THE EMPLOYMENT TRIBUNALS

Claimant: Mr M Elliott

Respondent: The Commissioners for Her Majesty's Revenue and Customs

Heard at: Newcastle Hearing Centre (by CVP) **On:** 24, 25 and 26 January 2022
with deliberations on 27 January 2022

Before: Employment Judge Morris
Members: Ms S Don
Mr K Smith

Representation:
Claimant: In person
Respondent: Mr A Tinnion of Counsel

RESERVED JUDGMENT

The unanimous judgment of the Employment Tribunal is as follows:

1. The claimant's complaint that, contrary to section 21 of the Equality Act 2010, the respondent failed to comply with its duty under section 20 of that Act to make adjustments is not well-founded and is dismissed.

2. The claimant's complaint that the respondent unlawfully discriminated against him by treating him unfavourably because of something arising in consequence of his disability contrary to sections 15 and 39 of the Equality Act 2010 is not well-founded and is dismissed.

3. The claimant's complaint that his dismissal by the respondent was unfair, being contrary to Section 94 of the Employment Rights Act 1996 with reference to Section 98 of that Act, is not well-founded and is dismissed.

4. The claimant's complaints that the respondent discriminated against him with reference to age, whether direct age discrimination (as described in section 13 of the Equality Act 2010) or indirect discrimination (as described in section 19 of that Act) were withdrawn by the claimant and are dismissed.

REASONS

The hearing, representation and evidence

1. This was a remote hearing, which had not been objected to by the parties. It was conducted by way of the Cloud Video Platform as it was not practicable to convene a face-to-face hearing, no one had requested such a hearing and all the issues could be dealt with by video conference.

2. The claimant appeared in person and gave evidence. The respondent was represented by Mr A Tinnion, of Counsel, who called four employees of the respondent to give evidence on its behalf: namely, Mr S Brown, the claimant's line manager; Mrs K Blades, the Dismissing Officer; Mr I Forster, the Appeal Officer; Dr R Hampson lead for Telephony (Customer Engagement Transformation).

3. The evidence in chief of or on behalf of the parties was given by way of written witness statements, which had been exchanged between them. The Tribunal also had before it a bundle of agreed documents comprising some 680 pages contained in two lever arch files. That quantity of documents is to be deprecated given that none of the documents in the second file was considered during the hearing and reference was made to only a fraction of those contained in the first file. The numbers shown in parenthesis below refer to the page numbers or the first page number of a large document in the bundle.

The claimant's complaints

4. The claimant's complaints were as follows:

    4.1 His dismissal by the respondent was unfair contrary to sections 94 and 98 of the Employment Rights Act 1996 ("the 1996 Act").

    4.2 The respondent had discriminated against him contrary to certain provisions of the Equality Act 2010 ("the 2010 Act") in that:

        4.2.1 the respondent had treated him unfavourably because of something arising in consequence of his disability as described in section 15 of that Act, that unfavourable treatment being dismissing him;
        4.2.2 the respondent had failed, contrary to section 21 of the 2010 Act, to comply with the duty to make adjustments imposed upon it by section 20 of that Act;
        4.2.3 the respondent had directly discriminated against him because of age, as described in section 13 of that Act, and in that regard his dismissal was discriminatory contrary to section 39(2)(c) of that Act;
        4.2.4 the respondent had indirectly discriminated against him in relation to his age, as described in section 19 of that Act, and in that regard also his dismissal was discriminatory contrary to section 39(2)(c) of that Act.

    4.3 Although at the commencement of this Hearing the claimant confirmed that he was pursuing each of the above complaints, after the evidence had

concluded and Mr Tinnion was beginning to make submissions on behalf of the respondent, the claimant confirmed that he accepted that he did not have the evidence required to sustain either of the complaints of age discrimination, which he withdrew. In these circumstances, although evidence was given in relation to the complaints of age discrimination it is neither necessary nor proportionate that any part of the proceedings relating to those complaints should be recorded below.

5. For completeness, the Tribunal records that in an email dated 27 July 2020 the claimant stated that he wished to amend his claim to add an allegation of "discrimination in respect of advancement, promotion". That possibility was discussed at a preliminary hearing on 7 August 2020 ("the Preliminary Hearing") and, on 3 September 2020, the claimant applied to amend his claim accordingly. By letter of 20 December 2020, that application was refused for the reasons stated.

The issues

6. The issues in this case had been fully canvassed with the parties at the Preliminary Hearing. The outcome of that hearing being a matter of record details need not be set out fully in this part of these Reasons but are summarised below.

7. First, however it is appropriate to record the following concessions and agreements on the part of the respondent:

Dismissal

7.1 The claimant was dismissed by the respondent.

Disability

7.2 The claimant suffers from physical impairments in both knees, which caused him physical pain from time to time.

7.3 The respondent was on actual notice of those impairments at all material times since 1 January 2014.

7.4 Such knee impairments constituted a disability within the meaning of section 6 of the 2010 Act.

7.5 The respondent knew of that disability at all material times since 1 January 2014.

7.6 The respondent offered certain reasonable workplace adjustments to assist the claimant in dealing with his disability; that being accepted by the claimant.

Discrimination arising from disability

7.7 The respondent dismissed the claimant because of his absence record and inability to identify a date on which he would be able to return to work to perform the duties of his post, and that dismissal for those reasons was unfavourable treatment.

7.8 The claimant's dismissal occurred in part because of the claimant's absence record at the time of his dismissal

7.9 The claimant's absence record was something that arose in consequence of his disability.

Failure to make reasonable adjustments

7.10 By no later than 4 August 2016, the respondent required the claimant, first, to carry out the duties of his post and, secondly to perform those duties in its offices for all or a majority of his working time; that reflecting the provisions, criteria or practices ("PCPs") identified by the claimant at the Preliminary Hearing, being as follows:

7.10.1 a requirement to carry out the role of personal adviser, personal taxes;
7.10.2 a requirement to work from the office.

7.11 The application of the second PCP put the claimant, because of his disability, to a substantial disadvantage consisting of the following mobility/comfort difficulties: while travelling to work; while discharging the duties of his work in the office; travelling back from work.

7.12 From no later than 4 January 2016 the respondent,

7.12.1 employed other people including non-disabled people in the claimant's post, and,
7.12.2 required those employees to perform their duties in the respondent's offices for all or majority of their working time.

7.13 Due to the claimant's disability and the mobility/comfort difficulties referred to above, the application of the second PCP did or would put the claimant at a substantial disadvantage in comparison to the respondent's non-disabled employees in the same post as the claimant.

8. The remaining issues that fell to be determined by the Tribunal can be summarised as follows:

Discrimination arising from disability

8.1 Whether the unfavourable treatment (i.e. the claimant's dismissal) was a proportionate means of achieving a legitimate aim? The respondent has stated that its capability and attendance/absence management policies, pursuant to which the claimant was dismissed, served the following legitimate aims:

8.1.1 Managing and/or ensuring the respondent's operation, financial and service needs are met.
8.1.2 Managing and/or ensuring that the respondent has staff fit to perform the duties of their post.
8.1.3 Managing attendance of employees long term absent from work.
8.1.4 Managing employee attendance in a manner agreed/approved by unions.
8.1.5 Managing and/or ensuring that burden on respondent's other employees caused by long-term absence of an employee is managed and addressed.

8.2 The Issues arising in light of the above are as follows:

8.2.1 Whether the claimant's dismissal was an appropriate and reasonably necessary way to achieve those aims?
8.2.2 Whether something less discriminatory could have been done instead?
8.2.3 How should the needs of the claimant and the respondent be balanced?

Failure to make reasonable adjustments

8.3 Whether the application of the first of the above PCPs to the claimant put him at a substantial disadvantage compared to someone without his disability?

8.4 Whether the respondent knew or could reasonably have been expected to know that the claimant was likely to be placed at the disadvantage?

8.5 What steps could have been taken to avoid the disadvantage? As set out in the record of the Preliminary Hearing, the claimant suggests the following:

8.5.1 To be allowed to work from home, doing off-line work only; the claimant accepting that such adjustment would only have been a reasonable one to avoid the substantial disadvantage from 19 November 2019 onwards.
8.5.2 To be allowed to work from the office, avoiding telephony work and only doing off-line work; the claimant similarly accepting that that duty would have arisen only from 19 November 2019 onwards.
8.5.3 The respondent to provide the claimant with parking facilities, which he said arose in 2014 when parking facilities were withdrawn from him.
8.5.4 The respondent to provide the claimant with an adjustable desk with an adjustable height setting to enable him to adjust his posture, which he said also arose in 2014; it being noted that this is not so much a duty to make adjustments but a duty to provide an auxiliary aid.

8.6 Whether those steps were ones that it was reasonable for the respondent to take to avoid the disadvantage to the claimant and, if so, and when?

8.7 Whether the respondent failed to take those steps?

Unfair dismissal

8.8 What was the reason or principal reason for the claimant's dismissal it being noted that the respondent relies upon the potentially fair reason of capability, being the claimant's long-term absence due to ill-health?

8.9 If the reason was capability, whether in all the circumstances including the size and administrative resources of the respondent, it acted reasonably in treating capability as a sufficient reason to dismiss the claimant, having regard to equity and the substantial merits of the case? Potentially relevant matters will include whether,

8.9.1 the respondent genuinely believed the claimant was no longer capable of performing his duties;
8.9.2 the respondent adequately consulted the claimant;
8.9.3 the respondent carried out a reasonable investigation, including finding out about the up-to-date medical position;
8.9.4 the respondent could reasonably be expected to wait longer before dismissing the claimant;
8.9.5 dismissal was within the range of reasonable responses open to the respondent?

9. For want of time, the issues considered at this Hearing were related to liability only and not to any issues in respect of remedy, if any.

Consideration and findings of fact

10. Having taken into consideration all the relevant evidence before the Tribunal (documentary and oral), the submissions made on behalf of the parties at the Hearing and the relevant statutory and case law, including that referred to by Mr Tinnion, (notwithstanding the fact that, in pursuit of some conciseness, every aspect might not be specifically mentioned below), the Tribunal records the following facts either as agreed between the parties or found by the Tribunal on the balance of probabilities.

