EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4107494/2020 Hearing by Cloud Video Platform on 11 and 12 October, 2 November and Members' Meeting on 2 December 2021

Employment Judge: M A Macleod
Tribunal Member: J Grier
Tribunal Member: J Anderson

Mustapha Ait Warahou	**Claimant** **In Person**
Lothian Buses Ltd	**Respondent** **Represented by** **Ms H Coutts** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous Judgment of the Employment Tribunal is that the claimant's claims all fail, and are dismissed.

REASONS

1. The claimant presented a claim to the Employment Tribunal on 27 November 2020 in which he complained that he had been unfairly dismissed and discriminated against on the grounds of disability.

2. The respondent submitted an ET3 response form in which they resisted the claimant's claims.

3. A Hearing was listed to take place by CVP on 11, 12, 14 and 15 October 2021. As it turned out, the Hearing proceeded on the first 2 of those dates, but then required to be adjourned at the request of the Employment Judge

following a sudden family bereavement, in order to allow him to attend the funeral in the Outer Hebrides. The loss of the two remaining listed dates was ameliorated by the institution of a third day, on 2 November 2021, during which the evidence and submissions were concluded. The Tribunal then arranged to meet remotely on 2 December 2021 in order to carry out their deliberations.

4. The claimant appeared on his own behalf at the hearing, and the respondent was represented by Ms Coutts, solicitor.

5. The claimant gave evidence on his own account. The respondent called as witnesses:

   - Tracey Bork, People Director;
   - Louis Ferguson, Traffic Manager; and
   - Lee Strachan, Traffic Manager.

6. The parties relied upon a joint bundle of productions, to which they both referred in the course of the hearing.

7. There were no particular difficulties in the hearing as it was conducted by CVP. Each participant was able to see and hear, and be seen and heard, by all others involved. The Tribunal was satisfied that the hearing proceeded appropriately and that the interests of justice were not compromised by hearing the case remotely.

8. Based on the evidence led and the information provided, the Tribunal was able to make the following findings in fact.

Findings in Fact

9. The claimant, whose date of birth is 26 March 1976, commenced employment with the respondent as a Bus Driver/Conductor on 20 March 2012. His contract of employment (80ff) confirmed that his place of employment was 55 Annandale Street, Edinburgh, the main depot for the respondent, and that he would be paid on an hours worked basis.

10. On 29 March 2015, the claimant's employment moved to that of a Double Deck PCV Driver with the respondent (92). It was confirmed that his basic working week was 39 hours.

11. On 6 December 2019, the claimant submitted a flexible working request to the respondent. In the form (192ff), he ticked "no" to the question "Are you a disabled person whose request for flexible working is related to your disability?" He went on to specify that the reason for the request was "family circumstances". He requested that he be allowed to work a pattern of working of "2 Day per week, Saturday and Sunday. 8 hours a day", from March 2020.

12. On 16 December 2019, Louis Ferguson, Traffic Manager, replied to his request, and invited him to a meeting on 23 December 2019, at which he could be accompanied by a work colleague or trade union official (195).

13. The meeting took place on 23 December 2019. Mr Ferguson chaired the meeting, and the claimant attended unaccompanied. The claimant explained at the meeting that the reason why he wished to alter his working pattern was that his wife had been ill, suffering from depression, and that he needed to take time to look after her. At that meeting, the claimant did not mention anything about his own health. Mr Ferguson put to the claimant the possibility of working on Thursdays and Fridays, as well as Saturdays, which would be of assistance to the respondent, but he was adamant that his request was for early shifts on Saturdays and Sundays.

14. Mr Ferguson considered what the claimant had said, and confirmed his decision by letter dated 27 December 2019 (196). Mr Ferguson said that he was unable to agree to the request to work a shift pattern of early shifts every Saturday and Sunday.

15. He went on:

"Unfortunately, we think that agreeing to this change would:

- *have a detrimental effect on the organisation's ability to meet its customers' demands;*

- *create unacceptable difficulties for the organisation as we have been unable to make arrangements to reorganise the work amongst other staff;*

- *create unacceptable difficulties for the organisation due to an insufficiency of work during the periods you proposed to work;*

The reason why this is relevant to your application for flexible working is early shifts are in high demand and especially at weekends where drivers often take extra shifts for overtime. We would not be able to guarantee the shifts you have requested as a result."

16. Mr Ferguson was concerned at that time about the significant understaffing among the drivers, that there may be risks that shifts were not covered, and that unfair demand would be placed on other drivers.

17. Mr Ferguson advised the claimant of his right to appeal against his decision within 14 days of the date of that letter, to David McCallum, General Manager.

18. The claimant submitted a medical certificate dated 22 January 2020 (198), signed by his General Practitioner at Inverkeithing Medical Centre. It was noted that the reason for the claimant's absence was "acute reaction to stress", and confirmed that he would be unfit for work from 21 January until 30 January 2020.

19. On 29 January 2020, the claimant submitted a further statement of fitness for work dated that date, confirming that he was suffering from "Depressive disorder NEC", and would be unfit for work for "2 months".

20. On 13 February 2020, Mr Ferguson wrote to the claimant to invite him to meet at Central Garage on 18 February 2020 to discuss his absence in line with the respondent's Absence Management Procedure (200). He advised

him that he was entitled to be accompanied to the meeting by a colleague or trade union representative.

