EMPLOYMENT TRIBUNALS

Claimant: **Ernest Parnaby**

Respondents: **Leicester City Council**

Record of an Attended Hearing heard at the Employment Tribunal

Heard at: **Leicester** **On: 15, 16, 17 & 18 November 2021 and In chambers on 19 November 2021**

Before: **Employment Judge M Butler**

Members: **Miss R Wills**
Mr K Rose

Representation
Claimant: **Mr R Kohanzad, Counsel**
Respondent: **Mr P Linstead, Counsel**

RESERVED JUDGMENT

The unanimous Judgment of the Tribunal is that: -

1. The claim of unfair dismissal is not well founded and is dismissed;

2. The claim of failure to make reasonable adjustments contrary to Section 20 of the Equality Act 2010 (EqA) is not well founded and is dismissed;

3. The claim of discrimination arising from disability under Section 15 EqA is not well founded and is dismissed;

4. The claim of indirect disability discrimination under Section 19 EqA is dismissed on withdrawal by the Claimant.

RESERVED REASONS

The Claims

1. By a claim form submitted to the Tribunal on 11 December 2017, the Claimant brought claims of unfair dismissal, failure to make reasonable adjustments and discrimination arising out of disability. He also claimed indirect discrimination, but that claim was withdrawn at the hearing and we need not consider it further. The Claimant was employed by the Respondent as a Caretaker from 21 July 2010 until his dismissal on 18 July 2017 on the grounds of long-term sickness absence. His disability was stated to be work related stress. The Respondent defended the claims on the grounds that, after an absence of some 7 months without any prospect of the Claimant's return to work in the foreseeable future, his dismissal was fair and did not concede that he was disabled.

2. At a Preliminary Hearing on 9 August 2018, Employment Judge Ahmed found that the Claimant was not disabled. This Judgment was appealed and the Employment Appeal Tribunal (Her Honour Judge Eady QC) at a hearing on 19 July 2019 found there had been an error of law and the issue of disability was remitted to a differently constituted Tribunal. It then came before Employment Judge Clark on 29 September 2020 who found that the Claimant was disabled at the material time by reason of work-related stress. The material time was held to be June and July 2017 which was the period immediately before the Claimant's dismissal.

Preliminary Issues

3. There were applications by both sides in relation to the issues to be decided by the Tribunal. The parties had attempted to agree a list of issues and the Claimant sought to rely on matters which the Respondent maintained could not be relied on because they had not been pleaded in the claim form.

4. We heard submissions from both Counsel and retired to consider the applications. The Employment Judge then gave brief oral reasons for the Tribunal's decision on the applications. In relation to the Claimant's reliance on dismissal being a discriminatory act, we found that the particulars of claim annexed to the claim form should be read as a whole and it was clearly the case that, by virtue of the opening scenario set out in those particulars, it was alleged that the dismissal was discriminatory. Accordingly, we found that no application to amend the claim was necessary.

5. In relation to the other matters the Claimant sought to rely on, we found he could not rely on these matters as the failure to attend meetings as being something arising from his disability had not previously been pleaded and so an amendment would be required; the speed of his work and changes to work given by the Respondent's management could not be relied on because they

related to a period when the Claimant was not disabled.

The Issues

6. Following our decision in relation to the above matters, the list of issues was then agreed between the parties. This appears in the appendix to this Judgment and is not repeated here.

The Law

7. Section 98 of the Employment Rights Act 1996 (ERA) provides: -

> *"(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—*
>
> *(a) the reason (or, if more than one, the principal reason) for the dismissal, and*
>
> *(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.*
>
> *(2) A reason falls within this subsection if it—*
>
> *(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,*
>
> *(b) relates to the conduct of the employee*
>
> *(c) ……..*
>
> *(d) …….*
>
> *(3) In subsection (2)(a)—*
>
> *(a) "capability", in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and*
>
> *(b)…….*
>
> *(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—*
>
> *(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and*
>
> *(b) shall be determined in accordance with equity and the substantial merits of the case.*

8. Section 15 EqA provides: -

> *"1) A person (A) discriminates against a disabled person (B) if—*
>
> *(a) A treats B unfavourably because of something arising in consequence of B's disability, and*
>
> *(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.*
>
> *2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability".*

9. Section 20 EqA provides: -

"(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.

(2) The duty comprises the following three requirements.

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

(4) ….

(5) ….

(6) ….

(7) ….

(8) ….

(9) ….

(10) …."

10. Section 21 EqA provides: -

"(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.

(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.

(3) A provision of an applicable Schedule which imposes a duty to comply with the first, second or third requirement applies only for the purpose of establishing whether A has contravened this Act by virtue of subsection (2); a failure to comply is, accordingly, not actionable by virtue of another provision of this Act or otherwise".

11. We were referred to the following cases: -

RBS v Ashton [2011] ICR632

Romec v Rudham [2007] All ER (D)206

Leeds Teaching Hospital NHS Trust v Foster UKEAT/0552/10

Doran v Department of Work and Pensions UKEAT/001714

Sheikholeslami v University of Edinburgh [2018] IRLR

A Limited v Z [2020] ICR199

City of York Council v Grosset [2018] ICR1492

Donelien v Liberata UK Ltd [2014] UKEAT/0297/14

Pnaiser v NHS England [2016] UKEAT/0137/15/LA

Herry v Dudley Metropolitan Council [2016] UKEAT/0100/16

J v DLA Piper UK LLP [2010] UKEAT/0263/09

Hardy and Hansons v Lax (CA) [2005] ICR156

Cadman v Health and Safety Executive (CA) [2005] ICR1546

Buchanan v Commissioner of Police of Metropolis [2016] IRLR918

O'Brien v Bolton St Catherines Academy [2017] IRLR547

BS v Dundee City Council [2014] IRLR131

Chacon Navas (Social Policy) [2006] EUECJ C-13/05

Wilcox v Birmingham CAB [2011] EqLR810

The Evidence

12. We heard oral evidence from the Claimant and from Mr James Burkama, the Claimant's Line Manager, and Mrs Jagruti Barai, a Human Resources Advisor of the Respondent. All witnesses produced witness statements which they confirmed were true to their best of knowledge and belief and were cross-examined.