10.1 The respondent is a very well-known and extremely large employer with considerable resources including a dedicated Human Resources Department ("HR").

10.2 The claimant was employed by the respondent from 14 March 2004 until his dismissal on 3 December 2019, with 13 weeks' notice (179); thus, his employment ended on 3 March 2020. Although earlier in his employment the claimant had performed other roles, at the time of his dismissal he was employed as a Customer Services Adviser in Personal Tax Operations (PTO). In that role, his responsibilities involved him mainly answering complex tax queries via telephony and sometimes answering customer queries via post and 'webchat'.

10.3 Prior to the commencement of his employment with the respondent, the claimant suffered significant crush injuries to his legs, which caused and continue to cause him significant pain, particularly in his knees. In these respects, the respondent made adjustments to the claimant's work including allowing him to take additional breaks. Despite his injuries, the claimant had not required any sickness absence from work on that account (and had worked regular overtime) but he had taken a few occasional days' sickness absence for other reasons (232). Occupational Health ("OH") reports dated 25 July 2017 (106) and 25 April 2018 (109) record, amongst other things, that the claimant was fit for work with adjustments for pain, including postural respite breaks and appropriate display screen equipment ("DSE") breaks, and that the existing DSE was suitable for his requirements.

10.4 On Sunday, 14 July 2019 the claimant experienced a significant increase in pain in his left knee, which caused him to be absent from work on Monday 15 July. Indeed, from that day onwards the claimant did not return to work before his dismissal. Mr Brown spoke to him on that day, 15 July, and the claimant reported feeling "loads of pain" and that his mobility was "massively affected". Mr Brown asked the claimant if he wished to adjust his hours of work and offered him a day attending work but working "off the phones" but the claimant declined saying that whatever the work he would not be able to attend the office that day or that week (114). Mr Brown agreed to contact the claimant again a week later.

10.5 The claimant submitted a fit note dated 18 July, which provided that, due to knee pain, the claimant was not fit for work from that day until 29 July 2019 (119). The claimant submitted a second fit note in similar terms covering the period from 25 July until 14 August 2019 (120).

10.6 As he had promised, Mr Brown telephoned the claimant on 22 July (117). He reported that he was still in a lot of pain with much reduced mobility and had been prescribed painkillers. Mr Brown repeated the offer for the claimant to do non-telephony work with additional breaks, and reduced shifts but although the claimant was grateful he declined as he said he was too uncomfortable to walk or sit at work all day. Again, Mr Brown agreed to contact the claimant a week later.

10.7 On 29 July Mr Brown met the claimant for an informal meeting in accordance with the respondent's attendance management procedures (121). The claimant informed Mr Brown that he was in extreme pain and was wearing a knee brace. Mr Brown offered the claimant certain adjustments to try to get him back to work. These included doing processing rather than telephony work (meaning that he could get up and walk around if he needed to), additional breaks and a possible phased return. Again the claimant thanked Mr Brown but said that he could not return to work.

10.8 A further fit note dated 12 August 2019 certified the claimant as being not fit for work until 8 September 2019.

10.9 As the claimant had been continuously absent from work for one month Mr Brown convened a formal attendance review meeting with him on 15 August 2020 (123) in accordance with the respondent's attendance management procedures. Matters discussed at the meeting included the following:

10.9.1 Mr Brown explained that if it was unlikely that the claimant could return to work within a reasonable time period his continued employment could be affected including that he could be dismissed. He had been absent for a total of 26 days and the attendance management policy stated that the consideration points in relation to poor attendance were 8 days or 4 separate episodes of absence over a 12 month period.

10.9.2 The claimant explained his current problems with his left knee, which created instability when he walked (meaning that he needed to stay in a safe, closed environment), disrupted his sleep pattern and caused him constant pain whether sitting or standing.

10.9.3 Mr Brown confirmed that any reasonable adjustments would be made to get the claimant back to work and gave examples of days spent processing or a phased return but the claimant explained that he was "not well enough at the moment" and he could not think of any reasonable adjustments that he would like or need although a parking pass would be useful so he could park close to the doors. The claimant said that the particular issues preventing him coming to work were stiffness from sitting/standing, pain and stability. He explained that a knee brace would help with his stability but could weaken his knee more as it would be protected by the brace. He would be interested in a phased return when he was well enough.

10.9.4 The claimant explained that the physiotherapist was to review his knee on 28 September.

10.9.5 The possibility of ill health retirement was discussed, if the claimant met the criteria, and Mr Brown reminded the claimant of forms of assistance including the employee assistance programme ("PAM") and Access to Work.

10.10 After the meeting Mr Brown reflected upon their discussions and he completed a "Decision making – Manager's record" template (127). His decision was to sustain the claimant's attendance. Mr Brown notified the claimant of his decision by letter of 22 August 2019 (128). In his witness statement Mr Brown stated that his letter included "correctly noting that Mr Elliott had declined the opportunity to be referred to Occupational Health for advice" but in oral evidence he accepted that that was inaccurate as the claimant had not declined that opportunity.

10.11 On 22 August Mr Brown again called the claimant (130) who told him that there had been "no improvements" in his condition, neither the pain nor his mobility had really improved.

10.12 A fit note dated 4 September 2019 certified the claimant as not fit for work from that date until 6 October 2019 (132).

10.13 The next contact between Mr Brown and the claimant was by telephone on 6 September 2019 (133). Mr Brown explained that given the claimant's length of absence a "month 2" meeting should take place on 15 September but would be delayed due to the claimant receiving his MRI scan results on 20 September and it would help to have as much information as possible of the extent of the injury. He asked if the claimant could return to work with the adjustments that had previously been offered: for example, moving his desk closer to the toilets/kitchen, a temporary reduction of hours, processing work and remote working from home. The claimant again thanked Mr Brown but declined his suggestions as he "felt too uncomfortable to come in". He informed Mr Brown that he had had his knee brace re-adjusted but was not feeling much benefit.

10.14 Mr Brown called the claimant again on 13 September 2019 (134). Mr Brown restated the offer of adjustments but the claimant stated that there was no chance of him coming into work even with the reasonable adjustments that had previously been offered. He explained that he could not sit for long periods or walk.

10.15 As the claimant had been absent for 50 days, by letter of 16 September (135) Mr Brown invited him to attend a second formal attendance review meeting with him on 24 September. In his letter Mr Brown reminded the claimant of his right to be accompanied and that his employment could be affected if his sickness absence could no longer be supported. The notes of the meeting (with some amendments made by the claimant being shown in green ink) (138) record that the matters discussed included the following:

10.15.1 The recent MRI results indicated that the claimant needed a different type of brace in respect of which he was seeing an orthotist on 16 October.

10.15.2 The claimant did not think he would be able to return to work when his current fit note ran out on 6 October. He thought that the time taken in receiving the new knee brace, trying it for a week and then it being reviewed would mean that he would be off work for one more month from 6 October.

10.15.3 The adjustments previously offered were again considered including that the claimant "could complete processing from home if needs be" but the claimant thought that the adjustments would not help "at this moment" and that there were no other adjustments he would like Mr Brown to consider.

10.15.4 As previously, the possibility of ill health retirement and support from PAM and Access to Work were discussed.

10.16 Mr Brown once more completed a "Decision making – Manager's record" template (147) and again decided to sustain the claimant's attendance. Mr Brown notified the claimant of his decision by letter of 3 October 2019 (149) in which it is recorded that the claimant had agreed to be referred to Occupational Health ("OH").

10.17 A further fit note dated 2 October 2019 certified claimant as not fit for work from that date until 12 November 2019. Although it was not contained within

the bundle of documents available at the Hearing during a break the claimant looked for and found a subsequent fit note that certified him of being unfit to work to 3 January 2020. The existence and content of this fit note was accepted on behalf of the respondent without requiring the claimant to produce a copy of it.

10.18 OH conducted a telephone assessment with the claimant on 7 October 2019. The report produced that day (150) recorded the claimant's background and current position. The advice was, "In my opinion Elliot can return to work when his certificate expires" as the Case Manager expected "his pain would be much better controlled, his mobility would have improved." A minor point in this respect is that the Case Manager recorded that the claimant's certificate expired in six weeks but the Tribunal notes that the then current medical certificate expired on 12 November. The claimant would require a workstation assessment, flexibility to stand up and have short stretches when required, regular one-to-one meetings with management to ensure his continued recovery and flexibility to have time off for hospital appointments. His condition was likely to fall under the provisions of the disability aspect of the Equality Act. In the above circumstances, she had not organised to speak to the claimant again.

10.19 When Mr Brown telephoned the claimant again on 9 October 2019 (152) he informed him that he had had his OH referral but at that point the report had not been received. The claimant advised Mr Brown that he was "still in pain and still feels really uncomfortable when walking and or sitting for prolonged periods of time". Mr Brown reiterated the previous offer of adjustments but the claimant again declined saying that he was "in too much pain to even come in."

10.20 The claimant having been absent for some three months, Mr Brown conducted a third formal attendance review meeting with him on 17 October 2019 (153). The notes of the meeting, which the claimant approved without amendment (157), record that the matters discussed included the following:

10.20.1 Mr Brown informed the claimant of the purpose of the meeting and that if it was unlikely that he would return to work within a reasonable time period his continued employment could be affected including dismissal or downgrading, which the claimant confirmed he understood.

10.20.2 The claimant informed Mr Brown that a provisional date of 4 November had been set for the claimant to receive his new knee brace. The consultant had informed the claimant that surgery would not help, "They said it is not improving and will only get worse".

10.20.3 Asked whether he thought he would return to work on the expiry of his fit note on 12 November he answered, "Probably not", explaining that he needed the new brace, which would have to be checked and there was an additional problem with his arthritis.

10.20.4 The claimant had not received the OH report (which Mr Brown said he would send him) but informed Mr Brown, "I will not return until I am cleared". When Mr Brown informed the claimant that OH had

recommended a new DSE assessment, he responded, “I don’t want to commit to giving a return to work today until I am cleared”. In oral evidence the claimant explained that by using the word “cleared” he meant that would not return to work until he was given clearance to do so by his treating physicians (explaining that by that he meant his GP, the doctors in the orthopaedic department, his physiotherapist and the orthotist) in the sense that his rehabilitation and stabilisation had reached a level where there was no risk of further damage and degeneration would not occur rapidly. He also confirmed in evidence that none of those persons had ever cleared him as being fit to return on any basis.

