THE EMPLOYMENT TRIBUNALS

Claimant: **Mr C West**

Respondent: **Tesco Stores Limited**

REASONS OF THE EMPLOYMENT TRIBUNAL

Held at: **Middlesbrough** **On:** **1st – 5th November 2021**

Before: **Employment Judge Aspden**

Members: **Mrs C Hunter**
Mr J Weatherston

Appearances

For Mr West: **Mr P Hargreaves (Solicitor)**
For the Respondent: **Mr P Morgan (Counsel)**

REASONS

Claims and issues

1. It is common ground that at all material times the claimant was a disabled person within the meaning of that term in the Equality Act 2010 and the respondent knew he was so disabled.

2. In discussions at the hearing the parties agreed that the claims being pursued by the claimant and that require determination by the tribunal are as follows.

Allegation 1: The claimant complains that the respondent contravened the Equality Act 2010 in requiring him to work his contracted hours over 5 days per week instead of 3. The claimant alleges that the respondent failed to comply with a duty to make reasonable adjustments.

3. It is common ground that, from the claimant's contractual working hours provided for him to work 5 days per week from July 2017 and that this was a provision, criterion or practice (PCP) of the respondent's.

4. The claimant alleges that:
   4.1. The PCP put him at a substantial disadvantage in relation to his employment in comparison with persons without a disability between July 2017 and the date his career break began because his disability meant that he became anxious on leaving the house and when faced with changes to his routine, and so to insist on spreading his contractual hours over 5 days caused him significant distress when compared to a person who did not share his disability.
   4.2. Allowing the claimant to work his 22.5 contracted hours over 3 days per week (at times other than evenings) is a step that would have avoided that disadvantage.
   4.3. That was a step that it was reasonable for the respondent to have to take (both before his absence on sick leave and notwithstanding his absence).
   4.4. In failing to take that step the respondent failed to comply with its duty to make reasonable adjustments.

5. The respondent's position is as follows:
   5.1. The respondent does not accept that the PCP put the claimant at a substantial (ie more than minor or trivial) disadvantage in relation to his employment in comparison with persons without a disability.
   5.2. The respondent contends that it did not know, and could not reasonably have been expected to know, that the that the PCP was likely to put the claimant at a substantial disadvantage in relation to his employment in comparison with persons without a disability.
   5.3. If, contrary to the respondent's position, the respondent was under a duty to make adjustments, the respondent contends that allowing the claimant to work his 22.5 contracted hours over 3 days per week (at times other than evenings) was not a step that it was reasonable for the respondent to have to take to avoid the disadvantage.
   5.4. In any event the respondent submits the claim is out of time.

Allegation 2: The claimant complains that the respondent contravened the Equality Act 2010 in requiring him to use handheld computer equipment without providing adequate training for him. The claimant alleges that the respondent failed to comply with a duty to make reasonable adjustments.

6. It is common ground that the respondent required the claimant to use an item of handheld computer equipment and that this was a provision, criterion or practice (PCP) of the respondent's.

7. The claimant alleges that:
   7.1. The requirement to use the equipment put him at a substantial disadvantage in comparison with persons without a disability because his disability means he struggles with concentration and with learning new skills and requires extra support in order to do so. When learning something new, he needs to be shown how to do it more times than a person who did not share his disability.
   7.2. Providing the claimant with additional training would have avoided that disadvantage.

7.3. That was a step that it was reasonable for the respondent to have to take.
7.4. In failing to take that step the respondent failed to comply with its duty to make reasonable adjustments.

8. The respondent's position is:
8.1. The respondent does not accept that the PCP put the claimant at a substantial (ie more than minor or trivial) disadvantage in relation to his employment in comparison with persons without a disability.
8.2. The respondent contends that it did not know, and could not reasonably have been expected to know, that the that the PCP was likely to put the claimant at a substantial disadvantage in relation to his employment in comparison with persons without a disability.
8.3. If, contrary to the respondent's position, the respondent was under a duty to make adjustments, the respondent contends that it provided such training as was reasonable and providing additional training was not a step that it was reasonable for the respondent to have to take to avoid the disadvantage while the claimant was absent from work on sick leave.
8.4. In any event the respondent submits the claim is out of time.

Allegation 3: The claimant alleges that the respondent treated him unfavourably by proceeding with a formal absence management procedure (without engaging with occupational health reports). The claimant alleges that this was unfavourable treatment which was discrimination arising from disability under Equality Act 2010 s15.

9. The claimant's case is that the respondent treated him unfavourably by proceeding with the absence management process from February 2018. It is common ground that the respondent proceeded with the absence management process because of the claimant's absence from work and that the absence was something arising in consequence of disability.

10. The respondent's position:
10.1. The respondent submits that its treatment of the claimant in proceeding with the absence management process was a proportionate means of achieving a legitimate aim of managing employees and having a consistent absence management policy. In this regard, the respondent denies that it failed to engage with occupational health reports.
10.2. In any event the respondent submits the claim is out of time.

Allegation 4: The claimant alleges that in May 2018 Ms Bromfield and Mr Elliot pressured the claimant to take a career break. The claimant alleges that this was a detriment/unfavourable treatment which was: a. discrimination arising from disability under section15; and/or b. victimisation.

Discrimination arising from disability - section 15 of the Equality Act 2010

11. The claimant alleges that the respondent treated him unfavourably in this way because of his absence from work (which the respondent accepts was something arising in consequence of his disability).

Victimisation

12. The claimant alleges that the respondent subjected him to this detriment because the claimant alleged, in a written grievance dated 23 April 2018, that the respondent had contravened the Equality Act 2010 (which the respondent accepts was a protected act).

13. The respondent's position on these claims is as follows.
    13.1. The respondent denies that it pressured the claimant to take a career break.
    13.2. If the Tribunal finds that the respondent pressured the claimant to take a career break, the respondent's position is as follows:
        13.2.1. It denies any pressure was unfavourable treatment or a detriment;
        13.2.2. It denies any pressure was because of the allegations in the grievance.
        13.2.3. It submits that, if the tribunal finds the respondent pressured the claimant to take a career break and did so because of the claimant's absence from work, any pressure was a proportionate means of achieving the legitimate aim of supporting employees and increasing the chance of the return of an experienced employee in the future.
        13.2.4. In any event the respondent submits the claim is out of time.

Allegation 5: The claimant alleges that in May 2018 Ms Bromfield deceived the claimant as to the terms of the career break. The claimant alleges that this was a detriment/unfavourable treatment and was: a. discrimination arising from disability – s15; and/or b. victimisation.

Discrimination arising from disability - section 15 of the Equality Act 2010

14. The claimant alleges that the respondent treated him unfavourably in this way because of his absence from work (which, as noted above, the respondent accepts arose in consequence of his disability).

Victimisation

15. The claimant alleges that the respondent subjected him to this detriment because the claimant alleged, in a written grievance dated 23 April 2018, that the respondent had contravened the Equality Act 2010 (which, as noted above, the respondent accepts was a protected act).

16. The respondent's position on these claims is as follows:
    16.1. The respondent denies that it deceived the claimant as to the terms of the career break.
    16.2. If the Tribunal finds that the respondent did deceive the claimant, the respondent denies that it did so because of the allegations contained in his grievance.
    16.3. If the Tribunal finds that the respondent did deceive the claimant and that this was because of the claimant's absence from work, the respondent does not say that the treatment was a proportionate means of achieving a legitimate aim.
    16.4. In any event the respondent submits the claim is out of time.

Allegation 6: The claimant's primary case is that his employment did not end when he took a career break. If the Tribunal finds that the claimant's employment did not end when he took a career break, the claimant alleges that the respondent dismissed him in April or May 2019 when the respondent told him he did not have a job to return to and/or failed to allow him to return to work. The claimant alleges that this was: a. discrimination arising from disability – s15; and/or b. victimisation; c. an unfair dismissal; and wrongful dismissal.

17. The respondent denies that the claimant was dismissed in 2019. Its position is that the claimant's employment terminated in July 2018 when the claimant took a career break so that, in 2019 the claimant was no longer an employee.

18. If the tribunal finds the claimant's employment did not end in 2018, Mr Morgan contends that the respondent did not, in any event, dismiss the claimant in 2019. His position is that the claimant did not have the right to return to his old job after the career break; he was given details of other vacancies that were available at the time; and that by not expressing an interest in any of those other vacancies the claimant resigned.

19. If the tribunal accepts that the claimant was, as contended for by the claimant, dismissed in April or May 2019, the parties' positions are as follows.

Discrimination arising from disability - section 15 of the Equality Act 2010

20. The claimant alleges that the respondent dismissed him because of his absence from work, whether on sick leave or on a career break.

21. Mr Morgan accepts that both the claimant's absence from work on sick leave and the fact that the claimant was on a career break arose in consequence of the claimant's disability. He submits that any dismissal was a proportionate means of achieving the legitimate aim of consistent application of the respondent's career break policy.

Victimisation

22. The claimant alleges that the respondent dismissed him because he alleged, in a written grievance dated 23 April 2018, that the respondent had contravened the Equality Act 2010 (which Mr Morgan accepts was a protected act). The respondent's position is that, if it did dismiss the claimant in April or May 2019, it did not do so because of that protected act.

Unfair dismissal

23. Mr Morgan's position is that dismissal was fair because the respondent had no option but to dismiss the claimant if he refused to apply for or show interest in any of the other positions available.

24. Mr Morgan does not contend that the reason for dismissal was one falling within section 98(2) of the Employment Rights Act 1996. Rather, he says the claimant was dismissed for some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the claimant held.

Wrongful dismissal

25. Mr Morgan's position is that, if the claimant was dismissed in April 2019 then the dismissal was not in breach of contract because the claimant's employment did not end until his career break was due to end in July 2019, meaning the claimant was given the 12 weeks' notice of termination to which he was contractually entitled.

Allegations 7 and 8: If, contrary to the claimant's primary submission, the Tribunal finds that the claimant's employment ended in July 2018 when he took a career break, the claimant's alternative case is that:

25.1. The termination of his employment in July 2018 was a dismissal which was a. discrimination arising from disability – s15; b. victimisation; c. an unfair dismissal; and wrongful dismissal.

25.2. **The respondent subjected him to unfavourable treatment/detriment in April or May 2019 when the respondent told him he did not have a job to return to and/or failed to allow him to return to work.**

26. In light of the conclusions we reach on allegation 6 (as set out below) it is unnecessary to say any more about those complaints in these reasons.

27. Mr Hargreaves confirmed on the second day of the hearing that, although the claimant had previously claimed age discrimination and direct and indirect disability discrimination, those claims were no longer pursued. There had also been a complaint in relation to holiday pay which the parties resolved by agreement before the end of the hearing.

Legal framework

Equality Act

28. It is unlawful for an employer to discriminate against or victimise an employee by dismissing them or by subjecting them to any other detriment: section 39(1)-(4) of the Equality Act 2010.

29. For the purposes of section 39, a detriment exists if a reasonable worker (in the position of the Claimant) would or might take the view that the treatment accorded to them had, in all the circumstances, been to his or her detriment: Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337.

30. The Equality and Human Rights Commission has issued a Code of Practice containing guidance as to the application of the Equality Act 2010. By virtue of section 15(4) of the Equality Act 2006, the code should 'be taken into account by a

court or tribunal in any case in which it appears to the court or tribunal to be relevant'.