13. There was an agreed bundle of documents of 659 pages and a few supplementary documents were added during the course of the hearing. References to page numbers in this judgment are to page numbers in the bundle.

The Factual Background

14. In relation to the Claimant's evidence, we noted that both Employment Judge Ahmed at paragraphs 13 and 14 of his Judgment and Employment Judge Clark at paragraph 6.5 of his Judgment considered that the Claimant's evidence before them was not only wholly reliable, was inconsistent and at sharp variance with his GP notes, had a tendency to exaggerate the effects of his condition and he was not always a particularly consistent or persuasive witness. We listened to his evidence over the course of the whole of the second day of the hearing and entirely endorse those comments.

15. We found his evidence to be unreliable in relation to a number of the issues in this case.

16. By way of example, we refer to the following parts of his evidence:

    16.1. The Claimant gave totally confusing evidence about the stress action plan sent to him by the Respondent. He said at paragraphs 4 and 5 of his witness statement that the Respondent sent the stress action plan to

him and he completed it. In his oral evidence he said for the first time that he did not receive this referring to the one sent by the Respondent on 25 January 2017 (page 282). He then said he was possibly confusing this with a stress action plan sent to him in 2016 after his previous sickness absence through work related stress and said, after Mr Burkama chased the completed stress action plan (page 276), he sent a text, which is in the bundle, saying he did not receive it. There is no such text message in the bundle and when Mr Burkama chased him again (page 286) he said in evidence "Why would I reply if I hadn't received it?".

16.2. The Claimant sought to excuse his lack of engagement with Mr Burkama in relation to his absence from January to July 2017 by saying it was due to a change in his medication, namely Citalopram. He said he was on a daily dose of 20mg which was reduced in around April 2017 to 15mg and, shortly afterwards, increased to 30mg. His GP notes are comprehensive and show only that he was on a consistent dose of 20mg until around April 2018 when it was increased to 30mg. His explanation for this inconsistency was simply not credible. He said he could not be responsible for what Doctors put in his notes. We found it not credible that his GP would have incorrectly recorded the dosage of an antidepressant.

16.3. The Claimant also said that he was unable to attend a meeting to discuss his continued employment on 17 July 2017 at 9.00am (page 325). Fifteen minutes before that meeting was due to commence, the Claimant sent a text message to Mr Burkama saying he had an appointment with his GP at 9.15am for a blood test so would not be attending the meeting. His medical records show that he did not have a blood test that day. We noted that previous blood tests had been noted in his GP notes with a full breakdown of the results of the test.

16.4. The Claimant could not seem to make up his mind which of the letters sent to him by Mr Burkama inviting him to a meeting were received by him. Indeed, in his evidence, they seemed to be interchangeable which we considered to be a sign that he did receive them.

16.5. Whilst he sent text messages to Mr Burkama indicating he would not be attending various meetings because he was feeling "bad" or otherwise unwell and blamed this on his work related stress, in his oral evidence he said in relation to one meeting he would have attended had it not been for the death of his sister and in relation to another he simply asked for it to be rearranged because he was unavailable.

16.6. The Claimant's evidence that his previous Line Manager, Mr Guyan, was deliberately changing his password to the Respondent's computer system so he could not book his holidays online was lacking in credibility. There was no evidence before us that the Claimant was ever refused annual leave.

16.7. On one occasion the Claimant said he would not be attending a meeting because he was not feeling well, and he had taken legal advice. Despite this appearing to be a threat made to the Respondent he explained it as merely "a slip of the tongue" in his oral evidence. He said the relevant text message was dictated by him to his wife and it was meant to say that he would get legal advice. We found this evidence to be unreliable.

16.8. In relation to the meeting on 17 July 2017, the Claimant said he did not get the invitation from Mr Burkama (page 323) but assumed it said he could get dismissed. This is despite the fact that there is a fairly comprehensive account of the letter in his claim form.

17. Taking these matters into consideration, we found the Claimant's evidence to be unreliable.

18. In relation to the evidence of Mr Burkama and Mrs Barai, we found it to be honestly and consistently given. The thrust of Mr Kohanzad's cross-examination of Mr Burkama was that the language used on the many internal communications with Mrs Barai was euphemistic and really showed that the object of the correspondence was to bring about the dismissal of the Claimant. Whilst that is one interpretation that could be put on many of the emails from Mr Burkama, he was resolutely consistent in trying to resolve the issues with the Claimant with the intention of bringing about a return to work. He readily admitted he was frustrated by the Claimant's complete lack of engagement and that he found himself in unchartered territory having not had to deal with a matter like this before. This is why he asked for assistance from Mrs Barai in trying to resolve the issue with the Claimant who had become a problem employee. Indeed, in his submissions, Mr Kohanzad said Mr Burkama "was composed and answered difficult questions well".

19. Similarly, we found Mrs Barai's evidence to be honest and consistent. When she was asked whether it was she who brought up the possibility of redeployment of the Claimant at a meeting with him and his Union representative on 15 September 2016, she said she could not remember whether she had raised it or whether it was raised by the Claimant's Union representative. Her notes at page 183 refer to "deployment" being raised but not by whom. We found this to be an example of the honesty of her evidence especially since she had heard Mr Burkama say that redeployment was raised by the Claimant's Union representative in that meeting.