10.20.5 The claimant informed Mr Brown that the physiotherapist had said “it is not improving and will only get worse.”

10.20.6 Mr Brown restated the adjustments he had previously suggested including, once more, “you could complete processing from home if needs be”. The claimant replied that he had been thinking a lot about that and once he received the new knee brace, “I think I need a job where I can potter around and take additional breaks”. Mr Brown commented that the claimant could do that in the office where adjustments could be made so that he could move freely. He asked the claimant if there were other adjustments he would like to be considered and responded, “No not at the moment”.

10.20.7 As previously, ill health retirement, PAM and Access to Work were raised and then the claimant indicated that there was nothing else that he would like to add.

10.21 Mr Brown again completed a “Decision making – Manager’s record” template (158) but on this occasion decided that the claimant’s case should be sent to a Decision Manager. His reasoning was that the claimant’s inability to return to work could continue for a couple of months after which, if he did not make a full recovery, he would still be unable to attend work. Various adjustments had been offered to the claimant to enable him to return to work including remote working from home on processing on a temporary basis but all adjustments had been declined by the claimant who had said that his condition was not improving, was degenerative and was only going to get worse. Fundamentally, the claimant had given no indication of a return to work within a reasonable time. In evidence, the claimant agreed that the fact-finding upon which Mr Brown based his decision had been reasonable.

10.22 Mr Brown advised the claimant of his decision by letter of 28 October 2019 (159) and informed him that Mrs Blades would contact him in due course. At this point, Mr Brown completed a “Referral to Decision Manager Recommendation of Dismissal” (185) in which he summarised matters thus far including that a fit for work plan and had not been arranged as there had been “no indication of a return to work” (191).

10.23 Summarising Mr Brown’s involvement, the claimant said in evidence that he was very supportive, was, “Fighting my corner to the best of his ability within the constraints of management” and agreed that he had “bent over

backwards" to do his best to help the claimant get back to work. The claimant also accepted that the various notes of the telephone calls and meetings between him and Mr Brown were broadly accurate non-verbatim records. Further, throughout that time, he had been unfit for any work in any location due to excruciating pain and that at no point had his GP recorded on any of the fit notes that he was fit for work if any of the benefits referred to in the template fit note certificate were to be made available for him.

10.24 Mrs Blades wrote to the claimant on 11 November 2019 (161) inviting him to attend a meeting with her on 19 November at which, amongst other things, he would have the opportunity to put forward any additional new facts which he wished her to consider. She advised him of his right to be accompanied.

10.25 On 19 November Mrs Blades contacted HR to check if the claimant met the criteria for ill-health retirement but was advised that in his particular circumstances he was unable to apply (163). The notes of the meeting between the claimant and Mrs Blades on 19 November (173 with additional points could be made by the claimant at page 175) include the following:

10.25.1 The claimant first rehearsed the background to his condition and the advice and treatment with which he had been provided, including a stronger knee brace some 2 to 3 weeks previously. He explained that that was the reason for the delay in him returning to work on the expiry of his fit note on 12 November 2019 as the OH report had suggested.

10.25.2 The claimant informed Mrs Blades that his "condition is chronic and degenerative and is not going to improve". He was "not in a position to return to work at the moment and is unable to provide a return to work". Further, his current fit note was valid up to 6 December 2019 and he "was unable to confirm if he would be able to return to work on expiry of current fit note." His next consultant appointment was in March 2020 and he did not have an appointment with his orthotist, whom it was the claimant's responsibility to contact.

10.25.3 The claimant confirmed that he had been offered various adjustments by Mr Brown but "they would not enable him to return to work at present". A permanent reduction in his hours would not help and he was worried that it could make his condition worse. He explained that he was unable to sit comfortably with his knee brace (which was only fitted to assist him with his mobility) and he was also unable to stand for long periods.

10.25.4 Although OH had recommended a DSE workplace assessment the claimant confirmed that he already had various DSE adjustments in place and nothing else would be of benefit to him at present; additionally, a job at a lower grade would not be of any benefit.

10.26 Under cover of a letter dated 22 November 2019 (164), Mrs Blades sent the claimant the notes of their meeting. In his email of 26 November the claimant acknowledged receipt and informed Mrs Blades that he had

obtained an appointment with the orthotist with a view to providing a more appropriate knee brace as the current brace did not provide the support relief anticipated.

10.27 Mrs Blades completed a "Decision-making – Manager's record" template (177), which is dated 3 December 2019. She decided that the claimant should be dismissed her reasoning being recorded as follows:

> "I have taken into consideration the full facts of this case and taken advice from HO colleagues. Based on this and information supplied in meeting on 19 November 2019, a return to work within a reasonable timescale has not been provided, despite a number of adjustments offered to him by his Manager."

10.28 Mrs Blades also recorded:

> "If I continue to support the absence without a planned return to work date from job holder, there is the risk the absence will continue beyond a reasonable timescale and AWDL will be impacted."

In her witness statement, Mrs Blades explained that AWDL stood for "average working days lost" and was related to Departmental sick absence targets not to a specific individual. In answering questions she maintained that the impact recorded in the above note "certainly had no bearing" on her decision, which was based on the claimant's circumstances at the time. Somewhat surprisingly, she could not explain why, therefore, she had made the reference to AWDL in both the decision-making record and her witness statement.

10.29 In light of the claimant's email of 26 November Mrs Blades also recorded that since their formal meeting the claimant had sent her an email advising that he was seeing his orthotist with a view to having a more suitable knee brace fitted. In this respect she also added her opinion that, "This will result in a more prolonged absence if this is supported".

10.30 The claimant had requested that Mrs Blades should inform him of her decision at a face-to-face meeting, which she convened on 3 December 2019. Mrs Blades handed the claimant her decision letter (179) and summarised its content. There are no notes of that meeting. In answering questions at the Hearing Mrs Blades accepted that although the possibility of redeploying the claimant to a different role completely had not been raised by him at their meeting on 19 November he did raise it at their meeting on 3 December but by then Mrs Blades had made her decision and informed the claimant that he could lodge an appeal. She explained at the Hearing that she did not consider the possibility of redeploying the claimant to a different role within the respondent as the adjustments offered were to help him in his current role, in which she believed he was happy.

10.31 In her decision letter Mrs Blades recorded that she had "decided to end your employment on the grounds of continuing absence". She then explained,

"My decision is due to the fact you have been unable to provide a return to work within a reasonable timeframe and you have confirmed there are no current adjustments that will enable you to return to work", which in cross examination the claimant confirmed was 100% accurate as at that date.

10.32 Mrs Blades subsequently noted certain errors in her decision letter, which she amended and reissued, albeit with the same date of 3 December 2019 (207).

10.33 In the decision letter the claimant was offered a right of appeal, which he exercised by letter of 6 November (181). Mr Forster was appointed to hear the claimant's appeal and wrote to him to that effect on 29 January 2020 (209). This delay arose from the fact that the person who had initially been appointed to consider the claimant's appeal had too great a workload in relation to other cases to allow him to do so. In his letter, Mr Forster explained that the respondent's procedures provided for three permissible grounds of appeal, which he set out and asked claimant upon which of those grounds he relied. The claimant responded on 11 February (210). He set out the background to his employment and his ill-health including excerpts from OH reports. In the section of his letter headed "Appeal Grounds" the claimant set out, amongst other things, the following:

10.33.1 His contention that the decision to dismiss him was wrong and "new information had become available" but in cross examination he accepted that no new information was in fact available.

10.33.2 At the meeting with Mrs Blades on 3 December 2019 he "advised that working from home was something I could do, and medically agreed, as would take mobility limitation issues out of the equation. I was advised by the Decision Maker I could appeal the dismissal decision."

10.33.3 In response to Mr Forster having requested from the claimant a desired outcome he stated "this would be compensation equal to three years gross pay."

10.34 Adverting to the third of the above matters the Tribunal notes, as did Mr Forster, that the claimant did not seek a return to work in his former role, neither did he seek re-engagement in a different role.

10.35 Although it had been omitted from the bundle of documents, during the course of the hearing the claimant located a further fit note dated 7 December 2019 that again certified him as being not fit for work until 3 January 2020 due to knee pain.

10.36 By letter dated 18 February 2020 (213) Mr Forster invited the claimant to attend an appeal meeting on 27 February 2020. In that letter he encouraged the claimant to prepare by reading the "Supporting Your Attendance" policy (which he enclosed) and considering the following: what outcomes he would like from the meeting; whether there was any other information he thought Mr Forster would need to be aware of; the claimant's Wellness Plan and any further support that may help him to improve his well-being. He

reminded the claimant that the respondent's Employee Assistance Programme was available to support and advise him around any concerns he may have relation to the meeting, and provided the helpline telephone number. He also advised the claimant of his right to be accompanied at the meeting.

10.37 At the meeting (215) Mr Forster noted that the main focus of the claimant's appeal appeared to be that he had not been offered Working from Home, which the claimant had stated would have been the solution. Mr Forster explained that in relation to employment with the respondent there was a difference between Working from Home and Remote Working. Working from Home was for staff whose place of work is normally their home. It could only be considered as a possibility on a very short term temporary basis, where a return to work date could be given. Remote Working allowed staff whose place of work was normally in the workplace the opportunity, subject to business need and workloads, on occasion to work from home. Remote Working was only being trialled at the time.

10.38 Mr Forster reminded the claimant that he had been offered Remote Working as a reasonable adjustment in the formal attendance review meeting on 17 October 2019 but had replied that it was something he could not consider at that time. Mr Forster advised the claimant that Working from Home was not something that could be offered to the claimant at that time but enquired whether he would be able to remote work for part of the week then come into the office for the rest. The claimant replied that he was not able to do that as he needed flexibility due to his mobility and his medication. He continued that "he was not in a position to return to work. He could work from home fully, then possibly 6 months down the line review it again after new treatment if it becomes available"; he would not be able to return to work now. Mr Forster sought confirmation that if remote working was offered the claimant would still not be able to return to work and he replied that he would not "as there was no flexibility like at home".

