THE EMPLOYMENT TRIBUNALS

Claimant: **Mr Thomas Nelson**

Respondent: **Co-operative Group**

Heard at: **Newcastle upon Tyne Hearing Centre**
On: **21st – 23rd February 2022**

Before: **Employment Judge Johnson**

Members: **Mr G Page**
Mr K Smith

Representation:

Claimant: **Ms H Hogben of Counsel**
Respondent: **Ms N Webber of Counsel**

JUDGMENT

The unanimous judgment of the employment tribunal is as follows:

1. The claimant's complaint of unfair dismissal is well-founded and succeeds.

2. The claimant's complaint of unlawful disability discrimination (unfavourable treatment because of something arising in consequence of disability, contrary to Section 15 of the Equality Act 2010) is well-founded and succeeds.

3. The claimant's other complaints of unlawful disability discrimination are not well-founded and are dismissed.

4. The claimant's complaint of unlawful deduction from wages is dismissed upon withdrawal by the claimant.

REASONS

1. The claimant was represented by Ms Hogben of Counsel, who called the claimant to give evidence. The respondent was represented by Ms Webber of Counsel,

who called to give evidence Mr James Anthony Dean (Transport Manager) and Ms Karen Anne Hopkinson (General Manager) to give evidence. The claimant and both witnesses for the respondent had prepared typed, signed, witness statements, which were taken "as read" by the tribunal, subject to questions in cross-examination and questions from the tribunal.

2. There was an agreed bundle of documents marked R1, comprising an A4 ring-binder containing 363 pages of documents. Ms Hogben prepared a skeleton argument marked CS1 and Ms Webber produced a skeleton argument marked RS1.

3. At the beginning of the hearing Ms Webber for the respondent informed Ms Hogben and the tribunal that the respondent's principal witness, Miss Sarah Hall, was unable to attend the hearing. No application was made for the issue for a witness order and no application was made for the postponement of the hearing. Ms Webber invited the tribunal to admit the witness statement of Miss Hall and to take it "as read". Alternatively, Ms Webber invited the tribunal to attach such weight to Miss Hall's statement as was appropriate in the circumstances, taking into account that she was not present to be sworn or to answer questions from the respondent or the tribunal. Ms Hogben for the claimant submitted that the tribunal should disregard Sarah Hall's statement in its entirety. Ms Hogben submitted that it was entirely unsatisfactory that she and the tribunal were only informed this morning that Miss Hall would not be attending the hearing. Ms Hogben pointed out that Ms Hall was the dismissing officer and thus the respondent's principal witness in terms of the unfair dismissal claim. After considering those submissions, the tribunal decided that the statement of Sarah Hall should be admitted in evidence, but that there should be attached to it only such weight as was appropriate to take into account that she was not present as to be sworn as to her evidence, nor to be cross-examined about its contents or to answer questions from the tribunal.

4. By a claim form presented on 15th February 2021, the claimant brought complaints of unfair dismissal, unlawful disability discrimination and unauthorised deduction from wages. Those claims arise from the claimant's dismissal on or about 15th September 2020, for reasons which the respondent says related to his capability to perform the duties for which he was employed, because of his long-term absence. The claimant had been absent from work due to illness from 5th November 2019 until he was dismissed on or about 15th September 2020. That was a period of approximately 10 months, during which the claimant had not attended for work. The claimant alleges that his dismissal was unfair because the stage had not been reached where the respondent could not be expected to wait any longer for him to return to work. In particular, the respondent had failed to carry out a thorough investigation into the claimant's medical condition, had failed to take into account the prospect of imminent surgery which was likely to correct the condition which caused the absence and to fairly to take into account the prospect of the claimant returning to work in the foreseeable future. The claimant further alleged that his dismissal amounted to unfavourable treatment because of something (his absence) which arose as a consequence of his disability and was thus a breach of Section 15 of the Equality Act 2010, in that the respondent could not show that its dismissal of him in those circumstances was a proportionate

means of achieving a legitimate aim. The claimant alleged that, had the respondent made reasonable adjustments to accommodate his disability, then he would have been able to continue working. The claimant also alleged that his dismissal was an act of direct discrimination contrary to Section 13 of the Equality Act 2010.