21. No formal minutes were taken of this meeting, but Mr Ferguson made some handwritten notes on his copy of the letter inviting the claimant to the meeting. The notes stated:

"Met GP on morning of 18/02/20 – Fluoxitine as doesn't affect driving.

Issues sleeping – not fit to work.

Things to do to help mental health – finding some classes.

Omeprazole for stomach – repetitive dose.

No body contacted from OCH.

19th March with GP"

22. Mr Ferguson understood that the claimant had been prescribed medication for his illness, which had been changed to Fluoxetine, an anti-depressant, as it did not have an adverse effect upon his driving. He said he was unfit for work owing to his difficulties with sleeping, and related to his mental health. He had not been contacted by the Occupational Health provider for the respondent.

23. On 25 February 2020, the claimant attended an Occupational Health appointment with Innovative Business Support Services, the respondent's OH providers, and was seen by Geof Humphrey, Employee Wellbeing Management, Health and Safety Management and Sickness Absence Management Consultant. Mr Humphrey produced a report (201ff).

24. It was noted that the claimant had previously been diagnosed as suffering from Depressive Disorder NEC in early February 2020, and that his wife was very ill with depression for some 3 to 4 years following the death of her parents, which had affected the claimant himself. His symptoms included emotional distress, difficulty socialising and leaving his home, poor sleeping

patterns, tiredness and associated poor concentration and fluctuating mood between low and very low.

25. Mr Humphrey advised that *"Mustapha was unable to report any improvement in his mental health to date. He remains unfit for work and may remain so for the foreseeable future.*

On his return, I would advocate that an appropriate rehabilitation plan is developed to include a phased return, an internal driving assessment, and possibly adjustments to duties for a time-bound period."

26. He indicated that it was too soon to predict with any accuracy what adjustments the claimant may need in order to support his return to work in the future.

27. The report went on to provide some advice to the claimant about how to look after his wellbeing.

28. The conclusion of the report was that he was *"currently battling to cope with everyday life"*, but that Mr Humphrey confirmed that *"I would expect the medication to fully kick in soon, and the addition of therapy commencing next month will also hopefully, be beneficial in terms of treatment. This is likely what's needed to kickstart his recovery, which may take a considerable timescale before he reaches the point of being able to contemplate a return to work."*

29. The claimant met again with Mr Ferguson on 11 March 2020, having been invited to do so on 5 March 2020 (206). Again, no formal minutes were taken but Mr Ferguson's handwritten notes appear on his copy of the invitation letter.

30. The notes read:

"Discussed issues with work vs OCH Report – issue is everything not just work.

Not eating + sleeping well – tiredness a lot. GP told me to go off sick.

Blood tests anemia – but tiredness remained. Still checking – endoscopy etc.

Anti-Depressant – up + down – feel nervous.

Going to chill out class. (Sleep Apnoea) 2 years ago.

See GP once a month don't need to tell DVLA.

Asked to bring Medical Notes to next meeting."

31. Mr Ferguson's evidence was that there was no indication at that meeting that the claimant was unhappy with the terms of the report by Mr Humphrey.

32. Mr Ferguson did not meet with the claimant after that meeting.

33. The claimant remained absent from work due to illness. On 26 March 2020, following the national lockdown imposed as a result of the effects of the coronavirus pandemic, an email was sent to all staff, including the claimant (207). It was noted therein that the respondent was working on a bespoke network designed to provide critical links for key workers, and that by the end of that day the respondent would have finalised the number of people required to work. It noted that there were applicants to join the Job Retention Scheme from 29 March 2020, and that further details would be provided over the course of the next week.

34. There followed a Question and Answer section. One of the questions was *"I'm already off sick – what should I do?"*, to which the answer was given: *"If you are currently off sick you will be transitioned into the JRS from Sunday 29th March."*

35. The evidence given by the respondent to this Tribunal was that that was revised, and that staff on sick leave were not moved into the JRS, but continued to be treated under the Attendance at Work policy.

36. The claimant submitted a further statement of fitness to work dated 27 March 2020 ((218), confirming his unfitness until 31 May 2020 due to Depressive Disorder NEC.

37. Following the decision to impose lockdown, very few staff were attending the respondent's offices, including Lee Strachan, who took over the management of the claimant from Mr Ferguson in April 2020. He contacted the claimant by telephone on 28 April 2020, and found him very reticent, though he explained that he was absent from work due to depression; and that his wife had been depressed, which had had an impact upon him.

38. Mr Strachan understood that another manager was in contact with the claimant in May 2020, but on 23 June he contacted the claimant again by telephone. Again the claimant confirmed that he remained unfit for work. There appeared to be no change in his condition, and no indication was to when he might be in a position to return to work.

39. On 28 May 2020, the claimant obtained a further statement of fitness to work which confirmed his unfitness for two months (220), and on 29 July 2020, a further statement on 29 July which covered his absence until 30 September 2020 (221).

40. On 31 July 2020, Steve McQueen, General Manager, wrote to the claimant to invite him to attend an absence meeting on 6 August 2020 (222). The claimant attended and the meeting was conducted by Mr Strachan. Notes were taken of that meeting (223ff).