10.39 Mr Forster asked the claimant if he felt that the decision to end his employment was not supported by other factors or he had any new evidence. He replied that all the information was there, such as OH reports but he could get further medical reports. He stated, "From his point of view he was still capable of work and could work from home fully and build a package which could be reviewed in 6 month's time. He could come into work once a month to meet with his manager and then return back home." Mr Forster reiterated, however, that "working from home was not an option for anyone in PT Ops". In this connection however the Tribunal notes that in cross examination, the claimant confirmed that at the time of the appeal meeting he was "still unfit for work".

10.40 In conclusion, Mr Forster asked the claimant if he was happy with the conduct of the hearing and had been given the opportunity to state his case and provide any further evidence or mitigation. The claimant replied that "he didn't want to overcomplicate things and that he was looking into getting clarity around the ill-health retirement and compensation". Once more,

therefore, as with the outcome that the claimant had said in his appeal letter that he was seeking the claimant did not say that he was hoping for a return to work in his former role or re-engagement in a different role.

10.41 Mr Forster completed an Appeal Managers Deliberation Template (218). Having summarised the claimant's appeal, Mr Forster set out his decision not to uphold the appeal. Amongst other things, he recorded that he had to consider whether Mrs Blades was in a position to offer working from home as a reasonable adjustment. That could have been considered as a short-term temporary arrangement providing a return to work date was given but the claimant had been unable provide a return to work date and had requested working from home as a solution and for the position to be reviewed in six months' time. Mr Forster noted, however,

> "Working from Home for an indefinite period is not available and cannot be considered in PT Operations. The role involved the job holder spending all or the majority of their time in the workplace. Job holders can be offered various reasonable adjustments and specialist equipment to facilitate a return to work, but Working from Home is not an adjustment that can be considered for the reasons already given."

10.42 On 5 March 2020 Mr Forster wrote to inform the claimant of his decision not to uphold his appeal (220). He explained that the reason for his decision was that the claimant had been unable to provide a return to work date and "Working from Home" which he had requested was not an adjustment that could be considered as he said was explained in more detail in the Deliberation Template, which he enclosed with his letter along with the minutes of their meeting.

10.43 Dr Hampson had no involvement in any part of the above process. His evidence related to the respondent's employees undertaking work from home. At the time relevant to these proceedings, no employees working in the Customer Services Group (as did the claimant) undertook work at home. While that might have been technically possible, the barriers included whether minimum service levels of performance, well-being and engagement could be maintained; how a variety of business processes could be supported (including supporting employee well-being) such as some processes involving large machines that are only located in the office and others requiring paperwork with a "wet signature"; security/data protection issues; how service users would feel about discussing personal information with an adviser who was not working in the normal secure office environment; a lesser degree of supervision and control of the environment; the cost of providing suitable equipment. That changed, however, when the respondent needed to react to the impact of the Covid-19 pandemic. A choice had to be made between providing a low quality service or accepting the security risks involved in allowing staff to work at home. The latter prevailed as the security profile had changed; the risk in the office was higher than the risk at home. As Dr Hampson put it, "either take the risk or

don't do the work". First there was a trial of some 4 to 5 weeks with homeworking beginning in approximately May 2020.

Submissions

11. After the evidence had been concluded Mr Tinnion and the claimant made submissions. It is not necessary for the Tribunal to set out those submissions in detail here because they are a matter of record and the salient points will be obvious from its findings and conclusions below. Suffice it to say that the Tribunal fully considered all the submissions made and the parties can be assured that they were all taken into account by the Tribunal in coming to its decision.

12. That said, the key points made by Mr Tinnion on behalf of the respondent included as follows:

12.1 The claimant has pursued the issue of redeployment during these proceedings. In accordance with the decision in Chandhok v Tirkey, however, the claimant cannot pursue that issue. It is not referred to in his claim form (ET1), not in the issues considered at the Preliminary Hearing, not in the claimant's witness statements and has not been dealt with in the respondent's evidence. In particular, the claimant has not suggested that the respondent was in breach of the duty to make reasonable adjustments in failing to redeploy him rather than dismissing him.

12.2 As to credibility, all the witnesses including the claimant had sought to assist with their honest recollections. The claimant's attempts to give his best, honest recollection is not challenged.

Unfair dismissal

12.3 The range of reasonable responses applies and is not judged with the benefit of hindsight.

12.4 The respondent relies upon capability being long term absence on health grounds. There is not a high burden and it has been discharged. The claimant had been off work since July 2019 and there is no dispute that he had been signed off as being unfit and there was no return to work date in sight.

12.5 As to procedure the respondent adopted a fair and transparent process, which was well within the band of reasonable responses. Mr Brown held regular keeping in touch meetings and three formal absence review meetings. The claimant was referred to OH who produced a timely report on 2 October 2019 only some six weeks before the dismissal meeting. The advice that the claimant was fit to work with adjustments was rejected by the claimant who stayed off work. The claimant has not suggested any material non-compliance, either technical or substantive, by the respondent with its policies.

12.6 As to substantive fairness, by 3 December 2019, the claimant had been absent for just under five months, had been certified unfit throughout and

there was no firm or prospective return to work date. The claimant had said that he would not return until he was "cleared" meaning that a team of people needed to sign him off: GP, OH, physiotherapist and his clinical/medical team but none had ever cleared him as fit to return. The alternative to dismissal was demotion, which was canvassed but was rejected by the claimant as it would not help. The question is whether the respondent could be expected to wait longer. The claimant had adduced no evidence of anything suggesting he might return. At the Preliminary Hearing the claimant had said that the respondent "should wait longer, perhaps a month" before dismissing him. If Mrs Blades had waited a month there is no evidence that at that time the claimant could return to work. Indeed a further fit note certified the claimant as being unfit to work to 3 January 2020. There is no evidence from any of those treating the claimant that his health had improved such that he was fit for work between the date of his dismissal and the appeal outcome on 5 March 2020; or after that date.

Discrimination arising from disability

12.7 Given the concessions by the respondent, the only issue is justification. The respondent has pleaded five aims and the claimant accepted in cross examination that they were legitimate aims. Therefore, the question for the Tribunal is to look at whether they were proportionate: could the respondent have done anything short of dismissal to achieve each aim? All reasonable adjustments were fully canvassed. Any extension of the support period would not have made any difference as the claimant was unfit at dismissal and at appeal and there is no evidence that he improved afterwards. Demotion was canvassed more than once but was rejected by the claimant. At dismissal the claimant had refused all the suggested reasonable adjustments including some Working from Home undertaking processing.

Reasonable adjustments

12.8 On the facts of the case there was no duty at all to make reasonable adjustments. If an employee is unfit and cannot do any work because of his or her health the duty does not arise because the reasonable adjustment cannot adjust the employee's health: see HMP v Johnson [2007] IRLR, Conway v Community Options Limited and Wade v Sheffield Hallam University [2017]. There is no duty to make any adjustment if the adjustment will not enable the claimant to return to work; and at all times the claimant was medically certified by his GP as being unfit and no evidence from those treating the claimant ever showed any material improvement such that he was fit for some type of work. He remained unfit because of his knee and, if so, it follows as night follows day that there was no duty to make adjustments to get him back to work because he could not.

12.9 Additionally, the claimant accepted that Mr Brown tried his level best to offer reasonable adjustments including temporary working from home processing. He was being offered a chance to prove he could work from home but that was declined.

12.10 Refinements of the reasonable adjustments sought by the claimant were discussed at the Preliminary Hearing, as recorded in paragraph 16a to d. In those respects:

b. Working from the office avoiding telephony was a non-starter as the claimant was not willing to attend the office after 19 November under any scenario.
c. The question of parking facilities arose in 2014, must be years out of time and Access to Work was repeatedly canvassed with the claimant but was rejected. On the claimant's evidence he was incapable of returning to work under any circumstances so parking is a moot issue.
d. The claimant says that the issue of the adjustable desk arose in 2014 so is years out of time, and a DFE assessment was canvassed with the claimant and he clearly declined as he was not requesting any additional arrangements
a. The claimant had said that the adjustment regarding being allowed to work from home, doing off-line work only arose from 19 November 2019 but nothing happened on that day or afterwards to trigger the duty, and any work undertaken by the claimant required him to be online connected to the Internet. A variety of issues would need to be addressed including the claimant's fitness to work from home; technology issues at the time; security concerns including data breaches and GDP issues, which do not arise at work; productivity.

13. The key points made by the claimant included as follows:

13.1 Mr Tinnion had said that at the time I had not brought up the question of alternative employment but in paragraph 29 of the respondent's amended response it is stated that in reaching the decision to dismiss the respondent had considered alternative employment. In meetings with Mr Brown he never suggested or raised alternative employment and I was focused on what he raised. If he had asked what I could do I would have gone to the physicians and asked, 'With different start times and role, what can I do?'

13.2 Mr Tinnion made much of me being unfit for work. I explained to the GP what I do and what adjustments are in place. I could not put forward to the GP alternative employment and seek his opinion of its suitability. The options in the fit note include altered hours, amended duties and workplace adaptations. I already had altered hours and amended duties were not discussed. The respondent was keen to keep me on telephony and I was never advised that they considered alternative employment. That they were focused on telephony is reinforced in the witness statements of Mrs Blades and Mr Forster. They were not prepared, on a long-term basis, to move me into a different role. All the suggestions were short-term – to get me back to work. That was fair comment but I needed to return to work in a role that did not make my condition worse. Alternative employment was never brought up – all that was on the table were these particular options. It was clear that

I could have been offered alternative employment. I could then go to the clinicians and say, 'This is what is proposed can we assess that'.

13.3 The advice in the OH report was that I could return to work when my certificate expired. She states that I could return to work in that role. There would have been a referral document to OH and there is nothing in that report to indicate that Mr Brown had discussed alternative employment.

13.4 All suggested adjustments related to a role in telephony and were temporary; not for more than one month. It was for a fixed time and they never discussed alternative employment.

13.5 Mr Tinnion had suggested that the fit note stating that I was unfit related to all sorts of work but I suggest it was limited to the work that I was in.