Discrimination arising from disability

31. A person discriminates against a disabled person if they treat that person unfavourably because of something arising in consequence of their disability and they cannot show either (a) that they did not know, and could not reasonably have been expected to know, that the employee had the disability; or (b) that the treatment was a proportionate means of achieving a legitimate aim: Equality Act 2010 s15.

32. Simler P in Pnaiser v NHS England [2016] IRLR 170, EAT, gave the following guidance as to the correct approach to a claim under Equality Act 2010 s 15:

32.1. A tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B.

32.2. The tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a s.15 case. The 'something' that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.

32.3. The tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is 'something arising in consequence of B's disability'. That expression 'arising in consequence of' could describe a range of causal links. The 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 the disability may require consideration, and it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability.

33. For an employer to show that the treatment in question is justified as a proportionate means of achieving a legitimate aim, the legitimate aim being relied upon must in fact be pursued by the treatment.

34. The principle of proportionality requires an objective balance to be struck between the discriminatory effect of the measure and the reasonable needs of the undertaking. The Tribunal must weigh the reasonable needs of the undertaking against the discriminatory effect of the employer's measure or treatment and make its own assessment of whether the former outweigh the latter: Hardys & Hansons plc v Lax [2005] IRLR 726, CA. In doing so the Tribunal must keep the respondent's workplace practices and business considerations firmly at the centre of its reasoning (City of York Council v Grosset UKEAT/0015/16, upheld by the Court of Appeal [2018] EWCA Civ 1105, [2018] IRLR 746) and in appropriate contexts should

accommodate a substantial degree of respect for the judgment of the decision-taker as to the respondent's reasonable needs (provided he or she has acted rationally and responsibly): O'Brien v Bolton St Catherine's Academy [2017] EWCA Civ 145, [2017] IRLR 547; Birtenshaw v Oldfield [2019] IRLR 946. To be proportionate the conduct in question has to be both an appropriate and reasonably necessary means of achieving the legitimate aim; and for that purpose it will be relevant for the Tribunal to consider whether or not any lesser measure might have served that aim: Birtenshaw v Oldfield [2019] IRLR 946.

35. The Code of Practice referred to above states at paragraph 21: '5.21 If an employer has failed to make a reasonable adjustment which would have prevented or minimised the unfavourable treatment, it will be very difficult for them to show that the treatment was objectively justified. …'

Failure to make reasonable adjustments

36. Under section 39(5) of the Equality Act 2010 a duty to make reasonable adjustments applies to an employer. A failure to comply with that duty constitutes discrimination: Equality Act 2010 s21.

37. Section 20 of the Equality Act 2010 provides that the duty to make reasonable adjustments comprises three requirements, set out in s 20(3), (4) and (5). This case is concerned with the first of those requirements, which provides that where a provision, criterion or practice of an employer's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, the employer must take such steps as it is reasonable to have to take to avoid the disadvantage. Section 21(1) provides that a failure to comply with this requirement is a failure to comply with the duty to make reasonable adjustments.

38. In considering whether the duty to make reasonable adjustments arose, a Tribunal must consider the following (Environment Agency v Rowan [2008] IRLR 20):
    38.1. whether there was a provision, criterion or practice ('PCP') applied by or on behalf of an employer;
    38.2. the identity of the non-disabled comparators (where appropriate); and
    38.3. the nature and extent of the substantial disadvantage in relation to a relevant matter suffered by the employee.

39. A duty to make reasonable adjustments does not arise unless the PCP in question places the disabled person concerned not simply at some disadvantage viewed generally, but at a disadvantage which is substantial (ie more than minor or trivial) and which is not to be viewed generally but to be viewed in comparison with persons who are not disabled: Royal Bank of Scotland v Ashton [2011] ICR 632, EAT.

40. Simler P in Sheikholeslami v Edinburgh University [2018] IRLR 1090 held: 'The purpose of the comparison exercise with people who are not disabled is to test whether the PCP has the effect of producing the relevant disadvantage as between

those who are and those who are not disabled, and whether what causes the disadvantage is the PCP. …'

41. The Equality Act 2010 provides that a substantial disadvantage is one which is more than minor or trivial: see s 212(1). The EHRC Code of Practice states that 'The fact that both groups [ie disabled and non-disabled persons] are treated equally and that both may suffer a disadvantage in consequence does not eliminate the claim. Both groups might be disadvantaged but the PCP may bite harder on the disabled or a group of disabled people than it does on those without disability. Whether there is a substantial disadvantage as a result of the application of a PCP in a particular case is a question of fact assessed on an objective basis and measured by comparison with what the position would be if the disabled person in question did not have a disability.'

42. An employer is not subject to a duty to make reasonable adjustments if the employer does not know and could not reasonably be expected to know that the employee is likely to (ie could well) be placed at a substantial disadvantage by the PCP relied on.

43. The predecessor to the Equality Act 2010, the Disability Discrimination Act 1995, contained guidance as to the kind of considerations which are relevant in deciding whether it is reasonable for someone to have to take a particular step to comply with the duty to make adjustments. Although those provisions are not repeated in the Equality Act 2010, the EAT has held that the same approach applies to the 2010 Act: Carranza v General Dynamics Information Technology Ltd [2015] IRLR 43, [2015] ICR 169. This is also apparent from Chapter 6 of the EHRC's Code of Practice, which repeats, and expands upon, the provisions of the 1995 Act. The 1995 Act provided, as does the Code of Practice, that in determining whether it is reasonable for an employer to have to take a particular step in order to comply with a duty to make reasonable adjustments, regard shall be had, in particular, to—
    43.1. the extent to which taking the step would prevent the substantial disadvantage;
    43.2. the practicability of the step;
    43.3. the financial and other costs of making the adjustment and the extent of any disruption caused;
    43.4. the extent of the employer's financial and other resources;
    43.5. the availability to the employer of financial or other assistance to help make an adjustment; and
    43.6. the type and size of the employer.

44. The duty necessarily requires the disabled person to be treated more favourably in recognition of their special needs: Archibald v Fife Council [2004] UKHL 32, [2004] IRLR 651.

45. The adjustment contended for need not remove entirely the disadvantage: Noor v Foreign and Commonwealth Office [2011] ICR 695, EAT. Nor must the claimant prove definitively that the adjustment will remove the disadvantage: provided there is a prospect of removing the disadvantage, the adjustment may be reasonable: Leeds Teaching Hospital NHS Trust v Foster UKEAT/0552/10, [2011] EqLR 1075.

46. In Royal Bank of Scotland v Ashton [2011] ICR 632, the EAT emphasised that when addressing the issue of reasonableness of any proposed adjustment the focus has to be on the practical result of the measures that can be taken. The duty to make adjustments is, as a matter of policy, to enable employees to remain in employment, or to have access to employment. It will not extend to matters which would not assist in preserving the employment relationship.

47. In the case of Doran v Department for Work and Pensions UKEAT/0017/14, where the employee was not fit to work even if adjustments were made, the duty to make reasonable adjustments was found not to have been triggered.

48. It is irrelevant to consider the employer's thought processes or other processes leading to the making or failure to make a reasonable adjustment: Ashton. The duty to make reasonable adjustments involves taking substantive steps rather than consulting about what steps might be taken: Tarbuck v Sainsbury Supermarkets Ltd [2006] IRLR 664, EAT. However, an employer cannot use the lack of knowledge that would have resulted from consultation as a shield to defend a complaint that he has not made reasonable adjustments.

Victimisation

49. Section 27 of the Equality Act 2010 provides as follows:

"(1) A person (A) victimises another person (B) if A subjects B to a detriment because—
(a) B does a protected act, or
(b) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act—
(a) bringing proceedings under this Act;
(b) giving evidence or information in connection with proceedings under this Act;
(c) doing any other thing for the purposes of or in connection with this Act;
(d) making an allegation (whether or not express) that A or another person has contravened this Act.…."

Burden of proof

50. The burden of proof in relation to complaints under the Equality Act 2010 is dealt with in section 136, which sets out a two-stage process.

51. Firstly, the Tribunal must consider whether there are facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an unlawful act of discrimination against the claimant. If the Tribunal could not reach such a conclusion on the facts as found, the claim must fail.

52. Where the Tribunal could conclude that the respondent has committed an unlawful act of discrimination against the claimant, it is then for the respondent to prove that it did not commit or, as the case may be, is not to be treated as having committed, that act.

53. The Court of Appeal in Igen Ltd v Wong [2005] EWCA Civ 142, [2005] IRLR 258 made the following points in relation to the application of the burden of proof:
    53.1. It is important to bear in mind in deciding whether the claimant has proved facts from which the Tribunal could conclude that there has been discrimination that it is unusual to find direct evidence of … discrimination: few employers would be prepared to admit such discrimination, even to themselves and in some cases the discrimination will not be an intention but merely based on the assumption that 'he or she would not have fitted in.
    53.2. In deciding whether the claimant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal.
    53.3. It is important to note the word 'could' in the legislation. At this stage the tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.
    53.4. In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts.

54. Where the claimant has proved facts from which the Tribunal could conclude that the respondent has treated the claimant less favourably because of disability, it is then for the respondent to prove that it did not commit that act or, as the case may be, is not to be treated as having committed that act. To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of the protected characteristic.

Time limits

55. Section 123 of the Equality Act 2010 provides as follows:

> Time limits
> (1) Subject to section 140B, proceedings on a complaint within section 120 may not be brought after the end of—
> (a) the period of 3 months starting with the date of the act to which the complaint relates, or
> (b) such other period as the employment tribunal thinks just and equitable.
> …
> (3) For the purposes of this section—
> (a) conduct extending over a period is to be treated as done at the end of the period;
> (b) failure to do something is to be treated as occurring when the person in question decided on it.
> (4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—
> (a) when P does an act inconsistent with doing it, or
> (b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

56. In the case of conduct extending over a period, section 123(3)(a) applies. In cases involving numerous discriminatory acts or omissions, it is not necessary for the claimant to establish the existence of some 'policy, rule, scheme, regime or practice, in accordance with which decisions affecting the treatment of workers are taken'. Rather, what she has to prove, in order to establish a continuing act, is that (a) the incidents are linked to each other, and (b) that they are evidence of a 'continuing discriminatory state of affairs': Hendricks v Metropolitan Police Comr [2002] EWCA Civ 1686, [2003] IRLR 96.

57. In South Western Ambulance Service NHS Foundation Trust v King [2020] IRLR 168, the EAT considered the authorities on this issue and held that the only acts that can be considered as part of a continuing course of conduct are those that are upheld as acts of discrimination or some other contravention of the Equality Act 2010.

58. A failure to comply with a duty to make reasonable adjustments is an omission and, therefore, engages section 123(3)(b) and (4). The application of these provisions was considered by the Court of Appeal in the case of Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] EWCA Civ 640, [2018] IRLR 1050. The Court of Appeal held that ascertaining when the respondent might reasonably have been expected to comply with its duty is not the same as ascertaining when the failure to comply with the duty began. As Lord Justice Leggatt said:
'Pursuant to s 20(3)… the duty to comply with the …requirement begins as soon as the employer is able to take steps which it is reasonable for the employer to have to take to avoid the relevant disadvantage. It can readily be seen, however, that if time began to run on that date, a claimant might be unfairly prejudiced. In particular, the claimant might reasonably believe that the employer was taking steps to seek to address the relevant disadvantage, when in fact the employer was doing nothing at all. If this situation continued for more than three months, by the time it became or should have become apparent to the claimant that the employer was in fact sitting on its hands, the primary time limit for bringing proceedings would already have expired. This analysis of the mischief which s 123(4) is addressing indicates that the period in which the employer might reasonably have been expected to comply with its duty ought in principle be assessed from the claimant's point of view, having regard to the facts known or which ought reasonably to have been known by the claimant at the relevant time.'

