EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**AND**	**Respondents**
Mr T. Walsh		London Borough of Islington

Heard at: London Central Employment Tribunal

On: 2, 3, 6, 7, 8 September 2021 (9, 10 September in chambers)

Before: Employment Judge Adkin
Ms J Cameron,
Mr T Harrington-Roberts

Representations

For the Claimant: Ms S Dervin, Counsel
For the Respondent: Mr S Harding, Counsel

JUDGMENT

(1) The following claims succeed:

a. The claim of failure to make reasonable adjustments under section 20-21 of the Equality Act 2010 ("EqA") with regard to part-time working only.

b. The claim of unfavourable treatment because of something arising in consequence of the Claimant's disability (section 15) with regard to the dismissal.

c. The claim of unfair dismissal under section 98(4) of the Employment Rights Act 1996.

(2) The remaining claims are not well founded and are dismissed:

a. Direct disability discrimination (section 13 of the Equality Act 2010).

b. Indirect disability discrimination (section 19 of the Equality Act 2010).

c. Harassment (section 19 of the Equality Act 2010).

d. Remaining allegations of failure to make reasonable adjustments under section 20-21 of the Equality Act 2010.

e. Remaining allegations under section 15 EqA claim.

REASONS

Procedural matters

1. This is of hearing was fully remote. The parties, witnesses and the Tribunal were all in different locations.

2. All evidence was electronic. We received an agreed bundle of 467 pages. There were some documents added to the bundle.

3. We heard from the Claimant himself and from Mr Patrick Bonner a union representative in support.

4. From the Respondent we heard from Ms Christine Short, dismissing manager (second line manager) and Mr Simon Kwong, appeal manager (third line manager).

The Claim

5. The Claimant presented his claim on 6 July 2020. The claim, of unfair dismissal and variety of different types of disability discrimination claim relates in large part to the management of the Claimant's absences and his applications for flexible working.

6. An agreed list of issues is attached as an appendix to this claim. This list was further clarified in closing submissions as discussed below, in particular with regard to the PCPs.

Findings of fact

History of Claimant's disability

7. In 2000 the Claimant was diagnosed with Crohn's Disease. The Claimant gave unchallenged evidence about a period in 2000-8 when he could not do full-time work at all. We do not make detailed findings about that but we accept in general terms that there was a period before his employment with the Respondent where he needed to do part-time working.

Claimant's work in the Respondent

8. On 25 January 2016 the Claimant's employment as Clerk of Works ("COW") with the Respondent commenced within the Capital Programme Unit of the Housing Property Services Division. He worked within a team of COWs led by Mr Barry Cunningham. Mr Cunningham's line manager was Ms Christine Short, Head of Capital Programme Delivery. Her line manager was Mr Simon Kwong, Director of Property Services.

9. The Claimant's job description [106] contains the following

> "6. Carry out site visits at least weekly, to all sites to:
>
> - Ensure that materials, construction standards and site practices meet Islington Council's requirements.
> - Prepare a Health and Safety report.
> - Record the outcome of these visits and report to the Project Manager."

10. The large part of the Claimant's work related to planned refurbishments or improvement works to the Respondent's residential housing stock.

11. We find that the work of the Unit as well as the work of the of individuals within it and the individual projects being monitored by the Unit would "ebb and flow". This was driven by the number of projects ongoing, and the stage at which those projects had reached. Ms Short gave evidence that the size of the Department was something that she had to manage, to expand and contract to match the available resources to the project demands. She explained that the use of agency COWs was used to achieve this.

12. One of the duties of the COWs was to carry out inspections within 48-hour in response to CIR (Contractor's Inspection Requests). The effect of not carrying out the inspection within 48 hours would be that a contractor could continue to the next stage of the works

Bereavement

13. In April 2018 the Claimant's father sadly died. The Claimant had took a period of special leave in and around April and May 2018 to care for his father before his death. The Claimant told us that was that he was having to go to Cardiff frequently in April, May, June following on from his Father's death.

14. On 15 May 2018 Mr Barry Cunningham the Claimant's line manager wrote to the Claimant to confirm that Mr Simon Kwong, the Claimant's third line manager had agreed 10 days paid leave and 58.5 days unpaid leave.

15. On 29 May 2018 the Claimant issued an Application for Special Leave requesting unpaid leave from 5th June 2018 to 1st July 2018, with the reason given of 'recent bereavement'.

Flexible working application

16. On 4 June 2018 the Claimant issued an Application for Flexible Working, requesting a reduction from 5 days per week to 2.5 or 3 days per week and a change in working hours from 8:30am - 4:30pm to 9:00am to 5.00pm. He stated:

> "This should enable a job share opportunity enabling the department to provide two employees and should increasing the department experience and the departments capabilities. As a result providing more skills to the department and improved services to our customers. recruitment of another part time member to cover half post while maintaining current productivity allowing for more flexability and better cover. Supported and in accordance by Islington coucil flexable working poilcy" [*sic*]

17. The Claimant stated

> "I am a disabled employee whose request for flexible working is related to my disability Chrons Disease. I belive my disability status is recoreded on My HR. If not can HR update my status accordingly many thanks." (*sic*)

18. On 11 June 2018 by a fit certificate on this date the Claimant's GP signed him off as not fit to work for bereavement for the period 5 June 2018 to 29 June 2018.

19. On 19 June 2018 Mr Cunningham held a meeting with the Claimant to discuss his flexible working application.

20. On 21 June 2018 by email, Mr Cunningham refused the Claimant's flexible working request. He wrote:

> "your post is full time position. We spoke about the option of job share however this creates problem for service mainly regarding ensuring continuity . Inspecting building work is not a job that lends itself easily to 2 people visiting the same site / contract and I can foresee numerous issues arising. I have concluded therefore that this is not something that I can accommodate."

21. On 2 July 2018 in a fit certificate on this date the Claimant's GP signed him off as not fit to work for bereavement for the period 30 June 2018 to 31 July 2018

22. On 12 July 2018 by letter, the Claimant was invited to a 'first formal meeting' under the Respondent's Managing Attendance Procedure ('MAP'); scheduled to take place on 23rd July 2018.

Flexible working appeal

23. On 17 July 2018 the Claimant appealed Mr Cunningham's decision to refuse his request for flexible working. The Claimant's grounds of appeal were sent by

email to Ms Short, in which he set out both grounds and new information in an email and attached appendix. As to Mr Cunningham's concern about continuity, the Claimant suggested the solution as being allocating sites to particular individuals exclusively. He expressed a view that there were plenty of industry professionals seeking part-time work. He suggested that there would be no additional cost. He wrote

> "I would be able to arrange my workload with the contractor to allow all inspections to take place on those days of the week when I am working. With the contractor obliged to provide 48h notice. Inspections I would have the flexibility to arrange this adequately."

24. As to his health he set out

> "I have a condition - Crohn's Disease - which, if it is extremely serious, could be considered a serious disability. The Social Security Administration includes Crohn's Disease as a qualifying condition under listing 5.06 Inflammatory Bowel Disease.
>
> Early on in this employment I was hospitalised for a short period but with proper treatment managed to recover and return to work.
>
> My request for flexible working is related to my management of this condition. Stress is a factor, and the use of immunosuppressant medication makes me more at risk of infections working part-time would reduce my exposure and give me the respite periods to allow my body to recover if in danger of infection."

First attendance procedure meeting

25. The Claimant's attended his 'first formal meeting' under the MAP was held on 23 July 2018. In this meeting the Claimant discussed "good days and bad days" in relation to his bereavement. The only medication he was taking was for Crohn's disease.

26. In a letter dated 26 July 2018, the Claimant was advised of the outcome of the 'first formal meeting' under the MAP. Mr Cunningham set a four-week review period. That review meeting was scheduled for 20 August 2018.

27. By an email dated 26th July 2018, Ms Short invited the Claimant to a meeting to discuss his grounds of appeal (re. flexible working); scheduled to take place on 31st July 2018. It seems unfortunately that this went into the "spam" filter in the Claimant's Hotmail email account, with the result that he did not see this invitation until much later.

Flexible working appeal hearing

28. On 31st July 2018 the appeal meeting (re. flexible working) proceeded in the Claimant's absence.

29. By an email 6th August 2018 by email, Ms Short advised the Claimant she assumed his appeal was withdrawn due to his non-attendance at the meeting of 31st July 2018.

First Occupational Health report

30. The first Occupational Health ('OH') Report was produced on 9th August 2018 following a review of the Claimant on 2nd August 2018. This report, written by Marry-Rose O'Neill, Occupational Health Advisor, contained the following:

> "Mr Walsh informed me his father became ill and he frequently travelled to Wales to see him, as the bond was close. Then, as his father's illness progressed, he took 10 days unpaid leave to be with him and support him. His father sadly died earlier than expected in May this year. As to Walsh has remained off work since, firstly due to bereavement and also stress due to his father's more sudden death.
>
> He had the responsibility of managing his father's estate, and as he grieved, he considered working part time and plans to continue to address this, as he does not wish to work full-time as of now.
>
> In relation to his general health; Mr Walsh is otherwise well presently. He does have a history of Crohn's disease which was diagnosed in 2011, which is well-managed with daily medication. He has infrequent flare ups the last being over two years ago."

31. While she expressed the view that the Crohn's disease would be covered by the Equality Act she said "the present reason for his sickness absence is unlikely to be covered under the provision of the [equality] Act."

32. Finally she said Mr Walsh advised if he is not supported in his present role, he plans to seek a part-time role elsewhere. The decision is with management to decide if they can support. If not then he will actively look elsewhere.

Claimant chases flexible working appeal

33. On 22nd August 2018 the Claimant emailed Ms Hambis (HR) to enquire as to the status of his appeal (re. flexible working). Ms Short re-sent her earlier email correspondence and advised the matter was now closed.

34. The Claimant advised Ms Short on 4th September 2018 he had not received her earlier email correspondence (re. flexible working).

35. On 10th September 2018 in an email, Ms Short advised the Claimant that she considered the appeal (re. flexible working) in his absence; the outcome being his appeal was rejected. She wrote

> "The role of Clerk of Works needs consistency and a flexible work force who can respond promptly to requests from contractors to inspect works. We try as far as possible to ensure that one Clerk of Work is responsible for each project so that only one Council

officer is monitoring quality of works on site and thus minimising risk of confusion from the contractor. During periods of leave I know Clerks cover for each other and this can't be avoided but I cannot see a permanent arrangement for staff to job share would be advantageous to the service, in fact I feel that it would be detrimental."