13.6 Mr Tinnion suggested that the removal of my parking pass was not relevant if I did not go to work but if I was in a different role it would have been extremely useful. He also mentioned taxis but all that was focused on my returning to work in telephony.

13.7 The most recent OH report was light compared with earlier ones in describing my condition. The respondent should have said that they needed another assessment and then they would have had a clear idea of what I could do for them; it was not a big ask to keep me in employment. It would have been easy to have a report and run through alternative employment but they did not and that makes it unfair. The respondent discriminated against me on ill-health because they did not consider alternative employment that would have been suitable and could have got a medical report.

The Law

14. The principal statutory provisions that are relevant to the issues in this case are as follows:

14.1 Unfair dismissal - Employment Rights Act 1996

"94 The right.

(1) An employee has the right not to be unfairly dismissed by his employer."

"98 General.

(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, …

(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,…..

(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.

14.2 Disability discrimination - Equality Act 2010

"15 Discrimination arising from disability

(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."

"20 Duty to make adjustments

(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."

"21 Failure to comply with duty

(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."

"39 Employees and applicants

(1) An employer (A) must not discriminate against an employee of A's (B)-

…….

(a) *by dismissing B;*

…….

(5) A duty to make reasonable adjustments applies to an employer."

"136 Burden of proof

(1) This section applies to any proceedings relating to a contravention of this Act.

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision."

Application of the facts and the law to determine the issues

15. The above are the salient facts and submissions relevant to and upon which the Tribunal based its Judgment having considered those facts and submissions in the light of the relevant law and the case precedents in this area of law.

16. There is a degree of overlap between the complaints presented by the claimant that the Tribunal has considered and each of those complaints was borne in mind throughout our deliberations. That said, the Tribunal considers that it is appropriate to address first the claimant's complaint that the respondent failed to comply with the duty to make adjustments as our decisions in respect of that complaint will inform our decisions in respect of the other two complaints of discrimination arising from disability and unfair dismissal.

17. That approach would be consistent with an aspect of the decision of the Court of Appeal in Griffiths v Secretary of State for Work and Pensions [2017] ICR 160 where, at paragraph 26, it is stated as follows:

> "An employer who dismisses a disabled employee without making a reasonable adjustment which would have enabled the employee to remain in employment – say allowing him to work part-time – will necessarily have infringed the duty to make adjustments, but in addition the act of dismissal will

surely constitute an act of discrimination arising out of disability. The dismissal will be for a reason related to disability and, if a potentially reasonable adjustment which might have allowed the employee to remain in employment has not been made, the dismissal will not be justified."

18. Similarly, in the Code it is stated at paragraph 5.21, "If an employer has failed to make a reasonable adjustment which would have prevented or minimised the unfavourable treatment it would be very difficult for them to show that the treatment was objectively justified"; this reflecting an aspect of the above quotation in Griffiths.

Failure to make adjustments

19. The following propositions (in no particular order) can be said to emerge from relevant case law in the context of the above statutory framework and the Code to which the Tribunal has had regard:

19.1 It is for the disabled claimant to identify the PCP of the respondent on which he relies and to demonstrate the substantial disadvantage to which he was put by that PCP.

19.2 It is also for the disabled claimant to identify at least in broad terms the nature of the adjustment that would have avoided the disadvantage; he need not necessarily in every case identify the step(s) in detail but the respondent must be able to understand the broad nature of the adjustment proposed to enable it to engage with the question whether it was reasonable. There must be before the tribunal facts from which, in the absence of any innocent explanation, it could be inferred that a particular adjustment could have been made: Project Management Institute v Latif [2007] IRLR 579.

19.3 There must be a causal connection between the PCP and the substantial disadvantage contended for: as was said in the decision in Nottingham City Transport Ltd v Harvey UKEAT/0032/12, "It is not sufficient merely to identify that an employee has been disadvantaged, in the sense of badly treated, and to conclude that if he had not been disabled, he would not have suffered; that would be to leave out of account the requirement to identify a PCP. Section 4A(i) of the Disability Discrimination Act 1995 provides that there must be a causative link between the PCP and the disadvantage. The substantial disadvantage must arise out of the PCP."

19.4 The test of reasonableness is an objective one: Smith v Churchills Stairlifts plc [2006] ICR 524, CA.

19.5 Making a reasonable adjustment may necessarily involve treating a disabled employee more favourably than the employer's non-disabled workforce.

19.6 "Steps" for the purposes of section 20 of the 2010 Act encompasses any modification of, or qualification to, the PCP in question which would or might remove the substantial disadvantage caused by the PCP: Griffiths.

19.7 It is important to identify precisely what constituted the "step" which could remove the substantial disadvantage complained of: General Dynamics Information Technology Ltd v Carranza [2015] ICR 169 and HM Prison Service v Johnson [2007] IRLR 951.

19.8 It can be a reasonable adjustment if there is a prospect that the adjustment would prevent the claimant from being at the relevant substantial disadvantage without there needing to be a good or real prospect: Leeds Teaching Hospitals NHS Trust v Foster [2010] UKEAT/0552/10. Thus, it is not for the claimant to prove that the suggested adjustment will remove the substantial disadvantage, it is sufficient if the adjustment might give the claimant a chance that the disadvantage would be removed and not that it would have been completely effective or that it would have removed the disadvantage in its entirety: see Griffiths and South Staffordshire and Shropshire Healthcare NH Foundation Trust v Billingsley UKEAT/0341/15 in which it is stated as follows:

"Thus the current state of the law, which seems to me to accord with the statutory language, is that it is not necessary for an employee to show the reasonable adjustment which she proposes would be effective to avoid the disadvantage to which she was subjected. It is sufficient to raise the issue for there to be a chance that it would avoid that disadvantage or unfavourable treatment. If she does so it does not necessarily follow that the adjustment which she proposes is to be treated as reasonable under Section 15(1) of the 2010 Act."

19.9 Notwithstanding the above, in Romec Ltd v Rudham [2007] UKEAT 0069/07/1307 it was held that the essential question for an employment tribunal is whether the adjustment would have removed the disadvantage experienced by the claimant. In that case, in remitting the issue to the same tribunal, the EAT directed that if the tribunal concluded that there was no prospect of the suggested adjustment succeeding, it would not be a reasonable adjustment: if, however, the tribunal found a real prospect of the adjustment succeeding it might be reasonable to expect the employer to take that course of action. Thus, an employer can lawfully avoid making a proposed adjustment if it would not be a reasonable step to take Royal Bank of Scotland v Ashton [2011] ICR 632. Similarly, at paragraph 6.28 of the Code it is provided that one of the factors that might be taken into account when deciding what is a reasonable step for an employer to take is, "whether taking any particular steps would be effective in preventing the substantial disadvantage".

19.10 Once a potential reasonable adjustment is identified, the onus is cast on the respondent to show that it would not have been reasonable in the circumstances to have had to take the step: Latif.

19.11 The question of whether it was reasonable for the respondent to have to take the step depends on all relevant circumstances, which will include the following:

19.11.1 the extent to which taking the step would prevent the effect in relation to which the duty is imposed;

19.11.2 the extent to which it is practicable to take the step;
19.11.3 the financial and other costs which would be incurred in taking the step and the extent to which taking it would disrupt any of the respondent's activities;
19.11.4 the extent of the respondent's financial and other resources;
19.11.5 the availability to it of financial or other assistance with respect to taking the step;
19.11.6 the nature of its activities and the size of its undertaking.

19.12 If a Tribunal finds that there has been a breach of the duty, it should identify clearly the PCP, the disadvantage suffered as a consequence of the PCP and the step that the respondent should have taken.

20. In the context of the above general position, the Tribunal moves on to consider the claimant's complaint in this case.

The duty

21. As indicated above, section 20(3) of the 2010 Act provides that the duty to make adjustments arises where an employer's PCP "puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled".

22. In that context, the Tribunal first considered the submission made by Mr Tinnion that (at the risk of some oversimplification) in this case the duty to make reasonable adjustments did not arise because, given that the claimant was at all times certified as being unfit to return to work, no adjustment would have enabled him to return as he could not do so. The Tribunal has brought into its consideration the authorities cited by Mr Tinnion but draws particular guidance from the decision of the Employment Appeal Tribunal in NCH Scotland v McHugh EAT 0010/06 in which it was said that the duty to make adjustments is not triggered unless and until the claimant indicated that he or she was intending or wishing to return to work: "We agree that a managed programme of rehabilitation depends on all the circumstances of the case, but it does include a return to work date." More particularly, having referred to the decision in The Home Office v Collins EWCA Civ 598 CA, the EAT continued:

> "It follows from the above analysis that while the Claimant was unable or unwilling to give a return to work indication, any adjustments would be futile. She was, after all, indicating through her medical certificates that she was unfit to work *at all*. If the indication were that she was fit to work part-time, an adjustment would have to be made for that. But while she is incapable of all work, it does seem pointless to impose a duty on an employer to make adjustments in case she can return, unless there is some reasonable prospect of that occurring."

23. The Tribunal considers that quotation to be particularly apposite in this case. As submitted by Mr Tinnion, throughout the claimant's absence his fit notes certified him as being unfit for any work rather than the alternative provided for in the template certificate that he might have been fit for work taking account of whatever advice might have been provided by the GP. Similarly, there is no evidence from

those whom the claimant described as being his treating physicians that he was anything other than unfit for any work during the entirety of his absence, and up to the appeal stage: to adopt the claimant's word, none of them ever "cleared" him for employment. This is of some significance not least because at their formal meeting on 17 October 2019 Mr Brown informed the claimant that if it was unlikely that he would return within a reasonable time he could be dismissed (which the claimant confirmed he understood), the OH advice on 7 October 2019 was that he could return to work when his current medical certificate expired on 12 November yet the claimant maintained an unwillingness to do so until he was "cleared". Such clearance was never given.

24. That the possibility of a return to work is relevant to the duty to make adjustments arising is also reflected in the respondent's attendance management policy in which it is stated, "Managers must make workplace adjustments to enable the job holder to attend work and carry out their role effectively" (252).

