EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Mr I Bugden	AND	The Royal Mail Group Limited

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD BY VIDEO (CVP) **ON** 11 to 14 October 2021

EMPLOYMENT JUDGE GRAY **MEMBERS – parties consented JSA**

Representation

For the Claimant: **In person**
For the Respondent: **Mr S Harte (Solicitor)**

JUDGMENT

The judgment of the tribunal is that:

- **The complaint of harassment related to disability is dismissed on withdrawal.**

- **The complaints of unfair dismissal, discrimination arising from disability and for breach of the duty to make reasonable adjustments, all fail and are dismissed.**

JUDGMENT having been delivered orally on the 14 October 2021, with written Judgment then sent to the parties on the 27 October 2021 and written reasons having been requested by email from the Claimant's recently instructed representative dated 10 November 2021, in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. In this case the Claimant Mr Bugden, who was dismissed by reason of unsatisfactory attendance, claims that he has been unfairly dismissed, and that he was discriminated against because of a protected characteristic, namely disability.

2. The claim for discrimination relates to arising from disability, because of the Respondent's failure to make reasonable adjustments and harassment related to disability.

3. The Respondent contends that the reason for the dismissal was some other substantial reason, that the dismissal was fair, and that there was no discrimination.

4. The Respondent accepted that:

    a. The Claimant is a disabled person by reason of anxiety and depression, visual migraines musculoskeletal disorders, and bladder issues; and

    b. That it had the requisite knowledge thereof.

5. The Respondent denied that the Claimant is disabled by virtue of any of the following conditions, or that it had the requisite knowledge thereof:

    a. Gallbladder/liver issues

    b. Narrowing of the urethra or diverticula disease

    c. Lung issues

    d. Heart/chest problems

6. By Judgment at a hearing on 13 July 2021, Employment Judge A Richardson determined in respect of the question of disability that:

a. The impairments of diverticular disease, raised liver enzymes, lung issues and heart problems did not amount to disabilities within S6 Equality Act 2010 at the material time.

b. The impairment of bladder issues includes narrowing of the urethra.

c. The impairment of gallstones is no longer relied upon by the Claimant.

7. Prior to this there had been a case management hearing before Employment Judge Goraj on the 1 October 2020 that initially set out the issues to be determined in this claim and the timetable for this final hearing (see pages 32 to 47 of the agreed bundle).

8. The parties subsequently confirmed their consent to this hearing taking place by video (CVP) and also by a Judge sitting without members.

9. For reference at this hearing I was presented with:

a. An agreed PDF bundle of 341 pages (with separate index)

b. A chronology and cast list

c. The Claimant's witness statement

d. Witness Statements from four Respondent witnesses:

i. Mrs J Povey ("JP")
ii. Mr T Wilkinson ("TW")
iii. Mr S Grout ("SG")
iv. Mrs C Tebbutt ("CT")

e. Respondents submissions (which are now out of date relevant to the issues, so it was requested these be set aside and not read by me).

10. At the start of this hearing on day one the process, timetable and issues were agreed. It was agreed that the Claimant could request breaks when ever he needed them. Throughout the hearing the Claimant was offered and took breaks when required and at the conclusion of the evidence and submissions agreed that he had no concerns as to fairness.

11. During that initial process preliminary points of clarification were made by the Respondent's representative:

a. That paragraph 14 of the amended Grounds of Resistance should include the word “not”, as the Claimant was not dismissed in 2014 (see page 21 of the bundle). The Claimant agreed this.

b. That the reference in the witness statement of JP to page 63 at paragraph 22 of her statement should be to page 163.

c. With reference to page 122 of bundle, the Respondent’s representative has crossed referenced what is recorded there against the Claimant’s attendance record (commencing at page 94) and confirmed that he cannot reconcile the numbers. He gets back pain – 5 absences – 14 days, and migraine - 4 absences – 4 days.

d. With reference to page 333 of the bundle he calculates the overall figure as being 294 days not 297 (and asserts that the 3 days would appear to be down to an addition error) and that 2018 should refer to 95 days not 50 and 2019 should be 64 days not 111 (and asserts that this discrepancy is due to one absence overlapping 2018/19).

12. It was agreed that I would determine the liability issues first (so jurisdictional and substantive as set in the agreed issues recorded below), before then moving to the remedy issues, if appropriate, as envisaged by the agreed timetable.

13. The hearing was then adjourned for reading (as provided for in the agreed timetable) and resumed at 2pm to hear the evidence starting with the Claimant.

14. Evidence and submissions concluded at just before 11:20am on day three and the hearing was then adjourned to 2pm on day four for deliberation and then delivery of an oral judgment on the question of liability.

15. The agreed issues are documented at pages 48 to 54 of the hearing bundle. For the purposes of this judgment the issues that needed to be determined were as updated as follows, taking into account the following matters:

a. That the question of disability has been determined by the Judgment from the hearing on the 13 July 2021.

b. In respect of the time limit jurisdictional issues, it was noted at the start of the hearing of the evidence that the claim form was presented on 7 February 2020. The Claimant’s ACAS Early Conciliation Certificate records that the Claimant’s EC notification was received by ACAS on 28 November 2019 and that the EC Certificate was issued by ACAS on 8 January 2020. This means that complaints on or after the 29 August 2019 are potentially in time. This would mean

that the complaints about harassment (on the 17 August 2018) and about the Attendance Review 1 on 4 August 2018 and Attendance Review 2 on 3 October 2018 are potentially out of time. The Claimant's witness statement was silent on the just and equitable question. It was agreed that he could confirm his position on this by supplemental oral evidence.

c. It being confirmed that the Claimant was dismissed.

d. It being confirmed that the reason for dismissal was not in dispute, being unsatisfactory attendance (see amended ET3 Grounds of Resistance – paragraph 31 at page 26 of the bundle).

e. The withdrawal of the complaint of harassment related to disability by the Claimant during day two, after the conclusion of his cross examination of the person complained about, TW. The Claimant confirmed that he did not want to accuse TW of harassment anymore, so it was agreed that my Judgment would record that the complaint of harassment related to disability is dismissed on withdrawal.