41. It was noted that the claimant was currently on medication, and had last had face to face contact with his GP two months before, only having telephone contact in the meantime. He had had Crisis counselling, but was vague about this, confirming that he had only had 4 sessions to date. It was noted that the claimant had made no effort to follow the recommendations of the report by Mr Humphrey in February 2020. He was taking very little exercise and was not socialising.

42. The claimant inquired about part time work, but it was explained to him that this would not be an option.

43. A further telephone consultation took place between the claimant and Mr Humphrey on 11 August 2020, and a report was produced by Mr Humphrey following that consultation (227).

44. It was recorded that the claimant reported that he had not improved at all in his mental health. He confirmed that he was receiving Fluoxetine, but that this anti-depressant medication was having no benefit for him, and that lockdown had prevented him engaging with the two forms of therapy which he had commenced.

45. Mr Humphrey confirmed that the claimant remained unfit for work and appeared to be a considerable distance away from being able to contemplate a return to work. He also noted that *"It is too soon, taking account of this, to predict with any degree of accuracy, whether he will require adjustments to either his hours or duties on a permanent or temporary basis."*

46. He also advised that redeployment was neither indicated nor requested at that stage.

47. He also said that the current ongoing sickness absence was likely to continue for the foreseeable future.

48. Mr Humphrey recorded the claimant's stated wish to reduce permanently his working time commitment from full to part time, and that once he was able to return to work, he would go back if his hours were reduced by mutual agreement.

49. He concluded that there was no light at the end of the tunnel for the claimant's absence, and that he would advocate that the respondent utilise its own related policies to manage the absence.

50. Mr Strachan was concerned about the conclusions in this report on its receipt, and accordingly wrote to the claimant on 13 August 2020 to invite him to an Ill Health Capability Meeting on 18 August 2020 (231).

51. In that letter, Mr Strachan notified the claimant that *"should we be unable to identify a timescale for your return to work or steps that could be taken to facilitate this in the foreseeable future including options such as redeploying you into an alternative role, then a possible outcome of this meeting may be the termination of your employment on the grounds of ill health capability."*

52. The claimant attended the meeting on 18 August 2020, accompanied by a representative from the Unite Trade Union, David Flynn. Notes were taken by Rosario Mastrocinque (232ff).

53. When asked how he was feeling, the claimant said that he was trying to get some exercise, but that *"at the moment I don't feel well unfortunately".*

54. Mr Strachan raised his concern about the terms of the OH report, in which it was clear that the claimant was unfit for work, and that there had been little improvement in his mental health over the previous 8 months. He asked the claimant if he had an expected return date to his role as a PCV driver, to which the claimant replied that he could contemplate part time work. Mr Strachan responded that his contract was full time, and that they did not have part time work available in the current climate.

55. Following an adjournment, Mr Strachan returned to confirm that he had decided that since the claimant remained unfit for work, and that there had been little improvement in his mental health; and that there was no expected return to work date and no alternative roles within the business available; his decision was to dismiss the claimant on the grounds of capability, with payment of 8 weeks in lieu of notice plus any outstanding holidays due.

56. He notified the claimant of his right to appeal against the decision. The claimant replied that he was not only intending to appeal, but also to go to court, and that he considered it disgraceful.

57. Mr Strachan then wrote to the claimant to confirm his decision (236).

58. The claimant notified the respondent of his intention to appeal against that decision (238). He said that he felt that his attendance with the respondent

up to that point should be taken into account, and also felt that if his group counselling had continued he may have been back at work, as this was out of his control due to the Covid-19 outbreak.

59. The claimant's prior sickness absence was noted by the respondent (239). He was absent from 23 January until 17 August 2020 due to depression; he also had an absence from 25 March until 14 April 2018, owing to a sore back.

60. An appeal hearing was fixed to take place on 26 August 2020, and the claimant received an invitation to that hearing by letter dated 21 August 2020 from Steve McQueen.

61. Notes of the meeting were taken by Ashton Harrison (241). The claimant attended and was accompanied by Peter Richardson, of Unite. The meeting was chaired by Steve McQueen.

62. The claimant said that he should not have been dismissed, and that it was not acceptable how it was done. He said that he had a good record and that he should not have been dismissed as he was vulnerable. He referred to the fact that he had received letters over the previous 5 years for his excellent attendance.

63. The minutes record the following exchange between the claimant (MW) and Mr McQueen (SM):

"SM: Can you tell me what's happening now?

MW: I'm happy and I want to come back. But I don't know when.

SM: Do you see yourself being fit to return to work in the near future?

MW: I'm being honest with you. Do you want me to say tomorrow? I can't.

SM: I understand, do you see it being weeks/months? The occupational health report we have received suggests you won't be fit to return for quite some time.

MW: I have been honest. But that was only a 3-minute phone call."

64. Following an adjournment, Mr McQueen advised the claimant that he was rejecting the appeal. The claimant was unhappy with that decision, and felt that he should have been given more time to recover, particularly given the difficulties he had encountered in obtaining the counselling he required to assist his recovery.