5. The respondent's position was that its dismissal of the claimant was substantively and procedurally fair. The stage had been reached where he could not be expected to wait any longer for the claimant to return to work. The claimant had been absent from work for 10 months and, as at the date of his dismissal, could give no firm indication as to when he may be able to return to work to perform the duties for which he was employed. The respondent conceded that the claimant is and was at all material times suffering from a disability as defined in Section 6 of the Equality Act 2010, but denied that this was the reason why he was dismissed and thus there was no act of direct disability discrimination, contrary to Section 13. The respondent conceded that its dismissal of the claimant was unfavourable treatment because of something (his absences) which arose as a consequence of his disability. However, the respondent argued that its dismissal was a proportionate means of achieving a legitimate aim, namely the upholding of its policies and procedures; managing attendance at work; managing human resources in order to meet service demand and contractual obligations; managing the effective performance of employee's contractual obligations and ensuring that its drivers held appropriate licences to enable them to carry out their duties. The respondent accepted that its requirement for employees to attend for work and perform all aspects of the role amounted to a provision, criterion or practice which may have placed the claimant at a disadvantage because of his disability. However, the respondent maintained that there were no adjustments which were reasonable in the circumstances and which would have removed that disadvantage.

6. Having heard the evidence to the claimant and the two witnesses for the respondent, having examined the documents to which it was referred and having carefully considered the closing submissions of both representatives, the tribunal made the following findings of fact on the balance of probabilities.

7. The claimant was employed by the respondent as a light goods vehicle (LGV) driver from October 2003 until his dismissal until 14th September 2020. There was no suggestion during these proceedings that the claimant had anything other than an exemplary disciplinary record.

8. The claimant suffered from a number of medical conditions which adversely affected his ability to undertake some of the duties normally associated with his role. In 2004 he had his third heart attack, following which the respondent's occupational health specialists advised in March 2007 that he should refrain from duties which involved severe physical exertion, as well as working in a cold environment. The recommendation was that the claimant should be restricted from performing any duties which caused symptoms of shortness of breath or chest pain, which meant effectively anything greater than light physical exertion, as well as working in a cold environment. In June 2007 occupational health further advised that the claimant should have help to move cages laden with

heavier items and should ideally, deliver to “one hit shops” with short rest breaks of 2-3 minutes to be incorporated into his daily routine. It was acknowledged that Mr Nelson remains vulnerable and, given his significant medical history, it was likely that he fell under the protection of the Disability Discrimination Act 1995.

9. The claimant accepted that the respondent implemented the recommendations made by occupational health, by making adjustments to his daily duties. As a result, the claimant was able to continue working. In July 2016 occupational health confirmed that the claimant’s clinical situation was unchanged and was likely to be long-term and that the work place adjustments then in place should remain in place long-term. Again, the respondent implemented those adjustments so as to enable him to continue working.

10. The claimant also suffered from a stomach hernia which caused him to commence a period of sick leave on 5th November 2019. The claimant’s treating clinicians confirmed that surgery would be required to repair the hernia. The claimant saw his consultant surgeon on 12th December 2019 and was told that he was on the waiting list for surgery. He was not told how long he would be on the waiting list. On 12th February 2020 the claimant was able to confirm to the respondent that he was on the “cancellation list”, which may mean that he would be called to undergo surgery at short notice.

11. The claimant remained subject to the conditions imposed by the DVLA upon those who are licensed to drive goods vehicles. The claimant accepted that he was unfit to drive goods vehicles at that time because of his ill-health. The claimant’s evidence to the tribunal, which was not challenged by the respondent, was that he could voluntarily agree to surrender his licence, failing which it may have been revoked. If it were to be revoked, it would be far more difficult to get it back than if he surrendered it and then re-applied. The claimant surrendered his licence in the knowledge that, to get it back, he would have to undergo a medical examination, followed by a treadmill test and then re-apply for the licence. The claimant explained this to the respondent.

12. In March 2020 the Covid pandemic struck and, as a result, specific guidance was issued by the government, which was designed to reduce the impact of the Covid pandemic. The government introduced the Job Retention Scheme (“furlough”) and also provided recommendations about particularly vulnerable people being required to “shield” so as to avoid contracting the virus. The claimant’s evidence to the tribunal was that he was one of those medically vulnerable people, that this was acknowledged and accepted by the respondent and that the claimant was for several months thereafter effectively “shielding” by remaining at home. Furthermore, the respondent implemented the furlough scheme in respect of the claimant.

13. Regardless of the furlough scheme and the fact that the claimant was entitled to shield himself, the tribunal was satisfied that, had it not been for the Covid pandemic, the claimant would have remained unfit for work and effectively absent on sick leave. The claimant would then have been entitled to the benefits of the respondent’s company sick pay scheme.

14. The respondent's absent management policy makes provision for what are known as "welfare meetings", which are designed to enable the absent employee to keep in touch with the company and for the company to monitor the absence, the reason for the absence and to consider whether the employee may be fit to return to work and, if so, what duties the employee may be able to perform. The claimant has not challenged the respondent's absent management procedure in this regard. The claimant's first welfare meeting took place on 19th November 2019 and his 16th welfare meeting took place on 30th June 2020. The tribunal found that the respondent had carefully followed its procedure in this regard and had conscientiously and reasonably managed the claimant's absence.