25. It is also relevant that although the claimant suggested at the appeal hearing that he should be permitted to work from home as a solution and for the position to be reviewed in six months' time, there was no supportive medical evidence that he was realistically in a position to do so. Indeed, as recorded above the claimant confirmed in cross examination that at the time of the appeal meeting he was "still unfit for work". On this basis also, the Tribunal is satisfied that the statutory duty was not triggered.

26. In short, the Tribunal is satisfied that the duty to make adjustments as set out in section 20 of the 2010 Act did not arise and, therefore, the claimant's complaint that the respondent failed to comply that duty is not well-founded. For completeness, however, (lest our decision in that important respect had been to the contrary) the Tribunal has gone on to consider other aspects of this particular complaint.

<u>The PCP and the substantial disadvantage</u>

27. The Tribunal reminded itself that it first must identify the PCP that the respondent is said to have applied: <u>Environment Agency v Rowan</u> [2008] IRLR 20. That is not contentious. At the Preliminary Hearing the claimant identified two PCPs being as follows:

    27.1 "The requirement to carry out the role of personal adviser, personal taxes".

    27.2 "The requirement to work from the office".

    The respondent has accepted that by no later than 4 August 2016, it required the claimant to carry out the duties of his post and to perform those duties in its offices for all or a majority of his working time.

28. The Tribunal similarly reminded itself that in <u>Rowan</u> it was also stated that it must consider the nature and extent of the substantial disadvantage suffered by the claimant. At the Preliminary Hearing the claimant explained that his contention was that the above PCPs placed him at increased risk of being subject to capability proceedings. In this connection the Tribunal accepts the respondent's position that

the application of the first of the above PCPs did not, of itself, put the claimant at that or any disadvantage but, as conceded by the respondent, the Tribunal is satisfied that the second PCP did place the claimant at a substantial disadvantage by reference to what are termed his "mobility/comfort difficulties".

29. That being so, section 20(3) continues that the employer is under a duty "to take such steps as it is reasonable to have to take to avoid the disadvantage".

The adjustments

30. As set out in paragraph 16 of the Case Management Summary arising from the Preliminary Hearing four adjustments have been contended for by the claimant in this case, which the Tribunal addresses in turn below.

To be allowed to work from home, doing off-line work only

31. Mr Tinnion submitted that none of the work available to the claimant could be done off-line as it would require some form of Internet access but the Tribunal considers that the claimant's description of "off-line work" is wide enough to include working away from the telephone line or system: i.e. not undertaking telephony. On that basis, the Tribunal is satisfied that permitting the claimant to work from home doing off-line line work only might have avoided the substantial disadvantage caused to him by the PCP requirement to work from the office.

From 19 November 2019 onwards, to be allowed to work from the office, avoiding telephony work and only doing off-line line work

32. The fundamental issue in this regard is that, as is described in more detail above, throughout his absence, whether before or after 19 November up until the date of the appeal meeting on 27 February 2020 (and so far as it is relevant, immediately beyond that date) the claimant was never certified by his GP as being fit to work from the office and neither did any other of those treating the claimant suggest that he was fit to do so.

33. Thus, this adjustment would not have removed any disadvantage caused to the claimant by the second of the above PCPs, being the requirement to work from the office: indeed, the claimant's contention that an adjustment should have been made to allow him to work from the office conflicts with his contention that the requirement to work from the office put him at a substantial disadvantage.

To provide the claimant with parking facilities

34. This adjustment is subject to the same fundamental issue as described above. The claimant was never in a position of being able to attend work and, therefore, providing him with parking facilities would have been "futile", to quote from the decision in Collins above. In any event, this contention is significantly out of time and the claimant has not provided any evidence as to why the primary three-month time limit should not apply in this case.

To provide an adjustable desk

35. As noted in the record of the Preliminary Hearing this is not so much a potential duty to make adjustments as it is a duty to provide an auxiliary aid under section 20(5) of the 2010 Act. That notwithstanding, the claimant confirmed that he did have an adjustable desk and, additionally, he declined a further DSE assessment when that was suggested to him. As with the above contention, this too is significantly out of time and the claimant has not provided any evidence as to why the primary three-month time limit should not apply in this case.

The reasonableness of the steps

36. Of the above adjustments, the Tribunal has found that only that of allowing the claimant to work from home doing off-line line work only might have avoided the substantial disadvantage caused to him by the PCP requirement to work from the office.

37. The Tribunal is satisfied on the evidence available to it, however, that such working arrangements at home were not available to the claimant or other employees of the respondent at the time relevant to these proceedings (which was before the respondent was obliged to reconsider these matters in the light of its response to the Covid pandemic) and that the "barriers" identified in the evidence of Dr Hampson precluded homeworking.

38. In the circumstances appertaining at the time, therefore, the Tribunal is satisfied that allowing the claimant to work from home doing off-line line work only was not a reasonable adjustment for the respondent to make

39. Additionally, in relation to the other three above adjustments contended for by the claimant, for the reasons set out above in relation to those adjustments, the Tribunal is satisfied that none of them would have avoided the substantial disadvantage to which the claimant was put by the second of the above PCPs and, therefore, those adjustments were also not ones which it was reasonable for the respondent take to avoid the disadvantage to the claimant.

40. In conclusion of this aspect of the claimant's claim, the Tribunal is satisfied that the claimant's complaint under section 21 of the 2010 Act that the respondent failed to comply with the duty under section 20 of the 2010 Act is not well-founded.

Discrimination arising from disability - section 15 of the 2010 Act

Unfavourable treatment

41. In relation to this complaint, as set out more fully above, the respondent has accepted that it dismissed the claimant, that his dismissal occurred in part because of his absence record and that absence record was something that arose in consequence of his disability.

42. Those issues therefore do not need to be taken much further. Suffice it to say that applying the guidance in Pnaiser v NHS England [2016] IRLR 170 and Basildon & Thurrock NHS Foundation Trust v Weerasinghe UKEAT/0397/14, the Tribunal is satisfied that the claimant's dismissal was unfavourable treatment, the cause or reason for that treatment was his absence record (coupled with him being able to

give even a potential date for his return to work) and, therefore, the unfavourable treatment was something arising in consequence of the claimant's disability.

Justification

43. It is to this issue of what is conveniently termed 'justification', therefore, that the Tribunal turns its attention: more accurately, "was the treatment a proportionate means of achieving a legitimate aim?" If so, in such circumstances it is provided in section 15(1)(b) of the 2010 Act that there will not be discrimination.

44. In this connection, the Tribunal adopts the two stage approach suggested at paragraph 4.27 of the Code (albeit there relating to the question of indirect discrimination) namely:

> "Is the aim ….. one that represents a real, objective consideration?
>
> If the aim is legitimate, is the means of achieving it proportionate – that is, appropriate and necessary in all the circumstances?"

45. The guidance contained in the Code is that the aim pursued should be legal, not discriminatory and must represent a real, objective consideration, which can include reasonable business needs and economic efficiency. To be proportionate, it should be "an 'appropriate and necessary' means of achieving a legitimate aim" which should not be achievable "by less discriminatory means". Finally, as to the meaning of "disadvantage", "It is enough that the worker can reasonably say that they would have preferred to be treated differently."

46. The Tribunal also applies the decision in Hardys & Hansons v Lax [2005] IRLR 726 that in considering the principle of proportionality, our task is to strike an objective balance between the reasonable needs of the respondent against the discriminatory effect of its measure in order to assess whether the former outweigh the latter; that is an objective test. There is no room to introduce into the test of objective justification the 'range of reasonable responses' which is available to an employer in cases unfair dismissal: see also Gray v University of Portsmouth EAT 0242/2020.

47. The respondent states that it had the five aims set out more fully above. Namely, managing and/or ensuring the following:

    47.1 that the respondent's operation, financial and service needs are met;

    47.2 that the respondent has staff fit to perform the duties of their post;

    47.3 attendance of employees long term absent from work;

    47.4 employee attendance in a manner agreed/approved by unions;

    47.5 that burden on respondent's other employees caused by long-term absence of an employee is managed and addressed

48. Although the claimant accepted that all of the above were legitimate aims, whether or not they were is a question for the Tribunal. It is satisfied that, with one

exception, each of the above was a legitimate aim that the respondent sought to achieve. The exception is that the Tribunal considers that the suggested aim relating to ensuring employee attendance in a manner agreed/approved by the unions is more a means of achieving the other four aims rather than being an aim in itself. The Tribunal is further satisfied, in terms of the Code, that each of those other four aims "represents a real, objective consideration".

49. A further point of relevance drawn from the Code is that, as set out above, it is stated at paragraph 5.21, "If an employer has failed to make a reasonable adjustment which would have prevented or minimised the unfavourable treatment it would be very difficult for them to show that the treatment was objectively justified". This provision in the Code is of obvious relevance in this case given that the Tribunal has already found that only one of the adjustments contended for by the claimant had a prospect of avoiding the substantial disadvantage to which he was put by the PCP, and even that one adjustment would not have been reasonable for the respondent to make; similarly, if its decision in respect of any of the other three adjustments had been to the contrary, it would likewise not have been reasonable for the respondent to make. In short, it is repeated that the Tribunal is satisfied that there was no failure on the part of the respondent to make reasonable adjustments.

50. Moving on to the question of proportionality, the Tribunal first repeats certain of its findings made above: during the period 14 July 2019 to the date of the claimant's dismissal on 3 December 2019, and beyond up to the date of the appeal meeting on 27 February 2020, the claimant had been certified as being unfit for any work in any location; there is no evidence from any of the claimant's treating physicians that he was anything other than unfit for any work throughout that period; the claimant accepted that the five aims relied upon by the respondent were legitimate aims; the claimant accepted that his absence was managed in accordance with the respondent's Attendance Management Policy.

51. In light of those and other findings set out above, the Tribunal has first weighed the needs of the respondent against the discriminatory impact of its decision on the claimant. The claimant understandably sought to continue in the employment that he had undertaken for in excess of 15 years; the respondent sought to achieve the aims set out above, and in this connection the Tribunal must also consider whether those aims can be achieved by less discriminatory means.

