EMPLOYMENT TRIBUNALS

Heard at: Croydon **On:** 1 to 5 November 2021

Claimant: Mr Alan Leslie

Respondent: Driver and Vehicle Standards Agency

Before: Employment Judge Fowell

Mr J Harvard

Ms A Rodney

Representation:

Claimant: Mr P Tapsell of counsel

Respondent: Mr T Kirk of counsel

JUDGMENT ON LIABILITY

1. The following claims are upheld:
    a. unfair dismissal
    b. discrimination arising from disability.
    2. The following complaints are dismissed.
    a. direct discrimination
    b. indirect discrimination
    c. harassment
    d. failure to make reasonable adjustments.
    3. The parties will be notified of a date for the remedy hearing.

REASONS

Introduction

1. These written reasons are provided at the request of the claimant following oral reasons given on the final day of the hearing. The have been edited to make them shorter and clearer, so this is the final version.

2. Mr Leslie worked for the DVSA as a driving examiner until his dismissal on 9 May 2019. They say that this was on grounds of capability, given his record of absences from work and also the likelihood of further absences. Those absences relate mainly to his long-standing mental health problems, and the agency agrees that these conditions - depression, anxiety and post-traumatic stress disorder - amount to disabilities. They also accept that they were aware of these conditions and their effects at all material times.

3. The complaints presented are therefore as follows:

    a. unfair dismissal under section 98 Employment Rights Act 1996;

    b. direct discrimination (under section 13 Equality Act 2010) on grounds of disability;

    c. discrimination arising from a disability (under section 15 Equality Act 2010);

    d. failure to make reasonable adjustments (under section 21 Equality Act 2010);

    e. indirect discrimination (under section 19 Equality Act 2010) on grounds of disability; and

    f. harassment (under section 26 Equality Act 2010) on grounds of disability.

4. There have been three preliminary hearings in this case, the most significant of which was on 11 January this year when Employment Judge Phillips struck out various historical allegations. That resulted from a previous claim form of Mr Leslie's being withdrawn on 20 November 2017. It was then dismissed, which meant that he was unable to revive those allegations in this claim. As we will describe shortly, when he withdrew the first claim, he felt that he was receiving more support from his managers and was keen to work with them to restore his health and working relationships.

5. The terms of his withdrawal were striking however. He stated that:

> "The objective of my claim was to remove the sense of worthlessness inflicted and prove to my employer and to myself that I have a right to be treated with dignity and also, as a relevant human being."

6. This reveals the extent to which he felt overlooked and mistreated. Our overall view, which we will explain, is that this reaction is a feature of Mr Leslie's mental health problems, which are serious, but nevertheless there were failings on the agency's part, and that his reaction was often extreme, as was the effect on his health.

7. Perhaps as a result of the extensive disagreements which arose, this is a document-heavy case. We were presented with a bundle of 1600 pages. The claimant's witness statement alone exceeded 100 pages. Nevertheless, both

counsel were able to marshal this material very expertly, focussing on the evidence relating to the agreed list of issues. It is important to emphasise that tribunals should only make findings of fact as far as necessary to support their conclusions. That means that a good deal of the background events, which do not feature in the list of issues, have to be treated more broadly and not all of the incidents can be covered at all. Other events have to be summarised, and any summary runs the risk of inaccuracy, but we need to do so to avoid a judgement of even greater length.

8. We will deal with each of the eight factual allegations of discrimination in due course, but suffice to say that they relate to failures by the agency to properly implement the occupational health advice they received, their refusal to allow Mr Leslie to return to work when that advice supported it, and their subsequent decisions to dismiss Mr Leslie and reject his appeal.

9. In addressing these issues we heard evidence from Mr Leslie, and on behalf of the agency from:

    a. Ms Nicola McLaren, his line manager for most of the events in question and the local driving test manager at the Hastings test centre, where he worked;

    b. Mr Mark Aston, her line manager, and the Operations Manager who took the decision to dismiss Mr Leslie;

    c. Mr Rowland Williams, a yet more senior manager, who held the appeal; and

    d. Mr Charles Perkins, an Operational Deliver Manager, who dealt with a grievance against Mr Leslie's appraisal score.

10. Having considered this documentary and oral evidence, and the submissions on each side, we make the following findings.

Findings of Fact

11. Mr Leslie started work for the DVSA in October 2015. That was just before his 56th birthday. We heard little about his earlier career, but the earliest occupational health report we have, from 3 January 2017 (p.383) states that he worked for the Ministry of Justice before taking up this role, and before that he was a police officer. That indicates that this was perhaps a job to tide him over until retirement, and also meant that he was starting out at a relatively junior level, being managed by younger people who may not have appreciated his broader experience and abilities.

12. The next medical report, from 9 May that year explains that he has a history of depression going back to 1986. Further:

> "In October 2016, he describes being subject to humiliation at work at the hands

> of two female colleagues. He stated that he was publicly criticised having been observed by one of the female colleagues undertaking a particular test manoeuvre whilst examining a candidate. Mr Leslie stated that he was publicly criticised in front of colleagues which caused him some concern. He raised his concerns with his manager but was left feeling unsupported and vulnerable. Mr Leslie raised the issue directly with the colleagues in question but discovered that the colleagues had actively decided to treat him in this manner and felt no apology was due. Following this, he has felt ostracised by his colleagues with them ignoring his presence in the office. Despite raising further concerns, no action was taken and the situation persisted. Mr Leslie began to develop symptoms of depression and heightened anxiety. He continued to feel unsupported by his manager and submitted a grievance. Following submission of the grievance no action was taken for around eight weeks and he perceived his ostracisation to have continued. Mr Leslie's symptoms worsened and this led to him becoming absent from work. He has consulted his GP and has been recommenced on medication. His grievance was later heard and it concluded that neither party were at fault and mediation should be arranged. The mediation was undertaken in late March with one colleague only. The other colleague had refused to participate. The mediator concluded that mediation was inappropriate. It is understood that a decision was taken to move Mr Leslie to another test centre to separate him from his manager. He had continued to feel unsupported at his place of work and also ostracised by his colleagues. He moved to a different centre in Eastbourne two weeks ago and there has been an immediate improvement in the symptoms of anxiety."