The issues

Jurisdictional Issues

Time Limits

1. Given the date the claim form was presented and the dates of early conciliation, any complaint about an act or omission which took place prior to 8 November 2019 (allowing for any extension under the early conciliation provisions) is potentially out of time, so that the Tribunal may not have jurisdiction.

2. Were the discrimination complaints made within the time limit in section 123 Equality Act 2010?

   The Tribunal will decide: -

   2.1 was the claim made to the Tribunal within three months (plus early conciliation extension) of the act or omission to which the complaint relates?

   2.2 If not, was there conduct extending over a period?

   2.3 If so, was the claim made to the Tribunal within three months (plus early conciliation) of the end of that period?

2.4 If not, were the claims made within a further period that the Tribunal thinks just and equitable? The Tribunal will decide: -

2.4.1 why were the complaints not made to the Tribunal in time?

2.4.2 In any event, is it just and equitable in all the circumstances to extend time?

Substantive Issues

Unfair Dismissal

1. Was the Claimant dismissed? **[*this is not in dispute*]**

2. What was the reason for dismissal?

   The Respondent asserts that the reason for the Claimant's dismissal was 'some other substantial reason' pursuant to s.98(1)(b) Employment Rights Act 1996.

3. Did the Respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the Claimant?

4. Was the decision to dismiss a fair sanction, that is, was it within the range of reasonable responses open to a reasonable employer when faced with these facts?

5. Did the Respondent adopt a fair procedure?

   The Claimant challenges the fairness of the procedure in the following respects:

   The Claimant contends in particular that the Respondent acted unfairly in that (a) it issued the Attendance Review 1 (which lead to subsequent action against the Claimant) without awaiting diagnosis of the Claimant's medical conditions (including in particular the cardiac conditions) and (b) that the Respondent took into account disability related absences as referred to previously above.

6. If it did not use a fair procedure, would the Claimant have been fairly dismissed in any event and/or to what extent and when?

Disability Discrimination

Reasonable Adjustments (s.20/21 Equality Act 2010)

7. The PCP relied upon by the Claimant is the requirement to attend for work in accordance with the Respondent's Attendance Policy/attendance standards. The Respondent accepts that it applied such PCP to the Claimant.

8. Did the PCP put the Claimant at a substantial disadvantage compared to someone without the Claimant's disability?

   The Claimant contents that he was placed at such a substantial disadvantage as the Respondent took into account disability related absences when deciding to issue the Claimant with:

   8.1 An Attendance Review 1 on 4 August 2018;

   8.2 An Attendance Review 2 on 3 October 2018;

   8.3 Dismissing the Claimant on 10 December 2019.

   The Claimant contends that the following disability related absences should have been discounted to alleviate the above disadvantages:

   Attendance Review One:

   8.4 13 July 2017 (1 day) due to 'migraine';

   8.5 10 – 11 November 2017 (2 days) due to 'migraine';

   8.6 16 – 20 March 2018 (5 days) due to 'back pain';

   8.7 21 – 26 April 2018 (6 days) due to 'knee injury';

   8.8 1 – 2 June 2018 (2 days) due to 'gall bladder';

   8.9 4 – 5 July 2018 (2 days) due to 'migraine';

   8.10 10 July 2018 (1 day) due to 'gall bladder'; and

   8.11 1 - 3 August 2018 (3 days) due to 'anxiety.'

   Attendance Review Two:

   8.12 30 August – 20 September 2018 (22 days) due to 'gallstones';

   Consideration of Dismissal:

8.13 4 – 9 November 2018 (6 days) dye to 'chest pain';

8.14 15 November 2018 – 3 February 2019 (80 days) due to 'chest pain'

8.15 2 – 22 March 2019 (19) – 'abdominal pain' (relating to gallbladder surgery)

8.16 4 – 6 April 2019 (3 days) due to 'breathing abnormality';

8.17 14 – 16 July 2019 (3 days) due to 'back pain';

8.18 8 – 13 August 2019 (6 days) due to 'back pain'

9. Did the Respondent know, or could it reasonably have been expected to know, that the Claimant was likely to be placed at the disadvantage?

10. What steps (the 'adjustments') could have been taken to avoid the disadvantage?

    The Claimant says that the Respondent should have discounted the absences listed above at paragraphs 8.4-8.18.

    The Claimant says that, if these absences had been discounted, the Claimant would not have suffered the disadvantages at paragraphs 8.1-8.3 above, as he would not have exceeded the Respondent's Attendance Procedure in this regard.

11. Was it reasonable for the Respondent to have to take those steps and when?

    The Respondent avers that, as per its Attendance Policy, 'absences related to disability will normally be discounted' when deciding whether the Respondent's required standards of attendance have been met. However, in some circumstances, where it is justifiable to do so, the Respondent may count disability related absences in circumstances where the employee has been given advanced notification in writing.

    The Claimant was advanced notification in writing via a letter dated 29 August 2017 that 'any future absences relating to [his] back pain, mental health or migraines may be counted towards the formal attendance procedure.'

Discrimination arising from Disability (s.15 Equality Act 2010)

12. Did the Respondent treat the Claimant unfavourably by: -

    12.1 issuing the Attendance Review One on 4 August 2018;

    12.2 Issuing the Attendance Review Two on 3 October 2018;

    12.3 Dismissing the Claimant on 10 December 2019.

    The Respondent accepts that it subjected the Claimant to the above treatment.

13. Did the following things arise in consequence of the Claimant's disability?

    The Claimant's case is that the above treatment arose because of the Claimant's disability related absences (as outlined above at paragraph 11).

14. Was the unfavourable treatment because of any of those things?

    Attendance Review 1 – paragraph 12.1 above

    The Respondent accepts that the absences at paragraphs 8.4-8.7 and 8.9 and 8.11 arose in consequence of the Claimant's disability.