Second review meeting

36. On 13th September 2018 the Claimant's 'second review meeting' under the MAP took place. At this meeting the Claimant confirmed that his health was mostly the same and that he was managing his health but had a sick note up to the end of September. He explained that he did not attend an arranged meeting on 20 August as "the date did not register to attend". Mr Cunningham concluded that there was no obvious reason for the Claimant not returning to work, possibly on phased return, which he suggested could be over a period of one month, possibly two months. The Claimant asked about part-time work in other council departments. Mr Cunningham suggested he speak to HR.

37. On 27 September 2018 the Claimant notified Mr Cunningham by email (copying Ms Short) of an intended return to work, in line with a fit note of 1 October 2018. The existence of this communication was initially disputed by the Respondent, but it cannot seriously be in dispute. A copy of the email was produced at the hearing (page 144A).

38. In a letter dated 28 September 2018 Mr Cunningham confirmed the outcome of the 'second review meeting', which proceeded on 13th September 2018. It was confirmed the Claimant will be referred to senior management.

39. On 2nd October 2018 the Claimant returned to work on this date on a phased return to work. A GP certificate dated on this day confirmed that the Claimant may be fit to work on a phased return to work for the month of October.

40. In a return to work form filled in on this day the reasons for absence "bereavement/stress" were amended by hand by the Claimant to delete the word stress. A programme of phased return to work over four weeks is set out in the form. This builds from 3 hours a day 5 days a week to 5 hours a day 5 days a week.

Formal hearing

41. By a letter dated 18th October 2018 the Claimant was invited to a 'formal hearing' to 'consider [his] continued employment' (under the MAP). A further letter was sent on 29th October 2018, enclosing a 'Managing Attendance - Management Report'.

42. On 15th November 2018 a 'consideration hearing' under the MAP was held by Ms Short with Kim Hambis attending from HR and the Claimant accompanied by a Unison representative Marie Mccormack, with Mr Patrick Bonner observing.

43. On the day after this hearing the Claimant took one day of sickness absence re. stress and anxiety.

44. In a letter dated 28th November 2018, Ms Short confirmed the outcome of the 'consideration hearing' held on 15th November 2018. She placed the Claimant on a three-month review period under Stage 3 of the MAP. That review meeting was scheduled for 15th February 2019. In the letter it was documented that the previous sickness was due to bereavement stress.

> "explained that you often find your travelling into work very difficult and tiring. Also that you[r] ongoing medical condition (Crohn's disease) exacerbate this. We discussed lifestyles changes to help minimise your tiredness/lethargy and general well-being."

Sick absences

45. On 15th January 2019 the Claimant took one day of disability-related sickness absence. Also on 29th-30th January 2019 the Claimant took two days of disability-related sickness absence.

Flexible working application appeal hearing

46. On 7th & 15th February 2019 Ms Short held an appeal hearing (re. flexible working) following his appeal dated 17th July 2018. Ms Short explained that she "revisited" her earlier decision, feeling sorry for the Claimant.

47. It seems that from Ms Short's point of view the reconvened hearing on 15th February 2019 was to consider a counter proposal from her of a 6 hour working day rather than a 7 hour working day. This was rejected by the Claimant.

Consideration review meeting under MAP

48. Also on 15th February 2019 Ms Short held a 'consideration review meeting' under the MAP. This followed the three-month review period formalised on 28th November 2018. This was triggered by 4 days' absence, namely stress/anxiety, Crohn's flareup and a virus. The Claimant stated that he was learning to live with the his Crohn's disease and was also coping much better with the loss of his father. Nevertheless the Claimant indicated that he was still struggling with working 35 hours each week.

49. Following on from this meeting, in a letter dated 28th February 2019 confirmed the outcome of the 'consideration review meeting' held on 15th February 2019. She noted the Claimant's request for flexible working. She noted and rejected the Claimant's request for home working one day per week. Ms Short placed the Claimant on a further three-month review period under the MAP.

Outcome of the flexible working appeal

50. By letter, also on 28th February 2019 Ms Short confirmed the outcome of the Claimant's appeal hearings (re. flexible working) held on 7th and 15th February 2019, rejecting the appeal. The Claimant's request to work 2.5 or 3 days per

week was refused. Also noted was the Claimant's rejection of the Respondent's counterproposal of 6-hours per day 5 days a week. This letter contained the following:

> "You told me that your primary reason to reduce your working hours was to reduce anxiety and stress relating to the Crohn's disease that you suffer with. You explained that your body does not absorb all of the nutrients in the food you eat and this can leave you fatigued. As part of the disease you also suffer with acid reflux and stomach ulcers. You told me that you found 5 days week was a lot of commitment and continual exertion, travelling back and forth from home, walking about Islington, visiting sites and the added pressure of having to be at a certain place at a specific time.

51. The letter continued later on…

> We clarified that your application was to work 2 ½ or 3 days per week, and that you intended these to be full days consecutively, (not 5 x ½ days such as 5 mornings or 5 afternoon), so as to allow you to visit Cardiff.
>
> We spent time talking about the details given in your email to me dated 17 July 2018 and how you envisaged a job sharer arrangement could work. Your line manager and I were unhappy about this type of arrangement as we believe some contractors may play one Clerk of Works against the other. We explored the option of each job sharer having their own discrete packages of work, however, there work of the Clerks is to be responsive in terms of standard inspections following requests from the Site Manager but also being responsive and undertaking unannounced spot checks."

52. There was a reference to planned structural changes which in her oral evidence Ms Short explained to us was a reference to changes following on from the Grenfell fire disaster. The Claimant in his evidence to us did not accept that the Grenfell fire disaster had impacted on the area in which he worked. His evidence was that is was only of relevance to the fire team. We found this somewhat surprising but do not have any basis to doubt that this was his perception.

53. Finally, she wrote:

> "it is with this in mind that I asked you to consider flexibly working by reducing your hours from 35 a week to 28, split over 5 days, in other words working 6 hour day instead of a 7 hour day.

54. On 5th March 2019 the Claimant took one day of disability-related sickness absence.

Second OH report

55. On 21st March 2019 Dr Weadick (Occupational Physician) wrote an OH Report following a review of the Claimant on 14th March 2019. He made recommendations for reasonable adjustments, including but not limited to, a reduction in the Claimant's number of working days, and an amendment to absence triggers. This report confirmed that Crohn's disease was associated with pain, altered bowel function and increased levels of fatigue. According to Dr Weadick the Claimant was offering from an exacerbation of Crohn's disease. He advised that the Claimant would be liable to tire much more rapidly than he would otherwise be anticipated. He advised that Mr Walsh was fit to work although he would benefit from adjustments to facilitate this, specifically

> "Mr Walsh would benefit from a reduction in his working week, ideally in terms of number of days worked to reduce the commuting to and from the office, which will exacerbate the underlying fatigue (I note the suggested reduction of his working day by one hour, but this would not remove the effect of the commute upon his levels of exhaustion)

56. This suggested various adjustments including "Manage workloads in such a way to reduce the pressure on individuals"

57. On 11th-12th April 2019 the Claimant took two days of disability-related sickness absence.

Consideration review

58. On 16th May 2019 a 'consideration review meeting' under the MAP was held. This followed the three-month review period formalised on 28th February 2019.

59. Guidance was provided to the Respondent in the form of "Fact Sheet for Employers on Crohn's disease", produced by the Business Disability Forum [185 - 190]. This contained the following guidance:

> "It is very important to discuss possible adjustments with your employee as they will know more about how their Crohn's disease fact that – this is particularly important given the fluctuating pattern of symptoms in some individuals. Flexibility is the key, and adjustments may either be temporary or long-term.
>
> …
>
> Adjustments that might be needed include:
>
> - Allow people to use the toilet as and when needed;
> - Manage workloads in such a way to reduce the pressure on individuals
>
> Making reasonable adjustments can help improve attendance by addressing the causes of absence and also to ensure disabled

people are not unjustifiably discriminated against for a reason relating to their disability the attendance management process.

Adjustments that might be needed include:

- Ensuring that you have a scheme in place that distinguishes between sickness absence taken for reasons relating to disability and general sickness absence. Ensure that adjustments are made in processes to manage attendance and sickness absence so that disabled employees are not treated less favourably for a reason relating to their disability;

- Allowing working from home, permanently or occasionally, where an individual finds it difficult to travel for long periods of time

60. This document contains an explanation of direct discrimination, section 15, indirect discrimination, and reasonable adjustments.

61. Another document also supplied at this time was headed “Inflammatory Bowel Disease (Crohn’s Disease)” produced by the University of Oxford as an internal document for guidance in the management of students with this condition. It explains something about Crohn’s disease causing inflammation, deep ulcers and scarring to the wall of the intestines. It explained that the main symptoms are pain in the abdomen, urgent diarrhoea, general tiredness and loss of weight.

62. By a letter dated 4th July 2019 Ms Short confirmed the outcome of the 'consideration review meeting' held on 16th May 2019. Ms Short reiterated the Claimant's request for flexible working was refused:

> "because you need to be on site at set times, to manage contracts on a regular basis and provide consistency on a weekly basis".

63. She noted that the Claimant had obtained a pass to gain access to toilet facilities and further that his manager had adapted his start time to date as possible "and is willing to discuss any reasonable adjustments with you to assist you within the workplace".

64. Ms Short placed the Claimant on a further three-month review period under the MAP.

Third OH report

65. An Occupational Health Report was produced on 28th May 2019 following a review of the Claimant on 21st May 2019 by Dr Alex Swan (Consultant Occupational Physician). Dr Swan wrote that his report is to be read 'in conjunction' with previous reports, which was a reference back to Dr Weadick's earlier report. Dr Swan's recommendations included taking the Claimant's disability into consideration when monitoring sickness absence and 'permitting attendance' at medical appointments. Dr Swan offered the following opinions:

"This has been reasonably well controlled with his use of regular medication, although he is currently suffering a prolonged exacerbation of such.

…

Sadly, the matter is aggravated by stress, often delayed somewhat from the index event, as in this case.

In addition to the pain and altered bowel function, Chrome's is also associated with increased levels of fatigue. This has prompted Mr Walsh to request an amendment to his working hours, although I note from the enclosure within the referral, this is not been agreed.

….