13. Save for the fact that the purpose of the move was to separate him from one of the colleagues, rather than his manager, that is an accurate summary of the events of 2016. They are part of the withdrawn allegations and so are not directly relevant to the issues we have to decide, but they cast a long shadow over later events.

14. The grievance in question was an extensive episode. It occupied most of 2017. Initially it was rejected without a hearing. In due course it was referred to another manager, Mr Perkins, one of the witnesses we heard from, who decided that this process was inadequate and referred it to another manager for reconsideration. That decision then fell to Mr Rowland Williams, another witness, who provided a 15 page decision in October. There was then an appeal to a more senior manager still, which was not decided until December 2017. In all, five managers were involved in this back and forth process.

15. We note in passing that the outcome letter was in strong terms. Mr Williams described some of Mr Leslie's comments as outrageous. He also described Mr Leslie as having showed an aggressive response, and unreasonable and irrational behaviour. However, the grievance was partly upheld. In broad terms, Mr Williams accepted that the two female colleagues had been insensitive in raising the issue in an open office but concluded that it did not amount to bullying. That decision was not altered on appeal.

16. Mr Leslie's complaints were indeed made in dramatic terms. He described being

moved from his previous office at Burgess Hill as a banishment, then later as a banishment by deception, on the basis that he was induced to move on the promise of a later posting to Eastbourne, where he lives. In his comments on Mr Williams' findings, which are extensive, he refers to a prolonged and pernicious campaign of ostracism, a campaign which threatened his health and safety. He raised allegations of collusion and of interference with the witnesses, said that his efforts to try to engage with one of the colleagues had been "venomously rejected", and much more in the same vein. He also found it incredible that any other view could be held. It seems to us that he placed no weight on the responses given by the two colleagues, and expected Mr Williams to do the same, and hence to agree with him. For example, he commented that "the definition of bullying is therefore, fulfilled and I have proven that I was openly bullied." Similar references appear throughout. So, there is a combination of dramatic language and an insistence that the evidence is black-and-white and that if the decision-maker did not see it that way, he or she was part of the collusion.

17. In his later grievance, to which we will come, he employed the word 'corrupt' very frequently about his managers, including those managers who had handled the 2016 grievance. He defined that term to us as "morally debased". Sometimes the phrase seemed to mean little more than that the decision or outcome was not in accordance with the evidence, as he saw it, but it is still a stinging phrase to use about a manager.

18. That sort of language appears to us so out of the ordinary and so consistently expressed, that it can only be the consequence of his long and severe depressive illness. Mental health problems vary hugely in their symptoms and extent, and we do not pretend to have any medical expertise to bring to bear, but this sort of phrase appears most pronounced on his part at times of stress and conflict, when his anxiety is most apparent, and so we see no reason to doubt that it is a consequence. He referred in the course of his evidence to having autism too, but we have seen no diagnosis to that effect in any of the extensive medical reports and see no reason to change our view on the basis of that remark. Similarly, we conclude that his very different perception of events and of the motivations of others is also a feature of his disabilities.

19. Returning to the narrative, and the events of 2017, in August he submitted his claim form to this Tribunal, unhappy with the way his grievance was being handled. As the appeal against his grievance approached, his mental health suffered a sharp decline. He met his line manager, Kelly Galton, at Hastings on 27 November. According to her letter (p.674) he told her that staying at Burgess Hill would significantly harm his well-being, that his "current banishment" was driving him rapidly to a crisis point and it might only be "days until disaster". Further, a permanent posting to Hastings "would destroy him". In view of this he was suspended on medical grounds. (In fact, he welcomed his move to Hastings

only shortly afterwards, but he was clearly very anxious about the future at that point.)

20. Being placed on medical suspension appears to have been a huge relief to him. It was only the next day that he withdrew his Tribunal claim. Over the next few weeks, arrangements were made for a permanent move to Hastings, and the appointment of a new line manager. Then on 20 December he was seen by a Dr Khan in Occupational Health (p.685). Her letter of that date noted that he seemed to be cautiously optimistic about starting afresh with the new contract at Hastings and set out a number of recommendations for his new manager there. These included close communication and regular reviews on a weekly basis to ensure he was coping; the conclusion of the outstanding grievance; a stress risk assessment be carried out to understand any vulnerabilities together with a support plan in place; and ongoing counselling and support. She also noted that he was likely to need more sickness absence than his colleagues should he have similar incidents such as any difficult interaction with a colleague, and so his sickness absence threshold should be increased. It would also be helpful to have a psychiatric report to give an understanding of the depth of his medical issues and the likely impact on future sickness absence. That report resulted in an increase in his absence threshold from the usual 15 days to 20. However, no psychiatric report was commissioned.

21. That is therefore the background to events in 2018. At the beginning of that year, having welcomed his change of location, he was assigned to new line manager, Nicola McLaren. It is clear that she set about the challenge very willingly, and conducted a stress risk assessment (p.692) with him on 5 January 2018, at the very outset of their working relationship. The measures identified included a phased return to work; ensuring that he was on the same or similar pattern as other driving examiners so that he was not isolated; encouraging him to talk openly about his stress and anxiety at the workplace; allowing some extra time to develop knowledge of the test routes around Hastings; and a development day on 8 January. That was a good start. It shows a clear acceptance of the occupational health report and the fact that he would need more support than colleagues. He described to us his progress in those next few months as rapid and substantial; in fact he told us that it amazed him. In March that year the stress risk assessment was updated and reviewed, and Ms McLaren noted that she was really pleased with his progress.