65. On 27 August 2020, Mr McQueen wrote to the claimant (245) to confirm his decision. In that letter, he said:

"During January to March prior to lockdown you stated that you attended one group counselling appointment, you were on-line daily looking at counselling and you had several appointments with CRISIS over the phone, but that was stopped because they stated they needed to see you face to face. Your medication was changed from 10mg to 20mg (fluoxetine) which you have been on for some time now and makes you more relaxed.

When asked about returning to back to work (sic), you would not give a definite date. Giving (sic) the amount of time you have been off with your current ailment and Occupational Health reports received which state the following:

- *Current ongoing sickness absence is likely to continue for the foreseeable future, 'no light at the end of the tunnel'.*
- *The pandemic has delayed treatment, however there are no guarantees that this therapy will make a positive impact on your mental health.*
- *You declared to Occupational Health that at times you feel no benefit from your medication (fluoxetine).*
- *You mentioned to Occupational Health that CRISIS was not effective, but hopes to have face to face sessions once treatment starts again."*

66. The claimant produced a medical report from his General Practitioner dated 1 September 2020 (247). Dr Rahim reported that the practice was unable to

offer him the same service and level of care with regard to his mental health that they would normally strive to achieve. Dr Rahim also said that they had recently changed his psychotropic medication from Fluoxetine to Mirtazepine as he was still suffering from low mood and depressive symptoms.

67. The claimant submitted a final appeal by letter dated 21 September 2020 (249), on the grounds that the decision to dismiss him was too severe. He was invited to a final appeal hearing on 25 September 2020 to be chaired by David McCallum (250).

68. The claimant attended the final appeal hearing and was accompanied by Tony Pearson, his Unite representative. Mr McCallum chaired the hearing, and Fiona Macdonald took notes (251ff).

69. Mr McCallum noted that one of the grounds of appeal was that nobody from the respondent had been in touch with him during his absence from work. The claimant explained that his treatment had been too severe. Following a number of discussions, Mr McCallum asked the claimant why he had been unable to return to work, and he replied that he had not fully recovered.

70. The appeal was rejected, and Mr McCallum wrote to the claimant to confirm the outcome on 28 September 2020, on the basis that since the facts of the case were not in dispute he considered that the decision to dismiss the claimant was a fair one and the appropriate level of discipline was applied. The Tribunal did not hear evidence from Mr McCallum and accordingly it is not known why he used the word “discipline” in his letter.

71. He confirmed that the final stage of the internal appeal process had now been exhausted.

72. Since the claimant’s dismissal he was for some time unable to find alternative employment. He remained unfit for work, certified by his GP, due to his ongoing difficulties with depression. He applied for Universal Credit and has received payments of £71 per week, together with Employment Support Allowance monthly.

73. The claimant has now secured new employment as a bus driver with Brite Bus, commencing on 15 November 2021. He will be employed to work 38 hours a week over a seven day pattern. His pay is to be £10.50 per hour.

Submissions

74. For the respondent, Ms Coutts presented a written submission to which she spoke. She clarified that the respondent admitted that the claimant is and was at the material time a disabled person within the meaning of section 6 of the Equality Act 2010.

75. She set out the findings of fact which she considered appropriate, and the context in which these events took place, stressing that the respondent faced a most challenging set of trading conditions due to the coronavirus pandemic.

76. She argued that the claimant was treated consistently with others whose positions were not materially different to his, that the respondent carried out a reasonable investigation and that they genuinely believed that he was no longer capable of performing his duties. She submitted, further, that they carried out a reasonable procedure and consulted fairly with the claimant, that they could not have been reasonably expected to wait longer before dismissing the claimant, and that dismissal was within the range of reasonable responses.

77. Ms Coutts turned then to the claimant's claims of disability discrimination. She noted the claimant's case that the decision to reject his flexible working request was a failure to make a reasonable adjustment, but submitted that the respondent did not, and could not reasonably have been expected to, know that the claimant was disabled at the time. He had an excellent attendance record and he stated in his flexible working application that he did not have a disability.

78. She denied that the respondent had a practice of requiring employees to work varying shifts or refusing requests to work set shifts only; and that they had a practice of refusing requests to move from full time to part time work.

79. Ms Coutts argued that the claimant's claim must fail in all the circumstances, and, in addition, that it was presented out of time, and that it would not be just and equitable to extend the time for presentation of the claim. No reasonable explanation has been put forward by the claimant for the lateness of the claim.

80. She submitted that the claimant's position before the Tribunal, that he could have returned to part time work, was not a credible position for him to adopt. The medical evidence did not support this assertion.

81. Ms Coutts submitted that the claimant was not placed at a substantial disadvantage by the respondent using all sickness absence as a trigger for the Attendance at Work policy or any decision made thereunder. The long term absence procedure was triggered on approximately 18 February 2020, and at that point the respondent did not, and could not have been reasonably expected to, know that the claimant was a disabled person within the meaning of the Act.

82. The policy would have been triggered for someone who was absent but did not have the claimant's disability, and accordingly no substantial disadvantage arose for him as a result of this, on the grounds of disability.

83. She denied that it would have been a reasonable adjustment to have disregarded any disability-related absences when managing his absence or when dismissing him.