Mr Walsh is currently suffering from an exacerbation of his underlying Crohn's Disease, which has caused him to need some short-term absence from work. He appears to be taking all reasonable steps to manage this, with the support of his treating specialist team. He is reviewed by this team month and has a consultant assessment scheduled in the near future. However, ultimately, it is often a matter of time, for the flare to burn itself out, rather than the medical intervention that is of value. Until this occurs, he may continue to need further absence from work and also be liable to tire much more rapidly than would otherwise be anticipated.

Is the employee fit to be at work?

Yes, Mr Walsh is fit to work although he would benefit from some adjustments to facilitate this.

…

Mr Walsh would benefit from a reduction in his working week, ideally in terms of a number of days worked to reduce the commuting to and from the office, which will exacerbate the underlying fatigue (I note the suggestion of reduction of his working day by one hour, but this would not remove the effect of the commute upon his levels of exhaustion)

It would be his employer's decision as to what constituted a reasonable workplace adjustment bearing in mind the needs of the organisation."

Hospital admission

66. On 1st August 2019 the Claimant was admitted to hospital and was diagnosed with upper gastrointestinal tract bleeding and multiple gastric ulcers. He underwent a surgical procedure to stop the internal bleeding and a further

biopsy on 4th August 2019. He was discharged from hospital on 12th August 2019.

67. Mr Harding raised a concern that the Claimant provided little by way of disclosure of medical documentation. It is true to say that there is no correspondence between treating consultant and GP, and no GP records. There is however a Discharge Summary from Northwick Park Hospital dated 12 August 2019 relating to this admission produced by a Dr Alice Snell who appears to be a respiratory doctor trainee grade rather than a specialist gastroenterologist.

68. This document records that the Claimant had suffered from an "upper GI [gastrointestinal] bleed, multiple gastric ulcers". A history of duodenal stricture in 1999 is noted. He underwent a OGD [Oesophago-Gastro-Duodenoscopy] examination on 2 August 2019 during which the ulcers were "clipped" to prevent bleeding. However on 4 August he had further vomiting and there was fresh blood, leading to a second OGD.

69. On 3 September 2019 the Claimant's GP signed him off by a fit certificate on this date for the period 26 August 2019 to 23rd of September 2019

70. By letter dated 12th September 2019 and by way of addendum to the Managing Attendance Report, Mr Cunningham confirmed the Claimant's sickness absence since 1st August 2019. Therein it is noted that the Claimant was recently hospitalised and had undergone surgery. There is a reference to a concern about the standard of work that Mr Cunningham was seeing how quality was being managed. In fairness to the Claimant we consider that this may well simply be because of his absences.

Fourth OH report

71. Dr Weadick produced a further report on 17th September 2019 following a review of the Claimant on 10th September 2019. The report confirmed that the Claimant was not fit to return to work. Dr Weadick referred to his earlier report dated 21st March 2019. It is noted:

> '… [the Claimant] would benefit from working fewer days per week … as previously described in earlier reports and so this may be one method of achieving this, if such an adjustment is not possible to his substantive position'.
>
> "Is redeployment appropriate? This is a matter for discussion between Mr Walsh and management, rather than a medical issue. Mr Walsh would benefit from fewer working days per week, as described in earlier reports…"

Consideration review meeting

72. On 15th October 2019 another 'consideration review meeting' under the MAP was held. This followed the three-month review period formalised on 4th July

2019. There was discussion in this meeting about ill-health retirement and potential pension entitlement.

73. In this meeting the Claimant requested a further consideration of part-time working given that it had been 12 months since previous discussions. Ms Short responded "nothing has significantly changed".

74. On 30th October 2019 Ms Short followed this up by a letter in which she confirmed the outcome of the 'consideration review meeting' held on 15th October 2019 and noted the Claimant's recent hospitalisation. Ms Short placed the Claimant on a further six-week review period under the MAP.

Fifth OH report

75. On 13th November 2019 Dr Weadick produced a further OH Report following a review of the Claimant on 7th November 2019. Therein Mr Weadlick notes

> "Mr Walsh is able to make some return to work, following the above event [i.e. endoscopy], but will need increased support and adjustments to his role his main limitation relates to his level of fatigue. He is unable to return to full-time hours at present, but would be unable to undertake a role working more than 60 - 80% of his usual hours at present, ideally including some home working'. [233]

76. On 25 November 2020 the Claimant's GP signed him off for 4 weeks with a gastric ulcer.

Consideration review

77. On 28th November 2019 another 'consideration review meeting' under the MAP was held. This followed the six-week review period formalised on 30th October 2019. By this stage the Claimant had been continually absent for 82 days.

78. Ms Short advised the Claimant in fairly stark terms that if there was not a consultant report that he was at risk of losing his job. As to a return to work the Claimant was asked how he felt about this. He said that he would if it were part-time although were reasonable adjustments. He clarified that part-time meant 3 days a week as per OH recommendations. Ms Short said "I don't think you can legitimately come to the table and say you need a permanent adjustment". She expressed doubt about whether the Claimant was ill enough for medical retirement

79. On Christmas Eve the Claimant was signed off for 4 weeks with a gastric ulcer.

80. In a letter dated 20th January 2020, Ms Short confirmed the outcome of the 'consideration review meeting' held on 28th November 2019. Ms Short placed the Claimant under a further period of review.

81. On 21 January 2020 the Claimant's GP signed him off for 4 weeks with a gastric ulcer.

Stage 3 review meeting - consideration of dismissal

82. On 21 January 2020 the Claimant was invited to a further stage 3 review meeting, given that he had by this stage been off sick continuously since 1 August 2019. This letter contained a summary of recent absences including absences for bereavement stress from 5 June 2018 (19 days); 30 June 2018 (22 days); 1 August 2018 (23 days); 1 September 2018 (20 days); an absence for one day for stress anxiety on 16 November 2018; a one day absence cranes flareup on 15 January 2019; a 2 day absence for "virus" on 30 January 2019; a one day absence for Crohn's flareup on 5 March 2019; a two day absence for chest infection 11 - 12 April 2019 and a 121 day absence from 1 August 2019

83. The meeting took place on 4th February 2020. During this meeting, Ms Short verbally informed the Claimant of her decision to terminate his contract of employment.

84. In this meeting the Claimant again noted that the occupational health had mentioned part-time working. He stated in terms that he was able to work and able to work part-time. The Claimant was offered either (1) "reasonable adjustment" to reduce his working week by one hour per day; (2) termination of contract or (3) to be placed on medical redeployment.

85. Ms Short records that the Claimant in this meeting considered Dr Weadick's proposal to return to 60 - 80% of usual hours, gradually increasing to full contractual hours as “optimistic”.

86. By an email on 5 February 2020 the Claimant confirmed that he wished to be placed on the medical redeployment register during his notice period.

Letter of dismissal

87. By letter dated 14th February 2020, Ms Short confirmed the outcome of the meeting held on 4th February 2020. Ms Short confirmed her decision to terminate the Claimant's contract of employment. Ms Short also noted the Claimant had been placed on the medical redeployment register.

88. In her oral evidence to us Ms Short placed some emphasis on the GP fit note of 21 January 2020 which stated that the Claimant was not fit to work. The Claimant’s perspective was that he was not fit to work the unaltered 5 days a week that he was being asked to work.

89. The effective date of termination was 15th March 2020.

Post dismissal events

90. On 17th February 2020 the Claimant produced to the Respondent a Statement of Fitness for Work from his GP, which stated: 'you may be fit for work taking account for altered hours'.

Appeal & grievance

91. By a letter dated 28th February 2020, the Claimant appealed Ms Short's decision to terminate his contract of employment.

92. The Claimant stated that he wanted his employment to continue with a reduced number of days worked per week. He wrote that it was unreasonable to dismiss him under the MAP in circumstances where adjustments could have been made in line with the OH assessment. He complained that instead of consenting to the reasonable adjustments requested his feeling was that he was being coerced into taking redeployment or ill-health retirement. He explained that the concession of one hour a day working five days a week ran counter to the recommendation of the occupational health stop he emphasised that he was seeking a 3 day working week in order to have clear rest period in order to manage his Crohn's disease. He said that he would work any suitable hours that fit the Respondent's flexible core hours policy of 10.00 – 16.00.

93. He wrote:

> It must be stated that I unable to work but with a reduced intensity and frequency. I want to continue in the employment but with a reduced number of days per week.

Grievance

94. On 12th March 2020 the Claimant filed a written formal grievance under Stage 1 of the Respondent's Grievance Procedure.

95. The Claimant submitted an appeal (appeal against dismissal & grievance) on 18 March 2020. This was a document containing six pages of close type, with reference to the occupational health evidence. In this appeal the Claimant objected to being coerced into taking redeployment or ill health retirement. He said that he wished to continue in employment work with a reduced number of days per week.

96. On 24th April 2020 the Claimant commenced the ACAS Early Conciliation process. The certificate was issued on 7th June 2020.

Appeal hearing

97. On 2nd June 2020 the Claimant's appeal regarding Ms Short's decision to dismiss him and grievance hearing were held together, chaired by Mr Simon Kwong.

98. On 5th June 2020 there was an outcome meeting for both appeal and grievance by Teams. By letter, Mr Kwong confirmed the Claimant's appeal was dismissed and the Claimant's grievance was not upheld.

99. Mr Kwong confirmed to us in his oral evidence that he had read all of the documentation in the case and that if he felt that Ms Short was wrong about her decision about working part-time or working from home he had the power to overrule and reinstate the Claimant on those terms.

Claim

100. On 6th July 2020 the Claimant presented his claim.

LAW

101. We received succinct written submissions from Ms Dervin, which she supplemented orally.

102. Mr Harding made oral submissions and helpfully made available to us a range of relevant authorities on disability discrimination which had been marked up.

Time

103. Relevant to *time limits*, section 123 EqA provides:

> 123 Time limits
>
> (1) Subject to sections 140A and 140B proceedings on a complaint within section 120 may not be brought after the end of—
>
> (a) the period of 3 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.
>
> (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.
>
> (4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—
>
> (a) then P does an act inconsistent with doing it, or
>
> (b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

104. In *Robertson v Bexley Community Centre t/a Leisure Link* 2003 IRLR 434, the Court of Appeal held that when employment tribunals consider exercising the discretion under [what is now] S.123(1)(b) EqA, 'there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse, a tribunal cannot hear a complaint unless the applicant convinces

it that it is just and equitable to extend time so the exercise of the discretion is the exception rather than the rule.'