    However, the Respondent avers that, irrespective of its counting of the above disability related absences, the Claimant would have prompted this stage of the Respondent's Attendance Review process in any event based upon the absence at paragraphs 8.8, 8.10 and 8.12.

    Attendance Review 2 – paragraph 12.2 above

    The Respondent does not accept that the absence at paragraph 8.12 above arose in consequence of the Claimant's disability, therefore it is not accepted that the treatment at paragraph 12.2 above arose in consequence of it.

    In any event, it is again averred that, following from the position outlined above, the Claimant would have prompted this stage of the attendance review procedure on the basis of the absences at paragraphs 8.13-8.14 above.

Dismissal – paragraph 12.3 above

The Respondent accepts that the absences at 8.17 and 8.18 above arose in consequence of the Claimant's disability.

However, as stated previously, the Respondent avers that, following from the position outlined above, the Claimant would have prompted consideration of dismissal on the basis of the absences at paragraphs 8.15-8.16 above in any event.

As such, it is not accepted that the treatment at paragraph 12.3 above arose in consequence of the Claimant's disability.

15. Was the treatment a proportionate means of achieving a legitimate aim?

The Respondent says that: -

15.1 it aims were legitimate namely to secure a high standard of attendance in order to enable the Respondent to provide an efficient and reliable service;

15.2 its actions were proportionate in light of the Claimant's high level of absences and the adjustments which were made to support the Claimant/accommodate his absences.

16. The Tribunal will decide in particular: -

16.1 was the treatment an appropriate and reasonably necessary way to achieve those aims?

16.2 Could something less discriminatory have been done instead?

16.3 How should the needs of the Claimant and the Respondent be balanced.

17. Did the Respondent know or could it reasonably have been expected to know that the Claimant had the disputed disabilities? If so, from what date?

The Facts

16. I heard evidence from the Claimant.

17. For the Respondent I heard evidence from:

a. Mrs J Povey (“JP”)
b. Mr T Wilkinson (“TW”)
c. Mr S Grout (“SG”)
d. Mrs C Tebbutt (“CT”)

18. I found the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after considering and listening to the factual and legal submissions made by and on behalf of the respective parties.

19. This is a claim concerning a no-fault dismissal. The Claimant’s conduct and the genuineness of his sickness and his efforts to manage it are not challenged. The focus is the application of the Respondent’s attendance policy.

20. The Claimant was employed by the Respondent from the 15 August 1994 until his dismissal on the 10 December 2019.

21. His job title is stated by the Claimant as a Postal Worker which the Respondent describes as an Operational Postal Grade (‘OPG’), most recently based at the Dorset Mail Centre.

22. Documentary references confirming this are the ET1 (see page 5 of the bundle), ET 3 and GoR (see page 15 and 21 of the bundle) and the Claimant’s terms and conditions of employment which are at pages 86 to 93 of the bundle.

23. As well as the contractual terms of employment of the Claimant (included in the bundle) of importance in this claim are the Royal Mail Attendance Policy (pages 58 to 66) and the Royal Mail Attendance Agreement (pages 67 to 83).

24. The terms of the Royal Mail Attendance Policy are not in dispute and of note:

    a. The purpose of the Attendance Policy is stated to be … “This policy supports employees in achieving and maintaining a consistently good level of attendance. It applies to employees whose attendance is affected by ill health.” (page 59).

    b. Page 60 … “Absences arising from disability will normally be discounted when deciding whether the standards have been met. Such absences will still be discussed at the welcome back meeting. In some circumstances where it is justifiable to do so, the manager

may count the absence. Further details can be found in the Managing Absence and Disability Guide.".

c. Page 66:

"Attendance Standards … The formal process consists of two reviews and consideration of dismissal…"

There is then a table which sets out the attendance standards required for all Employees (except triallists), being:

Attendance Review 1 Prompt	4 absences or 14 days in a 12-month period
Attendance Review 2 Prompt	2 absences or 10 days in the next 6 months following an attendance review 1 formal notification
Consideration of dismissal prompt	2 absences or 10 days in the next 6 months following an attendance review 2 formal notification

"Employees on 2nd review who do better than the standard required with no more than 1 absence of 4 days or less will come off the formal attendance process.

Employees on 2nd review with 1 absence of more than 4 days but less than ten will revert to 1st review and will remain on Review 1 for six months.

Employees who are on attendance review 2 and do not meet the attendance standards may be considered for dismissal. If they are not dismissed they may be issued with a new attendance review 2."

25. Neither are the terms of the Royal Mail Attendance Agreement in dispute and of note:

a. It is a joint agreement issued by Unite, CWU and the Respondent.

b. The Attendance agreement aims to support employees in achieving and maintaining consistently good levels of attendance (see page 67).

c. It contains a managing absence and disability guide (page 76), which notes … "Any absence that is considered to be related to an employee's disability will still be reviewed but should normally be discounted as part of the formal attendance process.".

d. Further, if a manager is seeking to not discount such absence, then advice should be sought from HR and … "where it is justified to do so e.g. an employee's disability related absences reach an unacceptable level, the manager should advise them in writing that any future absences may be counted." (page 77).

e. It confirms that records … "relating to an employee's disability should be kept in the employee's file. Records should … Be accurate…". (page 77).

f. The need for accuracy of records is also noted in the section dealing with attendance review meetings and the need for accuracy of the record of such meetings (see page 78).

26. About employee absence the Claimant did accept in cross examination that:

a. The Respondent has a right to manage sickness absence of employees, set standards on attendance, warn employees if the standard is not met, and dismiss where there is a failure to improve. Also, entitled to have the sickness absence of disabled employees managed and if unacceptable stop discounting such absences.

b. Sickness absence can put pressure on other colleagues, lead to additional cost (such as sick pay, overtime and agency cover) and delay in service.

27. Pages 94 to 102 of the bundle provide copies of the Claimant's attendance record from 28 October 2004 to 18 February 2020 (the period after the date of dismissal appears to relate to the recording of annual leave).