15. The likelihood of the claimant undergoing surgery to correct his hernia in the foreseeable future was much reduced when all but urgent surgical operations were cancelled during the Covid pandemic. It was acknowledged by both claimant and respondent that this meant an indefinite postponement of the claimant's surgery until such time as the easing of the pandemic allowed non-urgent operations to recommence.

16. During this period of time, the claimant was examined by the respondent's occupational health specialists, who provided reports on 10th December 2019 and 21st August 2020. Both reports confirmed that the claimant remained unfit for work at that time.

17. The claimant's evidence to the tribunal was that, during his sickness absence, he was both available and able to undertake "office work" rather than be on the sick. The claimant accepted that he had no training in administrative work, had never undertaken such duties in the past and would require specific training in administrative work, if the respondent considered that he was competent to do it. The respondent's evidence was that there was no administrative work then available for the claimant to do and that they would effectively have had to create a job for the claimant, train him to do it and then assess whether he was capable of doing so. The tribunal accepted the respondent's evidence in this regard. The respondent could not reasonably have been expected or required to provide administrative duties for the claimant during the period of his sick leave or, subsequently, as an alternative to dismissal.

18. The claimant further alleged that there were duties which he could have undertaken in the Dekit department. The respondent disputed this, saying that the work in Dekit still required substantial physical exertion and that there were very few duties in that role which could be undertaken without contradicting the recommendations made by occupational health. The claimant's evidence was that, effectively, he could have undertaken those parts of the Dekit role which he was capable of performing, without being in breach of those recommendations. The tribunal found that it was unreasonable for the claimant to expect to be able to "cherry pick" those parts of the Dekit role which he felt he may be able to perform.

19. The tribunal found that it was reasonable for the respondent to conclude that the claimant could not undertake the Dekit role or any meaningful part of it, without being in breach of the occupational health recommendations.

20. Government guidelines about Covid were eased on 31st August 2020, so that the claimant was able to stop shielding as a vulnerable person. By then, the claimant had been absent from work for almost 10 months. The claimant was invited to a capability meeting, the purpose of which was to consider his continued absence, the prospect of him returning to work and whether any additional support could be provided. That meeting took place on 21st July 2020. Notes appear at page 192 in the bundle. Those notes show that the claimant was asked whether he was willing to work in other areas of the respondent's undertaking, including the funeral department. The claimant was also asked whether he was "office proficient". The claimant was asked whether he had considered early retirement due to his ill health. He asked for time to consider that, saying it would depend upon whether he received a satisfactory financial settlement. By the end of the meeting, it was agreed that a further meeting would take place "in two weeks' time to have a catch up".

21. The second capability meeting took place on 12th August 2020. Notes appear at page 224 in the bundle. The meeting was again conducted by Miss Sarah Hall. At the beginning of the meeting, Miss Hall confirmed that there were no vacancies then available which were suitable for the claimant. Miss Hall specifically asked the claimant if he was interested in Dekit and his reply was "Depends on the occupational health report. In February I mentioned office work as an option." The claimant confirmed that he was then on the emergency list for his surgery and that it could take place within 6 weeks. The claimant enquired as to whether his period of shielding due to Covid was still to be regarded as sick leave. Miss Hall proposed that a further occupational health report be obtained before any further discussions took place about the outcome of the capability procedure. The claimant's trade union representative, Mr Richardson, stated that once the claimant had his hernia operation, he would be expected to make a full recovery and be able to return to full duties. The claimant then asked whether the respondent would be prepared to pay for a private operation, which may well expedite the process and enable him to return to work sooner. Miss Hall said that she would look into that on behalf of the claimant.

22. The final capability meeting took place on 14th September 2020. There is no copy in the bundle of the letter inviting the claimant to that meeting. However, Sarah Hall's opening remarks as shown at page 247 were, "Thanks for coming for possible final health review". Mr Richardson immediately asked, "Why final meeting – any alternatives?" Miss Hall's reply was, "Final as in the process".

23. The meeting began at 13.10pm, adjourned at 13.20pm and reconvened at 13.45 when the claimant was informed that his employment was to be terminated within immediate effect. Reference was made in the first part of the meeting to the most recent occupational health report dated 21st August 2020, which is at page 214 in the bundle. The relevant extracts from that occupational health report are as follows:-

> "He is still waiting for his umbilical hernia repair operation. Tommy can also still get occasional chest pain when he over-exerts himself. Tommy described that his hernia canl be painful. He can also get low back pain