84. With regard to the claimant's claim under section 15 of the 2010 Act, Ms Coutts denied that the respondent had knowledge, actual or constructive, of his disability at the time when the decision to dismiss was made. However, if it were found that the claimant had been treated unfavourably on the grounds of disability, the claimant's treatment was a proportionate means of achieving a legitimate aim. The legitimate aims were those of promoting and securing a reasonable level of attendance at work, minimising the administrative and management time spent on absenteeism, supporting and facilitating a return to work and ensuring that the respondent could operate efficiently, effectively and profitably.

85. The time and monetary cost incurred in managing the claimant's absence was significant, she said, and given the demands imposed upon the respondent in the ongoing uncertainty surrounding the pandemic, and the claimant's prognosis, his dismissal was a proportionate and reasonably necessary means of achieving the legitimate aims of the respondent.

86. The claimant made a brief oral submission on his own account. He argued that nobody had been in touch with him for several months while he was absent. He did not think it was fair that during the pandemic the respondent's bosses were well paid while others suffered.

87. If he had not been absent, he would not have been dismissed. His absences were related to his disability. A non-disabled employee would not be likely to be absent at the same level.

88. He argued that the respondent's dismissal of him amounted to a substantial disadvantage on the grounds of disability, and pointed to the respondent's refusal to make changes to his shifts. It is a large company with an obligation to offer him alternative employment. They run many depots and they should have been able to accommodate him.

89. The claimant submitted that he was proactive during this time, and asked for part-time work, which was never agreed. They were not proactive in seeking out a solution for him. There is no defence for the company, he argued, because they never engaged with him.

90. He argued that it would have been very easy to accommodate him in a part-time role.

91. If the respondent had made the reasonable adjustment of disregarding all disability related absences, he would still be employed and would not have been dismissed.

The Relevant Law

92. In an unfair dismissal case, it is necessary for the Tribunal to have regard to the statutory provisions of section 98 of ERA. The Tribunal considered the

requirements of section 98(1) of the Employment Rights Act 1996 ("ERA"), which sets out the need to establish the reason for the dismissal; section 98(2) of ERA, which sets out the potentially fair reasons for dismissal; and section 98(4) of ERA, which sets out the general test of fairness as expressed as follows:

> *"Where the employer has fulfilled the requirements of sub-section (1), the determination of the question whether the dismissal was 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 employers 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 the equity and substantial merits of the case."*

93. **DB Schenker Rail (UK) Ltd v John Doolan 2011 WL 2039815** is an EAT decision in which Lady Smith clarified that the well known test in **British Home Stores Ltd v Burchell [1978] IRLR 379** can apply to capability dismissals, and accordingly a Tribunal must consider:

    i. whether the respondents genuinely believed in their stated reason;

    ii. whether they had reasonable grounds on which to conclude as they did; and

    iii. whether it was a reason reached after a reasonable investigation.

94. The EAT has made it clear that the decision to dismiss on the grounds of capability is a managerial, not a medical, one.

95. Section 15 of the Equality Act 2010 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.*

96. Section 20 of the 2010 Act sets out requirements which form part of the duty to make reasonable adjustments, and a person on whom that duty is imposed is to be known as A. The relevant sub-section for the purposes of this case is sub-section (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."*

97. Section 21 of the Equality Act 2010 provides as follows:

"(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…"

98. The Tribunal also took account of the authorities to which the parties referred us in submissions.

Discussion and Decision

99. In this case, the issues are as follows:

1. **What was the reason for the claimant's dismissal?**

2. **Was the claimant's dismissal unfair?**

3. **What remedy, if any, should be awarded to the claimant?**

4. **Was the claimant discriminated against under section 15 of the Equality Act 2010?**

5. **Was the claimant discriminated against under section 19 of the Equality Act 2010?**

6. **Did the respondent fail to make reasonable adjustments in relation to the claimant, under sections 20 and 21 of the Equality Act 2010?**

7. **What remedy, if any, should be awarded to the claimant in relation to his claims of unlawful discrimination?**

100. The Tribunal addressed each of these issues in turn.

1. **What was the reason for the claimant's dismissal?**

2. **Was the claimant's dismissal unfair?**

3. **What remedy, if any, should be awarded to the claimant?**

101. These three issues were taken together as bearing upon the claimant's first claim, of unfair dismissal.

102. The first task for the Tribunal is to determine the reason for the claimant's dismissal. The respondent's evidence, and the letter of dismissal itself, confirmed that the reason for the claimant's dismissal was that of capability, namely that he had been absent due to ill health for some 7 months, and was therefore incapable of rendering regular and effective service.

103. The claimant did not, in our view, dispute that this was the reason for dismissal. He did not suggest that there was another, unspoken, reason for

dismissal, or that the respondent was not genuine in its conclusion that he was no longer capable of working in the role in which he was employed.

104. Accordingly, the Tribunal must determine whether the claimant's dismissal was unfair.

105. Mr Strachan, the dismissing officer, gave evidence that since the claimant remained unfit for work, and that there had been little improvement in his mental health; and that there was no expected return to work date and no alternative roles within the business available; his decision was to dismiss the claimant on the grounds of capability.

106. We considered that Mr Strachan was entirely genuine in reaching that view, and that he took into account the facts which were available to him at the time when he made the decision.