28. The attendance record does record many sickness related absences for different sickness reasons.

29. Those in 2004/05 arise from a serious RTA the Claimant was unfortunately involved in.

30. JP summarises the position in paragraphs 7 and 8 of her witness statement:

> "7. I was aware that Ian suffered with a number of health issues, predominantly relating to his back condition, anxiety and migraines and issues with his gallbladder. Throughout my time as his manager, I tried really hard to support Ian in work with him and the local CWU representative (Paul Corbin) and to help him improve his attendance. For example, Ian's duty was originally in the tracked section in a confined area but Ian did not like being alone due to his anxiety so I moved him to work closer to others. Ian was also given light duties

> when he did not feel well and was permitted time away from the floor when needed. Ian was also allowed to wear headphones to help quieten his mind when suffering from anxiety.
>
> 8 Despite my assistance Ian had a poor absence record and he really struggled to maintain his attendance at work [pages 94-105]."

31. That Reasonable Adjustments were offered and put in place by the Respondent is not in dispute. In cross examination the Claimant accepted he had been offered OH assist and feeling first class as well as adjustments to duties e.g. rehab after absence due to gallbladder (see page 315 – minutes of appeal).

32. In her witness statement JP says, in accordance with the Attendance policy … "On 29 August 2017, Ian had been advised by the Early Shift Manager Adrian Rose that any future absences linked to his back pain, mental health or migraines may be counted towards the Attendance Policy [pages 121-122]." (paragraph 12).

33. The Claimant was asked about his attendance record in cross examination and agreed that in the 3 year period before the 29 August 2017 (which is the point of time for the notification letter) he had 16 periods of absence totalling 134 days, and he accepted, in looking at the record sheets, that it was an unacceptable level of attendance.

34. The absence was for different reasons, with it being accepted that 71 out of the 134 days related to the Claimant's disability.

35. The Claimant understood why the Respondent was concerned about it. He refers to it in his witness statement … "At the end of August 2017, I attended a short interview with Adrian Rose where I was informed that all absences concerning my long term medical conditions would now be counted, and issued with an envelope containing a 'line in the sand letter'."

36. The notification of counting letter is dated 29 August 2017 and there is a copy at pages 121 to 122 of the bundle. About this letter the Claimant confirmed in cross examination that he understood why it was issued. The letter notes that Reasonable Adjustments had been made to address specific concerns of the Claimant, and in cross examination he explained they arose from him being left working on a machine for too long which aggravated his back and to assist with mental health where he felt micro-managed.

37. With reference to page 122 the Claimant confirmed that he understood that before this decision was reversed there would need to be a clear improvement in his attendance.

38. JP and GS were asked to confirm what their positions would have been if, as asserted by the Respondent's representative about page 122, the number of absences should be Back - 5 absences = 14 days and migraine 4 absences = 4 days. JP confirmed that it would have made no difference to the AR 1 or AR 2. GS confirmed that it would have made no difference whatsoever to the decision to dismiss.

39. What followed though were further sickness absences and as the Claimant accepted, they were again for a variety of different reasons.

40. After the Notification letter and before the issuing to the Claimant the AR1 there are 10 periods of absence totalling 26 days (from 26 September 2017 to 1 August 2018). For ease of reference those absences for non-disability related reasons are highlighted in bold italics:

    1. 26 September 2017 to 28 September 2017 – 3 days – ***Flu like symptoms***.
    2. 10 – 11 November 2017 (2 days) due to 'migraine';
    3. 30 December 2017 – ***diarrhoea and vomiting***
    4. 16 – 20 March 2018 (5 days) due to 'back pain';
    5. 21 – 26 April 2018 (6 days) due to 'knee injury';
    6. 4 May 2018 – ***stomach upset***
    7. 1 – 2 June 2018 (2 days) due to '***gall bladder'***;
    8. 4 – 5 July 2018 (2 days) due to 'migraine';
    9. 10 July 2018 (1 day) due to '***gall bladder'***; and
    10. 1 - 3 August 2018 (3 days) due to 'anxiety.'

41. As JP explains in her witness statement at paragraphs 13 to 16, the Claimant's absences in the 12-month period had triggered three AR1s, but these were not issued, instead he was warned that further absences may be taken into account, but when a 4th AR1 was prompted action was taken:

> "13 Ian incurred a number of absences in the 12-month period prior to the AR1 being issued. This had led to him prompting an AR1 three times.

> 14 On each of these occasions he was not issued the AR1 but he was warned that further absences may be taken into account [pages 136-137, 144-145].
>
> 15 Ian prompted AR1 for the fourth time on 10 July 2018.
>
> 16 Ian attended an AR1 meeting with me and his union representative Paul Corbin on 27 July 2018 [pages 152-155]."

42. I have been referred to an OH report dated 6 August 2018 (pages 157 to 159 from OH Assist). This is also reference in paragraph 17 of JP's witness statement.

> … "Prior to making a decision Ian was also referred to OH Assist, and a report was produced on 6 August 2018 [pages 157-159]. The report suggested a reduction to Ian's working hours however Ian would not agree to this, despite encouragement from me and Paul."

43. At page 158 it recommends a reduction in hours. The Claimant accepts he was offered this, but it was not the right course for him finically at that time. The Claimant also accepted that it was suggested to him about applying to Rowlands fund (a charity to assist postal workers).

44. The AR1 is then issued on the 16 August 2018 (see page 160).

45. About this the Claimant confirmed that he did understand why he was issued with an AR1 on this date. The Claimant expressed how he did not know what else he could do though to reduce his sickness.

46. Next there is the absence of 22 days from the 30 August 2018 to the 20 September 2018 which is recorded in the Claimant's attendance record as being due to 'gallstones. This absence triggers the AR2.

47. What the correct recorded reason should be for this absence is in dispute.

48. Reference was made to the GP fit note at page 162 of the bundle dated 31 August 2018 which refers to the condition of Depression NOS and that the Claimant would be fit for amended duties with reference to anxiety and depression. The fit note is for a two-week period lasting until the 13 September 2018.