20. For the above reasons, we found the evidence of the Respondent's witnesses to be more reliable than that of the Claimant.

21. We find the following facts:

    21.1. The Claimant commenced employment with the Respondent on 21 June 2010 as a Caretaker. The Respondent is a large City Council employing approximately 16,000 people. There do not appear to have been any issues connected to the Claimant's employment until the early part of 2016 when there was a deterioration in the relationship between the Claimant and his work colleagues including his Line Manager, Paul Guyan, whose was Operations Manager.

    21.2. As well as work related stress, the Claimant suffered from a number of other conditions including high blood pressure and foot pain.

    21.3. On 15 April 2016 he went on sickness absence until 31 May 2016 for work related stress (page 385).

    21.4. The Claimant returned to work on 31 May 2016 and attended a return to work meeting at which it was agreed he would return on light duties and would not have to climb ladders, do painting or deal with electrical matters.

    21.5. Having been referred to Occupational Health, a report was produced dated 24 May 2016 (page 130). The report concluded that his work related stress was unlikely to be considered a disability because it had not lasted longer than 12 months and was unlikely to, did not have a significant impact on his ability to undertake his normal day to day activities and would not have a significant impact on those activities without the benefit of treatment. The report confirmed he would be fit to return to work on a phased return basis with reduced duties.

    21.6. The Claimant signed off his stress action plan on 13 July 2016 (page 143).

    21.7. Mr Burkama was appointed Workspace Manager and met with the Claimant together with Mr Guyan on 28 July 2016 where the Claimant's return to full duties was discussed and a timescale agreed (page 149).

21.8. Mr Burkama arranged weekly informal supervision meetings with the Claimant, the first of which was held on 4 August 2016 when Mr Burkama expressed some concern to the Claimant in relation to his lack of management of the jobs given to him and his failure to focus on priority jobs. In an email to Mrs Barai on 4 August 2016 (page 151), Mr Burkama noted these concerns and the fact that it was sometimes hard to account for the Claimant's time and his attitude was concerning (page 152). On 5 August 2016, Mr Burkama again emailed Mrs Barai indicating that it had been "impossible to find" the Claimant and therefore he could not ascertain whether he was working to schedule. He noted that this was having an impact on service. On the same day, Mr Burkama emailed Mr Guyan with a summary of his discussion with the Claimant which was also attended by Mr Guyan. This included the Claimant's refusal to paint a whole room (which he had done before) and that he was only prepared to undertake patch painting. The Claimant maintained it was not in his job description to paint whole rooms.

21.9. The weekly supervision meetings continued at which both Mr Burkama and the Claimant were able to discuss the Claimant's performance in relation to the tasks which had been allocated to him. On 29 August 2016 the Claimant emailed his Union representative, Mr Joyce, to say that he was being bullied by Mr Burkama. In that email (page171) the Claimant said that he was being pestered to paint whole rooms which we find was not the case.

21.10. As he remained concerned about the Claimant's performance, Mr Burkama referred him once more to Occupational Health and completed the referral at page 178. The subsequent Occupational Health Report from Doctor I Macheridis dated 23 September 2016 (page 204) included the following paragraph, "Mr Parnaby told me that he has no significant difficulties with performing normal day to day activities. He has been diagnosed with high blood pressure over the last 12 months however this is currently not causing any significant functional problems or symptoms. He is currently on one tablet for this problem. Mr Parnaby also acknowledges that about a year ago he developed some stress related symptoms following a dispute at work over his holidays, however, in his view this has now been resolved. He only took tablets for stress for about a week at the beginning and he did not receive further medical input. He reports no significant problems with his mental health or his psychological wellbeing at the moment and todays mental state examination was consistent with that as it was unremarkable".

Further, the report stated that: "Mr Parnaby feels able to perform all his duties including patch painting and all other duties as described in his job description".

The report also mentioned the Claimant's reference to new paint, which was using causing breathing difficulties, but we accept Mr Burkama's evidence that there had been no change in the manufacturer of the paint used by the Respondent.

21.11. Towards the end of September, the Claimant complained about Mr Joyce and was then represented by another Union representative, Mr Gary Garner. In an email to Nicola Graham (HR) dated 26 September 2016 (page 212), Mr Burkama discussed painting and also noted that the Claimant appeared to be trying to claim overtime pay for a call out which he had not attended.

21.12. On 29 September 2016 Mr Burkama emailed Miss Graham (page 223) setting out issues with the Claimant's performance. These included his failure to manages his job well, not taking responsibility for his role, not keeping up with a reasonable workload or accounting for his time, dishonestly trying to claim call out pay and refusing to paint whole rooms.

21.13. On 30 September 2016, Mr Burkama wrote to the Claimant regarding the report from Occupational Health with a view to discussing this and to discuss other issues raised by the Claimant and his Union (page 228). That meeting took place with Mr Garner of UNISON accompanying the Claimant and Miss Graham along with Mr Burkama. As noted above, the report said that the Claimant stated he had no significant difficulties with performing normal day to day activities, had been diagnosed with high blood pressure for which he was taking medication and had developed stress related symptoms following a dispute at work a year previously (page 204). The report also mentioned the issues with the "new" paint being used by the Respondent. The minutes of the meeting are at page 238. During the meeting, the Claimant said he had been covertly recording his meetings with Mr Burkama which he said showed Mr Burkama bullying him. He declined to play the recording when invited to do so by Mr Burkama and also alleged that Mr Burkama was "drinking mates" with his trade union representatives. Mr Burkama was concerned and frustrated by these remarks and suggested that the meeting should be terminated and that there was a really unpleasant breakdown in communications. Although pages 243, 244 and 245 show recordings sent by the Claimant to Mr Guyan, these were not produced in the hearing either as voice recordings or transcripts of those recordings from which we can conclude they did not show any bullying by Mr Burkama.