> and finds that if he bends/stoops to lift, his hernia will be more painful. Tommy also described that he will generally stop after walking 300 to 400 yards to rest due to chest symptoms. I see no medical reason why Tommy cannot work. However, this does need to be with some restriction. For example, he could only manually handle at waist height. I would not feel comfortable with him pushing or pulling trollies heavier than a small supermarket trolly. Tommy should avoid duties that would require him to bend/stoop to lift. I suspect that he would be slower than a comparative employee who did not have a hernia or any heart disease, when undertaking any work. He would also need to sit as required due to hernia or back pain. Even if so restricted with his duties, there could be a significant risk to Tommy's health if his hernia was to become obstructed. In that circumstance, a loop of bowel becomes trapped in the hernia. It would be worse for Tommy, given his heart disease. I do appreciate that whether or not you can accommodate Tommy into these circumstances is a matter for management. I see no scope to relax these restrictions until Tommy has had his operation and has fully recovered from it. As you know he does not yet have a date for his operation. Regrettably the treatment that Tommy needs has been delayed by the impact of the pandemic on hospital services as with so many other patients. It is obviously not his fault that he has not had his surgery yet."
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> A brief discussion took place about whether the claimant could work in the Dekit section, but Miss Hall dismissed that possibility, saying "I don't believe the information is relevant in this case but as a duty of care I am not willing to risk Tom's health."

24. After a 10-minute meeting and a 25 minute adjournment, Miss Hall returned, stating that she had discussed the matter with ER services, she had reviewed the occupational health reports and decided that the claimant was unlikely to return to work within a reasonable time frame and, accordingly, the claimant's employment will be terminated as of that day. At the end of the meeting, Miss Hall confirmed that, "Based on a reasonable timescale, if you had not been shielding you were still on the sick and would still be waiting for your hernia operation." That was in reply to a suggestion on behalf of the claimant that the period of time when he had been shielding under the government recommendation should not count towards the length of his absence.

25. The claimant's dismissal was confirmed in a letter dated 15th September 2020, a copy of which appears at page 256-7 in the bundle. The relevant parts of the letter are as follows:-

> "You've been off sick from work since 5th of November 2019, followed by a period of shielding and we've had several health review meetings during this time. At our meeting we talked through all the information available, including your most recent occupational health report. Unfortunately, this indicates you are unlikely to be well enough to return to work in the near future. We also talked about whether there were any adjustments we could make to help you return to work, or if you were well enough to be redeployed into another role. I concluded that there were no reasonable

adjustments that would help you to return to your role at this time as you are waiting for surgery and unfortunately, redeployment wasn't suitable for you. We had previously discussed the potential option of ill-health retirement or applying to the group income protection scheme. Unfortunately, you are not eligible for either of these. Taking all this into consideration, I am sorry to confirm that I've decided to dismiss you on the grounds of incapacity due to ill health on 14th of September 2020. You will be paid up and including the date of your dismissal. You'll also receive 12 weeks pay in lieu of your contractual notice period."

26. The claimant was advised of his right of appeal and by undated letter which appears at page 258-9 in the bundle, he submitted his appeal against his dismissal. The grounds of appeal may be summarised as follows:-

    (i) Covid 19 had affected the claimant and thousands of others on the NHS waiting lists which was beyond everyone's control. The respondent was aware that the claimant was at the forefront of the queue for his operation as soon as Covid abated.

    (ii) The claimant had asked for alternative work and had also been required to shield by the government under the Covid guidelines.

    (iii) He had tried to return to work at the first opportunity when shielding came to an end. The respondent would not accommodate him by allocating alternative duties.

    (iv) That he was not given support other drivers had been given, when they had been allowed to work in the office or on Dekit.

    (v) Other drivers had been allowed far longer periods in which to recover.

    (vi) That he was entitled to six months "on the sick" and that he had in fact only been allowed four.

27. The respondent's appeal procedure allows for a two-stage appeal process. The claimant's first appeal was heard by James Anthony Dean and the second appeal was heard by Karen Anne Hopkinson. Both Mr Dean and Miss Hopkinson appeared before the tribunal to give evidence and be cross-examined. The claimant has not challenged the fairness of the procedure followed by either Mr Dean or Miss Hopkinson, but maintains his challenge to their decisions to uphold the original decision made by Miss Hall. The approach adopted by both Mr Dean and Miss Hopkinson was that, following the 10 months during which he had been absent, there had been little, if any, change in his condition and he remained unfit for work at that time. The most recent occupational health report did not provide any adequate indication as to when the claimant may be fit to return to work and, if so, what duties he may be capable of performing.

28. Both Mr Dean and Miss Hopkinson were invited by the claimant's representative to consider other employees who had been dismissed for poor attendance, but who had been reinstated on appeal. Mr Dean and Miss Hopkinson explained that

those employees` circumstances were somewhat different to those of the claimant. There had been procedural errors in two of the cases and in another one the employee had been reinstated, but had declined that invitation. It was impossible to tell if there was any difference in circumstances because that employee's records had been destroyed.