49. At page 163 there is then a record of a call between the Claimant and JP on the 5 September 2018 which records that the Claimant confirmed that his anxiety and depression had increased due to the stress of his gallbladder and his conversation with TW about the Claimant leaving the shop floor. The Claimant agreed with this record.

50. The note also records that the Claimant is reminded that if he does not resume work tomorrow (being the 6 September 2018) he will need to submit a fit note.

51. There is then a further fit note at page 164 dated 7 September 2018 that records the condition as Anxiety Disorder. The Claimant is signed unfit for work until the 20 September 2018.

52. The Claimant clarified in oral evidence that he had seen his GP to get the fit note at page 162, then as he was not feeling well enough to go back to work he returned to his GP and asked to be signed off for a longer period, hence the overlap with the fit note that followed at page 164. The Claimant confirmed that it was only the second fit note that he had submitted to the Respondent. This accorded with the oral evidence of JP where she confirmed the first fit note was not on the Claimant's file but the second was.

53. I was also referred to page 291 of the bundle which is the return to work record dated the 21 September 2018, signed by the Claimant and TW that records the reason for absence as "Abdominal Pain, Gall Stones". The Claimant confirmed it was his signature, but he could not recall completing the reason for absence. TW was asked about this in evidence and he confirmed that it was his handwriting, he had completed the reason. The employee details and reason for absence would be populated from the PSP system and often in advance of the meeting. TW confirmed that 100% it would have been completed before the Claimant signed it.

54. The AR2 meeting takes place on the 28 September 2018 and the Claimant is accompanied by his union representative (see notes at pages 168 to 170). The notes record the reason for the 22-day absence as "Gallstones Anxiety and depression" (page 169). In oral evidence JP confirmed that it was recorded in this way by her as a result of what she had been informed in her telephone conversation with the Claimant on the 5 September 2018.

55. The Claimant in cross examination confirmed that he understood why it was recorded this way. Although he asserted that he and his union representative had requested the record be changed there is no note of this in the AR 2 meeting notes and JP could not remember such a request when asked about it in cross examination.

56. Ultimately the Claimant's circumstances are assessed giving the benefit of the doubt on this absence as can be seen from paragraph 11.4 of CT's witness statement … "In relation to the point that the 22 day absence from 30 August for gall bladder issues was also related to anxiety/stress, I noted that the absence was initially due to gall bladder/abdominal pain (according to Ian's self-certificate) but then from 7 September was anxiety (according

to his GP fit notes). Either way, in light of Ian's notification letter from August 2017 it was reasonable to consider them both. [page 328]"

57. The AR 2 is issued on the 10 October 2018 (see page 171). About this the Claimant says it was not reasonable to be issued because he was still undergoing investigation into the medical issues, although it was accepted by him that such absences do not need to be discounted.

58. The Claimant raises a Grievance about the issuing of the AR2 (see page 175). That is unsuccessful and he then appeals which is also unsuccessful.

59. The Claimant accepted that the Respondent would not normally allow such a grievance process against ARs (it is asserted as not being part of the attendance policy) and the Claimant accepted being allowed to proceed in that way was being fair to him.

60. The appeal outcome about the grievance does confirm that before the notification of counting disability related absence was issued advice was taken from HR in accordance with the attendance policy (see page 249 paragraph 3.7).

61. JP in her witness statement at paragraphs 27 and 28 does address her considerations around disability related absences being counted in her assessment of the Claimant's attendance levels and her justification for her issuing the AR1 and AR2. This identifies such things as the Claimant's views and mitigation being considered, the cost of covering absence and managing operational issues and budgets, as well as the need to deliver the service, including the Respondent's universal service obligations. This is not disputed by the Claimant.

62. What follows the AR2 is then 6 periods of absence totalling 117 days the last being on the 8 August 2019. For ease of reference those absences for non-disability related reasons are highlighted in bold italics:

    1. 4 – 9 November 2018 (6 days) dye to '***chest pain'***;

    2. 15 November 2018 – 2 February 2019 (80 days) due to '***chest pain***'

    3. 2 – 20 March 2019 (19) – ***'abdominal pain' (relating to gallbladder surgery)***

    4. 4 – 6 April 2019 (3 days) due to '***breathing abnormality'***;

    5. 14 – 16 July 2019 (3 days) due to 'back pain';

6. 8 – 13 August 2019 (6 days) due to 'back pain'

63. About this the Claimant appreciated that it was an unacceptable level of absence and it was him following medical advice which he now regrets.

64. The Claimant accepted that his attendance didn't meet the standards of the attendance policy.

65. This triggers the consideration of dismissal process under the attendance policy.

66. Before any decision is made it is accepted that an OH report is obtained dated 15 August 2019 (pages 271 to 273). The Claimant accepted that from this OH report the Respondent had the full medical position before deciding to dismiss. Both SG and CT were asked about this report and they confirmed that they had considered its content before making the decision to dismiss/decide the appeal. As to the suggestion that the gall stone matter was resolved, SG confirmed that gall bladder is just one of many reasons for absence. CT confirmed that there still seemed to be other absences coming into play and that she looked at the whole of the Claimant's absence history and that he had an inability to maintain attendance for more than 3 to 4 weeks at a time.

67. There is then the dismissal process. The Claimant is accompanied by his CWU representative and after a hearing on the 4 September 2019, the Claimant is then sent a dismissal letter dated 17 September 2019 (pages 282 to 285) from SG. The Claimant is dismissed with 12 weeks' notice for the undisputed reason of unsatisfactory attendance.

68. The Claimant agreed in cross examination that he understood why SG concluded that his (the Claimant's) absence was unlikely to improve in the foreseeable future, because the Claimant believed that at the point all investigation had been finished on his various issues.