21.14. On 10 October 2016, Mr Burkama wrote to the Claimant confirming what work he would not be required to undertake which included painting at height, electrical work and painting full rooms (page 247).

21.15. During this period, Mr Burkama continued to have weekly supervision meetings with the Claimant. The Claimant was able to put his point of view on a variety of matters but principally in relation to tasks he had or had not undertaken but continued to suggest Mr Burkama was "attacking him personally" for example, (page 255).

21.16. By 2 December 2016, Mr Burkama remained unsatisfied with the Claimant's work and wrote to Mrs Barai to confirm that he was considering moving to stage one of the Respondent's Capability Procedure (page 257).

21.17. On 5 December 2016 (page 261) Mr Burkama emailed Mrs Barai to confirm that he had told the Claimant he was unhappy about his work progress and intended to proceed with stage one of the Capability Procedure. He noted that the Claimant had told him he was joining a new Union who would be in touch in the New Year.

21.18. The last supervision meeting between Mr Burkama and the Claimant took place on 10 January 2017 (page 268). Mr Burkama advised the Claimant in this meeting that he would be writing to him about a disciplinary matter. This he did on 11 January 2017 (page 269) where the Claimant was invited to an investigation meeting regarding "aggressive behaviour and language towards your Line Manager in public place". This concerned an altercation the Claimant had allegedly had in front of others, including members of the public, with Mr Guyan. The meeting was to be held on 19 January 2017. The Claimant then went on sickness absence with work related stress. His first fitness for work certificate referring to work related stress is at page 271. The Claimant did not return to work again.

21.19. On 23 January 2017, Mr Burkama wrote to the Claimant enquiring what he felt the causes of his stress were (page 280). He also stated that he was enclosing a stress action plan for the Claimant to complete. That plan was not enclosed with the letter and, upon realising this, Mr Burkama sent it to the Claimant with a handwritten letter on 25 January 2017 (page 282). We find that the Claimant received the stress action plan but chose not to complete it.

21.20. Over the course of the next several months Mr Burkama had frequent correspondence with Mrs Barai setting out that the situation had

become unmanageable and whether there should be another referral to Occupational Health (page 283). He then texted the Claimant asking him when he planned to return to work (page 286) to which the Claimant replied that his sick note finished on 16 January when he had a further appointment with his Doctor. He also asked the Claimant whether he had managed to complete the stress action plan, but the Claimant ignored this message. On 16 February 2017, Mr Burkama texted the Claimant again to ask when he would be returning to work to which the Claimant replied "sicknote in post" (page 287).

21.21. The Claimant attended a further appointment with Occupational Health on 20 February 2017 (page 289). The report said that the Claimant had advised that "his condition and its symptoms have improved slightly, however, his medication is making him very drowsy". The Occupational Health Therapist said "I am hopeful that he will improve and be able to return (to work) within four weeks. This will give any medication time to be effective and any side effects to be tolerated allowing for a return to work". She also said that she did not think that there were any specific workplace adjustments considered likely to affect an early return to work. He was deemed not fit to attend a disciplinary meeting at this time.

21.22. On 17 March, the Claimant sent a text to Mr Burkama saying "sicknote in post". On 18 April 2017, Mr Burkama wrote to the Claimant to request he attend a meeting with him and Mrs Barai to discuss "your current sickness absence and referral to the Occupational Health Department" (page 299). On the same date Mr Burkama sent a text to the Claimant asking him to get in touch with his plans to return to work to which the Claimant again replied "sicknote in post" (page 300). On 24 April the Claimant sent a text to Mr Burkama saying that he had received the letter of 18 April saying he could not attend the meeting on 25 April as he had a medical appointment and asked whether it was possible to reschedule to another date. The Claimant's medical records show this to be untrue since he did not attend his GP surgery that day (page 390). Mr Burkama texted the Claimant asking him if he could attend on 2 May in the afternoon to which the Claimant replied, "yes that's ok". On the following day, Mr Burkama confirmed the appointment for 4.00pm on 2 April to which the Claimant replied "ok" (page 301). On the day of that meeting, the Claimant sent a text to Mr Burkama saying, "woke up feeling bad so will not be able to make the meeting" (page 301).

21.23. On 2 May 2017, Mr Burkama wrote to the Claimant again with a request that he attend a rearranged meeting on 9 May (page 305). On 8 May the Claimant sent a text to Mr Burkama saying, "I have got legal advice and I am sorry, but I will not be attending your meeting today as a change of medication has made me feel ill again". This was untrue

since the Claimant's medical records at pages 390-391 show that his medication remained the same throughout April, May, June and July.

21.24. On 12 May 2017, Mr Burkama wrote to the Claimant to advise that a further Occupational Health appointment had been made for him on 30 May at 2.30pm (page 312). On 30 May the Claimant sent a text to Mr Burkama saying, "sorry to say I have had to cancel Occupational Health appointment due to bereavement in the family (sister)" (page 314). No evidence of that bereavement has been produced. A further appointment was made with Occupational Health for 13 June 2017 (page 315) and on that day Mr Burkama received a text saying, "Ernie is not feeling very well today so sorry to tell you he will not be attending his appointment at Occupational Health (wife)" (page 316).