22. The first cloud on the horizon occurred on 30 April, when he went off sick following an accident at home in which he fell over and broke his nose. He went to see his GP and was signed off for a week, but he was so worried about taking time off work that he returned early. He emailed Ms McLaren early on 4 May, saying that he would return to work that day “in order to avert a final written warning and possibly dismissal”. She agreed to this and gave him admin tasks to complete because his wrist was also injured. At their return to work meeting

she noted that he had had a total of 43 days' absence in the previous 12 months, although by returning early he was doing what he could to minimise his absence and that was greatly appreciated.

23. The next incident occurred on 1 August 2018. It concerned a survey carried out on driving examiners to see how much variation there was between their pass and fail rates and other statistics. The information was collected on an Information Gathering Form (IGF) and Ms McLaren filled out the summary (p.713). She noted that "the figures show that Alan is pretty much in line with the rest of the office," then later, "On the whole I have no major concerns about Alan…"

24. This might be thought to be damning with faint praise, but he thought it even worse. He responded by email headed "Greetings from 30,000 feet" in which he said that he was livid. His pass rate was within 1% of the average, and in some aspects as little as 0.1%. He also pointed out that he had only just begun a long recovery, was still being heavily medicated and was driving on new routes. In response, she agreed to amend the comments and this time stated (p.721) "The figures produced on the IGF's highlight that Alan is performing well within the office. He is within more than an acceptable variance pass and fails within the office as well as serious and dangerous thoughts. Well done Alan, keep up the good work." Then later, "Overall as previously mentioned Alan is performing well and I have no concerns."

25. Asked at this hearing why she changed the wording so readily she said that it was a reasonable adjustment, a supportive measure, and that it was to appease him. But the more positive comments appear to us to have been fully justified and it is not clear why that approach was not adopted in the first place. We can only conclude that her patience is wearing thin. It seems that the positive atmosphere in January had largely dissipated.

26. His mental health was also badly affected by this exchange. He was having more trouble sleeping, partly as a result of bladder problems as well as his anxiety. On 8 August he lost concentration on his way to work and reacted late for a roundabout. It was a near-miss. He telephoned Ms McLaren to let her know that he was worried about being so tired and they had an exchange of emails (p.723). She thought he should go back to occupational health for a face-to-face assessment and asked him about reasonable adjustments. He responded,

> "My concern at the moment is the next two days… Places to stop are minimal. I'll buy plenty of Red Bull this evening and be sure to have a couple of large cans before I set out each day."

27. That did not prove a wise approach. After work on 9 August, after only two more days of work, he had intense abdominal pains and had to go to A&E, which he left at 3.30 am. They told him that it was down to an overdose of caffeine. The root of the problem, once again, was his determination to avoid taking any time off work and so put his job at risk.

28. He went back to work on reduced hours from 20 August and saw Dr Thornton in the occupational health department on 28 August. His or her report (p.730) stated clearly that she or he did not think it appropriate that he was driving or undertaking driving tests at present. His fatigue could present a risk to him and to the examinee. It also noted that DVLA had been informed and would make their own assessment of his fitness to drive.

29. Following that report, Mr Leslie was signed off sick by his GP to 1 October, although that was subsequently brought forward to 7 September 2018, a considerable change. Again, it is concerning that he was pressing to come back sooner than he ought.

30. Nevertheless his concerns about the consequences of his absence were not misplaced. The day before he returned, on 6 September 2018, Ms McLaren emailed him (p.746) to say that he could do admin for the next three weeks, and by then he needed to have provided a letter from his GP. The letter had to confirm that the GP had seen the occupational health report and was still happy that he was fit to drive. Otherwise, it went on, they may have to look to redeploying him into another civil service department, i.e. ending his role as a driving examiner.

31. That threat and short notice came as a considerable shock to Mr Leslie, particularly given his vulnerability at the time. The tone is also rather official and shows no concern as to how he might react to the possible end of his job. That is surprising given his reaction to setbacks at work. The letter from his GP was however provided and he was able to make a return to his driving duties.

32. He was next seen by occupational health on 17 October 2018. The report by Dr Murphy (p.792) confirmed that he or she supported the previous advice from Dr Thornton that Mr Leslie was not fit to be undertaking driving duties. He had been referred for a further assessment for sleep apnoea and that was due to take place at the end of November. He was therefore back at work driving against occupational health advice. Given that the likely reaction of management to this news was the removal of his driving duties, and the possible ending of his role, Mr Leslie refused to release it to management. He said repeatedly to us that he was terrified to do so.

33. There was then a quarterly appraisal review in October 2018 (known as a PMR) when he was given a downgraded assessment of his performance as "developing". At the previous quarterly review in July Ms McLaren had assessed him as "achieving". Her summary of the conversation (p.1383) provides:

> Alan and I discussed the objective set out above and have agreed that he has met the core objectives of the role as a driving examiner. However, Allan's behaviours this quarter have been less than desirable. He has sent an excessive number of emails to me on a weekly basis in comparison to his colleagues. Often the emails have an underlying tone of sarcasm and this could be seen as bullying and harassment. As Alan's line manager I spend more time dealing with Alan and his

> concerns than any other member of staff and Alan needs to have an awareness on how this makes the rest of the team feel. Alan did apologise to me with regards to the contents of the emails. But going forwards Alan needs to realise that his reactions have a greater impact on others. In August I issued Alan and the rest of the team with IGF reports, Alan expressed that he found these offensive and reacted to the feedback given in a negative way. Alan also finds it difficult to let go of an incident that happened over a year ago. This is at the heart of a lot of the issues. To enable Alan to become the best examiner he can be, he needs to let go of the incident that happened and look to the future."