69. The Claimant is informed of his right of appeal and by letter dated 18 September 2019 (page 286) he appeals against his dismissal for the following reasons:

"

1. In my interview I raised the discrepancy between the two OHS reports I have untaken, with the first report clearly stating that in their opinion given my current illness of shortness of breath and heart problems I would be covered under the EA 2010, but this has not been taken into account with your rationale or documented all it states is "the remainder of your absences do not relate to these conditions but to others".
2. I also provided a copy at interview from Salisbury Hospital where I was admitted by ambulance and treated for 6 days for Heart problems but again this has not been mentioned or considered in the decision making.
3. You documented my absences for back pain and migraines did not occur until 3 and 5 years after my motorbike accident, but after my bike accident I was accommodated on the drivers hours in the keyroom which was not a manual intensive job but an office job, as my hips were out of alignment a result of my accident and I had no strain on my back until moving back into Processing. I also explained about my brain injury I suffered and this being the reason I suffer with migraines, again this didn't become a problem until 2005 when I was sent for a brain scan at Poole Hospital and this should clearly be stated in my record, so to state the credibility of this claim is rather lacking leads me to believe my record has not been looked at.
4. During my interview I did clearly state that now my Gall bladder has been removed and my Heart condition is being controlled by medicine I believed my attendance would improve but you state you were not convinced.

"

70. It is helpful to remind myself here on what basis the Claimant has been found to be a disabled person about which the Respondent had knowledge.

71. That is by reason of anxiety and depression, visual migraines musculoskeletal disorders, and bladder issues (which includes narrowing of the urethra).

72. The Judgment from the hearing on the 13 July 2021 confirmed that the impairments of diverticular disease, raised liver enzymes, lung issues and heart problems did not amount to disabilities within section 6 of the Equality Act 2010 at the material time and that the impairment of gallstones was no longer relied upon by the Claimant.

73. Appeal points 1, 2 and 4 therefore do not relate to conditions found to amount to disabilities at the material times to this claim under the Equality Act.

74. Ground 3 challenges the accuracy of his record, but as can be seen from pages 94 to 102 the first recorded absence from back pain is 21 September 2009 (page 101) and the first recorded absence from migraines is 12 January 2009 (page 102).

75. There is then an appeal hearing on the 11 October 2019 before CT which the Claimant attends with a representative from his union. It is conducted as a full re-hearing. CT accepted that the correct absence detail should be 294 days not 297 and that the spread in 2018/2019 was not correct (correcting what was set out in paragraph 12.5 of her witness statement).

76. CT describes her consideration of the Claimant's appeal in her witness evidence and the Claimant accepted in cross examination that he understood why CT had concluded that he would have difficulty meeting and maintaining attendance and why CT believed it did not meet the standard. He agreed he had felt he had a fair hearing with CT and was able to put forward everything he wanted.

77. By letter dated 26 October 2019 (page 320) the Claimant's appeal is rejected and CT confirms that:

> "
>
> In the light of all the evidence, my decision is that you have been treated fairly and reasonably and therefore I believe that the original decision of dismissal with notice is appropriate in this case.
>
> "

78. The letter includes an appeal hearing report (pages 321 to 334).

79. Of note is that CT does address what the Claimant's circumstances under the attendance policy would be if disability related absence were discounted and if only 7 days of the 22-day gallbladder absence from the 30 August 2018 are counted and it would still result in the issuing of AR1s, AR2s and consideration for dismissal, see page 332. This does accord with my own understanding of the absences as recorded in the Claimant's record at pages 94 to 102 as identified in my fact find above.

80. CT also provides evidence in her witness statement at paragraph 17 as to why she believes that it was justifiable to count the absences for migraine, back injury, knee injury and anxiety towards the Attendance Policy. This is not disputed by the Claimant.

81. In relation to the time limit jurisdictional matters the Claimant confirmed by way of supplemental oral evidence that:

    a. He relied on the advice of the union's legal advisers whom he had contact with from the 21 November 2019.

    b. The complaint against TW was initially put in as a contributing factor towards the level of anxiety he was suffering from at that time.

The Law

82. Having established the above facts, I now summarise the relevant law.

83. The reason for the dismissal was unsatisfactory attendance which is capable of amounting to some other substantial reason which is a potentially fair reason for dismissal under section 98(1)(b) of the Employment Rights Act 1996 ("the Act").

84. I have considered section 98 (4) of the Act which provides "…. 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".

85. The starting point should always be the words of section 98(4) themselves. In applying the section the tribunal must consider the reasonableness of the employer's conduct, not simply whether it considers the dismissal to be fair. In judging the reasonableness of the dismissal the tribunal must not substitute its own decision as to what was the right course to adopt for that of the employer. In many (though not all) cases there is a band of reasonable responses to a set of factual circumstances within which one employer might take one view, and another might quite reasonably take another. The function of the tribunal is to determine in the particular circumstances of each case whether the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair.

86. This is also a claim alleging discrimination because of the Claimant's disability under the provisions of the Equality Act 2010 ("the EqA"). The Claimant complains that the Respondent has contravened a provision of part 5 (work) of the EqA. The Claimant alleges discrimination arising from a disability and failure by the Respondent to comply with its duty to make adjustments.

87. The protected characteristic relied upon is disability, as set out in section 6 and schedule 1 of the EqA. The Claimant's disability has been determined by the Judgment from the hearing on the 13 July 2021.

88. As for the complaint for discrimination arising from disability, under section 15 (1) of the EqA a person (A) discriminates against a disabled person (B) if A treats B unfavourably because of something arising in consequence of

B's disability, and A cannot show that the treatment is a proportionate means of achieving a legitimate aim. Under section 15(2), this does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

89. The provisions relating to the duty to make reasonable adjustments are to be found in sections 20 and 21 of the EqA. The duty comprises of three requirements, of which the first is relevant in this case, namely that where a provision criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, there is a requirement to take such steps as it is reasonable to have to take to avoid that disadvantage. A failure to comply with this requirement is a failure to comply with a duty to make reasonable adjustments. A discriminates against a disabled person if A fails to comply with that duty in relation to that person. However, under paragraph 20(1)(b) of Schedule 8 of the EqA, provides that a person is not subject to the duty to make reasonable adjustments if they do not know, and could not reasonably be expected to know that the relevant person is disabled but also that his disability is likely to put him at a substantial disadvantage in comparison with non-disabled persons.