107. By that date, 18 August 2020, the respondent had the OH reports from Mr Humphrey, the most recent of which had indicated that *"It is too soon, taking account of this, to predict with any degree of accuracy, whether he will require adjustments to either his hours or duties on a permanent or temporary basis."*

108. He also said, in that same report, that there was no light at the end of the tunnel, and that it was not possible to say when the claimant would be likely to return to work.

109. The claimant continued to submit fitness to work statements which consistently stated that he was unfit for work, over extended periods of time – several of the notes signed him off work for 2 months – and did not propose any adjustments to be made in order to assist him to return.

110. In our judgment, it was quite clear that the claimant was not in a position to return to work, and that there was no evidence to suggest that he would be able to do so for the foreseeable future.

111. Further, no adjustments were being suggested to the respondent by OH which might have alleviated the problem and allowed him to return to

work. Essentially, we considered that the respondent was entitled to take the view that there was no indication available to them that the claimant would be capable of returning to work. The claimant himself continued to confirm to the respondent that he remained unwell, and that he was struggling with sleep and socialising.

112. We have concluded that the respondent was entitled to conclude, on the evidence, that the claimant had no reasonable prospect of being able to return to work within any defined timescales, due to his ongoing illness.

113. Did the respondent carry out a reasonable investigation to allow them to reach this conclusion? In our judgment, they did. They referred the claimant to OH on two occasions and received comprehensive reports setting out their view as to his ability to work; they took account of the claimant's ongoing absence and the certified reasons for that absence; and they consulted with the claimant in order to obtain his own views about his illness and capacity to work.

114. They had reasonable grounds for reaching the conclusion that the claimant was unable to return to work owing to ill health for the foreseeable future, in our judgment.

115. They also considered whether there were other steps which could have been taken but determined that there were not. In our judgment, the respondent was justified in reaching this conclusion for two reasons: firstly, the claimant mentioned the possibility of part time work as a means of returning to work, but that discussion was frustrated by the advice of OH that any adjustments to the claimant's role would require to be considered only once he was in fact fit to work, a stage which was never reached; and secondly, the respondent was operating in a time of great difficulty, during the lockdown caused by the global pandemic, and was thus unable to identify suitable alternative roles for the claimant which would have been available at the time. The claimant repeatedly suggested that he could have worked in the ticket office, or the bus tours, but at that time, there were no

staff working in the ticket office due to Covid-19, and no tours were taking place.

116. As the respondent points out, the Tribunal must avoid substituting its own decision for that of the employer in cases such as these, and while it is not difficult to be sympathetic to the claimant, particularly given his previous excellent attendance record, it is our judgment that the decision made by the respondent to dismiss him at the time when it was made and in the circumstances was a fair one.

117. We also found that the respondent followed a fair procedure. The claimant was offered the opportunity to attend and be represented at the hearing and appeal hearings which led to his dismissal and its review. The trade union representatives who accompanied him did not, in our view, challenge the fundamental soundness of the respondent's reasoning, but suggested that longer should have been given to the claimant to enable him to recover from his illness. In our judgment that argument was not a strong one and did not find favour with us, but the claimant had the opportunity to make representations on the evidence before the respondent.

118. We concluded that the decision to dismiss the claimant fell within the band of reasonable responses open to a reasonable employer in the circumstances. The claimant appears to take the view that because the respondent is a large employer with a number of depots they should be able to tolerate an even longer absence than he had. This is not a view we could sustain. The respondent is a large employer, but it is entitled to implement its absence management policy, negotiated with its trade unions, and it is not required to wait indefinitely for an employee to recover, particularly in circumstances where the medical and other evidence available to them gives no indication as to whether, and if so when, he would be in a position to resume his employment with them. In any event, albeit that the respondent may have a number of places of work for its employees, the issue here was not so much that there was a lack of places for the claimant to be deployed, but that he was unfit to return to work on any basis at the

point when he was dismissed. That was the reason for his dismissal and we do not find that dismissal to be unfair in all the circumstances.

4. Was the claimant discriminated against under section 15 of the Equality Act 2010?

119. In order to determine this question it is necessary, firstly, to determine whether the claimant was a disabled person within the meaning of section 6 of the Equality Act 2010.

120. The respondent, in submissions, accepted that the claimant is, and therefore was at the material time, a disabled person within the statutory definition.

121. The question of whether the respondent knew or ought reasonably to have known that he was a disabled person remains open, and in dispute, and we address that below.

122. The claimant's claim is that the respondent treated him unfavourably on the grounds of disability by dismissing him on 18 August 2020.

123. We are of the view that the claimant's dismissal could amount to unfavourable treatment on the grounds of disability.

124. Did the dismissal arise in consequence of the claimant's disability? Since the claimant's disability caused the claimant's long absence from work, and was fundamentally the reason why he was unable to provide regular and effective service to the respondent, we concluded that the dismissal did arise in consequence of his disability.

125. Next, we concluded that the unfavourable treatment – his dismissal – was because of his sickness absence. There was no other reason given by the respondent for his dismissal.

126. We then considered whether the respondent's decision to dismiss him amounted to a proportionate means of achieving a legitimate aim. The respondent argued that the legitimate aims it had in mind were:

- promote and secure a reasonable level of attendance at work;
- minimise the administrative and management time spent dealing with absenteeism;
- support colleagues and facilitate a return to work and
- ensure that the respondent can operate effectively, efficiently and profitably.