105. *Abertawe Bro Morgannwg University Local Health Board v Morgan* 2018 ICR 1194, CA, the Court of Appeal pointed to the fact that it was plain from the language used in S.123 EqA ('such other period as the employment tribunal thinks just and equitable') that Parliament chose to give employment tribunals the widest possible discretion and it would be wrong to put a gloss on the words of the provision. At paragraph 18-19 Leggatt LJ said:

> "it is plain from the language used (such other period as the employment tribunal thinks just and equitable) that Parliament has chosen to give the employment tribunal the widest possible discretion. Unlike s 33 of the Limitation Act 1980, s 123(1) of the Equality Act does not specify any list of factors to which the tribunal is instructed to have regard, and it would be wrong in these circumstances to put a gloss on the words of the provision or to interpret it as if it contains such a list. Thus, although it has been suggested that it may be useful for a tribunal in exercising its discretion to consider the list of factors specified in s 33(3) of the Limitation Act 1980 (see *British Coal Corporation v Keeble* [1997] IRLR 336), the Court of Appeal has made it clear that the tribunal is not required to go through such a list, the only requirement being that it does not leave a significant factor out of account: see [2003] EWCA Civ 15, [2003] IRLR 220, para [33]. The position is analogous to that where a court or tribunal is exercising the similarly worded discretion to extend the time for bringing proceedings under s 7(5) of the Human Rights Act 1998: see Dunn v Parole Board [2008] EWCA Civ 374, [2009] 1 WLR 728, paras [30] [32], [43], [48]; and Rabone v Pennine Care NHS Trust [2012] UKSC 2, [2012] 2 All ER 381, para [75].
>
> That said, factors which are almost always relevant to consider when exercising any discretion whether to extend time are: (a) the length of, and reasons for, the delay and (b) whether the delay has prejudiced the respondent (for example, by preventing or inhibiting it from investigating the claim while matters were fresh)."

106. In Adedeji v University Hospitals Birmingham NHS Foundation Trust [2021] EWCA Civ 23, [2021] ICR D5, Underhill LJ said:

> "The best approach for a tribunal in considering the exercise of the discretion under section 123(1)(b) is to assess all the factors in the particular case which it considers relevant to whether it is just and equitable to extend time, including in particular (as Holland J notes) the length of, and the reasons for, the delay. If it checks those factors against the list in Keeble, well and good; but I would not recommend taking it as the framework for its thinking."

Reasonable adjustments

107. In considering reasonable adjustments claims, tribunals are required to have an analytical approach (*Environment Agency v Rowan* [2008] ICR 218). The correct approach is to identify (i) the PCP; (ii) non-disabled comparators, where appropriate, (iii) the nature & extent of substantial disadvantage. This is in order to consider the extent to which taking the step would prevent the effect in relation to which a duty was imposed.

108. In cases of reasonable adjustments the House of Lords confirmed in *Archibald v Fife Council* [2004] ICR 954, Baroness Hale para 47 that the adjustment required for a disabled person necessarily entails an element of more favourable treatment.

109. Regarding PCPs, in *Ishola v Transport for London* [2020] EWCA Civ 112, the Court of Appeal confirmed that one off events are not necessarily provisions criteria or practices (i.e. PCPs) and must be examined carefully to see whether it could be said that they are likely to be continuing.

110. In *General Dynamics Information Technology ltd v Carranza* [2015] IRLR 43 the EAT confirmed that the PCP in attendance cases should be defined in terms of the requirement of consistent attendance rather than the attendance procedure itself. It was doubtful that disregarding a final written warning could be a "step" for the purposes of section 21. In that case the fact that the Tribunal had allowed some leniency after the final written warning was not in itself a reason not to dismiss.

111. In *Griffiths v Secretary of State for Work and Pensions* [2017] ICR 160 the Court of Appeal confirmed that in that case the correct PCP was "the employee must maintain a certain level of attendance at work in order not to be subject to the risk of disciplinary sanctions". The Court held that the positive duty to make reasonable adjustments is only a part of the protection afforded to disabled employees. The fact that the employer may be under no duty to make positive adjustments for a disabled employee in any particular context does not mean that he can thereafter dismiss an employee, or indeed impose any other sanction, in the same way as he could with respect to a non-disabled employee. The employer is under the related duty in section 15 to make allowances for a disabled employee. It would be open to a tribunal to find that the dismissal for disability-related absences constituted discrimination arising out of disability contrary to section 15. This would be so if, for example, the absences were the result of the disability and it was not proportionate in all the circumstances to effect the dismissal.

112. In *Smith v Churchills Stairlifts plc* 2006 ICR 524, CA, the Court of Appeal confirmed that the test of reasonableness in the context of what is now S.20 EqA is an objective one, and it is ultimately the employment tribunal's view of what is reasonable that matters. A claim of a failure to make reasonable adjustments may therefore require a tribunal to take the unusual step of substituting its own view for that of the employer, in marked contrast to the approach taken in respect of unfair dismissal, where such an approach amounts to an error of law.

113. It is not the reasonableness of the process that is being analysed (*RBS v Ashton*).

114. The EAT held in *Lincolnshire Police v Weaver* UKEAT/0622/07 that it is proper to examine the question of reasonable adjustments not only from the perspective of an employee, but that a tribunal must also take into account "wider implications" including "operational objectives" of the employer.

115. The EHRC Employment Code ("the Code") has examples of matters that a tribunal might take into account (see para 6.28)), which uses the old statutory code from the Disability Discrimination Act 1995. This is merely guidance. The examples are:

115.1. the extent to which taking the step would prevent the effect in relation to which the duty was imposed (i.e. the effectiveness of the step)

115.2. the extent to which it was practicable for the employer to take the step

115.3. the financial and other costs that would be incurred by the employer in taking the step and the extent to which taking it would disrupt any of its activities

115.4. the extent of the employer's financial and other resources

115.5. the availability to the employer of financial or other assistance in respect of taking the step

115.6. the nature of the employer's activities and the size of its undertaking

116. The Code of practice EHRC contains the following

> altering hours of working or training —
>
> for example, allowing the disabled person to work flexible hours to enable him or her to have additional breaks to overcome fatigue. This could also include permitting part-time working or different working hours to avoid the need to travel in the rush hour. A phased return to work with a gradual build-up of hours may be appropriate in some circumstances

117. The Code gives the following example at paragraph 6.33:

> "Altering the disabled worker's hours of work or training"
>
> Example:
>
> An employer allows a disabled person to work flexible hours to enable him to have additional breaks to overcome fatigue arising

> from his disability. It could also include permitting part-time working or different working hours to avoid the need to travel in the rush hour if this creates a problem related to an impairment. A phased return to work with a gradual build-up of hours might also be appropriate in some circumstances."

Justification - proportionate means

118. The case law on justification suggests that proportionate means must be "appropriate" and "necessary". In this context, following the guidance of the Supreme Court in *Chief Constable of West Yorkshire Police v Homer* 2012 ICR 704, SC and Hardy and Hansons plc v Lax 2005 ICR 1565, CA "necessary" is to be read as "reasonably necessary".

119. The employer does not have to demonstrate that no other proposal is possible. The employer has to show that the relevant proposal, is justified objectively notwithstanding its discriminatory effect. The tribunal has to make its own judgement, upon a fair and detailed analysis of the working practices and business considerations involved, as to whether the discriminatory proposal or measure is reasonably necessary. This is stricter than "range of reasonable responses" test and does not allow for a margin of discretion or margin of appreciation. This requires an employment tribunal to take into account the reasonable needs of the employer's business.

Harassment

120. In *Richmond Pharmacology v Dhaliwal* [2009] ICR 724 the EAT (Underhill, P) emphasised both the subjective and objective elements of a claim of harassment under section 26. There is a minimum threshold and following guidance was given at paragraph 22:

> "it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase."

Dismissal in the context of discrimination

121. The Tribunal considered the question of whether discriminatory conduct makes a dismissal unfair. In short the one does not necessarily follow from the other.

122. In *Perratt v City of Cardiff Council* EAT 0079/16 the EAT held that a tribunal had erred in treating P's unfair dismissal claim as 'parasitic' on her claims for failure to make reasonable adjustments and discrimination arising from her disability. It held that the word 'parasitic' implied that the unfair dismissal claim did not need to be considered on its merits at all and that it would fail if the discrimination claims failed and succeed if they succeeded. This was an erroneous approach and it was not aware of any authority for the tribunal's proposition that 'it cannot be reasonable to dismiss an employee for a

discriminatory reason'. The EAT concluded that a discriminatory dismissal may be fair and a non-discriminatory dismissal unfair.

123. In *O'Brien v Bolton St Catherine's Academy* 2017 EWCA Civ 145, CA, the Court of Appeal however held that it was 'entirely legitimate' for an employment tribunal to decide, in the context of dismissal for long-term sickness absence, that its finding that dismissal was disproportionate for the purpose of S.15 EqA meant that it was not reasonable for the purpose of S.98(4). In the decision of Underhill LJ it was accepted that the language in which the two tests are expressed is different, although in his view (paragraph 53), it would be a pity if there were any real distinction in the context of long-term sickness where the employee was disabled within the meaning of the EqA. He said:

> "52. Nor am I sure that if the tribunal meant in its final sentence to say that any (unlawfully) discriminatory dismissal was ipso facto unfair that is necessarily the case 3 4 .
>
> 53. However the basic point being made by the tribunal was that its finding that the dismissal of the claimant was disproportionate for the purpose of section 15 meant also that it was not reasonable for the purpose of section 98(4) . In the circumstances of this case I regard that as entirely legitimate. I accept that the language in which the two tests is expressed is different and that in the public law context a "reasonableness review" may be significantly less stringent than a proportionality assessment (though the *756 nature and extent of the difference remains much debated). But it would be a pity if there were any real distinction in the context of dismissal for long-term sickness where the employee is disabled within the meaning of the 2010 act. The law is complicated enough without parties and tribunals having routinely to judge the dismissal of such an employee by one standard for the purpose of an unfair dismissal claim and by a different standard for the purpose of discrimination law. Fortunately I see no reason why that should be so. On the one hand, it is well established that in an appropriate context a proportionality test can, and should, accommodate a substantial degree of respect for the judgment of the decision-taker as to his reasonable needs (provided he has acted rationally and responsibly), while insisting that the tribunal is responsible for striking the ultimate balance; and I see good reason for such an approach in the case of the employment relationship. On the other, I repeat—what is sometimes insufficiently appreciated—that the need to recognise that there may sometimes be circumstances where both dismissal and "non-dismissal" are reasonable responses does not reduce the task of the tribunal under section 98(4) to one of "quasi- wednesbury " review (*Associated provincial picture houses ltd v Wednesbury corpn* [1948] 1 KB223): see the cases referred to in para 11 above 5 . Thus in this context I very much doubt whether the two tests should lead to different results 6 .