21.25. On 27 June 2017 Mr Burkama again wrote to the Claimant arranging a meeting for 10 July 2017 at 9.00am which said "I will now be meeting with Jagruti Barai…. to consider your current absence and if I can continue to hold the post open…. I must inform you that an outcome of this meeting maybe that you are dismissed from your employment with Leicester City Council" (page 320). On 8 July Mr Burkama texted the Claimant to ask whether he would be attending the meeting to which his wife replied, "Ernie doesn't know anything about a meeting". We find that the Claimant did in fact receive that letter. On Sunday 9 July Mr Burkama texted the Claimant to ask whether he would be attending the meeting the following day to which his wife replied, "Sorry. As Ernie is not feeling well this morning, he is unable to attend your meeting…" (page 322). Mr Burkama rearranged that meeting for 17 July and advised the Claimant of this by text. The meeting was due to commence at 9.00am. The Claimant texted at 8.45am saying "Sorry but I have appointment with the Doctor today at 9.15am for a blood test so I will not be attending your meeting unfortunately" (page 323). This was untrue since the Claimant's GP records make no mention of his attending the surgery for a blood test on that day (page 391).

21.26. Since the Claimant had been offered the opportunity to submit written representations to the meeting if he did not attend and had failed to engage in any discussion about his illness or a return to work, the meeting went ahead in his absence and the decision was to dismiss him on notice (page 327). The Claimant was advised of his right of appeal but did not appeal.

Submissions

22. Both Counsel made submissions. Mr Kohanzad made oral submissions and Mr Linstead supplemented his written submissions with oral submissions. Although

those submissions are recorded very briefly in this Judgment, we confirm that we considered them in detail in reaching our conclusions.

23. Mr Linstead argued that the dismissal of the Claimant was fair. The Claimant had been absent for 7 months and had failed to attend any meetings or an Occupational Health appointment. Indeed, he totally frustrated the Respondent's attempts to obtain information. It was perfectly reasonable to ask the Claimant to attend meetings and he had deliberately ignored those invitations. The dismissal was not because of any other reason other than his continued absence. In the circumstances, it was reasonable for the Respondent not to adjourn the dismissal hearing on 17 July 2017 and dismissal was within the range of reasonable responses.

24. In relation to disability, Mr Linstead submitted the Respondent had no information on which to conclude that the Claimant had a disability as it did not have actual or constructive knowledge that the Claimant had a substantial impairment likely to last more than 12 months.

25. Mr Linstead had also submitted that the requirements of knowledge applied equally to the claim under section 15 EqA. In any event, the Respondent's treatment of the Claimant was objectively justified as, in all the circumstances of this case, it was a proportionate means of achieving a legitimate aim.

26. For the Claimant, Mr Kohanzad concentrated on what he described as Mr Burkama's euphemistic language in dealing with the Claimant. He submitted that Mr Burkama had lost patience with the Claimant and the documents in the bundle undermined his evidence that his primary concern was for the Claimant's welfare. Both Mr Burkama and Mrs Barai believed the Claimant's absence was wilful.

27. He further submitted that the Claimant should have been performance managed from an earlier date, but Mr Burkama had failed to do so. He urged the Tribunal to focus on Mr Burkama's mindset which was "to get the Claimant gone". This was particularly the case as Mr Burkama was only looking at things from his own perspective in relation to budgets and getting work done. He failed do understand the Claimant's lack of engagement and should have written a gentle letter from a welfare perspective. The main reason he did not do this was his frustration with the Claimant and the Claimant's absence played a much smaller part in the process.

Conclusions

28. Our conclusions are based on the facts as we have found them. We have already noted that we found some of the Claimant's evidence to be unreliable. Indeed, we formed the view that the Claimant had no intention of returning to work evidenced by his deliberate failure to engage with Mr Burkama who did his best to engage with the Claimant in relation to his illness, its cause and when he would be likely to return to work. On occasion he failed to attend meetings because he said he was feeling "bad". He gave no further information as to whether his condition was because of his work-related stress or the other conditions from which he suffered. His evidence in relation to Doctor's appointments is not borne out by his GP records. We do not accept that he did not receive invitation letters sent to him by Mr Burkama. Indeed, we conclude that he deliberately frustrated Mr Burkama's attempts to engage with him. He can clearly be a prickly character evidenced by on two occasions answering questions put to him by Mr Lindstead with the response "That's your opinion".

29. Mr Kohanzad referred on many occasions in cross-examining Mr Burkama and in his closing submissions to the euphemistic language used by Mr Burkama in his correspondence with the Respondent's HR Team. We consider that referring to the correspondence as euphemistic is only one interpretation that may be attached to it. Another is that it is ambiguous and could be taken as being genuinely concerned for his welfare, when he would return to work and on what basis. Given that Mr Kohanzad conceded that Mr Burkama was composed and answered difficult questions well, which accords with our own view, we prefer the latter interpretation of his correspondence with HR.

30. Mr Kohanzad also argued that Mr Burkama should have performance managed the Claimant sooner. We reject that assertion because it is clear from the documents disclosed that, from a very early stage, Mr Burkama held weekly supervision meetings, duly noted, with the Claimant. We further accept Mr Burkama's evidence that, notwithstanding these weekly supervisions, the Claimant still underperformed. Neither are we surprised that Mr Burkama was frustrated and even possibly angry when he learned that the Claimant had been covertly recording his conversations with him and accused him of drinking with Union representatives. We consider it significant that none of these recordings were produced to us.