29. The claimant was dismissed on 14th September 2020. Because of his length of service, he was entitled to 12 weeks' notice or, alternatively, to twelve weeks pay in lieu of notice. The respondent chose to dismiss the claimant with 12 weeks pay in lieu of notice.

30. On 28th September 2020, the claimant underwent his hernia operation, which was successful. That was within 14 days of his dismissal. The medical opinions given to the claimant (which were not challenged by the respondent) from when he was placed on the waiting list for surgery, were that it could take up to 3 months for him to fully recover from the surgery. The claimant's evidence to the tribunal (again which was not challenged by the respondent) was that he would have to undergo a medical examination, following a treadmill test, before he could reapply to have his LGV licence reinstated by DVLC. When asked whether he had undergone that medical examination and undertaken the treadmill test, the claimant confirmed that he had not. His reason for not doing so was, "Because by then he had lost trust in the respondent due to the way he had been treated and because he no longer wished to work for the respondent." The claimant has since permanently retired from work.

31. Sarah Hall, the dismissing officer, did not attend the employment tribunal hearing to give evidence and be cross-examined. Ms Webber for the respondent conceded that Miss Hall was, effectively, the respondent's principal witness. It was she who made the decision to dismiss the claimant and it was she who made the decision to dismiss him with pay in lieu of notice, rather than simply with notice. No explanation was given by, or in behalf of the respondent, as to why the claimant was dismissed with pay in lieu of notice.

32. In the absence of Miss Hall, because neither Mr Dean nor Miss Hopkinson dealt with the point, there was no evidence from the respondent as to what was the impact on its business of retaining the claimant as an employee pending surgery, the outcome of the surgery and his recovery from that surgery. There was no evidence from the respondent as to why its dismissal of the claimant at that time amounted to a proportionate means of achieving a legitimate aim. No evidence was given after what was the aim, whether it was legitimate or whether the dismissal was a proportionate means of achieving it.

33. Miss Hall was not available to be cross-examined about matters relating to the extent of any medical investigation to establish the true medical position as at the date of dismissal. No attempt had been made to obtain any expert medical opinion on any of the relevant points relating to the claimant's ill health. No explanation was given as to why the respondent limited its medical enquiry to the obtaining of an occupational health report. No steps were taken to ascertain as to when the surgery may take place and what the likely outcome would be. There was no evidence as to why the respondent could not be expected to wait any

longer for the claimant to recover to such an extent that he would be able to return to work to perform his contractual duties.

The law

34. The claimant's complaints of unfair dismissal and unlawful disability discrimination engage the provisions of the Employment Rights Act 1996 (unfair dismissal) and the Equality Act 2010 (unlawful disability discrimination). The relevant provisions from those statutes are set out below.

Employment Rights Act 1996

Section 86 Rights of employer and employee to minimum notice

(1) The notice required to be given by an employer to terminate the contract of employment of a person who has been continuously employed for one month or more—

(a) is not less than one week's notice if his period of continuous employment is less than two years,
(b) is not less than one week's notice for each year of continuous employment if his period of continuous employment is two years or more but less than twelve years, and
(c) is not less than twelve weeks' notice if his period of continuous employment is twelve years or more.

(2) The notice required to be given by an employee who has been continuously employed for one month or more to terminate his contract of employment is not less than one week.

(3) Any provision for shorter notice in any contract of employment with a person who has been continuously employed for one month or more has effect subject to subsections (1) and (2); but this section does not prevent either party from waiving his right to notice on any occasion or from accepting a payment in lieu of notice.

(4) Any contract of employment of a person who has been continuously employed for three months or more which is a contract for a term certain of one month or less shall have effect as if it were for an indefinite period; and, accordingly, subsections (1) and (2) apply to the contract.

(5) **F1**. . . . . .

(6) This section does not affect any right of either party to a contract of employment to treat the contract as terminable without notice by reason of the conduct of the other party.

Section 94 The right

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

(2) Subsection (1) has effect subject to the following provisions of this Part (in particular sections 108 to 110) and to the provisions of the Trade Union and Labour Relations (Consolidation) Act 1992 (in particular sections 237 to 239).

Section 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,
(b) relates to the conduct of the employee,
(c) is that the employee was redundant, or
(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

(3) In subsection (2)(a)--

(a) "capability", in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and
(b) "qualifications", in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.

(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.

Equality Act 2010

Section 13 Direct discrimination

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

(2) If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim.

(3) If the protected characteristic is disability, and B is not a disabled person, A does not discriminate against B only because A treats or would treat disabled persons more favourably than A treats B.

(4) If the protected characteristic is marriage and civil partnership, this section applies to a contravention of Part 5 (work) only if the treatment is because it is B who is married or a civil partner.

(5) If the protected characteristic is race, less favourable treatment includes segregating B from others.