127. We accepted that these are legitimate aims for an employer to have, and that it is important for us to consider both parties' perspectives on the events which took place here. For the claimant, this was all about him and his own position within the company; for the respondent, the claimant's case was one of many, which require to be subject to the same principles and policies in order for each case to be dealt with equitably.

128. The respondent argues that in the circumstances dismissal was an appropriate and reasonably necessary way of achieving those aims. The pressures which bore upon those in management such as Mr Strachan were significant, and at the time when he had to deal with the claimant's absence he had many other duties which he had to carry out without much support. The context of the claimant's absence is critical, in our view; an unexpected pandemic had decimated the services being provided by the respondent, and they had to make many decisions on individual cases as well as more broadly in order to try to provide essential services and meet the needs of their employees.

129. In light of the fact that the claimant was not able to render regular and effective service, and that there was no evidence to suggest that he would be able to do so within the foreseeable future, we have concluded that the decision to dismiss the claimant was a reasonably necessary step in order to achieve the legitimate aims of the organisation.

130. Could something less discriminatory have been done instead? In our judgment, it would be unjust to find that the respondent should have done

something else at that time given the circumstances, and given the clear information they had about the claimant's ill health.

131. Balancing the needs of the claimant and the respondent is always difficult in a case such as this, particularly given that the claimant passionately believes that he should have been retained in employment so as to allow him more time to recover, but in our judgment, the respondent's priority, to seek to return the claimant to work within a reasonable period of time, was legitimate, and it would be unreasonable to expect of the respondent that they should allow the claimant's lengthy absence to be extended further. We consider that the interests of the claimant and the respondent are well balanced in this way.

132. Accordingly, we have concluded that the claimant's claim under section 15 of the 2010 Act fails, and must be dismissed.

133. The Tribunal did, nevertheless, consider whether, at the point of dismissal, the respondent knew, or ought reasonably to have known, that the claimant was disabled.

134. It should be noted that in his report of 25 February 2020, Mr Humphrey said that while the application of the definition of disability was ultimately one for the Tribunal, he was of the opinion that the claimant had had a mental condition which had lasted longer than 12 months, had an impact on his activities of daily living including working, sleeping, concentration etc and was in receipt of medication and impending therapy. While Mr Humphrey did not specifically express his opinion, it is plain that the terms of his report were such as to suggest that in his opinion the claimant was a disabled person.

135. The difficulty for the Tribunal is that we heard very little evidence about the claimant's previous experience of depression, and in the report the only previous diagnosis referred to was that made at the start of February 2020.

136. At the point of dismissal, we have concluded that the respondent may well have been in the position that they ought reasonably to have known that the claimant was a disabled person, since he had had the diagnosis of depressive disorder from early February 2020, he had not been fit for work for some 7 months, his condition showed no signs of improvement and he was taking anti-depressant medication and receiving therapy. However, at that stage, it was not entirely clear that the claimant was suffering from a condition which was likely to last more than 12 months, and so it is difficult for us to conclude the matter one way on the balance of probabilities.

137. We have, with some hesitation, concluded that it cannot be said that the respondent knew, or ought reasonably to have known, that the claimant was suffering from a condition which had a long-term and significant adverse impact upon his ability to carry out normal day-to-day activities.

5. Was the claimant discriminated against under section 19 of the Equality Act 2010?

138. We have noted that this claim was not pursued by the claimant before us. In his further and better particulars of claim, he withdrew this claim of indirect discrimination under section 19 of the 2010 Act (68). Accordingly, that claim is dismissed.

7. Did the respondent fail to make reasonable adjustments in relation to the claimant, under sections 20 and 21 of the Equality Act 2010?

139. The claimant relied upon 3 PCPs in his further and better particulars (68):

1. The respondent's practice of requiring employees to work varying shifts and refusing requests to work only set shifts;

2. The respondent's practice of refusing requests to move from full-time to part-time work; and

3. The respondent's practice of applying their attendance at work policy to employees based on any/all sickness absences, both in terms of when the policy is triggered and with regard to any decision made as a result of the policy.

140. We required to consider whether the respondent did in fact apply these PCPs in such a way as to cause employees of the same protected characteristic of the claimant a substantial disadvantage, and to cause him that substantial disadvantage.

141. In our judgment, there is no basis upon which it can be suggested that the respondent operated a practice of requiring employees to work varying shifts and refusing requests to work only set shifts. We heard evidence from the claimant that his request to work set shifts was refused, but no evidence led by him to demonstrate that this amounted to any more than an individual decision related to his own circumstances. In any event, the evidence of the respondent made clear that his request might have been granted had it offered a different set shift pattern.

142. Accordingly, we are not persuaded that the claimant had proved that the first PCP was actually applied by the respondent.

