underperformance having been about IT issues and stress.

126. The claimant did not plead a complaint of failure to reasonably adjust in response to his request that his dismissal be delayed nor in relation to the appeal nor the March 2019 Occupational Health report so it was not necessary for us to consider those issues as Section 20 complaints though they are relevant to our determination on unfair dismissal below.

127. The claimant's complaints of failure to reasonably adjust all fail.

<u>Discrimination arising from disability</u>

128. The one act of discrimination complained of in this part of the claim under Section 15 Equality Act 2010 is the decision to dismiss. Dismissal is the unfavourable treatment complained of. The decision was made prior to 21 November 2019 and was communicated to the claimant on 21 November 2018. We've already established that the claimant was disabled at this date. We find that the decision to dismiss was unfavourable treatment for the purposes of Section 15.

129. *Because of something arising out of his disability:* What was the something arising out of a disability ? The claimant was dismissed because he

did not meet targets. He did not meet targets because he had computer technical issues, software access and skill issues. He was slower than his colleagues and performing only 3 areas when the rest of the cohort had moved on to the full range of duties. He was tired and had memory and concentration problems.

130. Applying Pnaiser, we reminded ourselves that the something that causes the unfavourable treatment need not be the main or sole reason, there can be a number of steps in the causal connection, but it 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. His reduced ability to meet targets was in part because he had a condition that later came to be labelled Sleep Apnoea Syndrome. His reduced ability to meet targets arose in part (the other parts were his computer, technical, software and skill issues and his stress) out of his disability so that it was an effective cause of his dismissal. His section 15 complaint is made out.

131. We considered carefully the overlap here with our reasoning on substantial disadvantage for the reasonable adjustment complaint. We find above that the PCP did not put the claimant at a substantial disadvantage, it was his technical problems and subsequent skill issues that lead to any disadvantage. Here, in relation to the Section 15 complaint we had to consider did his fatigue, memory and concentration issues arising out of his sleep apnoea have a more than trivial impact on his underperformance against targets and we find that they did. They were one effective cause amongst others, and not the most dominant cause, but we find that for Section 15 they were one of the effective causes of his underperformance.

132. *Objective justification:* Turning to the respondent's defence that dismissal was a proportionate means of achieving a legitimate aim we accept the legitimate aim of regulating the output of performance of the workforce to ensure that employees perform to the required standard to meet customer demand and expectations of service.

133. *Proportionality:* Was dismissal a proportionate means of achieving the legitimate aim? To answer that question, we balanced the needs of the employer, its business need for efficiency and effective performance with the discriminatory treatment of the claimant.

134. We find dismissal was not a proportionate means of achieving the aim because the respondent could have taken steps short of dismissal in late October 2018, without discriminatory treatment, and still achieved its aim.

135. The respondent could have waited a little longer. The news had come in prior to dismissal on 31 October 2018 that the claimant had been referred for oxygen saturation testing.

136. The respondent was aware, in early 2019, following appeal but prior to dismissal taking effect that the claimant had been diagnosed with sleep apnoea and that it had affected his memory, concentration and caused fatigue.

137. The respondent was asked to delay the decision and at appeal was told

that the claimant believed his health had been a contributing factor to his underperformance and that his treatment was working, he was improving and he said he could render good service.

138. Having regard to the case law on capability related dismissals where the claimant is absent from work and not well enough to return yet, the respondent would not be expected to wait indefinitely for the claimant to be well enough to return to work. By analogy in this case we did not expect the respondent to wait indefinitely for the claimant to perform at the standard it required. It had had cause to monitor and support his performance since 2017. It could have waited, having already taken considerable time to implement performance plans and support the claimant through difficult family and personal circumstances, a little longer following receipt of the OH report in March 2019. It could then have consulted the claimant, set targets and allowed time for improvement once the claimant's treatment was working. It may well have been that with treatment in place the disabled claimant was able to perform to an acceptable standard. Failure to take time to test that was disproportionate and for this reason the Section 15 defence fails.

Unfair Dismissal

139. It was accepted that the claimant had been dismissed. The respondent said the reason for dismissal was capability and this fell within section 98 (2) Employment Rights Act 1996. The claimant made no arguments about the process of his dismissal. His argument was that the respondent acted outside the range of reasonable responses in dismissing him.

140. In considering whether or not the employer acted reasonably within section 98(4) we found that it did not. The respondent acted outside the range of reasonable responses in making a decision to dismiss on around 21 November 2018 because:

a. Mr Hull had had a conversation with the claimant on 31 October 2018 which had covered his ill-health and his referral to the oxygen saturation test.
b. Mr Hull had spoken to HR on 7 November 2018 and had told HR that the claimant was being investigated for a condition that affected his oxygen levels.
c. We find that Mr Hall ought reasonably to have known from 31 October 2018 that the claimant was disabled and that this ought to have given him pause as to the impact of any disability on the claimant's performance.
d. No reasonable employer in possession of that knowledge would have moved to dismiss based on underperformance against targets without turning its mind to whether or not the disability may have played a part in the underperformance.

141. The decision to dismiss in November 2018 was outside the range of responses of a reasonable employer. We also find the employer acted outside the range of reasonable responses in failing to review its decision on receipt of the diagnosis of obstructive sleep apnoea in early January 2019.

142. We find the employer acted outside the range of reasonable responses in refusing to accede to the request in the email from the claimant's representative requesting extension of the termination date of employment.

143. We find the employer acted outside the range of reasonable responses in upholding the dismissal on appeal given the availability of the OH report and the claimant's statement that his health had contributed to his underperformance, that he was now receiving treatment and improving and believed himself able to render good service.

144. We find that it would fall within the range of reasonable responses for the employer to have postponed the decision to dismiss in November 2018, awaited medical evidence, consulted the claimant about the impact of ill-health on performance and about target setting, awaited and monitored the effect of treatment on the claimant's performance.

145. We note that the second Occupational Health report anticipated an ongoing differential in performance between the claimant and his nondisabled peers but suggested that all the signs at that time were that the claimant was making a good improvement and that the treatment was effective. We find that it would have taken the respondent a further month, following the OH report and his reinstatement, after a 6 week performance plan, if the claimant had not met targets and was still as the report envisaged performing below peers, to move to a capability related dismissal.

146. We looked at the claimant's performance statistics across each of the plans and worked out each of the weeks as a percentage achievement against targets. In January the claimant achieved an average 71% achievement against target across those 4 weeks, when he was still experiencing the impact of his condition without treatment. We find that the claimant would have had a 50-50 chance of achieving these targets once this treatment was in place on a performance plan in relation to the 3 areas of BSU PPP and PNR. However, we acknowledge that the claimant's areas of responsibility had been limited and that there were broader areas of responsibility he would need to have undertaken.

147. Looking at the performance plans overall and the ongoing challenge of working with the planning portal and taking into account the new IT and the improving health we find that the claimant would have had a 1 in 3 chance of performing to the respondent's required standards and remaining employed, had the employer acted within the range of reasonable responses.

Conclusion

148. The claimant's complaint of failure to reasonably adjust fails. His complaints of discrimination arising out of disability and unfair dismissal succeed and a hearing has been listed to consider remedy.

149. The claimant indicated in his claim form that if successful he would seek reinstatement. Case management orders were made for remedy on 17 June 2021. If the claimant pursues reinstatement the parties must address arguments on reinstatement in their Skeleton Arguments due to be exchanged and sent to

the Tribunal no later than 9 November 2021.

Employment Judge Aspinall
Date: 30 September 2021

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

4 October 2021

FOR EMPLOYMENT TRIBUNALS

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