(6) If the protected characteristic is sex--

(a) less favourable treatment of a woman includes less favourable treatment of her because she is breast-feeding;

(b) in a case where B is a man, no account is to be taken of special treatment afforded to a woman in connection with pregnancy or childbirth.

(7) Subsection (6)(a) does not apply for the purposes of Part 5 (work).

(8) This section is subject to sections 17(6) and 18(7).

Section 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.

Section 20 Duty to make adjustments

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

(2) The duty comprises the following three requirements.

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

(4) The second requirement is a requirement, where a physical feature 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.

(5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put 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 provide the auxiliary aid.

(6) Where the first or third requirement relates to the provision of information, the steps which it is reasonable for A to have to take include steps for ensuring that in the circumstances concerned the information is provided in an accessible format.

(7) A person (A) who is subject to a duty to make reasonable adjustments is not (subject to express provision to the contrary) entitled to require a disabled person, in relation to whom A is required to comply with the duty, to pay to any extent A's costs of complying with the duty.

(8) A reference in section 21 or 22 or an applicable Schedule to the first, second or third requirement is to be construed in accordance with this section.

(9) In relation to the second requirement, a reference in this section or an applicable Schedule to avoiding a substantial disadvantage includes a reference to--

(a) removing the physical feature in question,

(b) altering it, or

(c) providing a reasonable means of avoiding it.

(10) A reference in this section, section 21 or 22 or an applicable Schedule (apart from paragraphs 2 to 4 of Schedule 4) to a physical feature is a reference to--

(a) a feature arising from the design or construction of a building,

(b) a feature of an approach to, exit from or access to a building,

(c) a fixture or fitting, or furniture, furnishings, materials, equipment or other chattels, in or on premises, or

(d) any other physical element or quality.

(11) A reference in this section, section 21 or 22 or an applicable Schedule to an auxiliary aid includes a reference to an auxiliary service.

(12) A reference in this section or an applicable Schedule to chattels is to be read, in relation to Scotland, as a reference to moveable property.

(13) The applicable Schedule is, in relation to the Part of this Act specified in the first column of the Table, the Schedule specified in the second column.

Part of this Act	Applicable Schedule
Part 3 (services and public functions)	Schedule 2
Part 4 (premises)	Schedule 4
Part 5 (work)	Schedule 8
Part 6 (education)	Schedule 13
Part 7 (associations)	Schedule 15
Each of the Parts mentioned above	Schedule 21

Section 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.

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

Section 39 Employees and applicants

(1) An employer (A) must not discriminate against a person (B)--

(a) in the arrangements A makes for deciding to whom to offer employment;

(b) as to the terms on which A offers B employment;

(c) by not offering B employment.

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

(a) as to B's terms of employment;

(b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;

(c) by dismissing B;

(d) by subjecting B to any other detriment.

(3) An employer (A) must not victimise a person (B)--

(a) in the arrangements A makes for deciding to whom to offer employment;

(b) as to the terms on which A offers B employment;

(c) by not offering B employment.

(4) An employer (A) must not victimise an employee of A's (B)--

(a) as to B's terms of employment;

(b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for any other benefit, facility or service;

(c) by dismissing B;

(d) by subjecting B to any other detriment.

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

Section 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.

Unfair dismissal

35. The respondent relies upon “capability” as a potentially fair reason for dismissing the claimant. The respondent’s position is that the claimant was no longer capable of performing work of the kind for which he had been employed, because of his long-term absence. That is a potentially fair reason under Section 98 (2) (a). The relevant authorities which provide guidance to the employment tribunal on the interpretation of that statutory provision are as follows:-

Spencer v Paragon Wallpapers Limited [1977 ICR 301]
BS v Dundee City Council [2014 IRLR 131]
East Lindsay District Council v Daubney [1977 ICR 566]
HJ Heinz Company Limited v Kenrick [2000 IRLR 144]

36. The basic principles established by those cases are as follows:-

(i) It is essential to consider whether the employer can be expected to wait any longer for the employee to return. The tribunal must expressly address this question, balancing all the relevant factors in all the circumstances of the individual case.

(ii) Those factors include whether other staff are available to carry out the absent employee's work, the nature of the employee's illness, the likely length of his or her absence, the cost of continuing to employ the employee, the size of the employing organisation and the unsatisfactory situation of having an employee on very lengthy sick leave.

(iii) A fair procedure is essential. This requires in particular, consultation with the employee, a thorough medical investigation (to establish the nature of the illness or injury and its prognosis) and consideration of other options (in particular alternative employment within the employer's business). In one way or another, steps should be taken by the employer to discover the true medical position prior to any dismissal. Where there is any doubt, a specialist report may be necessary. The employer must take into account not only the employee's current level of fitness, but also his likely future level of fitness.