> 54. Judge Serota [in the EAT] dealt with this point only briefly, at para 137 of his judgment, where he said:
>
> "while in determining if a dismissal is discriminatory, contrary to section 15 of the equality act 2010, it may be appropriate to carry out a balancing exercise the test is objective and therefore it is inappropriate to import the reasonable range of responses considerations relevant to unfair dismissal."
>
> I respectfully disagree with that formulation. The test under section 98(4) of the 1996 act is objective, no less than the test under section 15 of the 2010.

CONCLUSIONS

TIME LIMITS

Whether in time

124. Under S.123(3)(b) EqA a failure to do something is to be 'treated as occurring when the person in question decided on it'.

125. The claim was presented on 6 July 2020, following an ACAS early conciliation period between 24 April 2020 and 7 June 2020. Accordingly claims relating to events before 25 January 2020 are out of time in the absence of discriminatory conduct extending over a period, subject to the Tribunal's discretion to extend where "just and equitable".

126. It follows that the claims that the dismissal and appeal were discriminatory are in time.

127. As to events in 2018 and 2019, in respect of the alleged failures to make reasonable adjustments, we find that there were a number of decisions: specifically:

127.1. the decision of Mr Cunningham to refuse the flexible working request on 21 June 2018;

127.2. the decision of Ms Short dated 10 September 2018 to reject the flexible working appeal;

127.3. the decision of Ms Short by letter of 28 February 2019 to reject the reconsidered flexible working appeal following the meetings on 7 and 15 February 2019;

127.4. a decision of Mr Cunningham not to follow the recommendation of Dr Weadick, occupational health, in a letter dated 21 March 2019;

127.5. the decision of Ms Short following at a meeting on 16 May 2019 confirmed by letter dated 4 July 2019 refusing a request for flexible working;

127.6. a decision of Mr Cunningham not to follow the recommendation of Dr Swan, occupational health, in a letter dated 28 May 2019;

127.7. the decision of Ms Short in a meeting on 30 October 2019 not to consider a request for flexible working on the basis that nothing had significantly changed;

127.8. at the Stage 3 review meeting on 4 February 2020 at which the Claimant mentioned part-time working;

127.9. on receipt of the GP fit note dated 17 February 2020 and the Claimant's grounds of appeal 28 February 2020 (in reality these were only considered at the appeal against dismissal).

128. We find that there was not an act extending over a period, but rather a series of decisions not to offer flexible working. Only the reference to part-time working at the Stage 3 review meeting on 4 February 2020 was in time. The claim was not made within three months of all of the other events.

Just & equitable extension

129. At paragraph 13 of the grounds of complaint the Claimant invites the Tribunal to exercise the just and equitable extension under section 123 of the Equality Act 2010

> "because the conduct of which the claim arises failure to implement reasonable adjustment flexible part-time working continues over a period from the 04–6–2018 to 15–03–2020 dismissal. Grievance appeal on 02–05–2020 the rejection on 05–02–20. From which the time limit starts to run from the end of that period 05–06–2020".

130. As to why the claim was not presented, in his witness statement the Claimant says:

> "25. The R dragged this out over several months and this exacerbated my disability. I believe they prolonged all of the steps here. I strongly feel that not allowing me to bring these claims because they are out of time would be unfair"

131. While we do not necessarily accept the Claimant's characterisation of this being that the Respondent "dragged this out" over several months, it is clear that the Claimant was following two types of internal processes. First was the application for flexible working (the original application and associated appeal and a renewed application). The appeal process was delayed by a miscommunication initially and the Respondent exercised its discretion to re-hold the appeal. Second was the Management Attendance Process which the Respondent held a series of periodic reviews under. The Claimant himself

repeatedly requested part-time working. It was not simply the reiteration of this request in identical circumstances, but rather based on further medical evidence from the Respondent's occupational health advisers. We take the view that the Claimant should not be criticised for attempting to resolve matters internally before heading to an employment tribunal.

132. We have taken account of the fact that the Claimant was very ill in August 2019 and a hospital inpatient and there was a recovery period thereafter.

133. It is also open to us to consider that there is merit in his claim, which we find there is, certainly in relation to events in 2019 based on our findings below.

134. We have considered the balance of hardship and the prejudice to the parties. Not extending time might potential shut the Claimant out of part of his claim. Considering evidence and ability to defend the claim, we have considered that any delay has the potential to cause a degree of prejudice to a Respondent given that memories fade, and it may become more difficult for managers to recall the precise circumstances or to justify their decisions fully. In this case, the Respondent dealt with matters as part of the flexible working appeal and the managing attendance process (MAP). Considering the balance of hardship, the Respondent has the benefit of the documented evidence of these processes which were documented.

135. As to the events in 2018, we have not heard evidence from Mr Cunningham and considering the balance of hardship find that the Respondent would be prejudiced in their ability to deal with matters which happened three years before the date of the hearing. We find that that the claim is brought about these matters significantly out of time.

136. Events in 2018 were approximately two years distant at the time that the claimant was presented and approximately three years distant at the date of the liability hearing. We have concluded that it would not be just and equitable to extend time for the claim brought in respect of events in 2018.

137. Conversely, we have decided that it would be just and equitable to extend time in respect of the claim about events from February 2019 onward. This is for several reasons. These events are less out of time. There is a clear paper trial. These allegations relate to the involvement of Ms Short who took a series of decisions which ultimately led to the Claimant's dismissal. Ms Short would be giving evidence in any event about the dismissal. Furthermore we have taken some account of the prejudice that would be suffered by the Claimant if he would shut out of a meritorious claim.

REASONABLE ADJUSTMENTS

138. [**Issue 1**] Did the Respondent fail to comply with its duty to make reasonable adjustments as required by s.20 EA 2010

PCPs

139. It was agreed by Counsel that the relevant PCPs should be formulated as follows:

139.1. (1) working 5 days a week with physical attendance;

139.2. (2) Requirement for consistent attendance at work.

140. It is clear and not in dispute that the Respondent did operate both of these PCPs.

Substantial disadvantage

141. The Claimant explained that the full-time role put him at the disadvantage of suffering from ongoing disability related impairments such as incontinence, suppressed immune system and severe fatigue [C, §21(c), p6].

142. He also explained that the Respondent's proposed 6 hour working days was insufficient to relieve the fatigue caused by the impact of the need to still travel and commute 5 days a week. His evidence was that he believed I needed a clear day's break' [C, §50, p16].

143. Respondent's counsel, realistically, did not challenge substantial disadvantage, which we find was established.

Knowledge of substantial disadvantage

144. Had we not found that events in 2018 were out of time and it was not just and equitable to extend, we would have invited submissions on whether as at June 2018, when Mr Cunningham refused the application for flexible working, the Respondent had knowledge of substantial disadvantage.

145. Given the paucity of medical evidence at that stage and the limited information given by the Claimant in his application for flexible working, it seems to us a real possibility that we would have found that the Respondent did not have knowledge of substantial disadvantage at that early stage, by contrast with the period from February 2019 onward.

Reasonable adjustments contended for

146. The reasonable adjustment proposed at paragraph 13 of the Grounds of Complaint is part time working.

147. A reduction to part time working was recommended in the Occupational Health reports, in particular 21 March 2019 the recommendation of Dr Weadick at page 180 "reduction in working week, ideally in terms of numbers of days worked".

[**Issue 1**] Adjustments relating to flexible working application

148. In relation to the Claimant's application for Statutory Flexible Working:

149. [**Issue 1(a)(i)**] On receipt of the Claimant's application dated 4th June 2018 [123-125]. Reasonable adjustment contended for: reduction in working hours to 2.5 or 3 days from 1.7.18

150. We found that this was out of time and did not find that it was just and equitable to extend time.

151. [**Issue 1(a)(ii)**] On rejecting the Claimant's application on 21st June 2018 [128]. Reasonable adjustment contended for: reduction in working hours to 2.5 or 3 days -

152. We found that this was out of time and did not find that it was just and equitable to extend time.

153. [**Issue 1(a)(iii)**] On receipt of the Claimant's grounds of appeal dated 17th July 2018

154. We found that this was out of time and did not find that it was just and equitable to extend time.

155. [**Issue 1(a)(iv)**] Following the appeal hearings of 7th and 15th February 2019 [175-176].

156. *Reasonable adjustment contended for: working from home*.

157. There was something of a dispute between the parties about the extent to which work could be carried out at home. It was the Claimant's contention that 60-70% of his work needed to be done at site, but that the remainder of his work could be done in the COW office. He says the fact that Mr Cunningham and Ms Short and others work from home demonstrated that it could be done. Ms Short rejected the request to work from home on the basis that the nature of the work was site-based. He said that the Respondent's electronic systems could be accessed by him remotely.

158. We have reminded ourselves that reasonable adjustments contended for relate to the material time, before the Covid-19 pandemic, as a result of which many workplaces have evolved new ways of working from home.

159. We formed the impression, especially based on the Claimant's own oral evidence that there was real need for him to routinely attend not only the COW office, but the local office attached to individual sites to process paperwork following on from a site visit.

160. We received the following oral evidence from the Claimant:

> "Because projects spread out on the estate - everybody knew where they were - site meetings. We would sign paperwork off in there, we'd go back to site office, discuss any concerns regarding quality. I would take photocopies and if necessary email something back. There was a phone if you wanted it"

161. We understand that timely documentation of site visits carried out at site offices was an important part of the role. The Tribunal can see something inherently unsatisfactory about waiting for a home day once a week to carry out that documentation.

162. We accepted Ms Short's evidence that the impression given by the Claimant in respect of electronic systems was something of an "ideal world" and in reality use of a centralised electronic system was not always followed, such that she had to invest in employing someone to try to standardise it.

163. We have taken account of the fact the Claimant's role related to the sites and was not a management role such as the one being carried out by Ms Short.