31. Mr Kohanzad also took issue with the procedure followed by Mr Burkama. He submitted he had not acted in the interests of the Claimant's welfare; he was too quick to invoke a formal procedure and then did not follow it precisely. Further, he argued that the meeting on 17 July 2017, which the Claimant did not attend, should have been adjourned. He submitted that Mr Burkama should have realised that the Claimant's non-attendance at these meetings was a symptom of work-related stress. We do not accept these arguments. We note, for example, that in relation to two meetings, the Claimant said he could not attend and asked for it to be rearranged. This suggests he was able to attend meetings but chose not to. All of these matters add fuel to the argument that, no matter what Mr Burkama had done, the Claimant would have continued to

frustrate his efforts. The Claimant's failure to attend an Occupational Health appointment, ostensively because of his sister's death, and his failure to attend the rearranged appointment, speaks volumes for his mindset of complete lack of cooperation.

32. In relation to unfair dismissal, Mr Linstead referred to **BS v Dundee City Council** wherein the Court considered long-term sickness absence and held, firstly, that it is essential to consider the question of whether the employer could be expected to wait longer; secondly, the need to consult the employee and take his views into account; and, thirdly, the requirement to take steps to discover the employees medical condition and his likely prognosis. This third requirement does not require the employer to pursue detailed medical examination but to ensure that correct question is asked and answered.

33. In our findings of fact, we have noted the many attempts of Mr Burkama both to obtain evidence from the Claimant and Occupational Health and his attempts to consult with the Claimant. All of these attempts were rebuffed by the Claimant. He simply failed to engage, making up fictitious appointments for a blood test, other medical appointments and, according to his witness statement and his answers to questions in cross-examination, feeling ill because of a change in medication of which there is no record at all. We shall say more about the impact of the Claimant's evidence on Mr Burkama's Team below but, in the context of unfair dismissal, it is apt to consider how the Respondent was supposed to operate effectively and economically when the Claimant was on long-term sickness absence with no indication of when he would be able to return to work while Mr Burkama had to engage contractors at considerable expense and cost to the public purse to cover the Claimant's absence.

34. The Claimant describes Mr Burkama's attempts to engage with him as "pestering". We could not disagree more. The Respondent's Absence Management Policy and Procedure (page 336) states at clause 5.2 "where an employee is absent due to stress and does not feel able to have contact with the manager themselves, it is acceptable for them to communicate via a representative" (page 338). At clause 9.3 it states, "the frequency of contact should be determined by the manager in consultation with the employee, taking account of all the circumstances. Whilst managers have a duty of care to keep in contact with the employee, and keep them up to date on the developments of work, they should act with sensitivity and satisfy themselves that contact is appropriate" (page 340). We note that Mr Burkama seems to have contacted the Claimant principally on the day each of his fitness to work certificates ran out. The Claimant ignored correspondence but did at least communicate by text message. Those communications gave absolutely no insight into to his illness, recovery or return to work. Mr Kohanzad argues that a more gentle letter should have been addressed to the Claimant and that, instead of dismissal, a warning in the first instance would have been more appropriate. We reject that suggestion. The Claimant had been absent for over 6 months at the time of his dismissal and had not responded in any meaningful way to any

correspondence in whatever form sent to him by Mr Burkama. There is clearly a limit to how far an employer is expected to go before an employee is dismissed on the grounds of sickness absence. Mr Kohanzad's suggestions would have been far more pertinent had the Claimant engaged with Mr Burkama in any meaningful way.

35. Mr Kohanzad also submitted that the reason the Claimant failed to attend meetings was that he was unfit to do so but that argument falls down when the Claimant did not even give a hint as the difficulties he was allegedly experiencing and failed to even take advantage of trade union representation to do this for him or even ask his wife to do so as opposed to just sending text messages on his behalf and which he said in evidence he dictated to her.

36. A further strand of Mr Kohanzad's attack on the procedure followed by the Respondent was that the Claimant's dismissal was because of performance and conduct issues which pre-dated the start of his sickness absence. In particular, he suggested that Mr Burkama's failure to take action on a conduct issue against the Claimant when it was suggested he had falsely claimed overtime for a call out he did not attend, was due to his desire to hold on to that alleged misconduct and retain it for use against the Claimant at a later date. Indeed, Mr Kohanzad went so far as to suggest that the reason disciplinary proceedings were not taken against the Claimant in this instance was because Mr Burkama had investigated it and found there was no substance to the allegation. There is absolutely no evidence that this was the case and we accept Mr Burkama's evidence that, in asking HR whether he should raise it as a disciplinary matter immediately or hold on to it, he was merely asking for advice as to whether something should be done about it immediately or not at all.

37. We have already found that the Claimant received the letters inviting him to the absence hearing. In relation to the receipt of letters generally, the Claimant's evidence, as already noted, was confused which further persuaded us that he had in fact received all correspondence from Mr Burkama. There was thus no imperative on Mr Burkama to rearrange the meeting at which the Claimant was dismissed, having already rearranged it once.

38. In all the circumstances, with Mr Burkama having done all he conceivably could to engage with the Claimant and the Claimant having failed to cooperate at any stage of the process, Mr Burkama was entitled to conclude that the Claimant had deliberately failed to engage in the process. Further, there was no indication of when the Claimant would likely to be able to return to work. It would have been in the Claimant's interests and, possibly, a factor in his favour had he attended an Occupational Health appointment. We find he deliberately failed to do so and, and bearing in mind all of these matters, find that the decision to dismiss the Claimant was within the range of reasonable responses. The principal reason for dismissal was capability.

39. Moving on to disability discrimination, we first consider whether the Respondent had actual or constructive knowledge of the Claimant's disability. Employment Judge Clark found that the Claimant was disabled during June and July 2017 thus any duty imposed on the Respondent in respect of that disability could not arise before those dates (**Wilcox v Birmingham CAB**).