52. As set out above, throughout the management of the claimant's sickness absence the managers of the respondent who were involved in that process considered whether there were any steps that could be taken that would assist him in returning to work and thus avoid his dismissal. Those steps included allowing the claimant to work on processing work rather than telephony, working reduced hours, a phased return to work, reorganising the office so that the claimant could be closer to the toilets and kitchen facilities, returning to a demoted post, providing a DSE assessment and undertaking processing work from home on a temporary basis. Many of those steps were repeatedly offered to the claimant but on each occasion were declined. Thus, none of those steps would have achieved the respondent's aims by less discriminatory means. In this regard it is significant that when it was put to the claimant that it did not matter what adjustments were made he would not have been able to get back to work he agreed, "Yes". In the circumstances, the

Tribunal is similarly satisfied that avoiding the claimant's dismissal by extending the period during which the respondent sustained the claimant's attendance at work (as Mr Brown had done twice) would not have been productive in the absence of a clear return to work date and, would not have achieved the respondent's legitimate aims. In this regard the Tribunal acknowledges that at the appeal meeting the claimant did raise a proposal that he could work from home subject to a review in six months' time but accepts that it was reasonable for Mr Forster to reject that even as a temporary solution given that the claimant was not able to provide him with a date by which he could return to work.

53. In relation to this final point, in its findings of fact the Tribunal has accepted, on balance of probabilities, the evidence recorded by Mr Forster in the contemporaneous documents of his Deliberation Template and appeal outcome letter that his decision to reject the claimant's proposal that he could work from home subject to a six-month review was based upon the claimant's inability to provide a return to work date, which the Tribunal considers to be reasonable. In accepting that evidence, however, the Tribunal records that Mr Forster's evidence on this issue (both in his witness statement and in answer to questions) was not compelling. When asked why he had not explored the claimant's proposal he gave only inchoate answers that he did not deem Working from Home for up to 6 months "to be reasonable", "was not something I believed we could consider" and it appeared to him "was not a reasonable adjustment which could be offered to Mr Elliott while he was working in the PT Operations division". He did not, however, explain why not until, when pressed, he stated that there was no guarantee that after the six-month period the claimant would return to work and it would become an indefinite situation. He also said that whether the claimant was in a fit state to work from home and had the right environment would also have to be considered but, when asked, confirmed that he had not considered either of those matters and then added that there were other factors to consider such as security, "I did not believe it was a reasonable request".

54. The above notwithstanding, considering the evidence available to it as a whole as summarised in the findings of fact above, the Tribunal is satisfied that in all the circumstances the dismissal of the claimant was an appropriate and reasonably necessary way in which to achieve the respondent's aims as set out above. Further, that it would not have been possible for something less discriminatory to have been done instead.

55. At paragraph 4.26 of the Code it is stated that "it is up to the employer to produce evidence to support their assertion". Thus, it is for the respondent to establish that "treatment is a proportionate means of achieving a legitimate aim". In this case, on the basis of the findings summarised above, the Tribunal is satisfied that the respondent has done that.

56. In conclusion of this aspect of the claimant's claim in respect of discrimination arising from disability, for the reasons set out above, the Tribunal is satisfied that the claimant's complaint that the respondent discriminated against him by treating him unfavourably because of something arising in consequence of his disability as described in Section 15 of the 2010 Act, and discriminated against him contrary to Section 39(2)(c) of the 2010 Act by dismissing him is not well-founded.

Unfair dismissal

57. The issues in respect of the claimant's complaint that his dismissal by the respondent was unfair are set out in paragraphs 8.8 and 8.9 above. In this regard the Tribunal considered and applied section 98 of the 1996 Act and the relevant precedents in this area of law as more fully set out below.

58. The first aspect of that section 98 is what was the reason for the dismissal and was that a potentially fair reason under section 98(1) of the 1996 Act? It is for the respondent to show the reason for the dismissal and that that reason is a potentially fair reason. By reference to the long-established guidance in Abernethy v Mott Hay and Anderson [1974] IRLR 213, the reason for dismissal is the facts and beliefs known to and held by the respondent at the time of its dismissal of the claimant.

59. As set out in the record of the Preliminary Hearing, the claimant did "not accept the reason for his dismissal was ill health capability". During the course of the Tribunal Hearing he did not, however, explain why he did not accept that as being the reason for his dismissal. It might have been that he considered that his age was relevant in this regard but, as mentioned above, he withdrew any complaint of age discrimination. Be that as it may, on the evidence before the Tribunal it is satisfied that the respondent has discharged the burden of proof upon it to show that the reason for the claimant's dismissal was related to capability, that being a potentially fair reason.

60. Having thus been satisfied as to the reason for the dismissal, the Tribunal turned to consider the second aspect of that section of whether the respondent acted reasonably in dismissing the claimant for the reason of capability with reference to section 98(4) of the 1996 Act. That requires consideration of three overlapping elements, each of which must be brought into account:

    60.1 first, whether, in the circumstances, the respondent acted reasonably or unreasonably;

    60.2 secondly, the size and administrative resources of the respondent;

    60.3 thirdly, the question "shall be determined in accordance with equity and the substantive merits of the case".

61. In this regard the Tribunal reminded itself of the following important considerations:

    61.1 Neither party now has a burden of proof in this respect.

    61.2 Our focus is to assess the reasonableness of the respondent and not the unfairness or injustice to the claimant, although not completely ignoring the latter.

    61.3 The Tribunal must not substitute its own view for that of the respondent. This principle has been maintained over the years in decisions including Iceland Frozen Foods Limited -v- Jones [1982] IRLR 439 (re-confirmed in Midland Bank v Madden [2000] IRLR 288) and J Sainsbury plc v Hitt [2003] ICR 111. In UCATT v Brain [1981] IRLR 224 it was put thus:

> "*Indeed this approach of Tribunals, putting themselves in the position of the employer, informing themselves of what the employer knew at the moment, imagining themselves in that position and then asking the question, "Would a reasonable employer in those circumstances dismiss", seems to me a very sensible approach – subject to one qualification alone, that they must not fall into the error of asking themselves the question "Would we dismiss", because you sometimes have a situation in which one reasonable employer would and one would not*."

61.4 The decision in Polkey v AE Dayton Services Ltd [1988] ICR 142 firmly establishes procedural fairness as an integral part of the issue of reasonableness, which applies equally in cases of ill health dismissal such as this, including as to the procedure an employer has followed regarding such matters as engaging in discussions with the employee and obtaining up-to-date medical advice, both of which elements we address below.

61.5 Our consideration of whether the claimant's dismissal was fair or unfair is a single issue involving the substantive and procedural elements of the dismissal decision.

61.6 The 'range of reasonable responses test' (referred to in the guidance in Iceland Frozen Foods Limited and Post Office v Foley [2000] IRLR 827), which will apply to our decision as to whether the decision of the respondent to dismiss the claimant fell within the band of reasonable responses of a reasonable employer acting reasonably, applies equally to the procedure that was followed in reaching that decision: see, in the context of an ill health dismissal, Pinnington v City and County of Swansea EAT 0561/03, applying J Sainsbury plc v Hitt [2003] ICR 111.

62. The Tribunal acknowledges that while East Lindsay District Council v Daubney [1977] IRLR 181 is accepted as being a leading authority on medical investigation in the context of a fair capability dismissal, the well-established principles in British Home Stores Limited -v- Burchell [1978] IRLR 379 (albeit there in the context of a conduct dismissal) that were more recently endorsed in the decision of the Court of Appeal in Graham v The Secretary of State for Work and Pensions (Job Centre Plus) [2012] EWCA Civ 903 apply equally in the case of a dismissal for ill-health. That was made clear in the decision in DB Schenker Rail (UK) Ltd v Doolan (Unfair Dismissal: Reasonableness of dismissal) [2010] UKEAT/0053/09/1304 where it is stated, "the Tribunal is required to address three questions, namely whether the Respondent genuinely believed in their stated reason, whether it was a reason reached after a reasonable investigation and whether they had reasonable grounds on which to conclude as they did." As set out below, the Tribunal has brought each of those questions into account in making its decision. Addressing those three questions in turn, the Tribunal is satisfied on the basis of the evidence before it as follows:

Genuine belief

62.1 At the time the respondent (in the shape of Mrs Blades) took the decision to dismiss the claimant and (in the shape of Mr Forster) upheld that decision

on appeal, the Tribunal is satisfied that they did genuinely believe that the claimant's capability was such that his employment with the respondent should be terminated. They were satisfied that the claimant was incapable of returning to work on account of his ill health.

Reasonable investigation

62.2 The context for the investigation in this case was provided by the consistent fit notes from the claimant's GP that certified him as being unfit for any work and a relatively recent OH report dated 7 October 2019. In that context, Mr Brown had informal contact with the claimant either by telephone or in-person on seven occasions and conducted three formal attendance review meetings. There can be no doubt that he was fully aware of the claimant's circumstances and took those circumstances into account in twice deciding to sustain his employment before ultimately deciding to refer matters to Mrs Blades. She then engaged with the claimant during the course of their meeting on 19 November at which relevant matters were looked into before she decided that the claimant would not be able to return to work within a reasonable timescale and, therefore, his dismissal was appropriate. Matters were considered further by Mr Forster who again pursued relevant matters with the claimant before deciding not to uphold his appeal.

62.3 An aspect of any reasonable investigation is the reasonableness of the process adopted on behalf of the respondent. The matters set out in the immediately preceding paragraph are also relevant to this issue. Further, all the reasonable procedural steps that one would expect to see were apparent in this case: for example, giving the claimant notice of formal meetings, advising him of the purpose of the meetings and the potential consequences if he was unable to return to work, where appropriate informing him of the right to be accompanied, producing notes of formal meetings and inviting the claimant to prove them with or without amendment. Additionally the claimant did not challenge any of the respondent's witnesses as to the procedure adopted and was particularly warm in expressing his appreciation of Mr Brown's efforts on his behalf.

62.4 In East Lindsey District Council v Daubney [1977] IRLR 181 EAT the guidance given by the Employment Appeal Tribunal in relation to ill health dismissals included: "Unless there are wholly exceptional circumstances, before an employee is dismissed on grounds of ill-health, it is necessary that he should be consulted and the matter discussed with him, and that in one way or another, steps should be taken by the employer to discover the true medical position", "If the employee is not consulted and given an opportunity to state his case, an injustice may be done". Likewise, in Spencer v Paragon Wallpapers [1976] IRLR 37 the EAT stated, "Usually what is required is a discussion of the position between the employer and the employee so that the situation can be weighed up, bearing in mind the employer's need for work to be done and the employee's need for time to recover his health".