Unfair dismissal

59. An employee has the right, under section 94 of the Employment Rights Act 1996, not to be unfairly dismissed (subject to certain qualifications and conditions set out in the Act).

60. It is for the employee to prove that he has been dismissed within the meaning of s95 of the Act. The concept of dismissal includes a termination by the employer.

61. A mere intention to dismiss does not constitute a dismissal in itself: that intention must be communicated to the employee in some way. In some cases an employer

may use language which they did not intend to constitute a dismissal but which the employee interpreted as a dismissal. If the words used by the speaker are on their face ambiguous, then the test is how the words would have been understood by a reasonable listener. The question of whether or not there has been a dismissal must be considered in the light of all the surrounding circumstances.

62. In Hogg v Dover College [1990] ICR 39 the EAT held that 'both as a matter of law and common sense' the claimant was dismissed when the employer wrote to the claimant telling him that, henceforth, he would be employed in a different role, on different hours and a lower salary. The EAT held '…he was being told that his former contract was from that moment gone. There was no question of any continued performance of it. It is suggested, on behalf of the employers, that there was a variation, but again, it seems to us quite elementary, that you can vary by consent terms of a contract, but you simply cannot hold a pistol to somebody's head and say: "henceforth you are to be employed on wholly different terms which are in fact less that 50 per cent. of your previous contract." We come unhesitatingly to the conclusion that there was a dismissal on 31 July; the applicant's previous contract having been wholly withdrawn from him.'

63. in Alcan Extrusions Ltd v Yates [1996] IRLR 327 The EAT held as follows:

'…it is only where, on an objective construction of the relevant letters or other conduct on the part of an employer, it is plain that an employer must be taken to be saying, "Your former contract has, from this moment, gone" or "Your former contract is being wholly withdrawn from you" that there can be a dismissal under [s 95(1)(a)] other than, of course, in simple cases of direct termination of the contract of employment by such words as "You are sacked". Otherwise, we agree with him the case must stand or fall within [s 95(1)(c)].

However, in our judgment, it does not follow from that that very substantial departures by an employer from the terms of an existing contract can only qualify as a potential dismissal under [s 95(1)(c)]. In our judgment, the departure may, in a given case, be so substantial as to amount to the withdrawal of the whole contract. In our judgment, with respect to him, the learned judge in Hogg was quite correct in saying that whether a letter or letters or other conduct of an employer has such an effect is a matter of degree and, we would hold accordingly, a question of fact for the [employment] tribunal to decide.'

64. Section 98 of the Employment Rights Act 1996 provides:
'(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –
(a) the reason (or, if more than one, the principal reason) for the dismissal, and
(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.'

65. The reference to the reason, in section 98(1)(a), is a reference to the set of facts known to the employer, or beliefs held by the employer, which cause it to dismiss the employee: Abernethy v Mott, Hay and Anderson [1974] ICR 323, CA. As Cairns LJ said in Abernethy v Mott Hay and Anderson [1974] IRLR 213, [1974] ICR 323. Put

another way, the 'reason' for a dismissal connotes the factor or factors operating on the mind of the decision-maker which causes them to take the decision – or, as it is sometimes put, what 'motivates' them to do what they do: Beatt v Croydon Health Services NHS Trust [2017] EWCA Civ 401, [2017] IRLR 748.

66. In Abernethy the Court of Appeal noted that: "If at the time of his dismissal the employer gives a reason for it, that is no doubt evidence, at any rate as against him, as to the real reason, but it does not necessarily constitute the real reason'.

67. Having identified the reason (or, if more than one, the principal reason) for the dismissal, it is then necessary to determine whether that reason falls within subsection (2) or is some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

68. If the respondent shows that it dismissed the claimant for a potentially fair reason the Tribunal must then decide if the employer acted reasonably in dismissing the employee for that reason applying the test in section 98(4) of the Employment Rights Act 1996.

69. Section 98(4) of ERA 1996 provides that: '… 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.'

70. In assessing reasonableness, the Tribunal must not substitute its view for that of the employer: the test is an objective one and the Tribunal must not fall into the substitution mindset warned against by Mummery LJ in London Ambulance Service NHS Trust v Small [2009] EWCA Civ 220, [2009] IRLR 563. The objective approach requires the Tribunal to decide whether the employer's actions fell within the range of reasonable responses that a reasonable employer in those circumstances and in that business might have adopted (Iceland Frozen Foods Ltd v Jones [1982] IRLR 439). This 'range of reasonable responses' test applies just as much to the procedure by which the decision to dismiss is reached as it does to the decision itself (Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23).

Wrongful dismissal

71. At common law an employee is wrongfully dismissed if their dismissal was in breach of the contract of employment. A dismissal without the notice due under that contract (or upon short notice) will be a wrongful dismissal unless the employer was entitled to dismiss summarily, such as where the employee has repudiated the contract of employment or the employer relies on a provision of the contract permitting termination with a payment in lieu of notice.

72. The concept of dismissal is outlined above.

Evidence and facts

73. We heard evidence from Mr West on his own behalf and from his wife, Ms Collins. For the respondent we heard evidence from Mr Elliott, who was Lead Trade Manager at the respondent's Redcar store from early 2018 to October 2019 and from Ms Bromfield who was employed by the respondent as a People Partner for Teesside from 2017 until after Mr West's employment ended in 2019.

74. In addition, we took into account the documents to which we were referred in a bundle of documents prepared for this hearing and certain other documents that were disclosed during the course of the hearing. References to numbers in square brackets in these reasons are to pages in the bundle.

75. Important elements of this case were dependent on evidence based on people's recollection of events that happened some considerable time ago. In assessing that evidence we bear in mind the guidance given in the case of Gestmin SGPS -v- Credit Suisse (UK) Ltd [2013] EWHC 3560. In that case Mr Justice Leggatt observed that is well established, through a century of psychological research, that human memories are fallible. They are not always a perfectly accurate record of what happened, no matter how strongly somebody may think they remember something clearly. Most of us are not aware of the extent to which our own and other people's memories are unreliable, and believe our memories to be more faithful than they are. In the Gestmin case, Mr Justice Leggatt described how memories are fluid and changeable: they are constantly re-written. Furthermore, external information can intrude into a witness' memory as can their own thoughts and beliefs. This means that people can sometimes recall things as memories which did not actually happen at all. In addition, the process of going through Tribunal proceedings itself can create biases in memories. Witnesses may have a stake in a particular version of events, especially parties or those with ties of loyalty to parties. It was said in that case: 'Above all it is important to avoid the fallacy of supposing that because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth.' In light of those matters, inferences drawn from the documentary evidence and known or probable facts tend to be a more reliable guide to what happened than witnesses' recollections as to what was said in conversations and meetings. It is worth observing from the outset that simply because we do not accept one or other witness' version of events in relation to a particular issue does not necessarily mean we considered that witness to be dishonest.

76. Mr West was employed by Safeway from 1st April 1995 and transferred to the respondent by way of TUPE on 1st November 2004. He worked as a shop assistant in the Redcar store. His shifts were 22.5 hours per week over three days, Sundays, Mondays and Fridays from 7.00am to 4.00pm. Mr West had worked that shift pattern for over two decades by the time of the events with which we are concerned. Mr West is a carer for Ms Collins who has Chronic Fatigue Syndrome (CFS). He does most of the household chores, as well as helping her with physical tasks. Mr West's shift pattern allowed him to manage his disability and caring responsibilities.

77. Since around 1997 Mr West has suffered from anxiety and depression, with related insomnia. His condition makes him feel generally unwell and affects his

concentration and sleep pattern; he becomes anxious in unfamiliar situations and can sometimes 'freeze-up'. He sometimes finds its difficult to take in information. When his condition is particularly bad he gets suicidal thoughts. In order to manage his condition he takes medication, does meditation and sees his GP regularly. He has also had CBT. It is helpful for him to have a regular routine as this helps him to manage his anxiety. Changes to his routine are a source of anxiety for Mr West; even leaving his home can increase his anxiety. He has to take his medication at around 7.00pm or 8.00pm because if he takes it too early in the day it makes him sleepy and if he takes it too late he is unable to sleep at night.

78. When Mr West was diagnosed with mental impairments in 1997 he told Safeway's HR manager and he has discussed his condition with numerous HR managers and occupational health professionals since then.

79. For most of his years working for the respondent, and before that Safeway, Mr West had a good absence record. However, in 2014 Mr West had a breakdown triggered by an issue in his personal life and he had to take twelve months off work.

80. On 6th June 2017 Mr West contacted his GP surgery reporting that he had not been too good over the past month, that his anxiety was worse and that he had been having bad thoughts. He was given an appointment to see his GP that day which he attended. He reported that his mood had deteriorated in recent weeks, that he was experiencing increased anxiety, was waking anxious on a morning and was worrying something bad was going to happen. He told his GP that he was going to work and coping OK with work and that work was a good distraction from his thoughts. Mr West's medication was increased to help with his mood.

81. In May to June 2017 there was a restructure in the Redcar store. It became about as part of wider operational changes applying more generally, including to other stores in the company, as a consequence of a decision to remove the nightshift, resulting in some redundancies. The changes meant tasks that had been performed previously by the nightshift being done at other times. As part of those changes the respondent's managers decided to look at the shifts worked all store assistants at the Redcar store. Store assistants were all asked to fill in a form indicating the days and hours they could work. We were shown such a form completed in respect of Mr West at page 116 – 117 and another at 118 signed by Mr West. The respondent's case is that those documents show that Mr West was willing and able to work five day shifts per week and indeed agreed to do so. Mr West's evidence was that he was given no choice. His evidence was that he had in fact earlier completed a form indicating that he was available for three day shifts per week but that that form had not been disclosed by the respondent in these proceedings. We accept Mr West's evidence – it is supported by repeated references made to occupational health and managers during his latest sickness absence about his shifts and references to 'disability'. We find that what happened is as follows:

81.1. Mr West was given a form to take away and complete. In the form which Mr West completed, he said he could work any three days of the week between the hours of 5.00am and 6.00pm.

81.2. Mr King then told Mr West, ahead of a meeting on 12th June 2017, that there was no way he would be allowed to work just three day shifts any more,

and that he would have to spread the hours over five days. He said the only way Mr West would be able to stick to three shifts would be if he did late shifts ie finishing at 11.00pm.

81.3. The idea of such a change in his routine after more than twenty years caused Mr West anxiety because of his disability. Those hours would also affect his ability to care for Ms Collins (who had been diagnosed with CFS within the last few months) and would disrupt his medication. Mr West explained all of that to Mr King at the meeting on 12th June 2017. Mr King said again that Mr West could no longer work three day shifts. He said that Mr West could either do three late shifts or five day shifts and that that was the best he could do.

81.4. Mr West felt he had no choice but to agree to do his 22.5 hours over five day shifts. He made it clear he was very unhappy about it because of the way it would affect him due to his condition.

81.5. Throughout May, June and July 2017 Mr West told Ms Harran, Ms Green and Ms King that he would no longer be able to cope with the new hours and lack of support. In June and July he asked to keep his existing shift pattern, explaining that the changes would make his condition worse. He was told this would not be possible.