40. Following **Donelien v Liberata**, it is also the case that an employer must take its own view and not simply rely on an Occupational Health report. Whilst such reports are useful in assisting an employer to make a decision as to an employee's disability, it is also incumbent upon the employer to consult with the employee. It is crystal clear in this case that the Respondent, through the efforts of Mr Burkama, attempted to do precisely that without success due to the Claimant's complete lack of cooperation.

41. Accordingly, following the decision in **Donelien**, it was unreasonable to expect the Respondent to know that the Claimant suffered an impediment to his mental health which had a substantial and long-term effect on his ability to carry out normal day to day activities. We bear in mind, that the Occupational Health reports produced in the bundle show that the Claimant had seemingly made a complete recovery from his first bout of work related stress in 2016 and that in 2017 it was anticipated that he would be fit to return to work within a matter of weeks. There is, of course, a line of authorities (**Herry v Dudley Metropolitan Council** and **J v DLA Piper UK LLP**) which consider the value of an employee's representations in relation to the cause of his absence but, in this case, the Claimant made none.

42. In his written submissions, Mr Linstead makes the point that it is not enough for an employer to show they did not know that the disabled person had the disability. They must also show that they could not reasonably have been expected to know about it. Given our findings of fact above and our concerns about the reliability of the Claimant's evidence, having done everything he could to obtain information from the Claimant without response, including a referral to Occupational Health in respect of which the Claimant did not participate, there is no evidence before us which suggests the Respondent could have reasonably been expected to know the Claimant was disabled at anytime during his absence from work from January to July 2017.

43. As we find that the Respondent had no actual or constructive knowledge of the Claimant's disability, his claims of disability discrimination must fail.

44. If we are wrong in this conclusion, for the following reasons, we consider that his claims must still fail.

45. In relation to reasonable adjustments, Section 20 EqA requires a provision criterion or practice of the employer putting a disabled person at a substantial disadvantage in relation to a relevant matter (including employment) in comparison with persons who are not disabled. If this is the case, the employer must take such steps as it is reasonable to have to take to avoid the disadvantage. The Claimant relies on the following provisions, criteria and practices (PCP's):

    i) The requirement to attend work;

    ii) The requirement to meet with Occupation Health; and

    iii) The requirement to attend capability/disciplinary meetings.

    The Respondent accepts that i) and ii) above amount to PCP's but disputes that iii) is a PCP because there was no requirement to attend a disciplinary meeting or capability meetings.

46. The reasonable adjustments that the Claimant claims the Respondent should have made are:

    i) Provided a written and detailed response to the stress action plan which the Claimant completed in June 2016 confirming what support would be available to him on his return to work;

    ii) Rearrange the meeting on 17 July 2017 at which the decision to dismiss was made;

    iii) Invoked a lesser sanction than dismissal at that meeting.

47. In **RBS v Ashton,** the EAT held that a Tribunal must be satisfied that the PCP placed the disabled person concerned not simply at some disadvantage viewed generally, but at a disadvantage which is substantial and which is not to be viewed generally but to be viewed in comparison with persons who are not disabled.

48. Mr Linstead makes valid points in relation to whether the claim to PCP's put the Claimant at a substantial disadvantage. The Respondent disputes that the requirement to attend capability/disciplinary meetings is a PCP at all since there was no requirement to attend a disciplinary meeting or capability meetings. The Claimant was never invited to attend a disciplinary meeting, only an investigatory meeting, and that meeting scheduled for 19 January 2017 did not happen and was not rearranged by the Respondent. In relation to capability meetings, the Claimant was given the opportunity to be represented by his Union representative or to make written submissions and ignored both of those

opportunities. In the circumstances, the requirement relied upon by the Claimant does not amount to a PCP.

49. In relation to the requirement to meet with Occupational Health, it is difficult to see how this could have placed the Claimant at a substantial disadvantage in comparison with non-disabled persons. Occupational Health appointments are for the purpose of making a medical assessment which can be helpful for both employer and employee. Even those without disabilities may routinely be invited to attend such appointments for purposes which include ascertaining when an employee is likely to be able to return to work and whether any adjustments are necessary to achieve this. We consider that making a referral to Occupational Health was entirely appropriate both for the Respondent and the Claimant and, far from being a substantial disadvantage to the Claimant, it could well have been extremely advantages.

50. In relation to whether the adjustments required by the Claimant were reasonable, the Claimant's suggestion that there should have been a more detailed response to the stress action plan is not, in our view, a sustainable argument. Firstly, the Claimant's evidence about the stress action plans sent to him by the Respondent was extremely confused. We found that he received the second document but ignored it. In relation to the first completed in 2016, it was considered by the Claimant and his Line Manager in some detail at the time and, following on from the appointment of Mr Burkama, regular supervision meetings were held on a weekly basis. These set out fairly precisely what the Claimant could and could not do. There had already been a reasonable adjustment made by the Respondent in this regard.

51. In terms of rearranging the meeting on 17 July 2017, the Respondent had, of course, already rearranged it once. The Claimant had failed to attend any meeting either on the original date scheduled or on a rearranged date. In these circumstances, the Respondent was entitled to reach the conclusion that the Claimant was deliberately avoiding any engagement in the capability process. Accordingly, having already made reasonable adjustments by rearranging meetings which the Claimant did not then attend, it would not have been a reasonable adjustment to rearrange for the second time the meeting at which the Claimant had been advised (again for the second time) that he might be dismissed.