(iv) The employee's opinion as to his likely date of return and what work he will be capable of performing should also be considered.

37. When considering allegations of direct disability discrimination, contrary to Section 13 of the Equality Act 2010, it is for the claimant to prove facts from which the employment tribunal could infer in the absence of an explanation that there has been discriminatory conduct by the respondent. If a claimant does establish those facts, then the burden of proof passes to the respondent under Section 136 of the Equality Act, to satisfy the tribunal that there was a non-discriminatory reason. In simple terms, the employment tribunal should ask itself why the employee was treated the way he was. In the present case the question is simply, "Was the reason why the claimant was dismissed, because he is disabled?" That involves comparing the way the claimant was treated with the treatment administered to other employees in the same of similar circumstances. If there are no such employees, then the claimant may rely upon a hypothetical comparator. In the present case the hypothetical comparator would be an employee who has been absent on long-term sick leave for ten months, but who is not disabled (**Shamoon v Chief Constable of the Royal Ulster Constabulary - 2003 UKHL11).**

38. In **Pnaiser v NHS England and Coventry City Council [2016 IRLR 170]** the Employment Appeal Tribunal set out the correct approach to claims made under Section 15 of the Equality Act 2010 in the following terms:-

> "The tribunal must determine whether the reason/cause or if more than one (a reason or cause), is "something arising in consequence of the claimant's disability". That expression "arising in consequence of" could describe a range of causal links. A causal link between the something that causes unfavourable treatment and the disability may include more than one link. In other words, more than one relevant consequence of a disability may require consideration and it will be a question of fact to be assessed robustly in each case, whether something can probably be said to arise in consequence of disability. This stage of the causation test involves an objective question and does not depend upon the thought processes of the alleged discriminator."

39. Once the claimant has established that he has been subjected to unfavourable treatment because of something arising in consequence of his disability, the respondent may then go on to show the "justification" defence in Section 15 (1) (b). The authorities which give guidance to the employment tribunal as to the interpretation of the justification defence were recently summarised by the Honourable Mrs Justice Eady sitting in the Employment Appeal Tribunal in **Gray v University of Portsmouth [EA-2019-000891/00].** Those authorities are:-

Hardy and Hansons Plc v Lax [2005 EWCA-CIV-846]
McCulloch v ICI [2008 ICR 1334]
Lockwood v Department of Work and Pensions [2014 ICR 1257]
O'Brien v Bolton St. Catherine's Academy [2017 ICR 737]

What the employment tribunal must do is to expressly identify the legitimate aim and then establish the level of need of the respondent or the impact of the claimant's absence and whether the measures taken by the respondent in respect of the claimant's absence would assist with and/or achieve the effective running of the relevant operation. The tribunal must be satisfied that the measures "correspond to a real need and are appropriate with a view to achieving the objectives pursued and are necessary to that end." That requires an objective balance to be struck between the discriminatory effect of the measure and the needs of the undertaking. The more serious the disparate adverse impact, the more cogent must be the justification for it. It is for the tribunal to weigh the reasonable needs of the undertaking against the discriminatory effect of the employer's measure and to make its own assessment of whether the former outweigh the latter. The tribunal must take into account the reasonable needs of the business, but it must make its own judgment on a fair and detailed analysis of the working practices and business considerations involved as to whether the dismissal is reasonably necessary. That critical evaluation is required to be demonstrated in the reasoning of the tribunal. In principle, the severity of the impact on the employer of the continuing absence of an employee who was on long-term sickness must be a significant element in the balance that determines the point at which their dismissal becomes justified and it is not unreasonable for the tribunal to expect some evidence on the subject. What kind of evidence is

appropriate will depend on the facts of each case. Often it will be so obvious that the impact is very severe, that a general statement to that effect will suffice, but sometimes it will be less evident and the employer will need to give more particularised evidence of the kinds of difficulty that the absence is causing.

40. In cases where there is an allegation of failure to make reasonable adjustments contrary to Sections 20 – 21 of the Equality Act 2010, the duty to make any such adjustment arises in the following circumstances:-

(i) The employer imposes a provision, criterion or practice which puts the disabled person at a substantial disadvantage in relation to a relevant matter, in comparison with persons who are not disabled. The requirement is to take such steps as is it is reasonable to have to take to avoid the disadvantage. The burden is therefore upon the claimant to establish the following:-

(a) What is the provision, criterion or practice?
(b) How does that put disabled persons at a disadvantage?
(c) How does it put the claimant at a personal disadvantage?
(d) What is the proposed adjustment?
(e) How would that adjustment remove the disadvantage?