90. The provisions relating to the burden of proof are to be found in section 136 of the EqA, which provides in section 136(2) that if there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred. However, by virtue of section 136(3) this does not apply if A shows that A did not contravene the provision. A reference to the court includes a reference to an employment tribunal.

91. I was referred to the following case authorities:

    a. **Wilson v Post Office [2000] IRLR 834**

    b. **Kelly v Royal Mail Group Ltd UKEAT/0262/18/RN**

    c. **Foley v The Post Office [2000] IRLR 827**

    d. **Iceland Frozen Food v Jones**

    e. **Polkey v AE Dayton Services Ltd [1987] IRLR 503 (HL)**.

    f. **Sharkey v Lloyds Bank plc [2015] UKEAT/0005/15**.

    g. **Bray v London Borough of Camden UKEAT/1162/01**.

    h. **Jennings v Barts and The London NHS Trust UKEAT/0056/12**.

i. **Griffiths v Secretary of State for Work and Pensions [2015] EWCA Civ 1265**.

j. **Ruiz Conejero v Ferroser Servicios Auxiliares SA (C-270/16) EU:C:2018:17**.

k. **Smith v Churchill's Stairlifts plc [2006] IRLR 41**.

l. **Pnaiser v NHS England and another [2016] IRLR 170**.

m. **Hensman v Ministry of Defence UKEAT/0067/14**).

n. **Naeem v Secretary of State for Justice [2017] UKSC 27**.

92. I take these cases as guidance, and not in substitution for the provisions of the relevant statutes.

93. I note in particular the case of ***Kelly v Royal Mail Group Ltd EAT 0262/18*** Mr Justice Choudhury (President of the EAT) made the important point that attendance policies usually apply to all absences (save for those that may be discounted for disability-related conditions), and that ill-health absence does not imply fault on the part of the employee. Indeed, it is likely that most absences dealt with under absence procedure will entail little or no fault, since employees do not choose to get ill or to have accidents. Nevertheless, an employer is entitled to look at an employee's overall attendance in order to consider whether there is a likelihood of satisfactory attendance in the future. So far as general fairness is concerned, the question is not whether other employers in similar circumstances might have allowed additional time to see whether the employee's attendance improved before dismissing but whether what the employer did fell within the band of reasonable responses. In the circumstances of the particular case, the claimant — who had a poor attendance record since the start of his employment and had triggered the employer's attendance policy on a number of occasions — alleged that it was unfair to dismiss him following a latest period of absence in respect of which he was blameless. This was triggered by the need for a hospital stay to undergo corrective surgery for carpal tunnel syndrome in both of his hands. An employment tribunal dismissed his claim for unfair dismissal and that decision was upheld on appeal. Choudhury P rejected the claimant's contention that the tribunal's decision was perverse: the employer had been entitled to take into account the entire record of absenteeism. In any event, this was not a case in which an employee was being dismissed merely for surgery-related absences but one where the claimant himself had accepted that he had a poor attendance record going back to the beginning of his employment.

94. Time Limits

95. Section 120 of the EqA confers jurisdiction on claims to employment tribunals, and section 123(1) of the EqA provides that the proceedings on a complaint within section 120 may not be brought after the end of – (a) the period of three months starting with the date of the act to which the complaint relates, or (b) such other period as the employment tribunal thinks just and equitable. Under section 123(3)(a) of the EqA conduct extending over a period is to be treated as done at the end of that period.

96. From the 6 May 2014 a prospective claimant must obtain an early conciliation certificate from ACAS, or have a valid exemption, before issuing employment tribunal proceedings. The Claimant obtained a valid ACAS certificate for these proceedings.

97. I have considered the principles from the cases of ***British Coal v Keeble [1997] IRLR 336 EAT***; ***Robertson v Bexley Community Service [2003] IRLR 434 CA***; and ***London Borough of Southwark v Afolabi [2003] IRLR 220 CA***.

98. I note the factors from section 33 of the Limitation Act 1980 which are referred to in the ***Keeble*** decision:

    a. The length of and the reasons for the delay.
    b. The extent to which the cogency of the evidence is likely to be affected by the delay.
    c. The extent to which the parties co-operated with any request for information.
    d. The promptness with which the claimant acted once he knew the facts giving rise to the cause of action.
    e. The steps taken by the claimant to obtain appropriate professional advice.

99. I note that the Court of Appeal in the ***Afolabi*** decision confirmed that, while the checklist in section 33 of the Limitation Act provides a useful guide for tribunals, it need not be adhered to slavishly. The checklist in section 33 should not be elevated into a legal requirement but should be used as a guide. The Court suggested that there are two factors which are almost always relevant when considering the exercise of any discretion whether to extend time and they are: the length of, and reasons for, the delay; and whether the delay has prejudiced the respondent (for example, by preventing or inhibiting it from investigating the claim while matters were fresh).

100. It is also clear from the comments of Auld LJ in ***Robertson*** that there is no presumption that a tribunal should exercise its discretion to extend

time, and the onus is on the Claimant in this regard … "It is also important to note that time limits are exercised strictly in employment and industrial cases. When tribunals consider their discretion to consider a claim out of time on just and equitable grounds 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 discretion is the exception rather than the rule".

The Decision

101. The undisputed reason for the dismissal of the Claimant in this case is unsatisfactory attendance. It is clear from the case authorities I have been referred to that this amounts to some other substantial reason. I find therefore that there is a fair reason for the Claimant's dismissal being SOSR.