164. While we do accept the Claimant's case that working from home for a day a week would be likely to ameliorate the substantial disadvantage caused to him by the requirement to commute five days a week, ultimately, on balance we have accepted the Respondent's case that this role was not suitable for the Claimant to work for days at home.

165. Given that it was not practicable, we do not find that there was a failure to make a reasonable adjustment in this respect

166. *Reasonable adjustment contended for: reduction in working hours to 2.5 or 3 days*

167. We have considered the extent to which taking the step would prevent the effect in relation to which the duty was imposed (i.e. the effectiveness of the step). Based on the OH evidence generally and in particular the report of Dr Weadick dated 21 March 2019, we find that a reduction in working days was likely to be effective.

168. Considering the extent to which it was practicable for the employer to take the step, there was a dispute between the parties as to whether there was a risk that contractors might play one COW off against another. The Claimant did not accept that this occurred. His view was that this problem which had not been documented and that the Respondent's systems and standard documentation meant that this would not occur since any Clerk of Works would be aware of what had been agreed by his colleagues with a contractor. By contrast the Respondent's case was that this was a phenomenon that was more apparent to Mr Cunningham as manager than the Claimant as a COW. The Respondent's case is that even with standard systems and documentation there is a degree of discretion that varies from COW to COW and that not everything gets documented. Contractors can and do misrepresent, intentionally or otherwise, to one COW that things have been agreed by another COW. The result is that standards are not fully upheld.

169. The Tribunal found the Respondent's case on a potential risk of "playing off" plausible although note that it has not been evidenced to the Tribunal with specific real examples with clear consequences. We accepted however that it was a real potential risk and that was legitimate for the management of the Unit

to try to avoid this situation by minimising the extent to which different COWs were covering the same site.

170. The 'playing off' risk however, is not the end of our consideration on this point. The Claimant's case is that by going to work for example three days per week there would be a *pro rata* reduction in his work with the result that he would for example be reduced from covering three sites to covering two sites, with another COW covering the other site.

171. In order to enable the Claimant to reduce to 2.5 or 3 days a week in practical terms the Respondent would need to either engage an agency clerk or recruit a part-time Clerk of Works to fill in the gaps. The Claimant specifically suggested either 2.5 or 3 days a week in his flexible working application to give his employer a degree of flexibility to be able to offer this.

172. The Respondent, argued that there was a need to do unannounced "spot checks", which required continuous attendance. We entirely accepted the Claimant's counterargument that these were unannounced to the contractor, but could easily be planned in advance by the COW to fall on a day on which he was working. We did not find that this argument against part-time working stood up to scrutiny.

173. We considered the "access to work" possible funding, which in practical terms might have provided the Claimant with a taxi to work. We entirely understand the Claimant's reluctance to explore this option, given the Claimant's address in Harrow and his places of work in Islington. In practical terms a taxi would have the effect of replacing a reasonably lengthy commute by public transport with an even longer journey by road. This was simply not the answer in the Claimant's case, given that long journeys caused him difficulties in relation to his disability.

174. The Respondent contends that because of the nature of the notification process whereby contractors give a 48-hour CIR (Contractor's Inspection Request) notice for an inspection, it is vital to have staff who are able to carry out an inspection within that 48-hour period to avoid either a delay in the works or alternatively a stage of the works going ahead unscrutinised by the council. This 48-hour period applies to the working week, not the weekend. Ms Short acknowledged that this might have no effect in very many cases but that it might be that a quality check was thereby missed. She was not able to give evidence as to how often in fact this did happen, nor indeed any actual examples of the effect of this. She also emphasised that it might be a cumulative effect of such checks not being carried out timeously. We accepted that it was desirable for inspections to be carried out within 48 hours.

175. The Tribunal accepted that the 48 working hour CIR requirement might have caused a difficulty if the Claimant was working three consecutive days. Were he to work Tuesday/Wednesday/Thursday for example, he would only be able to deal with a CIR notice presented on a Thursday the following Tuesday, which would be more than 48 working hours later. This would not be a problem however if the Claimant's working days were non-consecutive.

176. The Respondent says that the Claimant required that the three days would run consecutively, in order that the Claimant could go to Cardiff. This is supported by the content of the letter dated 28 February 2019 (175) and also by the exchanges that took place in the meeting on 4 February 2020. On page 267 Ms Short said "to recap the readjustment PW wanted was to work 3 consecutive days a week." The Claimant does not dispute this when it is said, although he does dispute some other points. Later on in the same meeting (bottom of page 270) the Claimant says "I was never offered to work 3 days with 2 day break week".

177. The Claimant in cross examination agreed that this is the way that Ms Short had described the proposed instruction to him, but maintained that he was open to any configuration of days. We find that this is supported by the content of the original application document dated 4 June 2018 in he did not describe a particular requirement either in terms of days nor did he specify or suggest that the days should run consecutively.

178. We have considered the financial and other costs that would be incurred by the employer in taking the step and the extent to which taking it would disrupt any of its activities. The Respondent has not relied upon cost as a reason why it could not have made adjustments. As to the extent of the employer's financial and other resources, we found that the Respondent was sufficiently large to mean that this was not an issue.

179. As to the nature of activities, we consider that the relevant consideration here is the time sensitive scrutiny element of the role carried out by the Claimant's department within the Respondent, which has been considered by us above.

180. We have considered any potential disruption of the Respondent's activities. The practical effect was that this was not a change which could be dealt with temporarily by scraping by. The Respondent would need to make a decision about recruiting, either an agent or a part-time employee to fill the gap. The Claimant's evidence was that such individuals were readily available to be recruited. The Respondent did not argue that it would not be possible to recruit such an individual. Their argument was based on the practicability of it working due to the concern about 'playing off'. Ms Short's evidence was that she had to expand and contract the team to meet variations in workload, from which we infer that bringing new members into the team was not an insurmountable challenge.

Conclusion on reasonable adjustment

181. We have borne in mind that the scheme of the reasonable adjustment provisions in the Equality Act 2010 is to enable disabled people to continue working, where this can be accommodated by reasonable adjustments. There is of course a balancing act between this and an employer's operational factors.

182. Ultimately, we find that it would have been a reasonable adjustment to follow the medical advice and offer the Claimant a three-day working week. The Respondent was not bound to offer three consecutive days, for example Tuesday/Wednesday/Thursday. The Claimant says and we accept that he was

open to any configuration of days. There is no evidence that the Respondent ever offered a three-day working week of any sort. We find that the Respondent's concerns about contractors "playing off" COWs could reasonably be remedied by the Claimant's entirely reasonable suggestion that in reducing his hours he would be covering fewer sites and the sites he was relinquishing would be covered by either agency workers or another part time employee. We recognise that there might be some cost associated with this, this is not point that is being taken by the Respondent and in any event reasonable adjustments may entail some additional cost.

183. **It is our finding therefore that there Respondent failed to make this reasonable adjustment**.

Timing of reasonable adjustment

184. We find that there was a distinct and separate failure to make reasonable adjustments at each of the following points:

184.1. [Issue 1(a)(iv)] the decision of Ms Short by letter of 28 February 2019 to reject the reconsidered flexible working appeal following the meetings on 7 and 15 February 2019;

184.2. [Issue 1(c)(i)] a decision of Mr Cunningham not to follow the recommendation of Dr Weadick, occupational health, in a letter dated 21 March 2019;

184.3. [Issue 1(b)] the decision of Ms Short following at a meeting on 16 May 2019 confirmed by letter dated 4 July 2019 refusing a request for flexible working;

184.4. [Issue 1(c)(ii)] a decision of Mr Cunningham not to follow the recommendation of Dr Swan, occupational health, in a letter dated 28 May 2019;

184.5. [Issue 1(b)] the decision of Ms Short in a meeting on 30 October 2019 not to consider a request for flexible working on the basis that nothing had significantly changed;

184.6. [Issue 1(f)] at the Stage 3 review meeting on 4 February 2020 at which the Claimant mentioned part-time working;

184.7. [Issue 1(d), 1(e)] At the decision of the appeal against dismissal dated 5 June 2020.

We have not considered the separate point of the receipt of the GP note on 17 February 2020 or the receipt of the grounds of appeal since by this point the Claimant had been dismissed and this would be naturally considered as part of the appeal process rather than being considered immediately by a line manager which might otherwise be the situation.

185. [**Issue 1(g)**] Did Ms Short at the meeting of 15th February 2019 offer the Claimant the opportunity to work 5 half days Monday to Friday? If so, was this a reasonable adjustment?

186. This point is not essential to our reasoning on the reasonable adjustment claim, but the parties have put it in issue and we have dealt with it for completeness. An offer put forward by the Respondent in respect of hours of work was one hour less on each working day. We entirely understand the Claimant's difficulty with this, supported by medical evidence, that it was simply a very marginal change, only a very small reduction in hours and still required him to commute five days a week which in itself was something he was needed to minimise due to his disability.

INDIRECT DISCRIMINATION

187. [**Issues 2 & 3**] Did the Respondent discriminate against the Claimant indirectly within the meaning of s.19 EA 2010, in relation to:

188. The Claimant's counsel, realistically and appropriately, did not particularly focus on this claim in closing submissions, given that both Counsel, reasonably in our view formed the view that the real nub of the dispute was elsewhere.

189. In respect of the PCPs contended for at Issue 2 the Claimant did not satisfy us that there was a group of persons with whom the Claimant shares the characteristic of Crohn's Disease at a particular disadvantage.

190. In respect of the PCPs contended for at Issue 3, find that these were a set of specific events which occurred in the Claimant's case, not PCPs that were or were likely to be of general application. This failed following the case of *Ishola*.

SECTION 15 CLAIM – SOMETHING ARISING FROM DISABILITY

191. [**Issue 4**] Did the Respondent treat the Claimant unfavourably because of something arising in consequence of his disability within the meaning of s.15 EA 2010, with reference to the following acts of alleged unfavourable treatment:

Unfavourable treatment

192. [**Issue 4(a)**] Rejecting the Claimant's application for Statutory Flexible Working (on dates as stated above) notwithstanding that (so the Claimant will aver) the application arose in consequence of his disability.

193. We find that the rejection of the Claimant's application for flexible working was unfavourable treatment.

194. We find that the application arose in consequence of disability.

195. Was the unfavourable treatment was 'because of' something that arose in consequence of disability, i.e. in this case because of the application. This should not be assessed on a simplistic 'but for' view of causation. On a simplistic view it will always be the case that an application that is refused would

not have been turned down but for the making of the application. That might lead to a facile conclusion. We have to examine the reasons why.