34. Clearly this shows some frustration on her part. We have not seen all of the emails he sent her, but certainly the one regarding the IGF was quite hostile. No doubt from her point of view this was an excessive reaction to a minor point. We sympathise with that view but equally, his excessive reaction appears to have been a feature of his anxiety and depression, and so quite predictably he reacted even more strongly to this new and downgraded assessment.

35. The only way under the agency's policies to challenge such an assessment is to raise grievance, which he duly did on 3 December. Ms McLarens own views on the matter are set out in an email about a week later (p.877):

> "I have done nothing but support Alan and I now feel that he is using all he can to make me feel like I have failed as a manager.
>
> Alan says that he blames me solely for his stress and anxiety and this is a heavy and harsh statement to make. Especially when I have worked hard to assist him, spend time with him and help him overcome the incident last year. I now feel that because Alan has not been awarded his own way about the quarterly review and his latest bout of absence, he is indirectly bullying me. I believe that Allah knew those comments would upset me and provoke a reaction"

36. Clearly the working relationship had by now broken down. Given the strained relations at that time it is no surprise that on 13 December Mr Leslie saw his GP and was signed off work again, this time until 6 January 2019.

37. On receipt of this medical certificate a further occupational health referral was made. That led to another report, this time by Dr Obi (p.810) on 28 December 2018. He confirmed that Mr Leslie was not medically fit for work pending the outcome of his sleep study, and recommended that management undertake a further stress risk assessment and agree an action plan with Mr Leslie to support him on return to work. Some further, more detailed guidance was provided about how to go about that assessment; it was suggested that someone from HR should conduct it rather than his line manager, perhaps with a trade union representative also present.

38. On 7 January, when the sick-note expired, Mr Leslie was able to return to work. By then he had accumulated 27 days of absence over the past 12 months, taking him again past the trigger point of 20 days. This time he was invited to an absence review meeting on 17 January, by what appears to be a formal template

letter, to consider whether he should be given a written improvement warning.

39. Ms McClaren was concerned about him being back at work at all. On 8 January she emailed HR (p.823) forwarding the occupational health report and mentioned that he had told her that he was "only just" fit for work. Given his previous absences for fatigue she was worried that she might have another lapse of concentration. The final point in that email said this:

> "Alan was due to have his PMR in December, when he was off sick. On his last quarter review I assessed him as a developing grade, which has led to him submitting a grievance against me. I would have continued with a developing or possibly given a supporting [i.e. a lower grade] due to the behaviours demonstrated. However I am concerned that he cannot be managed under performance management system as he does not agree with it. Therefore should I conduct the PMR or not and based on the fact I don't feel he is fit to be managed under such his system should I allow him to be in work"

40. It is not clear what advice she received from HR, if any, but Ms McLaren spoke to him that day about the distinction between short and long-term absences, explaining that if he remained off sick for one long continuous period then he was unlikely to be dismissed until about the nine month stage. That was a considerable relief to him given his anxiety about taking time off work, and the following day, 9 January 2019 he was signed off again until 6 February. That meant that he was not at work for his absence review meeting but his absence was then treated as one continuous period from 13 December and no warning was imposed.

41. The day after that, on 10 January, Ms McLaren had a meeting with some of the HR team to discuss his situation. It was an unofficial meeting and the only remaining notes are some handwritten jottings from Ms McLaren herself. Mr Leslie describes it as "the secret meeting which decided his fate". It is difficult to know with any confidence what was discussed, or even who was there. One of the jottings states "Can we take this to a decision meeting?" It mentions the medical opinion that he was not fit for work and one entry states "What in your mind would be a solution/resolution." And there is mention of the grievance.

42. There gives some indication that the collective view of management was to bring things to a conclusion, i.e. dismissal, before too much longer. That is also consistent with the view expressed in the email from Ms Mclaren to HR that he was essentially unmanageable under the normal processes.

43. Mr Leslie then completed, on the agency's template, a Wellbeing Action Plan (p.859) It is not in our view a plan in anything but name. It is more a cry for help. In response to the first question on the form – "What helps you stay mentally well at work?" – Mr Leslie wrote:

> "Being treated as a sentient and relevant human being. If I raise something as a concern, please don't just dismiss it and me as irrelevant. Talk with me and address my concern. Ask if the outcome is helpful. If I insist I am right on a

> subject, by all means invite me to prove it, but do not expect me to breach integrity and yield to authority, on the basis of my pay grade. Honour in conduct and personal integrity, are in my core. They are not for sale!"

44. These sentiments continued throughout the form and he ended by stating that telling him to put what happened behind him and move on expressed total ignorance of his daily ordeal and was grossly offensive to him. No clear measures were set out in that document to support him, and it was clearly prepared entirely by him without any input from Ms McLaren or HR.

45. Shortly afterwards, on 23 January 2019, Ms McLaren referred the question of Mr Leslie's continued employment to her manager, Mr Mark Aston. By then, Charles Perkins had rejected his grievance against his appraisal score. He did so on the basis of papers given to him by Mr Leslie and of others sent to him by Ms McLaren. Those papers from her were not shared with Mr Leslie, nor were the contents summarised in an investigation report for him to consider. Mr Perkins felt that that might pour fuel on the fire.

46. On 6 February Mr Leslie's sick note came to an end, and he took the view that he wanted to return. But he was not allowed back, pending a futher occupational health report, and his absence continued to be counted in considering his overall time off.