52. The third adjustment suggested by the Claimant, that a lesser sanction than dismissal should have been given is not supported by the evidence. In his pleaded case, the Claimant does not say what lesser sanction he envisaged but Mr Kohanzad submitted it should have been a written warning. We do not agree that that would have been a reasonable adjustment. The Claimant had been absent from work for over 6 months with no indication whatsoever of when he would be likely to return to work or on what basis. He had failed to attend any meetings either with the Respondent or Occupational Health and

offered no information other than his fitness to work certificates. He had been advised that failure to attend the final meeting on 17 July 2017 would mean that a decision as to his future employment might have to be made on the information available to the Respondent which amounted to nothing apart from the fitness to work certificates. It would not have been a reasonable adjustment to give the Claimant a written warning or some other lesser sanction in circumstances where the Respondent, and with every justification, was of the view that he was merely attempting to prolong his employment.

53. We considered the claim under Section 15 EqA to be equally weak. The Claimant relies on his absence and the likelihood of having periods of absence and fatigue as the "somethings" arising in consequence of his disability. Mr Linstead challenges these matters and makes the point that no duty could have arisen prior to the start of the Claimant's disability in June 2017 as he was already on long-term sickness absence and the likelihood of absence did not arise in consequence of his disability. In relation to fatigue and insomnia, it has already been established before Employment Judges Ahmed and Clark that the Claimant has a tendency to exaggerate his symptoms and these are not supported by his medical evidence. The Claimant maintains that being subjected to the Respondent's formal management procedure and meetings (although he did not attend them) and his dismissal were unfavourable treatment. But even if we are to accept that submission, we have to consider whether the treatment was a proportionate means of achieving a legitimate aim.

54. In this case, Mr Burkama gave evidence both in his witness statement and orally of the extent of the financial implications to the Respondent of the Claimant being absent from work. He said the cost to the Respondent was in excess of £20,000 and there was the additional impact of the Claimant's absence on his colleagues and the inconvenience of having to engage contractors. Avoiding such issues clearly amount to a legitimate aim. In determining whether the means used by the Respondent were proportionate, we bear in mind the attempts to engage with the Claimant and to consult with him, the regular contact by Mr Burkama and the fact that the Claimant had been absent for more than 6 months before he was dismissed. Mr Linstead submits that at the point of making the decision the Respondent had no other realistic choice. We agree with that submission. The Claimant had totally and deliberately failed to give the Respondent any detail about his condition or potential return to work date. We agree with Mr Linstead that dismissal was proportionate in the circumstances. The Claimant had been warned this was a possibility but ignored that warning. Further, he was given a right of appeal against the decision and, unreliably, gave evidence that he did not appeal because he did not read all of the dismissal letter. We do not see that the Respondent could be expected to incur further costs and issues with covering the Claimant's work indefinitely. Accordingly, dismissal was a proportionate means of achieving a legitimate aim.

55. For the above reasons, the Claimant's claims are not well founded and are dismissed.

_____
Employment Judge M Butler

Date: 16 December 2021

JUDGMENT SENT TO THE PARTIES ON

17 December 2021

.....

.....
FOR THE TRIBUNAL OFFICE

Public access to employment tribunal decisions

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

Case No: 2602117/2017

IN THE LEICESTER EMPLOYMENT TRIBUNAL

B E T W E E N :-

ERNEST PARNABY

Claimant

and

LEICESTER CITY COUNCIL

Respondent

APPENDIX

AGREED LIST OF ISSUES

Unfair dismissal

1. What was the reason for the dismissal? R contends that the reason for dismissal was capability due to C's ill health.

2. If there was a potentially fair reason for dismissal, did R act fairly or unfairly in treating that as a sufficient reason for dismissal within the meaning of s.98(4) ERA.

Disability

3. C had a disability within the meaning of s.6(1) EqA from 1/6/17 to 31/7/17[1]. The disability was work related stress[2].

Unfavourable treatment contrary to s.15 EqA

4. C relies on the following as something arising in consequence of his disability:
   (i) absences and the likelihood of having periods of absence; and
   (ii) fatigue.

5. Did R subject C to the following unfavourable treatment because of one or both of those 'somethings':
   (i) being subjected to R's formal management procedure and meetings; and
   (ii) dismissal.

6. Can R show that any such treatment to which it subjected C was a proportionate means of achieving a legitimate aim?

7. Can R show that it did not know and could not reasonably have been expected to know that C had the disability, pursuant to s.15(2) EqA?

Failure to make reasonable adjustments s.20-21 EqA

8. Did R apply the following provision(s), criteria or practice(s) (PCPs) within the meaning of ss.20(3) EqA:
   (i) the requirement to attend work;
   (ii) the requirement to meet with OH;
   (iii) the requirement to attend capability/disciplinary meetings.

9. Did any such PCP put C at a substantial disadvantage in relation to a relevant matter[3] in comparison with persons who are not disabled and if so what was that disadvantage?

[1] Judgment EJ Clark 11/12/20 ¶4.1 and 7.2 [81-85]
[2] ET1 ¶3 [13]

10. If so, should R have taken the following steps, which C contends it was reasonable to have to take to avoid the disadvantage?
    (i) provided a written and detailed response to the stress action plan which C completed in June 2016, confirming what support would be available for C on his return to work;
    (ii) rearranged the meeting on 17/7/17 at which the decision to dismiss was made to another date;
    (iii) invoked a lesser sanction than dismissal at that meeting.

11. Can R show that it did not know and could not reasonably be expected to know that C had a disability and was likely to be placed at the relevant disadvantage, pursuant to EqA Sch 20(1)(b).

Remedy

12. What if any remedy is C entitled to including loss of earnings and injury to feelings?

13. Has C made reasonable efforts to mitigate his loss?

14. Even if a different procedure had been followed, would C have been dismissed in any event (*Polkey* issues).

[3] Relevant matter includes employment by R: EqA Sched 8 para 5