196. Our conclusion is that the reason for the rejection of the applications were the operational concerns put forward by the Respondent. This was the reason why. We do not find that this amounted to unfavourable treatment because of the making of the application.

197. [**Issue 4(b)**] Continuing with and/or failing to de-escalate management of the Claimant's sickness absence under the MAP notwithstanding that (so the Claimant will aver) the sickness absence arose in consequence of his disability, during the period from October 2018 to February 2020.

198. In this case the unfavourable treatment is alleged to be continuing with or failing to de-escalate management of the sickness absence under the MAP. We accept Mr Harding's argument that this engages the decision in *Williams.*

199. The decision to keep the Claimant under the MAP was essentially in the middle of the range of available options. He might have been removed from the MAP altogether on the one hand. He might have been dismissed at an earlier stage on the other. Remaining on the MAP was treatment somewhere in the middle of these possible options. Following *Williams*, just because there was an treatment that was more favourable, namely removal from the MAP, did not make the Respondent's action unfavourable. We find that this part of this claim does not succeed.

200. In any event, had we needed to consider it, we would have found that the Respondent's justification defence would have succeeded. It was a legitimate aim to manage attendance. We find the approach to continuing to manage the Claimant under the MAP rather than removing him from it was proportionate. It provided a mechanism for management to continue to monitor his absence, which we find was appropriate.

201. [**Issue 4c**] Dismissing the Claimant due to his level of sickness absence notwithstanding that (so the Claimant will aver) the sickness absence arose in consequence of his disability [Ms Short's written reason at 259; Ms Short's verbal reason at 271].

202. The Claimant's dismissal was unfavourable treatment.

203. The Respondent argues that the Claimant has failed to prove a connection between the ulcers, which were the cause of his sick absences and the disability. We find on the balance of probabilities that there was a direct connection between the ulcers and the disability. We find that ulcers were a manifestation of the Claimant's impairment, based on the information provided to Ms Short at the meetings in February 2019, specifically connecting the Claimant's disability with acid reflux and stomach ulcers. There is also the generic guidance on Crohn's Disease provided to the Respondent e.g. from the University of Oxford and the Discharge Summary from Northwick Park Hospital dated 12 August 2019. Both of these document support our conclusion on this point.

204. We find that the dismissal arose in consequence of the sickness absence.

205. The dismissal was because of the Claimant's sickness absence.

Justification of dismissal

206. We accept that it is a legitimate aim on the part of an employer to ensure attendance at work.

207. Was dismissal a proportionate means to achieve this aim? We have considered whether it was appropriate and reasonably necessary to dismiss the Claimant. This is not as high a threshold as whether it was necessary.

208. We find that the Respondent ought to have followed the medical advice, in line with what the Claimant was requesting and ought to have tried part time working to see if this would have led to an improvement in his attendance. The Claimant made a flexible working application for the first time on 4 June 2018. By the stage that dismissal was being considered on 4 February 2020, the Claimant had been repeatedly requesting reduction in his number of working days for 20 months. His request was supported by clear occupational health advice. In the circumstances we do not consider that it was appropriate and reasonably necessary to dismiss him when the option of allowing part-time working had not been tried and there were good reasons to believe that this option would be likely to improve his attendance.

209. For these reasons we do not find that the Respondent's justification is made out.

210. **This part of the section 15 claim succeeds**.

[Issue 5] DIRECT DISCRIMINATION

211. [**Issue 5**] Did the Respondent discriminate against the Claimant directly within the meaning of s.13 EA 2010, with reference to the following acts of alleged less favourable treatment:

212. Again Claimant's counsel realistically and appropriately placed little emphasis on this part of the claim in closing submissions.

213. The Tribunal has reminded ourselves that simple 'but for' causation is not the appropriate approach (*James v Eastleigh*). We have considered the operative reason for the Respondent's treatment in each case toward the Claimant.

214. In each case, considering the allegations set out at 5(a)-(e) in the list of issues, we have found that the reasons for the treatment were the Claimant's absences and the Respondent's operational reasons. We do not find that the operative reason was the fact of the Claimant being disabled. The claim of direct discrimination does not succeed.

[Issue 6] HARASSMENT

215. [**Issue 6**] Did the Respondent harass the Claimant within the meaning of s.26 EA 2010, with reference to the following acts of alleged unwanted conduct:

216. We have reminded ourselves following *Dhaliwal v Richmond* that there is an objective threshold test for claims of harassment. Not every unfortunate comment should lead to legal liability.

217. [**Issue 6(a)**] Raising on its own initiative medical redeployment and/or medical retirement notwithstanding (so the Claimant will aver) the Claimant wished to return to work:

218. This allegation was, appropriately in the Tribunal's view, not pursued by the Claimant in view of his evidence on this point.

219. [**Issue 6(b)**] In a meeting of 28th November 2019:

220. [**Issue 6(b)i**] Stating that the Claimant could be dismissed in the following terms, Ms Short: 'If there is no report from consultant you could lose your job' [per Mr Bonner's note: 241].

221. The Tribunal found that this was plain talking from Ms Short and was designed to make clear to him the position that he was in. This was not harassment.

222. [**Issue 6(b)ii**] Refusing to engage in the Claimant's requests for reasonable adjustments, Ms Short: 'I can't allow that [3 days per week]. I don't think you can legitimately come to the table and say you need a permanent adjustment. I can't accommodate that…' [per Mr Bonner's note: 241].

223. We find that this was unlawful discrimination insofar as it was a statement failure to make reasonable adjustments. While it might perhaps have been unwise to make this comment and it was unwanted conduct from the Claimant's perspective, we do not find that objectively it amounted to harassment, but rather was a robust statement of the Respondent's position. We do not find that it additionally amounted to harassment.

224. [**Issue 6(b)iii**] Further raising on its own initiative medical redeployment and/or medical retirement notwithstanding (so the Claimant will aver) the Claimant wished to return to work, Ms Short: 'When we met last time we discussed two other options… medical retirement and redeployment… What we ought to do now is send you to OH with a view to ill-health retirement…' [per Mr Bonner's note: 241-242].

225. We find that this was no more than statement of where Ms Short saw that the process would be likely to lead. We do not find that this objectively amounted to harassment.

226. [**Issue 6(b)iv**] Trivialising the Claimant's disability in the following terms, Ms Short: 'If people get up each day, get dressed, get up, get to work etc. it helps them. We need you in every day. I cannot have someone else covering your job when you are off…' [per Mr Bonner's note: 242].

227. The Tribunal acknowledges that there are some cases where employees allow themselves to become marginalised or retreat from the workplace which affects their mental-health and it may be, entirely dependent on circumstances, appropriate for an employer to try to encourage the employee to get back into a regular working pattern which might be hoped improve their mental-health. It seems to us suggests that Ms Short seem to think Mr Walsh's situation was one of those sort of cases. Although the Claimant had been absent due to a bereavement, in our assessment the later part of his absences were connected to a physical ailment and the difficulties caused by having to work five days a week with the commute. The Tribunal takes the view that Ms Short, rather than trivialising the Claimant's disability, seems to have misunderstood it or mischaracterised it.

228. While this was unwanted from the Claimant's perspective and related to his disability, we do not find that this objectively amounted to harassment.

229. [**Issue 6c**] On 18th December 2019, pressuring the Claimant to engage in the process of medical retirement, Mr Cunningham: 'I urge you to send the consent form to Medigold so the process can start… Kim can pressure pensions…' (emphasis in original) [245].

230. Although we find that this approach was misguided, given our finding elsewhere that what the Respondent should have been doing is making adjustments to enable the Claimant to return to work, we do not find that this objectively amounted to harassment.

231. [**Issue 6d**] On 4th February 2020, presenting the Claimant with either medical redeployment or dismissal having not, the Claimant will aver, exhausted all other options [262-272].

232. We do not find that this objectively amounted to harassment for reasons the same as Issue 6c.

CLAIMS UNDER THE EMPLOYMENT RIGHTS ACT 1996 ('ERA 1996')

UNFAIR DISMISSAL

233. The agreed list of issues contained numbering for the unfair dismissal claim starting at (1). In our findings to avoid confusion we have used UD1 to denote the first issue in the unfair dismissal claim

234. [**Issue UD1**] Did the Respondent unfairly dismiss the Claimant:

235. [**Issue UD1(a)**] What was the reason (or principal reason) for the termination of the Claimant's employment?

236. The Respondent asserts that the reason for dismissal for capability. The Tribunal finds that the reason for dismissal was capability.

237. [**Issue UD1(b)**] Was that reason a potentially fair reason for the Claimant's dismissal within the meaning of s.98(2) ERA 1996?

238. Capability is a potential fair reason for dismissal.

239. [**Issue UD1(c)**] If so, did the Respondent act reasonably within the meaning of s.98(4) ERA 1996 in dismissing the Claimant for that reason and when having regard to the range of reasonable responses?

240. It does not automatically follow from a finding of discrimination that a dismissal is unfair because of an act of discrimination, see the discussion of *Perratt* and *O'Brien* above.

241. We find that in the circumstances of this case however, that it fell outside of the range of reasonable responses to dismiss in circumstances where the employer had decided not to follow clear Occupational Health advice to allow the Claimant to work part-time to help ameliorate the effect of his disability.

242. We find that it was outside of the range of reasonable responses open to a reasonable employer to dismiss rather than give the Claimant the opportunity to work part-time working with the goal of reducing his difficulties with attendance. While the section 15 proportionality test and the range of reasonable responses are not the same test, we have noted the doubt of Underhill LJ at paragraph 53 of the decision of the Court of Appeal in O'Brien about them leading to different results. We find that in the circumstances of this case the same considerations that lead us to the conclusion that it was not appropriate or reasonableness necessary to dismiss the Claimant also lead us to the conclusion, considered separately, that it fell outside of the range of reasonable responses.

243. We consider that there was also a failure at the appeal stage to allow the Claimant to return to his duties on the part-time basis. This was an option that was open to the appeal manager. The GP note of 17 February 2020 dating that the Claimant may be fit to work taking account for altered hours was further evidence supporting the Claimant's position, already supported by OH evidence that he could return to work if he could be given part-time hours. For similar reasons to those in the paragraph above we find that this took the refusal of the internal appeal outside of the range of reasonable responses.