47. On 20 March DVLA wrote to Mr Leslie to say that he was allowed to continue driving, no doubt having contacted his GP, and on 26 March a further stress risk assessment was prepared between Mr Leslie and Ms McLaren (p.1029). The previous version had been reviewed periodically throughout 2018 but this was a fresh attempt. Mr Leslie, in his comments, highlighted high levels of concern over personal harassment; repeated that he had been "banished to Hastings"; stated that his relations to his managers had become strained to breaking point, and that in the first quarter of 2018 he had had full support from his line manager but that this had been withdrawn; and said that this was why resolution of the issues in 2016/2017 was essential. Clearly he was taking this opportunity to hark back over previous events. Ms McLaren's comments in response were neutral in tone. She avoided any confrontational language, went over the support that had been given, and suggested that Mr Leslie's new manager schedule is in regular one-to-one meetings with him, have development days, continue to support his absence with suitable treatment. (From the beginning of 2019 she was no longer his day-to-day line manager, but had agreed to continue to manage his absence for the sake of continuity.)

48. Pausing there, it does strike us as odd that she was the one carrying out this stress risk assessment, given the breakdown in their working relations and the advice from occupational health that it should be someone from HR.

49. She says in her witness statement that it is clear from this document that his No. 1 priority was the resolution of the 2016/17 issues. In fact we can see only one mention of that. On a fair reading, his priority was to get appropriate support

and improved relations.

50. The final occupational health report, and the most significant, was again carried out by Dr Obi, this time on 27 March 2019 (p.1052) He confirmed unequivocally that Mr Leslie was fit to work, stating:

> "It is my opinion that Mr Leslie is now medically fit to return to work in his capacity as a driving examiner. I would recommend the following adjustments if management is able to accommodate them."

51. Summarising them, the first was a phased return to work. Another was that he continue to engage with his GP to manage his background medical conditions. The main section stated,

> "Management is strongly advised to consider concluding the stress risk assessment as soon as possible and have a mutually agreed action plan with a view to addressing his perceived unresolved work-related stresses. I would recommend that this should be in place just before commencement of the above phased return to work plan and recommendations."

52. In response to a number of specific questions raised in the referral letter, Dr Obi also confirmed that Mr Leslie *was* fit to be managed under the sickness absent procedure and stated, at paragraph 12:

> "Providing that management has a mutually agreed action plan addressing his perceived work-related stressors, I do not foresee Mr Leslie being prone to further sickness absences due to psychological symptoms."

53. In the final paragraph he adds:

> "In my opinion, ill health retirement is not applicable because Mr Leslie's underlying medical conditions are currently treatable and in the majority are stable and controlled."

54. Mr Aston, who was by this stage managing the process, received that report on 2 April 2019 and forwarded it to HR. His covering email (p.869) asked, "What do you think of sections 7, 8 and 12?", i.e. the questions confirming that she was fit to manage under the normal procedure and that with a mutually agreed action plan further sickness absences were not foreseen. That suggests that this was not what he expected to hear.

55. In response to this report, Mr Leslie was invited to a meeting with Mr Aston on 10 April. It was said to be an informal meeting although he was accompanied by his trade union representative. The focus of that meeting ought to have been on conducting the stress risk assessment and well-being action plan recommended by Dr Obi, but instead Mr Aston appears to have been diverted by the comments in the existing Wellbeing Action Plan written by Mr Leslie himself. Mr Aston's witness statement highlights the remark at the end of that plan, that telling him to put what happened behind him expressed total ignorance of his daily ordeal. Mr Aston's view was that Mr Leslie would need to agree to move on before discussing such an action plan.

56. The meeting lasted for about four hours. The only notes we have on are those prepared by Mr Leslie himself, and they are quite brief. According to Mr Aston's account, Mr Leslie arrived with a suitcase full of documents, suggesting that he had come prepared to argue over the history of his difficulties but he also accepted that those documents were not explored to any extent.

57. According to those notes:

    a. Mr Leslie insisted that there has been corruption, and Mr Aston remonstrated with him - "unless [we] resolve the way you want it's not resolved";

    b. HR refused to accept any wrongdoing by the management and refused to accept that the decision was corrupt;

    c. Mr Leslie was repeatedly pressed to know what the future would be like for him if "the situation" was resolved – "what are the issues that need to be resolved"

    d. Ms Meraz (HR Business Partner) insisted that the grievance was dealt with.

58. Drawing those threads together it does not appear that any real attention was paid to what exactly were his current workplace stresses, and what steps managers need to take to address them. The stumbling block was the events in 2016 / 2017 but it is far from clear that Mr Leslie was the one pressing that issue. The agency's case is that he was essentially refusing to return to work unless they were re-opened, but that is not borne out by these notes. While Mr Leslie may have earnestly wanted that to happen, it does not follow that he would not return to work.

59. The next day Mr Leslie emailed Ms Meraz and stated that he had reflected deeply on the conversation and how they had circled back to his key issues, "avoided details and repeated the disagreements, with me seeking to show you, that my assertions are true, supported by the details of evidence." He suggested instead that she or Mr Aston "prove to him, using evidence, not mere bias opinion, or denial, that my assertions are just as managers claim they are?" She replied that this would be going over old ground and opening complaints that we considered to be closed, adding that "our past experience is that you are rarely satisfied with the outcomes of management investigation, and our attempts to explain events lead to further complaints or debates over issues, which is not productive to moving forwards."

60. He replied maintaining his view, saying that going into such detail and doing things right was vital for him. However, he ended:

> "I am confirmed as fit for work and wish to return. I am content to pursue acknowledgement of failures, whilst at work. Once achieved, I can begin to recover from the adjustment disorder."