(Archibold v Fife Council – 2004 IRLR 651 and Griffiths v Secretary of State for Work and Pensions – 2016 IRLR 216)

Conclusions

41. At paragraph 36 above, the tribunal has set out the principles which apply to the fairness of the dismissal on capability grounds relating to long term absence. The tribunal found that, in the absence of Sarah Hall, the dismissing officer, the respondent failed to show that it could not be expected to wait any longer for the claimant to return to work. No evidence was given to the tribunal about the impact on the respondent's business of the claimant's continued absence, or the cost of continuing to employ him. The claimant's clear opinion was that he expected to be fit to return to work within a reasonable period of time, after undergoing surgery to correct his hernia. The respondent failed to undertake any reasonable steps to establish when that surgery may take place, how long the post-operative recovery period would be and when the claimant would be fit to undertake his normal duties. The tribunal found that the respondent failed to conduct a thorough medical investigation to establish the true medical position. No explanation was given by the respondent as to why a specialist medical report was not obtained.

42. No explanation was given by the respondent as to why it was necessary or appropriate to dismiss the claimant with pay in lieu of notice, rather than to dismiss him with his contractual period of notice. Dismissing him with notice would have effectively given the claimant a further 3 months in which to recover, or at least to establish a date for surgery and an estimate for the period of time thereafter when recovery would take place so that he could

return to work. Had that been done, the claimant would have undergone surgery and would probably have recovered to such an extent that he would be unable to return to work shortly after his recuperation period.

43. Having taken all of those factors into account, the tribunal was satisfied that the claimant's dismissal was unfair and his complaint of unfair dismissal is well-founded and succeeds.

44. The tribunal was satisfied that the reason why the claimant was dismissed was because of his long-term absence and not because he is disabled. The complaint of unlawful direct discrimination, contrary to S.13 of the Equality Act 2010 is not well-founded and is dismissed.

45. The tribunal found that the claimant's dismissal amounted to unfavourable treatment because of something (his long-term absence) which arose in consequence of his disability. That was conceded by the respondent. The tribunal found that the respondent had failed to adduce any meaningful evidence to show that its dismissal of the claimant in all the circumstances, was a proportionate means of achieving a legitimate aim. There was no evidence as to any specific aim, nor was there any evidence as to the impact of the claimant's absence on the respondent's ability to achieve that aim. In the absence of any such evidence, the tribunal could not strike the objective balance between the discriminatory effect of the dismissal and the needs of the respondent's undertaking. Is dismissal clearly had a serious adverse impact upon the claimant, that there was no evidence about the impact of the claimant's continued employment upon the reasonable needs of the respondent's business. The respondent has therefore failed to show that its dismissal of the claimant was a proportionate means of achieving a legitimate aim. The tribunal takes into account the guidance given by the Employment Appeal Tribunal in **O`Brien** above, when considering both the fairness of a dismissal for long-term absence and whether that dismissal amounted to a contravention of S.15. "It would be a pity if there were any real distinction in the context of long-term sickness where the employee was disabled. The law is complicated enough without Artisan tribunal's having routinely adjudged the dismissal of such an employee by one standard for the purpose of unfair dismissal claim and buy a different standard for the purpose of discrimination law." The claimant's dismissal was therefore an act of unlawful disability discrimination, contrary to S.15 of The Equality Act 2010.

46. The claimant alleged that the respondent applied to him a provision criterion or practice of performing all aspects of the role as a HGV driver and for consistent attendance. The claimant alleges that the implementation of those put him at a substantial disadvantage when compared to employees who are not disabled in that it would have caused him pain and discomfort, posed a risk to his health and ultimately resulted in his dismissal. The claimant went on to allege that, had the following adjustments being made, that disadvantage would have been removed;

i) allowing him to work in DEKIT

ii) allowing him to carry out office duties
iii) allowing him to remain on sick until sick pay was exhausted
iv) paying for an operation privately

47. The tribunal found that it was not reasonable to expect the respondent allow the claimant to work in DEKIT, as the respondent genuinely believed that doing so could amount to a risk that the claimant's health. The tribunal was satisfied that there were no office duties which could reasonably have been undertaken by the claimant. There was no contractual entitlement to remain on sick pay until sick pay was exhausted and it would not be reasonable to require the respondent to permit the claimant do so. It would not have been reasonable to require the respondent to pay for private surgery. Accordingly, the complaints of failure to make reasonable adjustments contrary to S20-21 Equality Act 2010 are not well-founded and are dismissed.

48. The claimant complained that, had he remained an employee, he would have received the benefit of a wage rise which was implemented after his dismissal. Ms Hogben accepted that this was a matter which related to remedy in respect of those claims which have succeeded and that claim was withdrawn and is dismissed.

49. The parties will be notified of a date and time for a remedy hearing, at which the tribunal will consider what, if any, remedy should be awarded to the claimant.

G Johnson

EMPLOYMENT JUDGE JOHNSON

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON
4 April 2022