82. The shift changes took effect from 23rd July 2017.

83. Around about the same time as the restructure and shift changes were being discussed, starting in May 2017, Mr West was told he was going to have to take responsibility for price reductions on fresh goods, which involved using a piece of hand-held computer equipment – a PDA. Although Mr West had been involved with price reductions before, we accept his evidence that he had not himself used the PDA. Instead he had worked with a colleague (Dave) and they had split the task between them, his colleague using the PDA and Mr West taking sticky price labels from a printer and attaching them to the goods. Although that was not the usual way of operating for staff, it was done because Mr West was anxious about the idea of using the PDA. The respondent referred us to documents showing that Mr West had been criticised in connection with price reductions but we do not accept that showed he personally had used the PDA.

84. Ms Bromfield accepted that to use the PDA a staff member would need training. Sometime in early August Mr West was given some training in the use of the PDA by a Ms Dobson. In cross examination Mr West said the training only lasted about twenty minutes. On further questioning, however, he accepted that it may have been up to an hour, which is supported by a stress risk assessment completed by Mr West in January 2018 [120]. We find that the training lasted probably about an hour. However, at the end of the training Mr West felt that he still did not know how to use the PDA. Mr West's condition means he struggles with concentration and learning new skills. So Mr West asked for some more time with the person who had been training him. He said that he needed this because his condition means it takes him a bit longer to learn new things than it would take somebody else.

85. Mr West's colleague Dave was due to stop working in the second week of August 2017.

86. Mr West was signed off sick on 13th August 2017 with depression and anxiety.

87. As recorded above, Mr West visited his GP on 6 June 2017. At that time Mr West had not had the meeting with Mr King at which he was told his shifts were to change to a five-day pattern although he was aware there was a restructure. Mr West's next visit to his GP was the day after he went on sick leave. The notes from that appointment record Mr West saying he had increased anxiety over the last couple of months and that he was getting worse and was unable to work. There is no specific reference in those notes to any changes at work to Mr West's shift or duties. Nor is there any reference to the change in duties or shift being a trigger for Mr West's anxiety in the GP records for any of Mr West's visits in 2017 or 2018. Mr Morgan invites us to infer that Mr West did not tell his GP those matters caused him any anxiety and that neither the shift change nor the need to use a PDA triggered Mr West's absence from work. Mr West's evidence, in contrast, was that a trigger for his absence was that he was finding things difficult at work because of a combination of the shift changes and his anxiety about having to use the PDA, which he says he did not feel capable of using.

88. In resolving this dispute between the parties we have found the following documents to be of particular assistance:
    88.1. [127] An occupational health report dated 16th November 2017. In response to a question about whether there were any factors in the workplace that were impacting upon Mr West's health, the OH advisor notes 'prior to taking sick leave in August 2017, Craig reports concerns in relation to his shift pattern. That was changed to morning shifts only. It seems this impacted on his current feelings of anxiety and depression. Aside from that, there are no other work issues.'
    88.2. [130] In a meeting on 18th January 2018 between Mr West and Ms Clemmet to review his absence Mr West referred to the change of shift pattern as an issue, linking it with insomnia, and she agreed to look at what shifts were available.
    88.3. [120] In a stress risk assessment completed on 19th January 2018 Mr West referred to not having enough training for the PDA.
    88.4. [144] An occupational health report dated 25th January 2018 referred to Mr West's shift pattern.
    88.5. [149] Mr West asked about shift patterns again in a meeting with Ms Clemmet. Ms Clemmet said there was 'nothing at the moment' and said it was on her agenda. We also note that at that meeting Mr West said he was feeling positive.
    88.6. 15.4 [153 – 4] A report of 20th February 2018 from Remploy records that Mr West told his advisor about his shift pattern having changed and how his old shift pattern had allowed him to manage his anxiety, depression and insomnia. The report also records that Mr West told the advisor he had had additional duties added; we find that this was a reference to the use of the PDA. The report records Mr West saying he was struggling with the PDA 'as his reading and writing is not good'. The report records that Mr West reported certain key difficulties whilst at work including the use of the PDA device and his current shift pattern and the advisor identified an adjusted shift pattern and additional training on the PDA as appropriate adjustments.
    88.7. [174] In a meeting between Mr West and Mr Elliott in April 2018 there was talk about triggers for Mr West's anxiety and Mr West said he had been suffering

anyway but then his shift pattern changed and that he had explained to others his concerns about Ms Collins being ill and having to run the house.

89. Looking at the evidence in the round, we find as follows.
    89.1. The change to Mr West's shift pattern in July 2017 was a serious concern to Mr West, not just during his absence on sick leave but before then.
    89.2. The use of the PDA was also of concern both before and during Mr West's absence on sick leave but was not his primary concern.
    89.3. There were other stressors acting on Mr West before he went off work on sick leave, as is evident from the fact that he had visited his GP in June. Those stressors included Ms Collins's illness.
    89.4. Mr West had a pre-existing condition which was worse at some times than others and this was a period when Mr West's condition had worsened.
    89.5. The change in Mr West's shift pattern and the requirement to use the PDA contributed to his increased anxiety. That increased anxiety led to him being off work.

90. The respondent has a policy for dealing with sickness absence. In relation to sickness absences other than long term absences the policy set out four formal meeting stages at the end of which dismissal would be considered. There is a separate section of the policy for long term absences [99]. The policy on long term absence provides initially for a wellness meeting to take place followed by formal long term absence meetings if no return to work date is agreed at the wellness meeting. The section of the policy on long term absences does not set out meeting stages in the same way as the section on other absences but it is apparent that managers followed a similar staged process, as reflected in the checklist at [138] which reminds managers that 'there must always be at least two subsequent meetings before, moving onto the final meeting (therefore a total of at least four formal meetings).' The policy itself states 'If a return to work date can't be agreed at the first long term absence meeting a series of formal meetings at regular intervals will be arranged, depending on your condition, and any treatment you are receiving. You should be aware that ultimately if a return to work remains unlikely your employment may be terminated on the grounds of ill health.'

91. On 10th October 2017 Mr West attended a wellness meeting with Ms Green and Mr Cruikshank [124 – 125]. He was referred for an occupational health assessment.

92. That occupational health assessment took place on 16th November 2017 and a report was produced on that date [126 – 128]. The report was sent to the respondent, addressed to Ms Harran. We find Mr West would have been given the option to see it, given that was a legal requirement. We accept that he did not take up that option. We make the following observations about that report:

    92.1. It reports that Mr West's feelings of anxiety appeared to be severe and that he felt generally unwell, that he was currently reluctant to leave his home, preferring to stay indoors, and that his concentration, appetite and sleep were all affected at that time.
    92.2. In response to a question about how long the effects of the health condition had been ongoing and how long they might last, the advisor said Mr West had described ongoing symptoms for the last twenty-five years, that

previous exacerbations had improved after six to eight weeks but some had taken many months. The advisor said they were unclear how long this episode was likely to last. They also said they were unclear of an exact return to work date and felt return was unlikely in the next six to eight weeks. They said 'I anticipate that Craig will be fit to resume his usual duties when his current symptoms have settled.'

92.3. In response to a question about reasonable adjustments the advisor said 'at present, I cannot plan precise workplace adjustments. I am hopeful that Craig will return to his usual duties but he may need support measures such as adjusted shift times and a phased return.' The advisor also recommended that the respondent meet with Mr West and complete a stress risk assessment and said 'at present Craig is not fit for work, however I am hopeful that symptoms may improve following CBT, as this was the case previously.'

93. On 18th January 2018 there was a meeting between Mr West and Ms Clemmet to discuss Mr West's absence, which was described as a wellness meeting [130]. At the time of the meeting Ms Clemmet had not seen the OH report but did complete a stress risk assessment [120 – 122] with Mr West either that day or the next, as recommended in the report. She told Mr West she would get a copy of the report. At that meeting Mr West talked about the difficulties caused by his changed shifts and Ms Clemmet said she would look into it. The implication being that she would look into whether Mr West's shifts could be changed. Ms Clemmet was aware that Mr West had another occupational health appointment pending. They agreed to meet again in four weeks' time.

94. Later in January 2018 Mr West attended a further occupational health assessment. A report was prepared by the OH advisor and sent to Ms Harran. We note that the report indicates that it was copied to Mr West. The report said that Mr West was now able to leave his home for short periods; there had been a slight increase in anxiety but progress had been made and the advisor was hopeful that further progress would be made in the next few weeks. The advisor had been asked to give an opinion on whether there were any factors in the workplace that were impacting on Mr West's health. In response the advisor said 'there are no work issues, aside from concerns about shift patterns/working hours. Please can you review Craig's shift patterns if the business can accommodate it?' The advisor said Mr West reported ongoing disturbed sleep and then extreme fatigue, that he was able to carry out chores but lacked motivation and his concentration was affected. They expressed hope that ongoing CBT was helping to develop coping mechanisms. They said that they were 'unclear how long this exacerbation is likely to last' and were 'still unclear of an exact return to work date and feel return is unlikely in the next six to eight weeks'

95. On 5th February 2018 Mr West received an invite to what was described as a 'first formal meeting' under the respondent's sickness policy [146]. The letter said:

'The purpose of this meeting is to discuss your absence and how we can provide appropriate support to you. During this meeting well talk through your condition, any prognosis or future treatment plans and whether there have been any changes to your health. You'll have the full opportunity to provide any further information you think Is relevant. We'll also discuss whether there is a foreseeable

return to work date for you, the possible timescales for this and any adjustments that we can make to your role, to support your return to work.'

96. That meeting took place on 14th February with Ms Clemmet. At that meeting Ms Clemmet told Mr West she had not yet seen the occupational health reports. Mr West said he had received an e-mail asking for his authority to release a report. Ms Clemmet asked how Mr West was feeling. He replied that he was 'getting there' but was not yet ready for work. Mr West asked about changing his shift pattern again and Ms Clemmet said she would keep it on her agenda.

97. After that meeting Ms Clemmet, on the same day, sent Mr West a letter in which she said, in respect of his shift pattern 'we do not currently have any vacancies.' She did say, however, that she would be happy to support a return to work on three shifts a week to begin with.

98. That day, Ms Clemmet also sent a letter to Mr West arranging the next formal absence meeting to take place on 14th March 2018. In her letter she said:

'The purpose of this meeting is to discuss your absence and whether you've made any improvement from the last meeting we had. We will also discuss your Occupational Health report and most recent Fit Notes to understand the extent of your illness on your ability to work. In doing this we can establish whether we can provide any additional support to you during your absence. Within this meeting we will also discuss your current state of health and whether there are any reasonable adjustments that we can make to enable you to return to your existing role or whether there is any alternative work you would be able to carry out either on an interim or permanent basis, again, to enable you to return to work, and set agreed timescales for this return to work.

I will make every effort to support you to return to work however, please be aware that one of the outcomes of this process could be that the decision is made to dismiss you on the grounds of your incapability to return to work In the foreseeable future due to ill health.'

99. In the meantime, Mr West met with somebody from Remploy on 20th February 2018 and they prepared a report [153].

100. The second formal absence meeting did not take place until 23rd April. Mr West had been unwell on 14th March so it had to be postponed. It was originally postponed to an earlier date in April but was postponed again because Mr West did not feel well enough to go to the store so asked for the meeting to take place at his home. The meeting was conducted by Mr Elliott who had recently been appointed as lead trade manager at Redcar store. Mr Elliott was responsible for reviewing colleagues' absences and managing any meetings about absences. He sent a letter to the claimant ahead of the meeting which was in essentially the same terms as the original letter sent by Ms Clemmet.