61. In our view, it is clear from this that he *was* willing to return to work. We note too that there was no real discussion of medical issues at all, no mention of Dr Obi's report, of a phased return to work or of what support he might need on return. No one seems to have said at any stage, "Alright Alan, can we just park that and talk about your health? What would we need to do to help you get back to work?". Mr Aston accepted in his evidence to us that Mr Leslie wanted to return to work and if he was invited back the following Monday he would have turned up.

62. After that meeting some formal guidance was sought from HR, which is set out in a considered written report (p.1136). After relating the background facts it set out the HR advice and options. The first of these was dismissal for "medical inefficiency" as it is known. The four requisites for this were:

    a. that Mr Leslie was unable to return to his role within a reasonable timescale;

    b. that there were no further reasonable adjustments which could be considered;

    c. the business could no longer sustain his absence; and

    d. there were no suitable alternative positions available.

63. That is a helpful summary of the legal position, but on our view of the case it is clear that this approach fell at the first hurdle - Mr Leslie was fit to return to work.

64. The next option was alternative employment. The advice did not enter into any details about this but noted that Mr Leslie would have to agree to such a move.

65. The third option was to continue to sustain the absence, and the advice was based on the premise that an attempt had been made by management to address his concerns without success "and as a result he remains on sick leave."

66. The final option was headed "return to work" and simply stated, "If an agreed way forward as recommended by OH can be achieved you may consider facilitating a return to work in line with the recommendations."

67. Mr Aston then invited Mr Leslie to a final meeting, to take place on 1 May 2019. The invitation letter (p.1026) was in standard form and simply invited him to a meeting to discuss his sickness absence, warning him that he might be dismissed. It contained no reference to the previous meeting, or acknowledged the fact that he was viewed by occupational health as fit to return to work.

68. Although this was a formal meeting, and an important one, it seems that few notes were taken. Mr Leslie was accompanied again by his union representative and Mr Aston by Mr Leslie's new line manager, Mr Cave. It does not appear that there was a notetaker present. The notes taken were brief, then substantially amended by Mr Leslie, although none of his changes was challenged. This amended version is at p.1183.

69. These notes appear to indicate Mr Leslie was being steered down a certain path

from the outset. The meeting opened with Mr Aston saying:

> "After our last meeting we tried to address the occupational health report finding. All agreed no further forward so the question has to be asked, are you able to return to work, can you put the events and issues behind you?

70. Pausing there, that appears to be conflating the issues of returning to work and putting previous events behind him. He replied,

> "I can live without resolution, as I have said to Claire, medically I remain highly vulnerable without resolution."

71. That indicates to us again that he was expressing a preference, perhaps a strong preference, for those issues to be re-opened and re-examined, but he could live without it i.e. he was prepared to return to work without that happening. He repeated that a little later, and although there are references to him wanting to talk about the past rather than the future, he was also saying that the perceived issues within the workplace need to be resolved, which we take to be the ongoing concerns, including his recent concern about the grievance and his appraisal.

72. Much weight was placed at this hearing on his statement in that hearing that it would take six months for him after resolution to recover, but again there is no ultimatum on his part or an express refusal to return to work.

73. At the end of that meeting Mr Aston asked whether there were any other adjustments that could be made, specifically whether he had applied for the Civil Service Incapacity Benefit Scheme i.e. ill-health retirement. That was something ruled out in the occupational health report. Once again there was no mention of Doctor Obi's report or the need for an agreed wellness action plan.

74. Is it difficult to understand why so much weight was placed by the agency on these ambiguous remarks by Mr Leslie, given the clear medical advice that he was fit to return to work. The option of return to work, one of those raised in the HR advice, was not discussed at all.

75. The outcome of the meeting was of course his dismissal, by letter dated 9 May 2019 (p.1164). Mr Aston stated that he was satisfied that his line manager had been through with him a wellness action plan and a stress risk assessment, adding that they had met on 10 April 2019 for a four-hour meeting and all had agreed they had not made any progress. But as already noted there was no management involvement in the wellness action plan, and the stress risk assessment process appears to have exhausted its usefulness. The occupational health advice to put this in the hands of someone from HR and perhaps seek more specialist medical advice had not been followed.

76. One consequence of the dismissal on these grounds was that Mr Leslie became eligible to payments from the Civil Service Compensation Scheme. That requires the dismissing officer to set the relevant level of compensation, between 0% and 100%, depending on the degree of cooperation displayed by the employer in managing his absence. Mr Aston set this at 50% reflecting the relevant guidance

(at p.250) that he had, for example, cooperated with *most* measures to improve his attendance, kept in touch with the department for some of his absence, shown a fair amount of commitment and desire to return to work etc. This was subsequently upgraded on appeal by the Civil Service Appeal Board to 100%, indicating that he had cooperated fully. Their decision (p.1251) noted that although DVSA were taking into account his continuing mental health issues in connection with his absence, it was not clear how far they did so in their award. The relevant guidance, they stated, "very clearly recognises the impact mental health issues can have on individuals ability to make rational decisions about the future of their improvement. It concluded:

> "The board … took the view that Mr Leslie's mental health issues had a major influence on his perceived attitude and instructs DVSA to increase his award to 100%.

77. This was not until the following October. By then his appeal against dismissal had also been rejected by Mr Rowland Williams. He was the manager who had dealt so robustly with the 2016 grievance. It is not necessary to say a great deal about the appeal stage. The decision letter (p.1222) gave a characteristically robust assessment of the situation. Although the appeal was meant to be a re-hearing of the decision, he did not enter into any discussion of the occupational health report either, or discuss the possibility of a return to work. His focus was also on Mr Leslie's perceived intransigence, and so he dismissed the appeal.