143. Secondly and similarly we are not persuaded that the respondent refused requests, as a matter of practice, to move from full time to part time work. The evidence plainly showed that the respondent was willing to consider such requests, and that other staff do have such requests granted. Indeed, it was plain to us that the problem with the claimant's request was not that it involved a reduction in his working time to part time employment but that the pattern suggested, of working early shifts only on a Saturday and Sunday, was not one to which they could agree. There were other times when they would have been content for the claimant to work, but it was not the part time aspect of the application which caused its refusal. The request was refused because it did not assist the respondent in covering essential shifts at other times, and it would not have been regarded as fair

by the respondent to give the claimant the right only to work on weekend mornings, which we were told were attractive shift times, but not to have to work on other occasions. In other words, the problem was not that he wanted to reduce his hours, but with the times and days he was prepared to work.

144. It is quite clear, therefore, that the claimant has failed to prove that the second PCP was applied by the respondent.

145. The third PCP did amount to a valid PCP, in that the respondent did apply their absence at work to the claimant, and did not disapply all of the absences which were related to his disability in triggering action under the policy. The PCP made reference to the inclusion of “any/all absences”, but in his evidence before us, the claimant made it quite clear that his complaint was that the respondent should not have taken any of his absences into account when deciding to take action against him.

146. Notwithstanding the concerns we have about the claimant’s failure to prove that the first two PCPs were actually applied by the respondent, we move on to deal with the claimant’s claims in that light. He complains that the respondent failed to carry out reasonable adjustments in order to ameliorate the substantial disadvantage to which he was then subject.

147. The first reasonable adjustment the claimant argues should have been applied was that they should have granted his flexible working request.

148. In our judgment, the claimant is entirely misguided in this claim. He submitted his request in December 2019, and was issued with the decision on that request on 27 December 2019, before he became absent due to his depressive illness. There is simply no basis upon which it could be said that the respondent should have known that he was disabled at that time, for the following reasons:

1. He was not disabled at that time. His depressive illness was diagnosed in January 2020 and not before, on the evidence before us.

2. In his flexible working request, he indicated that he was not suffering from any disability.

3. The flexible working request was made not for a reason related to his disability, but for family reasons. In other words, he wished to adapt his hours in order to help look after his ailing wife.

4. The reasons for refusal of his request are entirely unrelated to his disability. The letter of outcome (196) confirmed that it was refused because it would have a detrimental effect on the respondent's ability to meet its customers' demands, create unacceptable difficulties for the respondent as they were unable to make arrangements to reorganise the work among other staff and in causing an insufficiency of work during the periods he proposed to work. There are no grounds for suggesting that the claimant's disability was in any way connected to the decision.

149. The claimant's argument was that had he been allowed to amend his shifts he would not have been absent from work. We are entirely unconvinced by this suggestion, which is not supported in the evidence. The claimant has failed to prove that there was any connection between the shift pattern he wanted to work and his capacity to work.

150. Accordingly, we concluded that the refusal of the claimant's flexible working request did not amount to a failure to make reasonable adjustments.

151. The second adjustment sought by the claimant was that the respondent should have been granted the right to work part time, which he submitted at the capability meeting of August 2020.

152. The further and better particulars put forward by the claimant unhelpfully conflate this statement, which did not amount to a request but an assertion, with the flexible working request. At that point, the claimant was unfit to work. No evidence has been presented to us that had he been offered part time work he would then have become able to return to work. The evidence all indicated that he was unfit to work; any adjustments, including the consideration of part time work, would require to await confirmation that he had recovered sufficiently to be able to work, but that stage was not reached.

153. We do not find that the respondent's failure – if that was what it was – to offer him part time work amounted to a reasonable adjustment which would have ameliorated the substantial disadvantage he suffered, that is, his dismissal. There is no basis for suggesting that the claimant was fit to work at all. It must be remembered that the claimant was a bus driver, which is a highly responsible job in which many risks arise. The respondent was entirely justified in seeking to ensure that the claimant was fit to return to work before considering how best to reintegrate him into the workplace.

154. The third adjustment which the claimant argued should have been put in place for him was essentially that the respondent should not have commenced the attendance at work process, nor dismissed the claimant, on the basis that they should have discounted all absences which related to his disability.

155. The claimant was asking the Tribunal to find that the respondent should discount all of his absences from consideration of the absence management policy, because they related to a disability. We found this to be an extraordinary assertion, for which he put forward no credible basis. He did not point to any provision in law or in the respondent's own policy which might have justified such a step. It is within the knowledge of the

Tribunal that some employers do provide for the discounting of a percentage of absences where they can be said to relate to a disability, but not that there is any foundation for suggesting that all such absences should be ignored.

156. Essentially, the claimant is arguing that the respondent should be obliged to employ him in perpetuity, notwithstanding his inability to provide any form of regular or effective service under the contract of employment. We do not regard that as a reasonable adjustment. We consider that the respondent was justified in reviewing the facts in this case, and determining that in the absence of any prospect of the claimant being able to return to work within a foreseeable period of time they had no alternative but to dismiss him. To require them to disregard his entire absence would be an unreasonable burden for any employer to carry, and in our judgment, therefore, would not be a reasonable adjustment to have taken in this case.

157. The claimant's claims under sections 20 and 21 of the 2010 Act are therefore dismissed.

158. The claimant's claims all therefore fail, and are dismissed. On that basis, the Tribunal does not require to address the issue of remedy in relation to the discrimination claims as no remedy is awarded.

Employment Judge: Murdo Macleod
Date of Judgment: 17 December 2021
Entered in register: 20 December 2021
and copied to parties