101. At the start of the meeting Mr Elliott told Mr West he was new to the 'processes around dismissal from the company and what the meetings are about.' Mr Elliott had said in his letter that they would review occupational health reports at the meeting

but he had not obtained them before the meeting. There was a suggestion by Mr Elliott in evidence that he may have seen the first one but we find that unlikely given the content of the meeting notes. The absence of the occupational health reports was specifically discussed and there was no record of Mr Elliott saying he had seen one of them. We find he had not seen the occupational health reports at this stage. At the meeting Mr Elliott said they would be chased up and they would then 'get together and review them informally'. During the meeting Mr Elliott asked if there had been a trigger for the claimant's absence. The claimant said there had been a trigger to do with work. Mr Elliott acknowledged that, from the notes he had seen, it appeared to have been driven by a change of working pattern, which the claimant confirmed. Mr West also acknowledged that a return to work was not likely 'at this moment' and he could not give a definite answer about the future. Mr Elliott told Mr West he would arrange a third formal meeting for four weeks' time. He added that they 'don't follow an exact line by line process as every case is different' but said that at this point they would be 'looking at holding another meeting then after that if nothing changes we can look at holding a final absence meeting four weeks after.' Mr West broached the subject of reasonable adjustments. Mr Elliott replied that they were 'not at that point' and that they would be discussed 'later down the line if you feel fit to return.'

102. On 23rd April 2018 Mr West submitted a grievance by e-mail marked for the attention of Ms Bromfield [188]. A few days later he followed that up with a handwritten grievance on the Tesco template providing quite a bit more detail. He referred in his grievance to the fact that a formal capability process was going ahead despite the fact that he had been referred for occupational health assessments and the reports had not been considered. He asked for the absence management procedure to be suspended until the respondent had read all of the occupational health reports. Mr West also referred to the change in his shifts that he had been doing for twenty-two years and the impact this had had on his ability to cope.

103. On 26th April Mr West had another occupational health assessment and a report was produced, addressed to Ms Bromfield [190 -193]. It is clear that Mr West mentioned to the OH advisor at that appointment concerns about the change to his shift patterns and the advisor said 'please can you meet with [Mr West]… to resolve the work issues'. In the section dealing with reasonable adjustments the advisor recommended '…a review of [Mr West's] shift patterns to ideally allow him to work three days instead of five, if the business can accommodate it.'

104. On 30th April 2018 Ms Bromfield sent a letter to Mr West inviting him to a grievance meeting which was to take place on 17th May 2018. The following day, on 1st May, Mr Elliott sent Mr West a letter inviting him to what was described as a third formal absence meeting under the sickness policy.

105. In her letter to Mr West, Ms Bromfield asked Mr West to contact her to confirm his attendance, which he did. When he did so Ms Bromfield asked Mr West to meet with her informally first to have a chat. That meeting took place in early May 2018. At that meeting Mr West and Ms Bromfield discussed the fact that Mr West was unhappy about the number of managers that had been involved in his absence management. His evidence is that Ms Bromfield told him she would be the one supporting his absence. Ms Bromfield's evidence is that she said she would be

overseeing the absence management process, that he was reassured and that he found her sympathetic, and she had described in the meeting how her husband had experienced depression. We find Ms Bromfield probably did use the words she refers to. Mr West may well have thought she would be conducting meetings and making decisions rather than simply overseeing the process. However, we find that was not what Ms Bromfield said or intended to convey. Her point was that she would have oversight of matters from an HR perspective from then on. We find there was no intention on her part to mislead Mr West.

106. During the meeting Ms Bromfield asked Mr West if he still wanted to go ahead with his grievance. Mr West was reassured by what she had said about her being involved in the absence management process and agreed to drop his grievance. There was then a discussion about career breaks, which was initiated by Ms Bromfield. She suggested it to Mr West as an option that would enable him to take time out of the business to get better. Mr West said he would think about it. There is a dispute on the evidence as to whether or not Ms Bromfield explained the career break policy to Mr West and directed him to the written policy on the respondent's intranet 'Our Tesco'. Ms Bromfield says she did so, Mr West says she did not do so. We return to this point later in our findings.

107. On 26th May 2018 there was a further (third) formal absence meeting between Mr West and Mr Elliott. Ms Collins was also present as was someone from the company who took notes. Mr Elliott had the latest occupational health report by this time. At some point before this meeting Mr Elliott and Ms Bromfield spoke and she told him she had suggested a career break. For his part, Mr Elliott did not think a career break would be appropriate.

108. With regard to the career break, Mr Elliott raised this with Mr West fairly early on in the meeting and asked if Mr West had thought about it. Mr West replied that he would want to carry on as is. Towards the end of the meeting Mr Elliott described what would happen next under the formal absence process. He said there would be another meeting in four weeks ie 22nd June. He suggested that, depending on the circumstances, that could then lead to a final absence meeting, the clear implication being that Mr West could be dismissed at that final meeting. Ms Collins then asked at the final meeting that the career break could be discussed. Mr Elliott replied 'we absolutely want to support you through your absence. [Ms Bromfield] offered it to you during your last meeting as a form of support but I can't guarantee that it would be available in the future. I don't want to put you in a position to make a decision now. So we will continue this meeting and schedule another four weeks and over the weekend you think about a career break and let us know.' He added 'contact [Ms Bromfield] in terms of your career break decision. I would suggest you go have a look at the career break policy on Our Tesco. That could help with your decision.' There is a dispute on the evidence as to what else, if anything, was said about a career break in the meeting. Mr West and Ms Collins say they told Mr Elliott that they did not have access to Our Tesco. Mr Elliott's evidence was that they did not say that but that he went on to explain what was said in the career break policy in more detail. We return to this dispute on the evidence later in our findings.

109. During this meeting Mr Elliott said they would look at the adjustments referred to in the report when they were in a position to facilitate the claimant's return. Mr Elliott

referred to the fact that there was no estimate of the claimant's return date in the report adding 'I have to tell you in regards to following the process we will arrange for another meeting in four weeks, which would be the fourth formal absence meeting. Then after that depending on circumstances it would lead to a final absence meeting.' The next meeting was arranged for 22 June 2018.

110. Mr Elliott followed up this meeting with a letter dated 26th May. That was a Saturday. The Monday was a bank holiday. It is unlikely the letter was received by Mr West until the Wednesday of the following week. It said 'we have agreed you will consider [the option of a career break] and inform us of your choice at the start of next week.' It also repeated that one of the possible outcomes of 'this process' was dismissal.

111. On 28th May 2018, ie bank holiday Monday, Mr West telephoned Ms Bromfield and said he wanted to take the option of a career break. There was a discussion about what that meant. There is a dispute on the evidence as to what was said. Ms Collins was present whilst Mr West was on the telephone and at one point she also spoke to Ms Bromfield, Mr West handed his phone to her so she could speak to Ms Bromfield. Again, there is a dispute on the evidence as to what was said. We return to that later in our findings.

112. Mr West was then sent a form to fill in to confirm he wanted to take a career break. The form is at page 218 of the bundle. Mr West received the form by post. He completed it and returned it to the respondent. The document is headed 'Leave request form'. There is a section that invites those completing it to state the 'type of leave requested' and somebody wrote in the space 'career break'. There is a space for the number of days leave requested to be entered. That space was left blank. The leave start date was completed with the date of 30th July 2018. The leave end date was left blank. The form was signed by Mr West and returned. The form was subsequently counter signed by a Ms Yarnell, who was the store manager at the time, to confirm that the leave was authorised.

113. The respondent did not send Mr West any other paperwork about the career break.

114. On 27th July 2018 Ms Collins telephoned Ms Bromfield about the career break. Ms Collins evidence to us was that her call to Ms Bromfield was prompted by her having seen some information about career breaks on a website called 'Very Little Helps' that had caused her concern. On cross examination, Ms Bromfield agreed that Ms Collins had told her during this conversation that she had seen some information about career breaks on that website. We find that Ms Collins had, at some point before calling Ms Bromfield on 27th July, looked at that website and seen information about career breaks that prompted her to contact Ms Bromfield. There is a dispute on the evidence as to what was said in this conversation. We return to this later in our findings of fact.

115. Mr West's career break started on 30th July 2018. He then had no contact with the respondent until 1st April 2019. On that date, Mr West went into the store at Redcar. He was keen to return to work in July when, as far as he was concerned, his career break was due to end. He went into the store for two reasons. Firstly, he

wanted to start acclimatising himself ahead of his return to work. He also needed to see his line manager, Mr Cruikshank, because he needed evidence of his employment with Tesco for financial reasons. Mr West spoke to Mr Cruikshank. Mr Cruikshank appeared, to the claimant, to be confused by Mr West's visit. Mr Cruikshank told Mr West that he did not have a job or that they did not have any hours for him or words to that effect.

116. Mr West texted Ms Bromfield straightaway [220 – 223] explaining what had happened. In his text he said 'when me and my wife spoke to you about these concerns, me and my wife was told by you not to worry I will be allowed to come back under the same contract and benefits.' The tone of the text was polite and Mr West said twice he was sorry for contacting Ms Bromfield about it. Later that day Mr West received a phone call from another manager, Ms Blackler. She told Mr West that Mr Cruikshank had made a mistake. Mr West's evidence is that Ms Blackler told him she had spoken to Ms Bromfield and he was not to worry, his job was safe and that Mr Elliott would be in touch with him in a few weeks, once he was back from a holiday, to arrange Mr West's return.

117. Six weeks passed without Mr Elliott or anyone else from the respondent contacting Mr West and so on 17h May Mr West texted Ms Bromfield again saying he had heard nothing from Mr Elliott [225]. Ms Bromfield subsequently spoke to Mr Elliott by phone and asked him to contact Mr West about facilitating his return to work. Later that day, Mr West received a phone call from Mr Elliott who told Mr West about some vacancies in the store. Mr West told Mr Elliott that Ms Bromfield had said he could return to his job ie the job he'd had before his career break. Mr Elliott replied 'she never told me that'. He told Mr West he could apply for one of the vacancies if he wanted to. This caused Mr West to panic. The next day, 18th May, he texted Ms Bromfield again asking her to contact him [227 – 229]. Mr West did not receive any response from Ms Bromfield.

118. Two days later, on 20th May, Mr West went into the store at Redcar with Ms Collins and spoke to Mr Elliott. Mr Elliott showed them a whiteboard displaying some vacancies. Mr West and/or Ms Collins said again that Ms Bromfield had said Mr West could go back to his job at the time the career break was arranged. Mr Elliott said he wasn't aware of that arrangement, that Mr West could apply for any of the vacancies and that he would not have offered Mr West a career break.

119. Mr West did not apply for any of the vacancies. On 27th May 2019 Mr West raised a formal grievance [230 – 234]. He raised a number of matters including the failure to allow him to return to his job. He gave an account of what he said he and Ms Collins had been told in May and July 2018 about the career break. Mr West subsequently received a phone call from someone called Doug at the respondent company telling Mr West his grievance had been received, would be investigated and that they would be in touch. Mr West heard nothing further before he commenced these proceedings on 25th July 2019.