78. Having gone through the main events in question we turn to consider the eight specific allegations of discrimination in the list of issues at paragraph 12. It is not clear why some of these issues were highlighted in preference to other concerns we have noted, but we will deal with them in term. At this stage we are just deciding whether the act occurred, not the reason behind it:

    a. The alleged failure to implement the recommendations of the occupational health report in August 2018 (mistakenly referred to as the October report, which was not disclosed) recommending a stress risk assessment and other steps:

        This report dealt with his fatigue and sleepiness and makes no mention of a stress risk assessment, so this allegation appears to be misconceived. In any event, at that stage the original 2018 stress risk assessment was being regularly reviewed, and relations with Ms McLaren were strained but functional.

    b. The allegation that the respondent made repeated occupational health referrals to challenge his fit to work and delay his return to work.

        That does not appear to be a fair criticism either. Although there were numerous referrals to occupational health, there were numerous absences and health concerns which were justified on each occasion.

    c. The alleged failure to implement the recommendations of the December

occupational health report including a suitable and sufficient stress risk assessment and mutually agreed wellness action plan.

Here, the allegation is more appropriate. That report recommended that this stress risk assessment be carried out by HR and with more specialist input, neither of which was done. By then the main workplace stressor was the grievance against Ms McLaren's decision to downgrade his performance, and it seems to us inappropriate for her to have carried on dealing with his stress risk assessment. That was therefore in our view unfavourable treatment.

d. The refusal to allow him to return to work after the confirmation by his GP on 6 February 2019 that he was fit to return.

   Given that Mr Leslie wanted to return to work and was not signed off as sick, and that his absence total continued to mount, this too was unfavourable treatment.

e. Failing to provide him with a copy of the investigation report.

   This is not upheld on the simple basis that there was no such report.

f. Failing to implement the recommendations of the March occupational health report.

   As with (d) above, this was clearly unfavourable treatment. The main failure here was refusing to let him back to work.

g. His dismissal, which is agreed.

h. The refusal of his appeal against dismissal, which is also agreed

Conclusions

79. Applying these findings and conclusions to the legal tests, we will start with the complaint of unfair dismissal. This important right is set out in s.94 Employment Rights Act 1996 (ERA), and by s.98, the employer has first to show a fair reason for the dismissal. In this case the reason relied on is capability, alternatively "some other substantial reason".

80. If that is shown, then by s.98(4)

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

81. This is of course a large public employer with access to an expert HR department and so a very high standard of fairness is to be expected.

82. In case of ill health absence the usual question, underlined by the Employment Appeal Tribunal in **BS v Dundee City Council** [2014]. IRLR 131 (at para 27) is whether the employer can be expected to wait any longer. However, for the reasons already given, we are satisfied that Mr Leslie was ready and willing to return to work, and so Mr Leslie was not "incapable" of doing his duties. Capability has not therefore been shown.

83. The alternative of "some other substantial reason" depends on the agency's view that Mr Leslie was insisting on having the 2016/17 grievance re-opened, alternatively that there was no point in him returning, as it would only result in further absences or disputes.

84. We have given careful thought to how this impasse arose. The skeleton argument from Mr Kirk set out the numerous occasions when there was some mention of events in 2016/2017 by Mr Leslie, some of which we have already mentioned. It was certainly something which he was keen to pursue at the meeting on 10 April 2019 but as we have already stated, that is not necessarily the same as insisting on it as a precondition of return to work. We note too that he raised these concerns with occupational health in December 2018, and then shortly afterwards with Ms McLaren. They also featured heavily at his dismissal meeting and appeal, with his insistence that previous decisions had been corrupt. However, there was no consideration of a "some other substantial reason" option in the HR advice, nor was the risk of further disputes or absences addressed by Dr Obi. We are not satisfied therefore that this was the reason for dismissal either, or that it was reasonable of the agency to treat it as a sufficient reason.

85. The only conclusion in those circumstances is that the dismissal was unfair. That conclusion does not deend on any failure of procedure on the part of the agency: instead the whole approach and reasoning justifying the dismissal were misguided, with its excessive focus on this issue of putting the past behind him, and allowing that to derail the discussion. There is therefore no scope for a reduction in the compensation awarded under the principle established in **Polkey v AE Dayton Services Ltd** [1987] UKHL 8 which concerns procedural unfairness.

86. Nor is there any scope for a reduction on grounds of contributory fault, very much for the reasons given by the Civil Service Appeal Board in their 100% assessment. It remains to be considered how long Mr Leslie would have remained in the agency's employment given his disabilities, and assuming that no unfairness or discrimination had been applied, but that is not a deduction to be made at this stage of the process.

87. Finally, we were not asked to make any adjustment to compensation on the basis of a failure to comply with the ACAS code of practice and can see no basis to do so.

Discrimination arising from disability

88. The test under section 15 Equality Act is as follows:

> (1) A person (A) discriminates against a disabled person (B) if—
>
> (a) A treats B unfavourably because of something arising in consequence of B's disability, and
>
> (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

89. Here the unfavourable treatment has been identified from the list of issues, and includes his dismissal. But was that because of something arising from his disabilities? There is relevant guidance for Tribunals on this question and related areas from the Equality and Human Rights Commission Code of Practice, which it may be convenient to set out first:

> Example:
>
> A woman is disciplined for losing her temper at work. However, this behaviour was out of character and is a result of severe pain caused by cancer, of which her employer is aware. The disciplinary action is unfavourable treatment. This treatment is because of something which arises in consequence of the worker's disability, namely her loss of temper. There is a connection between the 'something' (that is, the loss of temper) that led to the treatment and her disability. It will be discrimination arising from disability if the employer cannot objectively justify the decision to discipline the worker. …

90. Summarising our existing findings, the effects of his condition appear to be:

a. the use of dramatic or emotive language;

b. an altered perception of the seriousness of events;

c. an altered perception of the motives of others;

d. a marked difficulty in accepting criticism or adverse events.