102. As to the fairness, the Claimant's challenge is that the Respondent acted unfairly in that (a) it issued the first Attendance Review (which lead to subsequent action against the Claimant) without awaiting diagnosis of the Claimant's medical conditions (including in particular the cardiac conditions) and (b) that the Respondent took into account disability related absences.

103. This overlaps with the complaints of disability discrimination, being a failure to make reasonable adjustments and for discrimination arising from disability.

104. About the complaint for failure to make reasonable adjustments the PCP relied upon by the Claimant, which the Respondent accepts was applied to the Claimant is ***the requirement to attend for work in accordance with the Respondent's Attendance Policy/attendance standards***.

105. In oral closing submissions the Respondent accepted that this PCP would put the Claimant at a substantial disadvantage compared to someone without the Claimant's disability, in that the Claimant was more likely to have absences than a non-disabled person.

106. The Respondent asserts two lines of defence against this though, firstly that the reasonable adjustment of discounting disability related absence would not have prevented what happened to the Claimant because his non disability related absences qualified him for the issuing of ARs and then dismissal in accordance with the attendance policy.

107. Alternatively, that such an adjustment is not a reasonable adjustment.

108. It is the Respondent's case that it is acting in line with its attendance policy. The purpose of a reasonable adjustment is to return an employee to work. By keeping on discounting disability related absences when the levels are unacceptable, would not help employees to return to work. The Respondent relies on ***Bray v London Borough of Camden UKEAT/1162/01***, where the EAT stated:

"*The logical consequences of the argument that an employer should exclude from consideration the entire part of an employee's sickness absence related to disability would be that an employee could be absent throughout the working year without the employer being in a position to take any action in relation to that absence. In our view, the tribunal was correct, as a matter of good sense, to take the point that if any such absences were to fall outside the sickness policy it would generate enormous ill-feeling and be a potential for unauthorised absenteeism*."

109. Also, that the EAT in that case had regard that the Respondent as a local authority employer, would have been hampered in its ability to perform its statutory functions if the proposed adjustments to the sickness policy were required. The Respondent submits it too has statutory functions with the provision of its universal service.

110. Based on the facts I have found the first argument succeeds in that the discounting of disability related absence would not have prevented what happened to the Claimant because his non disability related absences qualified him for the issuing of ARs and then dismissal in accordance with the attendance policy. Even if I am wrong on this, I do accept based on the case authorities that I have been presented and considering the facts in this matter objectively, that discounting disability related absences in this case would not be a reasonable adjustment to make.

111. About the complaint of discrimination arising from disability the Respondent accepts that it subjected the Claimant to the treatment at paragraph 12.1 – 12.3 of the list of issues (page 52) (relating to the AR1, AR2 and dismissal).

112. The Respondent accepts that the absences at paragraphs 8.4 to 8.7, 8.9 and 8.11 of the list of issues arose in consequence of Claimant's disability. However, irrespective of whether disability related absences were counted or not, the Claimant would have prompted the AR1, AR2 and Consideration for Dismissal for reasons set out in the list of issues at paragraph 14. As such, it is not accepted that there was unfavourable treatment arising from disability. This does accord with my findings of fact, and I therefore find that reason for what happened to the Claimant did not arise in consequence of his disability.

113. Even if I am wrong on this, I do accept based on the case authorities that I have been presented and considering the facts in this matter objectively, that even if there were unfavourable treatment arising from the Claimant's disability, that the Respondent was objectively justified in issuing the ARs and dismissing the Claimant.

114. The Respondent says that: -

a. it aims were legitimate namely to secure a high standard of attendance in order to enable the Respondent to provide an efficient and reliable service;

b. its actions were proportionate in light of the Claimant's high level of absences and the adjustments which were made to support the Claimant/accommodate his absences.

115. The Respondent had in place a policy to reduce absenteeism agreed with the Unions, to reduce the negative impacts on its service and costs and provide an efficient and reliable service. A tribunal with err if it fails to consider the business considerations of the employer (see ***Hensman v Ministry of Defence***) albeit the tribunal must make its own assessment on the basis of the evidence then before it. I accept the Respondent's aims were legitimate.

116. As to proportionality, the attendance policy provided for an agreed process of management of absence which was understood by the Claimant, agreed by Unions and also allowed for it being reasonable to stop discounting disability related absences if the Respondent could justify it. The Claimant was given reasonable adjustments in respect of his disability and a large proportion of the absences he was managed for were non disability related. I accept the justification evidence of JP and CT about this.

117. Accordingly, therefore I dismiss the Claimant's complaints of failure to make reasonable adjustments and for discrimination arising from disability. With this finding there is no need for me to consider the time limit jurisdictional issues.

118. Revisiting then the fairness of the dismissal, I find that this was reasonable in all the circumstances for some other substantial reason and that there were no procedural failings. The Claimant accepted that SG had all the relevant medical evidence at the time of dismissal. In view of the requirements of the attendance policy as agreed with the Unions, the decision to dismiss the Claimant falls within the band or range of reasonable responses.

119. Therefore, I also dismiss the Claimant's complaint of unfair dismissal.

120. As said at the start of this Judgment this is not a fault dismissal, it is for some other substantial reason, the Claimant's conduct or capability is not the reason. The Claimant indicated in evidence that he wished he did not follow medical advice and also indicated in his closing submissions that he considers no longer following medical advice. I would urge against this. Also, I would encourage the Claimant to continue to reach out to organisations such as Mind which he has done since his dismissal and revisit what the Rowlands Trust can do for him. It is good to hear that he is now seeking to develop a better understanding of his health circumstances and how to manage them.

121. For the purposes of Rule 62(5) of the Employment Tribunals Rules of Procedure 2013, the issues which the tribunal determined are at paragraph 15; the findings of fact made in relation to those issues are at paragraphs 19 to 81; a concise identification of the relevant law is at paragraphs 83 to 100; how that law has been applied to those findings in order to decide the issues is at paragraphs 101 to 120.

Employment Judge Gray
Dated: 15 November 2021

Judgment sent to parties: 8 December 2021

FOR THE TRIBUNAL OFFICE