120. One of the main factual disputes in this case concerns what was said to Mr West and Ms Collins between May and July 2018 about career breaks. The main differences in the evidence are as follows.

120.1. Ms Bromfield's evidence was that she said to both Mr West and Ms Collins that they should look at the company policy on career breaks, that they had told her they had looked at the policy together, that she herself had explained the policy to them, including explaining that Mr West would be terminating his employment if he took a career break, that he was not guaranteed his job back, and that he would need to apply for jobs if he wished to return.

120.2. Mr Elliott's evidence was that, after his meeting with Mr West in May (immediately after the formal meeting had ended), he explained the company's career break policy to Mr West and Ms Collins, including that he would be leaving his role, that he could apply for vacancies and that there was no guarantee he would be able to get the same role back.

120.3. For their part, Mr West and Ms Collins' evidence was that it was only Mr Elliott who directed them to the company policy, in the meeting in May, and when he did so they said Mr West did not have access to it. They say that neither Mr Elliott nor Ms Bromfield said to either of them that Mr West would ending his employment by taking a career break; nobody told them the career break would mean a termination of Mr West's employment; Ms Bromfield said Mr West could go back to his old job if he returned from a career break; Ms Bromfield made no mention of Mr West having to apply for jobs if he wished to return; and they did not look at the company's career break policy because they did not have access to it and they did not tell Ms Bromfield that they had looked at the policy.

121. We considered Mr West to be a credible witness in the sense that he gave evidence he believed to be truthful. The texts Mr West sent to Ms Bromfield in 2019 are evidence that he genuinely believed he would be able to go back to his job based on what Ms Bromfield had told him and Ms Collins. That provides some support for his case. However, we also bear in mind a possibility that Mr West was mistaken. On his own case, he finds it difficult to take in information and it is perfectly possible that he could have misunderstood the things Ms Bromfield told him. That said, Mr West was not relying only his own perception and recollection of events. His belief that he would be able to go back to his job was also, we find, based on what Ms Collins had been told by Ms Bromfield.

122. Of course, it is always possible that Ms Collins misunderstood what Ms Bromfield and/or Mr Elliott said or that her recollection of what was said was flawed and that is something we bear in mind. We are also mindful of the fact that some of the evidence she gave in response to questions put to her at the hearing was not contained in her witness statement. When a witness introduces evidence in answer to questions that is not contained in their own witness statement that can undermine their reliability as a witness. In this case, however, we have concluded that it did not. We found Ms Collins responses to questions were spontaneous and detailed and the account she gave of the conversations she had about a career break was entirely plausible. On the whole we found Ms Collins to be a particularly compelling witness in these proceedings.

123. As for Ms Bromfield, we note that she is no longer employed by the respondent and, therefore, may no longer have ties of loyalty to the respondent that (as the case of Gestmin reminds us) might have influenced her perception or recollection of

events. Nevertheless, she may still have a stake in a version of events that does not undermine her professionalism.

124. There were a number of features in this case that caused us to question Ms Bromfield's reliability as a witness. For example, her evidence as to what was said about career breaks in 2018 was somewhat imprecise. Moreover, the fact that Ms Bromfield did not reply to Mr West's texts when he contacted her in May 2019 lends some support to Mr West's case. If Ms Bromfield had thought Mr West was incorrect in saying that she told him he could go back to his job, it is somewhat surprising that she did not contact him to correct him. When questioned about this Ms Bromfield said – for the first time - that Mr West contacting her was 'borderline harassment', suggesting that was the reason she did not reply. In no sense can those texts sent by Mr West reasonably be considered of a harassing nature, or in any way close to harassment. When Ms Bromfield was asked to explain why she considered them to be 'borderline harassment' she suggested that there had been other texts sent by Mr West. Mr West was recalled to deal with that in evidence. He denied there had been any other texts. We accept that he did not send any texts other than those that were shown to us in these proceedings: if there had been they would have been made available. We reject Ms Bromfield's evidence that the reason she did not respond to the claimant's texts was that she considered them to be 'borderline harassment'. Ms Bromfield's evidence on this issue undermines her credibility as a witness.

125. As for Mr Elliott, we have doubts about the reliability of his account of the discussion with Mr West and Ms Collins at the end of the meeting in May 2017. It seems to us somewhat unlikely that he would have explained the policy to Ms Collins and Mr West as he claims given that he had already signposted them to the policy on line and given that the career break discussions were not a matter with which he was involved.

126. We have found it of assistance to consider the policy document that was in place at the time the career break was under discussion (a document which the respondent disclosed during the course of this hearing). Mr Elliott and Ms Bromfield both said in evidence they told Mr West he would have to apply for jobs upon his return from a career break. That is not what the policy that was in place at the time suggested. That policy put the onus on the employer to offer jobs. When asked about this while giving evidence, both Mr Elliott and Ms Bromfield suggested that what the policy meant was that there should be an expression of interest by an employee following which they would be slotted into a role. Yet in their evidence in chief they both referred to employees having to 'apply' for a job. That word seems inapt to describe the process referred to in the policy that was in place when career break discussions began. The company introduced a new career break policy at some point in or after June 2018, after Mr Elliott had spoken to Mr West about the career break and after Mr West had said he wished to take the career break. That new policy document (which was disclosed before the hearing) does use the word 'apply'. That causes us to consider there is a real possibility that Mr Elliott and Ms Bromfield's beliefs as to what they told Mr West may have been affected by them subsequently reading the current policy (which was, until during this hearing, the only career break policy to have been disclosed in the proceedings).

127. We also note that Ms Collins spoke to Ms Bromfield twice about the career break. We find it highly likely that she did so, as she said, in order to seek assurance that Mr West would be able to return to his job. It is doubtful that, if she had not received that assurance from Ms Bromfield, Mr West would have taken the career break. It is significant that Ms Collins spoke to Ms Bromfield a second time after looking at the Very Little Helps website and having received no paperwork from the company about the career break, other than the form to fill in confirming that Mr West wished to take a career break. We accept Ms Collins' evidence that what triggered her decision to contact Ms Bromfield towards the end of July 2018 was the fact that she had seen references on the Very Little Helps website to career breaks meaning that employment ends and there was no guarantee of getting a job back. If, when Mr West agreed to take a career break, he and Ms Collins had known or believed that was what a career break meant there would have been no reason for Ms Collins to contact Ms Bromfield on that later occasion.

128. It might be thought unlikely that Ms Bromfield would have given Mr West an assurance that contradicted the company policy. As to that, however, we note that the company policy was not itself a model of clarity. Although the policy referred to a career break involving a termination of employment, it also said one of the benefits of the career break scheme for an employee as being that they could 'take time out from the business without the feeling that he/she has resigned and can contine to "keep their hand in"'. Our impression of that document is that it sought to give an impression of ongoing employment. Linked to that, it put the onus on the company to offer re-employment. For although the policy said there was no guarantee of getting a job back, reading the policy in the round it gave the impression that employees who took a career break would be offered jobs and slotted back in. Indeed, when it was put to Ms Bromfield at this hearing that she had guaranteed Mr West his job back, her reply was '***a*** job; not ***his*** job'. That suggests that even she thought the policy provided some guarantee of employment, notwithstanding some statements in the policy to the contrary. Indeed, her evidence was that her experience was that people were re-employed after a career break if they sought re-employment.

129. In any event, notwithstanding the policy document that was in place at the time Mr West agreed to a career break, the arrangement of Mr West's career break did not follow the respondent's policy in a number of respects. Mr West was not sent the leaflet explaining career break arrangements, as the policy, and a linked 'Career Break Procedures' document, said employees would be. Nor was there any written confirmation given of the terms of the career break, again, which the Procedure document suggested would happen. Furthermore, although the Procedure document referred to a career break being arranged by agreement with a senior manager, the arrangement reached in this case was an arrangement between Mr West and Ms Bromfield. That is certainly how Mr Elliott seemed to perceive the arrangement: he referred to an offer having been made by Ms Bromfield and although a form was signed by Mr West's manager to confirm the arrangement, she had no involvement in the arrangements themselves and we find that her signing that form was a mere formality. The signs are that the arrangement reached between Mr West and Ms Bromfield was one that was being made outside of the terms of the written policy and procedure documents that were in place.

130. Furthermore, the form that was completed by Mr West said nothing about his employment ending. Indeed, its use of the word 'leave' implied the opposite: that employment was continuing.

131. Considering the evidence as a whole, we prefer the accounts given by Mr West and Ms Collins and find as follows:

131.1. Although Mr Elliott suggested Mr West look at the policy on-line, neither Mr West nor Ms Collins did so because they did not have access to the on-line system. Had they had access they would have looked at it given that Ms Collins in particular was keen to get information about what a career break involved. Neither Ms Collins nor Ms West told Ms Bromfield or Mr Elliott that they had looked at the policy on-line.

131.2. Neither Ms Bromfield nor Mr Elliott told Mr West that by taking a career break he would be terminating his employment or that there was no guarantee that he could return to his existing job. On the contrary, Ms Bromfield told Mr West that he could return to his existing job at the end of the career break.

131.3. Notwithstanding what was said in the policy that existed at the time Mr West took his career break, the arrangement made was one reached outside that policy.

132. Accordingly, we find that when Mr West took a career break that did not have the effect of terminating his contract of employment. Nor did Mr West agree to give up his existing job. His taking a career break was not conditional upon accepting terms of the written policy, which he had not seen and which was not referred to in the document he signed confirming his wish to take a career break. The agreement reached between Mr West and the respondent was that he would take unpaid leave for up to a year, following which he was able, if he wanted to return, to return to his existing job.

133. When Mr West did attempt to return he was told first by Mr Cruikshank that his job was no longer available. That was reiterated by Mr Elliott when Mr West spoke to him on the telephone in May 2019 and again when Mr West met with Mr Elliott on 20th May 2019, even after Mr Elliott was aware the claimant had been expecting to return to his previous role. On 20th May Mr Elliott simply told the claimant he could apply for other vacancies.

134. Viewing all the circumstances objectively, we find that, certainly by 20th May 2019, there was no question of any continued performance of the claimant's extant contract of employment. Mr Elliott was telling the claimant that his contract was gone. Although the claimant had the option of applying for other jobs, it is plain that the respondent must be taken to be saying that it considered it was not bound by and would not continue to honour the terms of Mr West's existing contract of employment, his existing contract had been wholly withdrawn from him and was gone. We find that this was a dismissal by the respondent that took effect on 20th May 2019.

135. One of the allegations in this claim is that the respondent pressured Mr West to take a career break. We do not find there was any pressure from Ms Bromfield on Mr West to take a career break. We accept, from Mr West's own account, of the

conversation in which a career break was first suggested, that she suggested the matter in good faith. As for Mr Elliott, we have found that he did say to Mr West, at the meeting in May 2018, that Mr West should think about a career break over the weekend and he told Mr West that the option would not necessarily still be on the table if he did not accept it. However, we have also found that Mr Elliott did not want Mr West to take a career break: he did not agree with the offer of a career break that had been made. That being the case, we find it highly unlikely that there was any intention on the part of Mr Elliott to pressure Mr West into taking a career break. Insofar as Mr Elliott told Mr West to think about things over the weekend, he did not go so far as to say Mr West must make a decision over the weekend. We can understand that Mr West may have felt under pressure to make a decision but in telling Mr West that the option may not be open indefinitely Mr Elliot was simply stating a blunt fact and the respondent needed to know one way or another whether Mr West wished to take a career break. We readily accept that Mr West felt under some pressure to take a career break because he thought he would lose his job if he did not do so and saw this as the only way of keeping his job. However, that feeling of being under pressure was Mr West's subjective reaction to the circumstances in which he found himself. The respondent did not itself, whether through Ms Bromfield or Mr Elliott, put pressure on Mr West to take a career break.