62.5 In this case the Tribunal is satisfied that the process undertaken on behalf of the respondent accorded with the above guidance and with the respondent's Attendance Management Policy, and was reasonable.

62.6 In summary, the Tribunal is satisfied that each of the three respondent's managers involved in the process did undertake a reasonable investigation.

Reasonable grounds

62.7 For the reasons fully set out in the findings of fact above, the grounds that were established by the managers' investigations were quite simply that the claimant was not fit to return to any form of work and could not offer a date or even a potential date by which he might be able to return.

62.8 A matter that has a bearing upon both the questions of reasonable investigation and reasonable grounds is the issue of redeployment, which is referred to above. In this regard Mr Tinnion interjected during the claimant's cross examination of Mrs Blades that the claimant could not pursue this issue as he had not referred to it in his claim form. The Employment Judge acknowledged that but suggested that the Tribunal could nevertheless consider redeployment as part of its consideration of whether the respondent had acted reasonably. Mr Tinnion responded that it was established by precedent that it could not do so, which the Employment Judge suggested would better be left to submissions. As set out above, at that stage of the hearing Mr Tinnion repeated that in accordance with the decision in Chandhok, the claimant could not pursue the issue of redeployment as he had not previously referred to it at any stage of the proceedings: in his claim form, at the Preliminary Hearing or in his witness statement.

62.9 This is an important point, which the Tribunal therefore addresses at some length. The Tribunal certainly accepts that in Chandhok & Anor v Tirkey (Race Discrimination) [2014] UKEAT 0190_14_1912 Langstaff J stated as follows:

> *"The claim, as set out in the ET1, is not something just to set the ball rolling, as an initial document necessary to comply with time limits but which is otherwise free to be augmented by whatever the parties choose to add or subtract merely upon their say so. Instead, it serves not only a useful but a necessary function. It sets out the essential case. It is that to which a Respondent is required to respond. A Respondent is not required to answer a witness statement, nor a document, but the claims made – meaning, under the Rules of Procedure 2013, the claim as set out in the ET1."*
>
> *"…. the starting point is that the parties must set out the essence of their respective cases on paper in respectively the ET1 and the answer to it. If it were not so, then there would be no obvious principle by which reference to any further document (witness statement, or the like) could be restricted. Such restriction is needed to keep litigation within sensible bounds, and to ensure that a degree*

of informality does not become unbridled licence." The ET1 and ET3 have an important function in ensuring that a claim is brought, and responded to, within stringent time limits. If a "claim" or a "case" is to be understood as being far wider than that which is set out in the ET1 or ET3, it would be open to a litigant after the expiry of any relevant time limit to assert that the case now put had all along been made, because it was "their case", and in order to argue that the time limit had no application to that case could point to other documents or statements, not contained within the claim form. Such an approach defeats the purpose of permitting or denying amendments; it allows issues to be based on shifting sands; it ultimately denies that which clear-headed justice most needs, which is focus. It is an enemy of identifying, and in the light of the identification resolving, the central issues in dispute.

"In summary, a system of justice involves more than allowing parties at any time to raise the case which best seems to suit the moment from their perspective. It requires each party to know in essence what the other is saying, so they can properly meet it; so that they can tell if a Tribunal may have lost jurisdiction on time grounds; so that the costs incurred can be kept to those which are proportionate; so that the time needed for a case, and the expenditure which goes hand in hand with it, can be provided for both by the parties and by the Tribunal itself, and enable care to be taken that any one case does not deprive others of their fair share of the resources of the system. It should provide for focus on the central issues. That is why there is a system of claim and response, and why an Employment Tribunal should take very great care not to be diverted into thinking that the essential case is to be found elsewhere than in the pleadings."

62.10 The above excerpts appear to support Mr Tinnion's submission but in the experience of this Tribunal such considerations are applicable in situations where, for example, one or other of the parties is seeking leave to amend the claim form or response, which was an issue in Chandhok. In contrast, in Langston v Cranfield University [1998] IRLR 172 the EAT held that seeking alternative employment in a redundancy case is so fundamental that (along with other fundamental issues) it will be treated as being in issue in every redundancy unfair dismissal case and that, accordingly, even if not raised specifically by the claimant, the employment tribunal will be expected consider it. The Tribunal acknowledges that that decision related to a complaint of unfair dismissal in a redundancy situation but nevertheless considers that guidance to be of general application in all claims of unfair dismissal. Whether or not that is correct, the fundamental point is that it is well-established that in considering whether an employer has acted reasonably in accordance with section 98(4) of the 1996 Act the essential task for any tribunal is to consider the wording of the statute itself, which this Tribunal has sought to do: in short, whether the respondent acted reasonably or unreasonably in treating the reason of capability as a sufficient reason for dismissing the claimant.

62.11 As set out above, the Tribunal is satisfied that redeployment itself was not considered by any of the three managers of the respondent who were involved in this process but in this case the reality was that the claimant was certified as being unfit to work in any role including one to which he might have been redeployed. A further material consideration in this regard is that Mr Tinnion is correct in his submission that the issue of redeployment had not previously been raised by the claimant who seemed to latch onto this argument during proceedings (perhaps as a result of a question asked by one of the Tribunal members) such that it became central to his cross examination of Mrs Blades and Mr Forster; similarly, it was the principal basis for his submissions all of which related to "alternative employment" or employment in a "different role" compared with "the work I was in". In this connection also it is relevant that although when the claimant raised the possibility of redeployment with Mrs Blades at their meeting on 3 December 2019 she responded that he could lodge an appeal, in his letter of appeal he did not refer to redeployment and stated that his desired outcome was "compensation" and not a return to work in either his role or an alternative role; additionally, at the appeal meeting, he did not raise redeployment and repeated that he was seeking "clarity around ill-health retirement and compensation".

62.12 In the above circumstances, the Tribunal is satisfied that given the grounds set out above, in accordance with the respondent's Attendance Management Policy, it had reasonable grounds by reference to which to make the decisions to dismiss the claimant and not to uphold his appeal against that dismissal.

63. In summary of the above three questions, set out in DB Schenker Rail (UK) Ltd the Tribunal is satisfied that those taking the decision to dismiss the claimant on behalf of the respondent and not to uphold his appeal genuinely believed that the claimant was incapable of returning to work in a reasonable timescale, had carried out a reasonable investigation and had reasonable grounds for their respective beliefs and, therefore, that he should not continue in his employment.

64. Moving on from those three questions, the final issue is the reasonableness or otherwise of the decision that the claimant should be dismissed. Referring to established case law such as Iceland Frozen Foods there is, in many cases, a range or band of reasonable responses to the situation of the employee within which one employer might reasonably take one view and another quite reasonably take another view. The function of this Tribunal is to determine in the circumstances of this case whether the decision of this respondent fell within the band of reasonable responses that a reasonable employer might have adopted

65. Key findings that the Tribunal has already made that are relevant to this question include the following: the consistent fit notes provided by the claimant's GP that certified him as being unfit for any form of work; no evidence that any of his four categories of treating physicians ever "cleared" him as being fit for work; the most recent OH adviser expressing her opinion that the claimant could "return to work when his certificate expires", which would be on 12 November 2019, but the claimant declining to return given that his treating physicians had not cleared him to do so. In these circumstances the Tribunal is satisfied that at the point of

dismissing the claimant and not upholding his appeal the respondent could not have been expected to wait any longer: see Spencer.

66. Considering all of the evidence before the Tribunal in the round it is satisfied that the decision in this case fell within the range of reasonable responses of a reasonable employer acting reasonably in the circumstances. Importantly, the claimant had remained unfit for any work throughout, he had been unable to provide a return to work date, there was no commitment to him returning to the office the respondent being primarily office-based at the time and redeployment was not raised by the claimant.

67. In the above circumstances, therefore, the Tribunal is satisfied that the claimant's complaint that his dismissal by the respondent was unfair is not well-founded.

Postscript

68. Having found none of the claimant's complaints to be well-founded the Tribunal nevertheless wishes to record that it is far from unsympathetic to the claimant's position. Ill health dismissals (like redundancy dismissals) can rarely, if ever, be said to be attributable to any fault of the employee. That does not, however, have a direct bearing upon the issues that the Tribunal has determined or on its consideration of those issues in accordance with the statutory and case law framework. In relation to the complaint of unfair dismissal, for example, as long ago as 1977 it was said in the case of W Devis & Sons Ltd v Atkins [1977] ICR 662 HL that the test of fairness directs "the tribunal to focus its attention on the conduct of the employer and not on whether the employee in fact suffered any injustice". Similarly, in the decision in Graham v The Secretary of State for Work and Pensions (Job Centre Plus) [2012] EWCA Civ 903 the Court of Appeal put it thus, "An ET must focus its attention on the fairness of the conduct of the employer at the time of the investigation and dismissal (or any internal appeal process) and not on whether in fact the employee has suffered an injustice."

Conclusion

69. In conclusion, the unanimous judgment of the Tribunal is as follows.

    69.1 The claimant's complaint that, contrary to section 21 of the 2010 Act, the respondent failed to comply with its duty under section 20 of that Act to make adjustments is not well-founded and is dismissed.

    69.2 The claimant's complaint that the respondent unlawfully discriminated against him by treating him unfavourably (i.e. dismissing him) because of something arising in consequence of his disability contrary to sections 15 and 39 of the 2010 Act is not well-founded and is dismissed.

    69.3 The claimant's complaint that his dismissal by the respondent was unfair, being contrary to Section 94 of the 1996 Act with reference to Section 98 of that Act, is not well-founded and is dismissed.

69.4 The claimant's complaints that the respondent discriminated against him with reference to age, whether direct age discrimination (as described in section 13 of the 2010 Act) or indirect discrimination (as described in section 19 of that Act) were withdrawn by the claimant and are dismissed.

EMPLOYMENT JUDGE MORRIS

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON 10 February 2022