244. [**Issue UD1(d)**] Did the Respondent follow a fair procedure in terminating the Claimant's employment taking into account the size and resources of the Respondent?

245. It has not been necessary to consider this separately given our decision above.

Remedy Hearing

246. A one day remedy hearing has been listed on **Monday 24 January 2022** to take place by CVP

247. The Claimant shall send to the Respondent an updated Schedule of Loss together with any documents on which he relies in support of his losses (financial and injury to feeling), and disclosure of documents relevant to mitigation of loss (e.g. attempts to find work and medical evidence relating to the period post dismissal) by **29 October 2021**.

248. The Respondent shall send to the Claimant a Counter-schedule by **19 November 2021**, which should set out reasons for any deduction e.g. Polkey/Chagger points or contribution, together with any supporting documents.

249. The Respondent shall produce an agreed remedy bundle by **3 December 2021**.

250. The parties shall exchange any witness statement on which they rely relevant to the question of remedy by **17 December 2021**.

251. The parties are ordered to exchange and send to the Tribunal any written submissions on which they rely by **17 January 2022**.

Employment Judge Adkin

Date 21.10.21

WRITTEN REASONS SENT TO THE PARTIES ON

22/10/2021.

FOR THE TRIBUNAL OFFICE

Notes

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the Claimant (s) and respondent(s) in a case.

IN THE LONDON CENTRAL EMPLOYMENT TRIBUNAL **Case No. 2204074/2020**

B E T W E E N :

MR THOMAS WALSH

Claimant

-and-

LONDON BOROUGH OF ISLINGTON

Respondent

AGREED LIST OF ISSUES

(Numbers in square brackets denote hearing bundle page numbers)

CLAIMS UNDER THE EQUALITY ACT 2010 ('EA 2010')

The Respondent accepts that the Claimant is disabled within the meaning of s.6 EA 2010 by reason of Crohn's Disease. At all material times, the Respondent had actual knowledge of the Claimant's disability.

1. Did the Respondent fail to comply with its duty to make reasonable adjustments as required by s.20 EA 2010, namely:

a. In relation to the Claimant's application for Statutory Flexible Working:
   i. On receipt of the Claimant's application dated 4th June 2018 **[123-125]**.
   ii. On rejecting the Claimant's application on 21st June 2018 **[128]**.
   iii. On receipt of the Claimant's grounds of appeal dated 17th July 2018 **[135-136]**.
   iv. Following the appeal hearings of 7th and 15th February 2019 **[175-176]**.

b. Following managing attendance meetings held by Ms Short during which reasonable adjustments were discussed, during the period from November 2018 to February 2020.

c. On receipt of recommendations from Occupational Health, namely:
   i. Mr Weadlick's report dated 21st March 2019 **[179-180]**.
   ii. Dr Swan's report dated 28th May 2019 **[203-204]**.
   iii. Mr Weadlick's report dated 17th September 2019 **[220-221]**.
   iv. Mr Weadlick's report dated 13th November 2019 **[233-234]**.

d. On receipt of the Claimant's Statement of Fitness for Work ('GP fit note') dated 17th February 2020 **[273]**.

e. On receipt of the Claimant's grounds of appeal dated 28th February 2020 **[275-280]**, specifically: *'It must be stated that I am able to work but with reduced intensity and frequency. I want to continue in the employment but with reduced number of days per week'* **[276]**.

f. In relation to the management of the Claimant's disability-related sickness absence (addressed substantively below under **(3)**).

g. Did Ms Short at the meeting of 15th February 2019 offer the Claimant the opportunity to work 5 half days Monday to Friday? If so, was this a reasonable adjustment?

2. Did the Respondent discriminate against the Claimant indirectly within the meaning of s.19 EA 2010, in relation to:

a. Did the following amount to the application of a provision, criterion, or practice:
   i. The Respondent's application of its Flexible Working Policy **[357-369]**.
   ii. The Respondent's decision that the Claimant's job could only be worked on a 5-day week basis.
   iii. The Respondent's application of its Managing Attendance Procedure (addressed substantively below under **(3)**).

b. Did that put persons with whom the Claimant shares the characteristic of Crohn's Disease at a particular disadvantage when compared with persons who do not share that characteristic, where the pool of comparison is persons with Crohn's Disease.

c. Did it put the Claimant at a particular disadvantage?

– and if so, can the Respondent show that the discrimination was a proportionate means of achieving a legitimate aim?

3. Did the Respondent discriminate against the Claimant indirectly withing the meaning of s.19 EA 2010, in its application of the Managing Attendance Procedure ('MAP') [377-399] namely:

a. On 18th and 29th October 2018, proceeding with the 'formal hearing stage' under the MAP **[154-157]** notwithstanding the implementation of the Claimant's phased return to work plan, from 2nd October 2018 to 30th October 2018 **[149-150]**.

b. In the meeting of 15th February 2019, including disability-related sickness absences in the assessment of absence generally when setting a three-month review period under the MAP **[173-174]**.

c. In the meeting of 16th May 2019, including disability-related sickness absences in the assessment of absence generally when setting a three-month review period under the MAP **[205-207]**.

d. On 15th October 2019, setting a six-week review period under the MAP whilst the Claimant was absent from work due to disability-related sickness **[227-229]**.

e. On 28th November 2019, setting a further review period under the MAP whilst the Claimant was absent from work due to disability-related sickness **[252-254]**.

– and if so, can the Respondent show that the discrimination was a proportionate means of achieving a legitimate aim?

4. Did the Respondent treat the Claimant unfavourably because of something arising in consequence of his disability within the meaning of s.15 EA 2010, with reference to the following acts of alleged unfavourable treatment:

a. Rejecting the Claimant's application for Statutory Flexible Working (on dates as stated above) notwithstanding that (so the Claimant will aver) the application arose in consequence of his disability.

b. Continuing with and/or failing to de-escalate management of the Claimant's sickness absence under the MAP notwithstanding that (so the Claimant will aver) the sickness absence arose in consequence of his disability, during the period from October 2018 to February 2020.

c. Dismissing the Claimant due to his level of sickness absence notwithstanding that (so the Claimant will aver) the sickness absence arose in consequence of his disability [Ms Short's written reason at **259;** Ms Short's verbal reason at **271**].

5. Did the Respondent discriminate against the Claimant directly within the meaning of s.13 EA 2010, with reference to the following acts of alleged less favourable treatment:

a. Rejecting the Claimant's application for Statutory Flexible Working (on dates as stated above) when compared with the following part-time workers:
   i. Mr Barry Cunningham – Group Leader, Clerk of Works
   ii. Mr Jim Mathews – Project Manager
   iii. Mr Paul Croom – (Senior) Project Manager
   iv. Mr Mike Neil – Health and Safety Officer.

b. Following the meetings of 7th and 15th February 2019, rejecting the Claimant's request for home working one day per week **[173-174]** when compared with the following part-time home-worker:

i. Ms Christine Short – Head of Capital Programme Delivery.

c. Managing the Claimant's absence in the manner as stated above at **(3)** when compared with a hypothetical, non-disabled person.

d. Inviting the Claimant to consider medical redeployment and/or medical retirement when compared with a hypothetical, non-disabled person, namely:
   i. On 15th October 2019 [Mr Bonner's note of meeting: **223-225**].
   ii. On 28th November 2019 [Mr Bonner's note of meeting: **241-242**; Ms Short's letter: **252-253**].

e. Dismissing the Claimant **[258-261]** when compared with a hypothetical, non-disabled person.

6. Did the Respondent harass the Claimant within the meaning of s.26 EA 2010, with reference to the following acts of alleged unwanted conduct:

a. Raising on its own initiative medical redeployment and/or medical retirement notwithstanding (so the Claimant will aver) the Claimant wished to return to work:
   i. On 15th October 2019, Ms Short: *'I need to also raise issue of medical redeployment… Ill health retirement is something that happens with someone who is very ill… If you can't do the job your employed to do it is a legitimate option'* [per Mr Bonner's note: **224**].

b. In a meeting of 28th November 2019:
   i. Stating that the Claimant could be dismissed in the following terms, Ms Short: *'If there is no report from consultant you could lose your job'* [per Mr Bonner's note: **241**].
   ii. Refusing to engage in the Claimant's requests for reasonable adjustments, Ms Short: *'I can't allow that* [3 days per week]. *I don't think you can legitimately come to the table and say you need a permanent adjustment. I can't accommodate that…'* [per Mr Bonner's note: **241**].

iii. Further raising on its own initiative medical redeployment and/or medical retirement notwithstanding (so the Claimant will aver) the Claimant wished to return to work, Ms Short: *'When we met last time we discussed two other options… medical retirement and redeployment… What we ought to do now is send you to OH with a view to ill-health retirement…'* [per Mr Bonner's note: **241-242**].

iv. Trivialising the Claimant's disability in the following terms, Ms Short: *'If people get up each day, get dressed, get up, get to work etc. it helps them. We need you in every day. I cannot have someone else covering your job when you are off…'* [per Mr Bonner's note: **242**].

c. On 18th December 2019, pressuring the Claimant to engage in the process of medical retirement, Mr Cunningham: *'I urge you to send **the consent form to Medigold** so the process can start… Kim can pressure pensions…'* (emphasis in original) **[245]**.

d. On 4th February 2020, presenting the Claimant with either medical redeployment or dismissal having not, the Claimant will aver, exhausted all other options **[262-272**].

CLAIMS UNDER THE EMPLOYMENT RIGHTS ACT 1996 ('ERA 1996')

The Claimant's effect date of termination was 15th March 2020. The Respondent accepts that the Claimant was their employee with more than 2 years' continuous service, with a right not to be unfairly dismissed under s.94 ERA 1996.

1. Did the Respondent unfairly dismiss the Claimant:

a. What was the reason (or principal reason) for the termination of the Claimant's employment?

b. Was that reason a potentially fair reason for the Claimant's dismissal within the meaning of s.98(2) ERA 1996?

c. If so, did the Respondent act reasonably within the meaning of s.98(4) ERA 1996 in dismissing the Claimant for that reason and when having regard to the range of reasonable responses?

d. Did the Respondent follow a fair procedure in terminating the Claimant's employment taking into account the size and resources of the Respondent?

e. If the Tribunal should find that the Claimant's dismissal was procedurally unfair – had the Respondent conducted a further, fair procedure would it still have reached fairly the decision to dismiss the Claimant at the end of that further procedure?