136. The allegation that the respondent put Mr West under pressure to accept a career break is not made out on the facts.

137. Mr West alleges in these proceedings that he was deceived as to the terms of the career break. The allegation of deceit implies that the terms of the agreement regarding the career break were someway different to the terms which Mr West was led to believe would exist by Ms Bromfield. Our finding regarding what was agreed is as set out above. The career break was not subject to the terms of any career break policy. There was no deceit on the part of the respondent.

138. The allegation that the respondent deceived Mr West as to the terms of the career break is not made out on the facts.

Conclusions

Allegation 1

139. Mr West complains that the respondent contravened the Equality Act 2010 in requiring him to work his contracted hours over five days per week instead of three. Mr West alleges that the respondent failed to comply with a duty to make reasonable adjustments.

140. It is common ground that Mr West's contractual working hours provided for him to work five days per week from July 2017 and that this was a provision, criterion or practice (PCP) of the respondent.

Did that PCP put Mr West at a substantial disadvantage in relation to his employment in comparison with persons without a disability?

141. We have found as a fact that Mr West's disability meant that he could become anxious on leaving his home and that changes to his routine tended to increase his anxiety. Spreading his contractual hours over five days rather than three meant he had to leave the house more often. It was also a change to his routine, his shift pattern had been a constant for twenty-two years. Both of those things (the need to leave the house more often and the change to his routine) caused Mr West significant anxiety and distress: as is evidence by the fact that Mr West raised the matter with his managers on a number of occasions both at the time of the proposed changes and during his absence. Indeed, we have found it was a trigger for him needing to take time off work from August 2017. Mr West experienced anxiety to a degree that would not have been experienced by a person who did not share his disability. We accept that Mr West had other concerns, including that he would be less able to care for Ms Collins with a five-day week. That does not detract from the finding that the five-day shift caused him anxiety. Indeed, the impact on his ability to care for Ms Collins probably caused him more anxiety than would have been caused to somebody without a disability.

142. For those reasons we find that the PCP put Mr West at a substantial disadvantage in relation to his employment in comparison with persons without a disability.

Did the respondent know, or could it reasonably be expected to know, that Mr West was likely to be put at that disadvantage?

143. The respondent knew of Mr West's mental health impairment and Mr West told managers from as early as when shift changes were first being discussed that the proposed change in shift would cause difficulties for him. From then, the respondent knew, or could reasonably be expected to know, that working his hours over five days a week was likely to ie could well increase Mr West's anxiety levels considerably and therefore have a detrimental effect on his mental health.

Would the adjustment sought have avoided the disadvantage?

144. We are satisfied that allowing Mr West to work his 22.5 hours over three days instead of five days is a step that would have avoided the disadvantage to Mr West ie the increased anxiety. Such a work pattern would have enabled the claimant to limit one of his anxiety triggers (leaving the house more frequently) and avoided the problems caused by evening shifts. The claimant may have been left with some anxiety if the hours offered were not identical to those he had worked previously, as that would have involved a change in routine. However, the fact that the adjustment would not have eliminated the claimant's increased anxiety completely does not prevent it being an adjustment that would have avoided the disadvantage.

Is the adjustment sought a step that it was reasonable for the respondent to have to make?

145. Mr West had asked Mr King, and other managers, before he went off on sick leave to work his contracted hours over three days rather than five, as he had done for over twenty years. There was no evidence before us that the respondent could not have accommodated that arrangement. There was no explanation at this hearing as to why Mr West's shift had to change. Mr West was not one of the

employees who had been doing a night shift and who would be directly affected by the changes that were taking place. Mr Elliott speculated at this hearing that the respondent might have needed more workers doing earlier shifts across the week but no explanation was given to us as to why Mr West in particular needed to cover those shifts rather than somebody else; nor was any explanation of that given to Mr West at the time of the events with which we are concerned. This was not a case in which there was any evidence that accommodating Mr West would have involved disrupting the established shifts and nor was there evidence that the respondent could not have worked around Mr West to accommodate a shift pattern that would have avoided raising his anxiety. Mr West was told he could work evening shifts but we accept that that would have interfered with his medication routine and was not suitable for Mr West.

146. We are satisfied that allowing Mr West to work his 22.5 hours over three days instead of five days is a step that it was reasonable for the respondent to have to take before his absence began in August 2017.

147. We find that in failing to take this step of allowing Mr West to work his 22.5 contracted hours over three days per week (at times other than evenings) is a step that was reasonable for the respondent to have to take before Mr West took sickness absence. In failing to take that step before Mr West took sickness absence the respondent failed to comply with its duty to make reasonable adjustments and discriminated against Mr West.

Allegation 2

148. Mr West complains that the respondent contravened the Equality Act 2010 in requiring him to use hand-held computer equipment without providing adequate training for him. Mr West alleges that the respondent failed to comply with a duty to make reasonable adjustments in this regard.

149. It is common ground that the respondent required Mr West to use a PDA and that this was a provision, criterion or practice of the respondent.

Did that PCP put Mr West at a substantial disadvantage in relation to his employment in comparison with persons without a disability?

150. This was an additional responsibility that was being put on Mr West. Mr West was extremely anxious about getting things wrong and he knew the consequences of getting things wrong could lead, ultimately, to him losing his job: he had recent experience of being criticised for matters to do with price reductions. This was also a new responsibility for Mr West; he had not done this before. In that regard it involved a change in his routine, something that was a trigger for anxiety due to his existing mental health condition. Whilst somebody without a disability may well have felt some pressure and anxiety in taking on a new responsibility, because of his mental health impairments Mr West was prone to anxiety and negative thoughts, thinking bad things would happen, as reflected in his GP notes. In addition, whereas somebody without a disability could pick up a skill with relative ease, Mr West's condition meant he found it harder to take in new information and learn new skills: he needed more training.

151. We find that PCP put Mr West at a disadvantage that was more than minor or trivial in comparison with somebody without a disability.

Did the respondent know, or could it reasonably be expected to know, that Mr West was likely to be put at that disadvantage?

152. It is clear that the respondent knew about Mr West's anxiety in a general sense ie that Mr West had a disability. The respondent also knew Mr West would need training on the use of the PDA. We have found that the respondent provided Mr West with training and we accept that had always been the respondent's intention to do so. Mr West said at the end of the training that he needed some more training. We find that it was only at the end of the training that the respondent could reasonably have been expected to know that Mr West was likely to be (ie could well be) put at a disadvantage by the requirement to use a PDA that was more than minor or trivial in comparison with somebody without a disability. It is only at that stage that the respondent could reasonably have been expected to know that the training was insufficient for Mr West's needs.

Would the adjustment sought have avoided the disadvantage?

153. We accept that providing Mr West with additional training would have avoided the disadvantage to Mr West.

Is the adjustment sought a step that it was reasonable for the respondent to have to make?

154. We also accept that, in principle, the provision of additional training is a step that it was reasonable for the respondent to have to take. However, we do not find that it was reasonable to expect the employer to give Mr West additional training immediately after the end of the originally arranged training. It was reasonable for the respondent to take some time to make arrangements for further training. We find that the respondent did not fail to comply with its duty to make reasonable adjustments by not providing that additional training in the relatively short period between the end of the originally arranged training and the day Mr West went off sick.

155. Nor was it reasonable for the respondent to provide training on the use of the PDA to Mr West during his absence from work on sick leave: Mr Hargreaves did not submit that would have been a reasonable step for the respondent to take. Had Mr West returned to work it would have been a reasonable adjustment to provide more training but Mr West did not do so.

156. In light of the above we conclude that the respondent did not fail to comply with a duty to make reasonable adjustments in relation to the use of the PDA. That complaint is not well-founded.

Allegation 3

157. Mr West alleges that the respondent treated him unfavourably by proceeding with a formal absence procedure. Mr West alleges that this was unfavourable treatment which was discrimination arising from disability under Section 15.

158. Mr West's case is that the respondent treated him unfavourably by proceeding with the absence management process from February 2018. It is common ground that the respondent proceeded with the absence management process because of Mr West's absence from work and that the absence was something arising in consequence of disability.

Did the respondent treat the claimant unfavourably by proceeding with the absence management process from February 2018?

159. The absence management process was not entirely unfavourable to Mr West. In some respects it was designed to assist employees such as Mr West who were on sick leave by providing a structured process for discussing absences, reasons for absences, adjustments that could be made and return to work. However, what was unfavourable to Mr West was that, as the process progressed, it involved consideration of dismissal. In relation to sickness absences other than long term absences the policy set out four formal meeting stages at the end of which dismissal would be considered. The section of the policy on long term absences [99] did not set out stages in the same way but it is apparent that managers followed a similar staged process, as reflected in the checklist at [138] which reminds managers that 'there must always be at least two subsequent meetings before, moving onto the final meeting (therefore a total of at least four formal meetings).' That is not to say that dismissal was inevitable: there was flexibility in the policy as Mr Elliott acknowledged in meetings with the claimant. However, the fact that dismissal became a possibility under the terms of the policy was itself something that was reasonably perceived by Mr West to be to his disadvantage.

160. We find, therefore, that the respondent did treat Mr West unfavourably by proceeding with the absence management process from February 2018.

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

161. The question for the tribunal is whether the respondent's treatment of Mr West in proceeding with the absence management process was a proportionate means of achieving a legitimate aim.

162. The respondent's case is that it was a proportionate means of achieving the legitimate aim of managing employees and having a consistent absence management policy. Mr Hargreaves argues that any justification argument is undermined by the respondent's failure to engage with occupational health reports. The respondent specifically denies that it failed to engage with occupational health reports in the course of the process.

163. We accept that managing employees is a legitimate aim.

164. So far as having a consistent absence management policy is concerned, if it is suggested that the respondent's aim was to apply the same policy in exactly the

same way to all employees, notwithstanding any duty it may be under to make reasonable adjustments, then we would not accept that the aim was legitimate. However, Mr Morgan did not go that far. In any event, on the respondent's own case, its absence management policy was not rigid and inflexible: it allowed managers to exercise discretion in deciding whether and when to progress through its stages. In that context, we accept that having a consistent absence management policy was a legitimate aim.

165. A key issue to consider in this case in relation to proportionality is whether the respondent made such adjustments as were reasonable. We have already found that the respondent should have adjusted Mr West's shift pattern back to a three-day week before his absence began. Mr West's case is that, having not done so, the respondent should have done so during his absence. We have accepted that this is a matter that Mr West raised persistently throughout his absence both with managers and with the occupational health advisors he saw. The occupational health reports supported Mr West's case that the change in his shift patterns was a significant source of on-going stress to Mr West. Had the respondent's managers carefully considered those reports they would have seen that. Mr West's case is that the adjustments should have been made whilst he was on the sick notwithstanding that he may not have been able to return to work immediately because the knowledge that he could return to a shift that he knew was manageable would have alleviated one of the sources of stress.

166. We accept that if an individual is absent from work on sick leave and in no position to return to work then it is not reasonable to expect an employer to make adjustments that will not benefit the employee until the point at which they return to work because doing so would be futile: eg Doran v Department of Work and Pensions UKEATS/00174/14 (14th November, unreported). However, the position is different if an adjustment could help an employee to return to work or potentially aid their recovery.