91. The focus by the agency on his moving on from previous events, and their concern that he will not let them go and will continue to argue and absorb management time, perhaps causing further absences, appear to amount to a decision to dismiss squarely as a result of these effects.

92. It is often difficult to know what motive lies behind a particular step. Paragraph 136 of the Equality Act deals with the burden of proof in discrimination cases, which is often the main dispute. But in **Martin v Devonshire Solicitors** [2011] ICR 352 Mr Justice Underhill stated at paragraph 32:

> "It is important not to make too much of the role of the burden of proof provisions. They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other."

93. That applies here with some force. It remains open to the agency to justify such unfavourable treatment, but little was said on this aspect in the respondent's

skeleton argument. Reliance was placed on remarks in **O'Brien v Bolton St Catherine's Academy** [2017] IRLR 547 to the effect that the standard of fairness was little differnce to unfair dismissal, but we have found against the agency on that complaint too. There may be a legitimate aim to, for example, avoid stress to managers or excessive use of management time (though that was not alleged) but again, the occupational health advice was that he was fit to return, and that he would then have a satisfactor level of attendance.

Direct discrimination on grounds of disability

94. The test under section 13 Equality Act is as follows:

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

95. The question here is whether the agency, in: dismissing him etc, treated him *less* favourably than it treated or would have treated someone else in the same circumstances apart from his disability. That involves a comparison with someone in the same circumstances, i.e. someone with the same sickness record, and the same difficult behaviours, but which did not amount to a disability. Such a comparison is a difficult exercise in itself, but we see no basis to conclude that such an individual would have fared any better. Hence, we are not satisfied that this complaint is made out; it is rare in practice and has essentially been replaced by the section 15 complaint above.

Harassment on grounds of disability

96. The test under section 26 Equality Act is as follows:

> (1) A person (A) harasses another (B) if—
>
> (a) A engages in unwanted conduct related to a relevant protected characteristic, and
>
> (b) the conduct has the purpose or effect of—
>
> (i) violating B's dignity, or
>
> (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

97. Of the acts held to have occurred above, none seem to us to meet this definition. The dismissal and appeal cannot create a hostile etc. working environment, since they brought the employment to an end. We have found that the dismissal was closely related to the effects of Mr Leslie's disabilities, but it does not follow that the earlier events, including the failure to implement occupational health, was in any way motivated by his disability. Nor is there any other obvious connection. We see them as shortcomings in handing a difficult absence, with a disabled employee, but in no sense were these deliberate failings, because of the disabilities, and so they did not have the purpose of violating his dignity etc. Such failures may have that *effect*, but we do not accept that the were done for a

reason related to disability. It is not enough that there were shortcomings and that Mr Leslie had a disabilty.

Indirect discrimination on grounds of disability / Failure to make reasonable adjustments

98. These last two complaints both involve a "provision, criterion or practice" or PCP. All of the PCPs proposed mention acts done to Mr Leslie, or rely on a failure to apply their own policy.

99. The Court of Appeal made clear in **Griffiths v Secretary of State for Work and Pensions** 2017 ICR 160, CA that the provision, criterion or practice should be quite general. In that case Elias LJ held that the appropriate formulation was that the

> "employee had to maintain a certain level of attendance at work in order not to be subject to the risk of disciplinary sanctions. That was the provision, breach of which might end in warnings and ultimately dismissal. It was clear that a disabled employee whose disability increased the likelihood of absence from work on ill health grounds, was disadvantaged in more than a minor or trivial way."

100. Framed in that way, the complaint is perfectly intelligble. It might equally be argued that the sickness absence procedure itself is the PCP, and the agency ought to have departed from it and been more flexible. There has to be some general application of this sort, or "group disadvantage". A failure by the agency to follow its own policy is only a PCP if this is what it normally does, so that having drawn up and trained its staff on those policies, it then fails to apply them in most cases. If that could be shown, a reasonable adjustment might indeed be that they make an exception for Mr Leslie and apply their own policy, but there was simply no evidence of any such general failure.

101. Similarly the PCPs which depend on acts done to Mr Leslie do not take matters any further. Again, there is no group disadvantage.

102. There was a final issue concerning time limits. The dismissal was in time but as found at the preliminary hearing, events prior to 7 March 2019 may not be. Of these the only acts were (c) and (d) – the failure to implement the December report and not allowing him back to work in February. In view of our findings that the dismissal was the key act of discrimination this is of little practical effect, but we are satisfied that these are features of a continuing act, i.e. the handling of his sickness absence. That was being dealt with by Ms McLaren then Mr Aston, but each was liaising with Occupational Health and HR as part of a continuum, and in no way separable.

103. For all of the above reasons, the complaints of unfair dismissal and discrimination arising from disability upheld.

104. Directions were given for a one-day remedy hearing by video, on a date to be confirmed. Further:

a. The claimant is to file and serve an updated Schedule of Loss by **14 December 2021**, together with any further documents relating to his efforts to mitigate his loss;

b. The respondent is to file and serve a Counter Schedule of Loss by **14 January 2022**;

c. The claimant is to file and serve a witness statement by **28 January 2022**, limited to 3000 words;

d. The respondent is to prepare a bundle of documents for that hearing, limited to 100 pages plus this judgment and the witness statement, by **11 February 2022.**

Employment Judge Fowell

Date 10 November 2021