167. Looking at the evidence in the round we find that if the respondent had agreed to change Mr West's contracted hours during his sickness absence notwithstanding that he was not, at that time, fit to return to work, that would have benefited Mr West by removing a source of stress for him. Had that been done there is a real chance that that would have assisted the claimant's recovery and enabled him to return to work sooner. That is an adjustment that should have been made even before Mr West's absence from work began. We find it is an adjustment that the respondent remained under a duty to make notwithstanding that Mr West was absent from work given that his absence was a consequence of heightened anxiety, one source of which was the changed shift pattern to a five-day week.

168. The respondent's absence management process was sufficiently flexible to allow managers to pause the staged formal meetings and desist from considering dismissal in circumstances where adjustments could be made that might assist with and/or increase the prospects of a timely return to work. The respondent did not do that in this case. Instead, the respondent proceeded with the absence management procedure towards the stage at which the claimant's dismissal would have been considered had he not taken a career break.

169. Had the respondent adjusted the claimant's hours and exercised its discretion to pause the staged meetings, or extend the number of meetings beyond the four that Mr Elliott envisaged, to see if the claimant's mental health improved as a consequence, that would not have undermined its aim of having a consistent absence management policy, given that the policy allowed for such flexibility. Similarly, such an approach would not have undermined its aim of managing employees: the claimant's absence could still be managed.

170. The impact of proceeding with the absence management policy without adjusting the claimant's hours, as recommended in the occupational health reports, was that the claimant's chances of returning to work were diminished and the prospects of dismissal increased.

171. In all the circumstances, we are not satisfied that the respondent has shown that proceeding with the absence management policy as it did from February 2018 was a proportionate means of achieving its legitimate aims.

172. Mr West's complaint that the respondent discriminated against him contrary to Section 15 in this regard is well-founded.

Allegation 4

173. Mr West alleges that in May 2018 Ms Bromfield and Mr Elliott pressured him to take a career break and that this was a detriment/unfavourable treatment which was (a) discrimination arising from disability – Section 15; and/or (b) victimisation.

174. This complaint is not made out given that we have found as a fact that neither Ms Bromfield nor Mr Elliott put pressure on Mr West to take a career break.

Allegation 5

175. Mr West alleges that in May 2018 Ms Bromfield deceived Mr West as to the terms of the career break. Mr West alleges that this was a detriment/unfavourable treatment and was: (a) discrimination arising from disability – Section 15; and/or (b) victimisation.

176. We have found as a fact that Ms Bromfield did not deceive Mr West as to the terms of the career break. This complaint is not made out.

Allegation 6

177. Mr West alleges that the respondent subjected him to detriment and, thereby, dismissed him in April and/or May 2019 when the respondent told him he did not have a job to return to and/or failed to allow him to return to work. Mr West alleges that this was (a) discrimination arising from disability – Section 15; and/or (b) victimisation; (c) an unfair dismissal; and (d) wrongful dismissal.

178. We have found as a fact that Mr West's employment did not end when he took a career break and he was dismissed by the respondent in May 2019.

Section 15

179. Mr West's employment was terminated on 20th May 2019 when the respondent made it clear it considered it was not bound by and would not continue to honour the terms of Mr West's existing contract of employment.

180. It is clear that one of the reasons for not allowing Mr West to return to work was that he had taken a career break. Mr Morgan accepts that the fact that Mr West had taken a career break was something that arose in consequence of his disability.

181. Mr West also says he was not allowed his job back because of his previous absence from work. The respondent concedes that Mr West's previous absence from work arose in consequence of his disability. The question for us is whether that previous absence from work was a reason for Mr West's dismissal in May 2019.

182. When Mr West first broached the subject of a return to work, he was told there was no job for him by Mr Cruikshank. We accept that may well have been because Mr Cruikshank was unaware of the arrangement made by Ms Bromfield. However, based on what then happened, we are satisfied that the claimant has proved facts from which we could conclude, in the absence of an explanation from the respondent, that the decision to dismiss the claimant was influenced by the claimant's previous disability related absence. In particular:

182.1. Mr Elliott had not been in favour of Mr West having a career break. We infer that this was because of Mr West's extensive past absence from work.

182.2. When the claimant contacted Ms Bromfield to express his concerns about his conversation with Mr Cruikshank, despite assurances that Mr Elliott would contact him to arrange his return to work, Mr Elliott did not do so.

182.3. Mr Elliott did arrange to meet with the claimant when the claimant contacted Ms Bromfield again in May. At that meeting, when Mr West questioned why he was not allowed to return to his old job despite being told by Ms Bromfield he would be able to, Mr Elliott told Mr West he would not have offered him a career break. Although Mr Elliott may not have been aware in 2018 of the guarantee Ms Bromfield gave to Mr West, by the time he met with the claimant in May 2019 he knew that the claimant was expecting his old job back when his career break ended and that he was saying that is what Ms Bromfield had told him would happen.

182.4. Notwithstanding that the claimant's career break was not expected to end until the end of July 2019, Mr Elliott did not contact the claimant at any time after that meeting to discuss the possibility of the claimant's return to work in any capacity. Even if it came as a surprise to Mr Elliott to learn that the claimant was expecting to return to his old job, he made little effort to return the claimant to work. We infer that underpinning Mr Elliott's inaction was a reluctance to have Mr West back at work.

182.5. Other than an acknowledgement of receipt of his grievance by telephone, the claimant received no response to his grievance.

183. In light of the above, the burden is on the respondent to prove that the claimant's disability related absence did not have a significant influence on the decision to dismiss him.

184. The respondent has not discharged that burden. For the reasons set out in the penultimate paragraph, we infer that the claimant's disability related absence did have a significant influence on Mr Elliott's decision not to allow the claimant to return to work on his old terms. In particular, we are not persuaded that the reason Mr Elliott did not allow the claimant to return to his previous post was that he was – or believed he was- applying the career break policy. If the claimant had agreed to a career break under the terms of the career break policy, he would not have been entitled to insist on returning to his original job. Mr Elliott is likely to have known that. However, Mr Elliott also knew by 17th May 2019 that the claimant was expecting to do so and the claimant told him on that day that this is what he had been promised by Ms Bromfield. There is no evidence that Mr Elliott took any steps to check with Ms Bromfield whether what the claimant was saying was correct; instead, on 17th May he simply replied that Ms Bromfield had not told him that and on 20th May he told the claimant that he was not aware of that arrangement and that he could apply for one of the vacancies. Mr Elliott showed very little interest in investigating whether or not the claimant had in fact been guaranteed to return to his previous job. Furthermore, Mr Elliott made little effort to return the claimant to work. As noted above, the career break policy put the onus on the respondent to offer re-employment yet Mr Elliott did little to encourage the claimant's return after his career break. Although he showed the claimant the vacancies that were displayed on a board on 20th May 2019, he did not contact the claimant at any point thereafter to discuss his return to work or notify him of any new vacancies, notwithstanding that there were still several weeks of the claimant's career break left to run.

185. It follows that the respondent dismissed Mr West because of two things that arose in consequence of his disability:

185.1. the fact that Mr West had taken a career break; and
185.2. Mr West's absence from work prior to that career break.

Was the claimant's dismissal a proportionate means of achieving a legitimate aim?

186. The respondent submits that its actions in dismissing Mr West were justified as a proportionate means of achieving the legitimate aim of the consistent application of the respondent's career break policy.

187. We do not accept that submission.

188. Mr West was given a specific guarantee that he could go back to his job at the time he agreed to take a career break. It is clearly not appropriate to apply to Mr West a career break policy that did not reflect the terms on which the respondent agreed with Mr West he would take leave.

189. Mr West's complaint is well-founded.

Victimisation

190. We are satisfied that the grievance submitted by Mr West the previous year played no part in the decision not to allow Mr West back to work in 2019. Other than

Mr Elliott, there is no evidence to suggest that anyone who was the subject of that grievance played a part in the decision not to allow Mr West to return. As Mr Hargreaves conceded, even Mr Elliott was not the focus of that grievance. In any event, Mr West had withdrawn it and there were no consequences affecting Mr Elliott from that grievance.

191. The complaint of victimisation is not made out.

Unfair dismissal

192. Mr West's employment was terminated on 20th May 2019 when the respondent made it clear it considered it was not bound by and would not continue to honour the terms of Mr West's existing contract of employment.

193. Mr Morgan's submission is that Mr West was dismissed not for a reason in Section 98(2) of the Employment Rights Act but for some other substantial reason of a kind such as to justify the dismissal of an employee holding Mr West's position. He did not, however, say what that reason was. If it is suggested that that reason was the consistent application of the respondent's career break policy then we reject it as a fair reason given that the agreement between claimant and the respondent was that his employment would continue throughout the career break and that he would be able to return to his old job at the end of the career break.

194. The respondent has not shown that the dismissal was for a potentially fair reason. That being the case, the claim for unfair dismissal is well-founded.

Wrongful dismissal

195. Mr West's employment was terminated on 20th May 2019. That was a termination without notice which was in breach of contract.

196. The complaint is well-founded.

Time points

197. The complaints about Mr West's dismissal were brought within time.

198. We must, however, consider whether the other claims we have found to have been made out were brought in time. Those were allegations 1 and 3 outlined above.

199. The discrimination that took place before Mr West took sick leave in August 2017 (allegation 1) and during Mr West's absence on sick leave (allegation 3) were linked to each other by the fact that they both involved a failure to adjust Mr West's shift pattern. That link evidences a continuing discriminatory state of affairs that continued at least until July 2018. The key question for us is whether that discrimination was linked with the discriminatory dismissal in 2019 and part of the same state of affairs.

200. In this regard, there is an overlap in the individuals involved in, and responsible for, the discrimination. Whilst Mr Elliott was not involved in the original decision not to adjust Mr West's shift before he went on sick leave, he was involved in the management of Mr West's sickness absence in 2018 and in Mr West's dismissal in 2019. When he was dealing with the claimant's sickness absence in 2018, Mr Elliott failed to take any steps to adjust the claimant's shift pattern. Instead, he continued to progress through the stages of the absence process without making that adjustment. It is clear that he did not agree with the idea of the claimant being offered a career break. Then when the claimant tried to make arrangements for his return to work at the end of his career break, initially Mr Elliott did not contact the claimant even though one of his colleagued had told the claimant he would be in touch. When the claimant pressed the respondent, Mr Elliott made no attempt to re-engage the claimant on the terms he had been guaranteed by Ms Bromfield. That remained the case even when Mr West told Mr Elliott what Ms Bromfield had told him about being able to return to his old job. Even if it came as a surprise to Mr Elliott to learn that the claimant was expecting to return to his old job, he made little effort to return the claimant to work. We infer that underpinning Mr Elliott's decisions in this case was a reluctance to have Mr West back at work. That, we find, was all part of the same discriminatory state of affairs that continued up to and including the dismissal of the claimant.

201. That being the case, we find that all of the complaints of discrimination that we have found to be well-founded are in time and within the jurisdiction of the tribunal.

202. There was insufficient time to address remedy at this hearing. A remedy hearing was arranged to consider and determine those issues.

EMPLOYMENT JUDGE ASPDEN

REASONS SIGNED BY EMPLOYMENT JUDGE ON 21 April 2022

.....